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CANNABIS NEWS

THE STATE OF MAINE GOES 'LIVE' FOR RECREATIONAL CANNABIS SALES

As states make the decision, via ballot measure or via the state legislature to legalize cannabis, residents in that state start to plan out their first purchase of a product from a dispensary, in turn purchased from a state grower. But what if there were no legal growing licenses and no retail dispensary licenses issued? Legalization is just the first, important step in the process. Without regulations and rules formulated to address licensure, labelling, testing and the like, cannabis might remain in legal limbo for a time—often, for a period of several months. But what if regulations took years to be established? Recently in the State of Maine, the first retail sales of recreational cannabis began in October 9, 2020—not months—but nearly four years following the state's approval of legalized cannabis use.

Background

Maine voters approved a ballot measure to legalize recreational cannabis use back in late 2016. While the "use" was legalized, no administrative rules or regulations were then established to address and license grows and retail sales. This is the normal pattern when a state must establish a regulatory board or agency, and task that agency with establishing "rules" to govern all aspects of legalized cannabis. What wasn't expected was just how long it would take to establish those regulation in Maine.

Beginning on October 9, 2020, retail sales dispensaries opened to the public for recreational sales—nearly four years after legalization was approved by Maine's voters.

The 2016 Legalization of Cannabis

On November 8, 2016 Maine voters approved "Question 1" to legalize recreational cannabis use, retail sale and taxation. Once the election results were recounted and certified, the law was enacted as IB 2015, c. 5 and entitled: "An Act to Legalize Marijuana." (*See*, http://lldc.mainelegislature.org/Open/Laws/2015/2015_IB_c005.pdf)

The Act did more than just legalize cannabis for adult use but covered a comprehensive list of definitions and requirements for every aspect of growing and retail sales within the state. As is nearly always the case, with legalization also came the ability of local government within Maine to reject sales and growth within their jurisdictions:

> As with alcohol sales, municipalities can vote on whether or not to be a "dry town" regarding marijuana retail establishements and social clubs. Marijuana is still illegal at the federal level." (*See*, http://legislature.maine.gov/lawlibrary/recreational_marijuana_in_maine/9419)

A Moratorium Followed

On January 27, 2017 the Maine Legislature decided to approve a moratorium implementing parts of the law regarding retail sales and taxation, "until at least February 2018, giving time to resolve issues and promulgate rules." (*See:* An Act To Delay the Implementation of Certain Portions of the Marijuana Legalization Act: http://www.mainelegislature.org/legis/bills/getPDF.asp?paper=HP0066&item=3&snum=128)

However, the portion of the law previously enacted which allowed persons over 21 years of age to *grow* up to six mature plants and to *possess* up to 2.5 ounces was given the green light to become effective on January 30, 2017. So, you could grow plants and possess cannabis, and by those permissions, presumptively *use* of cannabis recreationally beginning in 2017. (*Ibid*)

A Disagreement between Governor LePage and the Legislature Ensued

In direct response to the legislative moratorium issued on January 27, Governor Paul LePage issued an Executive Order [made effective January 30], which, in essence, forced the process of rulemaking to move forward by transferring the responsibility to the Commissioner of Administrative and Financial Services.

The Legislature approved in early 2018 LD 1719. This bill, "An Act to Implement a Regulatory

Structure for Adult Use Marijuana." (*See*, http://legislature.maine.gov/LawMakerWeb/summary.asp?paper=HP1199&SessionID=12)

LD 1719:

> . . .will facilitate the timely implementation of a retail marketplace in the State for adult use marijuana and marijuana products [and[the agencies charged. . .with the implementation, administration and enforcement of the. . .[Marijuana Legalization] Act must adopt rules in accordance with the Act and the Legislature must review those rules in accordance with the. . .Administrative Procedure Act as soon as practicable. (*Ibid*)

The Governor vetoed this bill but the Legislature over-rode the veto and it became law in Maine on May 2, 2018. At the time, the Agency so tasked estimated not less than nine months to accomplish its task.

On June 27, 2019, current Governor Mills signed into law LD 719 which made further changes to the Marijuana Legalization Act. LD 719 which:

> . . .makes changes to the Marijuana Legalization Act and approves, with changes the provisionally adopted major substantive rules developed by the Mills Administration for adult use marijuana. (*See*, http://legislature.maine.gov/lawlibrary/recreational_marijuana_in_maine/9419)

Cannabis is Now Available for Sale in Maine

It was a long and tortured route for Maine to go from approval to legal sales some years later. Beginning on the weekend of October 9, 2020, legal recreational cannabis, sold by legal dispensaries took place. It was reported that during that first weekend, over $250,000 in sales took place. First day sales were reported as in excess of $94,000 and tax revenue for that day at over $9,400. This was from six of the then-eight licensed dispensaries in Maine. (*See*, https://www.pressherald.com/2020/10/10/first-day-of-recreational-pot-sales-in-maine-yields-9464-in-sales-taxes/) Since the weekend of October 9, the state has licensed one additional dispensary expected to begin retail sales soon. (*See*, https://www.wsoctv.com/news/trending/maine-residents-spend-250000-marijuana-first-weekend-legal-sales/QHGQKZNKL5FVHLH-PJNASWXCZ5A/)

Conclusion and Implications

Maine has joined many other states and the District of Columbia in legalized recreational cannabis sales and use. It took the state nearly four years to go from a ballot measure which legalized cannabis, through a maze of disagreements between the administration and the legislature which wrangled over establishing regulations, to October 9, 2020. With each new state coming on board, undoubtedly, other states are watching and hopefully learning from the hurdles and stumbles into legalization *and regulation* of legalization that the states before them have experienced. Perhaps Maine's story too will be constructive. (Robert Schuster)

ILLINOIS GOVERNOR CONTINUES TO PUSH FOR CANNABIS-RELATED CRIMINAL JUSTICE REFORM

Illinois became the 11th state to legalize recreational cannabis sales and use in June 2019. The law went into effect on January 1, 2020. The legislation and accompanying regulations have social equity components which include encouragement of "social equity candidates" deemed inherently at a disadvantage on several fronts without rules designed to address those disadvantages. In addition, the Governor had pledged to do his part in addressing criminal pardons.

