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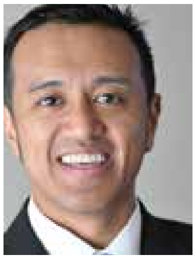
A MESSAGE FROM THE CHAIR



It has been a time like no other. The COVID-19 pandemic has shut down our daily routines and many businesses have been affected. Not only has the health and safety of our society been threatened, people are awakening to the impact of social injustice. Even with the threat of a pandemic, many took to the streets all across America to protest the inequality that has been a part of the country for far too long.

As of July 1, there have been a confirmed total of 35,258 cases of COVID-19 and 1,340 fatalities in Washington. The good news is that the state of Washington has made strides in "flattening the curve" and counties across the state are slowly reopening. But while we reopen, there still remains the risk of the spread of the coronavirus.

The impact of the COVID-19 pandemic on the legal profession is vast…

The impact of the COVID-19 pandemic on the legal profession is vast. Courts closed and office buildings were shut down as many continued to work from home. The alterations in the local legal landscape include the order by the Washington Supreme Court to allow applicants for this summer's 2020 bar exam with a J.D. from an ABA accredited law school to be permitted to choose to be admitted by diploma privilege instead of taking and passing the Uniform Bar Exam. Law school graduations were held online and many traditional events have been cancelled as we all have learned to do things virtually.

As many businesses attempt to regain footing in an economy placed on pause for several months, there are obvious hurdles that each must face. On the other end, there are industries that have kept the motor running as they were either an essential business or were not directly impacted.

Unemployment figures have increased causing many disruptions on various fronts. Efforts by the Small Business Administration to provide loans and loan forgiveness opportunities have offered hope for businesses, although some have not been able to obtain the funds in time.

As counties within the state enter Phase 2 and 3 of reopening businesses, planning for a return has brought up many legal issues regarding health and safety in the workplace. It's also put a strain on financial markets, which are experiencing turbulent times.

Legal professionals have had to learn, like many others, that working from home is much more difficult than it looked. While "working from home" was once seen as a luxury and even a reward, the last couple months have tested the mettle of many a lawyer as some adjusted to Zoom calls, modified work spaces, and worked around family members. Patience has been a virtue in 2020.

This past March, our annual Securities Law CLE had to be converted from an in-person session to online at the last minute due to the state mandate to stay at home. This impacted the engagement and in-person learning opportunity it annually offers. Hopefully, it will return to a more conventional program next year.

Notwithstanding the interruptions in our daily business, the Business Law Section has been at work with

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A Message from the Chair

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legal issues affecting the practice. Notably, the Partnership and LLC Law Committee worked to amend particular sections of the Washington LLC Act which would update the notification requirements in the Act to allow for electronic notification. The Legal Opinions Committee's legal opinion report was well-received by the WSBA's Board of Governors and is now available on both the Business Law Section website and the American Bar Association's website.

The Nonprofit Law Committee has been working on a major comprehensive revision to the Washington Nonprofit Corporation Act. The hope is to update the Act which first came into existence in 1969. Due to COVID-19, the timetable on bringing it before the Legislature may have been pushed back but it does not diminish the efforts of the committee members that have made an effort to make worthwhile changes.

While we were temporarily delayed with this issue, you will find up-to-date information on the basics of the federal loans issued to assist small businesses, an update on the diligent work performed by our Legal Opinions Committee, informative insight on Washington's Cannabusiness industry and a piece on Qualified Opportunity Zones.

As many of our clients and our own businesses are adjusting to transitions, here's hoping that the second half of 2020 provides some reasonable level of normalcy.

Jason J. Cruz
Chair, WSBA Business Law Section

THE BASICS OF THE PROGRAMS AIDING SMALL BUSINESS

By: Jason J. Cruz

The COVID-19 pandemic has forced many businesses to figure out how to survive without normal income.

This spring, the federal government under the Small Business Administration provided assistance which it hopes can sustain businesses until the economy can right itself.

As part of the Coronavirus Aid, Relief, and Economic Security (CARES) Act enacted to address the issues experienced by businesses across the nation, $500 billion was allocated to aid eligible businesses, states, and municipalities. As part of the CARES Act, the Paycheck Protection Program (PPP) was created to help small businesses.

PPP

PPP appropriated $349 billion (and then an additional $320 billion through the Paycheck Protection Program and Healthcare Enhancement Act) to be used to support small businesses to maintain their payroll and some overhead expenses through the period of emergency. The crux of the program is to keep workers paid and employed. The Small Business Administration will forgive loans if all employees are kept on the payroll for eight weeks and the money is used for payroll, rent, mortgage interest, or utilities. Sixty percent of the loan must be used to retain employees.

Small businesses who received a PPP loan have 8 weeks to use the funds for qualifying purposes and the entire loan could be forgiven. There has been an extension to the previous law, which allows the period to be extended to 24 weeks or December 31, 2020, whichever is first. Any funds not used within the "covered period" is not eligible for forgiveness and must be paid back.

The amount of the PPP loan is based on the applicant's payroll costs between January 1, 2019 and December 31, 2019. The loan amount is equal to 2.5 times the average monthly payroll costs and may not exceed $10 million. Among the eligibility requirements, it is limited to those companies with no more than 500 employees.

