No. 25A___

IN THE

Supreme Court of the United States

CANNA PROVISIONS, INC.; GYASI SELLERS; WISEACRE FARM, INC.; AND VERANO HOLDINGS CORP.,

Applicants,

v.

PAMELA J. BONDI, IN HER CAPACITY AS ATTORNEY GENERAL OF THE UNITED STATES,

Respondent.

ON APPLICATION FOR EXTENSION OF TIME TO FILE A PETITION FOR WRIT OF CERTIORARI

APPLICATION FOR AN EXTENSION OF TIME TO FILE A PETITION FOR WRIT OF CERTIORARI

JONATHAN D. SCHILLER
MATTHEW L. SCHWARTZ
DAVID BARILLARI
55 Hudson Yards
New York, NY 10001

JOSHUA I. SCHILLER
44 Montgomery Street, 41st Floor
San Francisco, CA 94104

BOIES SCHILLER FLEXNER LLP

DAVID BOIES
Counsel of Record
333 Main Street
Armonk, NY 10504
(914) 749-8200
dboies@bsfllp.com

Counsel for Applicants Canna Provisions, Inc., Gyasi Sellers, Wiseacre Farm, Inc., and Verano Holdings Corp.

384293

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of this Court, Applicant Canna Provisions, Inc. is 100% owned by Better Provisions, LLC, a Delaware Limited Liability Company. Better Provisions LLC has no parent corporation, and no publicly held corporation owns 10% or more of its stock. Applicant Gyasi Sellers is an individual. Applicant Wiseacre Farm, Inc. has no parent corporation, and no publicly held corporation owns 10% or more of its stock. Applicant Verano Holdings Corp. is a publicly held corporation with no parent corporation, and no publicly held corporation owns 10% or more of its stock.

TO THE HONORABLE KETANJI BROWN JACKSON, ASSOCIATE JUSTICE OF THE SUPREME COURT AND CIRCUIT JUSTICE FOR THE FIRST CIRCUIT:

Pursuant to 28 U.S.C. § 2101(c) and Rules 13.5, 22, and 30 of this Court, Applicants Canna Provisions, Inc., Gyasi Sellers, Wiseacre Farm, Inc., and Verano Holdings Corp. (collectively, "Applicants") respectfully request a 60-day extension, to October 24, 2025, to file a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case. The First Circuit entered its judgment on May 27, 2025. App. at 2a. Absent an extension, the deadline for filing a petition for a writ of certiorari would fall on August 25, 2025. This application is being filed more than ten days before the petition is currently due. This Court has jurisdiction over this matter under 28 U.S.C. § 1254(1). Before filing this Application, Applicants' counsel sought and received confirmation from the Office of the Solicitor General that Respondent does not object to the requested extension.

BACKGROUND

This case challenges Congress's authority to criminalize the intrastate farming, possession, and sale of marijuana grown and sold entirely in Massachusetts and which is not fungible with interstate marijuana, is readily distinguishable from interstate marijuana, and is responsible for *reducing* the amount of interstate traffic in marijuana over the last decade. In so doing, this case seeks to revisit *Gonzalez v. Raich*, 545 U.S. 1 (2005), in which this Court held that Congress could—under the Commerce Clause—ban purely intrastate marijuana.

On October 26, 2023, Applicants filed the Complaint in this case, alleging an as-applied challenge to the Controlled Substances Act ("CSA"), which makes it a crime to "manufacture, distribute, or dispense" marijuana, even in purely intrastate commerce. 21 U.S.C. § 841(a)(1). Applicants operate businesses that farm, deliver, and sell marijuana locally in Massachusetts pursuant to Massachusetts' strict marijuana regulations. Their activities are legal under Massachusetts law but illegal under the CSA.

The Complaint alleges the myriad changes that have occurred since *Raich* was decided. Applicants allege that the express predicates of this Court's *Raich* decision (a comprehensive Congressional scheme to ban totally the production and sale of marijuana, the danger that permitting intrastate production and possession would increase interstate marijuana commerce, and the conclusion at the time that all marijuana was fungible and that as a result intrastate and interstate products were indistinguishable) are no longer true. Applicants also assert, as preserved below, the claim that *Raich* was wrongly decided and inconsistent with this Court's subsequent Commerce Clause jurisprudence.

On the merits, the District Court held that Applicants' arguments were foreclosed by *Raich*: "While the Complaint has alleged persuasive reasons for a reexamination of the way the Controlled Substances Act ('CSA') regulates marijuana, the relief sought is inconsistent with binding Supreme Court precedent and, therefore, beyond the authority of this court to grant." App. at 24a. In granting the Government's motion to dismiss, the District Court noted that "the absence of judicial

relief from this court does not leave Plaintiffs without 'another avenue of relief.' Plaintiffs can pursue their claims and seek the attention of the Supreme Court." *Id.* (quoting *Raich*, 545 U.S. at 33).[1]

The First Circuit affirmed, noting that *Raich* permits Congress to regulate purely intrastate activities as long as "Congress could rationally conclude that an intrastate activity would 'substantially affect interstate commerce' if not regulated." App. at 15a-16a (quoting *Raich*, 545 U.S. at 22).

REASONS FOR GRANTING THE EXTENSION

Applicants respectfully submit that a 60-day extension of the filing deadline is appropriate for several reasons.

First, lead counsel for the Applicants, David Boies, has been, and is, heavily engaged in previously scheduled matters since the First Circuit's decision on May 27, 2025, including oral argument of *Atlas Data Privacy Corp. v. We Inform, LLC*, pending in the Third Circuit Court of Appeals; oral argument of dispositive motions in *Avangrid, Inc., et al v. NextEra Energy, Inc., et al*, pending in the United States District Court for the District of Massachusetts; hearings in *Delta Airlines, Inc. v. CrowdStrike, Inc.*, pending in the circuit court for Fulton County, Georgia, and in

[1] The District Court also concluded that Applicants have standing, both because they face a credible threat of prosecution under the CSA and because they have suffered economic harm that is traceable to the "risks and uncertainties the CSA imposes on transactions with state-regulated marijuana businesses." App. at 33a. The Court also dismissed Applicants' due process arguments. *Id.* at 36a.

