



9-1-2016

# Proposition 64: Marijuana Legalization

Gage Marchini

*University of the Pacific, McGeorge School of Law*

Brian Parino

*University of the Pacific, McGeorge School of Law*

Follow this and additional works at: <http://scholarlycommons.pacific.edu/california-initiative-review>



Part of the [Legislation Commons](#)

### Recommended Citation

Marchini, Gage and Parino, Brian (2016) "Proposition 64: Marijuana Legalization," *California Initiative Review (CIR)*: Vol. 2016 , Article 15.

Available at: <http://scholarlycommons.pacific.edu/california-initiative-review/vol2016/iss1/15>

This Article is brought to you for free and open access by the Journals and Law Reviews at Scholarly Commons. It has been accepted for inclusion in California Initiative Review (CIR) by an authorized editor of Scholarly Commons. For more information, please contact [mgibney@pacific.edu](mailto:mgibney@pacific.edu).

**Proposition 64:  
Marijuana Legalization.**

Initiative Statute.

Copyright © 2016 by the University of the Pacific, McGeorge School of Law

By

**Gage Marchini**

*J.D., University of the Pacific, McGeorge School of Law, to be conferred May 2018*

*B.S., Agriculture Business, California State University, Fresno, 2015*

*B.A., Economics, California State University, Fresno, 2015*

&

**Brian Parino**

*J.D., University of the Pacific, McGeorge School of Law, to be conferred May 2018*  
*B.A., Political Science, California Polytechnic State University, San Luis Obispo, 2007*

## I. EXECUTIVE SUMMARY

Proposition 64, the Control, Regulate and Tax Adult Use of Marijuana Act, is an initiative which will legalize marijuana for individuals over the age of 21 if passed.<sup>1</sup> The initiative would authorize possession of up to one ounce of marijuana and the cultivation of up to six marijuana plants per single household residence.<sup>2</sup> It would impose a tax of 15% excise tax on marijuana as well as an additional tax on the cultivation of marijuana.<sup>3</sup> The initiative prohibits advertising to minors and requires that packaging and labeling follow standards specific to marijuana products.<sup>4</sup> The initiative would change the penalty for possession by a minor to mandatory drug counseling and community service and the penalty for selling marijuana without a license to up to six months in jail and/or up to a \$500 fine.<sup>5</sup>

A “YES” vote on Proposition 64 means the possession, cultivation, and trade of marijuana would be legal for personal use within the limits set by the law.<sup>6</sup>

A “NO” vote on Proposition 64 means marijuana would continue to be legal for limited medical purposes only.<sup>7</sup>

## II. THE LAW

### A. Federal law

Laws related to marijuana are different at the federal and state levels. One of the largest looming questions is the degree to which the federal government will choose to get involved with states whose voters have elected to legalize marijuana.

#### *1. History of Federal Legislation*

In 1970, after several attempts to regulate marijuana, President Nixon signed into law the Comprehensive Drug Abuse Prevention and Control Act, which contained the Controlled Substance Act (“CSA”).<sup>8</sup> The CSA classified marijuana<sup>9</sup> as a schedule I drug, which made it unlawful for any person to knowingly or intentionally “manufacture, distribute, dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance.”<sup>10</sup> A schedule 1 classification means the government believes marijuana has a high potential for abuse and that there are no accepted medical treatments in use in the United States, and there exists a lack of accepted safety for use of the drug under medical supervision.<sup>11</sup> Other drugs classified as

---

<sup>1</sup> Cal. Proposition 64 (2016).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. §801 (2016).

<sup>9</sup> *Id.* (The CSA lists “marihuana;” however, for purposes of this article we will refer to cannabis as marijuana interchangeably for the sake of uniformity).

<sup>10</sup> Controlled Substance Act, 21 U.S.C. § 841(a)(1) (2016).

<sup>11</sup> 21 U.S.C. § 812(b)(1) (2016).

schedule 1 substances include, heroin, LSD (lysergic acid diethylamide), and ecstasy (3, 4-methylenedioxy amphetamine).<sup>12</sup>

## 2. *Enforcement by Current Administration*

In the last 20 years, 35 states have legalized medical marijuana in some form.<sup>13</sup> The current Presidential administration has tried to strike a balance between conflicting federal and state laws. The Department of Justice outlined eight enforcement priorities in a memo by Deputy Attorney General James Cole in August 2013. These guidelines, contained in what is very commonly referred to as the Cole Memo, are understood to allow states to legalize marijuana so long as the state laws adequately address the following goals of preventing: (1) distribution of marijuana to minors; (2) revenue from the sale of marijuana going to criminal enterprises; (3) diversion of marijuana from states where it is legal under state law to other states; (4) state authorized marijuana activity from being used as a cover for the trafficking of other illegal drugs; (5) violence and the use of firearms in the cultivation and distribution of marijuana; (6) drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use; (7) growing of marijuana on public lands and the attendant public safety and environmental dangers; and (8) possession or use of marijuana on federal property.<sup>14</sup> Therefore, it is likely that the state will not face any federal interference, even if they legalize marijuana, so long as these guidelines are met.<sup>15</sup> The federal government typically takes enforcement action when commercial distribution is suspected.<sup>16</sup>

It should be noted that these enforcement priorities are that of President Obama's administration. The next President may have different priorities for federal enforcement.

## **B. State Law**

### 1. *Current Penalties*

In 2010, Governor Arnold Schwarzenegger approved SB 1449 which downgraded possession of an ounce of marijuana or less from a misdemeanor to an infraction, which would not go on an individual's record.<sup>17</sup> It is illegal for California residents to grow marijuana for nonmedical purposes.<sup>18</sup> Drivers with marijuana found in their vehicle are subject to a \$100 infraction fine so long as the amount of marijuana is less than 1 ounce.<sup>19</sup> Driving under the

---

<sup>12</sup> 21 U.S.C. § 812 (b)-(c) (2016).

<sup>13</sup> Blue Ribbon Commission on Marijuana Policy, *Pathways Report: Policy Options for Regulating Marijuana in California* (2015) at 15, <https://www.safeandsmartpolicy.org/wp-content/uploads/2015/07/BRCPathwaysReport.pdf>.

<sup>14</sup> *Id.* at 16.

<sup>15</sup> *Id.*

<sup>16</sup> California NORML, *Guide to California's Marijuana Laws*, (last visited Oct. 15, 2016), <http://www.canorml.org/camjlaws.html>.

<sup>17</sup> Patrick McGreevy, *Schwarzenegger approves bill downgrading marijuana possession of ounce or less to an infraction*, L.A. TIMES (Oct. 2, 2010), <http://articles.latimes.com/2010/oct/02/local/la-me-marijuana-20101002>.

<sup>18</sup> CAL. HEALTH & SAFETY CODE § 11358 (2016).

<sup>19</sup> CAL. VEH. CODE § 23222(b) (2016).

influence of marijuana is illegal, and will still be illegal if Proposition 64 passes.<sup>20</sup> In 2014, there were 13,300 felony and 6,411 misdemeanor arrests involving marijuana.<sup>21</sup> In 2015, felony arrests for marijuana fell to 8,866 while misdemeanor arrests remained almost the same at 6,267.<sup>22</sup>

## 2. California Medical Marijuana laws

The California Legislature recently passed the Medical Marijuana Regulation and Safety Act (“MMRSA”) in 2015 to update existing medical marijuana laws. The MMRSA established a statewide framework for regulating medical marijuana. The MMRSA also established the various license types that Proposition 64 seeks to apply to recreational marijuana. However, under the MMRSA, there is no type of license that allows for a large scale indoor or outdoor cultivation site. Proposition 64 would add type “5 or 5a” licenses to the MMRSA list of license types. These licenses would be available 5 years after passage of Proposition 64 and would allow large scale cultivation.<sup>23</sup> The MMRSA also established restrictions on the amount of space allowed for the cultivation of marijuana, including 1 acre for outdoor cultivation and 22,000 square feet for indoor cultivation.<sup>24</sup>

To sell or cultivate medical marijuana an individual must get authorization from the government, both state and local.<sup>25</sup> Under Proposition 64, no authorization from local government would be required, other than compliance with reasonable regulations.

