

# CANNABIS LAW<sup>TM</sup>

## & REGULATION REPORTER

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Subscription Rate: 1 year (11 issues) \$595.00. Price subject to change without notice. Circulation and Subscription Offices: Argent Communications Group; P.O. Box 1135, Batavia, IL 60150-1135; 530-852-7222 or 1-800-419-2741. Argent Communications Group is a division of Argent & Schuster, Inc.: President, Gala Argent; Vice-President and Secretary, Robert M. Schuster, Esq.

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**FEATURE ARTICLE****WHAT A DIFFERENCE A YEAR MAKES—NOVEMBER 2020 ELECTIONS  
AND CANNABIS LEGALIZATION IN THE UNITED STATES  
TAKE CENTER STAGE**

*By Robert Schuster*

The year, 2020, in the United States, will be remembered in the months and years to come as tumultuous, challenging and divisive. Covid-19 took a year that began much like any other, and turned it all on its head. Everything from travel and graduations to Friday evening celebrations and Saturday night dates became sparse or completely absent. That glass of wine or beer once shared in the company of friends and family morphed into a world of all things virtual. Online gatherings became mostly vacant and somewhere along the way, the joy and calm associated with such gatherings lost something in the translation that quickly became our new world reality. But, perhaps as no surprise to anyone, cannabis sales thrived—and were often deemed an “essential product” by many states that have legalized recreational cannabis, right along-side alcohol sales.

2020 will also be remembered as one of the most visible and contentious years in some time for elections at the federal and state level. It would seem that America was a nation strongly divided by party affiliation and region. Perhaps, the election for President between Donald Trump and Joe Biden best highlighted this division—even as this article went to “print” a sitting President has not conceded the election results that, despite votes being tallied and recounted, would seem to indicate a newly-elected President will take the reins of leadership in Washington in January. In the dust of the passionate elections throughout the national we would appear to remain a nation passionately divided.

But the 2020 elections also shed light on the state of legalized cannabis in the nation. Despite ongoing strong divisions amongst states on the issue of

legalization, the proverbial dominoes continue to fall, slowly, in the direction of legalization. Is cannabis a dangerous gateway drug? Is it no more dangerous than alcohol? Does cannabis have any valuable medicinal properties worth utilizing? Do the tax revenues from sales tip the scales towards taking the risk of legalization?

In November, the residents of several states pondered these questions and voted. Their votes notched the national tally towards legalization in some form, whether it be medical cannabis legalization or recreational legalization. And in one state in particular, voters seemingly decided to throw out distinguishing one form of “drug” from another through decriminalization of, well, most everything. We’re looking at you Oregon.

This article takes a look at the movement toward legalization of cannabis at the state level. And presuming a democrat takes the reins of the nation in Washington in January 2021, this article ends with a healthy dose of speculation as to how a Joe Biden administration might shift the discussion at the federal level.

### **Medicinal Cannabis Legalization**

Even states that might never consider legalizing recreational use are warming to the medicinal values that cannabis brings to the tables. Tax revenues seem to weigh in here. What follows is an update on what November elections brought to medicinal legalization at the state level.

As of November 2020, 35 states and Washington, D.C., had passed laws legalizing or decriminalizing medical cannabis. Additionally, 15 states had legal-

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ized the use of cannabis oil, or cannabidiol (CBD)—one of the non-psychoactive ingredients found in marijuana—for medical purposes. In the State of Idaho medical marijuana was illegal, but the use of a specific brand of FDA-approved CBD, Epidiolex®, was legal.

## Mississippi

The voters of the State of Mississippi had an interesting choice in November as to medical cannabis legalization. Pursuant to Ballot Measure 1 [or perhaps better stated *within* Ballot Measure 1] were two initiatives: Initiative 65 or Alternative Initiative 65A. In essence, voters had three choices here: voting “no” as to either initiative would be a vote for rejecting medical cannabis in the state. A vote in favor of *either* initiative would have the force of *supporting* medicinal cannabis. Voters wanting to cast a “yes” vote had to choose which initiative to support. Initiative 65 and Alternative 65A were both designed to amend the Mississippi Constitution to provide for the establishment of a medical marijuana program for individuals with a debilitating medical condition.

- Voting for Initiative 65 supported approving the medical marijuana amendment as provided by [that initiative] which was designed to allow medical marijuana treatment for more than 20 specified qualifying conditions, allow individuals to possess up to 2.5 ounces of marijuana at one time and tax sales at 7 percent.
- Voting for Alternative [Initiative] 65A supported approving the legislature’s alternative medical marijuana amendment, which would have restricted smoking marijuana to terminally ill patients; required pharmaceutical-grade marijuana products and treatment oversight by licensed physicians, nurses and pharmacists; and left tax rates, possession limits and other details to the legislature. (See: [https://ballotpedia.org/Mississippi\\_Ballot\\_Measure\\_1,\\_Initiative\\_65\\_and\\_Alternative\\_65A,\\_Medical\\_Marijuana\\_Amendment\\_\(2020\)](https://ballotpedia.org/Mississippi_Ballot_Measure_1,_Initiative_65_and_Alternative_65A,_Medical_Marijuana_Amendment_(2020)))

State officials reported that in tallying the votes that said “yes” to either initiative, roughly 68 percent of the state’s voters approved Ballot Measure 1—thereby approving medicinal cannabis. Officials also parsed the votes as follows: 73 percent of those Mea-

sure 1 voters said “yes” to Initiative 65 with roughly 26 percent voicing their approval for the Alternative Measure 65A. As such, Initiative 65 via Measure 1 passed in the Mississippi. The full text of Measure 1 (and it’s two options) is available online. (Ibid; see also, <https://nypost.com/2020/11/04/legal-weed-2020-states-that-legalized-marijuana-on-election-day/>)

## South Dakota

In South Dakota voters faced two ballot measures. Both passed. One measure approved recreational marijuana use. The other measure approved of medical marijuana use.