Applicants apply for a PPP loan directly with an eligible private lender, or federally insured depository institution, federally insured credit union, or Farm Credit System institution. There have been online programs which help applicants navigate the process.

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EIDL

In addition to the PPP, the Economic Injury Disaster Loan (EIDL) Emergency Advance provides up to $10,000 of economic relief to businesses that are currently experiencing temporary difficulties. The EIDL provides low-interest loans as a result of the coronavirus. This program extends to the self-

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employed, and small businesses and agricultural businesses with 500 or fewer employees.

An entity can qualify for up to $2 million for the loan, which has set an APR of 3.75 percent for up to a 30-year term. Up to $10,000 is available as an emergency grant upon approval.

Entities may apply for both the PPP and EIDL although funds from both loans cannot be used for the same purpose.

Status of Aids

The initial wave of applications in April overwhelmed processors as the funds for the program were gone after the first two weeks. Many that did not navigate the application process, did not have a lender to use to apply for the loan, or were concerned that they could not meet the 60 percent payroll threshold, did not apply for the loan.

On June 30, the U.S. Senate passed an extension of the application deadline for PPP small-business loans. If not for the extension, approximately $130 billion earmarked for the program may have gone for naught. The Senate bill extends the application process for PPP loans until August 8.

Other Efforts

In June, legislation was introduced to get a second PPP loan. The Prioritized Paycheck Protection Program, or P4, would allow some small businesses that have already exhausted their PPP loans, or are on track to do so, to apply for a second one. The program targets small businesses with fewer than 100 employees, including self-employed and sole practitioners, and whose revenue dropped at least 50 percent because of the ongoing COVID-19 pandemic.

But as of July 1, P4 has not been signed into law as legislators continue to negotiate over the terms.

The restaurant industry, which is dependent on patrons to dine in or swing by to pick up takeout, has been hit hard by the pandemic. Legislation was drafted to establish $120 billion to help the industry navigate the pandemic. The bipartisan bill sought to help independent restaurants through a "restaurant stabilization grant program." A study released by The Independent Restaurant Coalition (IRC), a group formed to save local restaurants and bars, found that 85 percent of independent restaurants are likely to close by the end of 2020 without any funding. Restaurants have greatly been affected by the pandemic as most in the state of Washington have been closed since mid-March with some opening up but with limited capacity.

As of July 1, this effort has stalled as well.

Conclusion

The pandemic continues to obstruct businesses and create havoc for companies. Governmental assistance has been helpful, yet unattainable for some. There have been additional efforts to reach out to small businesses that were not able to attain assistance in the first wave of applications for PPP and/or EIDL. Nonetheless, some businesses are still teetering on insolvency. As businesses begin to reopen, there will still be a need for financial stability while we return to some form of normalcy.

Jason J. Cruz owns Cruz Law, PLLC in Seattle, Washington where he practices business and intellectual property law. He can be reached at *jason@cruzlawpllc.com*.

SUMMARY OF REPORT ON THIRD-PARTY LEGAL OPINION PRACTICE

By: Diane Lourdes Dick

In December 2019, the Legal Opinions Committee of the Business Law Section (the "Committee") obtained WSBA approval of its comprehensive legal opinion report entitled *Amended and Restated Report on Third-Party Legal Opinion Practice in the State of Washington* (the "Report").

The Report, which can be found on the Legal Opinions Committee's website, integrates, amends, and restates the Committee's prior 1998 and 2000 reports. The Report contains an illustrative form of opinion letter and detailed footnotes that explain the procedures Washington opinion-givers customarily follow when conducting the factual and legal investigations required to support their opinions, as well as the customary meaning of language typically used in opinion letters.

The Report takes into account certain developments in legal opinions practice since the 1998 and 2000 Washington reports. For instance, in recent years, the national legal opinion literature has moved closer toward a consensus that factual confirmations expose opinion-givers to added risk (*See* Section IV-A Cautionary Note about Factual Confirmations of the Report). The Report agrees with and adopts this position. In a similar way, "negative assurances" have become much less common in Washington and elsewhere.

In terms of its structure, the Report's illustrative opinion includes some, but not all, assumptions, qualifications, exclusions, and other limitations that are understood as a matter of Washington customary practice to be included whether or not expressly stated (*See* Section V-Listing of Assumptions, Qualifications, Exclusions, and Other Limitations of the Report). The Committee chose to expressly include them in part because firms have diverse preferences with respect to the appropriateness of listing customary terms, and greater explicitness may be beneficial in certain situations. But while the Committee has chosen to expressly state certain clearly customary terms in the illustrative form, the Report does not advocate their express inclusion in every opinion letter. To the contrary, the Report emphasizes the importance of streamlining opinion letters and tailoring express qualifications to the most important issues. And, of course, the Report reiterates that many assumptions and other limitations are customarily included in opinion letters, whether or not stated expressly.

The Report also addresses evolving trends and commercial expectations with respect to reliance on opinion letters by unknown future assignees, such as future lenders under syndicated loan transactions. Although many Washington attorneys choose to strictly limit reliance in order to reduce their potential liability, others are willing to allow future reliance under certain limited circumstances. Accordingly, the Report provides two alternative forms of reliance language. The first alternative strictly limits reliance. The second permits reliance by successor lenders, but expressly states that reliance must be reasonable and that consent to future reliance does not constitute reissuance of the opinions or create any obligation to update the opinions.

