

To: Interested parties in Massachusetts
From: Jordan Wellington, Vice President, Policy
Date: March 31, 2020
Re: Colorado's disparate treatment of resident vs. non-resident adult-use cannabis purchases

On March 23, 2020, Gov. Charles D. Baker issued COVID-19 Order No. 13, requiring all businesses that do not provide "essential services" to close their facilities to workers, customers and the public until April 7, 2020. Adult-use cannabis retailers were not included as essential service in that order. As a result, licensed sales of cannabis for adult use have been halted since March 24. The governor explained the decision at a news conference, expressing that his "main reason" for shutting down adult cannabis sales was to avoid attracting visitors from other states, which could hinder efforts to contain the spread of the virus.

Since the governor's announcement, a large number of adult-use cannabis retailers have expressed support for the idea of limiting sales to Massachusetts residents, should adult-use stores be given the opportunity to re-open. It follows that they would support a state-wide policy of only serving Massachusetts residents as a condition of re-opening. Questions have been raised, however, about whether such a policy could subject the Commonwealth to a lawsuit. We believe that the experience of Colorado in the wake of legalization, as well as legal scholarship, provides important insight into this matter.

When Colorado initially legalized and regulated adult-use marijuana sales in 2014, the state treated Colorado residents differently than residents from other states. Non-residents were allowed to patronize retail marijuana stores but were significantly restricted in the amount they were permitted to purchase. Residents were permitted to purchase up to one ounce of marijuana, whereas non-residents were restricted to only purchasing a quarter of an ounce.

Colorado adopted a policy that clearly discriminated against non-residents on its face. They justified this discriminatory policy as a way to reduce the potential for non-residents to purchase marijuana in Colorado and return to their home states where marijuana was likely to be illegal. This policy remained in effect until 2017, when it was repealed by the Colorado General Assembly.

Although the Supreme Court has invalidated state laws that discriminate against non-residents in other contexts, Colorado's discriminatory policy was never challenged in court. While legal scholarship on this issue as it relates to cannabis is limited, there seem to be two significant reasons why these lawsuits never occurred. First, it seems unlikely that a federal court would grant standing to a non-resident of a state to assert a constitutional right to purchase a federally illegal substance in state allegedly limiting that right. Moreover, other potential constitution arguments*, such as ones based on the Privileges and Immunities Clause or the Dormant Commerce Clause, respectively, turn on whether a state has a "substantial reason" for the discrimination (with the policy being related to that reason) or whether the policy furthers a legitimate end. Colorado's interest was in preventing diversion of cannabis. As far as Massachusetts is concerned, it is hard to imagine a more substantial reason or legitimate end than preventing the spread of the corona virus.

* An excellent discussion of these arguments is presented in "One Toke Over the (State) Line: Constitutional Limits on 'Pot Tourism' Restrictions," by Brannon P. Denning (Florida Law Review, Vol. 66, No. 6, 2014).