Measure 26 which dealt with medicinal cannabis requires the state for form a medical marijuana program for use, possession, and home cultivation of plants for people with qualifying medical conditions.

The state legislature is required to draft and pass new laws to establish a state medical marijuana program by no later than April 1, 2021. (See: <https://finance.yahoo.com/news/2020-elections-marijuana-on-the-ballot-in-these-5-states-173753954.html>)

The vote in favor of Measure 26 was roughly 70 percent. The vote:

... established a medical marijuana program in South Dakota for individuals who have a debilitating medical condition as certified by a physician. Under the measure, patients are allowed to possess a maximum of three ounces of marijuana. Limits on the amount of cannabis products a person may possess would be set by the Department of Health. According to the measure, patients registered to cultivate marijuana at home could grow three plants at minimum, or another amount as prescribed by a physician. (See: [https://ballotpedia.org/South\\_Dakota\\_Initiated\\_Measure\\_26,\\_Medical\\_Marijuana\\_Initiative\\_\(2020\)](https://ballotpedia.org/South_Dakota_Initiated_Measure_26,_Medical_Marijuana_Initiative_(2020)))

## Recreational Cannabis

Recreational cannabis use was on the November 2020 election ballots in the States of Arizona, Montana, New Jersey and South Dakota.

## Arizona

Voters said “yes” to Proposition 207 in Arizona supporting legalized recreational marijuana use for those 21 and older, along with a 16 percent excise tax on the drug. Currently, the state permits only medical use, and outlaws recreational use and possession.

A “yes” vote for this ballot initiative legalized the possession and use of marijuana for persons who are at least 21 years old, enacted a tax on marijuana sales, and required the state Department of Health and Human Services to develop rules to regulate marijuana businesses.

The measure passed by a margin of 60 percent to 40 percent with over 2 million votes tallied.

The ballot initiative made the Arizona Department of Health Services (DHS) responsible for adopting rules to regulate marijuana, including the licensing of marijuana retail stores, cultivation facilities, and production facilities. DHS was required to first accept license applications from existing non-profit medical marijuana dispensaries, which would be eligible to hold both nonprofit medical marijuana and for-profit marijuana licenses, and potential marijuana businesses within counties that have one or zero nonprofit dispensaries. Proposition 207 adopted a Social Equity Ownership Program (SEOP), which was designed to issue licenses to entities whose owners are “from communities disproportionately impacted by the enforcement of previous marijuana laws. ([https://ballotpedia.org/Arizona\\_Proposition\\_207,\\_Marijuana\\_Legalization\\_Initiative\\_\(2020\)](https://ballotpedia.org/Arizona_Proposition_207,_Marijuana_Legalization_Initiative_(2020)))

Proposition 207 placed a 16 percent tax on marijuana sales, in addition to the existing transaction privilege tax and use tax. Revenue from the tax was divided between community college districts; municipal police, sheriff, and fire departments; fire districts; the state’s Highway User Revenue Fund, and a new Justice Reinvestment Fund.

The ballot initiative provided local governments with the power to ban marijuana facilities and testing centers and give local control over elements of regulation, zoning, and licensing.

Proposition 207 also allowed anyone convicted of certain marijuana-related crimes related to possession, consumption, cultivation, and transportation to petition for the expungement of their criminal record starting on July 12, 2021. (Ibid)

## Montana

Adult recreational use of cannabis was legalized under Montana’s Marijuana Legalization Initiative I-190 and Constitutional Initiative 118. The measures legalized purchase and use for those 21 and older. Possession of the drug would be capped at one ounce, or less than 8 grams of concentrate.

Initiative 190 legalized the possession and use of one ounce or less of marijuana or eight grams or less of marijuana concentrate by persons over the age of 21 in Montana. It allowed individuals to grow no more than four marijuana plants and four seedlings for personal use in their residence, as long as the plants are within an enclosed area with a lock and beyond public view. Montana residents would be allowed to possess, use, and grow marijuana on January 1, 2021.

The Montana Department of Revenue is responsible for regulating the cultivation, manufacture, transport, and sale of marijuana in Montana. It would begin accepting marijuana provider and dispensary applications by January 1, 2022.

Marijuana and marijuana-infused product sales would be taxed at 20 percent of the retail price. After deducting any administrative costs incurred by the department to enforce the initiative, the tax revenue was set to be allocated to the general fund, conservation programs, veterans programs, drug addiction treatment programs, local authorities enforcing the initiative, and healthcare workers.

I-190 authorized local authorities to regulate by ordinances or resolutions marijuana establishment and testing facilities.

