Michigan Marijuana Laws Affect a Broader Jurisprudence

By Jeffrey A. Hank

More than 20,000 adults are arrested for marijuana use or possession annually in Michigan.[1] Michigan's possession-of-marijuana statute provides for up to one year in jail or a maximum $2,000 fine or both, plus driver's license sanctions.[2] A second offense can be charged as a felony. As opinion poll numbers indicate, a majority of Michigan citizens believe marijuana should be legal, so it's no surprise that marijuana laws are changing.[3]

Voters statewide have enacted at least 21 cannabis-related ordinances or charter amendments under the Home Rule City Act[4] or local law—more than in any other state. These reforms are charter amendments in cities like Lansing, Saginaw, and Jackson or municipal ordinances in Detroit and Grand Rapids. These initiatives have led to legal challenges affecting broad sections of law, with the Michigan Supreme Court and Court of Appeals creating appellate precedent in challenges to both the Detroit and Grand Rapids ordinances.[5]

This article reviews Michigan's unique legal history with cannabis and examines conflicts of law and other cannabis-related legal developments.

History of marijuana activism litigation

In 2010, the Detroit City Council and Elections Commission refused to certify a petition for the ballot. Proponents filed a mandamus complaint; the Wayne County Circuit Court denied mandamus; the Court of Appeals reversed and ordered the issue placed on the ballot; and the Michigan Supreme Court ultimately denied leave to appeal. Precedent was solidified: a lawfully qualified question should not be subject to pre-election interference from the judiciary or officials concerned with its substance or effect, and to the extent a conflict with state law may exist, it should be litigated post-election. After years of delay, the measure was approved by Detroit voters in 2012. This precedent affected future campaigns in which municipalities could not make similar arguments (e.g., marijuana being federally illegal) to refuse ballot certification.

In September 2014, the East Lansing city clerk failed to comply with petition certification timelines under the Home Rule City Act, which conflicted with other election deadlines under chapter 168 of Michigan election law. Petitioners filed a mandamus complaint and the Ingham County Circuit Court ordered the clerk to certify the measure for the next election.[6] While litigation delayed the initiative from appearing on the November 2014 ballot, voters in May 2015 approved a charter amendment to prohibit the city's code of ordinances from applying to the "use, possession, transfer, or transport, on private property, of one ounce or less of marihuana by adults age 21 and over." Since neither party appealed, it remains an unsettled question of law which legal timeline process prevails to certify an initiative.

In 2012, the Kent County prosecutor filed suit in response to a voter-approved ordinance in Grand Rapids. The ordinance created a civil infraction penalty rather than a criminal offense and prohibited city police from reporting marijuana offenses to the county prosecutor. This had implications statewide, including for Ann Arbor's longstanding $5 marijuana civil infraction first adopted in 1974. The issues were whether a city could create a different penalty for a criminal offense from what state law provides and whether municipal police could be prohibited from reporting marijuana complaints to other authorities charged with enforcing state law, who in this case was the county prosecutor. The case also touched on the broader theme of what discretion police have to enforce any law. The appellate courts ultimately held in 2015 that the ordinance did not conflict with the Home Rule City Act and local police could be ordered to refrain from referring complaints to the county.

FAST FACTS

Michigan is one of 24 states in the U.S. that allow for citizen-initiated legislation at the state or local level.

Through city charter amendments or adopted ordinances, Michigan marijuana reform activists have decriminalized, legalized, exempted, or set marijuana offenses as the lowest law enforcement priority in at least 21 cities—more than in any other state.

At the University of Michigan, campus police operate under state criminal marijuana law, not the more lenient city of Ann Arbor civil infraction that is enforced off campus, and for decades, police have exercised discretion and a general tolerance for public marijuana use at the annual Hash Bash. Marijuana is openly consumed annually on the campus and few, if any, arrests occur. There is a general understanding that during this time, peaceful protesters can engage in the civil disobedience of cannabis consumption and police generally will not enforce state law.[7]

MILegalize statewide initiative

At the time of drafting this article, three ballot-question committees are seeking to legalize marijuana. One of these groups, the Michigan Comprehensive Cannabis Law Reform Committee, also known as MILegalize, has continued the legal trailblazing, particularly in election law.

To qualify for a statutory initiative, petitioners currently need 252,523 valid signatures; 315,654 valid signatures are needed for a constitutional amendment. MCL 168.472a provides for the qualification of ballot initiatives. Although an initiative has four years to qualify for the ballot per Michigan's 1963 constitution, only signatures within 180 days of turn-in to the state are deemed presumptively valid; signatures beyond 180 days must be shown to not be stale or void. Apparently, no campaign other than MILegalize has ever attempted to use the statute's "rebuttable presumption" language to validate signatures beyond 180 days. Before the 1972 enactment of 168.472a, petitions did not face different qualification thresholds for signatures more or less than 180 days old.

