



## FACT SHEET ON PENAL CODE § 372.5 EFFECTIVE JANUARY 1, 2023 ([AB 2195](#))

### *New Option for Immigrants and U.S. Citizens Facing California Drug Charges*

By Kathy Brady, ILRC

**Why was this Law Passed?** A legacy of the War On Drugs is that a conviction for even minor conduct relating to drugs can trigger multiple “collateral” consequences, which can be far more severe than the criminal penalties. These collateral consequences destroy California families. The conviction can cause the person to lose their housing, employment, and other necessities, which in turn creates powerful obstacles to obtaining treatment for addiction. Noncitizens convicted of even a drug infraction can face catastrophic immigration consequences, including mandatory ICE detention, deportation, and permanent separation from family. Policing and prosecution for drug offenses disproportionately target communities of color.

This new law gives California prosecution and defense counsel a tool to avoid some of the worst collateral consequences of a drug conviction, without affecting the criminal penalties.

**What is Penal Code § 372.5?** See text of section 372.5 on the next page. As of January 1, 2023, a defendant who is charged with any of several drug offenses, from infractions to felonies, can ask for the drug charge/s to be dismissed in exchange for their agreement to plead guilty to being a public nuisance ([Penal Code § 370](#)) at the same offense level. Section 372.5(a)-(c) provides that in this circumstance, being a public nuisance is punishable as (a) an infraction, (b) an alternative one-year misdemeanor/infraction, or (c) an alternative felony/misdemeanor.

**What is the Procedure in Criminal Court?** Much like a “wet reckless” plea,<sup>1</sup> the prosecution cannot affirmatively charge a defendant under section 372.5. If a defendant is charged with one or more of the specified drug offenses, the defense may elect to ask the prosecution to agree to a section 372.5 disposition. The prosecution will consider each request on a case-by-case basis. Section 372.5 also is an option in post-conviction relief cases, if the person must re-plead after a conviction is vacated.

**Penal Code §§ 370, 372.5 is Not a Conviction of a “Controlled Substance Offense” (“CSO”).** The conviction is not of a CSO for immigration and some other civil law purposes because it does not require proof in every case (does not have as an “element”) that the person engaged in a CSO. The longstanding definition of public nuisance at Penal Code § 370 sets out a range of conduct, without reference to a CSO. New sections 372.5(a)-(c) reference “a disposition negotiated between the defendant and the prosecution, a term of which includes the dismissal of one or more” drug charges.

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<sup>1</sup> See [Cal. Penal Code § 23103.5](#).

This contains no finding or admission that the person committed a CSO. Also, “drug” is broadly defined by [Health & Safety Code § 11014](#). See section 372.5(d). Under the categorical approach used to determine whether a conviction is of a CSO for immigration purposes,<sup>2</sup> sections 370, 372.5 are “overbroad and indivisible,” so that no conviction can be a CSO. Still, *each noncitizen defendant requires an expert immigration analysis*, because even an allegation of drug conduct can cause harm.

## Text of California Penal Code §§ 370, 372.5

### Penal Code § 370

Anything which is injurious to health, or is indecent, or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property by an entire community or neighborhood, or by any considerable number of persons, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway, is a public nuisance.

### Penal Code § 372.5, effective January 1, 2023 (AB 2195)

(a) Notwithstanding [Section 372](#) [which states that section 370 is a misdemeanor unless otherwise provided], if a defendant is sentenced for a violation of Section 370 based on a disposition negotiated between the defendant and the prosecution, or pursuant to an indicated sentence of the court, a term of which includes the dismissal of one or more infraction charges that allege unlawfully cultivating, manufacturing, transporting, giving away, or selling a drug, or offering to transport, give away, or sell a drug, unlawful use of a drug, or unlawful possession or use of a drug or drug paraphernalia, public nuisance is an infraction punishable by a fine not to exceed two hundred fifty dollars (\$250).

(b) Notwithstanding Section 372, if a defendant is sentenced for a violation of Section 370 based on a disposition negotiated between the defendant and the prosecution, a term of which includes the dismissal of one or more misdemeanor charges that allege unlawfully cultivating, manufacturing, transporting, giving away, or selling a drug, or offering to transport, give away, or sell a drug, unlawful use of a drug, or unlawful possession or use of a drug or drug paraphernalia, public nuisance is punishable by a fine of not exceeding one thousand dollars (\$1,000), or imprisonment in a county jail for not more than one year, or by both that fine and imprisonment, or as an infraction punishable by a fine not to exceed two hundred fifty dollars (\$250).

(c) Notwithstanding Section 372, if a defendant is sentenced for a violation of Section 370 based on a disposition negotiated between the defendant and the prosecution, a term of which includes the dismissal of one or more felony charges that allege cultivating, manufacturing, transporting, giving away, or selling a drug, or offering to transport, give away, or to sell a drug, or unlawful possession of a drug, public nuisance is punishable pursuant to subdivision (h) of Section 1170 for a period of 16 months, or two or three years, or by imprisonment in a county jail for not more than one year.

(d) For purposes of this section, “drug” is defined as under [[Health and Safety Code § 11014](#)].

<sup>2</sup> For further discussion, see ILRC, [How to Use the Categorical Approach Now](#) (2021) at [www.ilrc.org/crimes](http://www.ilrc.org/crimes).