

Constitutional Challenges to Pot Licensing Residency Requirements: Will They Impact NJ?

By Lisa Gora and Chirali Patel

Article 1, Paragraph 8, Clause 3 of the U.S. Constitution, the Dormant Commerce Clause, has for years been considered an arcane doctrine of American constitutional law; however, recent cases brought by out-of-state cannabis applicants have challenged its constitutionality as it pertains to state cannabis licensing residency requirements. This article takes a look at the issues underpinning two recent lawsuits brought against Missouri and Maine by non-resident applicants seeking cannabis licensure in states with durational residency requirements, and explores the potential impact on the emerging regulatory framework and adult use market being established in New Jersey.

The Dormant Commerce Clause

The Dormant Commerce Clause prohibits states from enacting laws that discriminate or unduly burden interstate commerce unless doing so is the only way to achieve a legitimate policy goal. Historically, this clause has been implicated when the United States Supreme Court

has found that state laws or regulations either discriminate against out-of-state interests or unduly burden the free flow of commerce among the states. In other words, state laws violate the Dormant Commerce Clause if they require differential treatment of in-state and out-of-state economic actors that benefit those in-state and burden those out-of-state, unless the regulation is narrowly tailored to advance a legitimate local interest.

Recently, lawsuits filed by out-of-state resident applicants seeking licensure in Oklahoma, Maine, and Missouri allege that these states' durational residency requirements create discrimination by favoring in-state residents to the detriment of non-residents who are otherwise restricted from applying for a cannabis license if the state's regulation requires that the applicant be a resident of the state for a certain period of time prior to submission of the application. As such, the non-resident plaintiffs have moved to bar those states, such as Missouri and Maine (*Mark Toigo v. Department of Health and Senior Service*, and *NPG, LLC d/b/a*



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Wellness Connection and High Street Capital Partners, LLC v. City of Portland, Maine), and others—from enforcing such regulation.

Plaintiffs in these cases successfully argued that even if the state has a legitimate interest in enforcing its durational residency requirement, the state still has the burden to prove that no alternative mechanism exists under which that same interest may be achieved. If the state cannot provide justification for durational residency requirements as imperative to protecting the state's interests, recent case law demonstrates a likelihood that the non-resident shall prevail in arguing that the state requirement is in violation of the Dormant Commerce Clause.

Given New Jersey's similar durational residency requirements, lawsuits involving similar allegations of unconstitutionality may be filed. For example, as stated in our article published earlier this month titled **"NJ's Framework for Social Equity Within the Adult-Use Recreational Cannabis Industry,"** readers learned that when applying for a microbusiness license, the applicant needs to prove that 100% of the ownership in the microbusiness is held by New Jersey residents who have resided in New Jersey for at least two years prior to the submission of the microbusiness application. Additionally, a non-microbusiness adult use license will be issued only to an applicant whose individual ownership includes a "significantly involved person" who is an in-state resident of at least two years. In light of the durational residency requirements for cannabis licenses in New Jersey, this article takes a closer look at the lawsuits filed in Missouri and in Maine and examines each court's ruling that the Dormant Commerce Clause was in fact violated, barring each state from enforcing its durational residency requirements.

**'Mark Toigo v. Missouri DHSS,'
Case Number 2:20-cv-04243**

On June 21, 2021, a United States District Court Judge of the Western District of Missouri, Central Division, granted Mark

Toigo's motion to bar the Missouri Department of Health and Senior Services (DHSS) from enforcing the requirement for medical cannabis businesses to be majority-owned by state residents who have lived in the state for at least one year prior to applying for a cannabis facility license ("Missouri Durational Residency Requirement"). In granting Toigo's motion, the Hon. Nanette K. Laughrey ruled that the Missouri Durational Residency Requirement and the policy behind it likely violated the Dormant Commerce Clause.