Background

Governor J.B. Pritzker (D) has already pardoned 11,000 individuals for low-level cannabis offenses since Illinois's legal marijuana sales began earlier this year. Governor Pritzker said the move is intended to show that Illinois is "putting equity first" by clearing thousands of convictions and giving individuals and their families a new lease on life. The pardons were comprised of individuals who had convictions for possessing less than 30 grams of cannabis, something

that has often prevented them from obtaining housing, jobs or benefits. Now, he is pushing for broader decriminalization of minor non-violent offenses and seeks to institute a public health approach to drugs.

More pardons are expected over the coming months. "Through these pardons, thousands of families are no longer prohibited from having access to human services, financial aid for school, professional licensing, jobs, and housing," Pritzker's office said. "We're building toward an Illinois that works for everyone—and criminal justice reform is a key element of that holistic approach. Together we will shape a more equitable system of justice that makes our state stronger and safer and expands opportunities for all our residents to improve their lives," Pritzker said:

> At the state level alone, we spend billions of dollars a year keeping too many people in an overcrowded prison system that has proven itself too expensive, too punitive and wholly ineffective at keeping Illinois families safe.

Seven Principles to a More Equitable Justice System

Governor Pritzker has defined seven principles to build a more equitable justice system. He proposes to: 1) End the use of the cash bail system and limit pretrial detention to only those who are a threat to public safety; 2) Modernize sentencing laws on theft and drug offenses and use a public health approach to address mental health and addiction; 3) Reduce excessive lengths of stay in prison by providing pathways for people to earn opportunities for rehabilitation; 4) Prioritize rehabilitation and reduce the risk of recidivism by increasing access to housing and healthcare for returning residents; 5) Increase police accountability and transparency for police officers and police departments; 6) Update and strengthen statewide standards for use of force by police officers; and 7) Improve interactions with police by decriminalizing minor non-violent offenses, improving police response to crowd control, and increasing language and disability access.

The state has already been making sufficient strides toward these goals.

Tax Revenue Assists in the Process

In September, the state received nearly $67 million in revenue from marijuana sales. Approximately $18 million of the sales came from out-of-state visitors. A quarter of the revenues are to fund a social equity program. In May 2019, the state provided $31.5 million in restorative justice grants. The grants are a part of the state's Restore, Reinvest and Renew (R3) Program which is intended to provide opportunities for "communities impacted by economic disinvestment, violence, and severe multilayered harm caused by the war on drugs."

"In developing these funding opportunities, the focus has been on equity in opportunity at the community level," Jason Stamps, acting director of the Illinois Criminal Justice Information Authority, said:

> This program will start to close those gaps in areas most hard hit by gun violence, unemployment, and criminal justice system overuse. To do so, we are looking to R3 communities for proposals of programs and strategies they identify to best address their needs and challenges.

How Well Has the Social Equity Candidate Regulations Worked So Far?

However, the process of building an equitable justice system through an equitable market has not been without some roadblocks. Illinois was primed to issue 75 social equity licenses, but only 21 applicants ended up qualifying. This caused applicants to sue regulators. Governor Pritzker announced that the applicants would be permitted to submit corrected forms.

In the interim, Governor Pritzker intends to grant more pardons for cannabis convictions.

Conclusion and Implications

This course of action appears to be the trend in states that have legalized marijuana. For example, Colorado granted nearly 3,000 pardons and Nevada granted nearly 15,000 pardons for cannabis convictions this year. Just this month, Michigan signed legislation that would allow people with low-income marijuana convictions to have their records expunged. Governor Pritzker said his administration will continue toward building ongoing efforts toward a more just criminal justice system.
(Brittany Ortiz)

LEGISLATIVE DEVELOPMENTS

2020 CALIFORNIA LEGISLATIVE UPDATE ON CANNABIS RELATED BILLS

The 2020 Legislative session has come to an end after an unusual year in the California Legislature that saw lawmakers unexpectedly depart the Capitol in both March and July because of the COVID-19 pandemic. By the conclusion of this session, nevertheless a handful cannabis Bills were passed and signed into law, though far fewer than in recent years. What follows is a summary of those bills related to cannabis. Some made it into law while others were put off or killed. Either way, it's useful to see how in California the legal cannabis industry is maturing as regulation of that industry moves forward. California has a bicameral Legislature with a Senate and Assembly. "SB" refers to Senate bills and "AB" refers to Assembly bills.

Successful Legislation

SB 67 is seen as one of the biggest wins for the cannabis industry this legislative session with its imposition of new requirements for designations of origin on cannabis products. Under SB 67, appellations of origin are going to be limited to cannabis that is produced 100 percent in one designated location and grown outdoors. Appellations or origin will not be approved by the Department of Food and Agriculture where the cannabis was cultivated "using structures, including a greenhouse, hoop house, glasshouse, conservatory, hothouse, and any similar structure, and any artificial light in the canopy area." Under this Bill, cannabis products may continue to specify where they were produced even if they are grown indoors or using artificial light. *See,* related coverage at page 85 of this issue.

AB 1244 is one of a trio of bills related to cannabis testing that passed this session. AB 1244 authorizes licensed cannabis testing facilities to receive and test cannabis samples from state and local law enforcement agencies. AB 1244 further clarifies that the testing of such samples does not qualify as commercial cannabis activity.

AB 1470 is another bill related to cannabis testing. With this bill, definitions related to testing are clarified to specify that testing shall be conducted on products that in their "final form" which is now defined to mean "unpackaged product as it will be consumed." The clarification provided is that final retail packaging is not necessary for testing to be valid, only that the cannabis product itself be in its fully developed form for testing purposes.

AB 1458 is the final testing-related cannabis bill to be passed into law this Session. Under AB 1458, certificates of analysis issued by testing facilities must include certifications that the THC content per serving of a cannabis product does not exceed 10mg. Until January 1, 2022, this THC content may deviate by up to 12 percent and thereafter may only deviate up to 10 percent for products to receive certification.

