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Washington Cannabusiness: Washington's Durational Residency Requirement Should Be Eliminated on Economic, Social, and Constitutional Grounds

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Washington Cannabusiness:
Washington’s Durational Residency Requirement Should
Be Eliminated on Economic, Social, and Constitutional
Grounds

*Alejandro Monarrez**

CONTENTS

INTRODUCTION1
I. BACKGROUND2
II. ECONOMIC AND SOCIAL POLICY CONSIDERATIONS3
III. CONSTITUTIONAL LAW CONSIDERATIONS8
CONCLUSION.....13

INTRODUCTION

In Washington, starting a lawful cannabusiness generally begins with an applicant submitting a license application and requisite payment to the Washington State Liquor and Cannabis Board (WSLCB) for review and consideration.¹

However, a caveat exists: applicants must have resided in the state for at least six months prior to issuance of a cannabusiness license.² Specifically, under the Revised Code of Washington (RCW) 69.50.331(1)(b)(ii), (iii), and (iv),³ cannabis licenses may not be issued to

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1. *See Marijuana Licensing*, WASH. LIQUOR & CANNABIS BD., <https://lcb.wa.gov/mjlicense/marijuana-licensing> [<https://perma.cc/7YRR-6ELH>].

2. *See* WASH. REV. CODE § 69.50.331(1)(b)(ii), (iii), (iv) (2017).

3. *Id.*

“person[s] doing business as a sole proprietor who ha[ve] not lawfully resided in the state for at least six months prior to applying to receive a license[.]” including business entities that are not formed under the laws of Washington and their managers or agents who do not meet the residency requirement.⁴ In other words, any individual that has or will have less than a one-percent interest in a Washington cannabusiness must meet the same requirements as the licensee, including residency.⁵

In light of the U.S. Supreme Court’s decision in *Tennessee Wine & Spirits Retailers Ass’n v. Thomas*,⁶ Washington’s durational residency requirement likely runs afoul of the Commerce Clause; and if the Washington Legislature desires to avoid a viable challenge under a similar analysis, now is the time to eliminate it. This Comment explores the history of cannabis legalization in Washington, as well as the economic, social, and constitutional considerations for eliminating such a barrier.⁷

I. BACKGROUND

Washington⁸ and Colorado⁹ legalized cannabis for recreational purposes in 2012. Although both states had previously legalized cannabis for medicinal purposes, this was a historic move towards complete legalization with a domino effect that saw Alaska, Oregon, and Washington D.C. follow suit in 2014.¹⁰ More than thirty states have since legalized cannabis for medicinal, recreational purposes, or both¹¹ despite conflicting Department of Justice (DOJ) guidance on the enforcement of federal cannabis law.¹² The DOJ’s existential threats to state cannabis

4. *Id.*

5. *Id.*

6. *Tenn. Wine & Spirits Retailers Ass’n v. Thomas*, 139 S. Ct. 2449, 2457 (2019).

7. *Applicant FAQs*, WASH. LIQUOR & CANNABIS BD., <https://lcb.wa.gov/licensing/applicant-faqs> [<https://perma.cc/VCK2-KBQ2>].

8. WASH. REV. CODE § 69.50 (2020).

9. COLO. CONST. art. 18, § 16.

10. See Sarah Trumble, Infographic, *Timeline of State Marijuana Legalization Laws*, THIRD WATCH (May 2, 2016), <https://www.thirdway.org/infographic/timeline-of-state-marijuana-legalization-laws> [<https://perma.cc/UX9H-XV99>].

11. *National Survey of State Laws-Marijuana Laws*, <https://www.scribd.com/document/479258361/National-Survey-Marijuana-Laws> [<https://perma.cc/8SSR-ZG65>]; see also Anne Marie Lofaso & Lakyn D. Cecil, *Say “No” to Discrimination, “Yes” to Accommodation: Why States Should Prohibit Discrimination of Workers Who Use Cannabis for Medical Purposes*, SEATTLE U. L. REV. 955, 976 (2020).

