SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2023-2024 Regular Session

SB 302 (Stern)
Version: March 30, 2023
Hearing Date: April 18, 2023
Fiscal: Yes
Urgency: No
AWM

SUBJECT

Compassionate Access to Medical Cannabis Act or Ryan's Law

DIGEST

This bill expands existing law requiring specified health facilities to permit terminally ill patients to have access to their medical cannabis to also require those health facilities to permit patients who are over 65 years of age and have a chronic disease to have access to their medical cannabis.

EXECUTIVE SUMMARY

Medical cannabis has been legal in California since 1996. At the federal level, however, cannabis use of any sort remains illegal; and while the federal government has generally forbore from taking enforcement action against individuals and entities engaging in state-legal medical cannabis activities, the possibility of such action creates risks for industries subject to federal regulations. To address the concerns posed by one particular industry—medical facilities—the Legislature in 2022 enacted SB 311 (Hueso, Ch. 384, Stats. 2021), known as the Compassionate Access to Medical Cannabis Act, or Ryan's Law. Ryan's Law created a compromise framework that allows terminally ill patients to use medical marijuana in specified medical facilities without the direct participation of facility staff, provided that the patients using cannabis to comply with certain health and safety requirements.

This bill permits patients aged 65 and older with a chronic disease to use medical cannabis within the medical facilities covered by Ryan's Law.

This bill is sponsored by the author and supported by Americans For Safe Access, California Health Coalition Advocacy, and California NORML. There is no known opposition. This bill was passed out of the Senate Health Committee with a vote of 12-0.

PROPOSED CHANGES TO THE LAW

Existing law:

1) Establishes the Compassionate Use Act (CUA) of 1996, also known as Proposition 215, which protects patients and their primary caregivers from criminal prosecution or sanction for obtaining and using marijuana for medical purposes upon the recommendation of a physician, with the goal of ensuring that seriously ill Californians have the right to obtain and use marijuana for medical purposes where the medical use is deemed appropriate and has been recommended by a physician, as specified. (Health & Saf. Code, § 11362.5.)

2) Establishes a medical marijuana program through which qualified patients may obtain identification cards to be used to obtain medical marijuana and establishes requirements for establishments that possess, cultivate, or distribute medical cannabis. (Health & Saf. Code, div. 10, ch. 6, art. 2.5, §§ 11362.7 et seq.)

3) Establishes the Compassionate Access to Medical Cannabis Act, also known as "Ryan's Law," which reflects the Legislative intent to support the ability of a terminally ill patient to safely use medical cannabis within specified health care facilities in compliance with state law. (Health & Saf. Code, div. 2, ch. 4.9, §§ 1649 et seq.)

4) Defines the following relevant terms for purposes of 2):
    a) A "health care facility" is a health care facility specified in specific subdivisions of Health and Safety Code section 1250, and includes a general acute hospital, a skilled nursing facility, a special hospital, a congregate living health facility, and a hospice facility; the term excludes a chemical dependency recovery hospital, a state hospital, and an emergency department of a health care facility while the patient is receiving emergency services and care. (Health & Saf. Code, § 1649.1(b).)
    b) "Medical cannabis" is cannabis or a cannabis product used in compliance with the CUA and medical marijuana program. (Health & Saf. Code, § 1649.1(c).
    c) "Patient" is an individual who is terminally ill, except a patient does not include an individual receiving emergency services and care. (Health & Saf. Code, § 1649.1(d).)
    d) "Terminally ill" is a medical condition resulting in a prognosis of life of one year or less, if the disease follows its natural course.

5) Requires a health care facility to permit patient use of medical cannabis provided that certain requirements are met, including:
    a) The facility must prohibit smoking or vaping as methods to use medical cannabis.

   b) The use of medical cannabis must be included within the patient's medical records.
   c) The patient must provide the facility with a copy of their medical marijuana identification card.
   d) The medical cannabis must be stored securely in a locked container in the patient's room, in a designated area, or with the primary caregiver, and can be administered only by the patient or primary caregiver; health care professionals and facility staff are prohibited from retrieving or administering the medical cannabis. (Health & Saf. Code, § 1649.2.)

6) Requires, upon the patient's discharge, the patient or caregiver to remove all remaining medical cannabis from the premises; if the patient is unable to do so and does not have an available primary caregiver to remove the medical cannabis, the product shall be stored in a locked container until it is disposed of in accordance with the health facility's policy. (Health & Saf. Code, § 1649.3.)

