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Code Sections Affected

Health and Safety Code §§ 11362.7, 11362.71, 11362.715, 11362.72, 11362.735, 11362.74, 11362.745, 11362.755, 11362.76, 11362.765, 11362.77, 11362.775, 11362.78, 11362.785, 11362.79, 11362.795, 11362.8, 11362.81, 11362.82, 11362.83 (new).

SB 420 (Vasconcellos); 2003 STAT. Ch. 875.

I. INTRODUCTION

In November 1996, Californians voted in favor of Proposition 215, known as the "Compassionate Use Act" ("Act").[1] The Act, section 1136.5 of the California Health and Safety Code,[2] ensured the right of patients to obtain and use marijuana in California to treat specified serious illnesses.[3] Additionally, the Act protected physicians who appropriately recommended the use of marijuana to patients for medical purposes[4] and exempted qualified patients and their primary caregivers from California drug laws prohibiting possession and cultivation of marijuana.[5]

Since its enactment, uncertainties in the Act have become manifest, impeding law enforcement's ability to interpret and enforce the law.[6] Police challenged with enforcing the Act encountered difficulties in distinguishing between legitimate and illegitimate marijuana uses.[7] Both federal and California state courts sifted through often murky issues in adjudicating charges brought against defendants claiming protection under the Act.[8] Seeking to enhance precision of

1. *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 486 (2001).

2. CAL. HEALTH & SAFETY CODE § 11362.5 (West 1999).

3. *See id.* § 11362.5(b)(1)(A) (identifying medical conditions, including "cancer, anorexia, acquired immune deficiency syndrome (AIDS), chronic pain, spasticity, glaucoma, arthritis, migraine, or any other illness for which marijuana provides relief").

4. *See id.* §11362.5(c) (stating that "no physician . . . shall be punished, or denied any right or privilege, for having recommended marijuana to a patient for medical purposes").

5. *See id.* § 11362.5(d) (stating that Health and Safety Code section 11357 (possession) and Health and Safety Code section 11358 (cultivation) shall not apply to qualified persons).

6. SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF SB 420, at 2 (May 27, 2003).

7. Donna Horowitz, *Lawmen Against Pot ID Cards for the Sick*, OAKLAND TRIB., Jan. 9, 2003.

8. *See, e.g.*, United States v. Oakland Cannabis Buyers' Coop., 532 U.S. 483, 494-95 (2001) (denying a medical necessity exception for cultivation and distribution of marijuana under the federal Controlled Substances Act); People v. Galambos, 128 Cal. Rptr. 844, 859-60, 104 Cal. App. 4th 1147, 1167-68 (2002) (evaluating statutory plain language, case precedent and purpose of Proposition 215 in determining that the Act does not protect suppliers of medical marijuana); People v. Young, 111 Cal. Rptr. 2d 726, 92 Cal. App. 4th 229, 237 (2001) (reasoning that precedent and statutory plain language of the Act do not provide exemptions for

the Act, Senator John Vasconcellos introduced Senate Bill 420, aimed at curing the state law inadequacies.[9] This bill, enacted as Chapter 875, affects the scope and application of the Act, establishing requirements and guidelines for implementation of a state regulated program in California for issuing identification cards to qualifying patients and their primary caregivers.[10]

To clarify the effects of Chapter 875, identify persisting legal conflicts, and evaluate the limitations afforded by Chapter 875, this article explores the following issues: (1) provisions of Chapter 875 that augment the Act, (2) conflicting federal laws, (3) establishment of a state regulated identification card program, and (4) conduct not protected by Chapter 875.

II. LEGAL BACKGROUND

The use of marijuana for medicinal purposes has been debated for nearly thirty years.[11] Federal law regulating controlled substances prohibits the manufacture, distribution and possession of marijuana.[12] Justifications proffered in support of federal law are grounded in history, scientific research and public safety. Conversely, proponents of the Act raise fundamental principles of federalism and lack of effective alternatives to use of medical marijuana for treating symptoms of various serious illnesses.[13]

A. *Federal Law: The Controlled Substances Act*

The United States Constitution empowers Congress to enact laws regulating interstate commerce.[14] However, the Commerce Clause "is subject to outer

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"selling, giving away, transporting, and growing large quantities of marijuana"); People v. Trippett, 66 Cal. Rptr. 2d 559, 568, 56 Cal. App. 4th 1532, 1546 (1997) (finding no provisions in the Act regarding transportation of marijuana or quantities that may permissibly be possessed by qualified persons); United States v. Cannabis Cultivators Club, 5 F. Supp. 2d 1086 (N.D. Cal. 1998) (determining that distribution of marijuana by a California cooperative to its California members violated federal interstate commerce laws); Conant v. McCaffrey, 172 F.R.D. 681 (N.D. Cal. 1997) (determining that physician-patient communications regarding the use of marijuana for medical purposes implicates the First Amendment).

9. *See* SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF SB 420, at 2 (May 27, 2003) (discussing goals of SB 420).

10. *See generally* CAL. HEALTH & SAFETY CODE §§ 11362.7-11362.81 (enacted by Chapter 875) (setting forth the newly enacted requirements and guidelines).

11. Blanchard Randall IV, *Medical Use of Marijuana: Policy and Regulatory Issues*, at 12, *at* http://home2.netcarrier.com/~aahpat/mumcov01.htm (last updated Mar. 1, 2002), (copy on file with the *McGeorge Law Review*).

12. 21 U.S.C.A. § 841(a)(1) (West 1999); Raich v. Ashcroft, 248 F. Supp. 2d 918, 922 (N.D. Cal. 2003), *rev'd*, 352 F.3d 1222 (9th Cir. 2003), *cert. granted*, 124 S.Ct. 2909 (2004).