Panini America, Inc. v. Fanatics, Inc. et al, In Re: OpenAI, Inc. Copyright Infringement Litigation, and *In re: Google Digital Advertising Antitrust Litigation,* all pending in the United States District Court for the Southern District of New York; depositions in *Bulgari v. Bulgari*, pending in the United States District Court for the Southern District of New York, and *EFO Laser Spine Institute, Ltd., v. Holland & Knight, LLP*, pending in the Thirteenth Judicial Circuit Court in Hillsborough County, Florida; and a trial scheduled for August 18 in *Rodriguez, et al v. Google, LLC,* pending in the Northern District of California together with related preparation. These obligations will interfere with counsel's ability to prepare and file a petition that appropriately addresses the important issues in this case by August 25, 2025.

Second, counsel have heard from law professors, non-profits, state governments, and others interested in submitting amicus briefs in these proceedings, and several of these potential amici have expressed concern about having sufficient time to prepare over the summer. An extension will provide potential amici adequate time to consider the case and carefully craft their arguments.

Third, this case presents significant and complex constitutional issues concerning both state-regulated marijuana specifically and the authority of Congress to regulate purely intrastate commerce generally. The additional time will permit counsel to prepare a petition that appropriately addresses the questions of nationwide importance raised by this case, including the question of whether *Raich* was correctly decided.

Finally, Respondent will not suffer any prejudice from the requested extension. Because the First Circuit affirmed the dismissal of Applicants' claims, a brief extension will not in any way alter the status quo of this case. Applicants' counsel contacted the Office of the Solicitor General on August 4, 2025, to inquire whether Respondent had any objection to the requested extension. On August 8, 2025, the Office of the Solicitor General confirmed that Respondent does not object.

CONCLUSION

For the foregoing reasons, Applicants respectfully request that an extension of time to file a petition for a writ of certiorari be granted, extending Applicants' deadline to October 24, 2025.

Applicants greatly appreciate the Court's attention to this matter.

August 11, 2025

Respectfully submitted,

/s/ David Boies

BOIES SCHILLER FLEXNER LLP

DAVID BOIES
Counsel of Record
333 Main Street
Armonk, NY 10504
(914) 749-8200
dboies@bsfllp.com

Jonathan D. Schiller
Matthew L. Schwartz
David Barillari
55 Hudson Yards
New York, NY 10001

Joshua I. Schiller
44 Montgomery Street, 41st Floor
San Francisco, CA 94104

Counsel for Applicants Canna Provisions, Inc., Gyasi Sellers, Wiseacre Farm, Inc., and Verano Holdings Corp.

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United States Court of Appeals
For the First Circuit

No. 24-1628

CANNA PROVISIONS, INC.; GYASI SELLERS; WISEACRE FARM, INC.; VERANO HOLDINGS CORP.,

Plaintiffs, Appellants,

v.

PAMELA J. BONDI, Attorney General*

Defendant, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Mark G. Mastroianni, U.S. District Judge]

Before

Barron, Chief Judge,
Montecalvo and Rikelman, Circuit Judges.

David Boies, with whom Jonathan D. Schiller, Matthew L. Schwartz, David P.G. Barillari, Joshua I. Schiller, and Boies Schiller Flexner LLP were on brief, for appellants.

Daniel Aguilar, Attorney, Appellate Staff, Civil Division, U.S. Department of Justice, with whom Brian M. Boynton, Principal Deputy Assistant Attorney General, Civil Division, U.S. Department of Justice, Mark B. Stern, Attorney, Appellate Staff, Civil Division, U.S. Department of Justice, and Sarah Carroll, Attorney, Appellate Staff, Civil Division, U.S. Department of Justice, were on brief, for appellee.

* Pursuant to Federal Rule of Appellate Procedure 43(c)(2), Attorney General Pamela J. Bondi is automatically substituted for former Attorney General Merrick B. Garland as Defendant-Appellee.

May 27, 2025

BARRON, Chief Judge. The appellants are four businesses that allege that they cultivate, manufacture, possess, and/or distribute marijuana wholly within Massachusetts in full compliance with its laws and regulations. In 2023, they sued the Attorney General of the United States. They claimed that the Controlled Substances Act ("CSA"), 21 U.S.C. § 801 et seq., "as applied to [their] intrastate cultivation, manufacture, possession, and distribution of marijuana pursuant to state law," exceeded Congress's powers under Article I of the United States Constitution and violated the Due Process Clause of the Fifth Amendment to the Constitution. They sought a declaratory judgment to that effect. They also sought an injunction prohibiting the enforcement of the CSA as to them, "in a manner that interferes with the intrastate cultivation, manufacture, possession, and distribution of marijuana, pursuant to state law." The District Court dismissed the appellants' claims for failing to state a claim on which relief could be granted. We affirm.

I.

A.

Congress enacted the CSA in 1970, as part of the Comprehensive Drug Abuse Prevention and Control Act. Gonzales v. Raich, 545 U.S. 1, 10-12 (2005). "The main objectives of the CSA were to conquer drug abuse and to control the legitimate and illegitimate traffic in controlled substances." Id. at 12. To do

so, "Congress devised a closed regulatory system making it unlawful to manufacture, distribute, dispense, or possess any controlled substance except in a manner authorized by the CSA." Id. at 13 (citing 21 U.S.C. §§ 841(a)(1), 844(a)).

The CSA grouped all controlled substances into five "schedules" based on their "accepted medical uses, the potential for abuse, and their psychological and physical effects on the body." Id. Each schedule imposed "a distinct set of controls regarding the manufacture, distribution, and use of the substances listed therein." Id. at 14.