The MMRSA also allows individuals to grow marijuana on areas less than 100 sq. ft., however such growing is still subject to local regulations and restrictions.<sup>26</sup> If Proposition 64 passes, individuals over the age of 21 will be allowed to grow six plants per single family residence for recreational purposes.<sup>27</sup>

The MMRSA also establishes a “track and trace” program which provides a unique identification number for each marijuana plant in order to track the distribution chain of the product to ensure all regulations are complied with. This allows the consumer to be confident that the product has been officially tested and is safe for consumption. This system will also ensure that all taxes and regulations have been complied with.

---

<sup>20</sup> CAL. VEH. CODE § 23152(a) (2016).

<sup>21</sup> *CJSC Statistics: Arrests*, DEPARTMENT OF JUSTICE, OFFICE OF THE ATTORNEY GENERAL, <https://oag.ca.gov/crime/cjsc/stats/arrests> (last visited Oct. 19, 2016).

<sup>22</sup> *Id.*

<sup>23</sup> *Cal NORML: A SUMMARY OF THE MEDICAL CANNABIS REGULATION and SAFETY ACT (MCRSA)*, CALIFORNIA NORML, [http://www.canorml.org/news/A\\_SUMMARY\\_OF\\_THE\\_MEDICAL\\_MARIJUANA\\_REGULATION\\_AND\\_SAFETY\\_ACT](http://www.canorml.org/news/A_SUMMARY_OF_THE_MEDICAL_MARIJUANA_REGULATION_AND_SAFETY_ACT) (last visited Oct. 15, 2016).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Medical Marijuana Program Frequently Asked Questions*, CALIFORNIA DEPARTMENT OF PUBLIC HEALTH, <https://www.cdph.ca.gov/programs/MMP/Pages/MMPFAQ.aspx> (last visited Oct. 15, 2016).

Under the MMRSA, individuals would qualify if they are 18 years of age and have a proper medical marijuana identification card.<sup>28</sup> Though there are some differences, the regulatory structure of proposition 64 mirrors that of the MMRSA.

### III. PATH TO THE BALLOT

#### A. Previous Attempts

Marijuana has been regulated since the federal ‘Marihuana’ Tax Act of 1937.<sup>29</sup> That act placed special taxes on marijuana importers, manufacturers, producers, and professionals who used marijuana, including doctors, veterinarians, and researchers.<sup>30</sup> This was the extent of federal marijuana regulation until the Controlled Substance Act was passed in 1970,<sup>31</sup> which replaced the Marihuana Tax Act and made marijuana illegal in the United States as a schedule I controlled substance.<sup>32</sup>

California first considered an initiative to legalize the cultivation or possession of marijuana for personal use in 1972 when Proposition 19 was introduced.<sup>33</sup> The proposed law was minimal, only adding two sections to the Health and Safety Code, but would have limited use to those over the age of 18.<sup>34</sup> Proponents of the initiative reasoned that the new law would not legalize or encourage the sale of marijuana. Rather, it would allow people to grow the plant themselves instead of forcing them to purchase it illegally.<sup>35</sup> Proponents referenced studies—as well as President Nixon’s Commission on Marijuana which recommended the decriminalization of marijuana—indicating marijuana was not an addictive substance and its use was safer than that of tobacco or alcohol.<sup>36</sup> Additionally, proponents maintained that legalizing the personal use of marijuana would save hundreds of millions in tax dollars spent prosecuting marijuana users and would, “stop making criminals of normal people.”<sup>37</sup> The opponents of Proposition 19 relied primarily on the lack of research on tetrahydrocannabinol (THC), the active chemical in marijuana, which they argued made the effects of marijuana unpredictable.<sup>38</sup> They also argued that legalizing marijuana would encourage its use and open the door to abuse of other drugs, which they supported by reference to a study of 5,000 heroin addicts which found that marijuana was the introduction to drug abuse for 95% of the addicts.<sup>39</sup> The proposition ultimately failed with 66.5% of the electorate voting against Proposition 19 and only 33.5% in favor.<sup>40</sup>

---

<sup>28</sup> *Id.*

<sup>29</sup> Marihuana Tax Act 1937, 75 P.L. 238 (repealed 1970).

<sup>30</sup> *Id.*

<sup>31</sup> 21 U.S.C. §801 (2016).

<sup>32</sup> *Id.*

<sup>33</sup> *Marijuana - Removal of Penalty For Personal Use, Cal. Proposition 19 (1972)*, UC HASTINGS SCHOLARSHIP REPOSITORY, [http://repository.uchastings.edu/ca\\_ballot\\_props/770](http://repository.uchastings.edu/ca_ballot_props/770).

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> Jessica Roy, *California’s been rejecting legalized marijuana for more than a century. Here’s why this time is different*, L.A. TIMES (Sept. 13, 2016), <http://www.latimes.com/politics/la-pol-ca-timeline-california-recreational-marijuana-history-20160708-snap-story.html>.

Three years after Proposition 19 failed at the polls, California State Senator Moscone introduced Senate Bill 95 (“SB 95”) in response to a committee study which indicated that 90% of marijuana arrests were for possession.<sup>41</sup> The study also determined these arrests were costing the state over \$100 million annually.<sup>42</sup> SB 95 reduced the penalty for possession of up to an ounce of marijuana from a possible 10 year prison sentence and \$100 fine to no more than a six month sentence and/or up to a \$500 fine.<sup>43</sup> The bill was signed into law by Governor Jerry Brown during his first term.<sup>44</sup> A Los Angeles Times article called the controversial downgraded penalty a “traffic-style citation.”<sup>45</sup> However, Governor Brown insisted “severe penalties still remain[ed]” for marijuana offenses.<sup>46</sup>

Marijuana appeared on California’s ballot again in 1996 in Proposition 215, an initiative to legalize the cultivation and possession of marijuana for prescribed medical use.<sup>47</sup> Proposition 215 was known as the Compassionate Use Act of 1996 and it gave patients, who had been recommended by a doctor, the right to use marijuana in the treatment of, “cancer, anorexia, AIDS chronic pain, spasticity, glaucoma, arthritis, migraine, or any other illness for which marijuana provides relief.”<sup>48</sup> Proponents of Proposition 215 argued that medicinal use of marijuana allowed relief to terminally ill patients and in some cases eased side effects of treatments, such as chemotherapy, which would have discouraged continued treatment.<sup>49</sup> Several law enforcement agencies and drug prevention groups opposed the initiative.<sup>50</sup> They contended that the text of the legislation was sufficiently vague to allow marijuana to be prescribed for maladies as minor as, “headaches, upset stomach, ... or just about anything” with just an oral recommendation from a doctor.<sup>51</sup> Additionally, the opposition argued that the proposition should not be approved because it allowed a drug without FDA approval to be accessible to the public and would complicate efforts to encourage youth to remain drug free.<sup>52</sup> Ultimately Proposition 215 passed by a vote of 55.58%, making California the first state to legalize the medical use of marijuana.<sup>53</sup>

---

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> Gerald F. Uelmen, *California's New Marijuana Law: A Sailing Guide for Uncharted Waters*, 51 J. ST. BAR CAL. 27, 29 (1976).