13. *Talk of the Nation: Canada's Proposed Legislation to Change Marijuana Laws* (National Public Radio broadcast, May 28, 2003) [hereinafter *Talk of the Nation*] (copy on file with the *McGeorge Law Review*) (broadcasting interview by Neal Conan with Mitch Earleywine, author of "Understanding Marijuana" and associate professor of psychology at the University of Southern California).

14. U.S. CONST. art. I, § 8, cl. 3.

limits" and regulated activity must have a "substantial relation to interstate commerce."[15] Exercising its power under the commerce clause, Congress enacted the Controlled Substances Act ("CSA").[16]

Title II of the Comprehensive Drug Abuse Prevention and Control Act of 1970, provides that it is unlawful to manufacture, distribute, possess with the intent to distribute, or dispense any drug determined to be a controlled substance.[17] Under the CSA, drugs are classified into five schedules according to medicinal value, harmfulness and potential for abuse.[18] Consistent with the classification system, drugs placed in Schedule I, the most restrictive category, have "the highest potential for abuse and no generally accepted medical use, even under the supervision of a licensed physician."[19] Therefore, under the CSA, the sole permitted use of Schedule I drugs is government-approved research.[20] By contrast, drugs assigned to Schedule II are recognized as having accepted medical uses, although they are similarly deemed to have a high potential for abuse.[21] Marijuana is listed as a Schedule I controlled substance.[22] A drug may be reclassified by the Administrator of the Drug Enforcement Administration if, after review, the drug is found to meet criteria pertaining to a different schedule.[23] To date, attempts to reclassify marijuana reclassified as a Schedule II drug have been unsuccessful.[24]

Congress has determined that local activity relating to controlled substances substantially effects interstate trafficking of controlled substances, and thus, consistent with its power to regulate interstate commerce, even such local activity is subject to CSA restrictions.[25] Thus, the CSA applies even to wholly intrastate marijuana-related activities, including cultivation, possession, transportation and distribution of marijuana in California.[26] Reasoning that it is difficult to

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15. United States v. Lopez, 514 U.S. 549, 557, 559 (1995); *Raich*, 248 F. Supp. 2d at 922.

16. *See* 21 U.S.C.A. § 801(3)-(6) (West 1999) (finding that local cultivation and distribution of controlled substances not integral to the flow of interstate commerce nonetheless have a "substantial and direct effect" on interstate commerce and contribute to the swelling of interstate traffic of controlled substances).

17. *Id.* § 841.

18. *See id.* § 812 (listing the criteria for each schedule).

19. Randall, *supra* note 11, at 2; *see* 21 U.S.C.A. § 812 (b)(1) (listing the criteria for Schedule I).

20. Randall, *supra* note 11, at 4.

21. 21 U.S.C.A. § 812(b)(2).

22. *Id.* § 812 Schedule I(c).

23. *Id.* § 812(b); *see* Alliance for Cannabis Therapeutics v. Drug Enforcement Admin., 15 F.3d 1131, 1133 (D.C. Cir. 1994) (stating that pursuant to 21 U.S.C.A. § 811(a), the Attorney General has authority to reschedule drugs, and that this authority has been delegated to the Drug Enforcement Administrator).

24. *See Alliance for Cannabis Therapeutics*, 15 F.3d at 1133, 1137 (noting that petition to reschedule marijuana had presented to before the D.C. district court on four prior occasions, and affirming the Administrator's denial to reschedule marijuana based on substantial evidence that marijuana continues to meet the standards of Schedule I); Randall, *supra* note 11, at 7-9 (discussing the Drug Enforcement Administration's repeated denial of petitions to reschedule marijuana).

25. *See* 21 U.S.C.A. § 801(2)-(7) (detailing the Congressional findings regarding controlled substances and its impact on interstate commerce).

26. *Id.* § 801(3)-(4).

differentiate between locally cultivated and distributed marijuana and interstate marijuana, Congress does not distinguish between them for purposes of establishing controls.[27]

Historically, the Ninth Circuit Court of Appeals upheld the CSA as a permissible exercise of Congressional power, reasoning that "Congress may regulate not only interstate commerce but also those wholly intrastate activities which it concludes have an effect upon interstate commerce."[28] By contrast, in an important 2001 decision, the United States Supreme Court declined to decide whether the CSA exceeds Congress' power under the Commerce Clause, but upheld the validity of the CSA provisions by determining that they afford no medical necessity defense to the manufacture or distribution of marijuana.[29] Thus, both the Ninth Circuit and the United States Supreme Court enforced the CSA, and confirmed that it is unlawful to possess or distribute marijuana, or to possess marijuana with the intent to distribute. Although Congress and federal courts refuse to recognize any medical use of marijuana, several states, including California, have enacted medical marijuana legislation.[30]

B. California State Law: The Compassionate Use Act

Enacted by voters in 1996, the Act provides that "seriously ill Californians have the right to obtain and use marijuana for medical purposes where that medical use is deemed appropriate and has been recommended by a physician."[31] Although qualifying patients and their caregivers are exempt from California state cultivation and possession laws under the Act,[32] there are no provisions addressing other relevant issues, such as the formation of cooperatives for the purpose of cultivating and distributing marijuana, transportation of marijuana by patients or caregivers, or provisions establishing the quantity of marijuana a qualified person may possess. Further, absence of uniform guidelines adversely affected the ability of law enforcement officers to enforce the Act, resulting in inconsistent application.[33] It has even been alleged that Proposition 215 was purposely drafted to be vague.[34]

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27. *See id.* § 801(5) (discussing controlled substances generally).