The CSA classified marijuana as a Schedule I drug, which made "the manufacture, distribution, or possession of marijuana . . . a criminal offense," except as authorized by the CSA. Id. "Despite considerable efforts to reschedule marijuana, it remains a Schedule I drug."[1] Id. at 15.

In Raich, the Supreme Court of the United States ruled on a claim that the CSA exceeded Congress's Article I powers under the Commerce Clause and the Necessary and Proper Clause insofar as that statute applied to possession and cultivation of marijuana for personal medical use in compliance with state law. Id. at 7-8. There, the plaintiffs were two individuals who wished to

[1] In May 2024, the Attorney General issued a notice of proposed rulemaking that contemplates transferring marijuana from Schedule I to Schedule III. 89 Fed. Reg. 44597 (May 21, 2024). The administrative process remains pending.

grow and possess marijuana for personal medical use based on a physician's recommendation in accord with a California law that, notwithstanding the CSA, authorized such activity as a matter of state law. Id.

Raich rejected the constitutional challenge on the ground that Congress had a rational basis for concluding that the failure to regulate "the intrastate cultivation and possession of marijuana for medical purposes based on the recommendation of a physician would substantially affect the larger interstate marijuana market." Id. at 21-22. The Court explained that the CSA's criminalization of the cultivation and possession of marijuana for personal medical use in compliance with state law was "an essential part of a larger regulatory scheme" for regulating marijuana that the CSA establishes. Id. at 30.

Beginning roughly a decade later, however, Congress each year has attached a rider to its annual appropriations bill. The rider concerns the authority of the U.S. Department of Justice with respect to state-regulated medical marijuana. It provides:

> None of the funds made available under this Act to the Department of Justice may be used, with respect to any of [the listed states and territories] to prevent any of them from implementing their own laws that authorize the use, distribution, possession, or cultivation of medical marijuana.

Consolidated Appropriations Act, 2024, Pub. L. No. 118-42, § 531, 138 Stat. 25, 174 (2024); see also United States v. Sirois, 119

F.4th 143, 145 (1st Cir. 2024) (noting the same). This rider -- often referred to as the "Rohrabacher-Farr Amendment" -- "places a practical limit on federal prosecutors' ability to enforce the CSA with respect to certain conduct involving medical marijuana." United States v. Bilodeau, 24 F.4th 705, 709 (1st Cir. 2022). In addition, in 2010, Congress permitted the District of Columbia to enact a medical marijuana program.

B.

In advancing their as-applied challenge to the CSA, the appellants refer in their complaint to the post-Raich federal legislative developments just mentioned. They also allege that, as of the time of the complaint's filing, twenty-three states had created regulated intrastate markets for non-medical, adult-use marijuana. Their complaint asserts that, in consequence of these developments, Raich's rationale for upholding the CSA against the challenge in that case provides no basis for upholding it against their challenge to the CSA based on Congress having exceeded its Article I powers. Their complaint separately alleges that the CSA is unconstitutional as applied to their activities under the Due Process Clause of the Fifth Amendment.

The government moved to dismiss the complaint for, among other things, "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). As to the claim based on Article I, the government contended that "Raich's holding that the

CSA is within Congress'[s] power under the Commerce Clause and Necessary and Proper Clause, even as applied to intrastate marijuana activity compliant with state law, forecloses" the challenge. As to the claim based on substantive due process, the government argued that there is no fundamental right "to cultivate, manufacture, possess, and distribute marijuana, subject only to state health, safety, and public welfare regulations," and that "the CSA easily satisfies rational basis scrutiny."

The District Court granted the government's motion. The District Court reasoned that, because Raich held that "an aggregation of limited, non-commercial marijuana activity" provided a "rational basis" for Congress's conclusion that such activity would "substantially affect interstate commerce," it was bound by that precedent to "find the same to be true of [p]laintiffs' larger-scale, commercial activities." It also reasoned that "[t]here [was] simply no precedent for concluding that [p]laintiffs enjoy a fundamental right to cultivate, process, and distribute marijuana," and "[i]n the absence of a fundamental right to engage in the cultivation, processing, and distribution of marijuana, [p]laintiffs cannot prevail on their substantive due process claim."

This appeal timely followed.

II.

The appellants bear the burden of demonstrating that the CSA, as applied to their conduct, exceeds Congress's power under the Commerce Clause and the Necessary and Proper Clause as well as that the CSA violates the Due Process Clause of the Fifth Amendment. See Dep't of State v. Muñoz, 602 U.S. 899, 903 (2024). "We review de novo an order dismissing a complaint for failure to state a claim . . . ." Lee v. Conagra Brands, Inc., 958 F.3d 70, 74 (1st Cir. 2020).

III.

The Commerce Clause of the United States Constitution provides that "Congress shall have [the] [p]ower . . . [t]o regulate Commerce . . . among the several States." U.S. Const. art. I, § 8, cl. 3. The appellants do not dispute that they are engaged in commercial activity through their cultivation, manufacture, possession, and/or distribution of marijuana. They nonetheless contend that this commercial activity is purely "local" or "intrastate" in the sense that it takes place entirely within Massachusetts. They then go on to contend that Congress's power under the Commerce Clause and the Necessary and Proper Clause does not extend to this activity, notwithstanding that it is commercial in nature.

In pressing this contention, the appellants assert that "myriad changes, both in federal legislation and the markets for

marijuana, mean that the new marijuana regime today cannot satisfy the standard set out in Raich." We begin with their contention insofar as it rests on post-Raich changes in "federal legislation." We then consider their contention insofar as it rests on post-Raich changes in "the markets for marijuana."

A.