In preparing the Report, the Committee reviewed state, national, and international legal developments that have the potential to impact Washington legal opinion practice. For instance, the Report addresses, among other things, uncertainty resulting from the Washington Supreme Court's 2012 response to a certified question as to whether Mortgage Electronic Registration Systems, Inc. ("MERS") was a lawful beneficiary under two deeds of trust where MERS was named as beneficiary but never held the notes evidencing the obligations secured by the deeds of trust. Similarly, the Report details recent changes to the information set forth in certificates of existence issued by the Washington Secretary of State, provides sample language to address credit agreements that contain European Union bail-in provisions, and draws practitioners' attention to the potential impacts of the Hague Securities Convention's choice-of-law rules on transactions involving securities accounts.

The Committee shared drafts of the Report prior to publication with key stakeholder groups inside and outside the state of Washington, including other WSBA Sections and national commentators on legal

> *…a valuable resource for lawyers engaged in giving and receiving third-party legal opinion letters in the state of Washington…*

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Summary of Report on Third-Party Legal Opinion Practice

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opinion matters. The comments provided by these stakeholder groups assured the Committee that the Report reflected the best guidance for Washington lawyers on legal opinion practice. Following publication on the Business Law Section's webpage, the Committee has received favorable comments from several national commentators on the quality and accuracy of the Report.

The Committee hopes that the Report will be a valuable resource for lawyers engaged in giving and receiving third-party legal opinion letters in the state of Washington, and that it will also serve as a useful reference tool for business and corporate lawyers working on commercial transactions in our state.

1 Bain v. Metropolitan Mortgage Grp., Inc., 175 Wn.2d 83 (2012).

SOCIALLY RESPONSIBLE INVESTING AND QUALIFIED OPPORTUNITY ZONES

By: Monica L. Keo

When Congress passed the Tax Cut and Jobs Act in 2017, it created a new economic development tool known as QOZs.

Tax planning plays an important role for any business, no matter when the service is conducted. For many companies and investors, it is important to save money and take advantage of any benefit that is available and that is why tax planning is valuable. However, when new programs and benefits are introduced by the legislature, the risk-adverse investor may not be interested in restructuring or participating in a new program. When there is a lack of guidance on what constitutes an appropriate transaction and a lack of a brightline rule on how to properly participate in the program, many investors discount the potential savings due to the risk of noncompliance. This is the predicament that faced Qualified Opportunity Zones (QOZ). The QOZ program has great benefits for investors; however, the lack of guidance from the Internal Revenue Service (IRS) and U.S. Department of the Treasury did not incentivize investors to participate. Thus, how do we, as counsel and advisors, help to shed light on programs like QOZs that could benefit the community overall?

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When Congress passed the Tax Cut and Jobs Act in 2017, it created a new economic development tool known as QOZs.[1] The purpose behind QOZs is to unlock unrealized gains and pump as much cash as possible into low-income communities.[2] QOZs were anticipated to spur economic growth in lower-income areas by allowing investors to invest their capital gains in areas of need in exchange for the ability to defer taxes for a limited amount of time on qualified investments.[3] Essentially, the QOZ program is another tax deferral method that allows investors to defer capital gains tax for a limited amount of time[4] and will also allow the government to collect taxes that it historically has not been able to collect.[5]

The QOZ program allows private investors to invest in designated zones of their choosing. The form of investment may vary as investors are allowed to invest property other than cash (stocks, real estate, and partnership interests).[6] To participate in the QOZ program, an investor must first invest their gains into a Qualified Opportunity Fund (QOF). A QOF is a specific investment

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Socially Responsible Investing and Qualified Opportunity Zones

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tool that takes the form of either a partnership or corporation for the purpose of funding QOZs. The entity must file a Form 8996 with the IRS to become a QOF and must hold at least 90 percent of its assets in QOZ property[7] to be in compliance with the program.[8] Generally, the investor's gain must be invested into the QOZ within 180 days from the date of sale or exchange in order to qualify for the program.[9] Further, each investor must file an election on his or her tax return (Form 8949 or 4797) to designate the tax deferral.[10]

Once invested into the QOF, the investor may choose the QOZ project he or she would like to support. As of early January 2020, Novogradac, a national accounting firm, reported that investments into QOFs increased over 50 percent since December 2019 and more than $6.7 billion was raised within QOFs.[11] While the interest appears to be growing, the program exists in a mere two statutes in the Internal Revenue Code, which has deterred some investors from participating as there is not a lot of statutory guidance on the QOZ program. Luckily, the IRS and U.S. Department of the Treasury issued final guidance on the program in December 2019. However, while the interest in the program has grown since its start, the time period for the program is nearing the sunset and the incentive to participate is disappearing.

The main draw for investors to the QOZ program is the tax incentives. The QOZ program contains incremental benefits that reduce the taxes owed depending on how long the investment is held within the QOZ. If the investment is held for at least five years, the basis of the investment will be increased by 10 percent of the amount of gain deferred.[12] If the investment is held for at least seven years, that basis increase jumps to 15 percent of the gain deferred.[13] Lastly, if the investment is held for at least 10 years, the investor will receive the greatest tax benefit: a step-up in basis that results in permanent exclusion of new capital gains from taxation.[14] While the tax incentives were enticing for investors at the beginning of the program, for investors who are interested in investing or have not used their assets in the QOF quite yet, the question remains: what now?

