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MARIJUANA/CONSTITUTIONAL LAW—STATE BALLOT REFORMS 2016: THE RAMIFICATIONS ON PROBABLE CAUSE IN MASSACHUSETTS WITH LEGAL MARIJUANA CULTIVATION IN THE HOME

*Jacob T. Winniman**

2016 was a monumental year for state sovereignty regarding marijuana regulation. A total of nine states voted on marijuana reforms, with five deciding whether to legalize recreational use. Among them, Massachusetts voters came together in a display of democracy to end their decades long prohibition on recreational marijuana possession, distribution, and cultivation with a “Yes” on Question 4. By doing so, Massachusetts, as well as California, Alaska, and Nevada, joined the four other states in the Union to have legalized recreational marijuana, Colorado, the District of Columbia, Oregon, and Washington. As Massachusetts implements their marijuana reform, law enforcement faces a familiar but problematic dilemma. Question 4 legalized the personal cultivation of twelve marijuana plants in a home, but limited processing to six mature plants. Law enforcement is now presented with the question: what is sufficient probable cause to obtain a search warrant for illegal marijuana cultivation in Massachusetts in light of Question 4?

This Note will introduce and explore the background and status of marijuana laws in the country and the recent reforms of 2016. Then, it will analyze and compare what constitutes sufficient probable cause to obtain a warrant to search a home in Massachusetts and Colorado for suspected illegal marijuana cultivation in light of recreational reforms. Finally, this Note proposes that Massachusetts should look inward for guidance and rely on local precedent to determine sufficient probable cause to obtain a search warrant for suspected illegal marijuana cultivation.

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INTRODUCTION

When law enforcement seeks to search a property for suspected illegal behavior in the United States, they must normally obtain a search warrant.¹ To apply for a warrant, law enforcement must submit an affidavit that provides sufficient information for a detached and neutral magistrate to decide whether, based on the four corners of the affidavit, probable cause exists that the suspect has or is committing a crime.² Before the passage of the Humanitarian Medical Use of Marijuana Act (HMUM) in 2012,³ which legalized some forms of marijuana cultivation in the home, Massachusetts law enforcement could obtain a search warrant upon a showing of probable cause that any marijuana was being cultivated on a property.⁴

In 2016, Massachusetts voters decided to expand the legalization of marijuana to include recreational use.⁵ Question 4 (the Massachusetts Marijuana Legalization Initiative) appeared on the 2016 ballot proposing

1. See *United States v. Place*, 462 U.S. 696, 701 (1983) (The Fourth Amendment generally prohibits a seizure “unless it is accomplished pursuant to a judicial warrant issued upon probable cause and particularly describing the items to be seized.”).

“The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate’s disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people’s homes secure only in the discretion of police officers. . . .”

Coolidge v. New Hampshire, 403 U.S. 443, 449 (1971) (quoting *Johnson v. United States*, 333 U.S. 10, 13–14 (1948) (emphasis added)).

2. See *Coolidge*, 403 U.S. at 450 (holding that a search warrant for a vehicle was invalid because it was issued by the state attorney general, not by a neutral and detached magistrate); see also U.S. CONST. amend. IV (requiring that warrants may only be issued upon a showing of probable cause). “Probable cause exists where ‘the facts and circumstances within [the arresting officers’] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that’ an offense has been or is being committed.” *Draper v. United States*, 358 U.S. 307, 313 (1959) (alteration in original) (quoting *Carroll v. United States*, 267 U.S. 132, 162 (1925)).

3. An Act for the Humanitarian Medical Use of Marijuana, 2012 Mass. Acts ch. 369, <https://malegislature.gov/Laws/SessionLaws/Acts/2012/Chapter369> [<https://perma.cc/52RZ-URPL>] [hereinafter HMUM].

4. See *Commonwealth v. Allard*, 642 N.E.2d 307, 307–08 (Mass. App. Ct. 1994) (holding that where a police officer observes marijuana plants growing outside in a garden, there exists sufficient probable cause to search the property for related illegal materials).

5. Joshua Miller, *Mass. Voters Say ‘Yes’ to Legalizing Marijuana*, BOSTON GLOBE (Nov. 8, 2016), <https://www.bostonglobe.com/metro/2016/11/08/pot/n0rImK95SxMkC9Y0GaKsI/story.html>.

to regulate and tax marijuana in a way similar to alcohol.⁶ In 2008, Massachusetts voters decriminalized marijuana,⁷ and legalized medical marijuana in 2012.⁸ Both decriminalization and medical marijuana passed with over sixty percent of the vote.⁹ Question 4 proposed to legalize personal cultivation of twelve marijuana plants—limited to six mature marijuana plants—in a private home, adding to the complexity of a probable cause analysis.¹⁰ On November 8, 2016, a majority of Massachusetts residents voted in favor of legalizing recreational use of marijuana, turning the ballot initiative into law.¹¹ Between the passage of HMUM and the newly enacted legislation in The Act, Massachusetts stepped into uncharted territory regarding legalized personal marijuana cultivation.¹²

6. See generally The Regulation and Taxation of Marijuana Act, 2016 Mass. Acts, ch. 334, <https://malegislature.gov/Laws/SessionLaws/Acts/2016/Chapter334> [<https://perma.cc/QA7J-B7RJ>] [hereinafter The Act]. See also Hensley v. Att’y Gen., 53 N.E.3d 639, 654–56 (Mass. 2016) (deciding the precise language and how Question 4 would appear in a non-misleading way on the ballot in November). The Massachusetts Marijuana Legalization Initiative is referred to as “Question 4” because it appeared as the fourth question on the 2016 ballot. *Mass. Ballot Questions*, BOS. GLOBE, (Nov. 16, 2016 11:20 PM), <http://www.bostonglobe.com/elections/2016/MA/Question>.

7. MASS. GEN. LAWS ch. 94C, § 32L (2018).

8. HMUM, *supra* note 3.

9. Ken Belson, *Election 2012: Massachusetts*, N.Y. TIMES (Nov. 9, 2012), <http://elections.nytimes.com/2012/results/states/massachusetts.html> (noting that 63.3% of registered Massachusetts voters voted “Yes” to decriminalize the medical use of marijuana); John Schwartz, *Election Results 2008: Massachusetts*, N.Y. TIMES (Dec. 9, 2008), <http://elections.nytimes.com/2008/results/states/massachusetts.html> (noting that 65.2% of registered Massachusetts voters voted “Yes” to decriminalize marijuana).

10. The Act, *supra* note 6, at sec. 5, § 7. The Act created a fine line between legal and illegal personal marijuana cultivation. See *id.* Specifically, six mature plants are legal but seven mature plants are illegal; a total of up to twelve plants are legal but thirteen plants are illegal. *Id.* There is no guidance in The Act regarding sufficient probable cause to support the issuance of a search warrant for illegal marijuana cultivation. See generally *id.* (the terms “probable cause” and “warrant” do not appear in the text of The Act).

11. *Mass. Ballot Questions*, *supra* note 6 (noting that 1,745,945 (53.6%) of registered Massachusetts voters voted “Yes” on Question 4 while 1,513,304 (46.4%) voted “No”). In Massachusetts, a ballot initiative may become law after it is voted on without executive approval

[i]f it shall be approved by voters equal in number to at least thirty per cent of the total number of ballots cast at such state election and also by a majority of the voters voting on such law, *it shall become law*, and shall take effect in thirty days after such state election or at such time after such election as may be provided in such law.

MASS. CONST. art. XLVIII, pt. V, § 1 (2018) (emphasis added) *amended by* MASS. CONST. art. LXXXI, § 2. The Act took effect on December 15, 2016, thirty days after it was voted on and became law. The Act, *supra* note 6, at sec. 12.

12. Compare The Act, *supra* note 6, at sec. 5, § 7 (legalizing the personal cultivation of

Since probable cause has not been extensively analyzed with legal recreational marijuana, Massachusetts may face difficulties in its implementation of the voter's will against the often proactive and zealous duties of drug related law enforcement.¹³ Specifically, Massachusetts courts and law enforcement will need to address uncertainty regarding the protection of private residences from unreasonable searches and seizures, as it is now legal to cultivate a limited amount of marijuana in the home.¹⁴ Additionally, as the regulation is specific as to the limited number of plants allowed for cultivation, proper procedures and clear guidelines are important to ensure Massachusetts law enforcement make a smooth transition to marijuana legalization. As the law is currently structured, a gap remains regarding what standard of probable cause is required for law enforcement to obtain a search warrant for suspected illegal marijuana cultivation.¹⁵ As the law stands, it is unclear what pieces of information law enforcement will need to provide in an affidavit to obtain a search warrant for marijuana cultivation in violation of The Act. The purpose of this Note is to shed light on this gap by examining relevant marijuana case law from Massachusetts and Colorado to propose potential solutions to this imminent dilemma.

This Note will first introduce and explore the recent marijuana reforms voted on in the 2016 election cycle and status of marijuana laws at the federal level in the United States.¹⁶ Second, it will examine the Massachusetts initiative, comparing and contrasting it to Colorado¹⁷—the only state with similar marijuana cultivation laws to have analyzed the probable cause issue after implementing recreational marijuana.

up to six marijuana plants per individual, with a max of twelve plants in a home) *with* COLO. CONST. art. XVIII, § 16, cl. 3(b) (2018) (legalizing the personal cultivation of up to six marijuana plants in the home, with three or fewer being mature) *and* WASH. ADMIN. CODE § 314-55-075(1) (2018) (providing no express regulations legalizing the personal cultivation of marijuana in the home) *and* OR. REV. STAT. §§ 475B.245 (2018) (legalizing the personal cultivation of up to four marijuana plants per individual).

13. Alex Kreit, Symposium, *Marijuana Legalization and Pretextual Stops*, 50 U.C. DAVIS L. REV. 741, 768–71 (2016) (discussing and examining issues in implementation of marijuana reforms and how they affect proactive police tactics).

