STATE OF MICHIGAN
IN THE MICHIGAN SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff/Appellee.	COA No. 350386
v	Circuit Case No. 18-007432-FH
MICHAEL DEAN DUPRE, Defendant/Appellant.	MSC No. 162596

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BRIEF OF AMICUS CURIAE NATIONAL COLLEGE FOR DUI DEFENSE AND CRIMINAL DEFENSE ATTORNEYS OF MICHIGAN IN SUPPORT OF GRANTING LEAVE TO APPEAL

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ISSUE PRESENTED

I. DID THE COURT OF APPEALS MAKE AN ERROR OF LAW BY ENGAGING IN JUDICIAL CONSTRUCTION OF THE MICHIGAN MEDICAL MARIJUANA ACT (MMMA) WHEN: (1) AN UNAMBIGUOUS VOTER-INITIATED STATUTE MADE CLEAR THAT THE (MMMA) SUPERCEDED THE MICHIGAN VEHICLE CODE; (2) THE LEGISLATURE PASSED ON ITS OPPORTUNITY TO AMEND THE LANGUAGE BEFORE THE VOTE ON NOVEMBER 4, 2008; AND (3) THEN PASSED AN AMENDMENT TO THE ACT IN 2012 WITHOUT ADDING IMPAIRED OPERATION OF A VEHICLE TO THE LIST OF UNPROTECTED CONDUCT BY MMMA PATIENTS?

Court of Appeals answered:	"No"
Appellee answered:	"No"
Appellant will answer:	"Yes"
Amici NCDD/CDAM answer:	"Yes"

II. DOES CURRENT SCIENCE SUPPORT THAT THE VOTERS WERE RIGHT IN 2008 TO LEAVE IMPAIRED OPERATION OF A VEHICLE OFF THE LIST OF UNPROTECTED CONDUCT BY MMMA PATIENTS?

Appellee answered:	"No"
Appellant will answer:	"Yes"
Amici NCDD/CDAM answer:	"Yes"

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INTRODUCTION

The National College for DUI Defense (NCDD) and the Criminal Defense Attorneys of Michigan (CDAM) support Petitioner-Dupre's Application for Leave to Appeal. This Court is requested to grant the application and ultimately reverse the Court of Appeals for the reasons stated below. Also, while not addressed by the Court of Appeals opinion, the Michigan Regulation and Taxation of Marijuana Act (MRTMA) (MCL 333.27954) contains a clause similar to the MMMA "superiority" clause and also uses only the phrase "under the influence" as conduct of operating a motor vehicle that is not protected from arrest or prosecution under MRTMA.

If the Court of Appeals opinion is allowed to stand unamended, the likelihood of history repeating itself with a likely challenge to the MRTMA and the non-use of operating while visibly impaired is likely to be addressed by the Court of Appeals in the near future and again brought before this Court. Thus, the similarity between the laws is an additional basis for this Court to grant leave to appeal. Clarity by this Court addressing the underlying argument that would appear to apply equally to the MMMA and MRTMA would provide further clarity to the courts of this State.

The Court of Appeals erred when it injected its construction of the MMMA and found that the drafters of the MMMA "did not mean" to include the operation of a motor vehicle while impaired as conduct that was enveloped in the MMMA's protections from arrest and prosecution. The reason is because, by leaving the term "impaired" out of the Act in favor of "Under the Influence" the drafters knew exactly what they were doing: drawing the line between legal and illegal conduct in the MMMA at getting behind the wheel when the subject's use of marijuana "substantially and materially" affected their ability to operate that vehicle.

