

CASE NOTE

A “Growing” Concern: Have California’s Efforts to Legalize and Regulate Medical Marijuana Been Successful?¹

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I. Introduction

Just weeks before California voters passed the first law in the country to decriminalize the medicinal use of marijuana, California Senator Dianne Feinstein read the future when she said that Proposition 215 was so poorly written “you’ll be able to drive a truckload of marijuana through the holes in it.”² Since its passage, Prop 215, codified as The Compassionate Use Act of 1996³ (hereinafter “CUA”), has been both a wild success by creating safe access to medical marijuana and a calamity in its ambiguity. In the thirteen years since its passage, both the Legislature and the judiciary have wrestled with how to clarify and uphold the CUA, while still enforcing the laws against illegal uses of marijuana. The most salient attempt was the Medical Marijuana Program Act⁴ (hereinafter “MMPA”) passed seven years after Prop 215. Though the MMPA worked to clarify some of the ambiguity of the CUA, and broadened patients’ protections, the MMPA may have unconstitutionally amended the proposition, causing significant legal confusion and furthering marijuana’s mystique.

The California Courts of Appeal recently confronted the dilemma in two separate cases: *People v. Kelly*⁵ and *People v. Phomphakdy*.⁶ Both

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1. Scott Imler, *Medical Marijuana in California: A History*, LOS ANGELES TIMES, March 6, 2006, available at <http://www.latimes.com/news/printedition/suneditorials/la-oew-gutwillig-imler6-2009mar06,0,7296341.story> (last visited May 10, 2009).

2. *Id.*

3. Compassionate Use Act of 1996, CAL. HEALTH & SAFETY CODE § 11362.5 (West 2007).

4. Medical Marijuana Program Act of 2003, S.B. 420, Stats.2003, c. 875 (Cal. 2003).

5. *People v. Kelly*, 163 Cal. App. 4th 124 (2008), review granted by, 82 Cal. Rptr. 3d 167 (2008) (Second Appellate District held that the MMPA did unconstitutionally amend the CUA).

courts were faced with determining whether the MMPA's numerical limits on the amount of marijuana or plants a qualified patient can possess was an unconstitutional amendment to the CUA.⁷ The current battle concerns how best to carry out the promise of the CUA, how to safely regulate the new permitted uses of marijuana, and how to establish clear guidelines on which both patients and law enforcement can rely.

II. The Compassionate Use Act

The Federal Controlled Substances Act of 1970 (hereinafter "CSA") created a schedule of all illicit and prescription drugs.⁸ Marijuana was placed in Schedule I, defining it as having no acceptable medicinal use.⁹ This criminalized marijuana use in any way and thus severely restricted research regarding its medicinal value. Nonetheless, there seems to be a growing consensus that marijuana provides important therapeutic benefits for numerous medical conditions including some of the most deadly and debilitating illnesses, evidenced by the CUA's inclusion of them within its provisions: AIDS, cancer, hepatitis C, glaucoma, multiple sclerosis, epilepsy and chronic pain.¹⁰ California is among a growing number of states that has embraced these findings and through voter initiative, rejected the federal government's position.

The states have the freedom to regulate in the area of controlled substances, including marijuana, provided state law does not conflict with the CSA.¹¹ Neither the CUA nor the MMPA have been struck down as being in conflict with the CSA, because when enacting these two laws, California did not legalize marijuana. Instead, exercising its police powers, the state of California sought to avoid prosecution of certain marijuana offenses when a doctor has recommended its use to treat serious medical conditions in lieu of more common therapies.¹²

The Compassionate Use Act,¹³ passed in California by voter initiative in 1996, was the state's first attempt to create safe and affordable access to medical marijuana. Its first stated purpose was "[t]o ensure that seriously ill Californians have the right to obtain and use marijuana for medical pur-

6. *People v. Phomphakdy*, 165 Cal. App. 4th 857 (2008), *review granted by*, 85 Cal. Rptr. 3d 693 (2008) (Third Appellate District held that the MMPA did unconstitutionally amend the CUA).

7. Compassionate Use Act of 1996, CAL. HEALTH & SAFETY CODE § 11362.5 (West 2007).

8. Controlled Substance Act, Pub. L. No. 91-513, 84 Stat. 1236 (codified at 21 U.S.C.A. § 801 et. seq.) (1999).

9. *Id.* at § 812(c)Schedule I(c)(10).

