

**STATE OF MICHIGAN
IN THE SUPREME COURT**

Appeal from the Court of Appeals
Swartzle, P.J., and Redford and Feeney, JJ.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

Supreme Court No. 167895
Court of Appeals No.: 366148
Montcalm CC No. 22-029309-AR

DANIELLE HEAVEN-LEAH HESS,

Defendant-Appellant.

**AMICUS CURIAE BRIEF OF
THE AMERICAN CIVIL LIBERTIES UNION FUND OF MICHIGAN**

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QUESTION PRESENTED

1. Does MCL 771.3(1)(a), which makes it a mandatory condition of probation that “the probationer shall not violate any criminal law of . . . the United States,” require trial courts to bar probationers from engaging in marijuana use that is otherwise permitted by the Michigan Regulation and Taxation of Marihuana Act (MRTMA), MCL 333.27951 *et seq*?

Appellant’s answer: No.

Appellee’s answer: Yes.

Court of Appeals’ answer: Yes.

Amicus’ answer: No. The Court of Appeals answer to the contrary violates both the text of MRTMA and separation of powers principles requiring courts to faithfully implement laws initiated by Michigan’s voters.

2. If MCL 771.3(1)(a) does not automatically prohibit all probationers from MRTMA-compliant marijuana use and possession, under what circumstances may a trial court prohibit MRTMA-compliant marijuana use as a discretionary condition of probation under MCL 771.3(3)?

Appellant’s answer: Only marijuana use or possession that does not comply with MRTMA may be prohibited.

Appellee’s answer: Unclear.

Court of Appeals’ answer: Did not address.

Amicus’ answer: Only marijuana use or possession that does not comply with MRTMA may be prohibited.

STATEMENT OF INTEREST OF AMICUS CURIAE¹

The American Civil Liberties Union of Michigan (ACLU) is the Michigan affiliate of a nationwide nonpartisan organization of approximately 1.7 million members dedicated to protecting the liberties and civil rights guaranteed by the United States Constitution. The ACLU of Michigan regularly and frequently participates in litigation in state and federal courts seeking to protect the constitutional rights of people in Michigan. The ACLU has long been committed to protecting the privacy rights of all people, including individuals enmeshed in the criminal legal system. The ACLU has litigated extensively, as well as filed amicus briefs, in state and federal cases pertaining to the civil rights violations that have resulted from America's War on Drugs. See, e.g., *People v. Armstrong*, __ Mich __; __ NW3d __; 2025 WL 994370 (2025); *People v Bowden*, 344 Mich App 171; 999 NW2d 80 (2022); *Ter Beek v City of Wyoming*, 495 Mich 1; 846 NW2d 531 (2014); *People v Kolanek*, 491 Mich 382; 817 NW2d 528 (2012); *Braska v Challenge Mfg Co*, 307 Mich App 340; 861 NW2d 289 (2014); *People v Redden*, 290 Mich App 65; 799 NW2d 184 (2010); *Casias v Wal-Mart Stores, Inc*, 695 F3d 428 (CA 6, 2012); *Marchwinski v Howard*, 113 F Supp 2d 1134 (ED Mich, 2000). The ACLU has also repeatedly litigated and filed amicus briefs in cases relating to the separation of powers under the Michigan constitution, including the right of the People of Michigan to enact and amend legislation and constitutional amendments. See, e.g., *Mothering Justice v Attorney General*, __ Mich __; __ NW3d __; 2024 WL 3610042 (2024); *People v Johnson*, 511 Mich 1047; 992 NW2d 247 (2023).

¹ Pursuant to MCR 7.312(H)(5), amicus states that no counsel for a party authored this brief in whole or in part, no such counsel or a party made a monetary contribution intended to fund the preparation or submission of this brief, and no person other than the amicus curiae, its members, or their counsel made any such monetary contribution.

INTRODUCTION

In 2018, over 2.3 million Michiganders voted to enact the Michigan Regulation and Taxation of Marijuana Act (“MRTMA”), MCL 333.27951 *et seq.*, which allowed the personal use and possession of marijuana under Michigan law and, as particularly relevant here, expressly prohibits any “penalty in any manner” for acts MRTMA authorized. *Id.* MRTMA also expressly provides that it prevails over “[a]ll other laws inconsistent with this act.” In enacting this sweeping law, Michiganders joined a venerable tradition of voters—in Michigan and across the country—who have used direct democracy measures like Article 2, § 9 of the Michigan Constitution of 1963 to change laws that elected leaders have declined to amend.

As Appellant persuasively argues, the plain text of MRTMA renders the probation condition prohibiting Appellant from consuming marijuana (and her punishment for violating that condition) unlawful. Amicus submits this brief to expand upon how the lower court’s rejection of this clear textual argument also implicates the separation of powers scheme set forth in the Michigan Constitution, in which the people are not only sovereign, but are also a co-equal branch of government authorized to enact legislation that may not be stymied by the other branches of government. The lower court’s holding here usurped the will of Michigan voters and trampled on the longstanding tradition of direct democracy in Michigan in the process.

Amicus also demonstrates how the Court of Appeals’ holding would entrench the racial disparities that have been a trademark of the failed War on Drugs for decades—a war that Michigan’s voters emphatically sought to end. For many voters, the decision to adopt MRTMA certainly was a deliberate and conscious rejection of the racist intent and results of that failed war. Just like the political branches, Michigan’s courts “may not evade, parry, or ‘thwart’ the people’s Article 2, § 9 powers.” *Mothering Justice*, __ Mich at __; slip op at 12, quoting *Mich Farm Bureau*

v Secretary of State, 379 Mich 387, 393-395; 151 NW2d 797 (1967). Because that is precisely what the lower courts did, this Court should reverse.

FACTUAL FINDINGS AND PROCEDURAL HISTORY

The facts are accurately described in Ms. Hess's supplemental briefs. Def-Appellant Br, pp 9-12. Of particular relevance here, Ms. Hess pleaded guilty to retail fraud in the 3rd degree, a misdemeanor, and there was no evidence that the crime in any way involved the use of marijuana. Appellant Appendix 7a. Nonetheless, when sentencing Ms. Hess, the district court imposed probation conditions that prohibited her from possessing or using marijuana and further required Ms. Hess to submit to searches or testing (at her own expense) for marijuana upon orders from her probation officer or a police agency. Appellant Appendix 7a, 8a. During her probation period, Ms. Hess tested positive for marijuana twice and suffered a variety of punishments as a result: for the first violation, the court lengthened her probation by six months and sentenced her to additional community service; for her second, the court revoked her Holmes Youthful Trainee Act (HYTA) status and sentenced her to serve 10 days in jail. Appellant Appendix 50a, 81a. The district court and circuit court both denied Ms. Hess's motion to amend the terms of her probation on the grounds that the prohibitions on her use and possession of marijuana were unlawful under MRTMA. Appellant Appendix 22, 28a.