> *The creation of housing and jobs for those who truly need it will be not only investing in the spirit of the program as Congress envisioned, but also moving toward a sustainable and socially responsible investment model.*

When Congress introduced the QOZ program, investors were filled with skepticism. And now, as the opportunity to defer gains through the QOZ program will sunset on December 31, 2026, there is less of an incentive for investors to invest into the program because the timeframe for the maximum amount of deferral has passed. However, during a time in which socially responsible investing and sustainable investing are on the rise,[15] the QOZ program may be another avenue for clients to participate and invest in a socially responsible manner.

QOZs are intended to provide financial support to lower-income communities and by investing into a QOF, investors are able to provide funds toward supporting areas in need. The QOFs could provide essential funds to QOZs and build needed infrastructure and resources such as affordable housing and local businesses that support the communities. The creation of housing and jobs for those who truly need it not only advances the spirit of the program as Congress envisioned, but will also help move a sustainable and socially responsible investment model.

If providing affordable housing is of interest, the Low Income Housing Tax Credit (LIHTC) program is a possible avenue for QOF assets. LIHTC allows investors and developers to build and rehabilitate affordable housing communities in exchange for tax credits. It is possible for a QOZ to contain LIHTC affordable housing apartments and could be a way for investors to make a sustainable impact on the community. For investors who do not do business in the real estate or affordable housing markets, investing into a QOF which then applies for the LIHTC benefit could be of value to both the investor and community. The investor will be able to obtain the benefit from both programs and the affordable housing is an available option for a sustainable investment that continues to provide well-needed support for marginalized communities.

However, QOFs are not restricted to investing in buildings or apartments. Investors could use QOF assets to invest in businesses and other opportunities to bring employment and steady income into the community as well. Investors will be able to invest QOF assets into stock or partnership interests for businesses located within a QOZ.[16] For some investors looking to make an impact, this option could provide support for local businesses or communities that need financial support to get off the ground or expand.

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Socially Responsible Investing and Qualified Opportunity Zones

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While investors may not be able to obtain the full 15 percent basis increase on their deferred capital gains, it is still possible that the investor could receive the permanent step up in basis in additional gains if they keep their investment for 10 years or longer. For investment into a LIHTC-QOZ project, the 10-year benchmark is a near "gimme" as the LIHTC program requires at least a 15-year compliance period for investors to retain all of their tax credits.[17] Thus, to make an impact in the community while receiving two different benefits may be enough to sell a client on this opportunity.

As the public's call for transparency and socially responsible investing increases, we, as lawyers and advisors, should encourage and help to bridge the gap between the way things have always have been done and the way things should be done moving forward. For instance, attorneys can encourage clients to invest their gains in a program where they are both financially and emotionally invested, like the QOZ program. While the QOZ program is sunsetting, there are still ways for investors to meaningfully invest in a way that further benefits the community they are in.

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1 Tax Cuts and Jobs Act, Pub. L. No. 115-97, 131 Stat. 2054 (2017).

2 Reid S. Vardell, Note, The Land of Opportunity Zones: Deferring Taxable Capital Gains Through Investments in Low-Income Communities, 84 MO. L. Rev. 915, 926 (2019) (commenting that "the driving purpose behind the Opportunity Zone Program: helping people get back on their feet by bringing jobs back to their communities" is important to keep in mind when assessing the program).

3 Opportunity Zones Frequently Asked Questions, IRS, https://www.irs.gov/newsroom/opportunity-zones-frequently-asked-questions.

4 The statute contains a sunset clause where investors will be required to pay capital gains tax on their deferred gains after December 31, 2026 or upon disposition of the QOZ, whichever is earlier. See I.R.C. §1400Z-2(b).

5 For example, when taxpayers perform a §1031 like-kind exchange. A highly preferred method of deferring capital gains was through §1031 of the Internal Revenue Code. See Sidney Kess & Michael Kelley, How Collectors Can Utilize the Opportunity Zone Program: Investors See a Potential Replacement for Like-Kind Exchanges, 89 CPA J. 64, 64 (2019). In utilizing a §1031 like-kind exchange, the investor can exchange property with another and keep their original basis from the old property as the new property, regardless of its fair market value. If the gains are held until death, the heir of the property will simply receive a step-up in basis and the government may not receive the tax on the original gain.

6 See Alan Sage, Mike Langen & Alex Van de Minne, Where Is the Opportunity in Opportunity Zones? Early Indicators of the Opportunity Zone Program's Impact on Commercial Property Prices 6 (2019).

7 QOZ property is property that is either QOZ stock, QOZ partnership interest, or QOZ business property. Essentially, the assets of a QOF must be invested in a form that will benefit and be used for a QOZ. See I.R.C. § 1400Z-2(d)(2) (2018).

8 I.R.C. § 1400Z–2(d)(1) (2018).

9 I.R.C. § 1400Z–2(a)(1)(A) (2018). However, for taxpayers involved with passthrough entities and trust beneficiaries, there is a special 180-day period that may start on the due date of the entity's tax return, not including extensions, to account for the timing of when the taxpayers may receive information regarding their share of any gains or distributions and the characteristics of the income. Treas. Reg. § 1.1400Z2(a)–1(b)(2)(iii) (2020).