AB 1525 is a small step towards banking services being more widely accessible to cannabis licensees. This bill added § 26260 to the Business and Professions Code which provides that financial institutions do not violate California law for providing financial services to licensed cannabis businesses. Business and Professions Code § 26260 further allows cannabis licensees to authorize licensing entities to share their applications, financial statements, license information, and any other regulatory documents with financial institutions for the purpose of receiving financial services.

AB 1872 limits the ability of the California Department of Tax and Fee Administration to increase the excise tax on retail cannabis sales until July 1, 2021, except to make changes to account for inflation so long as the adjustment would be for no more than one percent. Additionally, this bill will modify the requirements for local governments to receive a portion of state cannabis tax revenues for local law enforcement and fire protection efforts. Going forward, local agencies will not be eligible for such disbursements if

they have banned indoor and outdoor cannabis cultivation, or retail cannabis sales. Previously, such funds were withheld from local governments if they banned any form of cultivation.

Failed Legislation

AB 545 would have removed the Bureau of Cannabis Control from a list of agencies exempt from redundancy review by the Joint Sunset Review Committee. In his note explaining the veto, Governor Newsom explained that the legislation was premature and that he sought to work with the legislature in the coming year to consolidate the regulatory authority over cannabis currently held by the Bureau of Cannabis Control, the Department of Food and Agriculture, and the Department of Public Health. While AB 545 failed this year, the veto sends the clear message that these departments are likely to face consolidation in the near future.

SB 627 would have authorized veterinarians to prescribe cannabis to their animal patients and called for the adoption of regulations for this practice. After failing to make it to the Governor's desk in 2019, the bill again failed to make it through the Assembly.

SB 827 would have put a one year pause on increases to the cannabis excise tax from being imposed by the California Department of Tax and Fee Administration. The passage of AB 1872 achieved the same result this Bill would have if passed.

AB 1639 would have prohibited the sale of cannabis vaping products flavored with non-cannabis-derived flavors. While this Bill failed, SB 793—prohibiting the sale of flavored tobacco vapes—did pass the legislature and was signed by the Governor.

AB 2749 would have given the Bureau of Cannabis Control until January 1, 2022 to develop cannabis testing standards for the compounds listed in Business and Professions Code § 26100(d). The bill would have additionally required the Bureau to provide notice on its website of any licensed cannabis testing laboratory that is suspended from issuing certificates of analysis for a period of more than 45 days.

Conclusion and Implications

After a fairly calm year for cannabis legislation, as the California Legislature adjusts to working amidst the ongoing pandemic and with hopes high for a vaccine in the coming year, new cannabis legislation should again see an uptick in the coming legislative session. For more information about bills referenced in this summary, *see:* http://leginfo.legislature.ca.gov (Andreas L. Booher)

APPELLATIONS AREN'T JUST FOR WINE ANYMORE: CALIFORNIA GOVERNOR SIGNS INTO LAW A BILL THAT DEFINES AND LIMITS COUNTY-OF-ORIGIN RECOGNITION FOR CANNABIS

Recently, California Governor Newsom signed into law a bill that corrects and limits existing broad requirements for area of origin labelling for cannabis. While addressing protocols for "purity" the bill, essentially sets the rules for cultivators to declare, and for retail sellers to market cannabis from certain regions in the state.

Background

In California It all begin with the Control, Regulate and Tax Adult Use of Marijuana Act (AUMA) which was approved by the voters at the November 8, 2016. AUMA, also known as Proposition 64, which legalized cannabis use in California, regulates the cultivation, distribution, transport, storage, manufacturing, testing, processing, sale, and use of marijuana for nonmedical purposes by individuals 21 years of age and older.

What followed, relevant to this article, is the Medicinal and Adult-Use Cannabis Regulation and Safety Act (MAUCRSA). Effective January 1, 2018, MAUCRSA, among other things, consolidates the licensure and regulation of commercial medicinal and adult-use cannabis activities. It also supplants prior legislation known as the MCRSA, which applied only to medical cannabis. It also makes adjustments to AUMA consistent with the intent of the initiative.

MAUCRSA requires the Department of Food and Agriculture (Department) to establish standards by which a licensed cultivator may designate a "county-of-origin" for cannabis, and requires for the designation that 100 percent of the cannabis be produced within the designated county, as specified. MAUCRSA requires the Department, no later than January 1, 2021, to establish a process by which licensed cultivators may establish appellations of origin for cannabis produced in certain geographical areas of California, instead of by county. MAUCRSA prohibits cannabis from being represented to consumers, as specified, as produced in a California county unless the cannabis was produced in that county. MAUCRSA prohibits the name of a California county, including any similar name that is likely to mislead consumers as to the kind of cannabis contained in the product, from being used, as specified, unless 100 percent of the cannabis contained in the product was produced in that county.

Senate Bill 67

SB 67 was signed into law by the Governor on September 29, 2020. SB 67 amends § 26063 of the Business and Professions Code, relating to cannabis, and declaring the urgency thereof, to take effect immediately. The bill is entitled: "Marketing: Appellations of Origin: County, City, Or City and County of Origin."

The bill would essentially limit the approval of "appellations" of origin for cannabis unless it requires the practice of planting in the ground in the canopy area and excludes the practices of using structures and any artificial light in the canopy area. The bill would also require the department to establish standards by which a licensed cultivator may designate a city or city and county of origin for cannabis produced 100 percent within the designated city or city and county. The bill would apply the same above-described prohibitions against misrepresentations related to the county of origin and the misleading use of county names to city or city and county origins and names.