On appeal to the Court of Appeals, the court did not directly address whether the marijuana-specific probation conditions for which Ms. Hess was punished violated MRTMA. Instead, it held that Ms. Hess's possession of marijuana violated MCL 771.3(1)(a), a mandatory term of probation that prohibits all probationers from violating any law of "this state, the United States, or another state" *People v Hess*, __ Mich App __; __ NW3d __ (2024) (Docket No. 366148); slip op at 5-6. According to the Court of Appeals, because possession of marijuana is illegal at the federal

level under the federal Controlled Substances Act, Ms. Hess violated this term of probation and therefore could be punished, notwithstanding any language to the contrary in MRTMA. *Id.* at 6.

ARGUMENT

Article 2, § 9 and, more broadly, the separation of powers scheme in the Michigan Constitution of 1963 prohibit Michigan courts from barring people on probation from engaging in MRTMA-compliant marijuana use or possession. Over the span of a century, various iterations of the Michigan Constitution have made clear that the People are the ultimate sovereign in Michigan. Michigan voters are directly empowered to circumvent the legislature and propose laws on their own, and they often do so when, as here, the legislature fails to respond to their will. The laws enacted by the People are insulated from dilution or amendment by the legislature and executive branch absent legislative supermajorities. MRTMA, which was enacted pursuant to Article 2, § 9, must be understood and interpreted in light of both the constitutional provision through which it was enacted and Michigan's steadfast commitment to direct democracy. It also must be understood through the lens of the electorate's clearly expressed purpose, which was to prohibit all possible forms of punishment of Michiganders for engaging in activities authorized by MRTMA.

Accordingly, the Court of Appeals erred in finding that the district court could revoke Ms. Hess's Holmes Youthful Trainee Act (HYTA) status and sentence her to jail time for her MRTMA-complaint marijuana use. The plain text of MRTMA prohibits the state from imposing any punishment on Michiganders who engage in MRTMA-compliant marijuana use. MCL 333.27955(2) provides that MRTMA-compliant marijuana use or possession "is not unlawful, is not an offense . . . [and] is not grounds for arrest, prosecution, or *penalty in any manner*." (emphasis added). Further, MCL 333.27954(5) states that "All other laws inconsistent with this act do not apply to conduct that is permitted by this act." Read together, it is clear that in enacting MRTMA,

Michigan voters sought to ensure that MRTMA would prevail where a conflict arose between another statute and MRTMA. Here, there is just such a conflict between MRTMA and the probation statute, MCL 771.3(1)(a): MRTMA authorizes recreational use and possession of small amounts of marijuana in Michigan, while MCL 771.3(1)(a) prohibits probationers from violating federal laws, such as the federal Controlled Substances Act (CSA) that makes marijuana illegal at the federal level. But states are not required to enforce the federal prohibition on marijuana. Both the CSA and the United States Constitution permit states to determine their own marijuana policies, and Michiganders voted to authorize marijuana use under MRTMA. Thus, the conflicting probation statute that incorporates the federal prohibition on marijuana must give way to MRTMA.

Finally, this Court has emphasized that “the intent of the electors governs the interpretation of voter-initiated statutes.” *Ter Beek v City of Wyoming*, 495 Mich 1, 8; 846 NW2d 531 (2014) quoting *People v Bylsma*, 493 Mich 17, 26; 825 NW2d 543 (2012). Michigan voters made clear in the text of MRTMA that it should be read expansively, and with the transparent goal of allowing broad MRTMA-compliant marijuana use. They did so in obvious reaction to the harmful effects of the War on Drugs, which disproportionately ensnared people of color in Michigan in the criminal legal system. The Court of Appeals failed to give proper accord to the voters’ intent as expressed through the text of MRTMA.

I. The Michigan Electorate Has Exercised Its Constitutional Prerogative to Make Clear that State Officials in Michigan May Not Punish Marijuana Possession and Consumption that Otherwise Complies with MRTMA.

A. Separation of Powers Principles Demand that Popularly Initiated Laws Be Liberally Construed by Courts.

The Michigan voters who approved MRTMA in 2018 participated in a rich tradition of direct democracy that dates back over a century in Michigan and across the country. The founding principle—indeed, the first sentence—of Michigan’s Constitution is that “[a]ll political power is

inherent in the people.” Const 1963, art 1, § 1. Pursuant to that core principle that the people are the ultimate sovereign, Michigan’s constitution contains “a series of powers that the people have reserved to themselves from the legislature.” *League of Women Voters of Mich v Secretary of State*, 508 Mich 520, 536; 975 NW2d 840 (2022) (emphasis omitted).

Article 2, § 9 of the Constitution of 1963, pursuant to which MRTMA was enacted, gives Michigan voters the right to adopt legislation by initiative. Direct democracy measures like the initiative power found in the Michigan Constitution have long served as the people’s “correctives to misrepresentation” in the elected branches of state governments. Bulman-Pozen & Seifter, *The Democracy Principle in State Constitutions*, 119 Mich L Rev 859, 884 (2021). South Dakota adopted the first statewide initiative and referendum processes in 1898; in the 25 years that followed, eighteen other states, including Michigan, followed suit. Jordan, *Constitutional Constraints on Initiative and Referendum*, 32 Vanderbilt L Rev 1143, 1144 (1979). The rapid adoption of the initiative power in the Progressive Era was a “symbol of [voters’] disillusionment with representative institutions” and the electorate’s desire “to bypass unrepresentative, irresponsible, and often corrupt [state] legislatures.” Michael, *Judicial Review of Initiative Constitutional Amendments*, 14 UC Davis L Rev 461, 461 n 1 (1980-1981), quoting Wheeler, *Changing the Fundamental Law*, Salient Issues of Constitutional Revision 56 (1961).

Michigan voters, too, felt antipathy towards their state legislature. Indeed, a delegate to Michigan’s constitutional convention of 1907 lamented that “[t]he history of legislatures for the recent past decades is prolific with disregard for the prayers of the people.” *The Democracy Principle*, 119 Mich L Rev at 884. It was against this backdrop that Michiganders adopted Article 5, § 38 of the 1908 Constitution, the precursor to what is now Article 2, § 9 of Michigan’s 1963 Constitution. As originally enacted, Article 5, § 38 did not allow the Michigan electorate to directly

introduce bills; rather, it allowed the Legislature to place bills on the ballot for a popular vote without giving the people a way to demand that it do so. *Mothering Justice*, __ Mich at __; slip op at 17; 2024 WL 3610042 at *8. This original version of Article 5, § 38 was a compromise that was “strongly opposed” by convention delegates who believed that the electorate should be able to directly introduce legislation. *Journal of the Constitutional Convention of 1907-1908*, p 446. Further, the initial version of Article 5, § 38 was framed as a “legislative veto” at the constitutional convention and structured such that *after* the legislature passed a bill and the governor signed it, the bill would then go to the people for a vote. Michigan, *Report of the Committee on Submission and Address to the People* (1907), p 24 (submitting the proposed revision of the present constitution of Michigan)²; see also Fairlie, *The Michigan Constitutional Convention of 1907-1908*, 2 Am Pol Sci R 443, 446 (1908).³

Just five years after enacting Article 5, § 38, Michiganders decided that it did not go far enough. Amidst “sheer desperation” that the Legislature was still not responding to their needs, Michigan voters amended the constitution again in 1913 to empower themselves to directly propose, enact, or reject laws. *Hamilton v Deland*, 227 Mich 111, 130; 198 NW 843 (1924). In doing so, the electorate “claw[ed] back from the Legislature the right of the people themselves to initiate legislation[.]” *Mothering Justice*, __ Mich at __; slip op at 17; WL 3610042 at *8, quoting *League of Women Voters of Michigan*, 508 Mich at 538.