12. U.S. Deputy Attorney General James Cole in 2013 released a memorandum addressing federal enforcement in light of state cannabis legalization. See Memorandum for All U.S. Att’ys, James M. Cole, Deputy Att’y Gen., U.S. Dep’t of Just., Guidance Regarding Marijuana Enforcement (Aug. 29, 2013), <https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf> [<https://perma.cc/KTE3-KFZ4>] (providing guidance to DOJ attorneys to focus enforcement efforts on preventing distribution of cannabis to minors and diversion of legalized cannabis). However, in 2018, U.S. Attorney General Jeff Sessions rescinded the Cole Memo by

marketplaces due to recent reversal on enforcement¹³ and early priorities in diversion prevention of legalized cannabis products all likely contributed to Washington's early adoption of a durational residency requirement.¹⁴ However, the requirement has also led to economic protectionism sustained by fears of nonresident cannabusiness interests overtaking the local industry.¹⁵

II. ECONOMIC AND SOCIAL POLICY CONSIDERATIONS

States obviously faced uncertainties with the legalization of recreational cannabis, including what the federal government's response¹⁶ would be against the backdrop of long-standing cannabis prohibition.¹⁷ Washington likely acted to restrict participation in the local market to those individuals and entities with state residency to thwart the possibility of cannabis diversion while providing a head start to in-state cannabusinesses without competition from nonresident interests at the outset.¹⁸ Eight years later, Washington has a mature industry with robust oversight,¹⁹ and the state's efforts have likely curtailed both illegal diversion of cannabis and nonresident interests crushing Washington

directing U.S. Attorneys to once again enforce federal cannabis law. *See* Memorandum for All U.S. Att'ys, Jefferson B. Sessions, Att'y Gen., U.S. Dep't of Just., Marijuana Enforcement (Jan. 4, 2018), <https://www.justice.gov/opa/press-release/file/1022196/download> [<https://perma.cc/P48Q-6RC3>] [hereinafter Sessions 2018 Memo]. However, prosecutors retained discretion as to which activities to prosecute and weigh all federal law enforcement priorities set by the Attorney General, including the seriousness of crimes, the deterrent effect of prosecution, and the cumulative impact of such crimes on a community. Sessions 2018 Memo, *supra*.

13. *See* Ed Cara, *How Jeff Sessions' Weed Enforcement Reversal Could Impact Medical Marijuana Patients*, GIZMODO (Jan. 4, 2018), <https://gizmodo.com/how-jeff-sessions-weed-enforcement-reversal-could-impac-1821779558> [<https://perma.cc/NX6C-74ET>].

14. *See* ALLIE HOWELL, REASON FOUND., RESIDENCY REQUIREMENTS FOR MARIJUANA LICENSURE (2019), <https://reason.org/wp-content/uploads/residency-requirements-marijuana-licensure.pdf> [<https://perma.cc/VDY8-L58B>].

15. *Id.*

16. *See* Laura L. Myers, *Marijuana Goes Legal in Washington State Amid Mixed Messages*, REUTERS (Dec. 5, 2012), <https://www.reuters.com/article/us-usa-marijuana-washington/marijuana-goes-legal-in-washington-state-amid-mixed-messages-idUSBRE8B506L20121206> [<https://perma.cc/K48J-JTBX>].

17. *See* Angela Dills, Sietse Goffard & Jeffrey Miron, *Dose of Reality: The Effect of State Marijuana Legalizations*, CATO INST. (Sept. 16, 2016), <https://www.cato.org/publications/policy-analysis/dose-reality-effect-state-marijuana-legalizations> [<https://perma.cc/8CPX-2DB8>].

18. *See* HOWELL, *supra* note 14, at 3.

19. *See* Melissa Pistilli, *Washington State's Cannabis Market Is a Launch Pad for Cost-Competitive Multi-State Operators*, CANNABIS INVESTING NEWS (June 12, 2019), <https://investingnews.com/innspired/washington-state-cannabis-market/> [<https://perma.cc/3F8M-PNMX>].

cannabusinesses.²⁰ However, the durational residency requirement has also constrained future growth in the market.²¹

With a projected \$44 billion market increase within the industry in 2020,²² Washington cannabusinesses are not positioned to capitalize on these projections because residency restrictions prevent these business from accessing new avenues of capital investment for operations and growth.²³ Although the Financial Crimes Enforcement Network (FinCEN) issued somewhat encouraging guidance to firms interested in engaging cannabusinesses, most have decided forego the opportunity²⁴ because of the current conflicting regulatory posture between states with legalization and the federal government. Firms are just not willing to take on such risk to provide the necessary venture capital to cannabusinesses for continued innovation.²⁵ As a result, initial expenditures associated with cannabusinesses are discouraging to cannabis entrepreneurs.²⁶