Under Initiative 190, persons serving marijuana-related sentences that are no longer crimes under the initiative or have a lesser punishment may request to be resentenced or have the conviction expunged depending on the circumstances. (See: [https://ballotpedia.org/Montana\\_I-190,\\_Marijuana\\_Legalization\\_Initiative\\_\(2020\)](https://ballotpedia.org/Montana_I-190,_Marijuana_Legalization_Initiative_(2020)))

Medical marijuana was approved by Montana voters in 2004 with the approval of I-148, a citizen-initiative approved with 61.81 percent of the vote. In 2011, the state legislature passed Senate Bill 423, which repealed I-148 and established a new medical marijuana program that banned medical marijuana advertisements, limited dispensaries to three users, and required state review of doctors who prescribe

marijuana to more than 25 patients per year. In 2012, advocates of medical marijuana attempted to repeal the bill but were unsuccessful at the ballot box. In 2016, voters approved Montana Medical Medicinal Marijuana Initiative I-182, which repealed SB 243's requirements that medical marijuana providers have no more than three patients, allowed physicians to prescribe marijuana for patients diagnosed with chronic pain or post-traumatic stress disorder (PTSD), and repealed law enforcement's power to conduct unannounced inspections of medical marijuana facilities. (Ibid)

## New Jersey

New Jersey voters legalized recreational cannabis use, saying "yes" to Question 1, after the vote failed in the state legislature [<https://www.law.com/njlawjournal/2019/07/01/what-extinguished-the-marijuana-bill-in-new-jersey-a-lot/>] which means the state's constitution will be amended to permit those who are 21 and older to use and possess marijuana, as well as to permit marijuana to be cultivated, processed, and sold in New Jersey. The measure passed by a vote of 67 percent to 32.9 percent.

Question 1 added an amendment to the state constitution that legalizes the recreational use of cannabis for persons age 21 and older and legalizes the cultivation, processing, and sale of retail marijuana. The constitutional amendment will take effect on January 1, 2021. New Jersey was the first state in the Mid-Atlantic to legalize marijuana.

The five-member Cannabis Regulatory Commission (CRC), which was first established to oversee the state's medical-marijuana program, was responsible for regulating the cultivation, processing, and sale of recreational marijuana.

Question 1 applied the state sales tax of 6.625 percent to recreational marijuana but prohibits additional state sales taxes. The state legislature was authorized to allow local governments to enact an additional 2 percent sales tax on recreational marijuana.

The ballot measure did not provide additional specifics, so the legislature and CRC will need to address additional laws and regulations. (See: [https://ballotpedia.org/New\\_Jersey\\_Public\\_Question\\_1\\_Marijuana\\_Legalization\\_Amendment\\_\(2020\)](https://ballotpedia.org/New_Jersey_Public_Question_1_Marijuana_Legalization_Amendment_(2020))) (For more on New Jersey's process from here, see pg. 108 of this newsletter).

## South Dakota

Voters in South Dakota supported Constitutional Amendment A, which amends the state's constitution to allow purchase and possession and distribution of up to one ounce of the drug, for those 21 years old and older. The measure passed by a slim margin of 54 percent to just shy of 46 percent.

Amendment A legalized the recreational use of "marijuana" for individuals 21 years old and older. Under the measure, individuals are allowed to possess or distribute up to one ounce of marijuana. The amendment required the legislature to pass laws providing for a program for medical marijuana and the sale of hemp by April 1, 2022. Individuals who live in a jurisdiction with no licensed retail stores can grow up to three marijuana plants in a private residence in a locked space, though not more than six marijuana plants could be kept in one residence at a time. Under the amendment, marijuana sales were set to be taxed at 15 percent. After the tax revenue is used by the Revenue Department to cover costs associated with implementing the amendment, 50 percent of the remaining revenue was set to be appropriated to fund state public schools and 50 percent would be deposited in the state's general fund.

Under the amendment, a local government could ban marijuana cultivators, testing facilities, wholesalers, or retail stores from operating in its limits. Under the amendment, a local government cannot prohibit the transportation of marijuana on public roads in its jurisdiction by those who are licensed to do so. (See: [https://ballotpedia.org/South\\_Dakota\\_Constitutional\\_Amendment\\_A\\_Marijuana\\_Legalization\\_Initiative\\_\(2020\)](https://ballotpedia.org/South_Dakota_Constitutional_Amendment_A_Marijuana_Legalization_Initiative_(2020)))

## Other Drugs

Cannabis wasn't the only substance that went before the voters looking to criminalization. At the state and local level, voters looked to legalize other drugs.

## Oregon

The situation in Oregon represents, perhaps, the most liberal attitude in the nation toward the decriminalization of drugs. The voters of Oregon approved in November 2020 two first-in-nation measures. One measure legalized psychedelic mushrooms and a sec-

ond measure decriminalized small amounts of other drugs.

Measure 109 addressed legal, supervised use of psilocybin. The measure passed with more than 56 percent and will allow for regulated use of “magic mushrooms” in a therapeutic setting. (See: <https://www.oregonlive.com/politics/2020/11/oregon-becomes-first-state-to-legalize-psychedelic-mushrooms.html>)

Citizens also approved Measure 110, making Oregon the only state in the nation to decriminalize small amounts of other drugs, including cocaine, heroin, oxycodone and methamphetamine, and reclassify the offense as a civil violation with a \$100 fine. (See: <https://www.opb.org/article/2020/11/04/oregon-measure-110-decriminalize-drugs/>)

Measure 110, passed by a vote of more than 58 percent, and which will take effect on February 1, 2021.

A “yes” vote supported making personal non-commercial possession of a controlled substance no more than a Class E violation (max fine of \$100 fine) and establishing a drug addiction treatment and recovery program funded in part by the state’s marijuana tax revenue and state prison savings. (See: [https://ballotpedia.org/Oregon\\_Measure\\_110,\\_Drug\\_Decriminalization\\_and\\_Addiction\\_Treatment\\_Initiative\\_\(2020\)](https://ballotpedia.org/Oregon_Measure_110,_Drug_Decriminalization_and_Addiction_Treatment_Initiative_(2020)))

The measure will also fund health assessments, addiction treatment, harm-reduction efforts and other services for addicts, with the money coming from revenues from legalized marijuana, which was approved in the state several years ago.

