



STATE OF OREGON
LEGISLATIVE COUNSEL COMMITTEE

February 23, 2016

Senator Floyd Prozanski
900 Court Street NE S415
Salem OR 97301

Re: Residency Requirements for Marijuana Related Business Operations

Dear Senator Prozanski:

You asked this office whether residency requirements for persons licensed to produce, process or sell marijuana, or for persons who have a financial interest in these marijuana business operations, are constitutional in consideration of the Commerce Clause and the Privileges and Immunities Clause of the United States Constitution. The answer to your question, in consideration of either clause, is yes. Residency requirements in the context of marijuana business operations are constitutional.

Under the Commerce Clause of the United States Constitution, Congress has the power to regulate commerce among the states.¹ In interpreting the scope of this congressional power, the United States Supreme Court reasoned that the Commerce Clause enables Congress to prevent the states from balkanizing the national economy and impeding the free flow of commerce.² The court further reasoned that the Commerce Clause impliedly invalidates any state law that unjustifiably burdens interstate commerce, even if Congress has not explicitly regulated that area of commerce.³ On the basis of that reasoning, the court found that the Commerce Clause grants Congress a “dormant” regulatory power.

Courts generally test whether a state law runs afoul of the dormant Commerce Clause power by determining whether the law unjustifiably burdens interstate commerce. In making that determination, courts first determine whether the law only incidentally burdens interstate commerce or whether the law actively discriminates against interstate commerce.⁴ A law that incidentally burdens interstate commerce is a law that indirectly affects the free flow of commerce but is otherwise legitimately within the ordinary purview of state regulation, such as a law that protects the health or safety of state residents or a law that is classified as an historic police power. In contrast, a law that actively discriminates against interstate transactions is a law that directly prejudices out-of-state economic interests, such as a law that favors in-state producers and sellers of a commodity over out-of-state producers and sellers of the same commodity.⁵

¹ Article I, section 8, clause 3.

² *Hughes v. Oklahoma*, 441 U.S. 322, 325 (1979).

³ *Philadelphia v. New Jersey*, 437 U.S. 617, 623 (1978).

⁴ *Maine v. Taylor*, 477 U.S. 131, 138 (1986).

⁵ *Oregon Waste Systems, Inc. v. Department of Environmental Quality of the State of Oregon*, 511 U.S. 93, 99 (1994).

If a court determines that a state or local law only incidentally burdens interstate commerce, the court will balance the burden the law imposes on interstate commerce against the law's putative benefit.⁶ Unless the burdens imposed are "clearly excessive," the court will uphold the state law.⁷ On the other hand, courts strictly scrutinize state laws that actively discriminate against interstate transactions. Courts presume that this type of law is invalid and will only uphold it if the state can prove that the law serves a legitimate purpose that cannot be achieved by other, nondiscriminatory means.⁸

In any other type of business, a residency requirement would be a law that actively discriminates against interstate transactions, making the law subject to the second, more stringent test. However, because marijuana remains illegal under the federal Controlled Substances Act, a residency requirement in the context of marijuana business operations does not result in state "balkanization" and does not affect the "free flow of commerce." At most, a residency requirement in the context of marijuana business operations incidentally burdens interstate commerce, making a law that imposes a residency requirement subject to the less stringent test that balances the burden the law imposes on interstate commerce against the law's putative benefit.

Because there is no legitimate interstate commerce for marijuana, and given the guidance from the federal Department of Justice for states that have legalized the recreational use of marijuana,⁹ we find that a residency requirement in the context of marijuana business operations would survive a constitutional challenge. The department notes enforcement priorities that include: "preventing revenue from the sale of marijuana from going to criminal enterprises, gangs and cartels"; preventing marijuana from states where it is legal under state law from being diverted in some form to other states; and "preventing state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity." These are all putative benefits, to one degree or another, of residency requirements.

Under the Privileges and Immunities Clause of the United States Constitution, "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."¹⁰ Under United States Supreme Court jurisprudence, the Privileges and Immunities Clause limits the ability of a state to discriminate against out-of-staters with regard to fundamental rights or important economic activities. Importantly, the jurisprudence involves a nonresident's ability to earn a livelihood.¹¹ A state's restriction of nonresident activity triggers the Privileges and Immunities Clause if "the activity in question [is] 'sufficiently basic to the livelihood of the Nation' . . . as to fall within the purview of the [clause]" and if it is "not closely related to the advancement of a substantial state interest."¹² In other words, if a law discriminates against nonresidents and is sufficiently basic to the livelihood of the nation, the law must be related to the advancement of a substantial state interest.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ An August 29, 2013, memorandum issued by former United States Department of Justice deputy attorney general James M. Cole to all federal prosecutors, provides guidance on how to proceed with enforcement of the Controlled Substances Act.

¹⁰ Article IV, section 2, clause 1.

¹¹ *Toomer v. Witsell*, 334 U.S. 385, 396 (1948) ("[I]t was long ago decided that one of the privileges which the clause guarantees to citizens of State A is that of doing business in State B on terms of substantial equality with the citizens of that State.")

¹² *Supreme Court of Virginia v. Friedman*, 487 U.S. 59, 64-65 (1988).

In any other type of business, a residency requirement would be a law that triggers the protections of the Privileges and Immunities Clause. However, because marijuana remains illegal under the Controlled Substances Act, it is questionable whether a court would find that a person has a fundamental right to produce, process or sell marijuana or to own, in whole or in part, a marijuana business. At this time, these activities are not sufficiently basic to the livelihood of the nation as to fall within the purview of the clause. And even if these activities were sufficiently basic to the livelihood of the nation to fall within the purview of the clause, it is likely that a court would find that Oregon has a substantial interest in imposing the residency requirements.

As we discussed above, the federal Department of Justice has instructed states that have legalized the recreational use of marijuana to prevent revenue from the sale of marijuana from going to criminal enterprises, gangs and cartels; to prevent marijuana from being diverted from states where it is legal under state law to other states; and to prevent state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity. Imposing residency requirements is one means by which Oregon can achieve these substantial state interests.

Do not hesitate to contact our office if you have any other questions regarding residency requirements in the context of marijuana business operations.

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Very truly yours,

DEXTER A. JOHNSON
Legislative Counsel

A handwritten signature in black ink, appearing to read "Mark B. Mayer". The signature is fluid and cursive, with the first letters of the first and last names being capitalized and prominent.

By
Mark B. Mayer
Deputy Legislative Counsel