

# Green Wave: The Latest Election Cycle Brings Hope for Standardized Cannabis Legalization

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Even two weeks after Election Day, jurisdictions nationwide are riding high after a number of positive wins related to the possible systemic legalization of cannabis use nationwide. As of November 3, 2020, the pendulum now undeniably swings in favor of cannabis, with medical cannabis legal in 33 states and recreational adult-use permitted in 12 states and Washington D.C.

While cannabis remains illegal at a federal level, the recent “green wave” witnessed 5 states pass cannabis-related measures – proof that many [Americans](#) are ready to shed the stigmatization related to cannabis use and decriminalize the use of same. To this end, while medical cannabis use has been much more widely accepted, the recent election results have a profound effect on the ability for Americans to engage in recreational use. This election authorizes adult use for approximately an additional 16 million Americans, meaning roughly 1 in 3 Americans over the age of 21 are permitted to legally use cannabis for recreational use.

The growing acceptance of cannabis use and of cannabis-based business operations is also reflected in local ballot initiatives throughout California. Even in local jurisdictions where cannabis operations have historically been eschewed, voters are approving tax schedules for these businesses in the event they are allowed in the future – indicating widespread anticipation that statewide authorization of cannabis-based business operations is imminent, and that this “green wave” trend will continue through future elections.

Proponents of the state and local measures have touted the economic benefits and stability taxation of the product would bring to local governments suffering under the weight of the COVID-pandemic and related fiscal fallout.

Below is a breakdown of successful state and local ballot measures, as well as an opinion on the potential for federal decriminalization due to results of the Presidential election.

## **I. State Trends**

### ***A. Arizona***

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On Election Day, 60% of Arizonan voters approved [Proposition 207 – Smart and Safe Arizona Act](#) (“Prop. 207”), legalizing recreational cannabis just 4 years after a similar measure was narrowly defeated by the state electorate.

Specifically, Prop. 207:

- Legalizes the sale and possession of up to one ounce of cannabis for adults over the age of 21;
- Allows licensed retailers to sell cannabis, but restricts the number of business licenses to no more than one or two per county, depending on whether a medical retailer is already in operation;
- Limits the number of cannabis retail licenses to one for every 10 pharmacy permits issued by Arizona;
- Earmarks 26 of the available for social equity applicants, who come from communities disproportionately impacted by anti-cannabis laws;
- Authorizes regulation of the new adult use program by the state’s Department of Health Services (“ADHS”), the entity responsible for Arizona’s current medical cannabis program; and
- Provides for a 16% excise tax on adult use cannabis sales.

Supporters of Prop. 207 contend this recent approval will result in a market worth more than \$1.5 billion within the next five years, will create thousands of jobs across the state, and provide ADHS with millions of dollars annually for “addiction prevention substance abuse treatment, suicide prevention, mental health programs and other justice investment projects.”

Opponents put forth the trite and overused tropes that legalization of adult use cannabis would create public safety issues, result in unnecessary governmental expenses related to program oversight and increase other indirect costs for public services, like police and medical. In an attempt to advance this position, the opposition initiated several judicial actions to enjoin an ultimate vote on Prop. 207. In these actions, the petitioners claimed that the ballot measure summary was misleading, challenged the impairment standard for a driving under the influence charge and contested the ability to fix the excise tax.

In [James et al. v. Hobbs et al.](#) (No. CV-20-0226-AP/EL), the [Arizona Supreme Court affirmed](#) the Maricopa County Superior Court’s decision to toss the challenge, opening the door to the ultimate electorate vote on Prop. 207. The decision found the above-referenced claims were tantamount to policy arguments and that the summary accurately articulated the question asking voters to legalize recreational cannabis.

## ***B. Mississippi***

In a move that would have been unheard of a mere few years ago, the electorate in Mississippi – a traditional conservative stronghold – unequivocally voted in favor of [Initiative Measure No. 65](#) (“Initiative 65”), citizen-led ballot measure requiring the creation of a comprehensive medical cannabis program, by over 70%. Simultaneously, the voters rejected a much less detailed alternative ([Initiative Measure No. 65A](#) [“Initiative 65A”]) championed by the state legislature.