### Washington, D.C.

As this article was being finalized it appeared that the District of Columbia’s voters likely approved of decriminalizing psilocybin. This would mean that D.C. would join five other U.S. cities. The measure would decriminalize psilocybin as “the lowest law enforcement priorities.” (See: <https://www.washingtonpost.com/local/dc-politics/dc-magic-mushrooms->

[result/2020/11/03/bb929e86-1abc-11eb-bb35-2dcfda-b0a345\\_story.html](https://www.washingtonpost.com/local/dc-politics/dc-magic-mushrooms-result/2020/11/03/bb929e86-1abc-11eb-bb35-2dcfda-b0a345_story.html))

### Conclusion and Implication

The November 2020 elections were very controversial and showed a nation still widely divided over which candidate and which political party would take the helm of the administration and of Congress. More money was spent this year on the Presidential election than ever in history. Senator Joe Biden is now the apparent President-elect, the Senate remains under Republican leadership and the House of Representative under Democratic leadership. Will cannabis legalization (or decriminalization) materialize under a Biden administration with a Senate controlled by the Republicans? Biden’s past remarks on cannabis have not been consistent enough to truly forecast the fate of “pot” at the national level. But the cannabis industry is truly betting on things to change. Stock Exchange cannabis companies saw substantially higher values following Biden’s apparent victory. Canopy Growth went up 10 percent and Aurora Cannabis up by 20 percent on the heels of the November 2020 elections. (See: [https://www.washingtonpost.com/local/dc-politics/dc-magic-mushrooms-result/2020/11/03/bb929e86-1abc-11eb-bb35-2dcfda-b0a345\\_story.html](https://www.washingtonpost.com/local/dc-politics/dc-magic-mushrooms-result/2020/11/03/bb929e86-1abc-11eb-bb35-2dcfda-b0a345_story.html))

Surely optimism is high for a federal government which dials down federal categorization of cannabis and halts enforcement, leaving the matter exclusively to the states. In a year of Covid-19 the world looks optimistically to a 2021 that will be different— one that will have vaccines and return to normal. In the United States, it is reported that vaccines will begin distribution in December 2020. (See: <https://www.bbc.com/news/world-us-canada-55036381>) So, change is indeed in the works. It’s extremely unfair to discuss vaccines, a horrible plague and legalized cannabis in one sentence—except perhaps as expressions of optimism for 2021.

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**CANNABIS NEWS**

**VICE PRESIDENT-ELECT KAMALA HARRIS  
DISCUSSES HER COMMITMENT TO MARIJUANA DECRIMINALIZATION**

Now that votes have been counted and recounted, and lawsuits filed and dismissed, it is safe to say that Joe Biden will become President of the United States in January 2021. His record on supporting cannabis reform at the federal level has been a bit of a moving target, therefore it would be difficult to presume if he favors legalization or decriminalization at the federal level. Recently, however, Vice President-elect Kamala Harris has been more forthright on her positions.

**Harris Goes on the Record  
Regarding Cannabis Decriminalization**

In an interview with *The Grio* in late October 2020, shortly before the November election, now-Vice President-elect Kamala Harris discussed her stance on marijuana decriminalization and how it will be an priority under a Biden administration.

“We have a commitment to decriminalizing marijuana and expunging the records of people who have been convicted of marijuana offenses,” Harris said:

When you look at the awful war on drugs and the disproportionate impact it had on black men and creating then criminal records that have deprived people of access to jobs and housing and basic benefits.

Kamala Harris went on to state the following:

This is no time—from, I think, our collective perspective—this is no time for half-steppin.’ This is no time for incrementalism. We need to deal with the system, and there needs to be significant change in the design of the system so that we can support working people, so that we can fight for the dignity of people, so that we can make sure that all people have equal access to opportunity and to justice. . . .

**Is Decriminalization Enough?**

However, many marijuana advocates view simple decriminalization as incrementalism.

When Harris was running for President, she called for comprehensive legalization. Since joining the Democratic ticket as former Vice President Biden’s running mate, she has scaled back her stance on reform. President-elect Biden, on the other hand, seemingly opposes outright cannabis legalization. President-elect Biden has only gone as far as to say he supports decriminalization, moderate rescheduling, medical cannabis legalization, state autonomy with respect to marijuana laws, and expungement for past marijuana offenses. Biden’s stance is a departure from that of the majority of Democrats.

Harris, on the other hand, is the lead sponsor of the Marijuana Opportunity, Reinvestment and Expungement (MORE) Act. The MORE Act proposes, among other things, to remove marijuana and THC from the Controlled Substances Act, provide for expungement and resentencing of prior convictions and prevent federal agencies from using cannabis as a reason to deny access to benefits or citizenship status for immigrants.

“Times have changed—marijuana should not be a crime,” she said when introducing the bill:

We need to start regulating marijuana and expunge marijuana convictions from the records of millions of Americans so they can get on with their lives.

“While I applaud Kamala Harris’s focus on criminal justice reform, and in particular expungement and decriminalization of cannabis offenses at the federal level, true reform will require more,” Steve Hawkins, executive director of the Marijuana Policy Project, told *Marijuana Moment*.

He went on to state:

Removing criminal penalties for marijuana possession is an important first step. But as we have seen in states around the U.S., decriminalization alone will not stop the arrest and persecution of people of color—or so many others touched by



the war on cannabis. . . It is only when we take a comprehensive approach through the framework of legalization that can we move away from the cycle of abuse.

After receiving a bit of pushback from marijuana advocates, Harris has since clarified that she had a “deal” with President-elect Biden to candidly share her perspective on the legalization of marijuana. Harris told *60 Minutes* during an interview:

What I will do—and I promise you this and this is what Joe wants me to do, this was part of our deal—I will always share with him my lived experience as it relates to any issue that we confront. I promised Joe that I will give him that perspective and always be honest with him.