10 I.R.C. § 1400Z–2 (2018).

11 Michael Novogradac, Opportunity Funds Listing Shows Strong Increase in Investment, Novogradac (Jan. 8, 2020), https://www.novoco.com/notes-from-novogradac/opportunity-funds-listing-shows-strong-increase-investment.

12 I.R.C. § 1400Z–2(b)(2)(B)(iii) (2018).

13 I.R.C. § 1400Z–2(b)(2)(B)(iv) (2018).

14 I.R.C. § 1400Z–2(c) (2018).

15 Adam Connaker & Saadia Madsbjerg, The State of Socially Responsible Investing, Harv. Bus. Rev. (Jan. 17, 2019), https://hbr.org/2019/01/the-state-of-socially-responsible-investing.

16 I.R.C. § 1400Z–2(d) (2018).

17 About the LIHTC, Novogradac, https://www.novoco.com/resource-centers/affordable-housing-tax-credits/lihtc-basics/about-lihtc (last visited June 23, 2020).

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

By: Alejandro Monarrez[1]

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.[2]

However, a caveat exists: applicants must have resided in the state for at least six months prior to issuance of a cannabusiness license.[3] Specifically, under RCW 69.50.331(1)(b)(ii), (iii), and (iv),[4] cannabis licenses may not be issued to "person[s] doing business as a sole proprietor who has 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 as well.[5] 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.[6]

In light of the U.S. Supreme Court's decision in *Tennessee Wine and Spirits Retailers Assn. v. Thomas*,[7] 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 article explores the history on cannabis legalization in Washington, as well as the economic, social, and constitutional considerations for eliminating such a barrier.[8]

Background

Washington[9] and Colorado[10] 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. following suit in 2014.[11] More than thirty states have since legalized cannabis for either medicinal and/or recreational purposes[12] despite conflicting Department of Justice ("DOJ") guidance on federal cannabis law enforcement.[13] The DOJ's existential threats to state cannabis marketplaces due to recent reversal on enforcement[14] and early priorities in diversion prevention of legalized cannabis products all likely contributed to Washington's early adoption of a durational residency requirement.[15] However, the requirement has also led to economic protectionism sustained by fears of nonresident cannabusiness interests overtaking the local industry.[16]

Economic and Social Policy Considerations

States obviously faced uncertainties with the legalization of recreational cannabis, including what the federal government's response[17] would be against the backdrop of long-standing cannabis prohibition.[18] Washington likely acted to restrict participation in the local market to those individuals and entities with state residency to stem the possibility of cannabis diversion while providing a head start to in-state cannabusinesses without competition from nonresident interests at the outset.[19] Eight years later, Washington has a mature industry with robust oversight,[20] and the state's efforts have likely stemmed both illegal diversion of cannabis and nonresident interests crushing Washington cannabusinesses.[21] However, the durational residency requirement has also had the effect of constraining future growth in the market.[22]

With a $44 billion market increase projected within the industry in 2020,[23] Washington cannabusinesses are just not positioned to capitalize on such projections because residency restrictions prevent new avenues of capital investment for operations and growth from being accessed.[24] Although the Financial Crimes Enforcement Network (FinCEN) issued somewhat encouraging guidance to firms interested in engaging cannabusinesses, most have decided to forego the opportunity[25] 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.[26]As a result, initial expenditures associated with cannabusinesses are discouraging to cannabis entrepreneurs.[27]

Oregon, for example, initially required 51 percent of a cannabusiness to be owned by two-year residents of the state.[28] However, Oregon eliminated the requirement after groups like the Oregon Cannabis Association lobbied legislators to realize prospective cannabis entrepreneurs were lacking access to critical capital as a result.[29] If Oregon did not take immediate action, state cannabusinesses would likely fail since survival depended on

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Washington Cannabusiness

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steady capital investment to continue competing with states that did not have such restrictions.[30] Although some believed eliminating Oregon's residency requirement would lead to oversaturation by nonresident cannabis interests, the reality was quite the opposite: nonresident investors sought partnerships with skilled Oregonian cannabusinesses over "muscle[ing] out local businesses."[31]

Colorado likewise maintained a residency requirement to curtail nonresident interests from taking over the market.[32] Coloradans claimed cannabusinesses were able to set up operations without having to compete with major 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."[33] However, Coloradan cannabusinesses also experienced the same lack of access to capital investment to continue thriving.[34] Tyler Henson, head of the Colorado Cannabis Chamber of Commerce, explained that "We 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."[35] Colorado first decided to ease residency requirements by requiring that at least one individual with direct beneficial ownership interest in a cannabusiness be a resident.[36] Cannabis sales then surpassed $1 billion, accounting for "roughly 3% of the state's $30 billion budget."[37] Colorado ultimately decided to eliminate any residency restrictions earlier this year.[38] The decision positions Colorado to see even more tax revenue through state cannabis sales, especially at a time when states so desperately need resources for recovery in the wake of COVID-19.[39]