<sup>44</sup> Roy, *supra* note 40.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Medical Use of Marijuana, Cal. Proposition 215 (1996)*, UC HASTINGS SCHOLARSHIP REPOSITORY, [http://repository.uchastings.edu/ca\\_ballot\\_props/1135](http://repository.uchastings.edu/ca_ballot_props/1135).

<sup>48</sup> CAL. HEALTH & SAFETY CODE §11362.5 (2016).

<sup>49</sup> Cal. Proposition 215 (1996).

<sup>50</sup> *Id.* (opposition included the California State Sheriffs Association, The California District Attorneys Association, The California Police Chiefs Association, The California Narcotic Officers Association, The California Peace Officers Association, Attorney General Dan Lungren, Californians for Drug-Free Youth, The California D.A.R.E. Officers Association, Drug Use Is Life Abuse, Community Anti-Drug Coalition of America, and Drug Watch International).

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> Roy, *supra* note 40.

In 2000, California voted on Proposition 36, The Substance Abuse and Crime Prevention Act of 2000.<sup>54</sup> The initiative introduced an alternative to a jail or prison sentence for offenders convicted of nonviolent drug possession.<sup>55</sup> Instead, the offender would be sentenced to probation with a mandatory drug treatment program element.<sup>56</sup> The proposition was passed with 60.9% in favor and 39.1% opposed.<sup>57</sup>

From 2003 to 2010, two bills were passed through the California Legislature further regulating marijuana.<sup>58</sup> The first was Senate Bill 420, the Medical Marijuana Program Act, which was passed in 2003.<sup>59</sup> This bill required the California Department of Health Services to institute a program for identification of individuals who have been prescribed marijuana for medicinal purposes.<sup>60</sup> In 2010, Governor Schwarzenegger signed Senate Bill 1449 into law.<sup>61</sup> This bill downgraded possession of an ounce, or less, of marijuana to an infraction from a misdemeanor offense.<sup>62</sup>

In 2010, thirty-eight years after its first appearance on the California ballot, marijuana legalization was presented to the voters, once again, as Proposition 19. Proposition 19 would have legalized the possession and cultivation of marijuana for personal use.<sup>63</sup> Possession would have been limited to individuals over the age of 21, to no more than one ounce of marijuana or 25 square feet of cultivated marijuana per residence, and cultivation on personal residences would be limited to personal use and not commercial.<sup>64</sup> The initiative left the authorization for commercial marijuana production to local governments and the state.<sup>65</sup> The state and local governments would have been authorized to impose taxes on marijuana, however, they would not be required to do so. The discretion provided to local governments concerning taxation left the prospective revenues of the initiative relatively unknown.<sup>66</sup> A field poll conducted prior to the November election found for the first time 50% of California voters believed that marijuana should be legalized for recreational use.<sup>67</sup> Despite apparent support for the initiative, it ultimately failed with 53.5% of the electorate against and only 46.5% in support.<sup>68</sup>

---

<sup>54</sup> *Drugs, Probation And Treatment, Cal. Proposition 36 (2000)*, UC HASTINGS SCHOLARSHIP REPOSITORY, [http://repository.uchastings.edu/ca\\_ballot\\_props/1184](http://repository.uchastings.edu/ca_ballot_props/1184).

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> Med. Marijuana Program Act, SB 420, 2003 Leg., 2003–2004 Reg. Sess. (Cal. 2003); SB 1449, 2010 Leg., 2009–2010 Reg. Sess. (Cal. 2010).

<sup>59</sup> Med. Marijuana Program Act, SB 420, 2003 Leg., 2003–2004 Reg. Sess. (Cal. 2003)

<sup>60</sup> *Id.*

<sup>61</sup> S.B. 1449, 2010 Leg., 2009–2010 Reg. Sess. (Cal. 2010).

<sup>62</sup> *Id.*

<sup>63</sup> Legislative Analyst's Office, *Proposition 19*, at 8 (July 12, 2010), [http://www.lao.ca.gov/ballot/2010/19\\_11\\_2010.pdf](http://www.lao.ca.gov/ballot/2010/19_11_2010.pdf).

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *See Reversal of Attitudes Towards Marijuana*, THE FIELD POLL ONLINE at 2 (December 10, 2013), <http://www.field.com/fieldpollonline/subscribers/RIs2455.pdf> (finding that 4% would legalize marijuana so it can be purchased by anyone and another 46% would legalize it with age controls similar to alcohol).

<sup>68</sup> Roy, *supra* note 40.

## B. Direct History of Proposition 64

In 2014, another marijuana initiative was registered for the November ballot, this time titled the Control, Regulate and Tax Marijuana Act.<sup>69</sup> The initiative would have legalized possession of up to an ounce of marijuana for individuals over 21 and allowed up to six plants to be cultivated for personal use.<sup>70</sup> It also contained provisions to institute a 25% tax on marijuana sales to be distributed among education, drug and alcohol treatment, law enforcement, and environmental restoration for damages caused by illegal cultivation.<sup>71</sup> While the campaign organized in support of the initiative was on track to obtain the signatures required to qualify for the ballot, the organization decided to stay its efforts.<sup>72</sup> The supporters decided to hold back until 2016 to give more time for outreach with, “elected officials, public health leaders and law enforcement,” and to take advantage of the 2016 presidential election, because presidential elections draw larger numbers of young voters who represent a demographic that historically is more supportive of marijuana legalization.<sup>73</sup>

In 2015, Governor Brown signed a package of bills that established the Bureau of Medical Marijuana Regulation.<sup>74</sup> The Bureau was established to regulate how marijuana is grown and distributed in the state, similar to the way other agricultural production is regulated.<sup>75</sup> In part, these bills were influenced by the drought due to the illegal diversions and the significant environmental effects of illegal marijuana cultivation. Aside from establishing these regulations specific to medical marijuana, the bills were able to create a framework for the distribution and regulation of recreational marijuana if it is legalized by voters.<sup>76</sup>

## IV. WHAT IS GOING ON IN OTHER JURISDICTIONS?

### A. Colorado

Colorado passed Amendment 64 in November 2012. This amendment allows adults 21 years or older to possess up to an ounce of marijuana and grow up to six plants in their home.<sup>77</sup> The first retail sales of recreational marijuana under the new law did not begin until Jan. 1, 2014.<sup>78</sup> In November 2013, Colorado passed Proposition AA, which imposed an excise tax of 15% with an additional 10% sales tax on recreational marijuana. This new law was expected to bring an

---

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> Maria L. La Ganga, *California ballot measure on pot legalization delayed until 2016*, L.A. TIMES (Feb. 18, 2014), <http://www.latimes.com/nation/la-na-pot-measure-20140218-story.html#axzz2tbyaar00>.

<sup>74</sup> Hillary Bricken, *An Overview of California’s New (And Improved) Medical Marijuana Laws*, ABOVE THE LAW (September 9, 2016), <http://abovethelaw.com/2015/10/an-overview-of-californias-new-and-improved-medical-marijuana-laws/>.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> Matt Ferner, *Amendment 64 Passes: Colorado Legalizes marijuana For Recreational use*, HUFFINGTON POST (Nov. 6, 2012), [http://www.huffingtonpost.com/2012/11/06/amendment-64-passes-in-co\\_n\\_2079899.html](http://www.huffingtonpost.com/2012/11/06/amendment-64-passes-in-co_n_2079899.html).