14. The cultivation of marijuana in the home for distribution without a license remains illegal and a target for law enforcement. The Act, *supra* note 6, at sec. 5, § 12(f).

15. *Id.*; *supra* text accompanying note 10.

16. Christopher Ingraham, *An Unprecedented Number of States Will Vote on Marijuana This Fall*, WASH. POST (Sept. 2, 2016), <https://www.washingtonpost.com/news/wonk/wp/2016/09/02/an-unprecedented-number-of-states-will-vote-on-marijuana-this-fall/> [hereinafter Ingraham, *Unprecedented*].

17. COLO. CONST. art. XVIII, § 16, cl. 3(b).

Third, this Note will analyze what constitutes sufficient probable cause to search a home in Massachusetts in light of The Act.¹⁸ Fourth, this Note will explain how Colorado has handled probable cause issues regarding the search for suspected illegal marijuana cultivation and possession. Finally, this Note proposes that Massachusetts should not adopt an approach similar to Colorado, but rather rely on local jurisprudence like *Commonwealth v. Canning*.¹⁹

Personal marijuana cultivation is an emerging legal issue, with only a handful of states legalizing it since 2012.²⁰ However, Massachusetts already has a body of settled marijuana jurisprudence it can rely on.²¹ With the Massachusetts Supreme Judicial Court (SJC) ruling in *Canning*, Massachusetts could look inward for guidance.²² This Note proposes that *Canning* does not significantly hamper law enforcement and provides a suitable framework for Massachusetts to transition toward legal cultivation of marijuana in the home. Moreover, the subject of this Note's inquiry is of special importance to safeguard the voters' decision from zealous and hostile law enforcement practices.

I. RECREATIONAL REFORMS IN 2016 ACROSS THE UNITED STATES AND THE STATUS OF MARIJUANA LAWS

2016 was a pivotal year for marijuana reform and drug policy in the United States.²³ More states than ever put marijuana reform to a statewide referendum.²⁴ The results were an incredible display of democracy in action: California, Maine, Massachusetts, and Nevada legalized the recreational use of marijuana while Arizona voters rejected their measure.²⁵

18. The Act, *supra* note 6, at sec. 5, § 7.

19. See generally *Commonwealth v. Canning*, 28 N.E.3d 1156 (Mass. 2015).

20. See generally German Lopez, *The Spread of Marijuana Legalization, Explained*, VOX (Jan. 22, 2018), <https://www.vox.com/cards/marijuana-legalization/where-is-marijuana-legal> [<https://perma.cc/5Z59-T6GJ>].

21. See generally *Canning*, 28 N.E.3d 1156; *Commonwealth v. Rodriguez*, 37 N.E.3d 611 (Mass. 2015); *Commonwealth v. Cruz*, 945 N.E.2d 899 (Mass. 2011).

22. See *Canning*, 28 N.E.3d at 1156 (requiring law enforcement to include proof that the target of search is not a registered medical marijuana grower in their application for a search warrant for illegal marijuana cultivation).

23. Ingraham, *Unprecedented*, *supra* note 16.

24. *Id.*

25. Christopher Ingraham, *Marijuana Wins Big on Election Night*, WASH. POST (Nov. 8, 2016), <https://www.washingtonpost.com/news/wonk/wp/2016/11/08/medical-marijuana-sails-to-victory-in-florida> [Ingraham, *Election Night*].

A. States That Legalized the Recreational Use of Marijuana

In 2016 Alaska,²⁶ California,²⁷ Colorado,²⁸ the District of Columbia,²⁹ Maine,³⁰ Massachusetts,³¹ Nevada,³² Oregon,³³ and Washington³⁴ have legalized the recreational use of marijuana. The Department of Justice (DOJ) announced on August 29, 2013, that it would not seek to challenge the ballot initiatives in Washington and Colorado, which sought to legalize the recreational use of marijuana under state law.³⁵ In the memo, the DOJ reaffirmed that marijuana

26. ALASKA STAT. § 17.38.020 (2017); Shelby Sebens, *Legal Toking Still Months Away Despite Pot Votes in Alaska, Oregon*, REUTERS (Nov. 5, 2014), <https://www.reuters.com/article/us-usa-elections-marijuana/legal-toking-still-months-away-despite-pot-votes-in-alaska-oregon-idUSKBN0IP1EB20141105> [https://perma.cc/UUA6-HDWE].

27. CAL. HEALTH & SAFETY CODE § 11362.1 (West 2017); Katy Steinmetz, *What to Know About Marijuana Legalization in California*, TIME (Nov. 9, 2016), <http://time.com/4565438/california-marijuana-faq-rules-prop-64/> [https://perma.cc/98KH-MB8L]. For the text of the initiative as originally filed with the California Attorney General, see generally CONTROL, REGULATE AND TAX ADULT USE OF MARIJUANA ACT (Cal. 2016) (Dec. 7, 2015), [https://www.oag.ca.gov/system/files/initiatives/pdfs/15-0103%20\(Marijuana\)_1.pdf](https://www.oag.ca.gov/system/files/initiatives/pdfs/15-0103%20(Marijuana)_1.pdf) [https://perma.cc/C9QF-JXV7].

28. COLO. CONST. art. XVIII, § 16 (2018).

29. D.C. CODE § 48-904.01 (2015); Kathryn J. Russo, *Oregon, Alaska, District of Columbia Legalize Recreational Marijuana*, JACKSON LEWIS (Nov. 7, 2014), <http://www.jacksonlewis.com/resources-publication/oregon-alaska-district-columbia-legalize-recreational-marijuana> [https://perma.cc/4AZB-2PAL]; Ian Simpson, *Legal Marijuana Begins in Washington, D.C. As 'Green Rush' Is On*, REUTERS (Feb. 26, 2015), <https://www.reuters.com/article/us-usa-marijuana-districtofcolumbia/legal-marijuana-begins-in-washington-d-c-as-green-rush-is-on-idUSKBN0LU0CK20150227> [https://perma.cc/7WYQ-ZVVV]. For the text of the initiative as originally published by the D.C. Board of Elections and Ethics, see generally LEGALIZATION OF POSSESSION OF MINIMAL AMOUNTS OF MARIJUANA FOR PERSONAL USE ACT OF 2014 (Mar. 25, 2014), https://www.dcboe.org/pdf_files/pn_1587.pdf [https://perma.cc/BD6H-9YWY].

30. ME. STAT. tit. 7 §§ 2441–54 (2017).

31. The Act, *supra* note 6, at sec. 5, § 7.

32. NEV. REV. STAT. § 453D.110 (2017). For the text of the initiative as originally filed with the Nevada Secretary of State, see generally INITIATIVE TO REGULATE AND TAX MARIJUANA (2014), <http://nvsos.gov/sos/home/showdocument?id=3294> [https://perma.cc/8B53-9K96].

33. OR. REV. STAT. §§ 475B.010–395 (2017). For the text of the initiative as voted on, see generally CONTROL, REGULATION, AND TAXATION OF MARIJUANA AND INDUSTRIAL HEMP ACT (Or. 2014) <http://www.oregon.gov/olcc/marijuana/documents/measure91.pdf> [https://perma.cc/D5Z9-EW6W]; Sebens, *supra* note 26.

34. WASH. ADMIN. CODE §§ 314-55-005–540 (2017). For the text of the initiative as originally filed, see generally INITIATIVE MEASURE NO. 502 (as filed July 8, 2011) https://www.sos.wa.gov/_assets/elections/initiatives/i502.pdf [https://perma.cc/433E-FBPC].

35. See Memorandum from James M. Cole, Deputy Att’y Gen., to all U.S. Attorneys (Aug. 29, 2013) <https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf> [https://perma.cc/92RH-B2SY] [hereinafter Cole Memo 2.0]. As this was the second

remains illegal under the Controlled Substance Act.³⁶ Further, the DOJ stated that it expects state governments to establish and enforce strict regulations in their marijuana reforms to meet federal objectives.³⁷ However, on January 4, 2018, Attorney General Jefferson Beauregard Sessions III issued a memorandum to all U.S. Attorneys rescinding “previous nationwide guidance specific to marijuana enforcement”—including the Cole Memo 2.0—thus pushing marijuana reform into greater uncertainty.³⁸

Most recently, on November 8, 2016, California, Maine, Massachusetts, and Nevada legalized the recreational use of marijuana.³⁹ California passed the Adult Use of Marijuana Act, which allows adults twenty-one and older to legally use, possess, transport, and purchase up to twenty-eight and a half grams of marijuana and eight grams of marijuana concentrates.⁴⁰

Maine passed a ballot question to legalize the purchase, non-public use, possession, and transportation of up to two and one-half ounces of marijuana in public for adults twenty-one and older.⁴¹ The law allows

memorandum issued by the Deputy Attorney General on the subject, it is also known as “the Cole Memo 2.0.” Scott H. Greenfield, *The Cole Memo 2.0: This Changes Everything*, SIMPLE JUST. (Aug. 30, 2013), <https://blog.simplejustice.us/2013/08/30/the-cole-memo-2-0-this-changes-everything/> [<https://perma.cc/QXS9-F7LU>].

36. Greenfield, *supra* note 35. *See generally* 21 U.S.C. § 802 (2016).

37. Cole Memo 2.0, *supra* note 35, at 1–2. The DOJ identified eight federal objectives: Preventing the distribution of marijuana to minors; [p]reventing revenue from the sale of marijuana from going to criminal enterprises, gangs, and cartels; [p]reventing the diversion of marijuana from states where it is legal under state law in some form to other states; [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; [p]reventing violence and the use of firearms in the cultivation and distribution of marijuana; [p]reventing drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use; [p]reventing the growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands; and [p]reventing marijuana possession or use on federal property.

Id.