To that end, Senate Bill 67 states in relevant part as follows:

> 26063 (a) (1) . . .To be eligible for the designation, 100 percent of the cannabis shall be produced within the designated county, city, or city and county, as defined by finite political boundaries.
> (2) Cannabis shall not be advertised, marketed, labeled, or sold as produced in a California county, city, or city and county, including any similar name that is likely to mislead consumers as to the kind of cannabis, when the cannabis was not produced in that county, city, or city and county.
> (3) The name of a California county, city, or city and county, including any similar name that is likely to mislead consumers as to the kind of cannabis contained in the product, shall not be used in the advertising, labeling, marketing, or packaging of cannabis products unless 100 percent of the cannabis contained in the product was produced in that county, city, or city and county.
> (b) (1) No later than January 1, 2021, the Department of Food and Agriculture shall establish a process by which licensed cultivators may establish appellations of origin, including standards, practices, and cultivars applicable to cannabis produced in a certain geographical area in California, not otherwise specified in subdivision (a).
> (2) Cannabis shall not be advertised, marketed, labeled, or sold using an appellation of origin established pursuant to paragraph (1), including any similar name that is likely to mislead consumers as to the kind of cannabis, unless the cannabis meets the appellation of origin requirements for, and was produced in, the geographical area.
> (3) An appellation of origin established pursuant to this subdivision, including any similar name that is likely to mislead consumers as to the kind of cannabis contained in a product, shall not be used in the advertising, labeling, marketing, or packaging of a cannabis product unless 100 percent of the cannabis contained in the product meets the appellation of origin requirements and was produced in the geographical area.
> (c) An appellation of origin shall not be approved unless it requires the practice of planting in the ground in the canopy area and excludes the practices of using structures, including a greenhouse, hoop house, glasshouse, conservatory, hothouse, and any similar structure, and any artificial light in the canopy area.

Conclusion and Implications

In California and in France, for example, the use of appellations serves several purposes: they ensure a product, like wine, is derived from a percentage of grapes from a designated region; they protect that's region's valuable product and they limit the generic use of that region by others. That is the purpose and intent of Senate Bill 67. While the original enabling cannabis legalization statutes and rules required area-of-origin labelling to ensure safety and perhaps to trace purity for the health of the public, apparently cannabis growers and retailers wanted recognition of the special nature of those to shine–and to be protected under the law in marketing and sales to the public. Not any wine can be labelled Champagne and now, cannabis production in the state gets that type of [state] protections. The text and history of this important bill is available online at: http://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200SB67
(Robert Schuster)

SOUTH DAKOTA RESIDENTS TO VOTE ON CANNABIS BALLOT MEASURES

On November 3, 2020, South Dakota voters will face two ballot measures relating to cannabis. One measure would legalize recreational cannabis use [and sales] to adults. The other ballot measure would do the same for medical cannabis.

Background

Currently, South Dakota does not recognize either medical cannabis use or recreational cannabis use as legal. But soon, which may be one of the first instances of a state deciding those two issues simultaneously, all that could change.

Currently, South Dakota criminalizes cannabis as follows:

> Possession of two (2) ounces or less of marijuana is a misdemeanor. Any amount of marijuana over two (2) ounces is subject to felony-based penalties, on a scale, depending on the amount. In addition, any and all forms of hashish are considered controlled substances in South Dakota and subject to felony penalties.

Selling more than half an ounce of marijuana is a felony carrying a mandatory 30-day sentence. Any marijuana found in a car leads to a 90-day suspended license for a first offense.

Cultivation in South Dakota will be punished based upon the aggregate weight of the plants found as either simple possession or as possession with the intent to distribute. (*See*, https://statelaws.findlaw.com/south-dakota-law/south-dakota-marijuana-laws.html)

Constitution Amendment A

Amendment A would, by its title:

> . . .legalize, regulate and tax marijuana; and. . .require the Legislature to pass laws regarding hemp as well as laws ensuring access to marijuana for medicinal use.

The amendment would legalize the possession, use, transport, and distribution of marijuana and marijuana paraphernalia by people age 21 and older and all possession and distribution of one ounce or less. It would also legalize marijuana plants "under certain conditions."

The Amendment would also authorize the state's Department of Revenue to issue cannabis licenses to commercial cultivators and manufacturers, testing facilities, wholesalers and retailers.

The Amendment would also insure that "Local governments [could] regulate or ban the establishment of licensees within their jurisdiction." This last "opt out" type language deals with those cities and counties that may not want sales and cultivation within their jurisdictions—a provision that is common in those states that have legalized recreational cannabis use and sales.

On a point of frequent litigation within current legal states, the Amendment would prohibit a local jurisdiction from prohibiting the transportation of cannabis on public roads by anyone licensed to do so by the state.

Regulations

The Amendment would then have the Department of Revenue establish [by April 1, 2022] regulations necessary to implement the purposes of the Amendment including the subjects of: licensure, fees, time periods to issue or deny an application, prospective licensee "qualifications," security requirements for sales facilities, testing, packaging, labeling, health and safety requirements, advertising and marketing and most every aspect of the system of growth and sales including taxation and distribution of taxes.

Revenue

Drey Samuelson, Political Director for South Dakotans for Better Marijuana Laws stated, on the issue of revenue sharing "The revenue from Amendment A would be split 50-50 to our schools in South Dakota and our state's general fund." (*See*, https://www.pix11.com/news/election-2020/south-dakota-first-state-to-vote-on-recreational-medical-marijuana-in-same-election)

Measure 26

In a year of much contentiousness, when the voters of the U.S. will determine who will serve as President, the voters of South Dakota face a second ballot measure concerning cannabis legalization. The ballot item comes in the form of "Measure 26" which, would open the door to legal medical cannabis in the state, including to minors:

> This measure legalizes medical use of marijuana by qualifying patients, including minors. "Medical use" includes the use, delivery, manufacture-and for State residents, cultivation-of marijuana and marijuana-based products to treat or alleviate debilitating medical conditions certified by the patients' practitioners.

South Dakota patients must obtain a registration card from the State Department of Health. Non-residents may use out-of-state registration cards. Patients may designate caregivers to assist their use of marijuana; the caregivers must register with the Department.

The ballot measure would allow "cardholders" to possess up to three ounces of cannabis and "additional amounts of marijuana products," and *may* allow cardholders to grow up to three plants and "as well as mariujuana and products made from those plants."

The measure would, like Amendment A, call for regulations that would establish rules for testing, manufacturing, cultivating and the retail selling of medicinal cannabis.

A Warning to Local Law Enforcement?