<sup>78</sup> *Marijuana Retailers & Home Growers*, COLORADO OFFICIAL STATE WEB PORTAL, <https://www.colorado.gov/pacific/marijuanainfodenver/marijuana-retailers-home-growers> (last visited Oct. 15, 2016).

additional \$70 million in revenue for the state along with local sales tax revenues.<sup>79</sup> Colorado collected \$76 million in taxes and licensing fees in 2014 related to recreational marijuana and \$135 million in 2015.<sup>80</sup>

Despite seeing increases in revenue Colorado has experienced an increase in driving fatalities involving marijuana. In 2013, there were 39 fatalities, however there were 63 and 68 in 2014 and 2015 respectively.<sup>81</sup> Colorado has also seen an increase in the number minority children who are arrested for the possession of marijuana.<sup>82</sup> Arrests for marijuana among white children between the ages of 10 and 17 decreased by 10% between 2012 and 2014, while at the same time the arrest rates for Latinos increased by 20% and African Americans increased by 50%.<sup>83</sup> There is some evidence that the new law is disproportionately affecting underage minorities.

## B. Washington

In 2012, the state of Washington passed Initiative 502 which allowed adults 21 years of age or older to legally possess up to one ounce of marijuana.<sup>84</sup> Recreational marijuana sales to the general public began on July 8, 2014.<sup>85</sup> Washington imposed a 37% excise tax on marijuana sales.<sup>86</sup> In the first year Washington anticipated \$36 million in tax revenue. However, those expectations were exceeded as the amount of revenue generated was almost \$70 million.<sup>87</sup> A study by the American Automobile Association (“AAA”) indicated that fatal crashes involving drivers who tested positive for THC increased from 40 crashes in 2015, to 85 in 2015.<sup>88</sup> Washington does have a DUI limit of THC levels greater than or equal to 5 nanograms per milliliter of blood.<sup>89</sup>

## C. Oregon

---

<sup>79</sup> Ferner, *supra* note 77.

<sup>80</sup> Ricardo Baca, *Colorado marijuana sales skyrocket to more than \$966 million in 2015*, THE CANNABIST (Feb. 9, 2016), <http://www.thecannabist.co/2016/02/09/colorado-marijuana-sales-2015-reach-996-million/47886/>.

<sup>81</sup> *Drugged Driving Statistics*, COLORADO DEPARTMENT OF TRANSPORTATION, <https://www.codot.gov/safety/alcohol-and-impaired-driving/druggeddriving/drugged-driver-statistics/view> (last visited Oct. 15, 2016).

<sup>82</sup> Ben Markus, *As Adults Legally Smoke Pot in Colorado, More Minority Kids Arrested For It*, NPR (June 29, 2016), <http://www.npr.org/2016/06/29/483954157/as-adults-legally-smoke-pot-in-colorado-more-minority-kids-arrested-for-it>.

<sup>83</sup> *Id.*

<sup>84</sup> Jonathan Martin, *Voters approve I-502 legalizing marijuana*, SEATTLE TIMES (Nov. 7, 2012), <http://www.seattletimes.com/seattle-news/voters-approve-i-502-legalizing-marijuana/>.

<sup>85</sup> *FAQs on I-502*, WASHINGTON STATE LIQUOR AND CANNABIS BOARD, [http://www.liq.wa.gov/mj2015/faqs\\_i-502](http://www.liq.wa.gov/mj2015/faqs_i-502) (last Visited Oct. 15, 2016).

<sup>86</sup> Joseph Henchman and Morgan Scarboro, *Marijuana Legalization and Taxes: Lessons for other States from Colorado and Washington*, TAX FOUNDATION (May 12, 2016), <http://taxfoundation.org/article/marijuana-legalization-and-taxes-lessons-other-states-colorado-and-washington>.

<sup>87</sup> Gene Johnson, *After year of Washington legal pot sales, taxes top \$70M*, HUFFINGTON POST (July 4, 2015), <http://www.huffingtonpost.com/huff-wires/20150704/us--legal-marijuana-washington/>.

<sup>88</sup> Andrea Noble, *Marijuana-related fatal car accidents surge in Washington state after legalization*, WASHINGTON TIMES (May 10, 2016), <http://www.washingtontimes.com/news/2016/may/10/marijuana-related-fatal-car-accidents-surge-washin/>.

<sup>89</sup> *FAQs on I-502*, *supra* note 85.

In 2014, Oregon passed Measure 91 which allows adults at least 21 years of age to legally possess up to one ounce of marijuana in public and up to eight ounces in their home.<sup>90</sup> Selling recreational marijuana began on a limited basis in medical marijuana dispensaries on October 1, 2015.<sup>91</sup> The state imposed a temporary tax rate of 25% which will eventually be replaced by a tax of 17%, allowing cities and counties to adopt laws to add an additional 3% for a total maximum tax amount of 20%.<sup>92</sup> Oregon anticipated about \$3 million in additional tax revenue over the year but collected \$10.5 million in taxes within the first three months.<sup>93</sup> There is no available data to determine whether there has been an increase in car fatalities or crime since legalization.

#### **D. Washington, DC**

In 2014, Washington DC voters approved Initiative 71 which legalized recreational marijuana use and allowed individuals to possess up to 2 ounces of marijuana, grow up to 6 plants, and be able to ‘share’ up to 1 ounce of marijuana with an individual as long as no goods or services are exchanged.<sup>94</sup> However, Congress stepped in and attached a bill as part of the budget that prohibits the city government from setting up a framework for the regulation and sale of recreational marijuana.<sup>95</sup> Since Congress has authority of Washington, DC, the city does not have the power to tax or regulate marijuana. Washington, DC had expected to bring in an additional \$20 million in new tax revenue based on legalizing marijuana.<sup>96</sup>

#### **E. Alaska**

In 2014, voters approved Ballot Measure 2 which allowed for the possession and sale of recreational marijuana to residents 21 years and older.<sup>97</sup> Alaska plans on taxing marijuana at \$50 an ounce, though the state has not begun the process of collecting taxes on commercial

---

<sup>90</sup> Noelle Crombie, *Recreational marijuana passes in Oregon: Oregon election results 2014*, OREGONLIVE (Nov. 5, 2014), [http://www.oregonlive.com/politics/index.ssf/2014/11/recreational\\_marijuana\\_passes.html](http://www.oregonlive.com/politics/index.ssf/2014/11/recreational_marijuana_passes.html).

<sup>91</sup> *Frequently Asked Questions*, OREGON LIQUOR CONTROL COMMISSION, [https://www.oregon.gov/olcc/marijuana/pages/frequently-asked-questions.aspx#Recreational\\_Marijuana\\_in\\_General](https://www.oregon.gov/olcc/marijuana/pages/frequently-asked-questions.aspx#Recreational_Marijuana_in_General) (last visited Oct. 15, 2016).

<sup>92</sup> Crombie, *supra* note 90.

<sup>93</sup> *Id.*

<sup>94</sup> WUSA–TV, Washington D.C., *What to know about pot becoming legal in D.C.*, USA TODAY (Feb. 25, 2015), <http://www.usatoday.com/story/news/nation/2015/02/25/what-to-know-about-marijuana-becoming-legal-in-dc/24026115/>.

<sup>95</sup> Patrick Caldwell, *Congress Is Blocking Legal Weed in DC—and Maybe Causing a Spike in Murders*, MOTHER JONES (Sep. 30, 2015), <http://www.motherjones.com/politics/2015/09/synthetic-drugs-washington-dc-marijuana-legalization>.