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The 94th Michigan legislature was in session when Initiated Law 1 of 2008 was certified and sent to it. The Michigan legislature has the duty under the constitution to review an initiated petition once it is certified and presented and, within 40 days, either enact that statute, reject it or let the proposed statute go to the full electorate on the ballot. This is not just a power that is conferred by the legislature – it is a duty found in the constitution:

> **"Initiative; duty of legislature, referendum.** Any law proposed by initiative petition shall be either enacted or rejected by the legislature without change or amendment within 40 session days from the time such petition is received by the legislature. If any law proposed by such petition shall be enacted by the legislature it shall be subject to referendum, as hereinafter provided.
>
> **Legislative rejection of initiated measure; different measure; submission to people.** If the law so proposed is not enacted by the legislature within the 40 days, the state officer authorized by law shall submit such proposed law to the people for approval or rejection at the next general election. The legislature may reject any measure so proposed by initiative petition and propose a different measure upon the same subject by a yea and nay vote upon separate roll calls, and in such event both measures shall be submitted by such state officer to the electors for approval or rejection at the next general election." MCLS Art II, Sec 9.

The legislature has had a roadmap for how to amend an initiative petition and that roadmap was over 40 years old as of the 2007-2008 legislative session, by virtue of an opinion by the Michigan Attorney General. *1964 Mich. Op. Att'y Gen. 4304* states that an initiative petition can be amended by the legislature by a simple majority vote, but it must still formally reject the petition first. Further, the Michigan Attorney General also advised the legislature in an opinion 12 years later, that the legislature had the choice of "living with" the requirement of 3/4ths majority to amend post-hoc a

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voter-initiated statute or it may reject the petition and then amend it by simple majority. *1976 Mich. Op. Att'y Gen. 4932.*

The initiative petition as a mechanism for the electorate to attempt to legislate for itself directly, was not an unknown to the 94th Michigan Legislature in 2008 when it was faced with the options for addressing the certified petition language against the backdrop of a raging debate about legalizing the medical use of marijuana. This court previously held that the filing of an initiative petition does not suspend the legislature's power. 25 years before Prop 1 of 2008 (the MMMA) was before the legislature in petition form, this court had addressed another controversial subject in the nadir of the energy crisis. In *In re Proposals D&H,* 417 Mich 409 (1983) this court ruled that the legislature was not precluded from enacting a competing statute to an initiative petition which would literally compete with the citizen-initiated statute on the ballot.

The opponents of allowing the competition on the November ballot argued that voter confusion would spawn from the language differences between Proposals D & H. The court said:

> "However, the political foundation for initiative and referendum is the assumption that a free people act rationally in the exercise of their power,"

As to the debate about whether the non-legislator drafters of Prop. 1 of 2008 knew what they were doing or not when they included "under the influence" and excluded "impaired," in (7) of the Act, this court in *Proposals D&H* said:

> "The people are presumed to know what they want, to have understood the proposition submitted to them in all of its implications, and by their approval vote to have determined that this [proposal] is for the public good and expresses the free opinion of a sovereign people." *In re Proposals D&H* at 423 (citing *Keenan v Price*, 68 Idaho 423, 434 (1948)).

The Court of Appeals erred when it injected its construction of the MMMA and found that the drafters of the MMMA "did not mean" to include the operation of a motor vehicle while impaired as conduct that was enveloped in the MMMA's protections from arrest and prosecution. The reason is because, by leaving the term "impaired" out of the Act in favor of "Under the

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Influence" the drafters knew exactly what they were doing: drawing the line between legal and illegal conduct in the MMMA at getting behind the wheel when the subject's use of marijuana "substantially and materially" affected their ability to operate that vehicle, which is the definition of under the influence in Michigan law since 1976 by virtue of *People v Lambert*, as recognized by this Court in *People v Koon*, 494 Mich 1 (2013). It is the definition found at Michigan Standard Criminal Jury Instruction 15.3 (Crim JI 15.3) and has been used to instruct juries for decades. It is no secret and the 94th Michigan Legislature is presumed to have known that.

