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Missouri's Residency Restrictions for Medical Marijuana Use

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MISSOURI'S RESIDENCY RESTRICTIONS FOR MEDICAL MARIJUANA USE

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MISSOURI'S ADOPTION OF A CONSTITUTIONAL AMENDMENT DECRIMINALIZING MEDICAL MARIJUANA FOR STATE LAW PURPOSES HAS PRESENTED NUMEROUS INTERSTITIAL ISSUES. THIS ARTICLE EXAMINES ONE THAT MISSOURI'S DEPARTMENT OF HEALTH AND SENIOR SERVICES ("DHSS") HAS ATTEMPTED TO ADDRESS BY REGULATION: RESIDENCY REQUIREMENTS FOR QUALIFYING PATIENTS. THE CURRENT REGULATIONS ADD DETAIL TO THE CONSTITUTIONAL REQUIREMENT THAT A QUALIFYING PATIENT BE A "MISSOURI RESIDENT."[2] THEY REQUIRE THAT A PATIENT MUST "RESIDE[] IN MISSOURI AND NOT CLAIM RESIDENT PRIVILEGES IN ANOTHER STATE OR COUNTRY."[3] THIS ARTICLE CONCLUDES THIS ASPECT OF THE REGULATIONS IS OF DUBIOUS TENABILITY.

We can summarize our discussion as follows: The regulations have selected a narrow interpretation of the term "resident." The first step in examining the regulations is to determine whether, but for their adoption, the constitutional provision would be so interpreted. The narrow interpretation of "resident" is inconsistent with a number of principles that generally apply to interpreting statutory or constitutional language: (i) language securing a civil right should be broadly construed; (ii) the language should not be construed so that different terms have the same meaning; and (iii) the language should be construed so as to give effect to its evident purpose, not creating an unreasonable framework.

The second step is to examine the scope of authority delegated to DHSS, to assess whether it has been authorized to curtail the benefits of medical marijuana in this way. In fact, the constitutional provision would appear to deny that authority.

Interpretation of the Constitutional Provision on Its Own

General Meaning of "Resident"

Missouri restricts the purchase of medical marijuana to residents.[4] The term "resident" has multiple meanings. *State*

v. Tustin notes, "We hesitate to essay any definition of 'residence,' for the word is like a slippery eel, and the definition which fits one situation will wriggle out of our hands when used in another context or in a different sense."[5] Black's Law Dictionary provides both narrow and broad definitions: "1. Someone who lives permanently in a particular place; specif., a person who has established a domicile in a given jurisdiction. 2. Someone who has a home in a particular place. • In sense 2, a resident is not necessarily either a citizen or a domiciliary."[6]

In a variety of contexts, Missouri courts have concluded that a person may be a resident of multiple places (or have a residence at multiple places).[7] In other contexts, the term is used so that a person can be a "resident" of only one place at a particular time.[8] We can identify three guiding principles in choosing among the options, each of which would urge a broad understanding of "resident" in the context of Missouri's medical marijuana regime.

Broad Construction of Civil Rights

As a general rule in the United States, civil rights statutes are broadly construed.[9] Missouri authority supports this result through two steps. It provides for a broad (liberal) construction of "remedial" statutes.[10] And a statute securing civil rights is a remedial statute; a statute enacted "for the protection of life" meets the definition of a remedial statute.[11]

Missouri's constitutional amendment decriminalizing medical marijuana, under state law, comfortably fits within the standard. It reflects a determination that a variety of very serious medical conditions may be ameliorated by use of marijuana.[12] So, it necessarily was adopted "for the protection of life."

Different Terms — "Resident" and "Citizen"

"The legislature's use of different terms in different subsections of the same statute is presumed to be intentional and for a particular purpose."[13] Although this principle is most frequently applied to statutory language, the same principles would seem applicable to understanding a constitutional provision, and courts outside the Missouri judiciary have so stated.[14]

The Missouri constitution requires marijuana facilities to be "majority owned by natural persons who have been citizens of the state of Missouri for at least one year prior to the application."[15] Qualifying patients are not required to be citizens. The constitutionally required nexus with Missouri is they be "resident[s]," and it does not include a durational limitation.[16]

In fact, Black's Law Dictionary directs one to a meaning of "resident" when used in contrast to "citizen": "Someone who has a home in a particular place."[17] That source thus would direct one to a broad interpretation of the constitutional language, under which a person can have multiple residences.[18]

Reference to Purpose

In ascertaining the meaning of "resided" or "resident" in a particular context, Missouri courts will look to the purpose of the residency reference,[19] and a construction yielding "'unreasonable or absurd results'"[20] should be avoided. So, for example, *State v. Tustin* states, "The meaning of the word 'resident' depends upon the purpose in the law where the word is employed."[21] These principles, of course, are generally applicable in interpreting words that, in various contexts, have different meanings.[22]

The types of circumstances that might typically give rise to a requirement for a narrow interpretation of "resident" include: (i) to assure some nexus with others living in the community, so that the individual in question can properly represent, or be selected to represent, the broader community;[23] (ii) to enhance performance of municipal employees;[24] (iii) to prevent using benefits for which others have paid;[25] and (iv) to prevent duplicative exercise of rights that inherently ought not be so exercised.[26] None of these is implicated in the context of using medical marijuana.