Oregon, for example, initially required that 51% of a cannabusiness was owned by at least one two-year resident of the state.²⁷ However, Oregon eliminated this requirement after groups like the Oregon Cannabis Association lobbied legislators to acknowledge that prospective cannabis entrepreneurs lacked access to critical capital as a result of the requirement.²⁸ If Oregon did not take immediate action, state cannabusinesses would have likely failed because their survival depended on a steady capital investment to continue competing with states that did not have these restrictions.²⁹ Although some believed that eliminating Oregon's residency requirement would lead to oversaturation by nonresident cannabis interests, the reality was quite the opposite;

20. See HOWELL, *supra* note 14, at 13.

21. See Christine Masse, Opinion, *Washington Cannabis Regulations Are Outdated*, PUGET SOUND BUS. J. (Nov. 27, 2019), <https://www.bizjournals.com/seattle/news/2019/11/27/opinion-washington-cannabis-regulations-are.html> [<https://perma.cc/ZUE7-TREL>].

22. Hilary Bricken, *Funding and Financing a Marijuana Business*, 13 ABA SCITECH LAW. 6 (2017).

23. See *id.*

24. *Id.*; DEP'T OF TREASURY FIN. CRIMES ENF'T NETWORK, FIN-2014-G001 BSA EXPECTATIONS REGARDING MARIJUANA-RELATED BUSINESSES (Feb. 14, 2014), <https://www.fin.cen.gov/sites/default/files/shared/FIN-2014-G001.pdf> [<https://perma.cc/2MEJ-DVMY>].

25. Compare Bricken, *supra* note 22, with John Shroyer, *Flood of Investment Money Flowing to Oregon Cannabis Firms After Residency Change*, MARIJUANA BUS. DAILY (July 28, 2016), <https://mjbizdaily.com/flood-of-investment-money-flowing-to-oregon-cannabis-firms-after-residency-change/> [<https://perma.cc/YN99-FZ54>].

26. See Shroyer, *supra* note 25.

27. *Id.*

28. *Id.*

29. See Shroyer, *supra* note 25.

nonresident investors sought partnerships with skilled Oregonian cannabusinesses over “muscl[ing] out local businesses.”³⁰

Colorado likewise maintained a residency requirement to curtail nonresident interests from taking over the market.³¹ Coloradoans claimed that cannabusinesses were able to setup operations without having to compete with major nonresident interests at the outset. A Colorado attorney expressed that “[residency requirements] allowed for small businesses, mom and pops. It doesn’t allow for corporate consolidation in the marketplace. You can be a small business in Colorado and compete.”³² However, Coloradan cannabusinesses also experienced a lack of access to capital investment to continue thriving.³³ Tyler Henson, head of the Colorado Cannabis Chamber of Commerce, explained that “[w]e can’t go get a loan from the bank to grow our business to help us accelerate, . . . We are susceptible to falling behind other states.”³⁴ Colorado first decided to ease residency requirements by requiring that at least one individual with direct beneficial ownership interest in a cannabusiness be a Colorado resident.³⁵ Cannabis sales then surpassed one billion, accounting for “roughly 3% of the state’s \$30 billion budget.”³⁶ Colorado ultimately decided to eliminate any residency restrictions earlier this year.³⁷ The decision positions Colorado to see even more tax revenue through state cannabis sales,³⁸ especially at a time when states so desperately need resources for recovery in the wake of COVID-19.

By comparison, even with Washington in 2019 having collected approximately \$390 million in cannabis taxes—up from \$362 million in 2018—and \$5.2 million in cannabis licensing fees—down from \$5.4 million in 2018³⁹—the residency requirement currently prevents cannabusinesses from competing with neighboring states. Washington

30. *Id.*

31. See HOWELL, *supra* note 14, at 3.

32. *Id.* at 3–4 (alteration in original).

33. *Id.* at 5.

34. Kristen Wyatt, *Legalized States Taking Fresh Look at Out-Of-State Marijuana Investing*, THE CANNABIST (Jan. 20, 2016) (citations omitted), <https://www.thecannabist.co/2016/01/20/marijuana-investing-lawmakers-out-of-state-ownership/46945/> [<https://perma.cc/G7S4-95NE>].