28. United States v. Visman, 919 F.2d 1390, 1393 (9th Cir. 1990).

29. United States v. Oakland Cannabis Buyers' Coop., 532 U.S. 483, 494-95 n.7 (2001).

30. *See Politics & Policy Medical Marijuana: Bill Would Allow "Medical Need" Defense*, AM. POL. NETWORK, Apr. 14, 2003, at 7 (listing states that have enacted medical marijuana laws, including Alaska, Arizona, California, Colorado, Hawaii, Maine, Nevada, Oregon and Washington).

31. CAL. HEALTH & SAFETY CODE § 11362.5 (b)(1)(A) (West Supp. 2003).

32. *Id.* § 11362.5(d).

33. SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF SB 420, at 2 (May 27, 2003).

34. *See* Eric Bailey & Marcelo Rodríguez, *The "Guru of Ganja" Gets a Day in Jail; A Judge Frees Activist Who Has Become a Symbol in a Clash with the Federal Government over California's Medical Marijuana Laws*, L.A. TIMES, June 5, 2003, at B1 (quoting an unidentified agent in the San Francisco Office of the Drug Enforcement Agency).

Resulting uncertainties have manifested in disparate application of the law. For example, some California counties, taking matters into their own hands, developed and adopted programs to implement the Act, thus contributing further to the disparity in statewide application.[35] As a defense in court, the Act provides only limited immunity, and "[p]olice officers can still arrest anyone who grows too much [marijuana], or tries to sell it."[36] Thus, the provisions and protections under the Act were limited, and "[t]he acts of selling, giving away, transporting, and growing large quantities of marijuana remain[ed] criminal."[37]

III. CHAPTER 875

In order to achieve uniformity and consistent application of the Act in California,[38] Chapter 875 focuses on two primary objectives: (1) adding to, clarifying and providing specificity to the scope and application of the Act; and (2) creating a voluntary program, to be established and maintained by the State Department of Health Services, for issuing photo identification cards to qualified patients and their caregivers.

A. Clarification of the Act

First, Chapter 875 defines necessary terms applicable to the Act, developing specific qualifying requirements for patients and their primary caregivers.[39] Additionally, the medical conditions authorized as "serious" under the Act are expanded, making marijuana available to patients who suffer from a wider array of illnesses.[40] Finally, guidelines for physicians prescribing or recommending

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35. *See* Ucilia Wang, *Mendocino County Tops in Per-Capita Medical Pot; Issuance of Authorization Cards Greater Than Any Other North Coast Registry*, PRESS DEMOCRAT, June 9, 2003, at A1 (comparing variations in programs developed by various California counties).

36. People v. Mower, 49 P.3d 1067, 1078, 28 Cal. 4th 457, 475 (2002).

37. People v. Rigo, 81 Cal. Rptr. 2d 624, 628, 69 Cal. App. 4th 409, 415 (1999).

38. *See* SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF SB 420, at 6 (May 27, 2003) (stating that SB 420 will provide uniform guidelines to help avoid confusion and frustration in determining validity of medical possession claims).

39. CAL. HEALTH & SAFETY CODE § 11362.7(d), (f), (g) (enacted by Chapter 875).

40. *See id.* § 11362.7(h) (enacted by Chapter 875) (listing qualifying medical illnesses). The list includes the following medical conditions:

> (1) acquired immune deficiency syndrome (AIDS); (2) anorexia; (3) arthritis; (4) cachexia [a wasting syndrome, often associated with cancer]; (5) cancer; (6) chronic pain; (7) glaucoma; (8) migraine; (9) persistent muscle spasms, including, but not limited to, spasms associated with multiple sclerosis; (10) seizures, including, but not limited to, seizures associated with epilepsy; (11) severe nausea; [and] (12) any other chronic or persistent medical symptom that either: (A) substantially limits the ability of the person to conduct one or more major life activities as defined in the Americans with Disabilities Act of 1990 (Public Law 101-336); (B) if not alleviated, may cause serious harm to the patient's safety or physical or mental health.

Id.

marijuana to their patients are created.[41] A physician must, among other things, assess the patient, record any serious medical condition the patient may have, and document whether the use of marijuana to treat the condition is appropriate.[42]

Second, Chapter 875 expands the scope of conduct in which qualified patients and their primary caregivers may engage without being subject to criminal liability under particular provisions of California law.[43] Specifically, authorized persons are exempt from California laws relating to the transportation, processing, distribution or donation of marijuana for medical purposes in amounts not exceeding those established by the State Department of Health.[44] Additionally, other individuals who assist in administering marijuana or provide services to patients are afforded the same criminal exemptions.[45] Finally, under Chapter 875, qualified persons may form state regulated cooperatives to cultivate marijuana for medical purposes without being subject to criminal liability.[46]

Third, Chapter 875 sets forth limits on the quantity of marijuana that may legally be possessed, stating that a qualified patient or caregiver may possess "no more than eight ounces of dried marijuana" and "no more than six mature or twelve immature marijuana plants" per individual.[47] Notably, however, these limits are not carved in stone. Patients or caregivers may legally possess quantities of marijuana that exceed state allowances if determined by the recommending physician to be necessary to meet the patient's medical needs, or as established by county or city guidelines.[48] Moreover, Chapter 875 empowers the Attorney General to make recommendations to the Legislature regarding modification of quantity limits and cultivation regulations.[49]

B. *Creation of a Voluntary Identification Card Program*

Enhancing statewide consistency in the enforcement of the Act,[50] Chapter 875 directs the California State Department of Health to establish and maintain a comprehensive, voluntary program through which a patient and his or her

41. CAL. HEALTH & SAFETY CODE § 11362.7(a) (enacted by Chapter 875).

42. *Id.*

43. *See id.* § 11362.765(a) (enacted by Chapter 875) (explaining that specified individuals "shall not be subject, on that sole basis" to liability under Health and Safety Code section 11357 (possession), section 11358 (cultivation), section 11359 (possession for sale), section 11360 (transportation, sale, distribution), section 11366 (opening or maintaining an unlawful place), section 11366.5 (providing a place for unlawful acts involving controlled substances), and section 11570 (nuisance).