## Conclusion and Implications

Perhaps Harris will take the lead in the Biden administration. At the very least, it is clear that decriminalization will likely be on the Biden-Harris agenda. This would include automatic expungements for prior cannabis convictions. Symone Sanders, senior advisor to Biden’s campaign said:

. . . we’re really reforming the criminal justice system so we’re preventing things on the front end. Joe Biden and Kamala Harris don’t believe anyone should be in jail for drug offenses only. They believe that marijuana should be decriminalized and folks with marijuana convictions should have those automatically expunged.

(Brittany Ortiz)

## LEGISLATIVE DEVELOPMENTS

### NEW JERSEY HAS LEGALIZED CANNABIS; LEGISLATURE ACTIVELY DEBATING REMAINING DETAILS

#### Background

On election day 2020, more than two-thirds of New Jersey voters voted resoundingly to legalize cannabis for adults. The constitutional amendment will go into effect on January 1, 2021. New Jersey Public Question 1 addressed the “cultivation, processing, and sale of retail marijuana” and legalized these for adult New Jerseyans aged 21 years or older.

Question 1 applied the New Jersey sales tax (6.625 percent) to recreational cannabis but prohibits additional state sales taxes. The state Legislature was authorized to allow local governments to enact an additional 2 percent sales tax on recreational cannabis. Despite hashing out these details, the ballot measure did *not* provide any further specifics, such as details regarding, home-grow rules, possession limits, or retail regulations. As a result, the legislature and the five-member Cannabis Regulatory Commission (CRC) will need to enact additional laws and regulations. The CRC, established via P.L. 2019, c. 153, will regulate personal and medical uses of cannabis.

According to a report, the “2020 Update to The State of Legal Cannabis Markets,” from BDS Analytics, the cannabis industry in New Jersey has the potential for annual sales of over a billion dollars by 2024 (See <https://bdsa.com/global-cannabis-market-to-hit-42-7-billion-by-2024-according-to-updated-report-from-arcview-group-bds-analytics/> for highlights from the report.) Perhaps for this reason, and perhaps for the looming January 1 deadline, legislation is moving quickly. Two important legislative budget committees in the state advanced amended legislation on November 19, but differences between the Assembly Measure A21 and Senate S21 mean new negotiations before anything can be enacted.

“We’ve got to get this done by the end of the year,” the lead sponsor of the legislation, Sen. Nick Scutari (D), said at the Assembly’s panel hearing. “If we don’t, we’re going to run into a myriad of other problems.”

At the Assembly Appropriations Committee, the vote for A21 was 7-to-4, with a number of committee members acknowledging that the bill still needed revising. Later that evening, the Senate Budget and Appropriations Committee approved S21 with an 8-to-3 vote. Each added different amendments, and the bills now need reconciling.

“Our language will be different than what the Assembly has, which will allow us to negotiate,” said Sen. Paul Sarlo (D), chair of the Senate Budget and Appropriations Committee at their November 19 hearing.

Final floor votes had been scheduled for Monday, November 23, but bicameral negotiations have delayed these plans.

#### Recent Amendments to A21 and S21

A number of changes to the Assembly bill, A21, are intended to address the concerns of social justice advocates. Some of these include adding an excise tax to cannabis at the cultivation level and lifting the state cap on cultivation licenses from 28 to 37.

While the Assembly bill modifies the cap, the Senate bill, S21, removes the cap altogether. The American Civil Liberties Union of New Jersey (ACLUNJ) has commented in a series of Twitter posts on the effect of caps in the legislation:

Under the current version of the legalization bill, just 28 licenses will be awarded to cultivate cannabis in New Jersey. 21 are already claimed. These caps would do little to advance racial justice – in fact, it’ll continue to perpetuate an unjust status quo. Caps make it almost impossible for equity candidates—people + families impacted by prohibition—to thrive in the new industry. Caps also drastically reduce funds collected from taxes on legal cannabis sales that could be reinvested into communities harmed by the War on Drugs. (<https://twitter.com/ACLUNJ/status/1329485251744313344?>)

## Addressing Social Justice and the Needs of Consumers

For social justice advocates like the ACLUNJ, A21 does little to address their interests, while S21 comes much closer. The latest version indicates that the excise tax *may* be of a social equity nature, or used for social equity:

There may be Social Equity Excise Fee imposed by the commission on the cultivation of cannabis by any cannabis cultivator licensed pursuant to the provisions of P.L. , c.(C.) (pending before the Legislature as this bill), or on the cultivation of cannabis for the personal use cannabis marketplace and not for the medical cannabis marketplace by any alternative treatment center deemed to be licensed to engage in personal use cannabis activities. (See latest version of S21 at: [https://www.njleg.state.nj.us/2020/Bills/S0500/21\\_R1.PDF](https://www.njleg.state.nj.us/2020/Bills/S0500/21_R1.PDF))

Local supporters of S21, such as Rev. Charles Boyer, the pastor of the Bethel African Methodist Episcopal Church in Woodbury, NJ, are hopeful this language will materialize into something more formal. He stated in a press release:

Today's amended cannabis legalization bill includes an extremely important step forward: a social equity excise tax that will fund financial reparations for communities of color devastated by the drug war. But there are serious concerns that have yet to be addressed. This bill still lacks firm, codified language that guarantees that funding from the excise tax is reliably allocated with real community input to the state's impact zones. (<https://www.insidernj.com/press-release/reverend-charles-boyer-responds-state-legislature-introduction-cannabis-legalization-bill/>)

During the Senate panel on November 19, a great deal of discussion focused on workplace protections for cannabis consumers and how employee drug testing should or shouldn't be implemented. Currently S21 is designed to allow employees to use marijuana away from work, but some are worried this will result in workers high on the job. And while other states allow for home cultivation of marijuana, S21 currently keeps it illegal. Senator Scutari, speaking at the Assembly hearing, commented on this piece of the puzzle, voicing concern. "Personally, yes, I believe that's something that's the future for New Jersey," he said. But in other legal states, he argued, homegrowing has caused issues:

That stuff found its way into the illicit market, competing with the regulated market, or in other instances [was] baled up and sent to jurisdiction that don't allow for marijuana.