35. See HOWELL, *supra* note 14, at 5.

36. Bryan Borzykowski, *Colorado Grows Annual Cannabis Sales to \$1 Billion As Other States Struggle to Gain a Market Foothold*, CNBC (July 10, 2019), <https://www.cnbc.com/2019/07/10/colorado-cannabis-sales-hit-1-billion-as-other-states-rush-to-market.html> [<https://perma.cc/7CV3-LPFJ>].

37. H.B. 20-1080, 72d Leg., 2020 Reg. Sess. (Colo. 2020) (passed and signed into law by Gov. Jared S. Polis on March 24, 2020).

38. *Id.*

39. WASH. LIQUOR & CANNABIS BD., ANNUAL REPORT FISCAL YEAR 2019, https://lcb.wa.gov/sites/default/files/publications/annual_report/2019-annual-report-final2.pdf [<https://perma.cc/T4JY-AHGC>].

cannabusinesses continue developing innovative products to remain competitive *within* the state.⁴⁰ However, with Oregon and Colorado having eliminated their residency requirements and Colorado's recent cannabis sales topping one billion, innovative products will not be enough because Washington cannabusinesses need new sources of capital to continue innovating in this cash intensive enterprise.⁴¹ And once cannabis becomes legalized federally, Washington cannabusinesses will be behind those states that already allowed for nonresident capital investment when it mattered.⁴²

Washington legislators also recognize current cannabis policy creates barriers to entry for minorities and women in the industry.⁴³ Representative Eric Pettigrew along with several other representatives introduced Washington House Bill 2263 in January of 2020, which will not only remove the residency requirement but also create a fund that provides low or no interest loans to new or existing minority- or women-owned cannabusinesses.⁴⁴ Fees collected on new investments in Washington cannabusinesses, including those made by nonresident investors, would fund the program.⁴⁵ However, to fully realize such an awesome initiative, Washington must eliminate targeted restrictions against nonresidents.⁴⁶ As Representative Pettigrew expressed, "if you are going to want to invest in the state, here are some conditions . . . we can take that chance . . . [but] if you are an investor like . . . I can invest in Colorado . . . and I can produce the same amount and sell in state, out of state, you know what I mean?"⁴⁷

In other words, H.B. 2263 reflects a commonsense sentiment that state officials recognize: *why would anyone consider investing in Washington cannabusinesses with all the existing bureaucracy?* Washington should desire to support minority- or women-owned cannabusinesses by increasing avenues for new investment and removing

40. See Masse, *supra* note 21.

41. *Id.*

42. *Id.* Maintaining a residency requirement remains at the expense of Washington cannabusinesses and discourages enthusiastic cannabis entrepreneurs seeking to participate in Washington's burgeoning cannabis industry today. *Id.*

43. H.B. 2263, 66th Leg., 2020 Reg. Sess. (Wash. 2020).

44. *Id.* at 1.

45. *Id.* at 1–2.

46. Interview with Eric Pettigrew, Washington State Representative for the 37th Legislative District, in Olympia, Wash. (Jan. 17, 2020) (on file with Author) ("As a state, we can make the call that, hey, if you're going to want to invest in the state, here are some conditions—that's good and we can take that chance at, you know—if you're an investor, like, okay I can invest in Colorado let's say, you know, or—maybe that doesn't exist—that piece of it—or I can invest in Washington state where, you know, these conditions do exist, and I can produce the same amount and I can sell in-state, out of state, you know what I mean?").

47. *Id.*

those barriers that prevent it.⁴⁸ And just like Representative Pettigrew said, “my first mathematical equation that I learned was one plus one equals two . . . so, money coming in plus money being made equals more money. So, a business that is infused with cash and is successful produces more tax revenue for us in the state.”⁴⁹