The initiative process thus creates “[] an express limitation on the authority of the Legislature,” *League of Women Voters*, 508 Mich at 536, quoting *Woodland v Mich Citizens Lobby*, 423 Mich 188, 214; 378 NW2d 337 (1985), and naturally also constrains the other branches of

² Available at <<https://babel.hathitrust.org/cgi/pt?id=mdp.39015030506458&seq=26>> (last accessed September 19, 2025).

³ Available at <<https://www.jstor.org/stable/1944826?seq=1>> (last accessed September 19, 2025).

government. Michigan voters gave themselves a direct check by which they could “bypass public officials who [are] deemed not responsive to the concerns of a majority of voters.” *Schuette v Coalition to Defend Affirmative Action*, 572 US 291, 311; 134 S Ct 1623; 188 L Ed 2d 613 (2014). The public’s rights of popular democracy “can be interfered with neither by the legislature, the courts, nor the officers charged with any duty in the premises.” *League of Women Voters*, 508 Mich at 549, quoting *Scott v Secretary of State*, 202 Mich 629, 643; 168 NW 709 (1918).

That is why laws enacted through the initiative process cannot be amended or repealed through the usual legislative process. Unless explicitly permitted by an initiative, voter-enacted legislation can only be amended or repealed through a direct vote by the electorate or by a three-fourths super-majority in both legislative chambers. Const 1963, art 2, § 9. It is also why the governor has no veto power over legislation that voters have enacted by way of the initiative process. *Id.*

This sacrosanct role that the people, as the ultimate sovereign, have reserved to themselves also bears on the interpretation of popularly enacted laws, as “popular sovereignty is the animating, fundamental principle of state constitutions.” *The Democracy Principle*, 119 Mich L Rev at 864. The text of initiated legislation must be interpreted to “give effect to the intent of the electorate” by giving words “their ordinary and plain meaning as they would have been understood by the electorate.” *People v Kolanek*, 491 Mich 382, 397; 817 NW2d 528 (2012). And “[i]nitiative provisions are liberally construed to effectuate their purposes and facilitate rather than hamper the exercise of reserved rights by the people.” *Welch Foods, Inc v Attorney General*, 213 Mich App 459, 461; 540 NW2d 693 (1995). The interpretation of a voter initiative therefore “requires a special emphasis on the duty of judicial restraint” and the court’s “interpretation is ultimately drawn from the words of the amendment and our understanding of the purpose the voters sought

to effectuate by ratification.” *Schmidt v Dep’t of Ed*, 441 Mich 236, 241–242; 490 NW2d 584 (1992). The need for judicial restraint as courts interpret voter-initiated legislation is particularly acute because, unlike the elected legislature, the people cannot easily iterate with the judiciary by tweaking initiated laws in response to narrow judicial constructions of those laws.

B. In Enacting MRTMA’s Expansive Language, Michigan’s Voters Made Clear Their Intent to Prohibit Punishment of Any Kind for Authorized Activities.

Marijuana is popular with Michiganders. For context, since the ratification of the Constitution of 1963, voters have used the initiative process to propose fourteen laws. Eight of the initiative laws have been adopted, and six have been rejected.⁴ The two most recent initiative laws⁵—in 2008 and 2018—were about marijuana: the Michigan Medical Marijuana Act (MMMA) on the ballot in 2008 asked voters to decide whether they wanted to authorize medical marijuana use under state law, and MRTMA, on the ballot in 2018, sought to authorize recreational marijuana possession, consumption, and distribution under state law. Michigan voters adopted both initiatives by large margins: the MMMA and MRTMA, were approved by 63% and 55.89%

⁴ Michigan Department of State, Bureau of Elections, *Initiatives and Referendums Under the Constitution of the State of Michigan* (August 2024), available at <https://www.michigan.gov/-/media/Project/Websites/sos/01mcalpine/Initia_Ref_Under_Consti_1208.pdf?rev=f34c2eb67c8f47378feba2c9119b240d> (accessed September 10, 2025).

⁵ Here, the phrase “initiative laws” refers to voter-initiated legislation as set forth in Article 2, § 9, as opposed to the voter-initiated constitutional amendments set forth in Article 2, § 2 of the Constitution of 1963.

of Michigan voters, respectively.⁶ In the 2018 election, MRTMA received more votes than every single elected official on the ballot.⁷

Michigan voters chose to legalize marijuana by initiative because the other branches of government were out of step with the public on the issue. In 2018, when MRTMA was on the ballot, national polling showed that 65% of Americans believed that smoking marijuana was morally acceptable. Jones, *Most in U.S. Say Consuming Alcohol, Marijuana Morally OK*, Gallup Politics (June 4, 2018). By contrast, leadership in the Michigan House of Representatives indicated that among most legislators in the House majority, “there was very little support for [legalizing marijuana].” Beggin, *Michigan Republicans Won’t Pass Marijuana Bill. Voters to Decide in November*, Bridge Michigan (June 5, 2018).

Even after the MMMA’s overwhelming enactment by Michigan voters, local governments continued to demonstrate resistance to the voters’ desire to decriminalize medical marijuana and protect Michiganders who used or acquired medical marijuana in ways consistent with state law. See, e.g., *Ter Beek*, 595 Mich at 5–6 (city adopted ordinance in violation of the MMMA). Prosecutors and courts, too, struggled to internalize the impact the MMMA had on longstanding assumptions and understandings about the criminalization of marijuana. See, e.g., *People v Koon*, 494 Mich 1, 832 NW2d 724 (2013) (Court of Appeals fails to recognize that MMMA supersedes criminal provision); *People v Thue*, 336 Mich App 35, 38; 969 NW2d 346 (2021) (district court not only imposed probation condition prohibiting use of medical marijuana, but did so under a

⁶ Michigan Department of State, Bureau of Elections, 2008 Election Results <<https://mvic.sos.state.mi.us/votehistory/Index?type=C&electionDate=11-5-2024>> [Select 11/4/2008 STATE GENERAL from drop-down menu] (accessed September 4, 2025).

⁷ Michigan Department of State, Bureau of Elections, 2018 Election Results, <<https://mvic.sos.state.mi.us/votehistory/Index?type=C&electionDate=11-5-2024>> [Select 11/6/2018 STATE GENERAL from drop-down menu] (accessed August 10, 2025).

“directive” from the circuit court that no probationer be allowed to use medical marijuana); *People v Latz*, 318 Mich App 380, 388 n 1; 898 NW2d 229 (2016) (O’CONNELL, J dissenting) (noting that “six district courts and three circuit courts” had authorized prosecutions of people transporting marijuana legally grown under the MMMA, convictions the *Latz* majority held to be impermissible). Thus, it is unsurprising that when presented with the opportunity to adopt MRTMA after hundreds of thousands of Michigan voters had signed the petition to place it on the ballot, the Michigan legislature declined. Beggin, *Michigan Republicans Won’t Pass Marijuana Bill. Voters to Decide in November*, Bridge Michigan (June 5, 2018).