Disagreements on the excise tax and other issues are familiar, as they were central the last time that lawmakers tried to enact these reforms legislatively. Eventually they gave up on negotiations and opted to refer the issue to voters via the ballot referendum of this last election cycle.

## Conclusions and Implications

As the legalization bill faces debate in and between the New Jersey Senate and Assembly, a separate decriminalization bill (A1897/S253) is moving forwards as well. This bill would eliminate both criminal and civil penalties for up to six ounces of cannabis. While this bill and A21/S21 are being actively debated for nuance, both are generally supported and appear poised for success. In the meantime, Governor Phil Murphy is actively assembling the CRC, and has appointed Dianna Houenou, a current staffer and former policy counsel for the ACLUNJ, to head the regulatory agency.  
(Miles S. Schuster)

**REGULATORY DEVELOPMENTS**

**CALIFORNIA BUREAU OF CANNABIS CONTROL  
ANNOUNCES PUBLIC UNIVERSITY GRANT FUNDING RECIPIENTS**

The California Bureau of Cannabis Control (BCC) announced in November 2020 that it has awarded nearly \$30 million in public university research grant funding to universities across California. The awards present a major step forward for cannabis research, an area which has been frequently constrained due to federal illegality, and which is increasingly important as recreational marijuana is legalized and use of cannabis becomes more widespread.

**Background**

The BCC is awarding \$29,950,494 in research grant funds, aimed to provide critical information to evaluate California’s legal cannabis system and its impacts. Bureau of Cannabis Control Chief Lori Ajax announced “this research will be a valuable tool to inform future cannabis policy in California.

In order to be eligible for a grant, research proposals had to fall within one of several specified categories, including public health, criminal justice and public safety, economic, environmental impacts, and the cannabis industry. The awards are pursuant to a defined list of research subjects for grant funding laid out in California Revenue and Taxation Code § 34019.

The BCC received more than 100 applications for grants of up to \$2 million for any specific proposal. Following a thorough review process, the nearly \$30 million was awarded to 34 different research proposals at California universities.

**The Awarded Proposals**

**UC Berkeley**

UC Berkeley leads the pack, with eight grants awarded to the university based on a wide variety of proposals. The Berkeley teams will receive \$1,827,596 to research local regulation of cannabis in California, focusing on regulatory differences between jurisdictions; \$658,306 to research the transformation of unregulated cannabis cultivation following

passage of Prop 64; \$489,762 for assessing the environmental impacts of cannabis-related noise and light disturbance to inform management of California wildlife; \$465,902 to examine tribal sovereignty over cannabis permitting on Native Ancestral Lands; \$328,916 to review cultivation bans, local control, and the efficacy of Prop 64; \$319,091 for a review of cannabis and wildfires with an aim to discovering potential solutions for cannabis farmers; \$314,417 to assess cannabis water-use impacts to streamflow and temperature in salmon-bearing streams; and \$270,269 to review the effect of local cannabis regulation on property prices.

**UCLA**

UCLA received 7 grants to research its proposals, and will receive: \$1,429,001 to research the impact of cannabis potency on the properties, composition, and toxicity of inhaled and second-hand smoke; \$1,082,815 for assessing the feasibility and consequences of implementing a cannabis potency tax in California; \$1,048,857 to study employment conditions and equity in California’s cannabis industry; \$896,794 to assess the impact of Prop 64 on cannabis use, maladaptive cannabis use, cannabis use disorder treatment and public health; \$781,707 to conduct a demographic analysis of the California licensed cannabis industry and consumer market; \$758,517 to research the impact of cannabis marketing on California’s youth; and \$414,183 to understand the impact of cannabis marketing on cannabis use disparities among sexual and gender minority youth.

**UC Davis and UC San Francisco**

UC Davis and UC San Francisco each received five grants. UC Davis will receive \$1,034,730 to understand the impact of cannabis use in early psychosis; \$726,816 to assess the location, structure, function and demographics of licensed cannabis focusing on geographical price differences; \$655,564 to research the economic impacts of market prices for

licensed and unlicensed cannabis; \$562,240 to review environmental impacts of cannabis cultivation in California; and \$144,949 to research California cannabis workers and occupational health and industry hazards. UCSF, meanwhile, will receive \$2,000,000 to conduct a comprehensive analysis of developmental cannabis exposure on brain, immune, and sensory systems; \$1,384,466 to research effects of chronic cannabis use on endothelial function; \$1,067,483 to conduct a study into lung effects and function associated with cannabis use; \$1,038,782 to review public health impacts of state policies mandating point-of-sale warning signs regarding cannabis use during pregnancy; and \$952,540 to review cannabis poisonings under Prop 64.

### **UC San Diego and California State University: Humboldt**

UC San Diego was awarded four grants, including \$1,321,833 to research the public health impacts of cannabis legalization; \$987,738 to evaluate the impacts of packaging and labeling on cannabis edible use among youth; \$887,101 to assess the role of cannabidiol in anandamide-related improvement in health outcomes; and \$235,039 to evaluate risks and benefits of cannabis use by older adults.