South Dakota is considered a "Red State" meaning it overwhelmingly votes for Republican candidates including for President of the United States. The ballot measure, most interestingly, acknowledges that cannabis "remains a federal crime"—but also instructs local law enforcement that despite the federal-state legality schism, that Measure 26 would establish, that local law enforcement cannot "help" federal law enforcement regarding cannabis arrests:

> The measure legalizes some substances that are considered felony controlled substances under current State law. Marijuana remains illegal under Federal law. The measure limits State and local law enforcement's ability to assist Federal law enforcement authorities.

Conclusion and Implications

It's always difficult and dangerous to predict the likely outcome of any cannabis related ballot measure. This is especially true in a state like South Dakota, not known for liberal politics. But perhaps the movement throughout the U.S. to legalize cannabis no longer is defined merely by "Red" and "Blue" state politics. Only November will tell, how the voters of South Dakota come to terms with not one, but two ballot measures legalizing in some form, cannabis use.

Constitutional Amendment A language is available online at: https://sdsos.gov/elections-voting/assets/2020_CA_LegalizeMarijuana_Petition.pdf.

Ballot Measure 26 language and history is available online at: https://sdsos.gov/elections-voting/assets/MedMarijPetitionApproved.pdf.

(Robert Schuster)

MADISON CITY COUNCIL PROPOSES LOCAL MEASURE EXPANDING MARIJUANA DECRIMINALIZATION

Local lawmakers in Madison, Wisconsin have introduced a municipal measure that would allow adults to possess and consume cannabis in private and public settings. This comes in the environment of a federal government which treats cannabis as an illegal Schedule I drug *and* within the State of Wisconsin which also treats cannabis as an illegal drug. Now some municipalities within the state are looking to move things along within their local jurisdictions.

Background

Wisconsin has an overarching state prohibition against cannabis consumption, but the new municipal measure would expand the already existing decriminalization policy in Madison, first enacted in 1977. The decriminalization ordinance makes it so law enforcement refrains from referring certain cases for prosecution. The proposed ordinance currently covers possession of up to 112 grams of cannabis in a private area. As a result, currently, possession in a public space is a punishable offense of up to a $500 fine. The new measure would expand the coverage so that those 18 years of age and older could publicly possess up to 28 grams of cannabis (slightly less than one ounce) without fear of prosecution. "While it is currently a violation of state statute and federal law to possess or consume cannabis or cannabis derivatives in the City, at the direction of the Dane County District Attorney's Office, the Madison Police Department would not refer charges for cases that only involve possession of less than 28 grams of cannabis," a summary of the legislation states.

Limitations

However, this expanded policy is subject to certain limitations. The possessing individual must receive permission to possess the substance on public property from the respective landlord or business owner. Under the proposed ordinance, possession while operating a motor vehicle would still be prosecutable unless the driver has a doctor's approval for cannabis use. Further, the ordinance prohibits the possession of cannabis on school property, within 1000 feet of any school, and on school buses. The proposed ordinance would also allow for consumption with permission from the property owner or business owner, so long as the consumption is not in violation of MGO §. 23.05 (smoking regulations).

Those in Madison Who Support the Measure

Member of the Madison Common Council, Mike Verveer (D) introduced the ordinance. Verveer told *The Capital Times*:

> I've long supported a more progressive and rational cannabis policy in Madison, and I long have felt that beyond Madison, Wisconsin should have moved long ago to legalize regulated adult use for both medical and recreational marijuana. This is long overdue because, just like Wisconsin has fallen behind the times in terms of rational cannabis policy, Madison has as well.

The proposed ordinance has been co-sponsored by 12 of the City Council's 20 members. Member of the Madison Common Council, Max Prestigiacomo (D), a cosponsor of the ordinance, said that the current "structure of fines and fees in this city effectively criminalizes poverty and often criminalizes homelessness" and that "compounding and successive fees coupled with restricting where consumption is allowed are direct causes of this injustice.

"Both my own personal interest in the decriminalization of not just cannabis but all fines and fees that criminalize a public health issue pushed me to sponsor this. Not to mention, these fines are disproportionately used against marginalized people of color foremost," Prestigiacomo said.

Those Who Oppose the Measure

Vic Wahl, acting chief of the Madison Police Department, has taken issue with the proposal. Wahl told the Wisconsin State Journal:

> I'm concerned that the city is putting forth a policy allowing 18 year-olds to smoke marijuana,

but not drink alcohol. I also am concerned that these ordinances don't do enough to keep marijuana out of the school environment.

"Generally, it seems better to have decisions on marijuana decriminalization happen at the state level. Changing the ordinance can create confusion. It also removes the option for officers to issue a municipal citation rather than proceed with a criminal charge when action is needed," Wahl said. Wahl noted that enforcement related to marijuana is generally focused on high-level trafficking and much less on small quantities or personal use, but sometimes marijuana possession can be associated with other criminal activity and result in enforcement.

Other Efforts in Wisconsin

Other local government in Wisconsin have moved in a similar direction. Dane County, in 2014, voted on a non-binding referendum to indicate whether or not state lawmakers should pass legislation to allow the recreational use of cannabis. The measure passed with 64.5% of the vote. In May 1997, Milwaukee Mayor John Norquist signed a bill to make the first-time possession of up to 25 grams of cannabis a non-criminal offense, punishable by a fine ranging from $250 to $500 or imprisonment of up to 20 days. The legislation also allowed offenders the option to perform community service or take drug education classes. In 2015 the penalty for possession of up to 25 grams was further reduced to a $50 fine. In November 2018, voters in eleven Wisconsin counties approved non-binding referendums expressing support for legalizing medical cannabis, and voters in six counties approved non-binding referendums expressing support for legalizing recreational cannabis. The support for medical cannabis ranged from 67.1 in Clark County to 88.5 percent in Kenosha County, while support for recreational cannabis ranged from 60.2 percent in Racine County to 76.4 percent in Dane County. The 16 counties that weighed in accounted for over half the state's population.