Moreover, in light of the recent global circumstances relating to the COVID-19 pandemic, Washington cannabusinesses are in an even greater need for new sources of capital unrestricted by such economic barriers.⁵⁰ COVID-19 is a highly contagious infectious disease with common symptoms, including fever, tiredness, and dry cough.⁵¹ In response to the outbreak and in an effort to curb the spread of the disease, Washington Governor Jay Inslee issued a statewide emergency stay-at-home order on March 23, 2020.⁵² Businesses that were deemed “essential,” like grocery stores, pharmacies, and banks, were allowed to remain open while sporting events, bars, and restaurants were closed.⁵³ To the benefit of cannabusinesses, Washington dispensaries were deemed essential and allowed to remain open.⁵⁴ Also, in response to the economic downturn and the increase in unemployment across the country, the federal government passed the \$2 trillion CARES Act, which allocated \$350 billion to the Small Business Administration to disburse in the form of forgivable loans to businesses with less than 500 employees.⁵⁵

However, because cannabis remains a Schedule I controlled substance and regulatory risk persists for financial institutions to engage cannabusinesses, such enterprises are ineligible for emergency financial

48. *Id.* It goes without saying that the “War on Drugs” has disproportionality affected these historically marginalized communities in our society. An initiative that attempts to rectify the costs of this War, with low or no interest loans to start a cannabusiness, especially when these same communities are experiencing the brunt of COVID-19, is an invaluable benefit.

49. *Id.*

50. Steve Levine & Megan Herr, *CARES Act – Stimulus Package Won’t Aid the Cannabis Industry*, CANNABIS INDUS. J. (Mar. 27, 2020), https://cannabisindustryjournal.com/feature_article/cares-act-stimulus-package-wont-aid-the-cannabis-industry/ [https://perma.cc/XQ4Q-UQMA].

51. *Q&A On Coronaviruses (COVID-19)*, WORLD HEALTH ORG. (Apr. 8, 2020), <https://www.who.int/news-room/q-a-detail/q-a-coronaviruses?> [https://perma.cc/6HP4-HMKD].

52. Joseph O’Sullivan, *Gov. Inslee Extends Washington State’s Coronavirus Stay-Home Order Through May 4*, SEATTLE TIMES (Apr. 2, 2020), <https://www.seattletimes.com/seattle-news/politics/gov-inslee-extends-washington-states-coronavirus-stay-home-order-through-end-of-may-4/> [https://perma.cc/CSG9-VZSX].

53. *Id.*

54. Beatrice Peterson, *Marijuana Dispensaries Deemed ‘Essential’ but Ineligible for Federal Stimulus*, ABC NEWS (Apr. 11, 2020), <https://abcnews.go.com/Business/marijuana-dispensaries-deemed-essential-ineligible-federal-stimulus/story?id=70066753> [https://perma.cc/RQ3K-F663].

55. *Id.*; see also Claudia Grisales, Kelsey Snell, Susan Davis & Barbara Sprunt, *President Trump Signs \$2 Trillion Coronavirus Rescue Package into Law*, NPR (Mar. 27, 2020), <https://www.npr.org/2020/03/27/822062909/house-aims-to-send-2-trillion-rescue-package-to-president-to-stem-coronavirus-cr> [https://perma.cc/4BG7-62VS].

relief.⁵⁶ In other words, although cannabusinesses are deemed “essential” in Washington, these businesses are denied access to forgivable loans and payroll relief under the CARES Act.⁵⁷ This response is patently unfair towards an industry that creates significant employment opportunities to the benefit of states. For example, Washington cannabusinesses paid approximately \$286.1 million in employee wages.⁵⁸ However, cannabusinesses will remain ineligible for relief for the obvious reason that cannabis remains controlled.

As a result, it is now more imperative than ever to reduce barriers like the durational residency requirement. Survival of Washington’s cannabis market is dependent on dismantling economic barriers in light of the current circumstances. And if these economic and social policy considerations were not enough, the following section explores a powerful constitutional argument in favor of ultimately removing the residency requirement.

III. CONSTITUTIONAL LAW CONSIDERATIONS

On June 26, 2019, the U.S. Supreme Court invalidated a similar durational residency requirement in *Tennessee Wine & Spirits*.⁵⁹ Tennessee required that applicants who sought an alcohol retailers license were residents of the state for at least two years prior to the initial issuance of an alcohol retailers license and for at least ten years for a renewal.⁶⁰ Moreover, Tennessee would not issue a license to a corporation unless “all of its officers, directors, and owners of capital stock satisfy the durational-residency requirements applicable to individuals.”⁶¹ In other words, Tennessee’s durational residency requirement effectively prevented any publicly held corporation from owning and operating a liquor store within the state.⁶² The U.S. Supreme Court held, in part, that Tennessee’s two-year durational residency requirement violated the Commerce Clause of

56. *See id.*; *see also* Braktkon Booker, ‘Illegal to Essential’: How The Coronavirus Is Boosting the Legal Cannabis Industry, NPR (Apr. 20, 2020), <https://www.npr.org/2020/04/20/831861961/illegal-to-essential-how-coronavirus-is-boosting-the-legal-cannabis-industry> [https://perma.cc/XC8C-3JRQ].