Research by this author uncovered a little-known 1986 policy adopted by the Board of Canvassers that provided for using voter or municipal clerk affidavits or certifications to qualify signatures more than 180 days old. That policy, as I argued in 2015–2016 testimony to the Bureau of Elections, cannot withstand a strict scrutiny First Amendment challenge. Courts have consistently held that petitioning—one of

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five guarantees of the First Amendment—constitutes core political speech. While a state is not required to provide its citizens with initiative rights, once it does, any law or policy burdening that right will be subject to a strict scrutiny analysis.[8] Strict scrutiny requires a compelling government interest, a narrowly tailored law or policy to achieve that interest, and the least burdensome means of achieving that interest. In this instance, requiring affidavits from potentially hundreds of thousands of petition signers to prove registration is not a narrowly tailored policy and is not the least burdensome means of ensuring the state's compelling interest that registered voters support placing a question on the ballot.

Since 1986, Michigan election law and technology have evolved with the creation of a statewide database, the Qualified Voter File (QVF). Before the QVF, voter verification was handled by hundreds of township, city, and county clerks. Creation of the QVF allows the state—as it is directed to do by various provisions of MCL 168.1 *et seq.*—to validate the registration of petition signers. I recently argued to the Bureau of Elections that the 1986 policy must be updated based not only on a strict scrutiny analysis, but also because of changes in Michigan election law and computer technology. Use of the QVF would further another compelling state interest—the purity of elections.

Using the QVF, which is available to the public at cost similar to Freedom of Information Act documents, to validate signers instead of the current random sampling process would qualify every signature and drastically mitigate invalidity and fraud. The Bureau of Elections and Board of Canvassers received public comment for six months and discussed updated policies to clarify use of the QVF to rebut signatures more than 180 days old but failed to enact any updates, while the legislature enacted 2016 PA 142, eliminating the ability to petition beyond 180 days—changing 108 years of law and tradition and in conflict with Art II, Sec. 9 of the 1963 constitution. As this article is being published, MILegalize has filed suit to have its signatures counted, and the suit is pending in the court of claims.

As marijuana law reform continues in Michigan, jurisprudence will develop in other fields as diverse as international treaty law, insurance law, child custody, finance, agriculture, consumer protection, food safety, and healthcare, and in doctrines like interstate commerce. For 2016 and beyond, the field of cannabis law will continue to provide interesting challenges and opportunities for attorneys and the legal system. ■

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ENDNOTES

1. Michigan State Police, *Michigan Incident Crime Reporting* <http://www.micrstats.state.mi.us/MICR/Reports/Query.aspx> (accessed July 12, 2016).
2. MCL 333.7403 *et seq.*
3. EPIC-MRA, Marijuana Poll (March 28, 2016).
4. MCL 117.1 *et seq.*
5. See *Coalition for a Safer Detroit v Detroit City Clerk*, 295 Mich App 362; 820 NW2d 208 (2012); *Kent County Prosecutor v Grand Rapids*, 498 Mich 939; 871 NW2d 720 (2015).
6. *Coalition for a Safer East Lansing v East Lansing City Clerk, Ingham Circuit Court*, Case No. 14-1059-AW (2014).
7. The Hash Bash has its roots in a historic marijuana legal dispute. In 1969, John Sinclair was arrested for giving an undercover officer two marijuana joints and was sentenced to 10 years in prison. Protestors, including Beatles member John Lennon, Bob Seger, Stevie Wonder, and others, demanded Sinclair's release in 1971. The Michigan Supreme Court ultimately struck down Michigan's marijuana law as unconstitutional. *People v Sinclair*, 387 Mich 91; 194 NW2d 878 (1972). Sinclair was released, and the Hash Bash tradition was born. For a brief period, marijuana possession was legal until the legislature enacted a new law.
8. The initiative process is not guaranteed by the U.S. Constitution (*Taxpayers United for Assessment Cuts v Austin*, 994 F2d 291, 295 (CA 6, 1993)), but once a state confers on its citizens the opportunity to participate in the initiative process, it may not limit that state-created right in contravention of federal fundamental law. *Meyer v Grant*, 486 US 414, 422–424; 108 S Ct 1886; 100 L Ed 2d 425 (1988) (the right to circulate an initiative petition is "core political speech").