Conclusion and Implications

The Public Safety Review Committee is set to hold a hearing on the measure on October 14, 2020. So far, at least three jurisdictions in Wisconsin voted in favor of non-binding resolutions expressing support for legalization of marijuana for both medical and recreational purposes. Decriminalization is often, for a state, a rest stop on the road towards legalization. This may be the case in Wisconsin but uniquely, the push towards legalization is coming locally, from within. It is therefore hard to predict if marijuana legalization for the State of Wisconsin may be imminent.
(Brittany Ortiz)

MONTANA MARIJUANA LEGISLATION WIDELY SUPPORTED, BUT MAY FACE LAST MINUTE CHALLENGE AT STATE SUPREME COURT

Until recently, the likelihood of Montana legalizing marijuana has seemed strong, if not certain. Two reform initiatives on the state's ballot this year deal with recreational cannabis, and they have been generally supported in the polls. However, a last-minute lawsuit to be filed before the state Supreme Court attacks one of the reforms in particular, a statutory adult-use legalization measure, and argues that it violates Montana state law. As Montana voters begin to submit mail-in ballots, and participate in early voting at their local polling places, supporters of the initiative consider the lawsuit an 11th-hour attempt to rock the boat. The group forwarding the initiative, New Approach Montana (New Approach), says their Prohibitionist challengers "are simply trying to cause confusion."

The Reforms

Montana I-190

The primary of the two reforms, the Montana I-190 (I-190), appears on the November 3rd state ballot as an initiated state statute, having received more than the requisite 25,468 votes needed for inclusion in 2020. Known as the Marijuana Legalization Initiative, some highlighted changes in the law deal with:

- quantities for possession and use;
- the growth of plants for personal use;
- regulation by local authorities;
- the rate at which products will be taxes, and;
- those serving sentences for decriminalized offences.

Specifically, the possession and use of *either* one ounce or less of marijuana, *or* 8 grams or less of marijuana concentrate by persons over the age of 21, would be legalized in Montana. Individuals would also be allowed to grow up to four marijuana plants (*and* four seedlings) for personal use in their residence. These must be within an enclosed area with a lock, and beyond the view of the public. It would become legal for Montana residents to possess, grow, and use marijuana under these conditions beginning on January 1, 2021.

Regarding retail, recreational marijuana and marijuana-infused products would be taxed at 20 percent of the selling price. After administrative costs utilized by the Department of Revenue to enforce I-190 have been deducted, the remaining tax revenue would be distributed to the state general fund, veterans' programs, conservation programs, drug addiction treatment programs, healthcare workers, and local authorities enforcing the initiative. These local authorities would be authorized to regulate marijuana establishment and testing facilities *via* resolutions or ordinances.

Montana CI-118

The second of the reforms, Montana CI-118 (CI-118), the Allow for a Legal Age for Marijuana Amendment, appears on the upcoming ballot as a Montana constitutional amendment. As such an initiative, it had to receive a greater number of signatures to appear on the ballot—50,936 or more. Under the Montana state constitution currently, the legislature or Montana residents (by initiative) may establish the legal age of purchasing, consuming, or possessing alcohol. A "yes" on CI-118 would add marijuana to the language of this article of the constitution (§14, Article 2). Here the language would then read (emphasis added):

> A person 18 years of age or older is an adult for all purposes, except that the legislature or the people by initiative may establish the legal age for purchasing, consuming, or possessing alcoholic beverages *and marijuana*.

Voting "no" opposes such an amendment.

Reforms that Most in the State Support

In multiple Montana polls this year, the initiative to legalize recreational marijuana in the state has received solid support, with those intending to vote "yes" leading those who intend to vote "no" by double digits. In a poll conducted by the University of Montana in February, 54 percent of voters supported the reforms, 37 percent opposed, with about 9 percent undecided.

In a larger and more recent poll (with a smaller margin of error), Montana State University found that the lead had slightly diminished. From mid-September to early October, 49 percent of those polled supported the reforms, 39 percent rejected them, and approximately 10 percent were undecided. In the survey, which also covered the presidential election, and gubernatorial, Senate, and House races in the state, the responses dealing with cannabis were notably the only ones outside the 3.9 percent margin of error of the overall survey. That is to say, that while a majority of Montana residents support the initiative, the odds are somewhat unpredictable, and a number of voters remain on the fence.

Opposition to the Initiatives

Opponents of the reforms, under the banner of committee Wrong for Montana, are filing a lawsuit intended to halt or stop the process. Local Billings car dealer, Steve Sabawa leads the campaign, and stated recently in a press call to local radio station KGVO:

> We have prepared this lawsuit and we are in the process of filing it. Brian Thompson at BKBH is our attorney, and we're going to ask that the Supreme Court of Montana remove this thing because it is a flawed initiative.

He then cited the state constitution, noting that in Article III §IV, regarding initiatives by citizens of the state, citizens "may enact laws by initiative on all matters except appropriations of money and local or special laws." The campaign to legalize was recently boosted by donations and endorsements after emphasizing a provision that half of the revenue generated from taxes on sales would go to environmental conservation programs. Zabawa is hopeful that this perceived unconstitutionality will be enough for the Montana Supreme Court to remove the initiative.

Given that the initiative is already being voted on, if the court were to hear the case, and side with the plaintiffs, votes would not be counted, or implementation would be disallowed.