57. *See* Zack Ruskin, *Despite ‘Essential’ Designation, Cannabis Industry Denied Stimulus Relief*, SF WEEKLY (Apr. 18, 2020), <https://www.sfweekly.com/news/cannabis/despite-essential-designation-cannabis-industry-denied-stimulus-relief/> [https://perma.cc/TX2W-KFXV].

58. WASH. STATE INST. FOR PUB. POL’Y, EMPLOYMENT AND WAGE EARNINGS IN LICENSED MARIJUANA BUSINESSES 1 (2017), https://www.wsipp.wa.gov/ReportFile/1669/Wsipp_Employment-and-Wage-Earnings-in-Licensed-Marijuana-Businesses_Report.pdf [https://perma.cc/C86X-8ZBT].

59. *See* Tenn. Wine & Spirits Retailers Ass’n v. Thomas, 139 S. Ct. 2449, 2457 (2019); Jake Holland & Greg Stohr, *Supreme Court Voids Residency Rule for Liquor Store Owners* (2), BLOOMBERG L. NEWS (June 26, 2019), shorturl.at/gwGKL [https://perma.cc/YH59-JYEX].

60. *See Tennessee Wine & Spirits*, 139 S. Ct. at 2456–57, 2459–76.

61. *Id.* at 2457.

62. *See id.*

the U.S. Constitution because the requirement “blatantly” favored in-state residents and bore little relationship to public health and safety.⁶³

The case began when the Tennessee Attorney General issued an opinion in 2012 addressing whether the state’s durational residency requirement violated the Commerce Clause.⁶⁴ In opining that the requirement was likely unconstitutional and directing the Tennessee Alcoholic Beverage Commission (TABC) to stop enforcement against new alcohol retailers license applicants, the Attorney General noted the residency requirements constituted “trade restraints and barriers that impermissibly discriminate against interstate commerce.”⁶⁵

In 2016, Total Wine, Spirits, Beer & More, LLC. and Affluere Investments, Inc. applied for licenses to own and operate liquor stores in the state.⁶⁶ The entities were not residents of Tennessee nor were they formed in accordance with the laws of Tennessee.⁶⁷ Despite not meeting the residency requirement, and in light of the Tennessee Attorney General’s earlier directive, TABC recommended approval of the parties’ applications.⁶⁸ The Tennessee Wine and Spirits Retailers Association (Association), a trade association for Tennessee liquor stores, threatened suit if TABC issued licenses despite the parties not having satisfied the durational residency requirement.⁶⁹ As a result, TABC sought a declaratory judgment in state court to settle the issue regarding the constitutionality of the requirement.⁷⁰

The case was removed to the United States District Court for the Middle District of Tennessee which ultimately determined that the requirements unconstitutional.⁷¹ The Sixth Circuit Court of Appeals affirmed the lower court’s decision and concluded that the residency requirements were facially discriminatory against nonresidents.⁷² However, the panel was divided as to whether the two-year residency requirement was saved under the Twenty-first Amendment, which repealed Prohibition and provided states with authority to regulate the in-state distribution of alcohol.⁷³ The Association sought certiorari on this question, and the U.S. Supreme Court granted review.

63. *Id.* at 2456–57.

64. *Id.* at 2457–59.

65. *Id.* at 2458.

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.* at 2459.