The most plausible reasons for requiring patients to have a nexus with Missouri do not require a narrow definition of residence.[27] The state has an interest in preventing medical marijuana tourism.[28] It is possible that but for the residency requirement, Kansas citizens, for example, might seek to get Missouri credentials and travel to Missouri to acquire marijuana.[29] This might be seen either as a problematic encroachment on federalism principles[30] or as potentially increasing undesirable trafficking within Missouri.

These factors might be of direct concern. Or they might be indirectly of concern by influencing the likelihood of federal intervention. The use of medical marijuana contemplated by Missouri's constitutional provision would remain criminal under federal law.[31] The interstate transport of marijuana, which might be associated with allowing nonresidents to acquire medical marijuana in Missouri, implicates some of the federal enforcement priorities referenced in the now-rescinded Cole Memo, which was issued by the U.S. Department of Justice to guide federal prosecutors concerning marijuana enforcement under the Controlled Substances Act (CSA).[32] Compliance with the thrust of the memo may decrease the likelihood of federal intervention, regardless of the ebb and flow of the adoption of formal enforcement guidance.[33]

Although these reasons support maintaining some residency requirement for medical marijuana in Missouri, they do not necessitate a narrowly defined one. The nonresident recreational marijuana laws in Colorado[34] and Illinois,[35] for example,[36] may provide access to marijuana for persons from neighboring states without the expense of either maintaining a second residence in Missouri or getting the required Missouri medical certification. These alternatives mitigate the incentive to select Missouri as a venue for servicing the marijuana needs of persons without a legitimate nexus to Missouri, even if there were a broad definition of "resident" to be a qualifying medical marijuana patient under Missouri law.

Additionally, a narrow definition of resident for Missouri's purposes may actually increase interstate transport of marijuana. It would do so by (i) forcing some who maintain residences in multiple states to transport marijuana across state lines if they wish to use it to treat serious medical conditions while at their Missouri residences; and (ii) decriminalizing

under Missouri law the possession of that marijuana transported interstate.

Consider a person who has a residence in Missouri but acquires medical marijuana credentials elsewhere. Focus on how a narrow interpretation of the term "resident" in Missouri law treats this person. The out-of-state credentials will operate as a defense to a criminal possession charge in Missouri.[37] But this individual cannot legally acquire medical marijuana in Missouri. So, he or she has an incentive, in connection with travel to his or her Missouri residence, to acquire it in quantity elsewhere and transport it to Missouri. The initial purchase could be (i) in another state of residence, (ii) in another state that allows purchases by visitors with out-of-state credentials,[38] or (iii) in a state that allows non-resident adult use.

The purpose of the restriction seems more naturally to be concern for a state framework that entices individuals to cross state lines to purchase marijuana. People who need to use medical marijuana ought to be able to purchase it where they live. This is not a right whose exercise at different times provides a suitable substitute. So, if a person maintains a residence in Missouri and needs to use medical marijuana, he or she ought to be able to purchase it in Missouri. It is important that a person be permitted to purchase in Missouri if he or she maintains both in-state and out-of-state residences. That is because the interstate transport by a patient into Missouri is illegal under federal law. Federal prosecution for that would appear to be unfettered,[39] and that transport might implicate the above-referenced enforcement priorities. In fact, a framework under which being a resident in multiple states would operate to prevent purchase of medical marijuana in Missouri could, in fact, increase interstate transport and the likelihood of federal enforcement.

Additional Details of DHSS's Limitation

As noted above,[40] the regulations require a patient "resides in Missouri and does not claim resident privileges in another state or country."[41] This phrasing compounds the ambiguity.

The meaning of a statutory amendment is sometimes informed by comparing changes in language,[42] which may clarify a purpose and thus intent. The same approach may illuminate the meaning of the regulations.

The initial DHSS draft contemplated a person "primarily resides in Missouri, with the intention of permanently or indefinitely residing in Missouri."[43] In voluntary, written comments on that initial drafted proposal, this author noted that the proposal "would [have] disqualif[ied] . . . an otherwise qualified person upon his or her determination to leave the State of Missouri for a new job in the future."[44] It is difficult to identify a plausible reason for allowing a decision to move before acquiring a residence elsewhere — by itself to disqualify a person. It would appear the change was intended to address that circumstance. The regulations as adopted address that issue: a mere change in mental state, reflecting an intention to leave, is not by itself sufficient to disqualify one from medical marijuana.

But the adopted regulation does not clarify whether the *claim* of residency elsewhere, disqualifying one from Missouri medical marijuana, is residency elsewhere: (i) for a broad range of purposes; (ii) for purposes of medical marijuana; or (iii) for any purpose whatsoever. None seems suitable.