In asserting that changes in federal legislation render Raich inapposite, the appellants focus chiefly on the Rohrabacher-Farr Amendments. They contend that those amendments show that "Congress has abandoned its goal of controlling all marijuana in interstate commerce" and thus that "[t]he current regime . . . lacks the comprehensiveness that was a predicate for Raich's upholding of the CSA." They further contend that those amendments show that "not even Congress believes that prohibiting state-regulated marijuana is 'essential to the effective control of the interstate incidents' of marijuana." (Quoting Raich, 545 U.S. at 12 n.20). As a result, they contend that Raich no longer "directly controls" because these post-Raich federal legislative developments reveal that regulating their activity -- given that it occurs wholly intrastate, subject to state regulatory regimes -- is not "an essential part of the larger regulatory scheme" for regulating marijuana that the CSA establishes. (Quoting Raich, 545 U.S. at 27).

As an initial matter, we observe that the Rohrabacher-Farr Amendments are of limited scope. They restrict the U.S. Department of Justice only from using federal funds "to prevent any of [the listed states and territories] from implementing their own laws that authorize the use, distribution, or cultivation of medical marijuana." Consolidated Appropriations Act, 2024 § 531 (emphasis added). The appellants are challenging the CSA, however, insofar as it applies to their cultivation, manufacture, possession, and distribution of marijuana without regard to whether that activity is for a medical purpose. And the appellants do not explain why, under Raich, the regulation of such activity is not "an essential part of the larger regulatory scheme" that the CSA establishes, even accounting for the Rohrabacher-Farr Amendments. Raich, 545 U.S. at 27. After all, notwithstanding those appropriation riders, the CSA remains fully intact as to the regulation of the commercial activity involving marijuana for non-medical purposes, which is the activity in which the appellants, by their own account, are engaged.

It may be that the appellants mean to suggest that Raich may not be understood to treat any legislative scheme regulating marijuana as "comprehensive" for purposes of triggering its "essential part" rationale unless that scheme regulates all marijuana. But even if we were to accept that questionable

premise, it would not help the appellants, given the commercial nature of their activity.

The Court did not suggest in Raich that Congress may rely on its Article I powers under the Commerce Clause and the Necessary and Proper Clause to regulate any activity involving marijuana only as part of its regulation of all activity involving marijuana. Instead, the Court there relied on the comprehensiveness of the CSA's regulatory regime and the "essential part" rationale only in the context of a challenge to the CSA as applied to the cultivation and possession of marijuana for personal medical use -- and thus as applied to what was in and of itself a non-commercial activity. See id. at 18-22. The appellants' challenge, by contrast, concerns the CSA's application to activity that the appellants do not dispute is commercial in nature. Yet, they identify nothing in Raich that indicates that even when an activity that the CSA covers is commercial in nature, its regulation must be an "essential part" of the CSA for Congress to have the Article I power to cover that activity via the CSA. Nor do we see anything in Raich that so indicates.[2]

[2] The appellants' reliance on Hobby Distillers Association v. Alcohol & Tobacco Tax & Trade Bureau, 740 F. Supp. 3d 509 (N.D. Tex. 2024), is unavailing for the same reason. While that case understood Raich to require "an established, comprehensive regulatory regime," id. at 532, it did so in considering an as-applied challenge to the regulation of non-commercial activity -- there, "home-distilling beverage alcohol for personal consumption," id. at 516-17.

The other "change[] . . . in federal legislation" to which the appellants point in challenging the ruling below based on the "essential part" test is Congress's choice in 2010 to permit the District of Columbia to enact laws legalizing medical marijuana within the District. That federal legislative change, however, also solely concerned medical marijuana. The appellants' argument regarding this federal legislative development thus would appear to suffer from precisely the same defects as their contentions pertaining to the Rohrabacher-Farr Amendments. And, insofar as the appellants mean to suggest that this federal legislative change demonstrates some problem with the application of the CSA to their conduct that the Rohrabacher-Farr Amendments do not, they do not explain what that problem might be. Any such contention is therefore waived for lack of development. See United States v. Zannino, 895 F.2d 1, 17 (1st Cir. 1990) ("[I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived.").

B.

The appellants also contend that post-Raich changes in "the markets for marijuana" mean that Congress may no longer regulate their marijuana activity under the Commerce Clause and Necessary and Proper Clause. Here, the appellants rely on United States v. Wrightwood Dairy Co., 315 U.S. 110 (1942), for the proposition that Congress may regulate intrastate

activities -- even those that are commercial in nature -- only if they "in a substantial way interfere with or obstruct the exercise of the granted power" to regulate interstate commerce, id. at 119.

The appellants contend that "there is no longer any reason to assume that state-regulated marijuana activities 'in a substantial way interfere with or obstruct the exercise of the granted power' to regulate interstate commerce in marijuana," (quoting United States v. Lopez, 514 U.S. 549, 556 (1995)), because "the decades since Raich have shown Congress's former concerns about swelling interstate traffic and enforcement difficulties can no longer be supported." In that regard, the appellants emphasize the allegations in their complaint that "states' medical and adult-use marijuana programs have drastically reduced illicit interstate and international commerce in marijuana" and that "state-regulated marijuana products are distinguishable (from each other and from illicit interstate marijuana) based on the labelling and tracking requirements that states impose."

Of course, for purposes of assessing Congress's power under the Commerce Clause and the Necessary and Proper Clause to regulate an activity, the question that we must ask is not "whether [appellants'] activities, taken in the aggregate, substantially affect interstate commerce in fact." Raich, 545 U.S. at 22. The question is "whether a 'rational basis' exists for so concluding." Id.

In addition, Raich held that Congress had a rational basis for concluding that failing to regulate "the intrastate cultivation and possession of marijuana for medical purposes based on the recommendation of a physician would substantially affect the larger interstate marijuana market." Id. at 21. And, in so ruling, the Court explained that the activity at issue there was not beyond Congress's reach under Article I because

> [o]ne need not have a degree in economics to understand why a nationwide exemption for the vast quantity of marijuana . . . locally cultivated for personal use (which presumably would include use by friends, neighbors, and family members) may have a substantial impact on the interstate market for this extraordinarily popular substance.