<sup>96</sup> Aaron C. Davis, *Budget bill outlaws pot sales in D.C. for 2 years*, WASHINGTON POST (June 11, 2015), [https://www.washingtonpost.com/local/dc-politics/house-budget-bill-would-outlaw-marijuana-sales-in-dc-for-two-years/2015/06/11/ffd763ae-1051-11e5-adec-e82f8395c032\\_story.html](https://www.washingtonpost.com/local/dc-politics/house-budget-bill-would-outlaw-marijuana-sales-in-dc-for-two-years/2015/06/11/ffd763ae-1051-11e5-adec-e82f8395c032_story.html).

<sup>97</sup> Suzanna Caldwell and Laurel Andrews, *Alaskans vote to legalize marijuana*, ALASKA DISPATCH NEWS (Nov. 4, 2014), <http://www.adn.com/cannabis-north/article/polls-close-legalized-pot-remains-question-mark-alaska/2014/11/05/>.

marijuana.<sup>98</sup> Alaska approved its first marijuana retail store license on Sept. 8, 2016—however when the first store opens will depend on local regulations.<sup>99</sup>

## V. PROPOSED LAW

### A. Summary

Proposition 64 would legalize recreational use of marijuana for adults 21 years or older. It would establish the regulatory structure to tax and regulate nonmedical marijuana along with the business associated with the sale of marijuana. Proposition 64 would also allow for the resentencing of individuals who are currently serving a sentence for which the penalty is reduced under the new law. The goal of Proposition 64 is to bring the sale of marijuana out of the shadows and into the light where it can be taxed, regulated, and overseen in a way that will provide greater benefit to the state. Proposition 64 would enact many of the key provisions that the Legislature passed in 2015 concerning medical marijuana use, but apply them to recreational use.

### B. Agency Responsibilities

Proposition 64 would place the Bureau of Marijuana Control within the California Department of Consumer Affairs. Three separate agencies would have authority to enforce the new law: the Department of Consumer Affairs; the Department of Food and Agriculture; and the Department of Public Health. The Department of Consumer Affairs would be tasked with the exclusive authority to issue, renew, discipline, suspend or revoke a license for the transportation, distribution, or sale of marijuana.<sup>100</sup> The Department of Food and Agriculture would be responsible for administering the provisions relating to the cultivation of marijuana and shall have the authority to create, issue, suspend or revoke a cultivation license.<sup>101</sup> Finally, the Department of Public Health would be responsible for enforcing provisions relating to the manufacturing and testing of marijuana and shall have the authority to create, issue, and suspend or revoke manufacturing and testing licenses for violations.<sup>102</sup>

### C. Taxing/Fiscal Analysis

If Proposition 64 passes, a marijuana excise tax of fifteen percent (15%) would be imposed upon the purchase of marijuana and marijuana related products sold legally beginning January 1, 2018.<sup>103</sup> There would also be a cultivation tax of \$9.25 per ounce.<sup>104</sup> These taxes are

---

<sup>98</sup> Laurel Andrews, *Here's where half of the revenue from Alaska's legal pot will go*, ALASKA DISPATCH NEWS (July 12, 2016), <http://www.adn.com/alaska-marijuana/2016/07/12/heres-where-half-of-the-revenue-from-alaskas-legal-pot-will-go/>.

<sup>99</sup> Laurel Andrews, *Revised Alaska marijuana timeline: First retail pot shops will open this fall*, ALASKA DISPATCH NEWS (Feb. 24, 2016), <http://www.adn.com/cannabis-north/article/retail-pot-shops-open-autumn-under-alaska-s-revised-marijuana-timeline/2016/02/24/>.

<sup>100</sup> Cal. Proposition 64, § 6 (2016), *adding* CAL. BUS. & PROF. 26012(a) (2016).

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> Cal. Proposition 64, § 7 (2016), *adding* CAL. REV. & TAX. 34011(a) (2016).

<sup>104</sup> *Id.*, *adding* CAL. REV. & TAX. 34012(a)(1) (2016).

in addition to sales and use taxes that can be imposed by state and local governments.<sup>105</sup> However, this tax would not apply to the sale of medical marijuana related products.<sup>106</sup>

Proposition 64 allows a county to impose a tax on a licensee who wants to cultivate, manufacture, produce, sell or distribute marijuana or marijuana products operating within that county.<sup>107</sup> This tax would be in addition to any other tax imposed by a city, county, or both.<sup>108</sup>

The legislative analyst's office estimates that the annual revenue based on the marijuana tax could reach \$1 billion annually, though this estimate is not likely to be reached immediately.<sup>109</sup> For reference, Governor Jerry Brown signed a \$167 billion dollar budget in June for the 2016-2017 fiscal year.<sup>110</sup> The revenue from the taxes will be distributed into a new state account which would be controlled by the state treasury, the California Marijuana Tax Fund.<sup>111</sup>

The California Marijuana Tax Fund will use the revenue it collects to first reimburse the reasonable costs the various agencies incur pursuant to the administration of Proposition 64.<sup>112</sup> Second, it will require the Controller to disburse \$10 million to public universities in California annually until 2028–2029 to fund studies on the effects of Proposition 64 and to make recommendations to the Legislature for possible amendments.<sup>113</sup>

Third, the Controller will disburse \$3 million annually to the Department of California Highway Patrol, until fiscal year 2022–2023, to develop policies and procedures to determine whether an individual is operating a vehicle while impaired by marijuana.<sup>114</sup>

Fourth, the Controller will distribute \$10 million to qualified community-based nonprofit organizations beginning fiscal year 2018–2019. These organizations provide mental health and job placement to individuals in communities that have been disproportionately affected by the war on drugs.<sup>115</sup> The amount would increase by \$10 million each subsequent fiscal year until it is capped at \$50 million in fiscal year 2022–2023.<sup>116</sup>

Fifth, the Controller must disburse \$2 million to the University of California, San Diego annually for research regarding the positive and negative effects of marijuana.<sup>117</sup>

---

<sup>105</sup> *Id.*, adding CAL. REV. & TAX. 34011(d) (2016).

<sup>106</sup> *Id.*, adding CAL. REV. & TAX. 34011(g) (2016).

<sup>107</sup> *Id.*, adding CAL. REV. & TAX. 34021.5(a)(1) (2016).

<sup>108</sup> *Id.*, adding CAL. REV. & TAX. 34021 (2016).

<sup>109</sup> Legislative Analyst's Office, *Proposition 64 Marijuana Legalization. Initiative Statute.*, 8 (July 20, 2016), <http://www.lao.ca.gov/ballot/2016/Prop64-110816.pdf>.

<sup>110</sup> Jim Miller, *Jerry Brown signs \$167 billion California budget, makes no cuts*, THE SACRAMENTO BEE (October 17, 2016), <http://www.sacbee.com/news/politics-government/capitol-alert/article86302827.html>.

<sup>111</sup> Legislative Analyst's Office, *supra* note 109.

<sup>112</sup> Cal. Proposition 64, § 7 (2016), adding CAL. REV. & TAX. 34019(a)(1)-(7) (2016).

<sup>113</sup> *Id.*, adding CAL. REV. & TAX. 34019(b) (2016).

<sup>114</sup> *Id.*, adding CAL. REV. & TAX. 34019(c) (2016).

<sup>115</sup> *Id.*, adding CAL. REV. & TAX. 34019(d) (2016).

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*, adding CAL. REV. & TAX. 34019(e) (2016).