Furthermore, it is well-established that "constitutional initiative and referendum provisions, by which the people reserve to themselves a direct legislative voice, should be liberally construed to effectuate their purposes." *League of Women Voters v Secretary of State*, 331 Mich App 156, 177 (2020) (citing *Bingo Coal for Charity – Not Politics v Bd of State Canvassers*, 215 Mich App 405, 410; 546 NW2d 637 (1996)). This principle goes back fifty years to this Court's decision in *Kuhn v Department of Treasury*, 384 Mich 378, 183 NW2d 796 (1971) and the legislature is presumed to know such.

The Appellant Therefore has a Valid Point that is Conceded

In this matter, the Court of Appeals in this case stated, "We concur with the state's argument that if the Legislature had enacted the MMMA, defendant's argument would have substantial merit because the legislature would have presumably known and adopted the motor vehicle code's definition of 'under the influence.'" *People v Dupre,* 2020 MichApp LEXIS 8465, Slip Op pp 10-11 (Dec 17, 2020). The Court of Appeals went on to say, "the Legislature did not approve the MMMA; the electorate did." *Dupre,* at 11. For the reasons stated above, that observation is not a complete one because of the constitutional duty that the legislature had when the MMMA was before it in its initiative form. The Legislature *did* approve the MMMA because it took a pass on its well-established duty to amend it under Art II, Sec 9 of the Michigan Constitution.

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It should not be lost that among the primary organizers of the MMMA petition was the Michigan Coalition for Compassionate Care (MCCC), which included citizen-lawyers as well. It also included citizen-legislators: the chair was Dianne Byrum, a former state representative, state senator and the current chairperson of the Michigan State University (MSU) Board of Trustees.

The constitutional duty is laid at the feet of the legislature. When the legislature passes, rejects or amends legislation, it is presumed to know the import of the use of certain words or phrases – or lack thereof. An example of this principle is *People v Williams,* 491 Mich 164 (2012). In *Williams,* Mr. Williams appealed his armed robbery conviction because MCL 750.530 had been amended to remove the requirement of a completed larceny. He argued that his plea colloquy did not support the conviction and his motion to withdraw the plea should have been granted because he only testified to sufficient facts to support an assault with an intent to rob which would be insufficient at the common law. *Williams* at 166.

However, this Court rejected Mr. Williams' arguments that the statute could not be interpreted such that a requirement that existed before it was amended (completed larceny) was still a predicate act after the statute was amended even though the amendment contradicted the common law:

> "[w]e hold that that the Legislature demonstrated a clear intent to remove the element of a *completed* larceny, signaling a departure from Michigan's historical requirement and its common law underpinnings." *Williams* at 172.

This Court also said:

> "[u]ltimately, defendant and the dissent would have this Court interpret the robbery statutes in accordance with an unstated legislative intent rather than the plain meaning of the words chosen." *Williams* at 178.

"The first step (of statutory construction) in that construction is to review the language of the statute itself." *House Speaker v State Administrative Bd,* 441 Mich 547 (1993).

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The MMMA, as cited by the parties, states that only certain types of conduct fall outside of the protections of the Act:

> **(a)** The medical use of marihuana is allowed under state law to the extent that it is carried out in accordance with the provisions of this act.
> **(b)** This act does not permit any person to do any of the following:
> **(1)** Undertake any task under the influence of marihuana, when doing so would constitute negligence or professional malpractice.
> **(2)** Possess marihuana, or otherwise engage in the medical use of marihuana at any of the following locations:
> **(A)** In a school bus.
> **(B)** On the grounds of any preschool or primary or secondary school.
> **(C)** In any correctional facility.
> **(3)** Smoke marihuana at any of the following locations:
> **(A)** On any form of public transportation.
> **(B)** In any public place.
> **(4)** *Operate, navigate, or be in actual physical control of any motor vehicle*, aircraft, snowmobile, off-road recreational vehicle, or motorboat *while under the influence of marihuana.*
> **(5)** Use marihuana if that person does not have a serious or debilitating medical condition.
> **(6)** Separate plant resin from a marihuana plant by butane extraction in any public place or motor vehicle, or inside or within the curtilage of any residential structure.
> **(7)** Separate plant resin from a marihuana plant by butane extraction in a manner that demonstrates a failure to exercise reasonable care or reckless disregard for the safety of others." MCL 333.26427

The drafters of the MMMA also incorporated a clear-cut preemption clause:

> **(e)** "All other acts and parts of acts inconsistent with this act do not apply to the medical use of marihuana as provided for by this act." MCL 333.26427.