10. Compassionate Use Act of 1996, CAL. HEALTH & SAFETY CODE § 11362.5(b)(1)(A) (West 2007).

11. Controlled Substance Act, 21 U.S.C.A. § 903 (1999).

12. *City of Garden Grove v. Superior Court*, 157 Cal. App. 4th 355 (2007).

13. Compassionate Use Act of 1996, CAL. HEALTH & SAFETY CODE § 11362.5 (West 2007).

poses”¹⁴ After passage of the CUA, the argument shifted from whether marijuana can be a useful medication to how to regulate its safe production and possession. Arguably, the CUA’s intent was to liberate qualified patients from illicit, expensive marijuana obtained from dubious sources. And though the CUA fell short of actually legalizing marijuana, it did decriminalize the cultivation, possession and use of marijuana by seriously ill people upon a doctor’s recommendation.¹⁵ To this end, the CUA does not grant immunity from arrest, but it does grant a limited immunity from prosecution.¹⁶ In relevant part, it provides that certain sections of the California Health and Safety Code shall not apply to qualifying medical marijuana users.¹⁷ The CUA, however, does not place numerical limits on the amount of marijuana that can be possessed or cultivated by those who qualify.¹⁸ This simple omission is at the heart of the legal wrangle.

With only a modicum of guidelines, patients have been at the mercy of law enforcement that continues to fight illegal uses of marijuana, not sure where the distinction lies. With little form to guide it, law enforcement has continued to raid and arrest qualified and often seriously ill patients who believe themselves to be within the law. And though some of these prosecutions have been thwarted under the protections that are expressly provided under the CUA, they nonetheless have led to untold stress, aggravation and expense for all involved.¹⁹

The first case to enforce provisions of the CUA and provide some clarity was *People v. Trippet*.²⁰ The court clarified the CUA’s scope and held that it applied retroactively.²¹ The defendant was charged with transportation and possession of more than 28.5 grams of marijuana in violation of Health and Safety Code sections 11360(a) and 11357(c).²² On appeal, the court remanded, agreeing that with a doctor’s recommendation, the CUA, which was enacted after her convictions, may have provided a defense.²³ But the court made clear that those proponents of the CUA never

14. Compassionate Use Act of 1996, CAL. HEALTH & SAFETY CODE § 11362.5 (b)(1)(A) (West 2007).

15. Compassionate Use Act of 1996, CAL. HEALTH & SAFETY CODE § 11362.5 (b)(1)(B) (West 2007).

16. *People v. Mower*, 28 Cal. 4th 457, 468-474 (2002).

17. Compassionate Use Act of 1996, CAL. HEALTH & SAFETY CODE § 11362.5(d) (West 2007) (“Section 11357, relating to the possession of marijuana, and Section 11358, relating to the cultivation of marijuana, shall not apply to a patient, or to a patient’s primary caregiver, who possesses or cultivates marijuana for the personal medical purposes of the patient upon the written or oral recommendation . . . of a physician.”).

18. Compassionate Use Act of 1996, CAL. HEALTH & SAFETY CODE § 11362.5 (West 2007); *People v. Kelly*, 163 Cal. App. 4th 124 (2008).

19. *People v. Windus*, 165 Cal. App. 4th 634 (2008); *People v. Chakos*, 158 Cal. App. 4th 357 (2007); *People v. Trippet*, 56 Cal. App. 4th 1532 (1997).

20. *People v. Trippet*, 56 Cal. App. 4th 1532 (1997).

21. *Id.* at 1544-1545.

22. *Id.* at 1536.

23. *Id.* at 1549.

intended for unlimited quantities of marijuana use and established the rule that quantity limits and a patient's "form and manner" of possession "should be reasonably related to the patient's current medical needs."²⁴ Though still ambiguous, for the first time quantity limits were addressed, serving as an initial step in ensuring the safe and orderly implementation of the CUA and the use of medical marijuana generally. This provided some degree of guidance for patients seeking to comply with the CUA.