Initiative 65 approves a Mississippi Constitutional amendment to legalize a medical cannabis program that:

- Authorizes physicians to certify medical cannabis treatment for individuals who suffer from at least one of 22 ailments including cancer, muscular dystrophy and post-traumatic stress disorder;
- Authorizes medical cannabis treatment centers to provide qualified patients with up to 2.5 ounces of medical cannabis during a 14-day period, not including the weight of other ingredients used to prepare certain products such as edibles and oils;
- Does not require any employer, school or prison to accommodate the use of medical cannabis, or require health insurers to provide coverage of the drug;
- Authorizes [Mississippi Department of Health](#) (“MDHS”) to draft program regulations;
- Prohibits MDHS from setting a limit on the number of approved treatment centers;
- Allows MDHS to impose a fee up to \$50 on medical cannabis identification cards and “reasonable fees” on treatment center licenses;
- Imposes a fee for sales in an amount up to the equivalent of the state’s sales tax rate (up to 7%); and
- Requires the program to be in place in July 2021 and related licenses to be in place beginning in August 2021.

In contrast, Initiative 65A articulated far fewer specifics, and allowed for a much more open-ended and constrictive approach on a statewide medical cannabis program. Importantly, Initiative 65A would have only permitted terminally ill patients to smoke medical cannabis and did not specify any other medical conditions that could justify a legal cannabis prescription. This option also failed to set a deadline for regulators to implement any such program, provide a tax rate or set possession limits.

Supporters of Initiative 65 contend this alternative was purposefully put forward to confuse voters – a “cynical effort to misdirect voters” – by first asking the electorate whether it approves either initiative and then requires a second vote for which option was supported. To this end, a lawsuit alleging Initiative 65 properly improperly qualified for the ballot because it [violated a state constitutional limit](#) on qualifying signatures per congressional district remains pending before the Mississippi Supreme Court.<sup>[1]</sup>

In addition to this lawsuit, the Mississippi State Board of Health, a division of the MDHS, opposed Initiative 65, objecting to the measure’s ability for MDHS to determine a *de facto* tax rate, and contending there would be scant oversight availability of the program and that the initiative would allow for broad use of medical cannabis beyond the specific conditions authorized by the citizen-initiative measure.

### **C. Montana**

This Election Day, the Montana electorate was faced with two related state ballot measures that, together, would legalize recreational use cannabis for adults 21 or older. First, [Initiative No. 190 – Marijuana Legalization Initiative](#) (“Initiative 190”) passed with approximately 57% of the vote. Second, [Constitutional Initiative No. 118 – Allow for a Legal Age for Marijuana Amendment](#) (“CI-118”) passed with slightly greater support at approximately 58%.

Initiative 190:

- Legalizes the possession and use of cannabis for adults over the age of 21;
- Imposes a 20% tax on cannabis sales;
- Requires the Department of Revenue to develop rules to regulate cannabis businesses on or before October 2021; and

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- Allows for the resentencing or expungement of cannabis-related crimes.

CI-118 supports amending the Montana Constitution to allow either the legislature or another ballot initiative to set a legal age limit for adult use cannabis different from the current designation of adulthood as 18 years old in the Montana Constitution.

Under Initiative 190, adult use licenses are limited to existing medical cannabis operators for the first year. Additionally, half of the public revenue generated from cannabis sales under the regulatory scheme will be directed to environmental conservation programs. Other revenue generated from sales is earmarked for land, water and wildlife conservation programs, veteran services, substance misuse treatment, health care and local governments, with the remainder being passed through to the general fund.

Due to the initiative's appropriation of funds, opponents filed a lawsuit<sup>[2]</sup> on November 4<sup>th</sup> in an attempt to waylay the vote, claiming the provisions directing where tax revenue generated through cannabis sales can be spent was unconstitutional. These claims are similar to those in a lawsuit brought in October by the same petitioner,<sup>[3]</sup> which was rejected by the Montana Supreme Court without weighing in on the merits of the challenge. Rather, the Supreme Court found the petitioners failed to demonstrate "urgency or emergency factors" that would justify moving the case into its jurisdiction instead of going through trial and appeals courts first. In order to continue prosecution of the case, petitioners were directed to first bring the litigation through the lower courts.