38. Memorandum from Jefferson Sessions, Att’y Gen., to all U.S. Attorneys (Jan. 4, 2018), <https://www.justice.gov/opa/press-release/file/1022196/download> [<https://perma.cc/6N7F-NB5B>].

39. Ingraham, *Unprecedented*, *supra* note 16.

40. CAL. HEALTH & SAFETY CODE § 11362.1; Patrick McGreevy, *California Vote to Legalize Recreational Use of Marijuana in the State*, L.A. TIMES (Nov. 8, 2016), <http://www.latimes.com/nation/politics/trailguide/la-na-election-day-2016-proposition-64-marijuana-1478281845-htmistory.html> [<https://perma.cc/SXC6-5U6A>].

41. *See generally* ME. STAT. tit. 7, §§ 2441–54 (2016).

residents to grow up to six cannabis plants at home.⁴² The law also creates a regulated marijuana retail sales system.⁴³

Massachusetts voters passed The Act, which legalized recreational marijuana for adults twenty-one and older.⁴⁴ Adults may possess up to ten ounces of marijuana inside their homes.⁴⁵ They may possess up to one ounce of marijuana in public.⁴⁶ Additionally, they may grow up to six cannabis plants per person, with a maximum of twelve plants in a home.⁴⁷ The law, which became effective December 15, 2016, restricts marijuana consumption to private locations.⁴⁸ Distribution of marijuana without a license remains illegal.⁴⁹

Nevada voters approved a ballot measure that legalizes marijuana possession, consumption, and cultivation for adults twenty-one and older.⁵⁰ The legislation also created a regulated marijuana retail sales system.⁵¹ The law became effective January 1, 2017.⁵²

Effective July 1, 2015, Oregon's recreational marijuana law legalized the possession, use, and cultivation of limited amounts of marijuana by adults twenty-one and older.⁵³ Adults twenty-one and older can legally possess up to eight ounces of marijuana and grow up to four marijuana plants in their households.⁵⁴ Licenses are available for businesses approved to grow, produce, and purchase recreational

42. tit. 7, § 2452.

43. tit. 7, §§ 2441–54.

44. The Act, *supra* note 6, at sec. 5, § 7; *Mass. Ballot Questions*, *supra* note 6 (noting that 1,745,945 (53.6%) of registered Massachusetts voters voted “Yes” on Question 4, the legalization of marijuana, while 1,513,304 (46.4%) voted “No”).

45. The Act, *supra* note 6, at sec. 5, § 7(a)(2).

46. *Id.* at sec. 5, § 7(a)(1).

47. *Id.* at sec. 5, § 7(a)(2).

48. *Id.* at sec. 5, § 12(c). While the recreational use, possession, and cultivation provisions of The Act went into effect on December 15, 2016, the provisions covering the taxation and commercial sale of marijuana were delayed by the legislature. Kristin LaFratta, *Massachusetts Gov. Charlie Baker Signs Marijuana Rewrite into Law*, MASSLIVE (July 28, 2017), http://www.masslive.com/news/boston/index.ssf/2017/07/governor_baker_signs_massachus.html [https://perma.cc/KT54-HVMZ]. A compromise bill was reached, and Massachusetts Governor Charlie Baker signed the rewrite of the marijuana law in July 2017. *Id.* “The rewrite doesn’t change personal home-growing and possession limits that went into effect in December 2016.” *Id.*

49. *See generally* The Act, *supra* note 6.

50. *See* NEV. REV. STAT. § 453D.110 (2017).

51. *Id.*

52. *Id.*

53. *See* OR. REV. STAT. §§ 475B.010–395 (2017); *see also* Sebens, *supra* note 26.

54. § 475B.245; Sebens, *supra* note 26.

marijuana.⁵⁵ The law did not amend or affect the Oregon Medical Marijuana Act.⁵⁶

On November 4, 2014, voters in the District of Columbia⁵⁷ and Alaska⁵⁸ approved measures to legalize recreational marijuana. The District of Columbia measure will allow individuals over the age of twenty-one to possess up to two ounces of marijuana and grow up to six marijuana plants at home.⁵⁹ Since the District of Columbia is technically a district and not a state, the measure is subject to presidential and congressional approval.⁶⁰ The final approval and implementation in the District of Columbia, however, remains unclear since federal law currently prohibits the possession of marijuana and its use.⁶¹

In Alaska, only adults at least twenty-one years of age can legally possess, use, and grow limited amounts of marijuana.⁶² The initiative authorizes the Marijuana Control Board to regulate and license marijuana.⁶³ Licenses are available for establishments who want to sell marijuana.⁶⁴ The initiative prohibits driving while under the influence of marijuana.⁶⁵

In Washington, voters passed Initiative 502 on November 6, 2012.⁶⁶ Initiative 502 authorized the Washington State Liquor and Cannabis Board to regulate and tax marijuana distributed and possessed by individuals twenty-one and older.⁶⁷ Additionally, the law added “a new threshold for driving under the influence of marijuana.”⁶⁸ Licenses are

55. § 475B.040; Sebens, *supra* note 26.

56. § 475B.020(7); Sebens, *supra* note 26.

57. D.C. CODE § 48-904.01 (2015).

58. ALASKA STAT. § 17.38.020 (2017).

59. D.C. CODE § 48-904.01.

60. Russo, *supra* note 29; *see also* Simpson, *supra* note 29.

61. *See generally* Ams. for Safe Access v. DEA, 706 F.3d 438 (D.C. Cir. 2013).

62. ALASKA STAT. § 17.38.020 (2017). Specifically, the initiative allows for possessing, using, displaying, purchasing, or transporting marijuana accessories or one ounce or less of marijuana; [and] possessing, growing, processing, or transporting not more than six marijuana plants, with three or fewer being mature, flowering plants, and possession of the marijuana produced by the plants on the premises where the plants were grown

§ 17.38.020(1)–(2).

63. ALASKA STAT. § 17.38.080(a); *see also* Sebens, *supra* note 26.

64. ALASKA STAT. § 17.38.121(b); *see* Sebens, *supra* note 26.

65. ALASKA STAT. § 17.38.220(b); *see* Sebens, *supra* note 26.

66. INITIATIVE MEASURE NO. 502, *supra* note 34.

67. *Id.* at § 1; *see also* WASH. ADMIN. CODE §§ 314-55-005–540 (2017).

68. INITIATIVE MEASURE NO. 502, *supra* note 34, pt. 1, § 1. If “the THC concentration of the driver’s blood is 5.00 or more” the individual’s “driver’s license, permit, or privilege to

available for establishments that were formed in Washington and for applicants twenty-one and older who have resided in Washington for three months.⁶⁹

Colorado amended its constitution to create a system that regulates marijuana according to a scheme similar to alcohol regulation.⁷⁰ Only adults at least twenty-one years of age can legally consume or possess limited amounts of marijuana.⁷¹ Licenses are available for establishments wishing to sell marijuana.⁷² Notably, Colorado and Washington were the first states in the Union to legalize recreational marijuana use.⁷³

B. *Status of Marijuana at the Federal Level*

While marijuana reform has swept across the Union, with more than half of the states approving some form of legalization, the drug remains illegal at the federal level.⁷⁴ On October 19, 2009, Deputy Attorney General David Ogden issued a guiding memorandum regarding investigations and prosecutions in states with legal medical marijuana.⁷⁵ In 2013, the U.S. Court of Appeals for the District of Columbia rejected a petition to change marijuana from a Schedule I drug under the

drive will be suspended, revoked, or denied for at least ninety days.” *Id.* pt. 5, § (c)(2)(i); *see also* ADMIN. §§ 314-55-005–540.

69. INITIATIVE MEASURE NO. 502, *supra* note 34, pt. 3, § 6; *see also* ADMIN. §§ 314-55-020(10).

70. COLO. CONST. art. XVIII, § 16 (2018).

71. *Id.* Specifically, the amendment allows

[p]ossessing, using, displaying, purchasing, or transporting marijuana accessories or one ounce or less of marijuana; [and p]ossessing, growing, processing, or transporting no more than six marijuana plants, with three or fewer being mature, flowering plants, and possession of the marijuana produced by the plants on the premises where the plants were grown, provided that the growing takes place in an enclosed, locked space, is not conducted openly or publicly, and is not made available for sale.

Id. § 16 cl. 3(a)–(b).

72. *Id.* § 16.

73. Lopez, *supra* note 20.

74. 21 U.S.C. § 812 (2016).

75. Memorandum from David Ogden, Deputy Att’y Gen., to Selected U.S. Attorneys (Oct. 19, 2009), <https://www.justice.gov/sites/default/files/opa/legacy/2009/10/19/medical-marijuana.pdf> [hereinafter Ogden Memo] (Federal resources are not to be directed at “individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana.”). *But see* Memorandum from Jefferson Sessions, *supra* note 38 (rescinding all “previous nationwide guidance specific to marijuana enforcement” including the Ogden Memo).

Controlled Substances Act to a non-Schedule I drug⁷⁶—the effect of which would have allowed for the possibility of federally authorized medical marijuana use with a prescription.⁷⁷

Additionally, in 2014, the U.S. House of Representatives passed an appropriations bill that contained the Rohrabacher-Farr Amendment restricting funds from the U.S. Department of Justice that would be used to prevent states from implementing their medical marijuana reforms.⁷⁸ One year later, the U.S. Senate approved the amendment and President Barack Obama signed it into law.⁷⁹ While the amendment has proven an effective safeguard for the states, it has the potential to expire without renewal from Congress each fiscal year.⁸⁰ Accordingly, the future of medical marijuana laws in the United States remains unclear.