However, along with attempting to clarify the scope of the CUA, *Trippet* and cases that followed have further highlighted its problems. Questions remain: how is one to legally transport marijuana to a qualified patient? And what is a reasonable amount? The court in *Trippet* dealt with the transportation dilemma by stating that practical realities give rise to an implied defense for transportation when in concert with the charges of cultivation and possession.²⁵ The court again noted that the test was one of reasonableness. The quantity being transported by a qualified patient or caregiver must be "reasonably related to the patient's . . . medical needs."²⁶

Later, the court in *People v. Young*,²⁷ while acknowledging the narrow exception established in *Trippet*, made clear by its holding that transportation of marijuana in a vehicle remained illegal under the CUA.²⁸ In *Young*, the defendant was convicted of transporting 135.3 grams of marijuana and was sentenced to four years in state prison.²⁹ On appeal, the defendant argued that he believed the CUA gave him a defense to transportation of medical marijuana.³⁰ The court, after reviewing *Trippet*, held that barring the limited "reasonably related" exception inferred therein, transportation in a vehicle remained unlawful under the CUA.³¹ Despite efforts to the contrary, definitive guidelines remained elusive.

III. The Effect of the Medical Marijuana Program Act

The California Legislature recognized the legal gaps and ambiguities of the CUA and attempted to fix the shortcomings by enacting the Medical Marijuana Program Act in 2003.³² Section 1(a)(2) states, "reports from across the state have revealed problems and uncertainties in the [CUA] that have impeded the ability of law enforcement officers to enforce its provisions as the voters intended and . . . have prevented qualified patients and

24. *Id.*

25. *Id.* at 1550-1551.

26. *Id.*

27. *People v. Young*, 92 Cal. App. 4th 229 (2001).

28. *Id.* at 235-237.

29. *Id.* at 231, 233.

30. *Id.* at 231.

31. *Id.* at 237.

32. Medical Marijuana Program Act of 2003, S.B. 420, Stats.2003, c. 875 (Cal. 2003) (became law on 1/1/2004).

designated primary caregivers from obtaining the protections afforded by the [CUA]."³³

The MMPA was codified within the Health and Safety Code.³⁴ The statute's stated goals included providing patients with enhanced access to medical marijuana by clarifying the scope of the CUA and promoting its consistent application.³⁵ To these ends, the MMPA seeks to immunize qualified people from unnecessary arrests and prosecutions.³⁶ Admittedly, the Legislature intended "to address additional issues . . . not included within the [CUA], and that must be resolved in order to promote the fair and orderly implementation of the act."³⁷ Generally, the MMPA expanded the protections and defenses available to qualified medical marijuana users, providing barriers to arrest, as opposed to the mere defense to prosecution furnished by the CUA.³⁸ For instance, unlike the CUA before it, the MMPA included transportation as a defensible action and provided protection from arrest, not just prosecution, if the patient has a valid identification card.³⁹ However, by imposing a numerical limit on the quantity of marijuana that qualified patients or caregivers may possess or cultivate, the MMPA may have unconstitutionally amended the CUA.⁴⁰

Specifically, the MMPA set forth the following numerical limits for the possession of marijuana: "[N]o more than eight ounces of dried marijuana per qualified patient . . . [N]o more than six mature or 12 immature marijuana plants per qualified patient."⁴¹ Notably, the quantity limits do not apply if a doctor recommends that those quantities would not meet a particular patient's medical needs.⁴² And the MMPA permits individual cities and counties to enact their own limits, even if in excess of the statute's limits.⁴³

But the CUA does not expressly give the Legislature the power to amend its provisions, and therefore it may only be amended by voter ap-

33. *See id.* § 1(a)(2).

34. Medical Marijuana Program, CAL. HEALTH & SAFETY CODE §§ 11362.7-11362.81 (West 2007).

35. Medical Marijuana Program Act of 2003, S.B. 420, Stats.2003, c. 875, § 1(b)-(c) (Cal. 2003).

36. Medical Marijuana Program Act of 2003, S.B. 420, Stats.2003, c. 875, § 1(b) (Cal. 2003).

37. Medical Marijuana Program Act of 2003, S.B. 420, Stats.2003, c. 875, § 1(c) (Cal. 2003).

38. Medical Marijuana Program, CAL. HEALTH & SAFETY CODE § 11362.71(e) (West 2007).

39. Medical Marijuana Program, CAL. HEALTH & SAFETY CODE § 11362.71(e) (West 2007) ("No person or designated primary caregiver in possession of a valid identification card shall be subject to arrest for possession, transportation, delivery, or cultivation of medical marijuana in an amount established pursuant to this article . . .").