Only Broad Range of Out-of-State Residence Privileges

If the reference is to claiming broad residence privileges elsewhere, that understanding would seem to be as invalid as equating citizenship with residence. As noted above,[45] citizenship is elsewhere referenced in the constitutional provision. So, to use "resident" in the narrow form, as essentially equivalent to "citizen," would require one of two circumstances:

> (i) There is some reason for having a gossamer distinction between residence for purposes of determining qualifying patients and citizenship for purposes of determining permitted facility owners. No reason is apparent for this choice; or
>
> (ii) The object of this part of the regulations is to select a definition of resident that is inconsistent with the principle that different terms have different meanings. The regulations elsewhere appear to clarify that this is what the authors of the regulations intended. As to ownership of facilities, the regulations expressly state, "For the purposes of this requirement, citizen means resident."[46]

Out-of-State Resident Medical Marijuana

The second alternative is that qualifying to buy medical marijuana out-of-state, under another state's regime, is sufficient to prevent being a qualifying patient in Missouri. This understanding has little to commend it. Missouri law would allow such a person to possess marijuana in Missouri.[47] But he or she would be required to transport it interstate or to buy it in-state in an illegal transaction. So, the law would promote the kind of activity the Cole Memo finds of concern.

Any Resident Privilege

Little needs to be said as to the possibility that an exercise of any resident privilege out-of-state is sufficient to deny a Missouri resident access to medical marijuana. Entirely unrelated conduct is not plausibly intended to deprive a person of what Missouri voters thought suitable to allow people to treat serious medical conditions.

Authority of DHSS to Narrow Residency

The validity of a DHSS rule narrowing the definition of "resident" from that which otherwise would obtain depends on the scope of authority expressly granted to the department. There can be an express authorization to interpret statutory or constitutional language. For example, one statute references "rules and regulations within the scope and purview of the provisions of [certain] sections . . . as the director considers necessary and proper for the effective administration and interpretation of the provisions of [those] sections."[48] However, DHSS has not been granted so broad an authority.

The most pertinent express authorization to promulgate rules concerning medical marijuana that is granted to DHSS includes the following:

(i) The DHSS is authorized to "[p]romulgate rules and emergency rules necessary for the proper regulation and control of the . . . dispensing[] and sale of marijuana for medical use and for the enforcement of this [the constitutional amendment] so long as patient access is not restricted unreasonably and such rules are reasonably necessary for patient safety or to restrict access to only licensees and qualifying patients."[49]

(ii) "The department shall issue any rules or emergency rules necessary for the implementation and enforcement of this section and to ensure the right to, availability, and safe use of marijuana for medical use by qualifying patients."[50]

(iii) "The department shall not have the authority to apply or enforce any rule or regulation that would impose an undue burden on any one or more licensees or certificate holders, any qualifying patients, or act to undermine the purposes of this section."[51]

The first provision limits authority to promulgate rules "necessary . . . for . . . enforcement." That does not authorize identifying a class of persons DHSS can disqualify. The second provision is limited to rules "necessary for the implementation and enforcement" of the section. That as well does not expressly authorize the exclusion of a class of persons who could otherwise be qualifying.

The third quoted provision would expressly negate the authority to identify an additional class of persons who are disqualified, if either of the prior two arguably allowed that (which neither does). The third expressly prohibits "an undue burden on . . . any qualifying patients." Because a complete prohibition is inherently an undue burden, DHSS has been expressly prohibited from excluding from the definition of "qualifying patient" an entire class of persons who otherwise would be qualifying patients.

In sum, the express authority to promulgate rules does not include the authority to adopt a definition of "qualifying patient" that is more restrictive than the definition in the constitutional amendment itself, as informed by the context of the usage.

In fact, it would appear that, in another context, a Missouri court has invalidated a rule having greater textual support than the one at hand. *McNeil–Terry v. Roling*[52] involves Missouri statutes that included dental services in Medicaid. A statute provided for payments made for reasonable charges "***for the services*** as defined and ***determined by the division*** of medical services . . . for . . . (7) Dental services."[53] The express authority to promulgate rules provided, "[T]he division of medical services shall by rule and regulation define the reasonable costs, manner, extent, quantity, quality, charges and fees of medical assistance herein provided."[54] So, an agency could "define[] and determine[]" the dental services, and then "define the[ir] reasonable costs . . . [and] quantity . . . ." But, a court concluded, in fact, the agency did not have the authority to determine what dental services would be covered.

Following enactment of a lean budget, which the court describes as having "eliminated funding for Medicaid adult dental services,"[55] the agency adopted a rule "which provided in part that only dentures and treatment of trauma to the mouth or teeth as a result of injury were covered dental services for Medicaid-eligible adults."[56]

The court rejected the agency's argument that "it merely exercised its authority to 'define' the Medicaid dental services program."[57] The court, in conclusory fashion, asserted the choice was not merely defining services but something different —"drastically curtail[ing]" them.[58] The opinion fails to grapple with applying the express authority of the agency to *determine* services.[59] Rather, the court pronounces there is a statutory requirement "to provide general 'dental services'"[60] that is not met by the limited services administratively defined, although the statute did not require "general" dental services.[61]

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The delegated authority to promulgate rules abridging entitlements was greater in *McNeil–Terry* than is granted to DHSS as to defining residents for medical marijuana purposes. Yet *McNeil–Terry* invalidates the rule that restrictively defines the scope of benefited activity.