44. *Id.* § 11362.765(a)-(b)(2) (enacted by Chapter 875).

45. *Id.* § 11362.765(b)(3), (c).

46. *Id.* § 11362.775.

47. *Id.* § 11362.77(a).

48. *Id.* § 11362.77(b), (c).

49. *See id.* § 11362.77(e) (stating that recommendations shall be made no later than December 1, 2005, and thereafter shall be subject to public comment and consultation with interested groups).

50. SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF SB 420, at 2 (May 27, 2003).

designated caregiver may each be issued a photo identification card ("ID card").[51] Because the program is voluntary, qualifying patients are not mandated to obtain an ID card in order to validly claim the protections of Chapter 875.[52] Those persons wishing to submit an application to enroll in the program must provide personal information, including the name of any primary caregiver, and written documentation from a physician indicating that the applicant has a serious medical condition for which the use of marijuana is recommended.[53] If an applicant lacks capacity to make medical decisions, the applicant's legal representative may submit the application.[54]

Chapter 875 establishes requirements that health departments or their designees must follow in implementing the program, including, *inter alia*, a timeframe for verifying information provided in an application,[55] verification procedures,[56] emergency and routine issuance procedures,[57] and protocol for reporting information to the State Health Department.[58] ID cards issued to patients and caregivers upon approval are valid for a period of one year,[59] and if the county or designee denies an application, the applicant may appeal the decision.[60] Chapter 875 also requires that a twenty-four hour, toll-free telephone number be made available to law enforcement officers to enable them to easily access information for the purpose of verifying the validity of an ID card.[61]

C. Limitations of Chapter 875

Although seriously ill patients, upon recommendation of their physician, may use marijuana for medical purposes, Chapter 875 does not provide carte blanche license to smoke marijuana in any place at any time. Chapter 875 does not

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51. CAL. HEALTH & SAFETY CODE § 11362.71(a) (enacted by Chapter 875).

52. *Id.* § 11362.71(f).

53. *Id.* § 11362.715(a)(1)-(5).

54. *See id.* § 11362.715(b)-(d) (identifying qualifying legal representatives and their responsibilities).

55. *See id.* § 11362.72(a)(1)-(3) (establishing that within thirty days of receipt of an application, the information contained in the application must be verified as accurate).

56. *See id.* (stating that the license of the recommending physician will be verified with the appropriate California state board to assure it is in good standing, that the physician will be contacted to confirm the medical records of the patient, and if an applicant is less than eighteen years of age, the parent or legal guardian will be contacted to verify information contained in the application).

57. *See id.* § 11362.72(a)(5), (c) (stating that if an identification card is needed on an emergency basis, a temporary card may be issued and will be valid for thirty days, or, if not needed emergently, the card shall be issued within five working days of approving an application).

58. *See id.* § 11362.72(b)(1)-(3) (stating that within twenty-four hours of approving an application, the county health department will provide the California State Health Department with information including: (1) the applicant's unique identification number; (2) the card's expiration date; and (3) the name and telephone number of the approving county health department or its designee).

59. *Id.* § 11362.745(a).

60. *See id.* § 11362.74(a)-(c) (listing reasons for which an application may be denied and right to appeal).

61. *Id.* § 11362.735(a)(4).

require that accommodations be made at: (1) any place of employment; (2) any jail or correctional facility; or (3) any place where smoking is prohibited by law.[62] Additionally, marijuana for medical purposes may not be smoked within 1,000 feet of a school, on a school bus, in a motor vehicle that is being operated or while operating a boat.[63] Further, Chapter 875 does not require that insurance providers reimburse medical marijuana claims.[64]

Finally, penalties are established by Chapter 875 for crimes including, but not limited to, fraudulent representation of a medical condition for the purpose of obtaining the benefits of Chapter 875, providing false information to a health department or enforcement officer, fraudulent use of another's ID card, or counterfeiting or tampering with an ID card.[65] Even first offenses may result in criminal sanctions, including possible fines, imprisonment, or both.[66] Additionally, any person committing such acts may be precluded from obtaining an ID card for up to six months.[67]

IV. ANALYSIS OF CHAPTER 875

A. *Chapter 875 and California Law: Finding the Loopholes*

Significantly, the enactment of Chapter 875 demonstrates de facto recognition by the state legislature of the need for uniform administration of the Act in California. By expanding the scope and providing specificity to the Act, Chapter 875 creates substantial and concrete guidance for patients, caregivers, law enforcement and courts concerning the cultivation, possession, use, distribution and transportation of medical marijuana in California.[68]

First, the language of Chapter 875 expands the Act by creating limited exemptions from criminal liability for transportation, distribution and cultivation of marijuana for medical purposes,[69] while simultaneously safeguarding against abuses of those exemptions. For example, persons entitled to the benefits of the Act are restricted as to the quantity of marijuana they can legally possess,[70] and such quantities are subject to potential modification upon recommendation by the Attorney General.[71] Additionally, patients may transport or process marijuana only for their own personal medical use, not for use by any other patient or

62. *Id.* §§ 11362.785(a)-(c), 11362.79(a).
63. *Id.* § 11362.79(b)-(e).
64. *Id.* § 11362.785(d).
65. *Id.* § 11362.81(b)(1)-(3).
66. *Id.* § 11362.81(a)(1).
67. *Id.* § 11362.81(c).
68. *See generally id.* §§ 113627-11362.81 (setting forth the details of chapter 875).
69. *Id.* § 11362.765 (enacted by Chapter 875).
70. *Id.* § 11362.77(a).
71. *Id.* § 11362.77(e).