40. *People v. Kelly*, 163 Cal. App. 4th 124 (2008) and *People v. Phomphakdy*, 165 Cal. App. 4th 857 (2008).

41. Medical Marijuana Program, CAL. HEALTH & SAFETY CODE § 11362.77(a) (West 2007).

42. Medical Marijuana Program, CAL. HEALTH & SAFETY CODE § 11262.77(b) (West 2007).

43. Medical Marijuana Program, CAL. HEALTH & SAFETY CODE § 11362.77(c) (West 2007).

proval.⁴⁴ “A statute enacted by voter initiative may be changed only with the approval of the electorate unless the initiative measure itself permits amendment or repeal without voter approval.”⁴⁵ In two separate cases, the California Courts of Appeal recently considered this issue.⁴⁶ With no reliance on each other, the appellate courts held the MMPA’s limits provision to be an unconstitutional amendment, holding that it alone imposed state-wide limits on the quantity of marijuana that qualified patients or primary caregivers may possess.⁴⁷ Both cases have recently been granted review by the California Supreme Court.⁴⁸ Because both cases have been depublished, until the court decides, the MMPA is the law in California.

IV. *Kelly* and *Phomphakdy*: Facts and Procedural History

The constitutional debate between the voters’ wish to protect their medicinal marijuana rights and the state’s efforts to ensure the safe and orderly implementation of the CUA, arose with *People v. Kelly* and *People v. Phomphakdy*.⁴⁹ To date, the only challenged provision of the MMPA is section 11362.77, arguably in part, because it worked to restrict, not expand, the CUA’s application; specifically because it imposed a substantive condition on the CUA.⁵⁰ Thus it is the only section under scrutiny by the court.⁵¹ Ironically, the law at issue in both cases may have provided further protection for patients who now seek to challenge it.

In *People v. Kelly*, California’s Second Appellate District held that the numerical limits of the MMPA amount to an unconstitutional amendment to the CUA.⁵² In *People v. Phomphakdy*, California’s Third Appellate District came to a separate but concurring opinion.⁵³ Importantly, both decisions specify that only section 11362.77 of the Health and Safety Code is affected by their holding and that the rest of the MMPA is not at issue.⁵⁴ The result

44. *People v. Phomphakdy*, 165 Cal. App. 4th 857, 864 (2008); CAL. CONST. art. II, § 10, subd. (c).

45. *People v. Phomphakdy*, 165 Cal. App. 4th 857, 864 (2008) (citing *People v. Cooper*, 27 Cal. 4th 38, 44 (2002)).

46. *People v. Kelly*, 163 Cal. App. 4th 124 (2008); *People v. Phomphakdy*, 165 Cal. App. 4th 857 (2008) (both appellate courts, from different districts, independently held that the MMPA did unconstitutionally amend the CUA).

47. *People v. Kelly*, 163 Cal. App. 4th 124, 136 (2008); *People v. Phomphakdy*, 165 Cal. App. 4th 857, 866 (2008).

48. *People v. Kelly*, 163 Cal. App. 4th 124 (2008); *People v. Phomphakdy*, 165 Cal. App. 4th 857 (2008).

49. *People v. Kelly*, 163 Cal. App. 4th 124 (2008); *People v. Phomphakdy*, 165 Cal. App. 4th 857 (2008).

50. *People v. Phomphakdy*, 165 Cal. App. 4th 857, 865 (2008) (citing *Planned Parenthood Affiliates v. Swoap*, 173 Cal. App. 3d 1187, 1200-1201 (1985)).

51. *People v. Kelly*, 163 Cal. App. 4th 124, 136 (2008); *People v. Phomphakdy*, 165 Cal. App. 4th 857, 866 (2008).

52. *People v. Kelly*, 163 Cal. App. 4th 124, 136 (2008).

53. *People v. Phomphakdy*, 165 Cal. App. 4th 857, 866 (2008).