7) Establishes that a health facility is not required to provide or furnish a patient with a recommendation to use medical cannabis under the CUA. (Health & Saf. Code, § 1649.4.)

8) Authorizes the Department of Public Health to enforce Ryan's Law, and establishes that compliance with Ryan's Law is not a condition for obtaining, retaining, or renewing a license as a health care facility. (Health & Saf. Code, § 1649.5.)

9) Authorizes a health care facility to suspend compliance with 5) if certain federal entities take specified action against the health care facility, and clarifies that a health care facility may not refuse to comply with 5) due solely to the fact that cannabis use is prohibited under federal law. (Health & Saf. Code, § 1649.6.)

This bill:

1) Defines "chronic disease" within Ryan's law as a condition that lasts one or more years and requires ongoing medication or limits the activities of daily living, or both.

2) Modifies the definition of "patient" within Ryan's law to include an individual who is over 65 years of age with a chronic disease, thereby expanding the obligation of a health care facility to permit those patients to use prescription cannabis medication within those facilities under the terms of Ryan's law.

COMMENTS

1. Author's comment

According to the author:

> The National Council on Aging reports that nearly 95% of people over 65 have one chronic condition and nearly 80% have two or more. Patients using medicinal marijuana to treat a variety of chronic illnesses have unfettered access outside of healthcare facilities. However, elderly patients who live in medically assisted facilities are not afforded this same right. As a caregiver to my elderly stepfather who experiences chronic illness and utilizes cannabis in his treatment plan, I am struck that my only option to continue his most effective means of care is to keep him at home. As the law stands, when his needs become too great for our family's capacity, he will no longer have access to this vital resource that dramatically elevates his quality of life until his life is nearly over. With the passage of SB 311 (2021) we have already seen the Legislature recognize the utility of cannabis in medical treatment. This bill simply allows the same access to more individuals who find benefit in it. Our elderly deserve all viable and effective options to treat chronic disease in any medical setting.

2. Background on state-level cannabis laws, federal conflict concerns, and Ryan's Law

California has permitted medical cannabis use since 1996.[1] Adult recreational cannabis use was approved by the voters in 2016,[2] and the Legislature subsequently enacted the Medical and Adult Use Cannabis Regulation and Safety Act (MAUCRSA) to streamline and synthesize the licensing and regulatory regimes for medical and recreational cannabis.[3] According to the National Conference of State Legislatures, as of February 2022, 37 states, three territories, and the District of Columbia authorize cannabis for medical use.[4]

Despite the widespread adoption of medical cannabis laws at the state level, cannabis remains a Schedule I narcotic under federal law.[5] There has not, to date, been any widespread federal effort to crack down on medical cannabis activity that is legal at the

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[1] Compassionate Use Act (Prop. 215), as approved by voters, Gen. Elec. (Nov. 5, 1996).
[2] The Control, Regulate, and Tax Adult Use of Marijuana Act (Prop. 64), as approved by voters, Gen. Elec. (Nov. 8, 20216).
[3] SB 94 (Senate Committee on Budget and Fiscal Review, Ch. 27, Stats. 2017).
[4] National Conference of State Legislatures, Report, *State Medical Cannabis Laws* (updated Sept. 12, 2022), https://www.ncsl.org/health/state-medical-cannabis-laws. All links in this analysis are current as of April 14, 2023.
[5] 21 U.S.C. § 812. Drugs designated as Schedule I ostensibly have a high potential for abuse, no currently accepted medical use in treatment in the United States, and a lack of accepted safety for use of the drug or other substance under medical supervision. (*Id.*, § 812(b)(1).) Opium and fentanyl, by contrast, are designated as Schedule II. (*Id.*, § 812, Schedule II.)

state level. Nevertheless, the possibility of federal action against state-level medical cannabis activities causes uncertainty for many entities, particularly because the federal government's approach to forbearance can differ from administration to administration.[6]

Enter Ryan's Law. While many terminally ill Californians use medical cannabis pursuant to the CUA, many medical facilities—which are subject to extensive federal regulations—were concerned that providing cannabis to patients and otherwise assisting in patients' cannabis use would result in negative federal action, including losing federal funding and facing penalties.[7] Ryan's Law was adopted as a compromise: terminally ill patients in specified health facilities can self-administer or have a caretaker administer medical cannabis.[8] Terminally ill patients using cannabis under Ryan's Law are also responsible for the safe storage of their cannabis and must provide certain information about their medical cannabis to the facility.[9] Although the California Hospital Association and California Association of Health Facilities remained opposed to the bill,[10] Ryan's Law was passed by the Senate with a vote of 36-0 and signed by the Governor.