A second illustration involves a regulation interpreting a term that, by itself, is ambiguous. *Union Electric Co. v. Director of Revenue*[62] involves whether the term "processing," as used in a statutory tax exemption, encompasses baking items in the bakery sections of grocery stores.[63] A regulation stated that a bakery qualified for the exemption.[64] Relevant to our purposes,[65] the court addressed the validity of regulations providing that activities of a bakery involve "processing," as that term was used in the statute. As to this, the court states:

> While administrative regulations are "entitled to a presumption of validity and may 'not be overruled except for weighty reasons,'" "[t]he rules or regulations of a state agency are invalid if they are beyond the scope of authority conferred upon the agency, or if they attempt to expand or modify statutes."[66]

The opinion elsewhere concludes that, without reference to the rule, a bakery's on-site thawing, cooking, etc., do not constitute processing, applying principles including *noscitur a sociis*.[67] That is a principle only applicable to ambiguous language.[68] From this circumstance, we can deduce the following principle: That statutory language that is ambiguous is not, by itself, sufficient to require a court to defer to an administrative interpretation selecting one of multiple possible meanings. And somewhat interestingly, this does not seem to depend on the agency having been given a narrow scope of authority to promulgate rules — the court's analysis, insofar as there is one, does not address that.

Union Electric is also comparable, in another way, to our question of defining "resident" for medical marijuana purposes. *Union Electric* involves exemptions from taxation. Interpretative principles call for such exemptions to be construed narrowly.[69] As circumstances would have it, as noted above,[70] there is a corresponding interpretative principle associated with interpreting the term "resident" for medical marijuana purposes. The reference to "resident" is in a civil rights statute — a statute of a type that is broadly construed both in Missouri and elsewhere.[71] So, there is not automatic deference to an administrative rule:

> (i) providing an *expansive definition* of a term that, devoid of context, is ambiguous in a statute *subject to a restrictive interpretation* (*Union Electric*); *or*
> (ii) providing a *narrow definition* of a term that, devoid of context, is ambiguous in a constitutional provision *subject to a broad interpretation* (interpreting "resident" for medical marijuana purposes).

These illustrations would seem to support the notion a court should not defer to the agency's determination as to the meaning of "resident." And it bears mention that one can see reference to even more intrusive judicial review in older authority.[72]

Conclusion

DHSS has on two occasions sought to define restrictively those persons who qualify as Missouri residents and thus might, with appropriate medical certification, become authorized to purchase, possess, and use medical marijuana in Missouri. The initial proposal contemplated a person who "primarily resides in Missouri, with the intention of permanently or indefinitely residing in Missouri."[73] One supposes that provision, automatically denying medical marijuana to a person upon his or her decision to leave Missouri, to be entirely irrational. DHSS's second effort limits medical marijuana to persons who "reside[] in Missouri and do[] not claim resident privileges in another state or country."[74]

The current regulations, although not as restrictive, also would appear to be infirm. There is not a good reason why individuals maintaining residences in Missouri ought to have their access to medical marijuana in Missouri depend on whether they also claim "resident privileges in another state." The restrictive definition is contrary to the principle that a grant of civil rights is to be broadly construed.[75] And, it disregards the distinction that is ordinarily a consequence of using different terms in the same provision.[76] Elsewhere the constitutional amendment references "citizens."[77] But the definition provided by DHSS leaves little room between its narrow definition of "resident" and what the law would provide were qualifying patients limited to Missouri citizens — the latter being something the constitutional provision would appear to have rejected. In fact, contrary to this interpretative principle, the regulations elsewhere define "citizen" as meaning "resident."[78]

Additionally, the Missouri constitution does not expressly provide DHSS with the authority to set a more limited definition of the term "resident." Rather, the constitutional provision prohibits "any rule or regulation that would impose an undue burden on . . . any qualifying patients."[79] So, under ordinary principles, it would appear a court should not validate this aspect of DHSS's rules.

Endnotes

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2 Mo. Const. art. XIV, § 1.2(16).