person.[72] Similarly, a primary caregiver may process or deliver marijuana only to the patient who has designated the individual as a primary caregiver.[73] Finally, the Attorney General is directed to establish guidelines "to ensure the security and nondiversion of marijuana grown for medical use[,]"[74] thereby creating a system of checks and safeguards on the system. Thus, Chapter 875 expands the provisions of the Act, but provides explicit limitations to those expansions, and penalties for violations.[75] Opponents characterize Chapter 875 as blanket legalization of marijuana,[76] but the narrowly tailored provisions indicate that Chapter 875 is intended to provide only seriously ill patients with the right to use marijuana for medical purposes, not to permit free access to marijuana to any and all citizens.[77]

Such narrow tailoring, however, potentially creates new loopholes and overlooks certain issues that existed prior to enactment of Chapter 875. First, section 11362.775 of the Health and Safety Code permits patients and caregivers to form state regulated cooperatives to cultivate marijuana.[78] However, read in conjunction with section 11362.765, the provisions may be interpreted as enjoining cooperative members from transporting or delivering the resulting product to any other member except as between a patient and his or her designated primary caregiver.[79] Such a restriction fundamentally limits the "cooperative" effect of cooperatives.

Second, the ID card program established by Chapter 875 only requires a patient to update information, including current medical status, with the state annually.[80] This requirement logically equates issuance of an ID card with authorization of a one-year supply of a prescription drug without requiring any re-examination by a physician, an atypical medical practice.[81]

Third, the provisions of Chapter 875 do not disqualify any adult from being identified as a primary caregiver by a qualifying patient, as long as the individual

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72. *See id.* § 11362.765(b)(1) (limiting the transportation and processing of marijuana to the patient's "own personal medical use").

73. *Id.* § 11362.765(b)(2).

74. *Id.* § 11362.81(d).

75. *See infra* notes 78-85 and accompanying text. (describing the provisions of Chapter 875).

76. *See* Bailey & Rodriguez, *supra* note 34, at B1 (quoting Drug Enforcement Administration special agent Richard Meyer as saying that advocates of the Act intend "not only to legalize medicinal marijuana, but to legalize the use of all marijuana and ultimately all drugs"); *see also* Jack W. Hook, *The Proposition 215 Dilemma*, SAN DIEGO UNION-TRIB., Oct. 2, 2002, at B7 (quoting one special agent in charge of San Diego Drug Enforcement Administration who stated that a proposed San Diego program designed to implement the Act lacked controls that render the program "nothing more than a state/city legalized drug distribution program").

77. SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF SB 420, at 6 (May 27, 2003).

78. CAL. HEALTH & SAFETY CODE § 11362.775 (enacted by Chapter 875).

79. *See id.* § 11362.765(b)(1)-(2) (enacted by Chapter 875) (restricting transportation of marijuana, permitting patients to transport only for their own use, and caregivers may transport only to his or her identified patient).

80. *Id.* § 11362.745 (enacted by Chapter 875).

81. *Cf.* Hook, *supra* note 76, at B7 (discussing concerns about proposed San Diego program to implement the Act).

has assumed responsibility for the housing, health or safety of the patient.[82] Thus, "a patient is able to designate a convicted drug trafficker" as his or her caregiver.[83]

Fourth, there is nothing in Chapter 875 prohibiting a teenager from obtaining a prescription for medical marijuana without parental knowledge or consent, although parents of minors applying for an ID card must verify the information submitted in the minor's application.[84] Minors wishing to prevent their parents from discovering the fact that they use marijuana for medical purposes may therefore simply forego applying for an ID card, while continuing to obtain the benefits and protections of Chapter 875.[85] Thus, the provisions of Chapter 875 appear to be simultaneously over-inclusive and under-inclusive, creating loopholes that may have unintended results.

Finally, some contend that there are insufficient restrictions to prevent physicians from over-recommending marijuana to patients.[86] Critics contend that some physicians may be too quick to write prescription for marijuana-seeking patients, or may not conduct a thorough enough exam of the patient before recommending marijuana as treatment.[87] Moreover, physicians have the power to override the state restrictions on the quantity of marijuana that may be legally possessed, if the physician determines that quantities in excess of that imposed by the state are necessary to meet the patient's needs.[88] Thus, physicians may potentially prescribe virtually unlimited amounts of marijuana to patients, and the debate between physician rights and attempts to keep a tight rein on those rights persists.[89]

B. The ID Card Program

The ID card program established by Chapter 875 effectively promotes consistency in statewide administration and enforcement of the Act as compared

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82. *See* CAL. HEALTH & SAFETY CODE § 11362.7(d)-(e) (enacted by Chapter 875) (identifying caregiver eligibility requirements).

83. *Cf.* Hook, *supra* note 76, at B7 (commenting on the effect of unrestricted controls in the proposed San Diego program intended to implement the Act).

84. CAL. HEALTH & SAFETY CODE § 11362.72(a)(1) (enacted by Chapter 875).

85. *Id.* § 11362.71(f).

86. *See* Toshi Maeda, *California Doctor Who Has Issued 7000 Medical Marijuana Recommendations Facing License Revocation*, ASSOCIATED PRESS NEWSWIRES, July 13, 2003 (discussing efforts by the Bush administration to crack down on doctors who recommend marijuana).

87. *Cf. id.* (discussing the investigation of Dr. Tod H. Mikuriya for writing 7,500 recommendations for marijuana, and for allegedly performing insufficient medical exams in connection with some of the recommendations).

88. See CAL. HEALTH & SAFETY CODE § 11362.77(b) (stating that upon the physician's recommendation, "the qualified patient or primary caregiver may possess an amount of marijuana consistent with the patient's needs").