73. *Id.*

On the issue of whether the two-year initial residency requirement was saved by Twenty-first Amendment, the Supreme Court held that the provision did not grant Tennessee an absolute license to impose all manner of restrictions that would be “hard to avoid the conclusion that their overall purpose and effect is protectionist.”⁷⁴ The Association argued that the residency requirements were necessary to (1) ensure alcohol retailers were subject to direct process in state courts, (2) prevent nefarious, nonresident actors from obtaining a liquor license, (3) provide regulatory oversight in the market, and (4) promote responsible sales and consumption.⁷⁵

Writing for the majority, Justice Alito articulated that the two-year residency requirement violated the Commerce Clause because the requirement unduly restricted interstate commerce.⁷⁶ Under the Twenty-first Amendment, Tennessee is free to implement measures its citizens believe appropriately address public health and safety concerns. However, the state cannot adopt protectionist measures with tenuous connections to the same.⁷⁷ The Supreme Court rejected the Association’s argument that the two-year residency requirement would serve the goal of only allowing for law-abiding applicants to obtain alcohol retailer licenses.⁷⁸ As the Court explained, “[t]he State can thoroughly investigate applicants without requiring them to reside in the State for two years before obtaining a license. Tennessee law already calls for criminal background checks on all applicants . . . and more searching checks could be demanded if necessary.”⁷⁹ The Court also suggested that Tennessee could mandate “alcohol awareness” training for managers and employees.⁸⁰ All in all, the Court concluded that the “predominant effect of the two-year residency requirement is simply to protect the Association’s members from out-of-state competition,” and therefore the provision violates the Commerce Clause.⁸¹

Following this logic, Washington’s six-month durational residency requirement is facially discriminatory against out-of-staters, and thus presents a viable constitutional challenge in light of *Tennessee Wine & Spirits*. In other words, similarly to how the Supreme Court held that Tennessee’s two-year residency requirement violated the Commerce

74. *Id.* at 2457, 2474.

75. *Id.* at 2474–76.

76. *Id.* at 2459–60; the longstanding interpretation of a *negative* aspect to the Commerce Clause or the “dormant Commerce Clause” has been generally understood to mean states are prevented from adopting protectionist measures that interfere with the national exchange of goods and services. *Id.*

77. *Id.* at 2474; although the Association’s arguments may have had merit, the Court held the record was devoid of evidence to support such contentions. *Id.*

78. *Id.* at 2475.

79. *Id.*

80. *Id.* at 2476.

81. *Id.*

Clause—in part because the predominant effect was to protect the Association’s members from out-of-state competition—a court examining a similar challenge to this restriction could conclude a six-month residency requirement violates the Commerce Clause because the predominant effect is simply to protect Washington cannabusinesses from out-of-state competition.

So how, precisely, is Washington’s durational residency requirement primarily intended to protect in-state cannabusinesses? Well, Colorado⁸² and Oregon⁸³ initially promulgated similar residency requirements for cannabusiness applicants for public health and safety reasons. However, both states have since eliminated such residency requirements with many other states⁸⁴ joining in this effort/trend. Washington also reasonably has a strong interest in public health and safety as it pertains to cannabusiness regulation. However, the state is hard-pressed to continue asserting that a residency requirement is a less restrictive means of regulating cannabis when similarly situated neighboring states have completely eliminated the same. The argument that a durational residency requirement serves in part to combat nefarious actors from obtaining cannabusiness licenses by allowing WSLCB sufficient time to conduct background checks of prospective applicants is undercut by the fact that neighboring states have removed residency restrictions with little to no evidence of cannabis diversion across state lines. Unless Colorado and Oregon somehow pale in comparison to Washington’s lackluster wisdom by eliminating their residency requirements, one may reasonably conclude that Washington’s durational residency requirement is nothing more than an economically protectionist policy veiled under the broad euphemism of “public health and safety.”

Additionally, as the U.S. Supreme Court reasoned in *Tennessee Wine & Spirits*, Tennessee could have thoroughly investigated prospective applicants for alcohol retailers’ licenses without requiring residency in the state for two years prior. A court can similarly conclude that Washington can continue thoroughly investigating prospective cannabusiness applicants without requiring them to have resided in the state for six months prior. Whether a nonresident applicant has lived in the state for the requisite six-month period or forty-five, thirty, or zero days does not bear

82. H.B. 20-1080, 72d Leg., 2020 Reg. Sess. (Colo. 2020) (passed and signed into law by Gov. Jared S. Polis on March 24, 2020).

83. See *Marijuana and Hemp (Cannabis): Frequently Asked Questions*, OR. LIQUOR CONTROL COMM’N, <https://www.oregon.gov/olcc/marijuana/Pages/Frequently-Asked-Questions.aspx#Policy> [https://perma.cc/6VMC-UW3K].