3 19 C.S.R. § 30–95.030(2)(A)(3) (Dec. 31, 2019). There are other theories on which one might seek to challenge a residency requirement. A claim under the Privileges and Immunities

Clause, U.S. Const. art. IV, § 2, cl. 1, does not seem likely to succeed. *See City of Missoula v. Urziceanu*, No. DA 13–0348, 2015 WL 1046111, at *2 (Mont. Mar. 10) ("[T]he Privileges and Immunities Clause in Article IV, Section 2 of the United States Constitution does not prohibit Montana from distinguishing between residents and nonresidents regarding the use of medical marijuana."). *See generally* Brannon Denning, *One Toke over the (State) Line: Constitutional Limits on "Pot Tourism" Restrictions*, 66 Fla. L. Rev. 2279, 2286-87, 2299 (2014). A claim under the dormant Commerce Clause would also seem unavailing. *Cf., e.g.*, *Predka v. Iowa*, 186 F.3d 1082, 1083–84 (8th Cir. 1999) (referencing a state prohibition on marijuana in a dormant Commerce Clause challenge to a state drug tax stamp law, and stating the challenger's "Commerce Clause argument must fail because the marijuana was contraband, that is, property that is unlawful to possess, and as such not an object of interstate trade protected by the Commerce Clause."); Denning, *supra*, at 2299.

4 Mo. Const. art. XIV, § 1.2(16).

5 322 S.W.2d 179, 180 (Mo. App. S.D. 1959), *abrogation recognized by* State *ex inf. Dalton v. Riss & Co.*, 335 S.W.2d 118, 129 (Mo. banc 1960). That case construes statutory language using "resident," "nonresident," "residence," and "place of residence." *Id.* at 180. The opinion does not seem to support the conclusion that the definition of "residence" is "like a slippery eel," but that of "resident" is not. *See generally George v. Jones*, 317 S.W.3d 662, 666 n.3 (Mo. App. S.D. 2010) (providing the following as text of a parenthetical summarizing *Barrett v. Parks*, 180 S.W.2d 665, 666 (Mo. 1944): "reside and residence have same meaning and this meaning depends upon statutory purpose").

6 *Resident*, Black's Law Dictionary (11th ed. 2019).

7 *E.g.*, *Pruitt v. Farmers Ins. Co.*, 950 S.W.2d 659, 663 (Mo. App. S.D. 1997) (examining insurance coverage); *State ex rel. Quest Commc'ns Corp. v. Baldridge*, 913 S.W.2d 366, 370 (Mo. App. S.D. 1996) (construing statutory language governing venue); *Genrich v. Williams*, 869 S.W.2d 209, 211 (Mo. App. E.D. 1993).

8 *E.g.*, *State ex rel. King v. Walsh*, 484 S.W.2d 641, 644–45 (Mo. banc 1972); *see also infra* note 25. *See generally* § 1.020, RSMo (2016) (defining "[p]lace of residence").

9 *E.g.*, Shambie Singer, 3C Sutherland Statutes & Statutory Construction § 76:5 (8th ed.) (Westlaw database updated Oct. 2019) ("A 'remedial statute' such as a civil rights law is one enacted for the protection of life and property and to introduce regulations conducive to the public good and is liberally construed to effectuate its purpose. A liberal construction can expand the meaning of a statute to meet cases which are clearly within the spirit or reason of the law, but courts cannot provide an interpretation inconsistent with the statute's language." (footnote omitted)).

10 *Lampley v. Missouri Comm'n on Human Rights*, 570 S.W.3d 16, 23 (Mo. banc 2019) (plurality opinion) ("'Remedial statutes should be construed liberally to include those cases which are within the spirit of the law and all reasonable doubts should be construed in favor of applicability to the case.'" (quoting *Mo. Comm'n on Human Rights v. Red Dragon Rest., Inc.*, 991 S.W.2d 161, 166–67 (Mo. App. W.D. 1999)).

11 *Hagan v. Dir. of Revenue*, 968 S.W.2d 704, 706 (Mo. banc 1998) ("[A] remedial statute is a statute enacted for the protection of life and property and in the interest of public welfare."). This principle has been applied, for example, in construing a section of the Missouri Human Rights Act, § 213.055, RSMo (2000). *Lampley*, 570 S.W.3d at 19, 23 (concerning the claims of a gay man alleging sex discrimination arising from alleged sexual stereotyping).

12 Mo. Const. art XIV, § 1.2(15) (including, for example, cancer, acquired immune deficiency syndrome, and "[a]ny terminal illness" as "qualifying medical condition[s]").

13 *State v. Moo*re, 303 S.W.3d 515, 520 (Mo. banc 2010). *See also, e.g.*, *Alberici Constructors, Inc. v. Dir. of Revenue*, 452 S.W.3d 632, 637 (Mo. banc 2015) ("The legislature's use of different terms in the same statute is presumed to be intentional."); *McAlister v. Strohmeyer*, 395 S.W.3d 546, 552 (Mo. App. W.D. 2013).

14 *Lathrop v. Deal*, 801 S.E.2d 867, 890 (Ga. 2017); *Teverbaugh ex rel. Duncan v. Moore*, 724 N.E.2d 225, 229 (Ill. App. Ct. 2000).

15 Mo. Const. art. XIV, § 1.7(3).

16 Mo. Const. art. XIV, § 1.2(16).

17 *Resident*, Black's Law Dictionary (11th ed. 2019).

18 *See supra* note 6 and accompanying text.