89. *See* Maeda, *supra* note 86 (describing efforts by the Bush administration to prevent doctors from even discussing medical marijuana with patients).

to the ad hoc approach previously taken by individual counties attempting to implement the Act.[90] As a result of Chapter 875, law enforcement officers may rely with confidence on a single, statewide program.[91] Because the state establishes the quantity of marijuana a qualifying individual may possess,[92] officers confronted with an individual's claim of entitlement to possession of marijuana for medical purposes may more easily determine whether the individual is qualified under Chapter 875, and whether the amount of marijuana possessed complies with state mandates.[93] However, an officer cannot refuse to accept an ID card, unless there is reasonable cause to believe the information on the card is false, or the card is being used fraudulently.[94]

Opponents of the ID card program express concern that people might produce, use and sell counterfeit ID cards.[95] Similar to regulations governing possession and use of driver's licenses,[96] however, the ID card program establishes procedures for law enforcement to verify the right of any individual to possess medicinal marijuana.[97] Those who use a counterfeit ID card, fraudulently use the ID card of another or violate established regulations are subject to penalties as prescribed under Chapter 875.[98] Additionally, law enforcement officers can access a twenty-four hour telephone verification system to validate the status of a card-carrying individual, enabling police to determine whether marijuana possessed by the individual is lawful.[99]

The ID card program is voluntary, however, and qualifying patients and their caregivers are not required to obtain an ID card to be entitled to the benefits provided by Chapter 875.[100] Therefore, possession of an ID card merely serves as

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90. *See, e.g.*, Wang, *supra* note 35, at A1 (stating that because "[t]he legislature and the governor have been unable to agree on statewide regulations to implement the [Act]... individual counties have had to struggle with ways to carry out the [Act]" and comparing a Mendocino county program that allows qualified people to have up to two pounds of marijuana in their possession with a Sonoma county program that allows authorized users to possess up to three pounds).

91. *See* Josh Richman, *Third Time Could Be a Charm for Pot Bill: Bay Area Lawmaker Pushes Medical Marijuana Registry Legislation*, OAKLAND TRIB., June 6, 2003 (stating that supporters of Chapter 875, including the California Medical Association, drug policy reform groups and Attorney General Bill Lockyer believe ID cards will "help law enforcement officers distinguish those who have valid medical need for marijuana from those using it for recreation").

92. CAL. HEALTH & SAFETY CODE § 11362.77 (enacted by Chapter 875).

93. *Id.*

94. *Id.* § 11362.78.

95. *See* Richard Guzman, *Bill Would Clarify Marijuana-Use Law*, DESERT SUN, July 1, 2002 at B1 (interviewing Wayne Koppel, chairman of the Drug Awareness Program for the Elks Association, who fears illegal activities will result from passage of a bill that expands the Act and implements an identification card program).

96. *See, e.g.*, CAL. VEH. CODE § 14610 (West 2000) (discussing unlawful and fraudulent use of driver's licenses); *see also* CAL. PENAL CODE § 470a (West 1999) (defining crimes and penalties relating to forgery and counterfeiting of driver's licenses).

97. CAL. HEALTH & SAFETY CODE § 11362.735(a)(4) (enacted by Chapter 875).

98. *Id.* § 11362.81(a)-(c).

99. *Id.* § 11362.735(a)(4).

100. *Id.* § 11362.71(f) (enacted by Chapter 875).

convenient proof of the individual's status.[101] Although this may present some difficulty or confusion for officers confronted with an individual who does not possess an ID card, but claims entitlement to the benefits of Chapter 875, such occurrences are likely to be infrequent because possession of an ID cards serves to benefit patients and caregivers as much as law enforcement. Therefore, many if not most qualifying individuals will likely apply to obtain cards.

V. THE COMPASSIONATE USE ACT, CHAPTER 875 AND THE CSA: RESOLVING THE CONFLICT

A. *The Trend in California*

Chapter 875 does not affect the CSA or any other federal law. Currently, "federal law prohibits the manufacture, distribution or sale of marijuana for any purpose."[102] Supporters of federal law contend that research does not support any medical use of marijuana, although a 1999 report issued by the Institute of Medicine urged further scientific research, concluding that the results were inconclusive.[103]

Senator Barney Frank, a supporter of medical marijuana, has repeatedly but unsuccessfully attempted to bring federal law in line with California law by proposing federal legislation that would have reclassified marijuana as a Schedule II drug and prohibited the CSA from restricting conduct authorized under state medical marijuana laws.[104] Considering the long-held federal position opposing any medical use of marijuana, it seems unlikely that similar future bills will survive.[105]

As compared to federal legislators, judges appear to be more sympathetic to the medical marijuana cause. In one highly publicized case decided prior to the enactment of Chapter 875, Ed Rosenthal, a marijuana activist, columnist of "High Times" magazine and author of many books on marijuana, was convicted in January 2003 for growing more than 100 marijuana plants in Oakland, California in violation of the CSA.[106] United States District Court Judge Charles Breyer refused to admit any testimony regarding medical marijuana, or that Rosenthal was cultivating the plants for use by patients, reasoning that the CSA

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101. *See* Richman, *supra* note 91 (discussing benefits of the ID card program to law enforcement officers).

102. United States v. Rosenthal, 266 F. Supp. 2d 1068, 1076 (N.D. Cal. 2003).

103. *See* Randall, *supra* note 11, at 15-20 (discussing research conducted on uses of marijuana for the treatment of certain serious illnesses as evaluated by the Institute of Medicine's 1999 report entitled *Marijuana and Medicine*, and other expert groups).

104. *Id.* at 30-31.

105. Jeninne K. Lee-St. John, *Rep. Frank Again Pushing Legal Use of Marijuana for Ill*, PATRIOT LEDGER, May 26, 2003, at 3.