When the above language was at the feet of the legislature, the legislature had a duty to either adopt it, let it go to the ballot as it did or, do what legislatures before the 94th Michigan legislature did before it - this legislature took a pass. Non-action is a choice. That was the legislature's choice.

<u>The Legislature Had Two Opportunities and Did Not Further Define "Under the Influence" or Include "Impairment" in the Unprotected Conduct Under the MMMA</u>

If reviewing what happened during the adoption of the MMMA were not enough, analyzing what happened after certainly informs the legislature's understanding - if not the intent. Almost exactly 4 years after the enactment of the MMMA, the legislature amended MCL 333.26421 with

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2012 PA 512. The Michigan legislature, who often is unable to find 3/4 majority to agree that the day ends in "y," found 3/4 majority for approximately 8 revisions to the MMMA. The changes included:

> o Require a patient registry identification card to contain a photo ID.
>
> o Require registry identification cards to be valid for two years.
>
> o Require LARA to privatize portions of the application process for a registry ID card.
>
> o Revise confidentiality provisions to apply to private vendors.
>
> o Create a panel to review petitions requesting the approval of medical conditions or treatments for addition to the list for which the use of medical marihuana would be approved, and provide for public input.
>
> o Define "bona fide physician-patient relationship" to include an in-person, physical examination of the patient, and revise other definitions, as well.
>
> o Place the penalty for selling marihuana in violation of registry identification card restrictions within the sentencing guidelines.
>
> o Regulate the transportation of usable marihuana in a motor vehicle and prescribe penalties for a violation.

https://www.legislature.mi.gov/documents/2011-2012/billanalysis/House/pdf/2011-HLA-4834-3.pdf.

Not one of those changes included either defining further what "Operating Under the Influence" meant or incorporating the conduct of "impaired" operation of a motor vehicle on the list of acts not protected by the MMMA. Speculation is not necessary, because at the time, the phrase "under the influence" was already defined in Michigan law under *People v Lambert*, 395 Mich 296, 305 (1975)(as cited by *Dupre*, Slip op at pp 3-4).

The appellee must acknowledge that its argument that the voters are not entitled to the deference shown to the legislature must fall in light of the process for enacting/rejecting voter-initiated legislation in Art II, Sec 9 of the Michigan Constitution. The 96th Michigan Legislature knew

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what it was doing when it maintained operation of the motor vehicle while impaired within the ambit of the protected conduct in the MMMA despite amending the MMMA in other ways in 2012.

The MRTMA Contains Almost Identical Language and History Will Repeat Itself

The Michigan Regulation and Taxation of Marijuana Act (MRTMA) MCL 333.27954 contains a clause similar to the MMMA "superiority" clause:

"All other laws inconsistent with this act do not apply to conduct that is permitted by this act." MCL 333.27954.

The MRTMA also is for the protection from arrest and prosecution of those who cultivate or possess marijuana or marijuana products including hemp as well as for the taxation of those products:

> "The purpose of this act is to make marihuana legal under state and local law for adults 21 years of age or older, to make industrial hemp legal under state and local law, and to control the commercial production and distribution of marihuana under a system that licenses, regulates, and taxes the businesses involved." MCL 333.27952

Since Michigan's appellate jurisprudence has recognized that "possession" of a substance including marijuana, encapsulates possession of the substance internally (*People v Koon*, 494 Mich 1 (2013)), it stands to reason that the same or a similar factual scenario will present itself to a trial court. The likelihood of history repeating itself and the additional need for clarity by this Court is an additional basis for this Court to grant leave to appeal.