3. <u>This bill expands Ryan's Law to permit cannabis use in covered medical facilities by a person aged 65 years or older with a chronic disease</u>

This bill extends the provisions allowing terminally ill patients in specified medical facilities to use, with or without the assistance of a caretaker, medical cannabis, pursuant to the existing conditions and restrictions provided by Ryan's Law. The analysis of the Senate Health Committee, which is incorporated here by reference, addresses the bill's policy as it pertains to patient wellbeing, the potential risks for medical facilities, and other health-related issues. This Committee has jurisdiction over the bill because the rights conferred by the bill are extended on the basis of two classifications—age and health status—which may place this bill in a constitutional gray area.

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[6] *Compare*, *e.g.*, United States Department of Justice, Office of the Deputy Attorney General, Memorandum for All United States Attorneys: Guidance Regarding Marijuana Enforcement (Aug. 29, 2013) (federal-level cannabis enforcement priorities generally will not include state-legal cannabis activity, known as the "Cole Memo") *with* Office of the Attorney General, Memorandum for All United States Attorneys: Marijuana Enforcement (Jan. 4, 2018) (rescinding the Cole Memo).
[7] Sen. Com. on Health, Rep. on Sen. Bill No. 311 (2021-2022 Reg. Sess.) as amended Mar. 1, 2021, pp. 5-6.
[8] Health & Saf. Code, § 1649.2.
[9] *Ibid*.
[10] Sen. Unfinished Bus. Rep. on Sen. Bill. 311 (2021-2022 Reg. Sess.) as amended Sept. 1, 2021, p. 7.

4. This bill's expansion of Ryan's law to persons aged 65 or older and who have a chronic illness may present equal protection concerns

"The Fourteenth Amendment to the United States Constitution and article I, section 7, of the California constitution guarantee all persons equal protection of the law."[11] The principle of equal protection "of course, does not preclude the state from drawing any distinctions between different groups of individuals, but it does require that, at a minimum, persons similarly situated with respect to the legitimate purpose of the law receive like treatment."[12] Accordingly, "a classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."[13] The classification must reflect "inherent differences in situations related to the subject-matter of the legislation."[14]

Generally speaking, legislative classifications—including age classifications—are "clothed in a presumption of constitutionality."[15] But if "the classification scheme affects a fundamental interest or right the burden shifts," and the state must establish that it has a "[c]ompelling interest which justifies the law and then demonstrate that the distinctions drawn are [n]ecessary to further that purpose."[16]

Under this framework, courts have invalidated age-related classification schemes. For example, the Medical Injury Compensation Reform Act (MICRA), as amended in 1975, established a different statute of limitations for medical malpractice actions based on age: for adults, the statute of limitations tolled from the date or injury, while for minors, the statute of limitations ran for three years from the date of the wrongful act.[17] The effect of these two provisions was to give minors a shorter window in which to bring a MICRA claim; the stated goal of this distinction was to reduce the number of "long tail" claims, thereby increasing certainty about potential liability for any given period of coverage and, theoretically, decreasing insurance costs.[18] The California Supreme Court declined to specifically invalidate the statute of limitations provisions but opined that "it is difficult to see how discrimination against minor malpractice plaintiffs vis-à-vis adults is rationally related to this or any other ascertainable legislative goal."[19] Ten

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[11] *Photias v. Doerfler* (1996) 45 Cal.App.4th 1014, 1017.
[12] *Brown v. Merlo* (1973) 8 Cal.3d 855, 861 (internal quotation marks and citations omitted).
[13] *Young v. Haines* (1986) 41 Cal.3d 883, 899 (internal quotations omitted.)
[14] *Ibid.* (internal quotation marks omitted).
[15] *People v. Olivas* (1976) 17 Cal.3d 236, 251; *see In re Arthur W.* (1985) 171 Cal.App.3d 179, 186 (age is not a suspect classification; " '[w]hile the age of each of us at any particular time is the certain result of the date of our birth, the progression through the stages of life is simply a natural process to which every one of us is subject. As a result, no member of an age group labors under any disability not encountered by every other member of society at some point in time.' ").
[16] *Olivas*, *supra*, 17 Cal.3d at p. 251.
[17] *Photias*, *supra*, 45 Cal.App.4th at p. 1017.
[18] *Id.* at p. 1018.
[19] *Young*, *supra*, 41 Cal.3d at p. 900.