On July 15 of each fiscal year, the remaining funds (which is predicted to be the majority of monies deposited in the fund)<sup>118</sup> would be disbursed on a percentage amount to the following sub-trust accounts:

- 60%—Would be attributed to youth drug prevention, treatment, and education.<sup>119</sup>
- 20%—Would go to environmental restoration projects.<sup>120</sup>
- 20%—Would go to State and Local law enforcement accounts for programs testing, detecting, and enforcing laws against driving under the influence of alcohol and other drugs, including marijuana. However, if a local government bans the cultivation or retail sale of marijuana, they will not be eligible to receive these funds.<sup>121</sup>

Revenue will also depend on three key questions:

1. How the state and local governments choose to regulate and tax marijuana (since the state could impose a sales tax in addition to the established excise and cultivation tax, also various local governments are free to pass their own taxes subject to voter approval).
2. Whether the U.S. Department of Justice enforces federal laws prohibiting marijuana.
3. How much consumption would increase or decrease in a given year.

By January 1, 2020, the Legislative Analyst’s Office is required to submit a report to the Legislature with recommendations for any changes to the tax rate in order to achieve the objective of the law and to undercut the illegal market prices, while discouraging individuals younger than 21 from using.

#### **D. Regulation by Local Government**

Proposition 64 allows for local governments to completely ban the cultivation and retail sale of marijuana.<sup>122</sup> It also allows for a local government to specifically ban the outdoor growing of marijuana and set zoning restrictions that “reasonably regulate” the cultivation of marijuana.<sup>123</sup> However, local governments cannot ban the indoor growing of marijuana in a private residence, nor prevent the delivery or transportation of marijuana on public roadways by a licensee acting in compliance with the law.<sup>124</sup>

#### **E. Licenses Available**

Under Proposition 64, there are nineteen available licenses for which applicants may apply. These licenses are available for a term of twelve months, however a licensee may apply for a annual renewal of the license. There is no guarantee that any individual is granted a license.

---

<sup>118</sup> Legislative Analyst’s Office, *supra* note 109, at 9.

<sup>119</sup> Cal. Proposition 64, § 7 (2016), *adding* CAL. REV. & TAX. 34019(f)(1) (2016).

<sup>120</sup> *Id.*, *adding* CAL. REV. & TAX. 34019(f)(2) (2016).

<sup>121</sup> *Id.*, *adding* CAL. REV. & TAX. 34019(f)(3)(C) (2016).

<sup>122</sup> Cal. Proposition 64, § 3 (2016).

<sup>123</sup> *Id.*

<sup>124</sup> Cal. Proposition 64, § 6 (2016), *adding* CAL. BUS. & PROF. 26080(b), 26090(c) (2016).

When a regulator is deciding whether a license shall be granted, denied or renewed the following factors are weighed:<sup>125</sup>

1. Does it create an unreasonable restraint on competition by creating of an unlawful monopoly?
2. Does it perpetuate the presence of an illegal market?
3. Does it encourage under age use or adult abuse of medical marijuana?
4. Does it result in an excessive concentration of licensees in a given city, county, or both?
5. Does it present an unreasonable risk of minors being exposed?
6. Does it results in violations of any laws governing environmental protection?

Licensing authorities are to begin issuing licenses by January 1, 2018.<sup>126</sup> Any licensee may apply to sell both medical marijuana and recreational marijuana.<sup>127</sup> An individual may appeal a decision denying their application for a license. In that appeal, a review panel shall be limited to review the following questions in determining if the decision was proper:<sup>128</sup>

- (A) Has the government proceeded without or in excess of its jurisdiction?
- (B) Has the state agent proceeded in a manner required by law?
- (C) Is the decision supported by the findings?
- (D) Are the findings supported by substantial evidence in the light of the whole record?

## **F. Packaging and Labeling Requirements**

All packaging containing marijuana will come with a standard warning label which will read:

THIS PACKAGE CONTAINS MARIJUANA, A SCHEDULE 1 SUBSTANCE.  
KEEP OUT OF REACH OF CHILDREN AND ANIMALS. MARIJUANA  
MAY ONLY BE POSSESSED OR CONSUMED BY PERSONS 21 YEARS OF  
AGE OF OLDER UNLESS THE PERSON IS A QUALIFIED PATIENT.  
MARIJUANA USE WHILE PREGNANT OR BREASTFEEDING MAY BE  
HARMFUL. CONSUMPTION OF MARIJUANA IMPAIRS YOUR ABILITY  
TO DRIVE AND OPERATE MACHINERY. PLEASE USE EXTREME  
CAUTION.<sup>129</sup>

A warning must also be included if nuts or known allergens are used in any product.<sup>130</sup> Packaging and labels cannot be geared towards children and must be sold in child-proof packaging.<sup>131</sup>

---

<sup>125</sup> *Id.*, adding CAL. BUS. & PROF. 26051(a)(1)-(6) (2016).

<sup>126</sup> *Id.*, adding CAL. BUS. & PROF. 26012(c) (2016).

<sup>127</sup> Carla Marinucci et al., Moderator, Politico, California Votes 2016 Ballot Measures Public Forum – Proposition 64 (Sept. 8, 2016), available at <http://www.calchannel.com/california-votes-2016-ballot-measure-forum/>.

<sup>128</sup> Cal. Proposition 64, § 6 (2016), adding CAL. BUS. & PROF. 26043(b)(1)-(4) (2016).

<sup>129</sup> *Id.*, adding CAL. BUS. & PROF. 26120(c)(2)(A) (2016).

<sup>130</sup> *Id.*, adding CAL. BUS. & PROF. 26120(c)(9) (2016).

<sup>131</sup> *Id.*, adding CAL. BUS. & PROF. 26120(a) and (b) (2016).

## **G. Track and Trace Program**

Proposition 64 would establish a “track and trace” system for recreational marijuana throughout the distribution chain and will allow regulators to determine if marijuana has entered the market legally. This ensures individuals that the products are properly tested and that all regulations and taxes have been complied with.

## **H. Growing Marijuana for Personal Use**

A single private residence may not grow more than six marijuana plants at one time.<sup>132</sup> Any marijuana that is produced by those 6 plants in excess of the allowable amount (28.5 grams) must be kept at the residence.<sup>133</sup> Individuals over 21 would also be able to “gift” marijuana as long as both parties are over 21 and there is no compensation exchanged.<sup>134</sup> Local governments may offer “reasonable” regulations pertaining to growing marijuana.<sup>135</sup> Local governments would not be allowed to prohibit the indoor growing of marijuana; however, they may ban the ability to grow outdoors at a private residence.<sup>136</sup>

# **VI. DRAFTING ISSUES**

## **A. Advertising**

Proposition 64 allows for the advertising of marijuana related products. However, a broadcast must be to an audience which is expected to have a viewership of adults age 21 or older that is equal to or more than 71.6% of the total audience. This calculation must be based on reliable, up-to-date audience composition data.<sup>137</sup> That would include programs like the Olympics, and The Voice.<sup>138</sup> However, proponents argue that Federal law prohibits the advertising of a scheduled I substance. Specifically, 21 USCS §843(b) and (c) state that it is unlawful for any individual to knowingly or intentionally use a communication facility to cause or facilitate the commission of any act which is illegal under the act and forbids the advertising of any schedule I substance in written advertisements.<sup>139</sup> Therefore, as long as marijuana is labeled as a schedule I substance by the federal government, it is likely there will be no advertisements promoting marijuana. The provision of Proposition 64 permitting advertising is likely preempted by the rules against advertising in federal law. Though, while federal law would supersede state law, the issue of commercial free speech relating to marijuana advertising has not been litigated and may pose an issue.