The Missouri DHSS created a regulatory framework for its medical marijuana facilities, limiting applicants to Missouri state residents who have resided in the state for at least one year prior to applying for the license. When Pennsylvania resident Mark Toigo, a minority owner of a licensed dispensary, Organic Remedies MO, Inc. ("ORMO"), sought an investment as a majority owner in the company, as an out-of-state resident, he was barred by Missouri's Durational Residency Requirement. In his lawsuit against the state, he argued that the Durational Residency Requirement violates the Constitution's Dormant Commerce Clause in that it discriminates against out-of-state commerce (i.e., the requirement restricted Toigo, a non-resident, from becoming a majority shareholder in



ORMO unless he lived in Missouri for one year), and fails to advance a legitimate local purpose (i.e., the local interest that Missouri was trying to protect in implementing such a requirement can be adequately achieved by reasonable nondiscriminatory alternatives).

The Missouri DHSS did not dispute Toigo's assertion that the Durational Residency Requirement is facially discriminatory. However, it did argue that the requirement is necessary to prevent the illicit diversion of medical marijuana for recreational or out-of-state use and that with this requirement, the DHSS can conduct thorough background checks of Missouri residents faster and more easily than without it, to ensure that licenses are not being issued to individuals or companies who might divert medicinal cannabis to recreational out-of-state uses. Therefore, the Missouri Durational Residency Requirement was narrowly drawn to protect Missouri's interest in enforcing drug laws and preventing medical cannabis from leaving Missouri.

The district court acknowledged that Missouri has a legitimate interest in enforcing its drug laws;

however, the court noted that there are multiple nondiscriminatory means of advancing that interest. The district court also noted that DHSS does not explain how the task of securing an applicant's out-of-state records would be eased by the simple fact that the applicant had lived in Missouri for the past year.

The district court indicated:

It is no easier for a person who has lived in Missouri for less than a year to drive from Missouri to Kansas with medical marijuana in their trunk than it is for a person who has lived in Missouri for a year and a day. And it is no more difficult for a long-time Missouri resident to smuggle marijuana out of the medical system and into the recreational market than it is for anyone else.

The district court was not persuaded by the arguments of the Missouri DHSS and did not find the interests posited to be narrowly tailored to advance such interests. As such, Toigo was able to meet his burden in establishing the basis for causing the District Court to grant Toigo's motion for a preliminary injunction.

'Wellness Connection v. City of Portland, Maine'

On Aug. 14, 2020, the United States District Court for the District of Maine granted Wellness

Connection's motion to bar the City of Portland (the "City") from enforcing rules requiring that adult use cannabis businesses have at least 51% ownership by Maine residents of at least five years, prior to applying for the cannabis facility license ("Maine Durational Residency Requirement"). In granting the City's motion, the district court noted that the City did not dispute the discriminatory character of the Durational Residency Requirement, but attempted to demonstrate that the City's interests in a residency requirement was to advance a legitimate local purpose.

The City contended that the reason behind the residency rule was "to ensure that the City understood the amount and quality of business oversight, and could easily verify any past violations." However, the District Court found its argument unsupported and unable to substantiate that the residency factors are necessary to achieve its asserted purpose. The City needed to present concrete record evidence and not simply make sweeping assertions or mere speculations that the discriminatory aspects of its challenged residency requirement are necessary to achieve its legitimate local objectives.

The District Court concluded that the City was unlikely to succeed

in justifying the Maine Durational Residency Requirement and granted Wellness Connection's motion for a preliminary injunction.

Conclusion

Multiple federal courts in the United States have addressed this issue, and similar lawsuits may continue to be filed challenging residency requirements. Whether or not a state legalizes adult use and/or medicinal cannabis, the reliance on the Dormant Commerce Clause in these cases should be considered by stakeholders in the novel cannabis industry. Certainly, states and/or municipalities must consider the limits imposed by the United States Constitution when creating legislation (or local laws) or assessing litigation.

Disclaimer: Cannabis remains a scheduled narcotic under federal law and anyone considering entering this field should first consult with competent counsel.

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