Id. at 28. Raich also observed that "[t]he notion that [state] law has surgically excised a discrete activity that is hermetically sealed off from the larger interstate marijuana market is a dubious proposition, and, more importantly, one that Congress could have rationally rejected." Id. at 30; see also United States v. Nascimento, 491 F.3d 25, 42 (1st Cir. 2007) ("Raich teaches that when Congress is addressing a problem that is legitimately within its purview, an inquiring court should . . . . respect the level of generality at which Congress chose to act.").

Against that backdrop, we find it significant that the "exemption" that is being sought via the asserted limits on Article I here would allow for more than the possession and

cultivation for personal medical use of marijuana -- as was the case in Raich itself. The "exemption" would allow for the commercial cultivation, manufacture, possession, and distribution of marijuana for both medical and non-medical purposes. The appellants, in other words, are asking for a "nationwide exemption" that is much broader than the one that Raich held Article I did not require, both in the kinds of conduct and the "quantity of marijuana" that would be exempted. 545 U.S. at 28.

True, the appellants allege that, as of the time of their complaint, the availability of regulated markets for marijuana in individual states has decreased interstate commercial activity involving marijuana. They allege, too, that state-regulated marijuana is distinguishable from illicit interstate marijuana. But, as we have emphasized, the relevant question is whether Congress could rationally conclude that an intrastate activity would "substantially affect interstate commerce" if not regulated. Id. at 22. And, as we have noted, in rejecting the "exemption" sought in that case, the Court in Raich relied on the conclusion that Congress could rationally conclude that a "vast quantity of marijuana" that a state permits to be lawfully used within its borders, id. at 28, subject to its regulation, would not remain "hermetically sealed off from the larger interstate marijuana market," id. at 30.

We thus do not see how we could conclude that Congress has no rational basis for similarly concluding as to the much larger exemption sought here. There is a difference between the factual predicate that may support a legislative choice and the kind of factual predicate that could compel a court to impose a constitutional limit on that choice. We thus conclude that the appellants have failed to show that there is no rational basis for concluding that their activity substantially affects interstate commerce.

To the extent that the appellants may be understood to be contending that Congress had to have made specific findings that the intrastate cultivation, manufacture, possession, and/or distribution of marijuana in compliance with a given state's laws allowing for such intrastate activity would substantially affect the larger interstate market, we are also unpersuaded. Congress is not required to make "detailed findings proving that each activity regulated within a comprehensive statute is essential to the statutory scheme." Id. at 21 n.32. For that reason, the Court rejected the analogous argument made by the appellants in Raich that Congress had not made "a specific finding that the intrastate cultivation and possession of marijuana for medical purposes based on the recommendation of a physician would substantially affect the larger interstate marijuana market." Id. at 21.

Relatedly, the appellants fault the District Court for "refus[ing] to permit [the appellants] to prove that the CSA's findings today are unsupported." But even they concede that "Raich permits courts to dispense with fact finding when the connection to Congress's interstate goals is 'visible to the naked eye.'" (Quoting Raich, 545 U.S. at 28-29). And, for reasons we have explained, that connection is no less "visible" here than it was in Raich.

C.

For the foregoing reasons, we conclude that the appellants have not plausibly alleged that the CSA's prohibition on the "intrastate cultivation, manufacture, possession, and distribution of marijuana pursuant to state law," as applied to them, exceeds Congress's authority under the Commerce Clause and the Necessary and Proper Clause.

IV.

The appellants separately challenge the District Court's dismissal of their claim that the CSA is unconstitutional under the Fifth Amendment's Due Process Clause as applied to their intrastate commercial activity involving marijuana because "the CSA's prohibition on state-regulated marijuana violates Plaintiffs-Appellants' rights to cultivate and transact in marijuana" for both medical and recreational purposes. In that regard, the appellants contend that the "right[] to cultivate and

transact in marijuana" for such purposes is "deeply rooted in this nation's history and its legal traditions." They further contend that the right is "further reinforced" by "current legal trends, which include the vast majority of the states . . . permitting the cultivation and distribution of marijuana." We are not persuaded.

A.

The Due Process Clause of the Fifth Amendment "provides heightened protection against government interference with certain fundamental rights and liberty interests." Washington v. Glucksberg, 521 U.S. 702, 720 (1997). To establish such a fundamental right, a plaintiff must show that the asserted right is "objectively[] 'deeply rooted in this Nation's history and tradition,'" id. at 720-21 (quoting Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977)), and "'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed,'" id. at 721 (quoting Palko v. Connecticut, 302 U.S. 319, 325, 326 (1937)). In addition, the plaintiff must provide a "careful description of the asserted fundamental liberty interest." Muñoz, 602 U.S. at 910 (quoting Glucksberg, 521 U.S. at 721). If the plaintiff succeeds in establishing the existence of a fundamental right, the government "can act only by narrowly tailored means that serve a compelling state interest." Id. "As a general matter," the Supreme Court "has always been reluctant to expand the concept of substantive

due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended." Collins v. City of Harker Heights, 503 U.S. 115, 125 (1992).

Every circuit to have addressed similar substantive due process claims related to the use, cultivation, or sale of marijuana has rejected them. See United States v. Kiffer, 477 F.2d 349, 352 (2d Cir. 1973) ("[T]here is no colorable claim of a fundamental constitutional right to sell marihuana."); United States v. White Plume, 447 F.3d 1067, 1075 (8th Cir. 2006) (no fundamental right to "hemp farming"); United States v. Fry, 787 F.2d 903, 905 (4th Cir. 1986) (no fundamental right to "produce or distribute marijuana commercially"); Raich v. Gonzales, 500 F.3d 850, 864-66 (9th Cir. 2007) (no fundamental right to use medical marijuana); Borges v. Cnty. of Mendocino, No. 22-15673, 2023 WL 2363692, at *1 (9th Cir. Mar. 6, 2023) (no fundamental right to cultivate marijuana); see also United States v. Cannon, 36 F.4th 496, 502 (3d Cir. 2022) (per curiam) (noting, on plain error review, that "it is certainly not 'clear under current law' that there is any fundamental right to use medical marijuana" (quoting United States v. Olano, 507 U.S. 725, 734 (1993))). We see no reason to part ways with our sister circuits in addressing appellants' as-applied challenge.