19 *State v. Tustin*, 322 S.W.2d 179, 181 (Mo. App. S.D. 1959) (quoted by *State ex rel. Quest Commc'ns Corp. v. Baldridge*, 913 S.W.2d 366, 369 (Mo. App. S.D. 1996)), *abrogation recognized by State ex inf. Dalton v. Riss & Co.*, 335 S.W.2d 118, 129 (Mo. banc 1960); *see also Lewis v. Gibbons*, 80 S.W.3d 461, 463, 466 (Mo. banc 2002) (addressing "resided").

20 *Lewis*, 80 S.W.3d at 466 (discussing statutory language) (quoting *Murray v. Mo. Highway & Transp. Comm'n*, 37 S.W.3d 228, 233 (Mo. banc 2001).

21 *Tustin*, 322 S.W.2d at 181 (quoted in part by *Quest Commc'ns*, 913 S.W.2d at 369).

22 *E.g.*, *State ex rel. Stinger v. Krueger*, 217 S.W. 310, 315 (Mo. banc 1919) ("The word 'or' in statutes or documents is frequently interpreted to mean 'and,' and this interpretation is given to it whenever required to carry out the plain purpose of the act or contract, and when to adopt the literal meaning would defeat the purpose or lead to an absurd result.").

23 *Lewis*, 80 S.W.3d at 466 ("The purpose of residency statutes is to ensure that governmental officials are sufficiently connected to their constituents to serve them with sensitivity and understanding.").

24 *Perry v. City of St. Louis Civil Serv. Comm'n*, 924 S.W.2d 861, 864 n.1 (Mo. App. E.D. 1996); *see also, e.g.*, *Krzewinski v. Kugler*, 338 F. Supp. 492, 500 (D.N.J. 1972).

25 *Cf. Binde v. Klinge*, 30 Mo. App. 285, 289 (Mo. App. E.D. 1888) (stating, as to a provision allowing tuition charges to non-residents, "[I]t is well known that some communities in the state, more wealthy, more public-spirited, or more disposed to tax themselves to foster a good system of common-school instruction than other communities, are burdened by migrations of children from other communities, who, on various pretexts, seek to avail themselves of the superior privileges which their schools afford without the payment of tuition.").

26 *See Barrett v. Parks*, 180 S.W.2d 665, 666 (Mo. 1944) (addressing suffrage).

27 There are a number of reasons why a closer nexus with Missouri is required as to facility ownership, where the constitutional amendment references Missouri citizenship (as to ownership of facilities). This close nexus may reflect protectionism (which is not to say this objective would be legitimate). It may be to diminish the likelihood of federal enforcement. *See* Joseph Hughs, Trusts and Estate Planning in Light of Missouri Residency Requirements, at 4–5 (n.d.). Relevant considerations could be restricting the flow of funds from marijuana operations to persons outside Missouri. This is one manifestation of a larger potential interest in assuring facility owners are not engaging in other criminal activity, which the Cole Memo references. Memo from James M. Cole, Deputy Attorney Gen., U.S. Dep't of Justice, to all U.S. Attorneys, Guidance Regarding Marijuana Enforcement, at 1 (Aug. 29, 2013, https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf.) These activities may be better monitored by Missouri where the owners have a primary connection to Missouri. Additionally, at one time the mere size of a business could enhance the likelihood of federal enforcement. Cole Memo, *supra*, at 4. So, limiting Missouri facilities to those that are majority-owned by Missouri citizens may exclude multi-state conglomerate participation.

28 *See generally* Denning, *supra* note 3, at 2279, 2282.

29 Missouri has a rather broadly defined set of qualifying conditions. *See* Mo. Const. art. XIV, § 1.2(15)(j) (including the following language, which precedes a lengthy list: "[i]n the professional judgment of a physician, any other chronic, debilitating or other medical condition, including, but not limited to,"). It is possible persons from a state allowing medical marijuana for a more limited set of conditions also might be interested in travel to Missouri. *See generally, e.g.*, Ark. Const. amend. 98, § 2(13)(C) (including, after a list of specific aliments, "[a]ny other medical condition or its treatment approved by the Department of Health").

30 *See* Denning, *supra* note 3, at 2282. *See generally Safe Sts. All. v. Hickenlooper*, 859 F.3d 865, 913 (10th Cir. 2017) (vacating order allowing contiguous states to intervene); Alex Kreit, *Marijuana Legalization and Nosy Neighbor States*, 58 B.C. L. Rev. 1059, 1060–61 (2017).