II. EXAMINATION OF THE MASSACHUSETTS INITIATIVE: COMPARING AND CONTRASTING IT TO COLORADO

A. *Massachusetts, The Act*

While seven states and the District of Columbia have legalized recreational marijuana in some form, only one state (Colorado) has had the opportunity to examine its probable cause to obtain a search warrant for suspected illegal marijuana cultivation in light of implemented

76. See generally *Ams. for Safe Access v. DEA*, 706 F.3d 438 (D.C. Cir. 2013).

77. *Id.* at 441 (“Unlike Schedule I drugs, federal law permits individuals to obtain Schedule II, III, IV, or V drugs for personal medical use with a valid prescription.”).

78. Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, § 538, 2014 U.S.C.C.A.N. (128 Stat. 2130) 2217.

None of the funds made available in this Act to the Department of Justice may be used, with respect to the States of Alabama, Alaska, Arizona, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Hawaii, Illinois, Iowa, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, Oregon, Rhode Island, South Carolina, Tennessee, Utah, Vermont, Washington, and Wisconsin, to prevent such States from implementing their own State laws that authorize the use, distribution, possession, or cultivation of medical marijuana.

Id. The amendment is named after its sponsors, Representatives Dana Rohrabacher and Sam Farr of California.

79. Steph Sherer, *Congress Extends ‘Ceasefire’ on Medical Marijuana, but Can They Clear the Smoke?*, HUFFPOST (Dec. 21, 2015) https://www.huffingtonpost.com/steph-sherer/congress-extends-ceasefir_b_8853606.html [<https://perma.cc/K4NJ-9X9L>].

80. Shira Schoenberg, *Federal Protections for State Medical Marijuana Set to Expire Without Congressional Vote*, MASSLIVE (Jan. 11, 2018), http://www.masslive.com/politics/index.ssf/2018/01/federal_protections_for_state.html [<https://perma.cc/X4WP-FBFZ>].

marijuana reform.⁸¹ Oregon issued its first retail marijuana license on October 1, 2016,⁸² but state courts have not had the opportunity to examine the issue of probable cause in light of their reform. Washington legalized the recreational use of marijuana in 2014 but did not amend the criminal laws outlawing personal marijuana cultivation in the home.⁸³ In D.C., voters passed recreational marijuana reforms; however, the complexity of the district not being a state has hindered implementation.⁸⁴ For these reasons, The Act may only be effectively compared with Colorado's Amendment 64.⁸⁵

The Act amended the state's criminal law to permit the possession and cultivation of marijuana in the home of a person who is twenty-one years of age or older.⁸⁶ Section 7 of the legislation covers the relevant personal use of marijuana.⁸⁷ The legislation legalizes possession of up to ten ounces of marijuana and any marijuana produced by marijuana plants cultivated in the home for personal use.⁸⁸ Additionally, it legalizes the possession, cultivation, and processing of up to six marijuana plants.⁸⁹ However, no more than twelve plants may be cultivated in any house at once.⁹⁰ Finally, the distribution of marijuana without a proper license remains illegal under the legislation.⁹¹

81. See *People v. Sexton*, 296 P.3d 157, 162 (Colo. App. 2012) (examining the validity of a search warrant for illegal marijuana cultivation in light of legal medical marijuana cultivation); *People v. Zuniga*, 372 P.3d 1052, 1057 (Colo. 2016) (“[W]e now turn to the role that the odor of marijuana can play in the totality of circumstances test in light of the fact that possession of one ounce or less of marijuana is now allowed under Colorado law.”).

82. *Oregon Begins Recreational Marijuana Sales on Saturday*, FOX NEWS POLITICS (Oct. 1, 2016), <http://www.foxnews.com/politics/2016/10/01/oregon-begins-recreational-marijuana-sales-on-saturday.html>.

83. WASH. ADMIN. CODE § 314-55-075(1)(a). Unlike the Colorado, Oregon, or Massachusetts recreational use legislation, Washington does not expressly allow the personal cultivation of marijuana in the home.

84. Russo, *supra* note 29; see also Simpson, *supra* note 29.

85. See COLO. CONST. art. XVIII, § 16 (2018).

86. The Act, *supra* note 6, at sec. 5, § 7(a)(2). The Act specifically states, [W]ithin the person's primary residence, possessing up to 10 ounces of marijuana and any marijuana produced by marijuana plants cultivated on the premises and possessing, cultivating or processing not more than 6 marijuana plants for personal use so long as not more than 12 plants are cultivated on the premises at once.

Id.

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

B. Colorado Amendment 64

Similar to The Act, Colorado's Amendment 64 amended the state's criminal law to allow the possession, growth, processing, and transportation of up to six marijuana plants.⁹² The amendment mandates that only three or fewer plants may be mature and flowering at one time.⁹³ In 2012, Colorado voters decided to provide added security by limiting the area where marijuana may be cultivated in the home.⁹⁴ Any marijuana must be cultivated in an enclosed, locked space, not in the open or in public.⁹⁵ Additionally, akin to the legislation in Massachusetts, the distribution of marijuana without a license remains illegal in Colorado.⁹⁶

III. WITH LIMITED FORMS OF LEGAL MARIJUANA CULTIVATION, WHAT IS SUFFICIENT PROBABLE CAUSE TO SEARCH A HOME FOR ILLEGAL MARIJUANA CULTIVATION?

In order to understand the concept of probable cause, we must first examine its source—the Fourth Amendment.⁹⁷ The drafters of the Fourth Amendment in 1791 had two models for guidance.⁹⁸ The first model came from Article X of the Pennsylvania Constitution of 1776, which provided in relevant part: “[T]he people have a right to hold themselves, their houses, papers, and possessions free from search and seizure.”⁹⁹ The second model came from the Massachusetts and New Hampshire Bills of Rights, which both provided in relevant part as follows: “Every subject has a right to be secure from all unreasonable searches[] and seizures.”¹⁰⁰ John Adams, from Massachusetts, played a critical role in shaping the Fourth Amendment.¹⁰¹ His contributions to the Massachusetts Constitution would later serve as primary guidance in

92. COLO. CONST. art. XVIII, § 16, cl. 3(b) (2018).

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.* at § 16, cl. 1(b)(II).

97. U.S. CONST. amend. IV.

98. See NORMAN J. SINGER & J.D. SHAMBIE SINGER, *2B Statutory Construction, in SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION* §§ 51:1–3 (7th ed., rev. vol. 2013) (arguing that those who draft legislation are presumed to know the relevant existing law).

99. PA. CONST. of 1776, art. X, http://avalon.law.yale.edu/18th_century/pa08.asp [<http://perma.cc/VTY7-B4JG>].

100. MASS. CONST. pt. 1, art. XIV; N.H. CONST. art. XIX.

101. Thomas K. Clancy, *The Framers' Intent: John Adams, His Era, and the Fourth Amendment*, 86 IND. L.J. 979, 979–80 (2011).

the creation of the Fourth Amendment,¹⁰² which affirms

[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.¹⁰³

The Fourth Amendment has traditionally been interpreted to contain two basic clauses.¹⁰⁴ The first focuses on a reasonableness requirement to conduct searches and seizures.¹⁰⁵ The second clause is commonly referred to as the warrant clause.¹⁰⁶ Together, these two separate requirements amount to an individual's rights under the Fourth Amendment.¹⁰⁷

A. *The Implied Warrant Requirement*

Historically, there has been a general understanding by the Supreme Court that the warrant clause implies a warrant requirement.¹⁰⁸ Under a strict interpretation, the warrant requirement dictates that “searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment[,] subject only to a few specifically established and well-delineated exceptions.”¹⁰⁹

102. *Id.* (explaining how, while drafting the Fourth Amendment, James Madison adopted the outline used by John Adams in Article XIV of the Massachusetts Declaration of Rights and copied Adams's language almost verbatim).

103. U.S. CONST. amend. IV.

104. *See generally* Silas J. Wasserstrom, *The Fourth Amendment's Two Clauses*, 26 AM. CRIM. L. REV. 1389 (1989).

105. *Id.*

106. *Id.*

107. U.S. CONST. amend. IV.

108. *See* *Katz v. United States*, 389 U.S. 347, 357 (1967); *Johnson v. United States*, 333 U.S. 10, 14–15 (1948). “Belief, however well founded, that an article sought is concealed in a dwelling house furnishes no justification for a search of that place without a warrant.” *Johnson*, 333 U.S. at 14 n.4 (quoting *Agnello v. United States*, 269 U.S. 20, 33 (1925)); Wasserstrom, *supra* note 104 at 1390 (“On the other view, the second clause helps explain the first; fourth amendment reasonableness turns on the presence of a validly issued warrant, except in certain [specified or] exceptional circumstances when it would not be feasible [for the police to obtain] one.”).

109. *Katz*, 389 U.S. at 357 (citations omitted). These exceptions, called exigent circumstances, include emergency situations which require immediate action to prevent danger to life or serious damage to property, immediate action to prevent the imminent destruction of evidence, and the imminent escape of a fleeing suspect. *Missouri v. McNeely*, 569 U.S. 141, 149 (2013).

Prominent critics of the warrant requirement, such as former Justice Antonin Scalia, disagreed with this view and argued that there is nothing explicit in the text of the Fourth Amendment, nor its history, that supports the proposition of a warrant requirement.¹¹⁰ Further, critics question whether the warrant requirement effectively protects an individual's rights under the Fourth Amendment.¹¹¹ These critics argue that our Founding Fathers were highly skeptical of warrants in general and their subsequent immunity for law enforcement officials from common law remedies such as tort actions.¹¹² Under this view, the Fourth Amendment is a reflection of this skepticism, requiring strict adherence to the limits set forth in a warrant and laying out the specific—but limited—circumstances where warrants may be issued.¹¹³ Accordingly, interpreting a warrant requirement from the warrant clause of the Fourth Amendment would contradict the views of the Founding Fathers who sought to restrain their use.¹¹⁴ As the Court developed its Fourth Amendment jurisprudence, it has arguably followed this view and has recognized numerous exceptions which have effectively eroded the

110. See, e.g., *California v. Acevedo*, 500 U.S. 565, 581 (1991) (Scalia, J., concurring) (“The Fourth Amendment does not by its terms require a prior warrant for searches and seizures; it merely prohibits searches and seizures that are ‘unreasonable.’”).