In arguing that we must, the appellants first point to historical practices in the original colonies prior to the

founding. They argue that "[e]ach of the thirteen original colonies enacted" laws concerning marijuana -- "then known simply as 'hemp'" -- some of which "encouraged (or even required)" colonists to grow marijuana. The appellants also rely on allegations regarding marijuana use in the United States "[a]round the [p]assage of the Fourteenth Amendment," which they say show that "Americans were using marijuana for medicinal and recreational purposes" at the time and that "marijuana was 'highly valued'" at the time for these uses. Finally, the appellants assert that English sources, including the Magna Carta, "created . . . rights concerning hemp cultivation" and sometimes even "made the cultivation of hemp compulsory." The sum total of this historical evidence, the appellants contend, establishes "a long legal tradition of recognizing the importance of marijuana commerce" and proves that "the 20th-century movement towards banning and criminalizing marijuana, which culminated in 1970 with the CSA, is a historical aberration compared to the practices in this country in the 17th, 18th, [and] 19th . . . centuries."

The appellants' reasoning would mean that there would be a fundamental right to grow and sell any product that founding era laws encouraged residents of that time to grow and sell. We decline to adopt a line of reasoning that would support such "sweeping claims of fundamental rights," Abigail All. for Better Access to Developmental Drugs v. von Eschenbach, 495 F.3d 695, 707

(D.C. Cir. 2007), particularly given that the rights in question must be those that are "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty," Glucksberg, 521 U.S. at 721 (first quoting Moore, 431 U.S. at 503; and then quoting Palko, 302 U.S. at 325).

B.

There remains to address only the appellants' argument that "[t]he widespread adoption of state-regulated marijuana programs further demonstrates the importance of marijuana commerce." But we know of no authority -- and the appellants identify none -- that supports the proposition that an activity not otherwise protected as a fundamental right under the Due Process Clause may become so protected solely because many states have in recent times provided legislative protections for that activity. We thus hold that the appellants have not plausibly alleged that the CSA's prohibition on "the intrastate cultivation, manufacture, possession, and distribution of marijuana pursuant to state law," as applied to their activities, violates the Fifth Amendment.[3]

[3] For the first time in their reply brief, the appellants gesture at an argument that the CSA's ban on intrastate marijuana commerce in compliance with state law would fail even rational basis scrutiny. Insofar as they mean to make that argument, we decline to address it. See Sparkle Hill, Inc. v. Interstate Mat Corp., 788 F.3d 25, 29 (1st Cir. 2015) ("Our precedent is clear: we do not consider arguments for reversing a decision of a district

V.

For the foregoing reasons, the District Court's dismissal of the plaintiffs-appellants' claims is **affirmed**.

court when the argument is not raised in a party's opening brief."); see also United States v. Zannino, 895 F.2d 1, 17 (1st Cir. 1990).

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CANNA PROVISIONS, INC.; GYASI SELLERS; WISEACRE FARM, INC.; VERANO HOLDINGS CORP.

Plaintiffs,

v.

MERRICK GARLAND, in his official Capacity as Attorney General of the United States

Defendant.

Civil Action No. 23-30113-MGM

MEMORANDUM AND ORDER REGARDING DEFENDANT'S MOTION TO DISMISS
(Dkt. No. 29)

July 1, 2024

MASTROIANNI, U.S.D.J.

I. INTRODUCTION

Almost twenty years ago, the Supreme Court declined to find that the reach of the Controlled Substances Act, 21 U.S.C. § 801 *et seq.*, exceeded the bounds of federal authority when applied to noncommercial, wholly-intrastate activities involving small-scale cultivation and possession of marijuana for personal medical use. *Gonzalez v. Raich,* 545 U.S. 1 (2005). The plaintiffs had argued that Congress lacked authority under the Commerce Clause to criminalize the cultivation and possession of marijuana that never enters the stream of commerce and is consumed in compliance with state law and pursuant to a physician's prescription. Despite acknowledging "the troubling facts" of the case, the Court wrote that "[o]ur case law firmly establishes Congress' power to regulate purely local activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce." *Id.* at 17.

Now, Plaintiffs, four owners of marijuana businesses that operate in Massachusetts and in compliance with state law, have asked this court to reach a different conclusion about the limits the Commerce Clause imposes on Congressional authority.[1] Plaintiffs support their position by detailing the extent of changed views about marijuana, state regulation, and federal enforcement since the Supreme Court decided *Raich*. While the Complaint has alleged persuasive reasons for a reexamination of the way the Controlled Substances Act ("CSA") regulates marijuana, the relief sought is inconsistent with binding Supreme Court precedent and, therefore, beyond the authority of this court to grant. Plaintiffs do not provide a basis for this court to disregard the broad reading of the Commerce Clause first announced in *Wickard v. Filburn*, 317 U.S. 111 (1942), and reaffirmed in *Raich*. *See State Oil v. Kahn*, 522 U.S. 3, 20 (1997) (explaining that it is the "[Supreme] Court's prerogative alone to overrule one of its precedents"); *see also United States v. Diggins*, 36 F.4th 302, 311 (1st Cir. 2022) ("We are in no position to overrule binding Supreme Court precedent."). Plaintiffs also argue that application of the CSA to their activities violates their rights to substantive due process; a claim raised in *Raich*, but not addressed by the Supreme Court. For the reasons that follow, this court discerns no plausible violation of substantive due process. Plaintiffs have not identified a basis for finding a fundamental right to engage in the cultivation and distribution of marijuana or that the CSA cannot survive rational basis review.