54. *People v. Kelly*, 163 Cal. App. 4th 124, 136 (2008); *People v. Phomphakdy*, 165 Cal. App. 4th 857, 866 (2008).

is that qualified users who have been or are in the future charged with violating either section 11357 or 11358, and possess an amount greater than that permitted by county or state guidelines, may, under the CUA, have an affirmative defense to those charges.⁵⁵

In *Kelly*, upon searching Patrick Kelly's home, police found several potted plants of marijuana and a total of twelve ounces of dried marijuana in vacuum-sealed baggies.⁵⁶ They also found a doctor's recommendation in the master bedroom and a copy of the same taped to the garage.⁵⁷ When a deputy called the number listed on the recommendation, he was told that Kelly had a "prescription" to use marijuana.⁵⁸ The expert for the defendant in *Kelly* testified that the amount found would last approximately six weeks if used at a rate of two ounces a week.⁵⁹ A jury found Kelly guilty of possession of more than twelve ounces of marijuana, more than that allowed by section 11362.77, and guilty of cultivation.⁶⁰ On appeal, the court concluded that the MMPA was an unconstitutional amendment to the CUA and therefore the prosecutor had argued in error that defendant could be guilty of possessing more than the eight ounces allowed by the MMPA without a doctor's recommendation for more.⁶¹ Because once determined unconstitutional, the prosecutor, on appeal, could not rely on subdivision (a) of section 11362.77 of the MMPA.⁶²

In *Phomphakdy*, when police searched the home of Chanh Phomphakdy, they found the following quantities of marijuana in different states of cultivation: a large stalk of drying marijuana weighing 1.8 pounds, a total of 2.2 pounds of marijuana in two plastic containers and a glass jar, three pounds of marijuana in baggies, and one and three-quarter pounds of marijuana in a cabinet.⁶³ Planted in the back yard they found four marijuana plants five to six feet in height.⁶⁴ In total, nine and one-half pounds of marijuana were found.⁶⁵ The police also found a doctor's medical marijuana recommendation.⁶⁶ An expert witness for Phomphakdy testified that the total amount of usable marijuana found was a one-year supply if eaten and a three-year supply if smoked.⁶⁷ Because he feared violating federal laws, Phomphakdy's doctor did not recommend a specific amount to be

55. Compassionate Use Act of 1996, CAL. HEALTH & SAFETY CODE § 11362.5(a) (West 2007).

56. *People v. Kelly*, 163 Cal. App. 4th 124, 129 (2008).

57. *Id.* at 129.

58. *Id.*

59. *Id.*

60. *Id.*

61. *People v. Kelly*, 163 Cal. App. 4th 124, 137 (2008).

62. *Id.*

63. *People v. Phomphakdy*, 165 Cal. App. 4th 857, 861 (2008).

64. *Id.*

65. *Id.* at 862.

66. *Id.* at 861.

67. *Id.* at 862.

ingested.⁶⁸ A jury found Phomphakdy guilty of two counts of misdemeanor possession of marijuana.⁶⁹ On appeal, Phomphakdy asserted that the MMPA's numerical limits were an unconstitutional amendment to the CUA.⁷⁰ The Court of Appeal agreed.⁷¹ Like the court in *Kelly*, it held that the portion of the MMPA establishing numerical limits for possession amounted to an amendment of the CUA.⁷² And therefore, the jury instructions, which included the numerical limits, amounted to prejudicial error.⁷³

The CUA and *Trippet* already provided qualified patients with an affirmative defense to Health and Safety Code sections 11357 and 11358.⁷⁴ The MMPA placed a numerical limit on that defense—the result of *Kelly* and *Phomphakdy*, if upheld, is that qualified patients may once again arguably possess an amount reasonably related to their medical needs, absent a bright-line rule.

“A statute which adds to or takes away from an existing statute is considered an amendment.”⁷⁵ An amendment is “any change of the scope or effect of an existing statute”⁷⁶ The court in *Phomphakdy* compared the provisions of the CUA to those of the MMPA to determine if the MMPA amended the CUA in any way.⁷⁷ It noted simply that the CUA does not place numerical limits on the quantity of marijuana a patient or primary caregiver may possess or cultivate and that the MMPA does.⁷⁸ Agreeing with the People's own admission “that the [MMPA] both expanded and clarified the scope of the [CUA],”⁷⁹ the court held that the numerical limits operated as an amendment and were therefore unconstitutional.⁸⁰ Relying on *Planned Parenthood Affiliates v. Swoap*,⁸¹ the court stated that the MMPA's fatality is in its imposition of a “substantive condition” that did not appear in the CUA—namely the mandatory numerical limits.⁸² In *Planned Parenthood*, the court of appeal had invalidated a budget act provision that impermissibly restricted the use of funds for organizations providing abortion-related services because it found

68. *Id.* at 861.