MRTMA’s proposal and adoption encapsulate why the initiative process was created. At its core, Article 2, § 9 was enacted by voters “to make government more responsive to the people,” and ensure that voter-initiated laws are largely shielded from being undermined by the other branches of government. *Mothering Justice*, ___ Mich at ___; slip op at 16; 2024 WL 3610042 at *7. In the face of resistance from the other branches of government to the will of the sovereign people as expressed in the MMMA, Michigan voters took matters into their own hands and advanced the law further on their own, creating, through MRTMA, “[a] sea change regarding the legality of marijuana.” *People v Armstrong*, __ Mich at __; slip op at 10; 2025 WL 994370 at *5.

Tellingly, MRTMA not only repeats expansive language in the MMMA that made clear the voters’ intent to reject the vestiges of prohibition; it goes further. MRTMA expressly states that any behaviors authorized by MRTMA not only are “not unlawful” but also “are not an offense, are not grounds for seizing or forfeiting property, are not grounds for arrest, prosecution, or penalty in any manner, are not grounds for search or inspection, and are not grounds to deny any other right or privilege.” MCL 333.27955(1); see Def-Appellant Br, p 26 (comparing this language with MMMA’s slightly less expansive language). MRTMA also expressly instructs courts that this strict

prohibition on punishing MRTMA-authorized activity was to prevail “[n]otwithstanding any other law.” *Id.* Further, even though, as noted above, courts should typically interpret voter-initiated laws liberally to accomplish their purposes, *Schmidt*, 411 Mich at 241–242, the voters made this instruction explicit. MRTMA plainly states that it must “be broadly construed to accomplish its intent as stated in section 2 of this Act.” MCL 333.27967. In turn, section 2 establishes that MRTMA’s intent is to “make marihuana legal under state and local law for adults 21 years of age or older” and to “prevent arrest and penalty for personal possession and cultivation of marihuana by adults 21 years of age or older.” MCL 333.27952. Where, as here, the voters have adopted initiative legislation with explicit and expansive language, even going so far as to instruct that the language be broadly construed, courts cannot undercut the will of voters and dilute the statute’s meaning by paring back or resisting the text.

C. The Court of Appeals’ Decision Authorizes Punishment of All Probationers and Criminal Defendants for MRTMA-Protected Activity, Contravening MRTMA’s Plain Text and this Court’s Precedent, and Defying the Expressed Intent of the Voters.

The Court of Appeals’ decision cannot be squared with MRTMA’s ban on punishing Michiganders engaged in MRTMA-authorized activity.

The Court of Appeals upheld the trial court’s punishment of Ms. Hess, a probationer, on the grounds that by consuming marijuana she violated the federal Controlled Substances Act (CSA). Violation of the CSA, the Court of Appeals held, thus violated a general term of probation the legislature has mandated in all cases to prohibit probationers from violating “any criminal law of . . . the United States” *Hess*, __ Mich App at __; slip op at 6; 2024 WL 4575803 at *5, quoting MCL 771.3(1)(a). In so holding, the Court of Appeals not only held that *Ms. Hess* is barred from possessing or consuming marijuana while on probation (and can be punished for doing so);

it also concluded that *every probationer in Michigan*⁸ can be so punished no matter how minor the underlying offense. The logic of the Court of Appeals’ decision would extend much further than that, however. It would also potentially encompass every Michigander *charged* with any crime: MCR 6.106(C) provides that a mandatory term of pretrial release for every defendant is that they “will not commit any crime while released.”

The conclusions that hundreds of thousands of Michiganders accused of crimes or on probation are prohibited under Michigan law from possessing and using marijuana, and can be punished by courts for doing so, is hopelessly inconsistent with the plain text of MRTMA. As noted above, MRTMA makes clear that MRTMA-authorized possession and use of marijuana may not constitute “grounds for arrest, prosecution, or penalty *in any manner*” nor may it be the “grounds to deny any other right or privilege.” MCL 333.27955(1) (emphasis added). There is, quite simply, no plausible argument that imposing adverse legal consequences on probationers or individuals on bond for use of marijuana is not some manner of penalty or the denial of a right or privilege. See Appellants Supp Br, p 16.

Tellingly, the Court of Appeals did not suggest otherwise. Its opinion takes no issue whatsoever with the fact that the revocation of Ms. Hess’s probation and HYTA status is a

⁸ In 2023, it was estimated that Michigan had approximately 111,000 individuals on probation at the time snapshotted. See Wang, *Punishment Beyond Prisons 2023: Incarceration and Supervision by State*, Prison Policy Initiative (May 2023) <<https://www.prisonpolicy.org/reports/correctionalcontrol2023.html>> (accessed September 17, 2023). Because this is a snapshot of a particular time, it presumably undercounts the number of probationers who cycle through the criminal justice system in a given year, many of whom may serve less than a year of probation. Michigan has the sixth highest percentage, among all states, of its population subject to some form of community supervision. Michigan Joint Task Force on Jail and Pretrial Incarceration, *Report and Recommendations* (January 10, 2020), p 14, available at <<https://www.courts.michigan.gov/48e562/siteassets/committees,-boards-special-initiatives/jails/jails-task-force-final-report-and-recommendations.pdf>>, citing U.S. Department of Justice, Bureau of Justice Statistics, *Correctional Populations in the United States, 2015* (2016).

punishment and denial of a privilege. The Court of Appeals did cite *People v Lopez-Hernandez*, __ Mich App __; __ NW3d __; 2024 WL 3380805 (2024) in support of its holding. For its part, the only thing *Lopez-Hernandez* has to say on this question is that a defendant punished for violating a probation condition involving marijuana use is “not penalized *simply* for recreational marijuana use” because “the probation condition prohibiting him from using marijuana was a penalty imposed for violating [a criminal statute].” *Lopez-Hernandez*, __ Mich App at __; slip op at 4; 2024 WL 3380805, at *4 (emphasis added). But *Lopez-Hernandez*’s use of the critical word “simply” speaks volumes; it demonstrates the obvious truth that in addition to being a punishment for prior conduct, any punishment for violating a probation condition (i.e., a probation condition that prohibits the use or possession of marijuana), is also, in significant part, a punishment for the conduct that the probation condition prohibits (i.e., a punishment for MRTMA-authorized use of marijuana). See, e.g., *People v Ford*, 410 Mich 902, 902; 301 NW2d 831 (1981) (explaining that when sentencing for a probation violation, a court must give “consideration . . . to the nature of the probation violation and the present circumstances of the defendant”) (emphasis added); see also *People v Peters*, 191 Mich App 159, 167; 477 NW2d 479 (1991) (when sentencing for probation violations, courts must look both to the sentencing guidelines for the original offense *and* to “the facts and circumstances surrounding the probation violation”) (emphasis added).