Finally, and as the Supreme Court noted in *Raich*, the absence of judicial relief from this court does not leave Plaintiffs without "another avenue of relief." *Raich*, 545 at 33. Plaintiffs can pursue their claims and seek the attention of the Supreme Court. They also are free to advocate for marijuana to be reclassified or removed from the CSA.

[1] Massachusetts permits marijuana to be sold to and consumed by adults for both medical and recreational purposes and Plaintiffs serve both types of consumers. Although there may be reasons to separately assess the basis for regulating these distinct types of consumption, neither Plaintiffs' Complaint, nor this decision, addresses those distinctions.

II. BACKGROUND

A. The CSA and Federal Enforcement

In 1970, Congress enacted the Comprehensive Drug Abuse Prevention and Control Act, which contained the CSA at Title II of the Act. *Raich*, 545 U.S. at 10, 12. At the time, marijuana was banned in all 50 states, subject to some limited exceptions. *Leary v. U.S.*, 395 U.S. 6, 16-17 (1969). In the preceding year, President Nixon had "declared a national 'war on drugs'" and the Supreme Court had "held certain provisions of the Marihuana Tax Act and other narcotics legislation unconstitutional." *Raich*, 545 U.S. at 10, 12. In *Raich*, the Supreme Court reported that "[t]he main objectives of the CSA were to conquer drug abuse and to control the legitimate and illegitimate traffic in controlled substances." *Id.* at 12. Congress attempted to effectuate these goals by creating "a closed regulatory system" under which it was "unlawful to manufacture, distribute, dispense, or possess any controlled substance except in a manner authorized by the CSA." *Id.* at 13. All substances were "grouped together based on their accepted medical uses, the potential for abuse, and their psychological and physical effects on the body." *Id.* "Congress classified marijuana as a Schedule I drug," grouping it with other substances considered to have a "high potential for abuse, lack of any accepted medical use, and absence of any accepted safety for use in medically supervised treatment." *Id.* at 14. The CSA makes it a federal criminal offense to manufacture, distribute, dispense, or possess Schedule I drugs, including marijuana, except within a preapproved research study. *Id.* In addition, the CSA imposes controls on the handling of the substances in all five classifications and separate federal approval is required before a drug can be marketed for medical use. *Id.* at 27-28; *see also* 21 U.S.C. §§ 321, 352.

Plaintiffs assert that marijuana has been miscategorized and, at the motion to dismiss stage, the court accepts as true their assertions about the safety of marijuana and its therapeutic benefits. The CSA provides a process for moving substances from one schedule to another and the Department

of Justice has commenced a process that could result in marijuana being moved from Schedule I to Schedule III. However, at this time, marijuana continues to be listed on Schedule I and, therefore, almost all activities that involve growing, processing, and possessing marijuana continue to be federal crimes. This is true even though thirty-eight states have adopted programs that legalize marijuana within a strict, state regulatory framework. Some states only permit marijuana used for medical purposes, while other states also allow marijuana to be consumed on a non-medical or adult-use basis.

Massachusetts is one of the states that operates a highly regulated system permitting both medical and adult-use marijuana businesses. In order to participate in the legal marijuana marketplace, all businesses must comply with exacting local and state regulatory requirements designed to ensure that all products containing marijuana are closely traced and that businesses operate in a manner that is safe for their customers, employees, and the local community. Rigorous regulation seeks to ensure that all the marijuana that moves through the legal Massachusetts market is grown, processed, and sold within the state. The regulatory scheme also includes taxes and community impact fees that generates significant revenue for state and local governments.

Plaintiffs have alleged there is data demonstrating that as state-regulated marijuana markets have grown, the amount of marijuana that travels in interstate and international commerce has declined dramatically. They assert that the federal government has responded to state-level legalization of marijuana by abandoning the "closed regulatory system" created by the CSA. Since 2014, Congress has included language in annual appropriations acts that prohibits the Department of Justice from using funds to challenge state laws legalizing medical marijuana, and Congress has not interfered with marijuana legalization programs adopted by the District of Columbia and several territories. For much of the last decade, the Department of Justice has acted in accordance with either a formal or informal policy not to prosecute individuals or companies under the CSA for conduct that complied with state laws that permit intrastate possession, cultivation, and distribution of marijuana.

B. Plaintiffs

The claims in this case are asserted on behalf of four businesses openly operating in Massachusetts in full compliance with state laws and regulations. Despite the legality of their operations under state law, Plaintiffs have alleged that the federal criminalization of activities involving marijuana has negatively impacted their financial viability. Plaintiffs have alleged specific injuries suffered by each business and attributed to the criminalization of marijuana under the CSA, though they have not quantified the monetary value of those injuries.

Canna Provisions, Inc. ("Canna") is a Massachusetts corporation that operates a cultivation facility and two retail, adult-use marijuana dispensaries within Massachusetts. The Complaint alleges there are many businesses who will not work with Canna because of federal marijuana policy. Canna's marketing efforts have been limited because promotional companies and magazines have refused to work with it. Many business service providers, like banks, payroll services, 401(k) providers, and insurance companies also refuse to work with state-regulated marijuana businesses and, as a result, Canna has had to pay "higher interest rates, insurance premiums, and payments for goods and services." (Compl. at ¶ 36.) Although Canna was able to accept credit cards for a period of time, credit card processors are no longer willing to work with marijuana businesses, even those operating under state law. When Canna lost the ability to accept credit cards, the average amount spent by customers at Canna's retail stores "dropped by around 30%." (*Id.*) Canna has also been unable to sponsor job training programs through a career services organization operated by Massachusetts because marijuana is illegal under federal law. Finally, Canna has alleged that its employees and officers have had trouble obtaining mortgages and accessing personal banking services because they earn their income in the cannabis industry.