31 The possession is a criminal violation of the Controlled Substances Act. 21 U.S.C.A. § 844(a) (criminalizing unauthorized possession of a controlled substance); *Gonzales v. Raich*, 545 U.S. 1, 14 (2005) ("By classifying marijuana as a Schedule I drug, as opposed to listing it on a lesser schedule, the manufacture, distribution, or possession of marijuana became a criminal offense, with the sole exception being use of the drug as part of a Food and Drug Administration preapproved research study."). However, for a few years, riders to federal appropriation bills have prohibited the use of funds appropriated to the Department of Justice to prosecute persons' actions in compliance with state medical marijuana law. *See United States v. McIntosh*,

833 F.3d 1163, 1169–70, 1179 (9th Cir. 2016). It remains possible that other funds, e.g. forfeited funds, could be so used. *See* Gerald S. (Gerry) Sachs & Evan T. Shea, *What Is the Significance of the DOJ's Change in Marijuana Enforcement Policies?*, Venable LLP (March 08, 2018, https://www.venable.com/insights/publications/2018/03/what-is-the-significance-of-the-dojs-change-in-mar.) However, the interstate transport would apparently be outside the enforcement prohibition. *See, e.g.*, Mo. Const. art XIV, § 1.5(1) (limiting a patient's exculpation from criminal liability for transportation to transit from a dispensary to the patient's residence).

32 Cole Memo, *supra* note 27, at 1 (identifying enforcement priorities as including "[p]reventing the diversion of marijuana from states where it is legal under state law in some form to other states; [and] [p]reventing state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity." The Cole Memo notes, "[A] robust system may affirmatively address those priorities by, for example, implementing effective measures to prevent diversion of marijuana outside of the regulated system and to other states . . . ." *Id*. at 3.

33 *See* Denning, *supra* note 3, at 2282 (identifying this concern in Colorado). The Cole Memo was subsequently rescinded. Memorandum from Jefferson B. Sessions, III, Attorney Gen., U.S. Dep't of Justice, to all U.S. Attorneys, Marijuana Enforcement (Jan. 4, 2018), https://www.justice.gov/opa/press-release/file/1022196/download.

34 In June 2016, the Colorado governor signed legislation increasing from one-quarter ounce to one ounce the amount of marijuana that could be sold to a non-resident in a single transaction. *See* H.B. 16–1261, 70th Gen. Assemb., 2d Reg. Sess. § 8 (Colo. 2016). *See generally* Kreit, *supra* note 30, at 1074 n.83 (referencing the change).

35 A dispensary's duty in Illinois to inspect identification of a purchaser requires confirmation of age, not residence. 410 Ill. Comp. Stat. Ann. 705/15–85. The possession limits for nonresidents in Illinois are half those for residents. 410 Ill. Comp. Stat. Ann. 705/10–10(a). *See also* Rhys Saunders, *Expungement by Algorithm*, 107 Ill. B.J., Oct. 2019, at 12 ("Nonresidents can purchase and possess quantities equal to half these amounts.").

36 There are other potential sources, e.g., Arkansas for "visiting qualifying patients." *See* Ark. Const. amend. 98, §§ 2(18), 3(*l*)(2). Oklahoma allows a medical marijuana temporary adult patient license. *See* Oklahoma Medical Marijuana Authority, Temporary Patient Application Information, http://omma.ok.gov/temporary-adult-patient-application-information1 (last visited Dec. 9, 2019).

37 Mo. Const. art. XIV, § 1.5(1).

38 *See supra* note 36.

39 *See supra* note 31.

40 *See supra* note 3 and accompanying text.

41 19 C.S.R. § 30–95.030(2)(A)(3) (Dec. 31, 2019).

42 For example, "Further insight into the legislature's object can be gained by identifying the problems sought to be remedied and the circumstances and conditions existing at the time of enactment." *Sermchief v. Gonzales*, 660 S.W.2d 683, 688 (Mo. banc 1983) (discussing an amendment). *See generally Carrera v. People*, 449 P.3d 725, 730 (Colo. 2019); *State v. Roberts*, 817 P.2d 855, 860 (Wash. 1991) (referencing "the development" of a statute).

43 19 C.S.R. § 30–95.030 (draft of Apr. 26, 2019), https://web.archive.org/web/20190502161833/https://health.mo.gov/safety/medical-marijuana/pdf/19CSR30-95.030.pdf (captured May 2, 2019). In late 2019, effective January 2020, DHSS adopted some changes, although the reference to residency was not changed. 44 Mo. Reg. 3133, 3133 (Dec. 2, 2019). DHSS's comments on those changes do not illuminate the residency reference.

44 Letter from Royce de R. Barondes to Missouri Department of Health and Senior Services, at 3 (Apr. 28, 2019).

45 *See supra* note 15 and accompanying text.

46 19 C.S.R. § 30–95.040(3)(B), 44 Mo. Reg. 3135, 3136 (Dec. 2, 2019). The constitutional provision requires medical marijuana facilities be "majority owned by natural persons who have been citizens of the state of Missouri for at least one year prior to the application for such license or certification." Mo. Const. art. XIV, § 1.7(3).

47 Mo. Const. art. XIV, § 1.5(1).

48 Section 374.705.1, RSMo (2016).

49 Mo. Const. art. XIV, § 1.3(1)(b). The constitution also addresses the extent to which legislation may address the secured rights. Statutes may be enacted that are "consistent with . . . or otherwise effectuating the patient rights of" the constitutional provision. Mo. Const. art. XIV, § 1.6. However, "The legislature shall not enact laws that hinder the right of qualifying patients to access marijuana for medical use as granted by this section." *Id*.