MRTMA prohibits punishment “in any manner” for MRTMA-authorized activity—this prohibition extends to probation or bond violations that punish MRTMA-authorized marijuana use. And, as discussed *supra*, both MRTMA itself and general principles of interpretation of voter-enacted legislation demand that MRTMA be “broadly construed,” MCL 333.27967, to “prevent arrest and penalty for personal possession and cultivation of marihuana by adults 21 years of age or older.” MCL 333.27952. Once it is recognized that punishment for violating a probation

condition (such as punishment for violating a probation condition that prohibits the use of marijuana) is punishment, at least in part, for the conduct that violates the condition (the conduct, here, being MRTMA-authorized use of marijuana), the only possible argument that could support the Court of Appeals' reasoning would be if the statute imposing the mandatory probation condition superseded MRTMA.

But the opposite is true under both the plain text of MTRMA and well-established precedent. MRTMA itself makes clear that its terms apply "[n]otwithstanding any other law," MCL 333.27955(1), and that "[a]ll other laws inconsistent with this act do not apply to conduct that is permitted by this act," MCL 333.27954(5). Thus, MRTMA expressly supersedes more general laws, not vice versa.

Although this conclusion is compelled by MRTMA's supersession clause, it would also follow from a simple application of the general/specific canon of statutory interpretation. See Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* (St. Paul: Thomson/West, 2012), § 28, p 183 (describing "[t]he most common example . . . and the easiest to deal with" of the canon being "a general prohibition that is contradicted by a specific permission"). Here, MCL 771.3(1)(a) is the broadest of all possible "general prohibitions," prohibiting, essentially, any violation of any criminal law, state or federal. By contrast, MRTMA provides a very "specific permission" for a clear and specified range of conduct involving marijuana. *Reading Law*, p 183. MRTMA, therefore, plainly supersedes MCL 771.3(1)(a).

Indeed, this Court has already held that the MMMA, which has a *less* extensive supersession clause than MRTMA, supersedes other statutes where the statutes irreconcilably conflict. In *People v Koon*, 494 Mich at 7-8, this Court held that the MMMA supersedes the Michigan Vehicle Code, which generally prohibits a person from driving with any amount of a

Schedule 1 controlled substance under the federal Controlled Substances Act (CSA), including marijuana, in their system. This Court noted that the Michigan Vehicle Code's general prohibition on driving with any amount of a controlled substance in one's system "inescapably conflicts" with the MMMA's grant of immunity from prosecution to registered medical marijuana patients who are not under the influence of marijuana while driving but do drive while internally possessing marijuana (or having some marijuana in their system). *Id.* at 7. And in light of the MMMA's supersession provision, which states that "all other acts and parts of acts inconsistent with [the MMMA] do not apply to the use of medical marijuana[,]" MCL 333.26427(b)(4) and (e), this Court found that the conflicting Michigan Vehicle Act provisions were superseded, as applied to marijuana, by the MMMA. *Koon*, 494 Mich at 7.

Likewise, in *Ter Beek*, 495 Mich at 19, this Court explained that "[t]he required analysis" on an issue of the MMMA's interaction with inconsistent local laws "is not complex." In *Ter Beek*, a City of Wyoming ordinance that prohibited a registered medical marijuana patient from growing, using, and possessing medical marijuana was superseded by Section 4(a) the MMMA. *Id.* at 19. As with MRTMA, § 4(a) of the MMMA provides that registered medical marijuana patients "shall not be subject to arrest, prosecution, or penalty in any manner . . . for the medical use of marihuana" when used in accordance with the statute. *Ter Beek*, 495 Mich at 8-9, quoting MCL 333.26424(a). Because the ordinance imposed civil sanctions on people for engaging in MMMA-compliant marijuana use, this Court determined that the ordinance "unambiguously" penalized registered medical marijuana patients in contravention of the MMMA's provision that expressly prohibits imposing "a penalty in any manner" on registered patients. *Id.* at 19-20. Accordingly, as in *Koon*, this Court concluded that the MMMA prevailed over the conflicting ordinance. *Id.*

Furthermore, *Ter Beek* also rejected an attempt by the City of Wyoming to preserve its otherwise superseded ordinance by relying upon the federal CSA. In *Ter Beek*, the ordinance in question did not *directly* prohibit MMMA-authorized activity; rather, it did so by prohibiting, via its zoning ordinance, any use of land that is “contrary to federal law,” and making violations of the zoning ordinance a civil infraction. *Id.* at 6, quoting City of Wyoming Code of Ordinances § 90-66. Wyoming argued that the CSA preempted the MMMA, and thus saved Wyoming’s ordinance, because the ordinance simply prohibited locally what the CSA prohibits federally. This Court squarely rejected that argument, holding both that the CSA did not preempt the MMMA, and that the MMMA prevailed over the local ordinance. *Ter Beek*, 495 Mich at 10.

The exact same logic applies to any possible suggestion that Section 771.3(1)(a)’s general reference to violations of federal law somehow preempts or prevails over MRTMA. There has been no intervening federal change since *Ter Beek*. The anti-commandeering doctrine and Tenth Amendment still prohibit the federal government from forcing states to enforce federal law. *See Printz v United States*, 521 US 898; 117 S Ct 2365; 138 L Ed 2d 914 (1997); *New York v United States*, 505 US 144; 112 S Ct 2408; 120 L Ed 2d 120 (1992). The CSA still provides that it should not “be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State.” 21 USC 903. The Department of Justice still allows states to decide whether they want to prosecute people for their personal use of marijuana, as it must, and as it has for over a decade.⁹ The only change in Michigan

⁹ Cole, *Memorandum for All United States Attorneys: Guidance Regarding Marijuana Enforcement* (August 29, 2013), available at <<https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>> (accessed September 4, 2025).

has been that voters enacted MRTMA, making clear to both Michigan and federal officials that they do not want any Michigan authorities to enforce the federal prohibition on marijuana, and that they want to allow Michiganders to engage in broad MRTMA-compliant use of marijuana under state law.

This is true for both probationers like Ms. Hess, whose underlying offense was not related to marijuana, and probationers like Mr. Lopez-Hernandez, for whom marijuana did play a role in the underlying offense. As discussed *supra*, MRTMA's supersession clause is expansive, sweeping more broadly than even the MMMA. At issue in both *Hess* and *Lopez-Hernandez* is not whether people can use marijuana in a manner that does not comply with MRTMA, but rather, whether courts can restrict the ability of *all* people on probation to engage in lawful use of marijuana. No one contests that Mr. Lopez-Hernandez engaged in marijuana use that does not comply with MRTMA; however, that should have no bearing on whether, as a condition of probation, a court can bar him from subsequent MRTMA-compliant marijuana use. While this may feel to some lower courts like an unfamiliar imposition on their judicial discretion, that imposition must be understood in light of the background against which voters were reacting—namely, the decades-long, failed “War on Drugs” that became a major driver of mass incarceration in Michigan and the United States. As discussed in detail in the next section, honoring the voters’ intent in enacting MRTMA directly responds to and alleviates generations of distortions and racial disparities created by the War on Drugs, whereas the Court of Appeals’ holding below would retrench them.

In short, the Court of Appeals erred in holding that the CSA authorizes state officials—including those in the judiciary—to enforce federal drug policy that is contrary to state law. In doing so, it improperly stymied the will of Michigan voters who exercised their constitutional prerogative to broadly authorize recreational marijuana use for *all* Michiganders.

II. Prohibiting Probationers from Engaging in MRTMA-Compliant Marijuana Use Will Reinforce and Further Entrench Racially Disparate Drug Enforcement Across Michigan, Consistent with Disparities Present Across the Country.