69. *Id.* at 860.

70. *Id.* at 862-863.

71. *Id.*

72. *Id.* at 866.

73. *Id.* at 867.

74. Compassionate Use Act of 1996, CAL. HEALTH & SAFETY CODE § 11362.5(d) (West 2007); *People v. Trippet*, 56 Cal. App. 4th 1532 (1997).

75. *People v. Phomphakdy*, 165 Cal. App. 4th 857, 865 (2008) (quoting *Franchise Tax Bd. v. Cory*, 80 Cal. App. 3d 772, 776 (1978)).

76. *Id.* at 865.

77. *Id.*

78. *Id.* at 866.

79. *Id.*

80. *Id.*

81. *Planned Parenthood Affiliates v. Swoap*, 173 Cal. App. 3d 1187 (1985).

82. *People v. Phomphakdy*, 165 Cal. App. 4th 857, 866 (2008) (citing *Planned Parenthood Affiliates v. Swoap*, 173 Cal. App. 3d 1187, 1200-1201 (1985)).

that the act had "impose[d] substantive conditions that nowhere appear in existing law."⁸³ The court stated that "by placing numerical limits on what constitutes the 'patient's current medical needs' . . . where no such limits are found in the [CUA], the challenged provision of the [MMPA] is amendatory."⁸⁴ The court noted that this particular provision could be severed without affecting the validity of the rest of the MMPA.⁸⁵

Ironically, by acting alone the legislature may have affirmed the CUA's ambiguous authority. If upheld, the rulings of *Kelly* and *Phomphakdy* will revert the law back to its state prior to the imposition of numerical limits. This will have to be squared with what remains of the MMPA,⁸⁶ and may work to only further erode protections and increase the intensity of the confusion driving the battle.

V. Amending a Voter Enacted Initiative

"An amendment is ' . . . any change of the scope or effect of an existing statute'"⁸⁷ As stated, the CUA does not, within its pages, authorize the Legislature to amend any of its provisions without voter approval.⁸⁸ Even in the absence of language expressly purporting to amend existing law, new laws aiming to "clarify or correct uncertainties which arose from the enforcement of existing law, . . . will be deemed amendatory"⁸⁹ The MMPA used express language to change certain provisions of the prior CUA statute by limiting allowable amounts of marijuana to eight ounces of dried marijuana and no more than six mature or twelve immature plants.⁹⁰ With the holdings in *Kelly* and *Phomphakdy*, two California courts of appeal have determined these specific quantity caps to be impermissibly amendatory, even though the Legislature's aim may have been merely to clarify the existing law established by the CUA. The Legislature itself recognized its own error and attempted to correct the MMPA's constitutional flaw with the introduction of Senate Bill No. 1494 in 2004.⁹¹ When Senator John Vasconcellos introduced the bill, he acknowledged that the MMPA

83. *People v. Phomphakdy*, 165 Cal. App. 4th 857, 866 (2008) (quoting *Planned Parenthood Affiliates v. Swoap*, 173 Cal. App. 3d 1187, 1201 (1985) (alteration in original)).

84. *People v. Phomphakdy*, 165 Cal. App. 4th 857, 866 (2008) (quoting *Planned Parenthood Affiliates v. Swoap*, 173 Cal. App. 3d 1187, 1201 (1985) (alteration in original)).

85. *People v. Phomphakdy*, 165 Cal. App. 4th 857, 866 (2008) (citing *Medical Marijuana Program*, CAL. HEALTH & SAFETY CODE § 11362.82 (West 2007)).

86. *People v. Phomphakdy*, 165 Cal. App. 4th 857, 866 (2008); *Medical Marijuana Program*, CAL. HEALTH & SAFETY CODE § 11362.82 (West 2007).

87. *People v. Phomphakdy*, 165 Cal. App. 4th 857, 864 (2008) (quoting *Franchise Tax Bd. v. Cory*, 80 Cal. App. 3d 772, 776 (1978)).