106. *Rosenthal*, 266 F. Supp. 2d at 1074.

makes no exceptions based on motive or purpose.[107] Thus, jurors never heard arguments that Rosenthal's acts were consistent with the Act, and many jurors later expressed regret at having convicted Rosenthal.[108] Although prosecutors sought a six and a half year sentence for the conviction, Judge Breyer sentenced Rosenthal to one day in prison, thereby affirming that it is illegal under federal law to cultivate marijuana, but recognizing it as an act of compassion.[109] The import of the minimal sentence is disputed.[110] Judge Breyer subsequently denied Rosenthal's motion for a new trial.[111]

Within two months after the enactment of Chapter 875, the Nine Circuit addressed the issue of medical marijuana directly.[112] Plaintiff Angela McClary Raich, who used marijuana for relief from numerous medical conditions, including an inoperable brain tumor, a seizure disorder, severe weight loss and various chronic pain disorders, sought declaratory relief in a California district court.[113] Raich alleged that the CSA is unconstitutional as applied to persons who possess, obtain, manufacture or distribute marijuana solely for medical purposes.[114] Although the district court acknowledged her grave need for medical marijuana, and California's interest in permitting persons in her circumstances to use marijuana for such purposes, the court denied her motion for a preliminary injunction, finding that she had not met the necessary burden of demonstrating a likelihood of success on the merits.[115]

The Ninth Circuit reversed.[116] Affirming that the Commerce Clause may properly regulate activities bearing a substantial relation to commerce, the court acknowledged that it had previously upheld the CSA on Commerce Clause grounds, and stated the principle that "[w]here the *class of activities* is regulated and that *class* is within the reach of federal power, courts have no power to

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107. *See id.* at 1075 (reasoning that "[t]here is no local 'opt out' provision in the [CSA], even though many would question the wisdom of applying [the CSA] to those who furnish medical marijuana").

108. *See* Bailey & Rodriguez, *supra* note 34, at B1 (reporting that "[s]everal jurors later said they would have acquitted [Rosenthal] if they had known he was growing the plants for patients").

109. *See* Dan Reed, *Pot "Guru" Gets Fine, 1-Day Term*, MERCURY NEWS (San Jose), June 5, 2003 at 1 (reporting "Breyer said it was reasonable to conclude that Rosenthal had believed he was acting legally and set Rosenthal free by awarding him credit for a day spent in jail last year").

110. *See* Rene Sanchez, *One Jail Day for Marijuana Felony: Jurors Rebelled at Own Verdict on Medicinal Use Advocate*, WASH. POST, June 5, 2003, at A2 (quoting Bruce Mirken, spokesman for the Marijuana Policy Project as saying "[f]or all practical purposes, Judge Breyer just overturned the federal law banning medical marijuana" and "[t]his could be the final crack in the wall that brings the whole federal war on medical marijuana patients crashing down"); *but cf. id.* (warning that federal "crackdowns on marijuana traffickers will continue").

111. *Rosenthal*, 266 F. Supp. 2d at 1090.

112. *See* Raich v. Ashcroft, 352 F.3d 1222 (9th Cir.), *cert. granted*, 124 S.Ct. 2909 (2004).

113. *Id.* at 1225-26; *see generally* Raich v. Ashcroft, 248 F. Supp. 2d 918 (N.D. Cal. 2003), *rev'd by* 352 F.3d 1222 (9th Cir. 2003), *cert. granted*, 124 S.Ct. 2909 (2004).

114. *Raich*, 352 F.3d at 1226.

115. *Raich*, 248 F. Supp. 2d at 931, *rev'd by* 352 F.3d 1222 (9th Cir.), and *cert. granted.* 124 S.Ct. 2909 (2004).

116. *Raich*, 352 F.3d at 1235, *cert. granted*, 124 S.Ct. 2909 (2004).

excise, as trivial, individual instances of the class."[117] The court drew a distinction between classes of activities such as drug trafficking, where the CSA has been upheld, and an altogether separate class involving the use of marijuana for medical purposes.[118] Specifically, the court carved out the class of activities engaged in by Raich as being narrow and distinct: "the intrastate, noncommercial cultivation and possession of cannabis for personal medical purposes as recommended by a patient's physician pursuant to valid California state law."[119] In a detailed discussion that analyzed whether this narrow class of activities sufficiently effects interstate commerce to bring it within the purview of the Commerce Clause,[120] the court determined that the CSA is likely unconstitutional as applied to Raich.[121]

On remand, the district court entered a preliminary injunction that forbid the government from interfering with Raich's cultivation, possession or use of medical marijuana.[122]

The *Raich* decision appeared to establish new precedent in the classification and analysis of medical marijuana-related activities as related to the CSA, although one dissenting opinion suggests it may actually create a rift that will result in split court rulings.[123] The narrow exception that the Ninth Circuit carved out appeared to answer an important constitutional question: does the CSA exceed Congress' Commerce Clause power as applied to intrastate medical marijuana activities?[124] In June, 2004, the United States Supreme Court granted certiorari to provide a final resolution to this question.[125]

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117. *Id.* at 1228.

118. *Id.*

119. *See id.* (reasoning that health and safety concerns are ameliorated when marijuana is used pursuant to a physician's recommendation, that the policy considerations are different from those raised by concerns about drug abuse, and that the limited use of marijuana for medical purposes, as opposed to illicit drug trafficking, is not intended to enter the stream of commerce).

120. *See id.* at 1229 (applying the four part test established in *United States v. Morrison*, 529 U.S. 598 (2000)). The four factors of *Morrison* are:

> (1) whether the statute regulates commerce or any sort of economic enterprise; (2) whether the statute contains any express jurisdictional element that might limit its reach to a discrete set of cases; (3) whether the statute or its legislative history contains express congressional findings regarding the effects of the regulated activity upon interstate commerce; and (4) whether the link between regulated activity and a substantial effect on interstate commerce is attenuated.)