As described above, the Court of Appeals erred in ignoring the express intent of Michigan voters in enacting MRTMA “to prevent arrest and penalty for personal possession and cultivation of marihuana by adults 21 years of age or older . . . [t]o the fullest extent possible. . . .” MCL 333.27952. Michigan voters made clear that not only do they support the legalization of marijuana, but they also repudiate the failed War on Drugs policies that, for decades, caused the arrest, incarceration, and continued entanglement with (and surveillance by) the criminal justice system of far too many Michiganders for marijuana-based offenses.

Many of the Michiganders who approved MRTMA certainly did so with full awareness of the deeply troubling reality about how drug enforcement has disparately impacted Black and Brown communities. In failing to give due attention to the forceful text enacted by the voters, the Court of Appeals’ holding would entrench and replicate those disparities in multiple ways.

First, by essentially incorporating the CSA into MCL 771.3(1)(a) (and, by implication, MCR 6.106(C)), the Court of Appeals codifies the federal War on Drugs into Michigan law, replete with the deliberate and implicit racism that has pervaded that war for decades. Studies show that the War on Drugs created a massive uptick in racial profiling in traffic stops through nationwide drug enforcement and interdiction programs.¹⁰ The War on Drugs began in 1971 and involved a

¹⁰ See, e.g., Alexander, *The New Jim Crow* (New York: The New Press, 2010), p 60 (“Nothing has contributed more to the systematic mass incarceration of people of color in the United States than the War on Drugs.”); National Association of Criminal Defense Lawyers, *Race and the War on Drugs* <<https://www.nacdl.org/Content/Race-and-the-War-on-Drugs>> (accessed September 10, 2025) (“At every stage of the criminal justice process—from the geographical distribution of police, to stops and searches, to arrest, to pretrial detention, to sentencing, to post-conviction, to collateral consequences—communities of color, especially Black communities, disproportionately bear the brunt of the War on Drugs.”); Cummings & Ramirez, *The Racist Roots of the War on Drugs and the Myth of Equal Protection for People of Color*, 44 U Ark Little Rock L Rev 453, 459 (2022) (“Upon close inspection, evidence indicates that the War on Drugs was never actually

concerted effort to label drug use as the United States’ “problem number one,” which led to the rapid and vast expansion of federal support for local drug enforcement and, consequently, a sharp increase in the number of people policed and incarcerated for using, possessing, or distributing drugs.¹¹ The passage of the Anti-Drug Abuse Act in 1986 encouraged the use of punitive criminal sanctions to reduce drug use and distribution, which shifted law enforcement’s focus to mid-and-low level dealers and drug users.¹² National drug enforcement strategy thus sought to ensure that all drug users and distributors—whatever the scale—faced risk of criminal sanction, and

about stemming the use of drugs in the United States, nor about stanching the flow of drugs into the country. Rather, the WOD originated with the intent to criminalize communities of color and marginalize the voting power of political enemies.”); See Baum, *Legalize It All*, Harper’s Magazine (April 2016) <<https://harpers.org/archive/2016/04/legalize-it-all/>> (accessed September 10, 2025) (quoting John Ehrlichman, Nixon’s close advisor during the development of the War on Drugs, claiming that the Nixon campaign in 1968, and the Nixon White House after that, sought to get the public to associate hippies and Black people with drugs and then criminalize both heavily to arrest their leaders, raid their homes, break up their meetings, and vilify them on the evening news.); Tonry, *Race and the War on Drugs*, 1994 U Chi Legal F 25, 27 (1994) (“The War on Drugs foreseeably and unnecessarily blighted the lives of hundreds of thousands of young, disadvantaged Americans, especially black Americans, and undermined decades of effort to improve the life chances of members of the urban black underclass.”).

¹¹ Bay, *Traveling Black: A Story of Race and Resistance* (Cambridge: Harvard University Press, 2021), p 322.

¹² See NCJRS Virtual Library, *Anti-Drug Abuse Act of 1986, Annotation and Abstract* <<https://www.ojp.gov/ncjrs/virtual-library/abstracts/anti-drug-abuse-act-1986>> (accessed September 10, 2025); Office of Justice Programs, *Office of National Drug Control Policy Agency Accomplishments and Significant Actions January 1993 – December 2000*, p 11, available at <<https://www.ojp.gov/pdffiles1/Digitization/185694NCJRS.pdf>> (The Act “enhanced penalties for drug trafficking . . . created a new offense with an enhanced penalty for using a juvenile to commit a drug offense, amended the forfeiture laws, proscribed trafficking in controlled substance ‘analogues’ . . . created money laundering offenses, and proscribed use of interstate commerce to distribute drug paraphernalia.”)

“[e]ffective street-level enforcement mean[t] dramatically increasing the number of drug offenders arrested.”¹³

Black people have been much more likely to be arrested for drug crimes than other groups, even when drug usage rates are similar. The disproportionate policing of Black people, driven in large part by the War on Drugs, has been particularly stark with respect to marijuana. Despite similar rates of marijuana possession and use for Black and white people, both nationwide and in Michigan, Black people are 3.6 times more likely than white people to be arrested for marijuana possession.¹⁴ Additionally, a 2019 data analysis conducted by the University of Michigan using data from the Michigan State Court Administrative Office’s Judicial Data Warehouse found that in Michigan, despite being 14.1% of the population in 2018, Black people comprised 28.6% of people convicted of marijuana-related offenses.¹⁵

The racial disparities in marijuana-related policing endure even in states that have authorized or decriminalized marijuana,¹⁶ despite the fact that legalization and decriminalization efforts have reduced the number of arrests for marijuana possession overall.¹⁷ These results

¹³ See The White House, *National Drug Control Strategy* (September 1989), pp 18-24, available at <<https://www.ojp.gov/pdffiles1/ondcp/119466.pdf>> (accessed September 10, 2025).

¹⁴ ACLU, *Extreme Racial Disparities Persist in Marijuana Arrests* <<https://graphics.aclu.org/marijuana-arrest-report/>> (accessed September 10, 2025).

¹⁵ Papp et al, *Trends in Michigan Marijuana Offenses* (July 2019), available at <https://cjars.org/wp-content/uploads/CJARS_MI_Marijuana.pdf> (accessed September 10, 2025).

¹⁶ ACLU, *A Tale of Two Countries: Racially Targeted Arrests in the Era of Marijuana Reform* (2020), p 7 <https://www.aclu.org/wp-content/uploads/publications/marijuanareport_03232021.pdf> (accessed September 10, 2025).

¹⁷ *Id.* at 34.

“indicate that neither decriminalization nor legalization of marijuana possession alone eliminates” the racially disparate policing of marijuana, revealing how deeply the War on Drugs has entrenched racial profiling in modern drug enforcement.¹⁸ In light of the systemic, racially disparate targeting of Black marijuana users, even in legalized states like Michigan, allowing courts to bar MRTMA-compliant marijuana use for probationers—violations of which can result in revocation of probation and incarceration—risks worsening these trends.