Conclusion and Implications

At this time, it seems unlikely that the last-minute lawsuit fielded by Wrong for Montana will halt the legalization or recreational cannabis in the state. Wrong for Montana has received contributions of about $78,000, much less than the $6,953,000 of New Approach Montana, who have widely advertised their goals for the state. With medical cannabis already legal in the state, and revenue from sales set to support state programs for veterans and the environment (among others), the majority of the state seems receptive to plans for recreational marijuana. As such, Montana may soon begin the process to join the 11 other states and District of Columbia where recreational marijuana is already legal.
(Miles S. Schuster)

LAWSUITS FILED OR PENDING

FLORIDA SUPREME COURT HEARS ORAL ARGUMENT ON THE STATE'S PROHIBITION ON 'SPECIAL LAWS' IN THE CONTEXT OF LEGALIZED MEDICINAL CANNABIS

The Florida Supreme Court agreed to take up a case on appeal from the Court of Appeals regarding the legality of a 2016 voter initiative which amended the state's constitution allowing for medicinal cannabis use. The Court has already heard one round of oral argument and to the surprise of many observers, on October 7, 2020, heard a second round of oral argument—this time, focusing on the state's prohibition on "special laws." [*Florida Department of Health, Etc., et. al. v. Florigrown, LLC, et. al.* SC19-1464]

Background

In 2016, voters approved an amendment to the state constitution to allow the use of marijuana for medical purposes. The Amendment requires the Department of Health to issue regulations to implement and enforce its safe use. In 2017, the Florida Legislature amended a Florida statute governing medical marijuana in relation to the constitutional Amendment. Florigrown and others filed a lawsuit in the trial court challenging the constitutionality of the statute. The trial court entered a temporary injunction against the enforcement of the statute based on a determination that Florigrown has a substantial likelihood of success on the merits of its claims. The Department of Health appealed to the First District Court of Appeal, which agreed with the trial court but certified a question of great public importance to this Court for review. (https://thefloridachannel.org/videos/5-6-20-florida-supreme-court-oral-arguments-florida-department-of-health-etc-et-al-v-florigrown-llc-et-al-sc19-1464/)

The Department of Health appealed to the Supreme Court after lower courts sided with Florigrown. A panel of the First District Court of Appeal last year upheld part of a temporary injunction issued by a Leon County Circuit Judge Charles Dodson, who found that the 2017 law conflicted with the constitutional amendment. Dodson's temporary injunction required state health officials to begin registering Florigrown and other medical-marijuana firms to do business, but the judge's order was put on hold while the state appealed. (https://www.law.com/dailybusinessreview/2020/07/15/supreme-court-orders-more-arguments-on-medical-marijuana-law/?slreturn=20200615145038)

The Key Issue Now Before the Supreme Court

The Florida Supreme Court, on October 7 heard oral argument in a challenge to a state law aimed at implementing a constitutional amendment that broadly legalized medical marijuana.

Tampa-based Florigrown LLC is challenging the 2017 law, which created a regulatory structure for the state's medical marijuana industry. Florigrown alleges that the law improperly carries out the amendment. One part of the law requires medical marijuana operators to handle all aspects of the cannabis business, including growing, processing, distributing and selling products. But Florigrown argues that the requirement, known as a "vertical integration" system, runs afoul of the constitutional amendment, approved by more than 71 percent of Floridians in 2016. The vertical integration requirement limits the number of companies that can participate in the industry, the Tampa business contends.

Florigrown won in lower courts after initiating its legal challenge three years ago. This second round of oral argument came after Governor Ron DeSantis' administration appealed an appellate-court decision that upheld part of a temporary injunction issued by Leon County Circuit Judge Charles Dodson, who found that the 2017 law conflicted with the constitutional amendment.

The Supreme Court heard arguments in the case in May 2020 but, in a rare move, ordered a new round of arguments focused on whether the statute equates to an unconstitutional "special law." The Florida Constitution bars "special" laws, which, generally, are intended to benefit specific entities.

'Special Law'

A law is deemed a special law if in reality, the law's focus is on one primary entity. If the Court determines the 2017 law was focused primarily, if not exclusively on one company in a "closed universe of licensed medical marijuana treatment centers," the result would be a ruling the law was unconstitutional.

Florigrown argues that the 2017 law is a special law because it created two "closed classes" of businesses that could receive cannabis licenses—one class involving companies that had been licensed after passage of the non-euphoric cannabis law; and the other including companies that were not chosen in the earlier round of licensing or had been in litigation with the state's department of health. (*See:* https://www.wuft.org/news/2020/10/08/justices-look-again-at-high-stakes-marijuana-case/)

Oral Argument

After oral argument, the Supreme Court ordered additional briefing on the issue of whether Florigrown has a substantial likelihood of success on the merits of its challenge to certain provisions of Florida law as invalid special laws under the Florida Constitution.

Representing the Florida Department of Health during Wednesday's hearing, DeSantis General Counsel Joe Jacquot argued that the 2017 law allows applicants that meet certain criteria to vie for highly coveted medical-marijuana licenses.

"This is an expanding bucket of licenses. This is clearly an open class," Jacquot said.

But Florigrown attorney Katherine Giddings pointed out that the state thus far has issued licenses to just 22 marijuana operators—each of whom previously had applied for licensure under a 2014 law authorizing non-euphoric cannabis, which preceded the passage of the constitutional amendment.

During this second round of oral argument, from the justice's questioning, the Court appeared split on the law's constitutionality. "This is a law of statewide application, broad application that applies to implement a constitutional amendment. It looks like a general law," Justice Alan Lawson said. But Chief Justice Charles Canady asked Jacquot "why it's not arbitrary" to provide that an entity is eligible for a license because they sued the state. Jacquot said the losing applicants had already been "evaluated and scored" by state health officials and were "at least close to receiving a license." But Canady remained unconvinced. "I don't know how you say they've got a comfort level, because they were scored and ranked and found lacking," he said. Justice Jamie Grosshans also appeared skeptical of the law's licensing system. "Why do they get a priority over those newcomers? How would that not be a closed or a preferential class, when they clearly couldn't meet the standards of the department before? Yet, the Legislature is giving them an advantage over someone that is new to the industry," she asked. Jacquot acknowledged that currently licensed operators, known as medical marijuana treatment centers, or MMTCs, "got a head start" in the industry. But that doesn't make the statute a special law, he argued. "They've gone through the Department of Health process," Jacquot said. "Now, they may say they're second tier … but they still have met some criteria to become an MMTC." Justice Carlos Muñiz appeared to support Jacquot's position. The law gives the old applicants "a priority in line, but it's not like they're exempted from the requirements that the Legislature has decided that these entities, once everybody's up and running, has to be able to do," Muñiz said. (*See,* https://www.wuft.org/news/2020/10/08/justices-look-again-at-high-stakes-marijuana-case/)

Conclusion and Implications

This is a substantial ongoing case that has caught the attention of those both within and without the state. The special laws rule is a common constitutional restriction in states. As the cannabis industry matures and legislatures attempt to provide a level playing field for potential licensees, sometimes the best laid plans backfire. For more information on this ongoing case, *see,* http://onlinedocketssc.flcourts.org/DocketResults/CaseDocket?Searchtype=Case+Number&CaseTypeSelected=All&CaseYear=2019&CaseNumber=1464

(Robert Schuster)

ILLINOIS CANNABIS LICENSE FINALISTS SUE OVER SECOND-CHANCE APPLICATIONS

Investors who won a chance to establish recreational cannabis dispensaries in Illinois have filed a lawsuit asserting it is illegal for the state to provide other applicants a second chance at licensure. The suit sets up a potential court battle over when to hold a lottery to award 75 new retail dispensary licenses.