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 2018[40]—the residency requirement currently prevents cannabusinesses from competing with neighboring states. Washington cannabusinesses continue developing innovative products to remain competitive *within* the state.[41] However, with Oregon and Colorado having eliminated their residency requirements and Colorado's recent cannabis sales topping $1 billion, innovative products will not be enough because Washington cannabusinesses need new sources of capital to continue innovating in this cash intensive enterprise.[42] And once cannabis becomes legalized federally, Washington cannabusinesses will be behind those states that were already allowing for nonresident capital investment when it mattered.[43]

Washington legislators also recognize current cannabis policy creates barriers to entry for minorities and women in the industry.[44] Representative Eric Pettigrew along with several other representatives introduced Washington House Bill 2263 in January 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.[45] Fees collected on new investments in Washington cannabusinesses, including those made by nonresident investors, would fund the program.[46] However, to fully realize such an awesome initiative, Washington must eliminate targeted restrictions against nonresidents.[47] As Representative Pettigrew expressed, "we can make the call that … 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 …"[48] 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 those barriers that prevent it.[49] 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."[50]

Moreover, in light of the recent global circumstances relating to the COVID-19 pandemic, Washington cannabusinesses are in an even greater need now of new sources of capital unrestricted by such economic barriers.[51] COVID-19 is a contagious infectious disease with common symptoms of fever, tiredness, and dry cough in humans.[52] 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.[53] Businesses that were deemed "essential," like grocery stores, pharmacies, banks were allowed to remain open while sporting events, bars, and restaurants were closed.[54] To the benefit of cannabusinesses, Washington dispensaries were deemed essential and allowed to remain open.[55] Also, in response to the economic downturn and increase in unemployment across the country, the federal government passed the $2 trillion CARES Act which allocates $350 billion to the Small Business Administration to disburse in the form of forgivable loans to businesses with less than 500 employees.[56]

However, because cannabis remains a Schedule I controlled substance and regulatory risk

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persists for financial institutions to engage cannabusinesses, such enterprises are ineligible for emergency financial relief.[57] 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.[58] This response is patently unfair toward an industry that creates significant employment opportunities to the benefit of states. In Washington, for example, cannabusinesses paid approximately $286.1 million in employee wages.[59] 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 a 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.

Constitutional Law Considerations

On June 26, 2019, the U.S. Supreme Court invalidated a similar durational residency requirement in *Tennessee Wine and Spirits*.[60] Tennessee required applicants seeking an alcohol retailers license to have been residents for at least two years prior to issuance of an alcohol retailers license and at least 10 years for renewal.[61] Moreover, Tennessee would not issue corporations a license unless "all of its officers, directors, and owners of capital stock satisfy the durational-residency requirements applicable to individuals."[62] In other words, Tennessee's durational residency requirement effectively prevented any corporation whose stock was publicly traded from owning and operating a liquor store within the state.[63] The U.S. Supreme Court held in part that Tennessee's two-year durational residency requirement violated the Commerce Clause of the U.S. Constitution because the requirement "blatantly" favored in-state residents and bore little relationship to public health and safety.[64]

The case began when the Tennessee Attorney General issued an opinion in 2012 answering the question of whether the state's durational residency requirement violated the Commerce Clause.[65] 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."[66]

> *…although cannabusinesses are deemed "essential" in Washington, these businesses are denied access to forgivable loans and payroll relief under the CARES Act.*

In 2016, Total Wine, Spirits, Beer & More, LLC., and Affluere Investments, Inc., applied for licenses to own and operate liquor stores in the state.[67] The entities were not residents of nor had been formed in accordance with the laws of Tennessee.[68] Despite not meeting the residency requirement and in light of the Tennessee Attorney General's earlier directive, TABC recommended approval of the parties' applications.[69] 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.[70] As a result, TABC sought a declaratory judgment in state court to settle the issue regarding the constitutionality of the requirement.[71]

The case was removed to the United States District Court for the Middle District of Tennessee which ultimately determined the requirements unconstitutional.[72] The Court of Appeals for the Sixth Circuit affirmed and concluded that the residency requirements were facially discriminatory against nonresidents.[73] However, the panel was divided as to whether the two-year residency requirement was saved under the 21st Amendment which repealed Prohibition and provided states with authority to regulate the in-state distribution of alcohol.[74] The Association sought certiorari on the question and the U.S. Supreme Court granted review.

On the issue of whether the two-year initial residency requirement was saved by the 21st Amendment, the U.S. 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."[75] The Association argued 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.[76]

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Writing for the majority, Justice Alito articulated the two-year residency requirement violated the Commerce Clause because the requirement unduly restricted interstate commerce.[77] Under the 21st 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.[78] The U.S. 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.[79] 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."[80] The Court also suggested Tennessee could mandate "alcohol awareness" training for managers and employees.[81] All in all, the Court concluded 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.[82]

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 and Spirits*. In other words, just as the Supreme Court held in the case that a two-year residency requirement violated the Commerce 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 Washington's restriction could conclude that 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, Colorado[83] and Oregon[84] initially promulgated similar residency requirements for cannabusiness applicants for reasons pertaining to public health and safety. However, both states have since eliminated such residency requirements with many others[85] joining as well. Now, Washington reasonably has a strong interest in public health and safety too 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 Washington State Liquor & Cannibis Board 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 reasonably may conclude Washington's durational residency requirement is nothing more than an economically protectionist policy veiled under a broad euphemism of "public health and safety."