Second, because Black people are arrested and convicted at higher rates than other groups, automatically prohibiting all probationers (and, by implication, everyone charged with a crime and released under standard conditions) from engaging in MRTMA-authorized activity will necessarily result in disproportionately banning Black people from authorized marijuana use. Despite being roughly 13% of the U.S. population, nationally, Black people comprise a full third of the people incarcerated in state and federal prisons.¹⁹ The demographic disparities are even more lopsided in Michigan: Black Michiganders comprise 36% of the state’s prison population and 51% of the state’s jail population.²⁰

¹⁸ *Id.* at 35.

¹⁹ Carson, *Prisoners in 2022 - Statistical Tables*, U.S. Department of Justice Bureau of Justice Statistics (November 2023), available at <<https://bjs.ojp.gov/document/p22st.pdf>> (accessed September 10, 2025).

²⁰ Prison Policy Initiative, *Michigan Profile* <<https://www.prisonpolicy.org/profiles/MI.html>> (accessed August 21, 2025); see also Michigan Joint Task Force on Jail and Pretrial Incarceration, *Report and Recommendations* (January 10, 2020), p 8, (documenting that in a cross section of Michigan jurisdictions studied, Black people consisted of 6% of the total population and 29% of total jail admissions), available at <<https://www.courts.michigan.gov/48e562/siteassets/committees,-boards-special-initiatives/jails/jails-task-force-final-report-and-recommendations.pdf>> (accessed September 10, 2025).

Arrest rates across the state demonstrate the racial disparities in policing. The Detroit Police Department made 10,628 arrests in 2018, and Black people were arrested at a rate 1.65 times higher than white people.²¹ In Farmington Hills, where the city's population was 18.2% Black in 2022, 40.37% of citations issued by the city's police that year were given to Black drivers.²² A recent study of the Ferndale Police Department's actions at Ferndale's border with Detroit shows that in the first 10 months of 2021, 86% of arrests and 84% of tickets issued by Ferndale police were to Black people, despite Ferndale's population being only 6.3% Black.²³ Dearborn police similarly arrest Black people and issue citations to them at significantly disproportionate rates: Black people make up about 3 to 4 percent of Dearborn's population but comprised 58.6% of the arrests and received 47.7% of the citations issued in 2019.²⁴ Like Ferndale, many of these arrests and citations occurred in areas near Dearborn's border with Detroit,

²¹ Vera, *What Policing Costs: A Look at Spending in America's Biggest Cities, Detroit: MI*, <<https://www.vera.org/publications/what-policing-costs-in-americas-biggest-cities/detroit-mi>> (accessed September 10, 2025).

²² Shaykhet, *Farmington Hills Police Pull Over Black Drivers at Higher Rates, Data Shows*, WXYZ Detroit (July 1, 2022) <<https://www.wxyz.com/news/farmington-hills-police-disproportionately-pull-over-black-drivers-data-shows>> (accessed September 10, 2025).

²³ Samra, *Report Reveals Large Racial Disparity Among Ferndale Tickets and Arrests Involving Black Drivers*, CBSNews (August 17, 2023) <<https://www.cbsnews.com/detroit/news/report-reveals-large-racial-disparity-among-ferndale-tickets-and-arrests-involving-black-drivers/>> (citing CAIR Michigan, *Lifting the Veil of Racial Profiling* (2023), available at <<https://cairmichigan.org/wp-content/uploads/2023/08/Lifting-the-Veil-on-Racial-Profiling-in-Ferndale-FINAL-EDITS.pdf>>) (accessed September 10, 2025).

²⁴ Warikoo, *Dearborn Police Arresting Black People Disproportionately, Sparking Complaints*, Detroit Free Press (February 20, 2021) <<https://www.freep.com/story/news/local/michigan/2021/02/20/data-show-dearborn-police-arrests-disproportionate-black-people/6558379002/>> (accessed September 10, 2025).

with 2019 data showing that approximately three of every four arrests in Dearborn were by its “Border Crimes Initiative Team.”²⁵

As the stark disparities in policing demonstrate, it is indisputable that automatically subjecting justice-involved Michiganders to conditions prohibiting MRTMA-compliant use or possession of marijuana while on probation or on bail awaiting trial will result in the disproportionate denial of privileges to Black Michiganders.

Third, the racial disparities in policing in Michigan are not cabined to arrests and convictions: people of color, and especially Black people, are also disproportionately targeted by law enforcement for low-suspicion or pretextual searches and seizures. That means that among the population of probationers or people charged with crimes (groups already disparately composed of people of color, as just explained), probationers of color are more likely to actually be apprehended and punished for MRTMA-compliant behavior under the Court of Appeals’ rule.

In 2023, the U.S. Department of Justice recognized that “[s]tudies from across the country have found that overreliance on pretextual stops leads to racial disparities”²⁶ Racially disparate policing of Black motorists is particularly widespread. Across the country, Black people and other people of color are already more likely to be stopped by police officers.²⁷ And, once

²⁵Accountability For Dearborn, *2010 – 2020 Citations Data Analysis* (2021), archived at <<https://web.archive.org/web/20250325184603/https://www.accountabilityfordearborn.org/policing-in-dearborn/dearborn-police-data/citations>> (accessed September 10, 2025).

²⁶ U.S. Department of Justice, *Investigation of the Louisville Metro Police Department and Louisville Metro Government* (March 8, 2023) p 51, available at <<https://www.justice.gov/crt/case-document/file/1572951/download>> (accessed September 10, 2025).

²⁷ See, e.g., Harcourt & Meares, *Randomization and the Fourth Amendment*, 78 U Chi L Rev 809, 854–859 (2011) (citing numerous studies that have demonstrated evidence of racial profiling); see also Inspector General, LAPD, *Review of Stops Conducted by the Los Angeles Police Department* (October 27, 2020), available at <www.oig.lacity.org/_files/ugd/b2dd23_d3e88738022547acb55f3ad9dd7a1dcb.pdf> (accessed

stopped, a 2020 study of 100 million traffic stops nationwide found that Black and Latine drivers were searched based on less evidence than white drivers.²⁸ Similarly, a U.S. Department of Justice analysis of 2020 national data revealed that a higher percentage of Black people were stopped in *Terry* street stops than white people.²⁹ This phenomenon of racial disparities in street and pedestrian stops has been widely documented.³⁰

September 10, 2025); Pierson, et al, *A Large-Scale Analysis of Racial Disparities in Police Stops Across the United States*, *Nature Human Behavior* (2020), p 736, available at <<https://5harad.com/papers/100M-stops.pdf>> (accessed September 10, 2025) (concluding Black drivers were less likely to be stopped after sunset, when skin color is more difficult to discern, suggesting bias in stop decisions); LaFraniere & Lehren, *The Disproportionate Risks of Driving While Black*, *New York Times* (October 24, 2015) <<https://www.nytimes.com/2015/10/25/us/racial-disparity-traffic-stops-driving-black.html>>; Harris, *Profiles in Injustice* (New York: The New Press, 2003) (discussing lawsuits in New Jersey and Maryland that found irrefutable statistical evidence of racial profiling in traffic stops). See also Schwartz & Jahn, *Mapping Fatal Police Violence Across U.S. Metropolitan Areas: Overall Rates and Racial/Ethnic Inequities* (2020) <<https://pmc.ncbi.nlm.nih.gov/articles/PMC7313728/pdf/pone.0229686.pdf>> (showing racial disparities in searches and uses of force as well).