Background

Three finalists for dispensary licenses filed a petition asking the Illinois Supreme Court to order that the licenses be awarded without incorporating the recent changes to the application process petitioners assert were made as a matter of "political expediency." In September 2020, Governor J.B. Pritzker announced new procedures that would allow applicants to correct any deficiencies in their applications and get those applications rescored. In essence, the Governor's new procedures would give some applicants a second chance at qualifying for the state's license lottery.

The lawsuit was filed in early October by SB IL, Vertical Management and GRI Holdings IL, all of whom received perfect scores on their applications. The parties filed a petition asking the Illinois Supreme Court to order that the licenses be awarded without recent changes to the application process they say were made because of "political expediency."

Those three were among the 21 businesses that qualified in September for the license lottery. They are now suing Pritzker and officials from the Illinois Department of Financial and Professional Regulation, which oversees the licensing of cannabis dispensaries. Attorney John Fitzgerald, of the firm Tabet DiVito & Rothstein which filed the lawsuit, said the changes run contrary to the law that legalized pot in the state. Mr. Fitzgerald stated:

> Specifically, the changes created a supplemental deficiency notice and a chance to ask for a rescoring, neither of which are in the law. . . .Deficiencies were meant to notify applicants of an omission before their applications were scored, he said, not give them a chance to correct mistakes after they were scored. (*See*, https://www.stltoday.com/news/local/marijuana/marijuana-license-finalists-file-suit-to-stop-illinois-from-giving-losers-a-second-chance/article_f27dad64-1862-5841-bb04-90ede793b6a9.html)

Procedural Changes

Pritzker changed the application process after applicants complained of inconsistent scoring and handling of applications. The new procedures allowed applicant to be notified of any deficiencies in their applications and given ten days to correct any problems. Those applications are then to be scored a second time to see who else might qualify for the lottery.

Petitioners argue that they qualified for the lottery, and that they deserve a shot at selection without the addition of potentially hundred more contestants. They argue that this procedural change amounts to allowing a do-over for applicants who did not put in the time and effort to ensure perfect applications were submitted in the first instance.

Social Equity Disputes

The original procedures did not include preferences for any racial group, in order to avoid assertions of discrimination. However, all of the finalists were given a preference as social equity applicants, meaning most of them lived in poorer neighborhoods with many cannabis arrests and convictions, or had low-level convictions themselves or in their family. State officials have said this in effect favors minority applicants, who bore a disproportionate weight of the war on drugs.

Of the 21 applicants, 13 are majority owned and controlled by persons of color, and 17 have at least one owner who is a person of color. Governor Pritzker has called the state's legalization "the most equity-centric" approach in the nation, arguing it would transform communities hardest hit by harsh drug policies of previous decades.

Pandemic Delays

By law, the licenses were to be awarded on May 1, 2020. Yet Pritzker has delayed, first due to the coronavirus pandemic, and later to promulgate rules

establishing the lottery. Many applicants and investors say they have been harmed by the wait, spending tens of thousands of dollars on rent to hold properties for potential use while not knowing if they will ever be granted permission to operate. Plans to award new licenses for craft growers, infusers, and transportation workers have also been delayed indefinitely.

Meanwhile, businesses that were previously operating as medical marijuana dispensaries have been allowed to open new recreational stores on their old sites, as well as new ones on second sites. Since legalization took effect in Illinois on January 1, those businesses have been setting records for sales almost every month.

Proposed Fixes

Petitioners suggest there are two ways to fix the errors in the system. First, if any of the 937 applicants believe they were the victim of faulty scoring or a missing deficiency notice, they can file suit and ask the courts to correct the error. In the alternative, it would be left to lawmakers to alter the process prospectively, rather than for Governor Pritzker to change the procedures retroactively.

Before the process was revised, dozens of applicants who did not make the cut for the lottery filed a federal lawsuit demanding changes, and asserting they were not notified of any deficiencies. They also claimed that identical exhibits were scored differently for different companies or in different geographical regions of the state. That lawsuit was dropped following the regulatory revisions by Pritzker. The governor has not announced a timeline for rescoring applicants.

Charity Greene, a spokeswoman for the governor, has indicated that:

> . . .the administration remains committed to launching the Illinois adult-use cannabis industry in a fair, equitable manner that provides a path for Illinoisans from all backgrounds to benefit from legalization, including diversifying the industry and criminal justice reform, and investing proceeds to rebuild communities most harmed by the failed war on drugs. (*See:* https://www.chicagotribune.com/marijuana/illinois/ct-illinois-marijuana-license-finalists-lawsuit-20201005-djuoiyydqzbf3ncdb3zffedou4-story.html)

Conclusion and Implications

Cannabis licensing is inevitably highly contentious, particularly when a jurisdiction imposes caps on the number of licenses it will award. Legal fights over the regulatory procedures for selecting the few among many who can enter the recreational cannabis marketplace are bound to occur when the opportunity-cost of not being selected can be millions of dollars in revenue. Those left out of the marketplace are highly motivated to fight for a chance to enter the industry, while those who are selected aim to protect their share of the market by excluding competitors. Illinois is far from alone in facing these issues, but how the Illinois Supreme Court addresses this case may provide further clarity on how judicial resolution of cannabis licensing fights may play out across the country. (Jordan Ferguson)

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