88. *People v. Phomphakdy*, 165 Cal. App. 4th 857, 864 (2008).

89. *People v. Phomphakdy*, 165 Cal. App. 4th 857, 864 (2008) (quoting *Franchise Tax Bd. v. Cory*, 80 Cal. App. 3d 772, 777 (1978)).

90. *Medical Marijuana Program*, CAL. HEALTH & SAFETY CODE § 11362.77(a) (West 2007).

91. *People v. Kelly*, 163 Cal. App. 4th 124, 135-136 (2008) (citing S.B. 1494, 2003-2004 Reg. Sess. (Cal. 2004)).

was problematic in that it subjected qualified patients to guidelines not established by the CUA and was enacted without voter approval.⁹² Had it passed, this would have worked to delete the quantity limits and designate the allowable amount as “*any amount* of marijuana consistent with the medical needs of that qualified patient”⁹³ However, California Governor Arnold Schwarzenegger was concerned that Senator Vasconcellos’ bill removed “[r]easonable and established quantity guidelines” and vetoed the bill.⁹⁴

In contrast, other provisions of the MMPA have been upheld. In *County of San Diego v. San Diego NORML*,⁹⁵ the MMPA was described as an amendment to the Health and Safety Code, not the CUA.⁹⁶ The court held that the MMPA’s identification card program was a valid provision because, as it was voluntary, it did not impact the protections provided by the CUA.⁹⁷ The court described the identification program as part of a new and wholly separate legal scheme intended to add protections to qualified marijuana users, not to establish new standards for or amend provisions of, the CUA.⁹⁸ This dichotomized interpretation of the MMPA’s impact highlights the specific problem with the numerical ceiling caps.

The purpose of the CUA was “[t]o encourage the federal and state governments to implement a plan to provide for the safe and affordable distribution of marijuana to all patients in medical need of marijuana.”⁹⁹ Proponents of legalized medical marijuana may applaud the holdings in *Kelly* and *Phomphakdy* for the seemingly broad freedom the lack of quantity limits provide patients and their caretakers. But this freedom may be elusive. If the cases are upheld, the laws regarding quantity limits and transportation of marijuana will remain ambiguous, which could in fact work against proponents’ goals of safe and predictable access. The aim of the MMPA was to address the issues omitted from and left unresolved by the CUA.¹⁰⁰ These are issues that must be resolved in order to effectuate the promise of the CUA.¹⁰¹ If *Kelly* and *Phomphakdy* are upheld, we may have taken a step backward rather than forward, arguably moving us away from the voters’ intentions of safe, fair and orderly medical marijuana use. A

92. *Id.* at 135-136.

93. *Id.* at 135.

94. *People v. Kelly*, 163 Cal. App. 4th 124, 136 (2008) (citing Governor Arnold Schwarzenegger, letter to the Members of the Cal. State Sen. re Sen. Bill No. 1494, July 19, 2004) (alteration in original).

95. *County of San Diego v. San Diego NORML*, 165 Cal. App. 4th 798 (2008).

96. *Id.* at 831.

97. *Id.*

98. *Id.*

99. Compassionate Use Act of 1996, CAL. HEALTH & SAFETY CODE § 11362.5(b)(1)(C) (West 2007).

100. Medical Marijuana Program Act of 2003, S.B. 420, Stats.2003, c. 875, § 1(c) (Cal. 2003).

101. *Id.*

close look at the issue reveals this irony: the quantity limits held unconstitutional in *Kelly* and *Phomphakdy* may have in fact been good for patients, their caretakers and marijuana growers in general. And lifting the limits may actually strip them of critical protections.

The issue now facing both medical marijuana proponents and the Legislature is whether to take on the challenge and risk the high cost of implementing a voter initiative to create quantity limits similar to those impermissibly created by the MMPA.

VI. Current Developments

The question now is whether upholding *Kelly* and *Phomphakdy* will be good for patients. Recent developments indicate California voters still seek clearer guidelines. For instance, in January 2009, a medical marijuana advocacy group planned to sue Solano County for failing to implement the identification card program as mandated by the MMPA,¹⁰² which requires each county to "provide applications upon request to individuals seeking to join the identification card program."¹⁰³ Though joining the identification card program is voluntary for individuals, it is mandatory for the counties to create it.¹⁰⁴ The group's attempt to compel Solano County implies that it believes its members rights are best protected if and when they can obtain a valid identification card. It seems that both certain medical marijuana proponents and the Legislature recognize that clearer guidelines benefit everyone.