84. Penelope Overton, *Maine Drops Residency Requirement for Recreational Marijuana Businesses*, PRESS HERALD (May 11, 2020), <https://www.pressherald.com/2020/05/11/maine-drops-residency-requirement-for-recreational-pot-businesses/> [https://perma.cc/7H6W-9USU].

a practical effect on Washington's ability to effectuate its public health and safety objectives within the state's cannabis industry. For perspective, it takes a nonresident between ten and sixty days to *purchase a firearm* in Washington—an arguably greater health and safety concern to the public at-large.⁸⁵

Moreover, Washington would likely fail in its assertion that such a requirement promotes the responsible sale and consumption of cannabis products. The idea that prospective cannabusiness applicants who meet a residency threshold may be better positioned to understand Washington-specific cannabis law and regulations by virtue of their time living in the jurisdiction appears to be without merit. Just as the U.S. Supreme Court suggested in *Tennessee Wine & Spirits* that the state could accomplish a similar objective by mandating “alcohol awareness” training for managers and employees working in such establishments, Washington too could mandate “cannabis awareness” training. Prospective applicants could be required to complete this training at the time they submit an initial application and periodically throughout the period an active cannabusiness license is held. This would be a less restrictive alternative to accomplish the same objective without imposing burdensome and unconstitutional requirements.

Nonetheless, it goes without saying that the elephant in the room must be acknowledged: cannabis remains a Schedule I controlled substance under federal law.⁸⁶ This begs the question: how would a court entertain such a constitutional challenge? The answer: a court would entertain a claim centered not on the broad merits of cannabis legalization but rather on the issue of whether a state may impose a durational residency requirement that burdens interstate commerce when individuals arrive to Washington to partake in a lawful enterprise yet are subjected to systematic mistreatment on the basis of residency alone without evidence to the contrary. Admittedly, *Tennessee Wine & Spirits* resolved the question of whether a two-year durational residency requirement was saved by the Twenty-first Amendment. And because no such law exists here with respect to cannabis, Washington could reasonably argue that this absence provides the state even more reason to enact such residency measures where the law is devoid of precedent.

However, even in the absence of precedent at this intersection of constitutional law and cannabis, Washington cannot maintain restrictions that “blatantly” favor in-state residents and bear little relationship to public

85. See WASH. REV. CODE § 9.41.092 (2019).

86. 21 U.S.C. § 812.

health and safety.⁸⁷ Despite the nonexistence of a Twenty-first Amendment to fill the jurisprudence void with respect to Washington cannabis law and regulation, the spirit of Section 2 of the Twenty-first Amendment does remain: Washington is free to implement measures its citizens believe appropriately address public health and safety concerns. However, Washington is not free to adopt protectionist measures with tenuous connections to the same.⁸⁸ Ultimately, a successful constitutional challenge will effectively force Washington to concede that maintaining the residency requirement is cover for the real motive: *to insidiously protect Washington cannabusinesses from out-of-state competition.*

CONCLUSION

Washington's regulatory regime has likely prevented organized criminal enterprises from gaining a foothold in the state's cannabis industry, keeping the federal government at bay, and giving local cannabusinesses an opportunity to establish operations without having to compete with major nonresident cannabusiness interests at the outset. Such regulatory measures are laudable. However, approximately eight years later, the regulatory regime has also presented adverse economic and social effects on cannabis entrepreneurs, especially at a time when economic activity is vital to governmental recovery efforts in response to COVID-19. And if the Washington Legislature desires to avoid costly constitutional confrontations that would likely see the durational residency requirement struck down, now is the time to eliminate this stifling requirement in favor of policies that strengthen and grow Washington's cannabis market.

87. There is obvious tension and a quirk in the law with respect to a case involving a commodity that is lawful within a state but unlawful under federal law. A challenge to Washington's durational residency requirement on the basis of the Commerce Clause of the United States Constitution would not be a first for a court. In fact, the U.S. Supreme Court, in *Gonzales v. Raich*, 545 U.S. 1 (2005), ruled that under the Commerce Clause, Congress has the authority to criminalize the production and use of homegrown cannabis, even if state law allowed use for medicinal purposes and in the interest of addressing a "substantial effect on supply and demand in the national market for that commodity." *Id.* at 19.

88. *See Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449, 2474 (2019).