111. For an extensive critique of Fourth Amendment jurisprudence regarding the warrant clause and probable cause requirement, see Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 761–81 (1994).

112. See *Riley v. California*, 134 S. Ct. 2473, 2494 (2014) (“Our cases have recognized that the Fourth Amendment was the founding generation’s response to the reviled ‘general warrants’ and ‘writs of assistance’ of the colonial era, which allowed British officers to rummage through homes in an unrestrained search for evidence of criminal activity.”); *Acevedo*, 500 U.S. at 581 (Scalia, J., concurring) (“For the warrant was a means of insulating officials from personal liability assessed by colonial juries.”); *Boyd v. United States*, 116 U.S. 616, 624–25 (1886); Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 399–401 (1974) (arguing that the drafters of the Bill of Rights were influenced by their experiences with an oppressive government); Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 601–11 (1999). “The historical record . . . reveals that the Framers focused their concerns and complaints rather precisely on searches of houses under general warrants [when drafting the Fourth Amendment].” *Id.* at 601.

113. *Acevedo*, 500 U.S. at 581 (Scalia, J., concurring) (“What [the Fourth Amendment] explicitly states regarding warrants is by way of limitation upon their issuance rather than a requirement of their use.”); Richard Posner, *Rethinking the Fourth Amendment*, 1981 SUP. CT. REV. 49, 72 (1981) (“The natural reading is not that the Framers wanted to encourage the use of warrants but that they wanted to discourage their use by imposing stringent requirements on their issuance.”).

114. Posner, *supra* note 113, at 73 (“The use of the magistrate as a shield against liability would be the opposite of what the draftsmen of the warrant clause intended.”).

warrant requirement.¹¹⁵

Issues regarding the warrant requirement have risen as the country has entered the digital era where law enforcement has increased access to modern surveillance and data aggregation technologies,¹¹⁶ such as stingrays,¹¹⁷ Global Positioning System (GPS) devices,¹¹⁸ and cell-site tracking.¹¹⁹ While several Justices have addressed this issue—specifically regarding the public observation¹²⁰ doctrine—and whether to

115. *Acevedo*, 500 U.S. at 582 (Scalia, J., concurring) (outlining the warrant as “basically unrecognizable” due to all the exceptions recognized by the Court); *United States v. Place*, 462 U.S. 696, 721 (1983) (Blackmun, J., concurring); Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1475 (1985) (describing how there are more searches performed today based on an exception to a warrant than pursuant to a warrant); Silas J. Wasserstrom & Louis Michael Seidman, *The Fourth Amendment as Constitutional Theory*, 77 GEO. L.J. 19, 34 (1988) (citation omitted) (“[T]he rule is now so riddled with exceptions, complexities, and contradictions that it has become a trap for the unwary.”).

116. See, e.g., Marc Jonathan Blitz, *The Fourth Amendment Future of Public Surveillance: Remote Recording and Other Searches in Public Space*, 63 AM. U. L. REV. 21, 48–67 (2013); David Gray & Danielle Citron, *The Right to Quantitative Privacy*, 98 MINN. L. REV. 62, 103–25 (2013) (“Today, the risk of a surveillance state arises with law enforcement’s unfettered access to advanced surveillance technologies, including aerial drones, GPS-enabled tracking devices, and data aggregation and mining projects.”); Orin S. Kerr, *The Mosaic Theory of the Fourth Amendment*, 111 MICH. L. REV. 311, 338–39 (2012) (“[T]he most challenging and important threshold question in interpreting the Fourth Amendment is what [surveillance] counts as a ‘search’”); Paul Ohm, *The Fourth Amendment in a World Without Privacy*, 81 MISS. L.J. 1309, 1332 (2012) (“[E]ven if we increase probable cause and warrant requirements, we still will be subject to far too much arbitrary surveillance.”); Christopher Slobogin, *Making the Most of United States v. Jones in a Surveillance Society: A Statutory Implementation of Mosaic Theory*, 8 DUKE J. CONST. L. & PUB. POL’Y 1, 16–28 (2012).

117. See, e.g., Ellen Nakashima, *Secrecy Around Police Surveillance Equipment Proves a Case’s Undoing*, WASH. POST (Feb. 22, 2015), http://www.washingtonpost.com/world/national-security/secrecy-around-police-surveillance-equipment-proves-acasesundoing/2015/02/22/ce72308a-b7ac-11e4-aa05-1ce812b3fdd2_story.html?hpid=z1 [<https://perma.cc/7XLM-XP82>] (describing how a stingray, a cell-tower simulator, operates). “The StingRay is a box about the size of a small suitcase—there’s also a handheld version—that simulates a cell phone tower.” *Id.*

118. See, e.g., *United States v. Jones*, 565 U.S. 400, 404 (2012) (holding that, under the Fourth Amendment, the government’s use of a GPS tracking device on the defendant’s vehicle constituted a search).

119. *Id.* at 413–18 (Sotomayor, J., concurring) (explaining new methods of surveillance which rely on electronic signals); *id.* at 426–30 (Alito, J., concurring) (explaining how technological advances, especially in cell phone technology, influence the expectations of privacy when programs gather location data from a phone). Massachusetts grappled with the issue in *Commonwealth v. Augustine*, 35 N.E.3d 688, 693 n.9 (Mass. 2015) (citing *Commonwealth v. Augustine*, 4 N.E.3d 846 (Mass. 2014)) (“[A]n individual has no reasonable expectation of privacy in his or her [cell site location information], and therefore the warrant requirement of the Fourth Amendment does not apply.”).

120. The public observation doctrine holds that where law enforcement make an observation from a public place or from a place where they are legally allowed to be, there is no search under the Fourth Amendment. See *Florida v. Riley*, 488 U.S. 445, 449–50 (1989)

rein these technologies into Fourth Amendment jurisprudence, no consensus has formed surrounding the implications of these issues on the warrant requirement.¹²¹ Effectively, this lack of consensus has left the door open to law enforcement to investigate and collect information from suspects using advanced technologies and methods that fall outside the warrant requirement.¹²² In the context of marijuana cultivation specifically, helicopters,¹²³ drones,¹²⁴ night vision goggles, as well as utility records are available and widely used.¹²⁵

B. State Law Governing the Existence of Probable Cause and What Is Needed to Obtain a Warrant in Massachusetts

In Massachusetts, there is well-established law detailing what is required of law enforcement to obtain a warrant to search a house or dwelling for suspected criminal activity.¹²⁶ Under Massachusetts law, an

(holding that law enforcement did not conduct a search under the Fourth Amendment where they observed marijuana cultivation from a helicopter because they were in a public airway); *Dow Chem. Co. v. United States*, 476 U.S. 227, 239 (1986) (“We hold that the taking of aerial photographs of an industrial plant complex from navigable airspace is not a search prohibited by the Fourth Amendment.”); *California v. Ciraolo*, 476 U.S. 207, 215 (1986); *United States v. Knotts*, 460 U.S. 276, 281–82 (1983) (“A person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another.”).

121. See *Riley v. California*, 134 S. Ct. 2473, 2495 (2014) (“Our answer to the question of what police must do before searching a cell phone seized incident to an arrest is accordingly simple[,] get a warrant.”). However, the Court left open the question of how the warrant requirement will be affected by technological changes. See *Jones*, 565 U.S. at 426–30 (Alito, J., concurring). “In circumstances involving dramatic technological change, the best solution to privacy concerns may be legislative.” *Id.* at 429. See also *Augustine*, 35 N.E.3d at 690 (examining whether cell site location information collected without a warrant supported the issuance of a search warrant for suspected arson).

122. See, e.g., *Riley*, 488 U.S. at 449–50 (holding that where law enforcement make an observation in a public place, like a helicopter, there is no search and therefore no need to acquire a warrant).

123. See, e.g., *id.*

124. Phil Mattingly, *FBI Uses Drones in Domestic Surveillance, Mueller Says*, WASH. POST (June 19, 2013), https://www.washingtonpost.com/world/national-security/fbi-uses-drones-in-domestic-surveillance-mueller-says/2013/06/19/d51d40da-d925-11e2-a9f2-42ee3912ae0e_story.html?noredirect=on&utm_term=.a5c119c33ccd [https://perma.cc/5HYB-KM8R].

125. *Commonwealth v. Canning*, 28 N.E.3d 1156, 1159 (Mass. 2015) (noting that law enforcement may rely upon previously obtained electric utility records and observations made using night vision goggles to support their application for a search warrant for illegal marijuana possession and cultivation).

126. See generally MASS. GEN. LAWS ch. 276 §§ 1–2C (2017); *Commonwealth v. Upton*, 476 N.E.2d 548 (Mass. 1985); *Commonwealth v. Smith*, 348 N.E.2d 101 (Mass. 1976); *Commonwealth v. Von Utter*, 246 N.E.2d 806 (Mass. 1969); *Commonwealth v.*

affidavit to establish the probable cause to obtain a warrant must comply with state statutory requirements as well as satisfy the requirements of the United States Constitution and Supreme Court decisions.¹²⁷ An affidavit in support of a search warrant must be strictly scrutinized and will only be held “valid where the underlying circumstances presented to the issuing judge or clerk clearly demonstrate probable cause to search the named premises and to believe that all persons present are involved in the criminal activity afoot.”¹²⁸ Accordingly, an affidavit including purely conclusory information is an insufficient basis to obtain a search warrant.¹²⁹ Instead, law enforcement must clearly show the underlying facts which give rise to their belief that probable cause exists.¹³⁰

Additionally, to establish probable cause, an affidavit must show the source of the information, the reliability of the source, and the nature of the information.¹³¹ Law enforcement may include hearsay statements as a basis to establish probable cause, so long as the statement also includes support for their belief in the credibility of the informant and reliability of the information.¹³² Information obtained during a surveillance period is acceptable to support an affidavit for probable cause.¹³³

However, the SJC has declined to follow the Supreme Court’s decisions regarding the requisite information in an affidavit.¹³⁴ In circumstances where the outcome of a decision would violate the

Causey, 248 N.E.2d 249 (Mass. 1969); *Commonwealth v. Cuddy*, 231 N.E.2d 368 (Mass. 1967).