years later, a Court of Appeal followed the California Supreme Court's suggestion and ruled that the classification had no relation to the statutory objective.[20]

Here, Ryan's Law currently allows all terminally ill persons—regardless of age—to possess and administer medically prescribed cannabis at their health care facilities, as specified. The rights granted by Ryan's Law, as such, are contingent upon membership in a class, specifically, the class of those who are terminally ill. While this Committee did not analyze the bill that enacted Ryan's Law, there does not appear to be any serious constitutional problem with a legislative classification based on the severity of a medical condition, particularly where, as here, the medical product in question poses federal law concerns for the health care facilities.

The classification set forth in this bill is more complex. Rather than relying solely on the medical status of the patient who has a prescription for medical cannabis, this bill allows persons aged 65 and older and who have a chronic disease to possess and administer medically prescribed cannabis at their health care facility. The classification is thus not solely aged-based—not all persons over 65 can access cannabis under this bill—nor solely condition-based—not all persons who are chronically ill can access cannabis under this bill.

According to the author, the bill's definition of "chronic disease" was adapted from the Center for Disease Control's (CDC) definition. The CDC defines "chronic disease" broadly; conditions that last a year or more *or* limit the activities of daily living include diabetes, tooth decay, and arthritis as well as cancer and heart disease.[21] As the author notes, the National Council on Aging states that nearly 95 percent of adults aged 65 and older have a chronic condition, and nearly 80 percent have two or more chronic conditions.[22] But chronic diseases are not unique to persons aged 65 and older; the CDC estimates that six in ten Americans overall live with at least one chronic disease.[23] It thus does not appear that chronic diseases are so correlated with age that the classifications are functionally coterminous.

Overall, it appears that this bill treats chronically ill persons differently, not on the basis of the severity of their disease, but on their age. For example, if two cancer patients suffering the same symptoms were residing in a covered facility, and one was 66 years old and one was 63 years old, this bill would grant the 66-year-old patient the right to medical cannabis while denying the 63-year-old patient the same relief. There is no case

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[20] *Photias*, *supra*, 45 Cal.App.4th at p. 1020.
[21] Centers for Disease Control and Prevention, Health and Economic Costs of Chronic Diseases (last updated Sept. 8, 2022), https://www.cdc.gov/chronicdisease/about/costs/index.htm.
[22] National Council on Aging, Get the Facts on Healthy Aging (Mar. 13. 2023), https://www.ncoa.org/article/get-the-facts-on-healthy-aging.
[23] CDC, Living Well With a Chronic Disease (last reviewed Mar. 2, 2023), https://www.cdc.gov/chronicdisease/index.htm.

law directly on point addressing whether this specific classification runs afoul of equal protection principles, but precedent suggests that this classification exists in a gray area.

SUPPORT

Americans For Safe Access
California Health Coalition Advocacy
California NORML

OPPOSITION

None known

RELATED LEGISLATION

Pending legislation: None known.

Prior legislation:

SB 311 (Hueso, Ch. 384, Stats. 2021) required a health care facility to permit a terminally ill patient, defined as a prognosis of one year or less to live, to use medical cannabis within the health care facility.

SB 305 (Hueso, 2019) was nearly identical to SB 311, above, but was vetoed by Governor Gavin Newsom, who stated in his veto message, "It is inconceivable that the federal government continues to regard cannabis as having no medicinal value. The federal government's ludicrous stance puts patients and those who care for them in an unconscionable position. Nonetheless, health facilities certified to receive payment from the federal Center for Medicare and Medicaid Services must comply with all federal laws in order to receive federal reimbursement for the services they provide. This bill would create significant conflicts between federal and state law that cannot be taken lightly. Therefore, I begrudgingly veto this bill."

PRIOR VOTES:

Senate Health Committee (Ayes 12, Noes 0)

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