#### ***D. New Jersey***

New Jersey voters approved [Public Question 1](#) – a state constitutional amendment legalizing the possession and use of cannabis for persons age 21 and older and the cultivation, processing, and sale of retail cannabis – after state legislators in favor of a legalization bill were unable to garner the necessary support earlier in 2019.

While Public Question 1 is a bit light on details, requiring state legislators to subsequently determine the regulatory details, the initiative:

- Caps the tax rate that local governments can impose on cannabis sales at 2% on top of the state sales tax of 6.625%; and
- Designates the state commission responsible for the existing medical cannabis program to be additionally responsible for the recreational regulatory scheme.

The constitutional amendment does not take effect until January 1, 2021 and requires enabling legislation and regulations, setting forth the legal amounts and lawful locations for the sale, possession and use of legal cannabis.

To this end, on Monday, November 16<sup>th</sup>, the New Jersey Senate approved [Assembly Bill 1897](#) ("[A.B. 1897](#)"), with a 29-4 vote margin, decriminalizing the possession of up to 6 ounces of cannabis or 170 grams hashish.<sup>[4]</sup> A.B. 1897 also provides reforms aimed at bringing social justice to marginalized communities disproportionately impacted by the war on drugs. The State Assembly had been expected to consider the bill on November 16<sup>th</sup>, but postponed its vote.

State legislators are pursuing a separate measure to [establish a regulated market](#) for adult use cannabis. Two proposed resolutions about how to spend tax revenue from adult use sales are pending in the State Assembly. One directs proceeds to property tax relief and the other toward

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mental health and drug treatment programs.

Supporters of Public Question 1 contend the constitutional amendment corrects social and legal injustices that have had a disproportionately negative impact on marginalized communities, while making cannabis regulated and safer. A coalition of proponents believe that legalization and related taxation would address existing harms perpetuated by the ongoing illegal market.

Opponents argued that legalization poses a danger for motorists and minors, while being ineffective in solving systemic racism.

New Jersey became the first mid-Atlantic state to legalize adult use cannabis with the decisive passage of Public Question 1. It is largely believed by those in the industry that this approval in New Jersey likely will trigger a domino effect of legalization measures within the Northeast, notably in New York and Pennsylvania.

To this end, New York Governor Andrew Cuomo was quoted as saying on a radio interview on WAMC, the day after the election, that he wants to try again to legalize and tax recreational cannabis following New Jersey's vote. The ability to tax may be particularly attractive to voters due to existing budget pressures caused by the COVID-19 pandemic.

Similarly, earlier this week, Virginia Governor Ralph Northam threw his support behind the legalization of adult use cannabis after publication of a legislative report recommending lawmakers allow adult use cannabis and consider an assessment of up to 30% combined tax rate on retail sales. Governor Northam pledged to introduce legislation to legalize cannabis in the commonwealth and finalize a policy for the 2021 legislative session.

### ***E. South Dakota***

On Election Day, voters in South Dakota were faced with two cannabis-related ballot questions. [Amendment A – Marijuana Legalization Initiative](#) ("Amendment A"), a constitutional amendment to legalize, regulate and tax adult use of cannabis, passed with over 54% approval. A parallel ballot question, [Measure 26 – Medical Marijuana Initiative](#) ("Measure 26"), authorizing medical cannabis use for those with "debilitating" medical conditions, passed with almost 70% voter approval. However, with the passage of Amendment A, South Dakota became the first state to go from an absolute ban to legalizing adult use cannabis, leapfrogging the multi-step process prior states have engaged in when legalizing cannabis.

