

All Eyes on Ohio's Adult-Use Marijuana Measure Post Issue 1 Defeat

August 15, 2023

On August 8, 2023, Ohio voters defeated a proposed amendment to the state's Constitution that would have required at least 60% of the vote on any citizen-initiated proposal to amend the Constitution, otherwise known as Issue 1.

Since 1912, the Ohio Constitution has required only a majority of the vote to pass an amendment to the state's Constitution. The defeated amendment also sought to increase the number of signatures required to qualify any citizen-initiated constitutional amendment to be placed on the ballot from at least 5% of eligible voters in 44 of Ohio's 88 counties to not less than 5% in each of its 88 counties. The final amendment sought by the proposal would have also prohibited petitioners from seeking new signatures on a petition after it had been filed with the Ohio Secretary of State.

What does this mean for the proposed citizen-initiated statute for the legalization of adult-use marijuana?

On July 5, 2023, the Coalition to Regulate Marijuana Like Alcohol (Coalition) submitted over 220,000 petitioned signatures to the Ohio Secretary of State's office to qualify its citizen-initiated statute seeking to legalize adult-use marijuana on the November 2023 ballot (Adult-Use Measure). Of those submitted signatures, approximately 125,000 were required to be valid. Upon review, the Ohio Secretary of State determined that the Petition fell short of the requirement by 679 signatures. Under Ohio law, the Coalition then had until August 4 to submit supplemental signatures in order to meet the 125,000-signature threshold. On August 3, the Coalition submitted an additional 6,500+ supplemental signatures to the Ohio Secretary of State for approval and, on August 16, the Secretary of State certified that the required number of valid signatures necessary to place the proposed statute on the November ballot had been received, thereby confirming that, in less than three months, Ohio voters will be able to decide whether adult-use marijuana will become a reality in the state.

Even if the proposed constitutional amendment had passed, it would not have affected the Adult-Use Measure, because that measure was approved for placement on the November ballot, and the proposed constitutional amendment would not have come into effect until January 2024. However, had the constitutional amendment passed and the Adult-Use Measure not qualified for November's ballot, a new 2024 petition for the legalization of adult-use marijuana would have had an extremely difficult, if not impossible, chance of qualifying for another election.

That is because, if passed, not only would the proposed Constitutional amendment have required the daunting task of obtaining not less than 5% of the valid signatures in each of the state's 88 counties, but it would have also eliminated the 10-day cure period to gather additional signatures to meet the number of valid signatures required to place an issue on the ballot (i.e., the cure process by which the Coalition recently gathered its additional 6,500+ signatures).

What is the likelihood of passage?

Given the defeat of Issue 1, the likelihood of passage of the Adult-Use Measure is fairly good for two reasons.

First, a recent USA TODAY Network/Suffolk University survey published in July found that about 59% of Ohioans support legalizing the possession and sale of cannabis for adults 21 and older, with just 35% opposed. Of those, 77% of Democrats and 66% of independents were in support of legalization.

Second, also on the November ballot, is the initiated petition for a constitutional amendment to establish a constitutional right to make and carry out one's own reproductive decisions without state interference, otherwise known as the Ohio Right to Make Reproductive Decisions Including Abortion Initiative (Abortion Initiative). The petition was one, if not the most significant, reason for the now-defeated Issue 1. A USA TODAY/Suffolk University poll released in late July found that 58 percent of likely Ohio voters support the Abortion Initiative. Because of this, the Abortion Initiative will, most surely, attract an extremely large voter turnout in November, many of whom will likely be those in favor of passing the Adult-Use Measure.

If the Adult-Use Measure passes in November, adult-use marijuana will become legal in Ohio. However, that does not mean licenses will be immediately issued and dispensaries opened. Further, even if the Adult-Use Measure does pass as a statute, as opposed to a constitutional amendment, a supermajority Republican state legislature still has the power to repeal or modify the statute. No one knows, however, whether they would choose to take either of those actions.

So, what's next?

Once passed, the Adult-Use statute establishes the Division of Cannabis Control (DCC) within the Department of Commerce, which will have the authority to license, regulate, investigate, and penalize adult-use cultivators, processors, dispensaries, and testing laboratories and individuals required to be licensed under the statute. The Adult-Use statute mandates that license applications be available within six months of the effective date of the statute.

How has the rulemaking process progressed in other states?

That the Adult-Use statute mandates that license applications be made available within six months of the effective date does not necessarily mean that, even if it passes in November, applications will be available on that timeline. Like in most other states, the Ohio state legislature maintains the authority to repeal or modify a citizen initiative after it has passed. In fact, many state legislatures with the same type of authority have modified citizen-driven legislation. While some have exercised this authority in connection with marijuana and

other controlled substance legalization initiatives, none has yet to nullify the clear preferences of its citizens through an outright legislative repeal.

Notably, measure 91 in Oregon, which legalized adult-use marijuana in 2014, contained a residency requirement that was removed by the Oregon state legislature before the first license was ever issued. While this change was applauded by industry insiders at the time, in retrospect, many believe that the presently dire state of the Oregon adult-use marijuana industry has its roots in that decision. More recently, in the first legislative session following its passage, the Colorado General Assembly pushed back certain implementation timelines related to psychedelics and psychedelic-based treatments that were part of Colorado's Proposition 122.

In addition, many states have failed to meet implementation timelines in legalization legislation for a variety of other reasons. Often, like in New York, this is merely the result of administrative challenges associated with the creation of an entirely new regulatory scheme. In other cases, however, a reticent executive branch can simply stall, delay, or refuse to allocate sufficient resources to the administering agency. In 2010, for example, former New Jersey Governor Chris Christie requested that the New Jersey legislature delay implementation of its medical marijuana program for a variety of reasons, including that the executive branch did not have sufficient resources to draft regulations in time to meet the statutory deadline. This position ignores the fact that the governor likely had the authority to allocate additional resources to the program.

All of this means that adult-use cannabis advocates in Ohio still have a long road ahead and many potential challenges and obstacles on the path to legalization despite the outcome of Issue 1 last week. It remains to be seen how a Republican supermajority legislature and a Republican-led executive branch will react to the passage of a citizen initiative that they clearly do not support. If it does pass, all eyes will be on Ohio to see how it plays out.

Related people

Perry Salzhauer

David Waxman