²⁸ *A Large-Scale Analysis of Racial Disparities in Police Stops Across the United States*, p 736 (2020).

²⁹ U.S. Department of Justice, *Contacts Between Police and the Public*, 2020 (rev ed, 2024), p 6, available at <<https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/cbpp20.pdf>>.

³⁰ See, e.g. Rudovsky & Harris, *Terry Stops-and-Frisks: The Troubling Use of Common Sense in a World of Empirical Data*, 79 *Ohio State L J* 501 (2018). Further, and to provide a specific example, findings from a 2014 ACLU of Massachusetts report on stops and frisks conducted by the Boston Police Department were stark enough to lead the Massachusetts Supreme Court to question whether a Black person's flight from a police officer was enough to establish reasonable suspicion of criminal activity or merely a rational reaction to racially disparate policing. See *Commonwealth v Warren*, 475 Mass 530, 539; 58 NE 3d 333 (Mass 2016) ("Given this reality [of being disparately targeted for stop and frisks] for [B]lack males in the city of Boston, a judge should, in appropriate cases, consider the report's findings in weighing flight as a factor in the reasonable suspicion calculus.").

Michigan parallels these nationwide trends. Where data has been collected in Michigan, Black drivers and other drivers of color are almost twice as likely to be pulled over by police than white drivers.³¹ In Grand Rapids, an analysis of over 400 incident reports from 2011 and 2012 revealed that “75% of the officer-initiated encounters described involved a [B]lack subject while only 15% involved white subjects, despite the 2010 Grand Rapids census showing that the city's population as 21% [B]lack and 65% white.” *Harrison v Vanderkooi*, unpublished per curiam opinion of the Court of Appeals, issued May 23, 2017 (Docket No. 330537), pp 10-11. See also *Johnson v Vanderkooi*, 509 Mich 524; 983 NW 2d 779 (2022) (not reaching the racial disparity issues, but holding that it is unconstitutional to subject people to mobile fingerprints during investigatory *Terry* stops). A 2021 study commissioned by the Michigan State Police (MSP) revealed that across Michigan, MSP stopped Black drivers at disproportionately high rates.³² In some Michigan cities, nearly 77% of all traffic stops in 2020 involved a Black driver (compared to 22% statewide), and Black drivers were significantly more likely to be stopped in 8 out of the 11 cities studied.³³

³¹ Chowning, Keith & Leonard, *Highway Robbery: How Metro Detroit Cops & Court Steer Segregation and Drive Incarceration*, (March 2020) p 23, available at <<https://detroitjustice.org/highwayrobbery/>> (accessed September 10, 2025).

³² Wolfe, Carter, & Knode, *Michigan State Police Traffic Stop External Benchmarking: A Final Report on Racial and Ethnic Disparities* (2021), available at <https://cj.msu.edu/_assets/pdfs/mjsc/MJSC-MSP-FinalReport.pdf> (accessed September 10, 2025). See also Burns, *Michigan State Police Were Sent Into Cash-Strapped Towns to Help. Beatings, Complaints, and Lawsuits Followed*, MLive (February 22, 2024) <<https://www.mlive.com/news/2024/02/michigan-state-police-were-sent-into-cash-strapped-towns-to-help-beatings-complaints-and-lawsuits-followed.html>> (accessed September 10, 2025).

³³ Clarke & Woods, *Study finds Michigan State Police Disproportionately Stop, Search Black Drivers* (January 12, 2022) <<https://www.clickondetroit.com/news/local/2022/01/12/study-finds->

The same 2021 study found that, after being stopped by police, Black drivers were significantly more likely to be searched than white drivers, even after accounting for relevant predictors of post-stop outcomes such as the reason for the stop and the crime rate of the stop location.³⁴ A subsequent December 2023 traffic enforcement assessment commissioned by MSP indicated that “going beyond the stop,” i.e., officers taking any investigative action supplemental to the specific reason for which the traffic stop was initiated, “frequently occurs in predominantly minority communities.”³⁵ This practice was recently the subject of at least one federal lawsuit on equal protection grounds after MSP troopers questioned and searched a Black couple during a traffic stop that lasted ninety minutes and resulted in no contraband being found and no ticket or warning being issued.³⁶

When this firmly established trend of low-suspicion or pretextual searches is combined with the Court of Appeals’ erroneous interpretation of MRTMA, the result will inevitably be a perpetuation of racial disparities. Black and Brown defendants—already disproportionately enmeshed in the criminal legal system—will be more likely to be searched and found to be

michigan-state-police-disproportionally-stop-search-black-drivers/> (accessed September 10, 2025); see also *Traffic Stop External Benchmarking*, p 12.

³⁴ *Traffic Stop External Benchmarking*, pp 11, 13

³⁵ Christoff et al, *Final Report: Michigan State Police Traffic Enforcement: An Assessment of Policies, Training, and Operations 2023* (December 2023), available at <https://www.michigan.gov/msp/-/media/Project/Websites/msp/reports/MSP_Traffic_Enforcement_Assessment.pdf>.

³⁶ ACLU, *ACLU: MSP-Commissioned Report Confirms that Practices, Policies, and Inadequate Trooper Training Have Likely Contributed to Racial Disparities* (January 18, 2024) <<https://www.aclumich.org/en/press-releases/aclu-msp-commissioned-report-confirms-practices-policies-and-inadequate-trooper>> (accessed September 17, 2025); ACLU, *ACLU of Michigan Sues Michigan State Police for Racial Profiling and Unlawful Search and Seizure During Traffic Stop* (June 23, 2021) <<https://www.aclu.org/press-releases/aclu-michigan-sues-michigan-state-police-racial-profiling-and-unlawful-search-and>> (accessed September 17, 2025).

possessing or using marijuana in ways authorized by MRTMA, particularly given how MRTMA has relaxed cultural norms throughout Michigan regarding the use of marijuana. The result will be yet more racially disparate punishment for conduct that Michigan's voters have already emphatically stated must not be the subject of "penalty in any manner." MCL 333.27955(1).

CONCLUSION

Empowered by the Michigan Constitution's direct democracy provisions, millions of people in Michigan chose to authorize recreational marijuana, stepping in after the elected branches of government declined to act. The Michigan voters who enacted MRTMA ushered in a new paradigm in the state's approach to marijuana and provided explicit, expansive protections for Michiganders who partake. These protections are unqualified by an individual's status as a probationer. For the foregoing reasons, amicus respectfully urges this Court, in accordance with both the plain text of MRTMA and the will of Michigan's electorate, to reverse the Court of Appeals and rule that the lower courts erred in prohibiting individuals on probation from engaging in MRTMA-compliant marijuana use.

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Respectfully submitted,

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**WORD COUNT STATEMENT AND ATTESTATION REGARDING AMICI'S TAX
EXEMPT STATUS**

This brief contains 8,486 words in the sections covered by MCR 7.212(C)(6)-(8). This amicus brief is also filed on behalf of a tax exempt organization under section 501(c)(3) of the Internal Revenue Code. MCR 7.312(H)(2)(f).

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