California State University: Humboldt received two grants: \$464,997 to research cannabis business

entrepreneurs and jobs; and \$183,015 to review the economic impact of cannabis legalization in rural northern California.

### **Other Grants**

The final three grants were awarded to UC Santa Barbara, which received \$1,999,191 to research surface water emissions from cannabis cultivation sites; California State University: Dominguez Hills, which received \$1,866,311 to assess the cannabis industry in South Bay Los Angeles; and UC Irvine, which was awarded \$1,351,556 to explore cannabis policies and practices that influence adolescent use.

### **Conclusion and Implications**

The Bureau of Cannabis Control's awards represent a massive influx of money into cannabis research throughout California. As cannabis cultivation, manufacturing, distribution, retail sales and use all increase, it is vital for academics and researchers to understand the cannabis industry and its effects on public health and public safety. This crop of research will go a long way towards improving California's cannabis industry, and giving cannabis customers a better understanding of the health impacts of cannabis use. For more information, see: [https://www.bcc.ca.gov/about\\_us/documents/media\\_20201113.pdf](https://www.bcc.ca.gov/about_us/documents/media_20201113.pdf) (Jordan Ferguson)

## LAWSUITS FILED OR PENDING

### U.S. SUPREME COURT DECLINES TO HEAR CASE SEEKING TO RECLASSIFY MARIJUANA UNDER THE CONTROLLED SUBSTANCES ACT

In October 2020, the U.S. Supreme Court announced that it will not hear a case challenging the constitutionality of federal prohibitions on cannabis.

In July of this year, a petition for writ of *certiorari* was submitted to the Supreme Court in the case *Washington v. Barr*. The case was rejected by the lower courts, finding that advocates would have to first seek administrative relief through existing channels such as a petition asking the Drug Enforcement Agency (DEA) directly to reclassify cannabis. In 2018, a U.S. District Court Judge rejected plaintiff's arguments, opining:

No such fundamental right (to possess or use cannabis) exists. Every court to consider the specific, carefully framed right at issue here has held that there is no substantive due process right to use medical marijuana. (See: <https://norml.org/blog/2018/02/26/federal-judge-dismisses-lawsuit-challenging-marijuanas-schedule-i-prohibited-status/>)

Litigants had appealed their case to the U.S. Court of Appeals for the Second Circuit, which also rejected plaintiffs' arguments. (See: <https://norml.org/blog/2020/10/13/scotus-declines-to-hear-appellate-challenge-to-federal-cannabis-prohibition/>)

#### The Writ

The questions presented by the Writ were:

- Can Congress, consistent with the Due Process Clause of the Fifth Amendment to the U.S. Constitution, criminalize medical cannabis without exception, even for patients who require its daily administration to live?
- Given the three requirements for designation as a Schedule I drug under the CSA (21 U.S.C. § 812(b)(1)), is the classification of cannabis so

irrational that it violates the Due Process Clause of the Fifth Amendment to the U.S. Constitution?

- Can Congress, consistent with the Due Process Clause of the Fifth Amendment to the U.S. Constitution, require persons aggrieved by the classification of a substance under the CSA to submit to an administrative law process that cannot, as a matter of law, provide the relief they seek?

#### Members of Congress Urged the Court to Take up the Case

In September, seven members of Congress urged the Supreme Court to take up a lawsuit against the DEA refusal to change the federal classification of cannabis. Reps. Earl Blumenauer (D-OR), Tulsi Gabbard (D-HI), Jared Huffman (D-CA), Barbara Lee (D-CA), Alan Lowenthal (D-CA), Mark Pocan (D-WI), and Jamie Raskin (D-MD) filed an *amicus* brief stating that they:

...support the Petition asking the Court to find unconstitutional the rigid scheduling of cannabis, including medical cannabis, on Schedule I pursuant to the Controlled Substances Act, despite ample evidence that the qualifications of Schedule I classification are simply not met.

The brief went on to state:

This Court must take action to remedy the unconstitutional system that has unfairly burdened Petitioners and similarly-situated patients who lawfully use medical marijuana under the supervision of a physician and pursuant to state law. While a legislative solution is theoretically possible, various unsuccessful Congressional attempts to deschedule marijuana have made clear that legislative action is made practically impossible by complicated political realities.

Because the current federal scheme violates federal law and infringes on Constitutional rights, the Court should grant certiorari to resolve this matter.

### **NORML Filed an Amicus Brief Urging That the Court Take up the Case**

On the same day, the National Organization for the Reform of Marijuana Laws (NORML) filed a similar brief, highlighting:

...a supremacy and nullification crisis. . .fomented by all branches of government. . . [as]. . .each have made statements and taken actions to protect and further state cannabis programs despite federal illegality.

NORML urged the Court to resolve the nullification crisis:

...rather than letting future political whims undo the efforts of the three coordinate branches of federal government to protect and promote state cannabis program. . . .

### **Conclusion and Implications**

Despite these efforts by members of Congress, NORML, and several other advocacy organizations,

the Supreme Court was unpersuaded to take the case and listed it among the cases they are declining to hear. While not surprising, as less than one percent of all petitions to the Supreme Court get a hearing, it is still very disappointing as we have been fighting this case for over three years now,” Sebastien Cotte, a family member of a plaintiff in the case, told Marijuana Moment.