## **B. DUI Standard**

---

<sup>132</sup> Cal. Proposition 64, § 4 *adding* HEALTH & SAFETY 11362.2(a)(3) (2016).

<sup>133</sup> *Id.*, *adding* HEALTH & SAFETY 11362.2(a)(2) (2016).

<sup>134</sup> *Id.*, *adding* HEALTH & SAFETY 11362.1(a)(1) (2016).

<sup>135</sup> *Id.*, *adding* HEALTH & SAFETY 11362.2(b)(1) (2016).

<sup>136</sup> *Id.*, *adding* HEALTH & SAFETY 11362.1(2) and (3) (2016).

<sup>137</sup> Cal. Proposition 64, § 6 (2016), *adding* CAL. BUS. & PROF. 26151(b) (2016).

<sup>138</sup> Roy, *supra* note 40.

<sup>139</sup> 21 U.S.C. §843(b)–(c) (2016).

The omission of a DUI standard was intentional on the part of the drafters.<sup>140</sup> While some other states do have a defined driving limit, Proposition 64 instead would allocate funding specifically for the California Highway Patrol to determine the best practice for implementing a successful policy aimed at detecting and preventing driving under the influence. A study was done by AAA which concluded that a quantitative threshold for a driving standard for THC cannot be scientifically supported.<sup>141</sup> However, technology is emerging on a daily basis, including a potential roadside test developed at Stanford which is able to detect the amount of THC based on a saliva swap named the ‘potalyzer’.<sup>142</sup>

### C. Delivery

Marijuana delivery has quickly become a very lucrative business with some delivery services advertising that they can deliver marijuana to your home quicker than ordering a pizza.<sup>143</sup> However, Jason Kinney, an official spokesman for the Yes On 64 campaign stated that the drafters intended to prohibit on-demand delivery.<sup>144</sup> Delivery could only take place after the sale had been completed in a brick and mortar establishment licensed to sell marijuana. However, it is not clear if an individual buys marijuana once at a brick and mortar licensed establishment, if they then could purchase by delivery in future transactions.

However, that interpretation is not sitting well with many delivery services who currently deliver medical marijuana. “Eaze,” a company that describes itself as the “uber of pot,” maintains that should Proposition 64 pass, it will be expanding its services for recreational marijuana in California.<sup>145</sup>

## VII. CONSTITUTIONAL CONSIDERATIONS

Proposition 64 does not affect the California Constitution, but instead affects several state codes.<sup>146</sup> However, enacting law that makes recreational use of marijuana legal under California law does nothing to address the federal criminalization of marijuana. The Supremacy Clause of the U.S. Constitution makes all federal laws the “supreme law of the land.”<sup>147</sup> Therefore, Proposition 64 would not override the schedule I status of marijuana under the Controlled Substance Act.<sup>148</sup>

---

<sup>140</sup> Marinucci, *supra* note 127.

<sup>141</sup> *An Evaluation of Data from Drivers Arrested for Driving Under the Influence in Relation to Per se Limits for Cannabis*, AAA FOUNDATION FOR TRAFFIC SAFETY (May 2016) available at <https://www.aaafoundation.org/sites/default/files/EvaluationOfDriversInRelationToPerSeReportFS.pdf>.

<sup>142</sup> Carrie Kirby, *Stanford engineers develop the ‘potalyzer,’ a roadside saliva test for marijuana intoxication*, STANFORD NEWS (Sept. 8, 2016), <http://news.stanford.edu/2016/09/08/potalyzer-roadside-marijuana-tests/>.

<sup>143</sup> Laurel Rosenhall, *Budding confusion: Split over whether Prop. 64 allows on-demand marijuana delivery*, CALMATTERS (Sept. 28, 2016), <https://calmatters.org/articles/budding-confusion-split-over-whether-prop-64-would-allow-on-demand-marijuana-delivery/>.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> Cal. Proposition 64 (2016).

<sup>147</sup> U.S. CONST. art VI.

<sup>148</sup> *See supra*, Part II.A.

## VIII. PUBLIC POLICY CONSIDERATIONS

### A. Proponents Main Arguments

Proposition 64 is supported by an extensive collection of newspapers, politicians, and organizations including Lieutenant Governor Gavin Newsom, ex-President of Facebook Sean Parker, the California Medical Association, and hundreds of other entities.<sup>149</sup>

#### 1. Limited Access to Recreational Marijuana

Proponents argue that marijuana access would be limited and regulated. To possess marijuana, individuals must be over the age of 21.<sup>150</sup> There would be additional restrictions on where marijuana could be sold or consumed.<sup>151</sup> Marijuana would not be able to be purchased at locations where alcohol is served or within 600 feet of schools or youth centers.<sup>152</sup> Consumption of marijuana is banned in the presence of individuals under the age of 21, or at locations where alcohol or tobacco are sold.<sup>153</sup>

#### 2. Toughest-in-the-Nation Protections for Children

Proposition 64 supporters maintain that it provides greater protection for children than the laws of other states where marijuana has already been legalized.<sup>154</sup> Proposition 64 would still make it illegal to consume marijuana in the presence of children.<sup>155</sup> Marijuana businesses would not be permitted near schools and advertising would be restricted from being directed to children under the age of 18.<sup>156</sup> Prop 64 also has strict labeling requirements to protect children. These requirements include childproof packaging, warning labels, and prohibitions on label content that would appeal to children.<sup>157</sup> Additionally, portions of the revenue generated by Proposition 64 will be redirected into youth education and treatment funds to help educate children on the misuse of drugs, including marijuana, and to support youth treatment programs.<sup>158</sup>

---

<sup>149</sup> *Endorsements*, YES ON 64, <http://www.yeson64.org/endorsements> (last visited Oct. 15, 2016).

<sup>150</sup> Cal. Proposition 64, § 3 (2016).

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> CAL. SEC'Y OF STATE, OFFICIAL VOTER INFORMATION GUIDE: CALIFORNIA GENERAL ELECTION, TUESDAY NOVEMBER 8, 2016, at 99, <http://vig.cdn.sos.ca.gov/2016/general/en/pdf/complete-vig.pdf>.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> Californians for Responsible Marijuana Reform, *Why Drug Policy Action Supports Prop 64: It Protects Youth*, DRUG POLICY ACTION, [https://d3n8a8pro7vhmx.cloudfront.net/responsiblemarijuanareform/pages/31/attachments/original/1468260450/Drug\\_Policy\\_Action\\_Fact\\_sheet\\_Prop\\_64\\_Protecting\\_Youth.pdf?1468260450](https://d3n8a8pro7vhmx.cloudfront.net/responsiblemarijuanareform/pages/31/attachments/original/1468260450/Drug_Policy_Action_Fact_sheet_Prop_64_Protecting_Youth.pdf?1468260450).