II. DOES CURRENT SCIENCE SUPPORT THAT THE VOTERS WERE RIGHT IN 2008 TO LEAVE IMPAIRED OPERATION OF A VEHICLE OFF THE LIST OF UNPROTECTED CONDUCT BY MMMA PATIENTS?

The science of the psychoactive compound in marijuana is such that it affects users in different ways across the population and affects users differently than does other controlled substances or alcohol. The National Highway Traffic Safety Administration (NHTSA)

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commissioned a study that concluded that there is no validated scientific research that demonstrates a correlation between the effects of marijuana use on a subject and an increase in traffic accidents. https://www.nhtsa.gov/sites/nhtsa.dot.gov/files/documents/812440-marijuana-impaired-driving-report-to-congress.pdf. The report acknowledges:

> "Psychoactive substances include alcohol, some over-the-counter drugs, some prescription drugs, and most illegal drugs. The mechanism by which these drugs affect the body and behavior, the extent to which they impair driving, and the time course for the impairment of driving can differ greatly among these drugs." NHTSA, 2017 Marijuana-Impaired Driving report to Congress, p 2.

The report goes on to say that not enough is known about THC and its effect on the subject's psychomotor skills, "A clearer understanding of the effects of marijuana use will take additional time as more research is conducted." NHTSA Marijuana-Impaired driving report to Congress, p 6.

The State of Michigan also commissioned a study through the Michigan State Police (MSP) which was released in 2019.

https://www.michigan.gov/documents/msp/Michigan_Impaired_Driver_Report_155355460114 8_79160282_ver1.0_651633_7.pdf.

The Michigan Impaired Driving Report (MIDR) ultimately concluded that there is no correlation between a specific concentration of marijuana in the blood stream with effects on psychomotor skills needed for driving citing a number of research studies including in 2017 that found, "…in most of the simulator and vehicle studies, cannabis-impaired subjects typically drive slower, keep greater following distances, and take fewer risks than when sober. (MIDR, p 8).

Tetrahydrocannabinol (THC) is the psychoactive compound in marijuana. It is certified as having a potentially palliative effect on a number of physical ailments by virtue of the MMMA. In one respect, it is similar to other "medications," both prescribed and unprescribed, in that the reason a subject consumes it or uses it is for its effect. From allergy medications to Selective Serotonin Reuptake Inhibitors (SSRI), society consumes controlled substances with growing acceptance and

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frequency to help individual users tolerate the vicissitudes of everyday life ranging from anxiety to nerve-pain caused by computer-elbow.

It may mean that a person's homeostasis state (completely unaffected by any food or drug or other environmental factor) is rarely, if ever the state a driver is in on a Michigan road - but that does not make a person who has taken his or her substance a danger on the road. Would a driver rather share the road with: (1) a driver who is impaired by the use of caffeine that makes the driver a bit jumpier and alert; or (2) a driver who rose from a rough night's sleep and, instead of affecting their psychomotor skills with caffeine, simply got behind the wheel in a drowsy state? Or (3) a driver who is anxious or impatient because the driver has not ingested a THC-infused gummy to calm his or her nerves from the day's events?

The false choice posed by the Appellee's brief and posited by the Court of Appeals is that THC-impairment is automatically an impairment that makes people dangerous behind the wheel. The two publications from governmental agencies cited above are clear: researchers do not know enough to answer that question yet.

THC is not like ethanol in that alcohol affects even chronic users in a way that depresses the user's fine motor skills dependent on the volume of dosage over time. The drafters of the MMMA made a choice that was clear: impaired operation of a motor vehicle is still protected by the Act and the legislature let that choice stand. Until a person is "under the influence" of marijuana, their conduct is protected by the MMMA. This Court can make a science-driven and law-driven exercise of its use of its power as the final say of Michigan law, grant leave to the Appellant and ultimately reverse the Court of Appeals.

Respectfully Submitted,

CBW (P75395) for MJN.

Date: April 22, 2021

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