Morrison, 529 U.S. at 610-12 (internal quotations omitted).

121. *Raich*, 352 F. 3d at 1234.

122. Petitioner's Brief on Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit at 9, Ashcroft v. Raich, 124 S.Ct. 2909 (2004) [hereinafter Petitioners' Brief].

123. *Raich*, 352 F. 3d at 1235-43 (Beam, J., dissenting) (relying on case precedent and deferring to Congressional findings to support the conclusion that use of marijuana, even for medical purposes, violates the CSA, and that to hold otherwise would undermine Congressional inent).

124. *Id.* at 1234.

125. *Id.*

B. Raich *and the United States Supreme Court*

In deciding the question presented, the Supreme Court will likely address and refine the extent of Congress' reach pursuant to its Commerce Clause power.[126] Resolution of this issue may turn on whether 1) intrastate medical marijuana-related activities are commercial or economic in nature, and if so, 2) whether such activities "substantially affect interstate commerce."[127] Congress has issued clear statements that it would answer these sub-issues in the affirmative.[128] However, recent cases decided by the Supreme Court indicated a trend that limits and narrows the class of activities that it is willing to regard as being economic in nature.[129] Should the Supreme Court find that wholly intrastate medical marijuana activities are neither "commercial" nor "economic" in nature, the Court will likely find that the CSA is invalid as to such activities.[130] On the other hand, the fungible character of marijuana and congressional intent to provide a comprehensive scheme to regulate controlled substances may favor a finding that the CSA is constitutional as applied to intrastate medical marijuana activities.[131]

V. CONCLUSION

Currently, nine states, including California, have laws permitting the use of marijuana for medical purposes.[132] Surveys indicate that eighty percent of

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126. *Id.* at 1227-35 (analyzing the Commerce Clause power as applied to defendant, and holding that Congress exceeded its power). *But see* Petitioners' Brief, *supra* note 122, at 10 (arguing that the CSA's regulation of the "commercial market in marijuna" is constitutional); Brief Amicus Curiae of Pacific Legal Foundation in Support of Neither Party at 24, Ashcroft v. Raich, 124 S.Ct. 2909 (2004) [hereinafter Pacific Legal Foundation Brief] (stating that "this Court should more clearly definie the scope of the commerce power").

127. *See* Pacific Legal Foundation Brief, *supra* note 126, at 21-22 *Raich* (No. 03-1454) (stating that "[a] statute that, by its terms, does not regulate a commercial or economic activity and does not expressly require that the regulated activity have nay connection with interstate commerce . . . cannot be said, therefore, to be in pursuance of a legitimate Commerce Clause end"); Petitioners' Brief, *supra* note 122, at 9-10 (stating that Congress has the power "to regulate local activity that substantially affects interstate commerce").

128. *Supra* note 25 and accompanying text.

129. *See* Pacific Legal Fundation Brief, *supra* note 126, at 3-4 (stating that the Court recognized and affirmed limitations on commerce Clause power in two cases: United States v. Lopez, 514 U.S. 549 (1995) where the Court held that the possession of a gun in a school zone was not an economic activity and did not substantially affect interstate commerce, and United States v. Morrison, 529 U.S. 598 (2000) wherein the Court held that an intrastate act of violence by one person against another was not economic activity and could not substantially affect interstate commerce).

130. *See id.* at 24 (stating that the "key in this case . . . is wether the activity the federal government seeks to regulate is 'some sort of economic endeavor' that also has a substnatial effect on interstate commerce").

131. *See* Petitioners' Brief, *supra* note 122, at 21-22 (stating that mariuana is a fungible commodity, that activities related to mariuna possession and processing are economic activities distinquishable from gun possession in *Lopez*, and that prohibitions affecting marijuana are part of a comprehensive statutory scheme that Congress may validly regulate under the CSA).

132. *See Politics & Policy Medical Marijuana: Bill Would Allow "Medical Need" Defense*, AM. POL. NETWORK, Apr. 14, 2003, at 7 (listing states including Alaska, Arizona, California, Colorado, Hawaii, Maine, Nevada, Oregon, and Washington).

Americans support the use of marijuana for medical purposes.[133] Chapter 875 succeeds in bolstering and expanding California law that supports the right of seriously ill Californians to obtain and use medical marijuana. However, Chapter 875 creates new loopholes, and opens the door to potential abuses by recommending physicians and persons wishing to gain access to marijuana. The ID card program establishes an effective tool for law enforcement and promotes consistency in statewide application of the Act, enhancing California's ability to regulate lawful marijuana-related conduct.[134]

Significantly, federal law banning conduct permitted under Chapter 875 is unaffected.[135] Although the Ninth Circuit has seemingly removed medical marijuana-related activities in California from the scope of CSA regulation,[136] The United States Supreme Court has granted certiorari to resolve the long-debated issues surrounding the use of marijuana for medical purposes.[137] The Court's ruling may reach beyond the issue of medical marijuana, and redefine Congress' power pursuant to the Commerce Clause.

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133. *See Talk of the Nation*, *supra* note 13 (broadcasting interview of Neal Conan with Mitch Earleywine, author of "Understanding Marijuana" and associate professor of psychology at the University of Southern California).

134. *See* SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF SB 420, at 6 (May 27, 2003) (stating that SB 420 provides uniform guidelines to help avoid confusion and frustration "in determining the validity of medical possession claims").

135. *See United States v. Rosenthal*, 266 F. Supp. 2d 1068, 1076 (N.D. Cal. 2003) (holding that federal law prohibits manufacture, distribution and sale of marijuana for any purpose).

136. *Raich*, 352 F.3d at 1235 (9th Cir. 2003).

137. *Supra* note 125.