Amendment A authorizes or requires the following:

- South Dakotans 21 years or older are permitted to possess or distribute up to one ounce of cannabis;
- South Dakota State Legislature is required to pass laws providing for a program for medical cannabis and the sale of hemp by April 1, 2022;
- The South Dakota Department of Revenue shall be in charge of licensing cannabis manufacturers, testing facilities and retailers;
- Individuals who live in a jurisdiction with no licensed retail stores can grow up to 3 cannabis plants in a private residence in a locked space, though not more than 6 cannabis plants could be kept in one residence at a time;
- Cannabis sales were set to be taxed at 15%, and after the tax revenue is used by the Revenue Department to cover costs associated with implementing the amendment, 50% of

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the remaining revenue will be appropriated to fund state public schools and the remaining 50% will be deposited in the state's general fund; and

- Local governments may ban cannabis cultivators, testing facilities, wholesalers, or retail stores from operating in its limits, BUT a local government cannot prohibit the transportation of cannabis on public roads in its jurisdiction by those who are licensed to do so.

Conversely, Measure 26 would allow patients with debilitating medical conditions to possess up to 3 ounces of cannabis from a licensed dispensary and grow up to 3 plants.

With the passage of both Amendment A and Measure 26, South Dakota is the *first* state to decide on legalization of both medical and adult use cannabis in the same election.

Like proponents of the bills addressed above, supporters of Amendment A believe legalization – and subsequent taxation – would generate tens of millions of dollars annually for the state, stabilizing and strengthening the economy. Amendment A advocates also contend that adult use legalization would alleviate the law enforcement and the judicial system, allowing the focus to be directed at more serious public safety issues.

Opponents of Amendment A emphasize the misguided tropes that legalizing cannabis use will decrease a user's productivity, resulting in increased worker and unemployment compensation claims and higher employment attrition. Opponents also voiced skepticism over the ability of cannabis taxation to provide any state revenue.

## **II. Local California Trends**

The “green wave” is demonstrated by voter approval of local ballot initiatives in jurisdictions that have historically rejected or severely restricted cannabis-based businesses. Some jurisdictions are finally allowing cannabis-based businesses to operate, while others are expanding the types of operations permitted within city limits. Even jurisdictions that currently prohibit cannabis operations are beginning to authorize business taxes on these operations before they are legally allowed – thus signaling the expectation that these operations will continue to expand throughout the state as pro-cannabis legislation gains traction. Examples of these initiatives are described below.

### **A. Encinitas – [Measure H](#)**

*Narrow Margin Pass (51%)* – Measure H would allow cannabis-related business operations within the City, including but not limited to retail, cultivation, and manufacturing. Encinitas does not currently allow cannabis retail dispensary stores to operate within city limits. As recently as 2014, a similar measure to permit dispensaries was unsuccessful.<sup>[5]</sup> Although the Encinitas City Council opted not to take a position on the controversial Measure H,<sup>[6]</sup> the 2020 election results indicate that Encinitas voters are warming up to cannabis-based operations.

### **B. Carson – [Carson Cannabis Regulation Measure](#)**

*Expected to Pass* – Carson's Cannabis Regulation Measure (“Measure”) repeals the existing prohibition on medical and recreational dispensaries within the City of Carson, and establishes permitting procedures for cannabis operations within city limits. The Measure authorizes up to four commercial cannabis operation centers, which may include any type of cannabis operations permitted by state law, such as cultivation, manufacturing, testing, distribution, and medical or recreational retail operations. Although the Measure is a path forward for additional facilities within



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the City, only four operation centers are permitted at any one time. This number may only be increased by voter initiative. For this reason, the Measure is not expected to result in immediate opportunities for additional facilities. However, it indicates a measured, but increasing acceptance of cannabis-based businesses amongst Carson residents.

### **C. Costa Mesa – Measure Q**

*Expected to Pass* – Measure Q would allow for two retail cannabis storefronts within a limited area of the city, aptly named the “Green Zone,” and establishes a retail tax of 4% to 7%. Existing municipal law allows permitting, manufacturing, testing and distribution, but retail operations are prohibited. Existing municipal law also requires voter approval of any amendments to municipal cannabis laws regarding dispensaries, cultivation, and the boundaries of the Green Zone. Measure Q softens this requirement to a 2/3 vote of City Councilmembers – facilitating faster amendments to local cannabis laws.