Yet those who applaud the holdings in *Kelly* and *Phomphakdy* seem to find security in the lack of quantity limits. As recently as February 23, 2009, California Assemblyman Tom Ammiano championed this notion when he introduced a bill proposing to legalize marijuana altogether.¹⁰⁵ Under his proposal, people over twenty-one years old would be allowed to grow, buy, sell and possess cannabis free from criminal prosecution. If passed, California would become the first state in the union to regulate marijuana like alcohol.¹⁰⁶

Actions like these promise to persist as people resist attempts to restrict their right to take advantage of the purported benefits of medical mari-

102. Sarah Rohrs, *County Slow to Meet Pot Law*, VALLEJO TIMES-HERALD, January 6, 2009, available at <http://www.safeaccessnow.org/article.php?id=5629> (last visited May 10, 2009).

103. Medical Marijuana Program, CAL. HEALTH & SAFETY CODE § 11362.71(b)(1) (West 2007).

104. Medical Marijuana Program Act of 2003, S.B. 420, Stats.2003, c. 875, § 1(d)(2) (Cal. 2003) ("With respect to individuals, the identification system established pursuant to this act must be wholly voluntary . . .").

105. Alison Stateman, *Can Marijuana Help Rescue California's Economy?*, TIME, March 13, 2009, available at <http://www.time.com/time/nation/article/0,8599,1884956,00.html> (last visited May 6, 2009).

106. Carla Marinucci, *Political winds shift in favor of legalized pot*, SAN FRANCISCO CHRONICLE, April 12, 2009, at A1, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2009/04/12/MNF0170FPU.DTL&hw=marijuana&sn=005&sc=417> (last visited May 6, 2009).

juana. Upholding *Kelly* and *Phomphakdy* may fade the bright line that the MMPA hoped to draw and ultimately frustrate the voters' intentions. The MMPA sought to fill the gaps left by the CUA and *Trippet* and made room for important implied defenses not previously available. *Kelly* and *Phomphakdy* presented the first attacks against the arguably healthy legislative goals of the MMPA. Are these the first of many? Like any legislation, other provisions of the MMPA can also be challenged. Any resulting increased litigation would seem to be the antithesis of the hopes of reasonable medical marijuana proponents, the Legislature, and law enforcement.

VII. Conclusion

Successful passage of the CUA speaks to the desire of California citizens. Whether or not marijuana is legal for medical purposes is no longer an issue for debate, but exactly how to best implement its use is far from resolved. The CUA's passage suggests that a majority of people agree that assuring safe and orderly access to medical marijuana is a step in the right direction. In the preamble to the MMPA, the Legislature admits that the glaring ambiguities created by the CUA have "impeded the ability of law enforcement officers to enforce its provisions as the voters intended and, therefore, have prevented qualified patients and designated primary caregivers from obtaining the protections afforded by the act."¹⁰⁷

If the numerical provisions of the MMPA are struck down, the "reasonably related" standard of *Trippet* is likely implicated again and together with the reemergence of the CUA's authority, is arguably an inferior solution to the problem.¹⁰⁸ Because the CUA is broad and vague in its language, when implemented it may work to strip patients of the explicit defenses available to them under the MMPA. These explicit defenses and the guidance they provided to both patients and law enforcement are arguably a good thing. Not only is the question of what "reasonable" may be left wide open, but leaving the issue to the mercy of court determination promises a multiplicity of suits and the undesirable consequence of patients having to fight for their predetermined rights.

A stalwart aim of the law is that people be informed of it and have notice of their rights. Few would argue the virtue in a law that broadens protections, clarifies charges, enables lawful arrests, and avoids excess litigation—ultimately better protecting the people who sought it in the first place. The MMPA must overcome its constitutional burden to successfully further the peoples' goal.

107. Medical Marijuana Program Act of 2003, S.B. 420, Stats.2003, c. 875, § 1(a)(2) (Cal. 2003).

108. *People v. Trippet*, 56 Cal. App. 4th 1532 (1997).