50 Mo. Const. art. XIV, § 1.3(2).

51 Mo. Const. art. XIV, § 1.3(25). There are numerous other references to issuance of rules, which do not seem to extend to the circumstances at hand. *E.g.*, Mo. Const. Art. XIV, § 1.3(2)(r) (allowing issuance of rules relating to "[s]uch other matters as are necessary for the fair, impartial, stringent, and comprehensive administration of this section").

52 142 S.W.3d 828 (Mo. App. E.D. 2004), *superseded by statute*, S.B. 539, 93rd Gen. Assemb., 1st Reg. Sess. (Mo. 2005); S.B. 577, 94th Gen. Assemb., 1st Reg. Sess. (Mo. 2007).

53 Section 208.152.1, RSMo (2000) (emphasis added) (current version at §§ 208.152.1, 208.152.1(22), RSMo (Supp. 2018)).

54 Section 208.153.1, RSMo (2000) (amended 2007).

55 *McNeil–Terry*, 142 S.W.3d at 831.

56 *Id*.

57 *Id*. at 833–34.

58 *Id*. at 834.

59 This issue was expressly raised by the agency in briefing. Appellant's Reply Brief at 6, *McNeil–Terry*, 142 S.W.3d 828 (No. ED 83731), 2004 WL 3666454, * 6 (". . . DMS is statutorily empowered to define and determine the adult dental services covered by Medicaid . . . .").

60 *McNeil–Terry*, 142 S.W.3d at 834.

61 The word "general" appeared in that section as part of "general population" and "general assembly." Sections 208.152.1(10), 208.152.1(22), 208.152.5, RSMo (2000) (current version at § 208.152, RSMo (Supp. 2018)). The opinion also alludes to a federal requirement that the service "reasonably achieve its purpose." *McNeil–Terry*, 142 S.W.3d at 834 (quoting 42 C.F.R. § 440.230(b) (2018)). It relies on a case from Vermont invalidating a rule, where the court found coverage of full dentures, but not partial dentures, was "not rationally related to the purpose of offering dental services." *Cushion v. Dep't of PATH*, 807 A.2d 425, 427, 430 (Vt. 2002). The *McNeil–Terry* court, however, does not provide an analysis demonstrating why the different funding choice it considered was not "rational." *See McNeil–Terry*, 142 S.W.3d at 834.

62 425 S.W.3d 118 (Mo. banc 2014).

63 *Id*. at 120.

64 *Id*. at 124 (citing 12 C.S.R. § 10–110.621(4)(O) (Mar. 31, 2019)).

65 The opinion includes alternative holdings, one not analogous to determining the meaning of "resident" for medical marijuana purposes. The court also held the Administrative Hearing Commission erroneously concluded these operations at groceries were bakeries, as used in the regulations. *Id*. at 125.

66 *Id*. at 124–25 (first quoting *State ex rel. Mo. Pub. Def. Comm'n v. Waters*, 370 S.W.3d 592, 602 (Mo. banc 2012) (alteration in original) (citation omitted); then quoting *PharmFlex, Inc. v. Div. of Emp't Sec.*, 964 S.W.2d 825, 829 (Mo. App. W.D. 1997), *readopted* May 13, 1998.

67 *Union Elec. Co.*, 425 S.W.3d at 122–24.

68 *E.g.*, *Kansas City v. Richardson*, 90 Mo. App. 450, 461 (Mo. App. W.D. 1901). *Cf. MC Dev. Co. v. Cent. R–3 Sch. Dist.*, 299 S.W.3d 600, 604 (Mo. banc 2009) ("Where there is no ambiguity, this Court does not apply any other rule of construction.").

69 *Union Elec. Co.*, 425 S.W.3d at 122.

70 *See supra* notes 9-11and accompanying text.

71 *See supra* notes 9-12 and accompanying text.

72 *See Wright v. Bd. of Ed.*, 246 S.W. 43, 45 (Mo. 1922) (stating the power to promulgate rules "can only be exercised as are clearly comprehended within the words of the statute or that may be derived therefrom by necessary implication; regard always being had for the object to be attained. Any doubt or ambiguity arising out of the terms of the grant must be resolved in favor of the people.").

73 19 C.S.R. § 30–95.030(2)(A)(3) (initial draft of Apr. 26, 2019) (captured May 2, 2019), https://web.archive.org/web/20190502161833/https://health.mo.gov/safety/medical-marijuana/pdf/19CSR30-95.030.pdf.

74 19 C.S.R. § 30–95.030(2)(A)(3) (Dec. 31, 2019).

75 *See supra* notes 9-12 and accompanying text.

76 *See supra* notes 13-14 and accompanying text.

77 *See supra* note 15 and accompanying text.

78 19 C.S.R. § 30–95.040(3)(B), 44 Mo. Reg. 3135, 3136 (Dec. 2, 2019). *See supra* note 45 and accompanying text.

79 Mo. Const. art. XIV, § 1.3(25). *See also supra* notes 49-51 and accompanying text.