### **D. Calabasas – Measure C**

*Expected to Pass* – Measure C authorizes a business tax of up to 10% on cannabis-based businesses. Existing municipal law prohibits all commercial cannabis businesses from operating within city limits. Measure C establishes a tax structure for cannabis-based businesses in the event that they are allowed in Calabasas in the future. Measure C does not amend the existing ban on commercial cannabis businesses. Although Calabasas may not be ready to allow cannabis-based businesses to operate within city limits, the Measure C ballot results indicate voter anticipation of cannabis-friendly state legislation in the near future.

### **E. Hawthorne – Measure CC**

*Likely to Pass* – All cannabis businesses are currently prohibited in the City of Hawthorne. Measure CC authorizes a business tax of up to 5% on cannabis-based businesses in the event they are eventually allowed within the city. The City of Hawthorne recently hired a consultant to evaluate the fiscal impacts resulting from a single retail operation within the City. The study estimates that each retail facility could generate between \$85,718 and \$175,494 in net general fund revenue, indicating a general interest in exploring the possibility of future retail operations in Hawthorne.

As demonstrated in the jurisdictions above, on the whole, California’s 2020 local ballot initiatives are trending towards expansion of cannabis-based businesses in jurisdictions where they are currently allowed, and planning taxation schedules in jurisdictions that have not yet authorized these operations within city limits. The common thread tying these initiatives together is a growing acceptance of cannabis-based businesses throughout California, as it has throughout the country, and the shared anticipation that this trend will continue.

## **III. Reasons for Federal Optimism**

The ballot initiatives detailed above clearly showcase that support for adult use cannabis legalization extends across the nation, blurring both geographic and party lines. Moving cannabis legalization out from the shadows into more mainstream America, will likely increase the federal government to pass major federal cannabis reform in the very near future.

At this juncture, it appears a new administration will be in the White House as of January 2021. During the campaign season, President-elect Joe Biden and Vice President-elect Kamala Harris have

voiced support for adult use cannabis decriminalization, moderate rescheduling and federal medicinal legalization, allowing states to set their own laws and expunging prior cannabis convictions, but have stopped short at officially endorsing federal legalization. This position is a striking difference in the position held by the Trump administration during the prior 4 years.

News of the election of the Biden/Harris ticket caused cannabis stocks to soar last week, indicating that industry leaders believe this win is a critical step to federal authorization of cannabis in the U.S. market through decriminalization and descheduling.

Additionally, following the Presidential Election, House Majority Leader Steny Hoyer indicated House members will vote on The Marijuana, Opportunities, Reinvestment, and Expungement ([“MORE” Act](#)),<sup>[7]</sup> legislation rescheduling marijuana from the Controlled Substances Act, in December. Per Representative Hoyer, members of Congress were initially scheduled to vote on the measure in September, but the vote was [postponed](#) due to ongoing negotiations between the House and Senate related to an additional COVID economic stimulus package.

## IV. Conclusion

During one of the most contentious elections in recent history, state and local trends highlight greater acceptance of cannabis at the electorate level regardless of party affiliation or historic positions on cannabis use – indicating that where cannabis policies are concerned, there is indeed common ground. With substantive reason to believe these trends will continue and that a new, cannabis-friendly federal administration is imminent, there is much to be thankful for in the cannabis industry following the November 2020 election. Suffice it to say, the “green wave” is here to stay.

## FOOTNOTES

[1] [Butler v. Watson](#) (2020-M-01199).

[2] [Wrong for Montana v. Montana](#) (BDV-2020-1854).

[3] [Wrong for Montana v. Fox](#) (OP 20-0513)

[4] Critics of A.B. 1897 believe the bill did not go far enough by failing to provide for the expungement of convictions and simultaneously going too far by downgrading the charge for possession of psilocybin (“magic”) mushrooms.

[5] Barbara Henry, The San Diego Union Tribune, *Encinitas Council Takes Stand Against Measure F* (Sept. 11, 2014) available [here](#).

[6] Barbara Henry, The San Diego Union Tribune, *Encinitas Council Won’t Take A Position on Cannabis Initiative* (June 19, 2020) available [here](#).

[7] A prior article on the MORE Act can be found [here](#).

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