127. See U.S. CONST. amend. IV; MASS. CONST. pt. 1, art. XIV; MASS. GEN. LAWS ch. 276 § 2B; *Upton*, 476 N.E.2d at 554 (quoting *Commonwealth v. Cinelli*, 449 N.E.2d 1207, 1216 (Mass. 1983)) (An “affidavit must ‘contain enough information for an issuing magistrate to determine that the items sought are related to the criminal activity under investigation, and that they reasonably may be expected to be located in the place to be searched.’”); *Commonwealth v. Cefalo*, 409 N.E.2d 719, 726 (Mass. 1980) (“In the case of a search warrant, as distinguished from an arrest warrant, the affidavit must . . . contain enough information . . . to determine that the items sought are related to the criminal activity under investigation, and that they may reasonably be expected to be located in the place to be searched.”); *Causey*, 248 N.E.2d at 249.

128. *Smith*, 348 N.E.2d at 107.

129. *Illinois v. Gates*, 462 U.S. 213, 239 (1983); *Cuddy*, 231 N.E.2d at 370.

130. See *Von Utter*, 246 N.E.2d at 809; *Commonwealth v. Penta*, 225 N.E.2d 58, 61 (Mass. 1967).

131. *Von Utter*, 246 N.E.2d at 809; *Causey*, 248 N.E.2d at 251.

132. See *Commonwealth v. Moran*, 228 N.E.2d 827, 829 (Mass. 1967); *Commonwealth v. Rossetti*, 211 N.E.2d 658, 660 n.4 (Mass. 1965).

133. See *Commonwealth v. Guerro*, 260 N.E.2d 190, 197–98 (Mass. 1970).

134. *Commonwealth v. Depiero*, 42 N.E.3d 1123, 1126 (Mass. 2016) (rejecting the adoption of the 9-1-1 system as an independent indicator of reliability for an anonymous tip reasoning that it would violate Article 14 of the Massachusetts Declaration of Rights).

Massachusetts Declaration of Rights, the SJC has declined to follow the Court.¹³⁵

C. *The Current Standard of Probable Cause for Suspected Illegal Cultivation of Marijuana in Massachusetts*

In *Canning*, the SJC set the most current standard of probable cause for illegal marijuana cultivation to obtain a search warrant in Massachusetts.¹³⁶ Police officers in *Canning* obtained a facially valid search warrant upon a showing of probable cause for illegal marijuana possession and cultivation.¹³⁷ However, the District Court and the SJC took issue with the fact that the affidavit failed to establish that the target of the warrant was not registered under HMUM to legally cultivate marijuana in the home.¹³⁸

The officers based their probable cause upon a tip from a confidential informant, their own surveillance of the property, training, and experience.¹³⁹ A confidential informant told police that the defendant was living at the property and was involved in a marijuana grow operation.¹⁴⁰ Law enforcement observed obscured windows, aluminum hoses protruding from a window, a pickup truck in the driveway registered to the defendant, a strong odor of freshly cultivated marijuana emanating from the house, and the sound of fans operating.¹⁴¹ Furthermore, while using night vision goggles, officers saw light emanating from another window at the property in question.¹⁴² Additionally, police from another town informed law enforcement that they had observed the defendant and another man purchasing a large

135. *See, e.g., id.*

136. *Commonwealth v. Canning*, 28 N.E.3d 1156, 1166 (Mass. 2015).

Detective Kent's affidavit filed in support of the search warrant in this case did not contain any information at all addressing whether the defendant was or was not registered as a qualifying patient or personal caregiver to grow the marijuana the police reasonably suspected was growing on the property. Nor, as the motion judge observed, did it contain other facts or qualified opinions that might supply an alternate basis to establish the necessary probable cause to believe the cultivation was unlawful. As such, the affidavit failed to establish probable cause for the search.

Id. (internal citation omitted).

137. *Id.* at 1158.

138. *Id.* at 1165.

139. *Id.* at 1159.

140. *Id.*

141. *Id.*

142. *Id.*

amount of indoor marijuana grow materials from a hydroponic shop and loading the equipment into the defendant's pickup.¹⁴³

Law enforcement also obtained utility bills relating to the electrical service of the property and other houses nearby.¹⁴⁴ The records showed that the average kilowatt usage for the neighboring three homes were 542.3 kilowatt hours (kWh), 23.3 kWh, and 246.6 kWh, while the average kilowatt usage for the defendant's property was 3116.5 kWh.¹⁴⁵ Based on their training, law enforcement was aware that the cultivation of marijuana required different types of electrical equipment including high intensity discharge lamps, fluorescent lights, and sophisticated irrigation and ventilation systems to be constantly operating, and therefore high usage of electricity was expected.¹⁴⁶

The officers searched the defendant's property and seized approximately 1.2 pounds of marijuana, seventy marijuana plants, and other marijuana cultivation paraphernalia.¹⁴⁷ The defendant was subsequently arrested and filed a motion to suppress the seized evidence along with the statements he made at the time of the search and his arrest.¹⁴⁸ The motion was granted by a District Court judge who concluded that the search warrant affidavit "establishe[d] probable cause that marijuana was being cultivated indoors at the defendant[']s home, but [also] concluded in substance that in light of [HMUM] the affidavit failed to establish probable cause that the cultivation was [illegal under HMUM]."¹⁴⁹ The SJC affirmed the order.¹⁵⁰

Canning is particularly useful for the transition to legal marijuana cultivation in the home because it details exactly what law enforcement needs in order to establish probable cause.¹⁵¹ Confidential informants and observations made during surveillance (for example: kWh, observations of equipment being used, training, and personal experience) can be included in an affidavit to support the existence of probable cause.¹⁵² These various methods will in no way be hindered with the legalization of personal marijuana cultivation in a home.

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.* (alterations in original).

150. *Id.* at 1166.

151. *Id.* at 1159.

152. *Id.*

The SJC, in deciding *Canning*, laid out a standard which Massachusetts law enforcement would need to satisfy in order to obtain a search warrant for suspected illegal marijuana cultivation in light of legal medical marijuana cultivation.¹⁵³ Specifically, *Canning* establishes that a supporting affidavit to establish probable cause must also show how the target owning or in control of the property is not registered under the HMUM to cultivate the marijuana at issue.¹⁵⁴ In order to determine whether this standard is appropriate for the legalization of personal cultivation of marijuana in the home in Massachusetts, we must examine how Colorado has approached the issue.

IV. HOW COLORADO HAS APPROACHED LEGAL MARIJUANA CULTIVATION IN THE HOME

Since Colorado has had a chance to examine its probable cause analysis in light of its implemented marijuana reforms, Massachusetts may look to Colorado for guidance. To determine whether Massachusetts should adopt a similar approach, we must examine the probable cause analysis that the courts in Colorado have utilized regarding marijuana cultivation in the home.

In Colorado, the courts have established a “totality of the circumstances” test for probable cause.¹⁵⁵ Specifically, in *Mendez v. People*, the court reasoned that the analysis of probable cause under both the state and federal constitutions requires judges to look at the totality of the circumstances.¹⁵⁶ “[J]udges, considering all of the circumstances,

153. *Id.* at 1165.

154. *Id.*

This is not to say that such an affidavit always must contain facts directly establishing that the person whose property the police seek to search for evidence of unlawful marijuana cultivation is not or probably not registered to do so; reasonable inferences may be drawn that a suspected marijuana cultivation operation is unlawful from other facts. For example, except for registered medical marijuana treatment centers, it remains unlawful to cultivate marijuana for sale. Facts indicating that a confidential informant recently purchased marijuana from the owner of the property where the cultivation operation is suspected to be taking place would likely supply the requisite probable cause to search that property for evidence of unlawful cultivation, as would information that police recently had observed marijuana plants growing on the property and that, in the opinion of a properly qualified affiant, the number of plants exceeded the quantity necessary to grow a sixty-day supply of ten ounces.

Id. at 1165 n. 15.

155. *Mendez v. People*, 986 P.2d 275, 280 (Colo. 1999) (citing *People v. Turcotte-Schaeffer*, 843 P.2d 658, 660 (Colo.1993)).

156. *Id.*

must make a practical, common sense decision whether a fair probability exists that a search of a particular place will reveal contraband or evidence of a crime.”¹⁵⁷ Finally, the information necessary to satisfy a finding of probable cause does not need to rise to the level of certainty.¹⁵⁸

In *People v. Sexton*, the Court of Appeals for Colorado examined a case where the Pueblo County sheriff’s office were conducting investigations looking for illegal marijuana cultivation in rural parts of the area.¹⁵⁹ Part of the investigation included an aerial marijuana eradication program where trained officers used helicopters to spot clandestine marijuana grow operations.¹⁶⁰ During one of these public observations via helicopter, a detective observed the defendant’s marijuana grow operation.¹⁶¹ He then directed ground officers to the location to contact anyone who may be there.¹⁶² After the officers did not find any one, they sought to obtain a search warrant for the property based on the marijuana cultivation they observed.¹⁶³

Upon issuance of the search warrant, the detective entered the property.¹⁶⁴ At that time, he observed a piece of paper attached to a plywood board on a tree that stated the marijuana cultivation was for medical purposes for “Colorado Compassion Club’s certified members (‘garden certificate’).”¹⁶⁵ The detective stated that the garden certificate had places for ten members’ numbers and several places for caregivers’ signatures and information.¹⁶⁶ However, the detective determined that “relevant information was missing or, where filled out, illegible.”¹⁶⁷ He then discussed the garden certificate with the other officers participating in the search and contacted the district attorney’s office to discuss the situation.¹⁶⁸ Nevertheless, because officers observed 128 marijuana plants—grossly exceeding the legal plant limit for medical marijuana—

157. *Id.* (citing *People v. Altman*, 960 P.2d 1164, 1167 (Colo. 1998)).

