

The Green Wave: Cannabis Legalization

South Dakota's Legalization of Adult-Use Cannabis Hits Significant Roadblock

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On February 8, 2021, South Dakota Circuit Court Judge Christina Klinger struck down Amendment A, the constitutional amendment legalizing adult-use cannabis that was approved by state voters at the ballot box this past November. The Superintendent of the South Dakota Highway Patrol and a county sheriff had speedily initiated a lawsuit asking the court to void the amendment at the behest of Governor Kristi Noem. By the end of the week, South Dakota's Attorney General, Jason Ravnsborg, stated that his office — which defended the ballot measure in the lower court — would not participate in any appeal. With the decision by the attorney general, an original sponsor of the ballot measure, South Dakotans for Better Marijuana Laws, announced it would take the lead in appealing the lower court ruling. This is by far the most prominent victory in recent memory for legalization opponents in light of the growing wave of states moving to legalize adult-use cannabis.

However, whatever happens on the appeal, the ramifications of this case are likely limited to South Dakota. Legalization proponents may have pushed “too much, too soon.” Unlike all other states that have legalized cannabis for adult-use, South Dakota did not have a prior existing medical marijuana program. The existence of a successful medical cannabis program generally increases cannabis acceptance and has historically paved the way for state legalization of cannabis for adult-use purposes. Indeed, just ten months ago, the state was one of only three that banned all forms of cannabis, including marijuana’s federally legal cousin, hemp. However, on November 3, 2020, South Dakota appeared to have upended the conventional wisdom when voters, in one go, approved two separate ballot questions — Amendment A *and* Initiated Measure 26 — legalizing cannabis for medical and adult-use at the same time.

Also, the ballot questions’ sponsors may have made serious (if not fatal) mistakes in the drafting of Amendment A. Judge Klinger found the ballot measure violated South Dakota’s constitution in two ways: the measure contravened the single-subject rule, which permits a measure to ask voters to consider only one “subject” for approval, and secondly, the measure’s proposed changes to the constitution were considered so broad as to constitute a “revision” — not an amendment — which instead required the approval of the state’s legislature by supermajorities at a constitutional convention.

Beyond legalizing the use and possession of adult-use marijuana, Amendment A includes provisions that, among other things, i) impose an adult-use sales tax, ii) forbid differing professions from disciplining their members for servicing the cannabis industry, and iii) compel the legislature to legalize hemp. Additionally, Amendment A vests “exclusive power” with the state’s Department of Revenue to not only license and regulate marijuana but also enforce certain provisions of the amendment. According to the court, this particularly “far reaching” change effectively removed the legislature’s ability to enact future marijuana policy, and, thus, could be construed as nothing less than a revision to the constitution.

Judge Klinger’s decision is likely to end up before the South Dakota Supreme Court. But not anytime soon and most likely not before the fall of 2021. Originally, Amendment A was to take effect on July 1, 2021. Even if the lower court’s ruling is reversed, it is highly unlikely South Dakotans will be able to use and/or possess cannabis for adult use by then.

As for the medical cannabis initiative, which is scheduled to take effect on July 1, 2021, it appears that will also have to wait. Governor Noem and legislative leaders just introduced a bill, H.B. 1100, designed to delay the implementation of Initiated Measure 26 by at least a year, as legislators claim that the additional time is necessary to address the measure’s perceived gaps and ensure the implementation of a safe and workable medical program.

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