

TESTIMONY FROM FORMER MADISON COUNTY COMMON
PLEAS COURT JUDGE ROBERT D. NICHOLS
Before the Ohio Senate General Government Committee

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Thank you, **Chairman Rulli**, Ranking Member **DeMora** and members of the **Senate General Government Committee** for the opportunity to speak with you today.

I am Bob Nichols, a mostly retired Common Pleas Judge from Madison County, appointed to the bench in 1970, and I have retained my qualifications to serve as an active duty judge for 54 consecutive years.

For the last 20 years, Ohioans have wrestled over the issue of whether and under what circumstances marijuana could or should be legalized. That was partially resolved on November 7th with passage of Issue II.

The issue of legalization got to the ballot through a citizens' initiative petition, a mechanism that provides Ohio voters a vehicle to advance legislation that the General Assembly has ignored.

Issue II was written for, promoted and supported by the Coalition to Regulate Marijuana like Alcohol. As passed on November 7th, it was composed of two distinct legislative constructs: 1) a minority set aside in licensing to sell marijuana and receive benefits from taxes generated by the sales; and 2) the legalization and regulation of the cultivation and sale of marijuana.

It is clear that the Coalition understood that its proposed legislation created a minority preference when it created a set aside that favored specified minorities in granting licenses to sell marijuana.

Without legal authority or supporting evidence, the coalition inserted into the Initiative a finding that Ohio had a compelling state interest to

redress past and present minority discrimination in its enforcement of criminalized pot laws. The remedy employed to redress that alleged discrimination was to award licenses to minorities, disadvantaged insular classes, and persons previously charged, convicted or incarcerated for violation criminal marijuana laws. By rules of construction and in the totality of the wording of the initiative, it is a minority preference.

All racial classifications are constitutionally suspect. They are circumscribed by strict scrutiny. And after the *Harvard* and *North Carolina* decisions from last summer, it is difficult to see what classifications survive strict scrutiny which requires a strong basis in evidence of a compelling state interest employing a narrowly tailored remedy specific to that interest.

Since 1989, and *Richmond v. Croson*, the Constitution has required legislative findings that singularly or together provide in Ohio the General Assembly or its competent delegate with a “strong basis in evidence for its conclusion that it had a compelling interest to remediate identifiable minority discrimination. That established a burden of proof that must be met before any kind of remediation can be considered.

The General Assembly has not conducted an evidentiary hearing regarding whether there was a compelling state interest to remedy discrimination in the enforcement of marijuana laws. Without a hearing there are no factual findings or conclusions of law. It is not that the Coalition failed in its burden of proof; there was no proof. In the absence of proof, there is nothing in the public record to support the compelling interest that the proponents claim, other than their opinion.

And to my knowledge, there is no binding legal precedent or controlling legislative fact finding in Ohio of past or present minority discrimination in its enforcement of criminalized pot laws.

This failure to have a factual basis to support racial preferences is fatal to the constitutionality of the Initiative. Although the Initiative contains a savings clause that protects the legalization functions from the set-

asides, a cursory look at the entire statutory scheme suggests that the two functions are inextricably intertwined to such a degree that the regulatory and licensing functions cannot survive separation.

The unconstitutionality of the minority preference within the Initiative should be sufficient to dismantle it. But there are countless additional reasons for the general assembly to do whatever is necessary to reduce the societal harm that will be caused by the regulation and legalization of pot.

It was reported last week that Republicans recognized “...what the people said — they want legalized marijuana, so we’re not going to change that.” I too accept that, but I want one last opportunity to reduce the scope of that legalization.

Proponents of legalization claim that health and addiction concerns raised are simply “scare tactics.” For reasons not articulated during the campaign, we, as Ohioans, have ample reason to be scared.

The use, abuse, dependence and addiction to pot is *the*—not just *a*-- but *the* gateway to hard drugs. The clever sophistry utilized as a proponents’ talking point tells us that only a small percentage of people who use pot jump to hard drugs. What the National Institute of Drug Abuse tells us, however, is that a staggering 70% of hard drug users began their descent into drug dependency on pot.

The University of Akron did a cost/benefit analysis of the legalization of pot and concluded there would be a \$444M benefit to the state, but it “did not take...into account the gateway drug effect [of pot] in regard to emergency department visits from drugs other than marijuana.”

That, my friends, makes pot the gateway to hard drugs; it has a recognized clinical term: cross-sensitization.

As an aside, there is no moral equivalency between tax revenue and drug abuse, addiction, debilitation and death from the use of pot and drugs to which it offers a gateway.

The Coalition tells us that issues of health, safety and welfare will be overcome if Ohio regulates marijuana legalization just like alcohol.

In 2021, there were: 43,000 highway deaths; 45,000 gun deaths, of which 25,000 were by suicide; 107,000 were drug related deaths; and 108,000 alcohol related deaths. Pot and alcohol are similar in the number of deaths caused.

But alcoholism is a protracted, progressive disease with years of available exit ramps before it is fatal. Pot is a gateway to hard drugs and fentanyl, the use of which produces instant death and an exit ramp to ashes in an urn.

By making marijuana more accessible and removing all legal and societal hinderances to abstaining from the drug, legalization will simply increase usage among the most vulnerable, not those under 21 but those under 26, and drug deaths will eventually blow by alcohol deaths.

And we should be even more scared of pot because of its deleterious effect of the juvenile brain:

To the immature brain [26 and under], pot can cause, with reasonable medical certainty among a segment of that population, reduced neuro-cognitive performance, reduced macro and micro structural brain development; it alters brain function; it reduces executive functioning: planning, working memory, impulse control; it increases novelty seeking, risk taking and shifts to peer-based interaction. 30% of users develop marijuana disorder, and users under 18 are four to seven times more likely to develop it than those over 18. It is not just like alcohol.

Marijuana use is correlated to schizophrenia, depression, and anxiety, where they intersect; equally important, pot use by those 26 and under

results in a higher likelihood of school drop out and lower IQ in adulthood.

It is immoral to ignore the morbidity of pot and its gateway to mortality resulting from the use of fentanyl.

Regulation of the cultivation of pot will control the quality of the product for the benefit of those who are afraid of bootleg pot. But for those who harbor no fear, bootleg pot will be as potent as the black-market demands. Young people binge drink to get drunk and often choose higher proof liquors to achieve that state more quickly; the same will find illegal pot that gets them higher faster than OTC pot.

Legalizing and regulating has not reduced the black market where untaxed pot remains cheaper than state pot. In California last year, legal sales of pot brought in \$5.4B subject to state taxes; untaxed illegal sales were estimated at \$8.1B.

Ohio cannot incarcerate its way out of the drug crisis, but it can't treat its way out either. No silver bullet exists to alter the trajectory of overdose deaths, although education, treatment, deterrence, and coercion are all part of the mix. And if we don't find a criminological, pathological, sociological and penological balance to address this, the tragedies associated with drugs of abuse will overwhelm us.

And in the midst of this all-encompassing drug epidemic in Ohio, we are legalizing the gateway which will simply exacerbate the death and destruction associated with our embedded drug culture.

I understand that the voters have spoken, but the public was given no guidance on the constitutionality of minority preferences or explained the details of the effect that pot has on the juvenile brain, the very population that embraces its use now.

If the General Assembly is going to consider the scope of legalization anew, I suggest that it proceed with all reasonable caution. At this time, I would be happy to answer any questions the committee may have.