158. *Id.* (“The probable cause standard does not lend itself to mathematical certainties and should not be laden with hypertechnical interpretations or rigid legal rules.”).

159. *People v. Sexton*, 296 P.3d 157, 159 (Colo. App. 2012).

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

the officers proceeded to pull up all the plants to eradicate them.¹⁶⁹

After the officers completed the eradication, the defendant arrived at the property.¹⁷⁰ He presented the officers with a notebook that contained medical marijuana registration cards for several patients, some of whom, himself included, had doctor recommendations to grow extra marijuana plants.¹⁷¹ Regardless, the officers seized the eradicated plants.¹⁷² Upon drying out, officers separated the leaves from the stalks of the plant to obtain an accurate weight.¹⁷³ The total weight of the leaves was 20.4 pounds.¹⁷⁴

The defendant was subsequently charged with illegal marijuana cultivation and possession.¹⁷⁵ At trial, his primary defense was that the marijuana cultivation was legal pursuant to the Colorado Constitution.¹⁷⁶ While the jury acquitted the defendant of cultivation, they found him guilty of possession.¹⁷⁷ In response, the defendant appealed asserting, among other things, that the search warrant lacked veracity and that probable cause was absent.¹⁷⁸

In addressing the defendant's assertion, the court first determined that any trespass on the property by law enforcement to confirm that the plants were marijuana was "immaterial to the validity of the warrant because the allegations of possible illegal activity in the affidavit were based solely on the detective's aerial observations."¹⁷⁹

Second, the court rejected the argument that the affidavit in support of the warrant was defective on the basis that it omitted previous misidentifications because the detective had fifteen years of experience and training in identifying marijuana cultivation.¹⁸⁰

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.* at 162; *see also supra* text accompanying note 120.

180. *Sexton*, 296 P.3d at 162 (citing *People v. Leftwich*, 869 P.2d 1260, 1265–66 (Colo. 1994) (holding that in reviewing an affidavit, the magistrate considers the totality of the circumstances, including the affiant's relevant experience and training, knowledge at the time he or she wrote the affidavit, and the veracity and basis of knowledge of anyone supplying hearsay information); *People v. Kerst*, 181 P.3d 1167, 1171 (Colo. 2008) ("A fact is material for the purposes of vitiating an entire affidavit only if its omission rendered the affidavit

Third, the court rejected the defendant's argument that the affidavit only described a possible, rather than a confirmed, marijuana cultivation operation.¹⁸¹ The court found that the detective's experience and training in locating marijuana grow operations provided a substantial basis for concluding that probable cause existed.¹⁸²

Fourth, the court rejected the defendant's argument that the affidavit only concluded that the cultivation was only "potentially" illegal under existing marijuana law, holding that it did not undermine the finding of probable cause.¹⁸³ The court reaffirmed that "[o]fficers need not 'refrain from searching premises under circumstances in which the activity in question could potentially be legal,' as long as the circumstances also support a reasonable belief that evidence of illegal activity will be found."¹⁸⁴

As the court of appeals rejected each argument by the defendant regarding a lack of probable cause, and rejected his other arguments raised, the judgment by the jury was affirmed.¹⁸⁵ The Colorado Supreme Court denied the defendant's subsequent writ of certiorari to review the court of appeals decision.¹⁸⁶

The Colorado Supreme Court has continually held steadfast to the "totality of the circumstances" approach to probable cause since the legalization of recreational marijuana.¹⁸⁷ In *People v. Zuniga*, a Colorado State Trooper stopped a Jeep Cherokee on an interstate highway.¹⁸⁸ As "the trooper approached the vehicle's open, passenger-side window he quickly noted a 'heavy odor' of 'raw' (i.e. unburnt) marijuana."¹⁸⁹ The trooper proceeded to question the driver and

'substantially misleading' as to the existence of probable cause to the magistrate who issued the warrant.")).

181. *Id.*

182. *Id.* (citing *People v. Gutierrez*, 222 P.3d 925, 937 (Colo. 2009) (holding that probable cause is not a precise calculation based on certainties, but rather a reasonable belief based on probabilities); *People v. Mapps*, 231 P.3d 5, 7–8 (Colo. App. 2009) (holding the same); *People v. Pacheco*, 175 P.3d 91, 94 (Colo. 2006) ("A court reviewing the validity of a search warrant does not engage in de novo review but rather examines whether the magistrate had a substantial basis for concluding that probable cause existed.")).

183. *Id.*

184. *Id.* (citing *Mendez v. People*, 986 P.2d 275, 281 n.4 (Colo. 1999); *United States v. Naugle*, 997 F.2d 819, 823 (10th Cir. 1993); *Kerst*, 181 P.3d at 1172).

185. *Id.*

186. *Id.*

187. *People v. Zuniga*, 372 P.3d 1052, 1054 (Colo. 2016); *Mendez*, 986 P.3d at 280; *Sexton*, 296 P.3d at 162.

188. *Zuniga*, 372 P.3d at 1054.

189. *Id.*

defendant.¹⁹⁰ Based on their inconsistent stories, his observations of “their extreme nervousness, and the strong odor of raw marijuana, the trooper” became suspicious that criminal activity was afoot.¹⁹¹ He proceeded to have his “K-9 unit . . . conduct a ‘free air sniff’ around the vehicle.”¹⁹² The canine “quickly alerted at the rear hatch of the Jeep Cherokee.”¹⁹³ As a result, the trooper searched the hatch and found a large duffel bag with one pound of marijuana and a cooler with “12.6 ounces of marijuana concentrate under . . . ice.”¹⁹⁴ Upon finding the marijuana, the trooper asked the defendant if it was his, to which the defendant responded, “Yes, sir.”¹⁹⁵ The defendant was subsequently arrested and “charged . . . with two counts of possession with intent to manufacture or distribute marijuana or marijuana concentrate.”¹⁹⁶

“The trial court . . . found that because possession of one ounce or less of marijuana [was] allowed under Colorado law, the odor of marijuana [could not] contribute to a determination of probable cause.”¹⁹⁷ The Supreme Court of Colorado disagreed with the reasoning of the trial court, relying on the Supreme Court’s decision in *Florida v. Harris*.¹⁹⁸ The Supreme Court of Colorado decided that, according to the Supreme Court, the totality of the circumstances test for probable cause is an “all-things-considered approach,” and its “ultimate touchstone” is reasonableness.¹⁹⁹ The Colorado Supreme Court found that their established precedent was “consistent with the principle that, while a possible innocent explanation may impact the weight given to a particular fact in a probable cause determination, it does not wholly eliminate the fact’s worth and require it to be disregarded.”²⁰⁰ Therefore, the court held that “the odor of marijuana is relevant to the totality of the circumstances test and can contribute to a probable cause determination” in light of the legalization of recreational use in Colorado.²⁰¹

190. *Id.* at 1055.

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.* at 1057.

198. *Id.* at 1058 (citing *Florida v. Harris*, 568 U.S. 237, 243–44 (2013)).

199. *Id.* at 1058 (citations omitted).

200. *Id.* at 1059.

201. *Id.*; *cf.* *Commonwealth v. Cruz*, 945 N.E.2d 899, 910 (Mass. 2011).

Given our conclusion that [MASS. GEN. LAWS ch. 94C §§ 32L–32N] has changed the status of possessing one ounce or less of marijuana from a crime to a civil

Under the decisions in *Sexton*, *Mendez*, and *Zuniga*, Colorado has established a method to determine probable cause in light of the legalization of recreational marijuana. Accordingly, Massachusetts has guidance available from Colorado to set a standard to determine probable cause to search a home for suspected illegal marijuana cultivation since passage of The Act.

V. MASSACHUSETTS SHOULD NOT ADOPT COLORADO'S APPROACH, AND INSTEAD SHOULD RELY ON LOCAL CASE LAW

As Colorado has had the opportunity to examine the probable cause analysis since implementation of recreational marijuana, Massachusetts may look toward their approach for guidance in implementation of The Act. That said, Massachusetts should only adopt an approach from Colorado that would benefit its implementation and conform with settled law. Therefore, we must determine whether the Colorado approach would conflict with established Massachusetts jurisprudence.

A. *Effect of Adopting the Colorado Approach*

Massachusetts and Colorado have both entered uncharted legal territory respectively in their states regarding the cultivation of marijuana in the home. Colorado allows the cultivation of up to six marijuana plants, while Massachusetts allows up to double that number.²⁰² Additionally, Massachusetts and Colorado are distinct from one another because of their jurisprudence regarding marijuana and the probable cause analysis.²⁰³ The Massachusetts Constitution contains distinct standards to establish probable cause of criminal activity to obtain a warrant.²⁰⁴ Further, the decision in *Canning* heightened the standard of probable cause more than any requirement established by

violation, without at least some other additional fact to bolster a reasonable suspicion of actual criminal activity, *the odor of burnt marijuana* alone cannot reasonably provide suspicion of criminal activity to justify [an order to exit the vehicle].

Cruz, 945 N.E.2d at 910 (emphasis added) (emphasis omitted).

202. Compare COLO. CONST. art. XVIII, § 16, cl. 3(b) (2018) (allowing the cultivation of up to six marijuana plants in a home), with The Act, *supra* note 6, at sec. 5, § 7 (allowing the cultivation of up to twelve plants in a home limited to six for processing).