Additionally, as the U.S. Supreme Court reasoned in *Tennessee Wine and Spirits,* Tennessee could have thoroughly investigated prospective applicants for alcohol retailers' licenses without requiring residency in the state for two years prior. A court could similarly conclude that Washington could 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 45, 30, or zero days does not bear 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 10 and 60 days to *purchase a firearm* in Washington—an arguably greater health and safety concern to the public at-large.[86]

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 seems to be without merit. Just as the U.S. Supreme Court suggested in *Tennessee Wine and 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. Such a training would be required by prospective applicants at the time of initial application submission and periodically done throughout the period an active cannabusiness license is held. This would be a less restrictive alternative to accomplishing the same objective without depending on burdensome and unconstitutional requirements.

Nonetheless, it goes without saying that the elephant in the room must be acknowledged: cannabis

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remains a Schedule I controlled substance under federal law.[87] 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 systemic mistreatment on the basis of residency alone without evidence to the contrary. Admittedly, *Tennessee Wine and Spirits* resolved a question as to whether a two-year durational residency requirement was saved by the 21st Amendment. And since no such law exists here with respect to cannabis, Washington could reasonably argue that this provides the state even more reason to enact such measures where the law is devoid of precedent.

> *…it goes without saying that the elephant in the room must be acknowledged: cannabis remains a Schedule I controlled substance under federal law.*

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 health and safety.[88] Despite the nonexistence of a 21st Amendment to fill the jurisprudence void with respect to Washington cannabis law and regulation, the spirit of Section 2 of the 21st 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.[89] Ultimately, a successful constitutional challenge will effectively force Washington to concede 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. Although asserting a constitutional challenge is overshadowed by the illegality of cannabis at the federal level, a challenge grounded in an individual's ability to participate in a lawful enterprise disinhibited by a state's unconstitutional requirement would likely prevail. And if the Washington Legislature desires to avoid such a costly constitutional confrontation that would likely see the durational residency requirement be struck down, now is the time to eliminate a requirement that constrains growth to Washington's cannabis industry.

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2 *See* Wash. Liquor & Cannabis Bd., Marijuana Licensing, https://lcb.wa.gov/mjlicense/marijuana-licensing (last visited on Jun. 19, 2020).

3 *See* Wash. Rev. Code § 69.50.331(1)(b)(ii), (iii), (iv) (2017).

4 *Id.*

5 *Id.*

6 *Id.*

7 Tennessee Wine and Spirits Retailers Assn. v. Thomas, 139 S. Ct. 2449, 2457 (2019) [hereinafter *Tennessee Wine and Spirits*].

8 Wash. Liquor & Cannabis Bd., Frequently Asked Questions, https://lcb.wa.gov/licensing/applicant-faqs (last visited on Nov. 1, 2019).

9 Wash. Rev. Code § 69.50. (2020).

10 CO Const. art. 18, § 16.

11 *See* Sarah Trumble, "Timeline of State Marijuana Legalization Laws," Third Watch-Infographic (May 2, 2016), https://www.thirdway.org/infographic/timeline-of-state-marijuana-legalization-laws.

12 "National Survey of State Laws-Marijuana Laws," https://heinonline-org.proxy.seattleu.edu/HOL/NSSL?collection=nssl&law=MARIJUANA%20LAWS&edition=8; *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 (forthcoming 2020).

13 U.S. Deputy Attorney General James Cole in 2013 released a memorandum addressing federal enforcement in light of state cannabis legalization. *See* James M. Cole, *Memorandum for all United States Attorneys*, U.S. Department of Justice Office of the Attorney General (Aug. 29, 2013), https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf; the memo provided guidance to DOJ attorneys to focus enforcement efforts on preventing distribution of cannabis

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to minors and diversion of legalized cannabis. *Id.* However, U.S. Attorney General Jeff Sessions in 2018 rescinded the Cole Memo by directing U.S. Attorneys to once again enforce federal cannabis law. *See* Jefferson B. Sessions, "Memorandum for all United States Attorneys," U.S. Department of Justice Office of the Attorney General (Jan. 4, 2018), https://www.justice.gov/opa/press-release/file/1022196/download. 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. *Id.*

14 *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.

15 *See* Allie Howell, "Residency Requirements for Marijuana Licensure," Reason Foundation (Jan. 2019), https://reason.org/wp-content/uploads/residency-requirements-marijuana-licensure.pdf.

16 *Id.*

17 *See* Laura L. Meyers, "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.

18 *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.

19 *See* Howell, *supra* note 15, at 3.

20 *See* Melissa Pistilli, "Washington State's Cannabis Market Is a Launch Pad for Cost-Competitive Multi-State Operators," Cannabis Investing News (Jun. 12, 2019), https://investingnews.com/innspired/washington-state-cannabis-market/.

21 *See* Howell, *supra* note 15, at 13.

22 *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.

23 Hilary Bricken, *Funding and Financing a Marijuana Business*, 3 ABA SciTech L. 6 (2017).

24 *See id.*

25 *Id.*; Fin. Crimes Enforcement Network, *FIN-2014-G001 BSA Expectations Regarding Marijuana-Related Businesses* (Feb. 14, 2014), https://www.fincen.gov/sites/default/files/shared/FIN-2014-G001.pdf.