<sup>158</sup> *Id.*

### 3. *Proposition 64 Specifies Where the Revenue Will be Directed*

Tax revenue generated by Proposition 64 will be controlled by the state treasury through the Marijuana Tax Fund.<sup>159</sup> Initially, there are several specified allocations of funds: \$10 million would be granted to a public university for research on marijuana legalization; \$3 million would be allocated for the California Highway Patrol to establish DUI protocols; the University of California at San Diego's Center for Medicinal Cannabis Research will receive \$2 million; and \$150 million would be distributed over 5 years to communities which have been harmed by the war on drugs.<sup>160</sup> The remaining revenue would be divided on a percentage basis: 60% would go towards youth programs for drug use education, prevention, and treatment programs; 20% would go towards cleaning up the environmental harm that has been caused by illegal marijuana cultivation; and the remaining 20% would be directed to programs aimed at reducing driving under the influence of alcohol or marijuana and reducing negative impacts on public health and safety resulting from legalizing marijuana.<sup>161</sup>

#### **B. Opponents Main Arguments**

Proposition 64 has a number of major opponents, including: the California Republican Party; the California Hospital Association; the California Police Chief's Association; and the California Libertarian Party.<sup>162</sup> Although the Libertarian Party is generally in favor of decriminalizing marijuana, the party argues that this proposition would damage the availability of medical marijuana and would result in additional criminal offenses and increased regulation.<sup>163</sup>

##### *1. Increased Public Safety Risks*

Opponents have referenced an AAA study that found that deaths resulting from marijuana-related car accidents have doubled since the drug was legalized in Washington. The study used blood test data from car accidents between 2010 and 2014.<sup>164</sup> The study revealed that not only did the number of drivers whose blood tested positive for THC increase, but also the proportion relative to the total number of accidents.<sup>165</sup> They argue that despite this, the initiative fails to create a DUI standard which is necessary to keep individuals from driving under the influence of THC and endangering out roads.<sup>166</sup>

---

<sup>159</sup> Cal. Proposition 64, § 7 (2016).

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> Stephanie Stephens, *Should Proposition 64 Pass Or Go Up In Smoke?*, CALIFORNIAHEALTHLINE (October 17, 2016) <http://californiahealthline.org/news/should-proposition-64-pass-or-go-up-in-smoke/>.

<sup>163</sup> *Measures*, LIBERTARIAN PARTY OF CALIFORNIA (October 17, 2016) <http://ca.lp.org/measures/>.

<sup>164</sup> *An Evaluation of Data from Drivers Arrested for Driving Under the Influence in Relation to Per se Limits for Cannabis*, *supra* note 141.

<sup>165</sup> *Id.*

<sup>166</sup> *See supra*, Part V.B.

Additionally, opponents point to an increase in black market marijuana activity in Colorado after legalization.<sup>167</sup> They argue that the initiative should have provisions to deal with this problem which has arisen in other states that have already legalized marijuana.<sup>168</sup> An additional public safety concern is the lack of any limitation on the number of marijuana stores that can be opened in a particular neighborhood.<sup>169</sup> Opponents argue that underprivileged communities, which are already subject to high rates of alcohol and drug abuse, will be hotspots for a concentrated number of marijuana stores.<sup>170</sup>

## 2. *Does not protect children enough*

Opposition arguments point to the text of the initiative that would prevent local governments from banning individuals from growing marijuana indoors, even near a school.<sup>171</sup> The California Police Chief's Association points out that a store selling marijuana could be located as near as 600 feet to a school and that marijuana could be delivered to an individual's home.<sup>172</sup> Arguments against Proposition 64 invoke anti-tobacco experts who have contrasted the provisions of the initiative with tobacco regulation to show some of the faults of Proposition 64, like a lack of educational efforts similar to those developed by health professionals to discourage youth from smoking tobacco.<sup>173</sup> Opponents argue that these portions of the initiative hamper local control and allow unacceptable marijuana access and exposure to youth.<sup>174</sup>

## 3. *Marijuana Advertising concerns*

The campaign in opposition to the initiative originally hoisted an argument about the advertising consequences, promoted by Senator Dianne Feinstein,<sup>175</sup> which was harsher than the one found in the voter guide today.<sup>176</sup> Senator Feinstein claims that Proposition 64 would backtrack some of the restrictions we have had on tobacco and allow marijuana to be advertised on prime-time television in front of children.<sup>177</sup> However, the proponents filed a lawsuit challenging the voter guide arguments against Proposition 64 and won a judge mandated

---

<sup>167</sup> Letter from Mike Ramos, District Attorney, San Bernardino County, to Administrative Committee Members, available at <http://noon64.net/wp-content/uploads/2016/05/DA-Ramos-Opposition.pdf> (last visited Oct. 19, 2016).

<sup>168</sup> *Id.*

<sup>169</sup> *Proposition 64 – Legalization of Marijuana*, CALIFORNIA CATHOLIC CONFERENCE (Oct. 17, 2016) <http://www.cacatholic.org/proposition-64—legalization-marijuana>.

<sup>170</sup> *Id.*

<sup>171</sup> Cal. Proposition 64, § 6 (2016), *adding* CAL. BUS. & PROF. 26054(b) (2016).

<sup>172</sup> Stephens, *supra* note 162.

<sup>173</sup> Jeff Chiu, *Slick Proposition 64 is bad for public health*, THE SACRAMENTO BEE (October 17, 2016) <http://www.sacbee.com/opinion/editorials/article102380352.html>.

<sup>174</sup> CAL. SEC'Y OF STATE, *supra* note 154.

<sup>175</sup> Tim Rosales, *U.S. Senator Dianne Feinstein Opposes Prop. 64 citing lack of child protections and DUI standards*, THEY GOT IT WRONG, AGAIN (October 17, 2016) <https://users.focalbeam.com/fs/distribution:wl/13z36xuzwn5pmk4/145sqjx8xsth6yw/lid/.preview>.

<sup>176</sup> *Compare* Order and Judgement After Hearing on Petition for Peremptory Writ of Mandate on Election Matter: Proposition 64, 2:14–17, Aug. 12, 2016, Case No. 34-2016-8000240, available at <http://www.courthousenews.com/2016/08/16/Prop%2064%20Ruling.pdf>; and CAL. SEC'Y OF STATE, *supra* note 154.

<sup>177</sup> Rosales, *supra* note 175.

amendment to the voter guide language.<sup>178</sup> Ultimately, the opposition still champions the argument that voting in favor of Proposition 64 will open the door for advertising to children despite tobacco ad bans that have been historically enforced.<sup>179</sup>

## IX. CONCLUSION

Proposition 64, an initiative to legalize marijuana for personal use, represents years of efforts to decriminalize the adult use of marijuana. If voters approve Proposition 64, adults over the age of 21 would be allowed, under California law, to possess up to one ounce of marijuana and to grow up to six plants. An excise tax of 15% would be put in place along with additional taxes on the cultivation of marijuana which would apply to commercial growers. Commercial marijuana would be prohibited from making direct advertisements or marketing to children and would be required to comply with marijuana-specific standards for packaging and labeling products. The initiative would change the penalty for possession by a minor to mandatory drug counseling and community service and the penalty for selling marijuana without a license to up to six months in jail and/or up to a \$500 fine.

The proponents of Proposition 64 argue that the initiative “creates a safe, legal, and comprehensive system for adult use of marijuana while protecting our children.” They propose that marijuana is already accessible in California, but this proposition would provide the control to regulate its use. Proponents contend that Proposition 64 will lower costs spent prosecuting marijuana related offenses and will, instead, generate revenue that will be directed into implementation and research of legalization, drug treatment programs, environmental restoration and communities that have been disproportionately affected by the war on drugs.

Opponents of Proposition 64 argue that the proposition is flawed because it does not adequately account for the problems that will arise from marijuana legalization. First, they argue that the proposition should prescribe some method for addressing driving under the influence of marijuana. Second, opponents contend the proposition does not go far enough to protect children or prohibit marijuana advertising. Opponents argue this will open the door to increase the amount of tobacco advertising engaged in within California. Finally, they argue underprivileged communities already affected by alcohol and drug addiction problems will be adversely affected by a concentrated influx of marijuana retailers.

---

<sup>178</sup> Order Proposition 64, *supra* note 176.

<sup>179</sup> CAL. SEC’Y OF STATE, *supra* note 154.