203. Compare *Commonwealth v. Canning*, 28 N.E.3d 1156, 1158 (Mass. 2015), and *Cruz*, 945 N.E.2d at 910 (finding the odor of marijuana irrelevant to the probable cause analysis), with *Zuniga*, 372 P.3d at 1052 (finding the odor of marijuana relevant to the probable cause analysis).

204. MASS. CONST. pt. 1, art. XIV; MASS. GEN. LAWS ch. 276, §§ 1–2C.

Colorado courts or legislation.²⁰⁵ Specifically, *Canning* imposes a requirement on law enforcement to include sufficient information in their affidavit to show how the target of the search is not registered under the medical marijuana program to cultivate.²⁰⁶ Conversely, in *People v. Sexton*, the Court of Appeals for Colorado, when faced with a similar set of facts (suspected illegal marijuana cultivation in lieu of medical marijuana), determined that no such extra step is required.²⁰⁷

Furthermore, Colorado uses a “totality of the circumstances” analysis to establish probable cause, unlike Massachusetts.²⁰⁸ In fact, the SJC has expressly rejected the “totality of the circumstances” test.²⁰⁹ Moreover, under a “totality of the circumstances” test, the courts in Colorado may take into consideration the odor of marijuana to determine probable cause, which Massachusetts courts have also expressly rejected.²¹⁰ Adoption of a “totality of the circumstances” test would conflict with the Massachusetts Constitution as stated in *Upton*.²¹¹ Accordingly, Colorado marijuana jurisprudence is too distinct from

205. Compare *Canning*, 28 N.E.3d at 1166 (finding that a search warrant for illegal marijuana cultivation was defective since it did not include information to show that the target was not registered under the HMUM), with *Sexton*, 296 P.3d at 162 (finding that a warrant for illegal marijuana cultivation that did not include information to show that the target was registered under the medical marijuana program was valid).

206. *Canning*, 28 N.E.3d at 1166.

207. *Sexton*, 296 P.3d at 162.

208. *Mendez*, 986 P.2d at 280 (establishing a totality of the circumstances test for probable cause to search for marijuana possession). “Hence, we hold that the odor of marijuana is relevant to the totality of the circumstances test and can contribute to a probable cause determination.” *Zuniga*, 372 P.3d at 1059.

209. Commonwealth v. Upton, 476 N.E.2d 548, 556 (Mass. 1985) (rejecting the “totality of the circumstances” test from *Illinois v. Gates*, 462 U.S. 213 (1983), finding it “unacceptably shapeless and permissive”) (quoting Commonwealth v. Upton, 458 N.E.2d 717, 724 (Mass. 1983)). “The Federal test lacks the precision that we believe can and should be articulated in stating a test for determining probable cause.” *Id.* “We conclude that art. 14 provides more substantive protection to criminal defendants than does the Fourth Amendment in the determination of probable cause.” *Id.*

210. Compare *Zuniga*, 372 P.3d at 1059 (finding the odor of marijuana relevant to the probable cause analysis), with *Cruz*, 945 N.E.2d at 899 (finding the odor of marijuana irrelevant to the probable cause analysis), and Commonwealth v. Rodriguez, 37 N.E.3d 611, 620 (Mass. 2015).

Because stops based on reasonable suspicion of a possible civil marijuana infraction do not promote highway safety and run contrary to the purposes of [MASS. GEN. LAWS ch. 94C, § 32L], we are disinclined to extend the rule that allows vehicle stops based on reasonable suspicion of a civil motor vehicle offense to stops to enforce the civil penalty for possession of one ounce or less of marijuana.

Rodriguez, 37 N.E.3d at 620.

211. *Upton*, 476 N.E.2d at 556.

Massachusetts and would contradict with Massachusetts law. Therefore, Massachusetts should not adopt the Colorado approach to establish probable cause of illegal marijuana cultivation to obtain a search warrant because it would erode existing state precedent.

B. *Massachusetts Should Look Inward and Rely on Local Precedents like Commonwealth v. Canning*

In *Canning*, the Commonwealth argued that limitations imposed on law enforcement following this decision would be impossible to overcome.²¹² However, the requirement for police imposed in *Canning* does not overwhelmingly hamper or limit law enforcement efforts.²¹³ Although there are requisite extra steps, as this Note²¹⁴ and the court in *Canning* both discuss, traditional methods of obtaining probable cause still exist.²¹⁵ As law enforcement evidenced in *Canning*, the continued use of computer services and advanced equipment like night vision goggles remain available.²¹⁶ Furthermore, the restrictions imposed by *Canning* are not too restrictive as technology to assist law enforcement continues to grow.²¹⁷ Additionally, because the distribution of marijuana remains illegal, law enforcement may avoid having to prove that the individual is not registered under HMUM if they can show probable cause of distribution of marijuana without a license.²¹⁸

Finally, the SJC properly considered the will of the voters and intent of the legislature in deciding *Canning*.²¹⁹ Following the same reasoning, The Act makes it clear that its intent is to protect individuals from

212. *Commonwealth v. Canning*, 28 N.E.3d 1156, 1166 (Mass. 2015).

213. *Id.* (“We disagree with the Commonwealth that the result we reach imposes an impossible burden on police to search for elusive and difficult-to-locate information about whether a person suspected of growing marijuana is registered to do so.”).

214. *See* discussion *supra* Subpart III.B.

215. *Canning*, 28 N.E.3d at 1159 (outlining the traditional methods used by law enforcement to obtain probable cause in the affidavit submitted by Detective Kent in support of the warrant application).

216. *Id.* at 1159.

217. *See generally* Gray & Citron, *supra* note 116 (examining the growing technologies available to law enforcement in the digital era).

218. *Id.* at 1165 n.15.

219. The SJC concluded “the [HMUM]’s provisions make it abundantly clear that *its intent* is to protect the lawful operation of the medical marijuana program established by the legislation from all aspects of criminal prosecution and punishment, including search and seizure of property as part of a criminal investigation.” *Id.* at 1165 (emphasis added) (citing An Act for the Humanitarian Medical Use of Marijuana, 2012 Mass. Acts ch. 369, §§ 1, 3–6 <https://malegislature.gov/Laws/SessionLaws/Acts/2012/Chapter369> [<https://perma.cc/52RZ-URPL>]).

prosecution for legal recreational marijuana use.²²⁰ The voters' will is at least an indication that the people of Massachusetts do not consider recreational marijuana use a serious criminal offense.²²¹ Accordingly, the public interest will arguably be better served if law enforcement redirects their drug task force resources to more important crises facing the Commonwealth.²²²

CONCLUSION

Marijuana reforms are rapidly spreading across the United States.²²³ In the twenty-first century, the majority of states and the District of Columbia have passed some form of marijuana reform.²²⁴ If these trends continue, it will not be long before each state in the Union has passed some form of marijuana reform. State legislatures, Congress, and the executive branch should continue to respect the intent of citizens to change marijuana laws in the United States.²²⁵

The issue regarding legal cultivation of marijuana in the home is a novel one for Massachusetts, and much of the United States. However, Massachusetts has a large body of settled law related to marijuana.²²⁶ Rather than adopt the approach from Colorado, which has already implemented legalized personal marijuana cultivation in the home,²²⁷

220. “[A] person 21 years of age or older shall not be arrested, prosecuted, penalized, sanctioned or disqualified under the laws of the commonwealth in any manner, or denied any right or privilege and shall not be subject to seizure or forfeiture of assets for [legal recreational use.]” The Act, *supra* note 6, at sec. 5, § 7.

221. *Id.*

222. For example, the opioid crisis in Massachusetts is one of the worst in the country. *See generally* Evan Horowitz, *Heroin, Prescription Opioids Form Especially Toxic Mix in Mass.*, BOS. GLOBE (May 2, 2016), <https://www.bostonglobe.com/metro/2016/05/01/heroin-and-prescription-opioids-form-especially-toxic-mix-mass/WejrwoaMOjM1vQFD9ov2GK/story.html> (“The Massachusetts heroin epidemic is unlike any other in the United States.”); Matt Rocheleau, *Opioid Overdose Deaths by Mass. Town in 2015*, BOS. GLOBE (May 3, 2016), <https://www.bostonglobe.com/metro/2016/05/03/map-opioid-overdose-deaths-mass-town/Ckn7zRuySCj7WYZWKqbjI/story.html> (“The opioid crisis has hit Massachusetts hard, particularly in some communities. . . . [Two hundred twenty-one] of the state’s 351 cities and towns had at least one overdose death in 2015.”).

223. Ingraham, *Unprecedented*, *supra* note 16; *supra* Part I.

224. Ingraham, *Election Night*, *supra* note 25.

225. *See* Consolidated and Further Continuing Appropriations Act 2015, Pub. L. No. 113-235, § 538, 128 Stat. 2130, 2217 (2014); Cole Memo 2.0, *supra* note 35, at 1; Ogden Memo, *supra* note 75, at 1. *But see* Memorandum from Jefferson Sessions, *supra* note 38.

226. *See generally* Commonwealth v. Canning, 28 N.E.3d 1156 (Mass. 2015); Commonwealth v. Rodriguez, 37 N.E.3d 611 (Mass. 2015); Commonwealth v. Overmyer, 11 N.E.3d 1054 (Mass. 2014); Commonwealth v. Cruz, 945 N.E.2d 899 (Mass. 2011).

227. COLO. CONST. art. XVIII, § 16 cl. 3(b) (2018).

Massachusetts should look inward. A “totality of the circumstances” approach would erode and conflict with state precedent.²²⁸ Therefore, Massachusetts should stand steadfast with local precedents like *Canning* in order to provide a fair and just transition to legal personal marijuana cultivation in the home.

228. See *Canning*, 28 N.E.3d at 1156; *Rodriguez*, 37 N.E.3d at 611; *Cruz*, 945 N.E.2d at 899; *Commonwealth v. Upton*, 476 N.E.2d 548, 556 (Mass. 1985).