Despite this loss, Cotte remains optimistic and noted, “We must not forget that this case has been groundbreaking on so many levels. Not only did a federal judge say on record that looking at [plaintiffs] that it is undeniable that cannabis has medical properties, but we also believe that this case moved the needle closer to descheduling cannabis by bringing extra awareness to the unfairness of the current classification of cannabis. We are confident our case will help another case down the road achieve the ultimate goal, as everyone knows that it is not a question of if cannabis will be descheduled, but when.”

A judge for the U.S. District Court in Sacramento considered similar arguments in a 2014 spearheaded by members of the NORML Legal Committee, but ultimately rejected them — ruling that plaintiffs failed to show that Congress acted irrationally when classifying cannabis as a schedule I controlled substance. “At some point in time, a court may decide this status to be unconstitutional,” the judge determined. “But this is not the court and not the time.” (Ibid) (Brittany Ortiz)

## **FERRARA CANDY CO. FILES INTELLECTUAL PROPERTY SUIT AGAINST CANNABIS BUSINESSES MARKETING THC-INFUSED PRODUCTS BEARING THEIR POPULAR CANDY’S NAME**

As cannabis goods expand beyond the traditional flower product into topicals, edibles, vapes, and more, brands are experiencing ever-growing pressure to make their products stand out. A common approach to differentiating your product on the dispensary shelves and online listings is to give it memorable names and flashy packaging. A variant of this approach is what Inland Empire 420 Supply (IE 420) and Tops Cannabis (Tops) attempted to do with their respective products: Medicated Nerd Ropes and

[product 2]. The Ferrara Candy Company (Ferrara) is now suing IE 420 and Tops in the U.S. District Court for the Central District of California for infringing on its intellectual property rights with the marketing of these products. [*Ferrara Candy Company v. Inland Empire 420 Supply & Tops Cannabis*, Case Nos. 5:20-cv-2357 and 2:20-cv-10349 (CD. Cal. 220)]

These cases are still in the pleading stage but provide a valuable reminder to everyone in the cannabis retail industry about the ground rules in the ever more crowded space of cannabis marketing.

## Background

Ferrara is the maker of the well-known Nerds candy which it introduced in the 1980s. In 1998, Ferrara registered a federal trademark, or wordmark, for the word “Nerds” and in 2013 registered a federal trademark for the logo it uses on all Nerds candy. In addition to Nerds, Ferrara markets a variety of related products, including Nerds Rope. (See: Nerds logo registered September 10, 2013, USPTO Registration No. 4,400,174))

IE 420 is a cannabis business operating in Riverside, California. Tops is a cannabis business operating in Covina, California. Ferrara alleges in its suit against the Defendants that they have and continue to sell products marketed as “Medicated Nerds Rope” under a label that looks remarkably similar to its own packaging. IE 420 also lists for sale on its website among other edibles “Medicated Skittles,” “Molly Ranchers,” “Sour Infused Gushers,” and “Cardi B Sour Ropes.” As of the writing on this article, Tops no longer lists “Medicated Nerds Rope” for sale on its website. [Medicated Nerds Rope marketed by IE 420—Nerds Rope marketed by Ferrara]

## Trademark Law

A trademark is a designation that is distinctive and used in a manner to identify distinct source of good or service. Trademarks are unique among the various types of intellectual property rights recognized under American law because they are granted not only to protect the holder of the right and the value accrued in developing the brand or product, but also to protect consumers when seeking out products on the market.

To establish infringement of a valid trademark, the holder of the trademark must show that there is a likelihood that the use of the mark by another party is likely to lead to confusion among consumers or that it will dilute the value of their mark. This is precisely what Ferrara is setting out to do in its lawsuits against IE 420 and Tops.

## Allegations against IE 420 and Tops

Ferrara is pleading a whole range of claims against the defendants as a result of the marketing of “Medicated Nerds Rope”:

- Trademark Infringement Under 15 U.S.C. § 1114

- Trademark Dilution Under 15 U.S.C. § 1125(C)
- Unfair Competition Under 15 U.S.C. § 1125(A)(1)(A)
- Unfair Competition Under Cal. Bus. & Prof. Code, § 17200, Et Seq.)
- Dilution Under Cal. Bus. & Prof. Code §§ 14330-14335
- Violation of California Common Law Unfair Competition Law

These claims all revolve on whether there is a likelihood that consumers will be confused regarding the origin of the product they are purchasing or consuming. Ferrara further alleges that the confusion resulting from the Medicated Nerds Rope packaging will result in harm to its brand, and that the value it has accumulated over the years of selling Nerds products will be diluted by this.

Ferrara alleges that due to the packaging of Medicated Nerds Rope, consumers will be tricked into thinking that they are purchasing a product it sanctioned. To support this contention, Ferrara claims that the packaging has already led to confusion among consumers—including would-be consumers of their own product where children have been hospitalized after mistakenly consuming Medicated Nerds Rope thinking they had consumed Ferrara’s product.

## Similar Litigation

These cases are not the first time that candy manufacturers have sought to stop cannabis businesses from using their trademarks to market THC-infused products. In 2019, Mondelēz Canada Inc. filed suit against Stoney Patch for marketing products that looked remarkably similar to its Sour Patch line of candies. (Case No. 2:19-cv-06245.) In April of this year, that court ruled in favor of Mondelēz finding that Stoney Patch products had in fact violated Mondelēz’s trademark under the Lanham Act (15 U.S.C. § 1114).

## Conclusion and Implications

It will be interesting to watch how many of these claims survive the initial stage of litigation and how the proceedings eventually shake out. In the mean-



time, cannabis manufacturers, distributors, and retailers should keep trademark laws in mind and consult with their legal representatives on this issue when

reviewing product packaging for compliance with all applicable laws and regulations.  
(Andreas L. Booher)

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P.O. Box 1135  
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