26 *Compare* Bricken, *supra* note 23 *with* John Shroyer, "Flood of Investment Money Flowing to Oregon Cannabis Firms After Residency Change," Marijuana Bus. Daily (Jul. 28, 2016), https://mjbizdaily.com/flood-of-investment-money-flowing-to-oregon-cannabis-firms-after-residency-change/.

27 *See id.*

28 *Id.*

29 *Id.*

30 *See* Shroyer, *supra* note 26.

31 *Id.*

32 *See* Howell, *supra* note 15, at 3.

33 *Id.* at 3–4.

34 *Id.* at 5.

35 Kristen Wyatt, "Legalized States Taking Fresh Look At Out-Of-State Marijuana Investing," The Cannabist (Jan. 20, 2016), https://www.thecannabist.co/2016/01/20/marijuana-investing-lawmakers-out-of-state-ownership/46945/ (updated Mar. 23, 2018).

36 *See* Howell, *supra* note 15, at 5.

37 Bryan Borzykowski, "Colorado Grows Annual Cannabis Sales to $1 Billion As Other States Struggle to Gain A Market Foothold," CNBC (Jul. 10, 2019), https://www.cnbc.com/2019/07/10/colorado-cannabis-sales-hit-1-billion-as-other-states-rush-to-market.html.

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

39 *Id.*

40 Wash. Liquor & Cannabis Bd., *Annual Report Fiscal Year 2019*, https://lcb.wa.gov/sites/default/files/publications/annual_report/2019%20annual-report-final.pdf (last visited on Jan. 5, 2019).

41 *See* Masse, *supra* note 22.

42 *Id.*

43 *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.*

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

45 *Id.* at 1.

46 *Id.* at 1–2.

47 Interview with Eric Pettigrew, Washington State Representative for the 37th Legislative District in Olympia, Wash. (Jan. 17, 2020) (on file with author).

48 *Id.*

49 *Id.*; it goes without saying the "War on Drugs" has disproportionality affected these historically marginalized communities in our society. An initiative that attempts to rectify the costs of such 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.

50 *Id.*

51 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/.

52 WHO, "Q&A On Coronaviruses (COVID-19)" (Apr. 8, 2020), https://www.who.int/news-room/q-a-detail/q-a-coronaviruses?

53 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/.

54 *Id.*

55 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.

56 *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.

57 *See id.*; *see also* Brakkton 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.

58 *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/.

59 WA St. Inst. for Pub. Pol'y, Employment and Wage Earnings in Licensed Marijuana Businesses 1 (Jun. 2017), https://www.wsipp.wa.gov/ReportFile/1669/Wsipp_Employment-and-Wage-Earnings-in-Licensed-Marijuana-Businesses_Report.pdf.

60 *See* Tennessee Wine and Spirits, 139 S. Ct. at 2457.

61 *See* Jake Holland & Gregg Stohr, Supreme Court Voids Residency Rule for Liquor Store Owners (2), Bloomburg Law News (Jun. 26, 2019), https://www.bloomberglaw.com/product/blaw/document/X1R9H0EG000000?bc=W1siU2VhcmNoIFJlc3VsdHMiLCIvcHJvZHVjdC9ibGF3L3NlYXJjaC9yZXN1bHRzLzFmYWEwNTM1YjJkMDZhYzczNjU2ODVhOTlmYzhiNjEwIl1d--08861615557066142e4d0be1d44d90861959e6d8&guid=40080c44-2168-41c3-8b9c-82bd0e57a1f6&search32=pWzQNBi0mCwTA9QKUJAlJw%3D%3D7ZR0te9xLA8MN1lGQqmgo0vuLyUuT2K-JSN22wl4ELvO4J3T-kcjlSUbZk9T3fIwY-zZyzZqu7434wjuD8eVNUiY6IDctzpjBaiemlcgAgUGI6CogoLCbEzVVeaHpcvjfcvwAhfU761G261ODOt6NKbkRVhYDZedEUxJlN0Fl87s%3D.

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

63 *Id.* at 2457.

64 *See* id.

65 *Id.* at 2456–57.

66 *Id.* at 2457–59.

67 *Id.* at 2458.

68 *Id.*

69 *Id.*

70 *Id.*

71 *Id.*

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72 *Id*.

73 *Id*.

74 *Id*. at 2459.

75 *Id*.

76 *Id*. at 2457, 2474.

77 *Id*. at 2474–76.

78 *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*.

79 *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.

80 *Id*. at 2475.

81 *Id*.

82 *Id*. at 2476.

83 *Id*.

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

85 *See* Oregon Liquor Control Commission, Recreational Marijuana—FAQs: Licensing-General, https://www.oregon.gov/olcc/marijuana/Pages/FAQs-Licensing-General.aspx (last visited on Jun. 20, 2020).

86 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/.

87 *See* Wash. Rev. Code § 9.41.092 (2019).

88 21 U.S.C. § 812.

89 There is obvious tension and a quirk in the law with respect to a case involving something lawful within a state but unlawful at the federal level. Aside from cannabis, the law has historically dealt with this in a myriad of contexts, including segregation, voting rights, and same-sex marriage. However, 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 judicial body. 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 the use for medicinal purposes.

90 *See* Tennessee Wine and Spirits, 139 S. Ct. at 2474.