Gyasi Sellers ("Sellers") is an entrepreneur who operates a state-licensed courier service for adult-use marijuana. He is also in the process of obtaining a license to operate a marijuana retail

delivery service. Like Canna, the business operated by Sellers is not able to accept credit cards because credit card processors will not work with marijuana businesses. The inability to accept credit cards has created economic and security risks for his business. Sellers's customers cannot prepay for their orders and the drivers he employs must interact directly with customers to collect payments. Federal rules regarding marijuana also prevent him from making deliveries to the homes of clients who live in federally-funded housing. Finally, Sellers has been unable to access financial assistance for his business from the Small Business Administration because marijuana businesses, even those which comply with state law, are ineligible for SBA assistance.

Wiseacre Farm, Inc. ("Wiseacre") is a Massachusetts corporation licensed by Massachusetts to cultivate marijuana on its outdoor farm. Payroll processors, insurers, and banks have all refused to work with Wiseacre because its income is derived from the cultivation of marijuana, which is illegal under federal law. This has increased the operational costs and risks for Wiseacre, which must pay its employees by checks and work with banks who charge Wiseacre additional fees because it is a marijuana business. Wiseacre has also lost an opportunity to grow its operation because it was unable to lease land from another farm because Wiseacre's marijuana cultivation on a portion of the farm's land would have disqualified the entire farm from receiving any federal assistance.

Finally, Verano Holdings Corp. ("Verano") is a Canadian corporation with subsidiaries in several states. In Massachusetts, Verano's wholly-owned subsidiaries operate cultivation and manufacturing facilities and medical and adult-use dispensaries. Like Canna and Sellers, Verano is not able to accept credit cards. Verano is only able to work with a limited group of business service providers because its business is illegal under federal law. Although Verano has been able to obtain insurance, it pays higher insurance premiums than it would if its business were legal under federal law.

III. ANALYSIS

A. Standing

This court's "judicial power is limited by Article III of the Constitution to actual cases and controversies" involving plaintiffs who have standing to sue. *Kerin v. Titeflex Corp.*, 770 F.3d 978, 981 (1st Cir. 2014). "Standing is 'built on a single basic idea—the idea of separation of powers.'" *FDA v. Alliance for Hippocratic Medicine*, 602 U.S. __, 144 S. Ct. 1540, 1545 (2024). "The requirement that the plaintiff possess a personal stake helps ensure that courts decide litigants' legal rights in specific cases, as Article III requires, and that courts do not opine on legal issues in response to citizens who might 'roam the country in search of governmental wrongdoing.'" *Id.* at 1554-55 (quoting *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 487 (1982)). "'Our system of government leaves many crucial decisions to the political processes,' where democratic debate can occur and a wide variety of interests and views can be weighed." *Id.* at 1555 (quoting *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 227 (1974)). The standing requirement is one of several tools that play an important, though not exclusive, role in preventing courts from inadvertently usurping those political processes. *Id.*

Since this court must be assured of its jurisdiction before reaching the merits of Plaintiffs' claims, the court turns first to Defendant's arguments that Plaintiffs lack standing. *Dantzler, Inc. v. Empresas Berríos Inventory & Operations, Inc.*, 958 F.3d 38, 46 (1st Cir. 2020). Although the government is the moving party, Plaintiffs, "as the party invoking federal jurisdiction," bear the burden of establishing that they have standing to bring their claims in this court. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016). "There are two types of challenges to a court's subject matter jurisdiction: facial challenges and factual challenges." *Torres-Negrón v. J & N Records, LLC*, 504 F.3d 151, 162 (1st Cir. 2007). As the government has raised only a facial challenge to standing, the court accepts as true the factual allegations in the Complaint and draws all reasonable inferences favorable to Plaintiffs. *Katz v.*

Pershing, LLC, 672 F.3d 64, 70 (1st Cir. 2012). Thus, to meet their burden, Plaintiffs "must sufficiently plead three elements: injury in fact, traceability, and redressability." *Kerin*, 770 F.3d at 981. Defendant challenges the sufficiency of Plaintiffs' allegations to establish an injury in fact and that any such injury is traceable to the CSA.

1. Injury in Fact

Plaintiffs have alleged two types of injuries: economic harms and threat of prosecution. Defendant concedes that the economic harms alleged by Plaintiffs constitute an injury in fact, though it disputes that any such injuries are traceable to portions of the CSA challenged by Plaintiffs. On the other hand, Defendant contends that Plaintiffs' factual allegations about the significant changes to cultural and governmental views and policies regarding marijuana are inconsistent with their assertion of facing a threat of prosecution sufficient to constitute an injury in fact.

"For an injury in fact to be plausibly pled, it 'must be both concrete and particularized and actual or imminent, not conjectural or hypothetical.'" *DiCroce v. McNeil Nutritionals, LLC*, 82 F.4th 35, 39 (1st Cir. 2023) (quoting *Hochendoner v. Genzyme Corp.*, 823 F.3d 724, 731 (1st Cir. 2016)). An injury is concrete if it "actually exists" and particular if it was caused by the defendant and the plaintiff was injured. *Id.* (internal quotations omitted). "In certain circumstances, 'the threatened enforcement of a law' may suffice as an 'imminent' Article III injury in fact." *Reddy v. Foster*, 845 F.3d 493, 500 (1st Cir. 2017). A pre-enforcement threat of future injury is sufficient to establish an injury in fact when a plaintiff "alleges 'an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by statute, and there exists a credible threat of prosecution thereunder.'" *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159 (2014) (quoting *Babbitt v. Farm Workers*, 442 U.S. 289, 298 (1979)).

In their Complaint, Plaintiffs allege that they are engaging in the intrastate cultivation, manufacture, possession, and distribution of marijuana. Since that conduct is clearly illegal under the CSA, even when permitted under Massachusetts law, federal prosecutors have a legal basis for prosecuting them. The question this court must answer is whether that threat of prosecution is credible or too remote and speculative. *Reddy*, 845 F.3d at 500. Citing *Reddy*, Defendant contends Plaintiffs' own allegations about the significant changes in federal policy erode the theoretical threat of enforcement down to the level of mere conjecture. *Reddy*, 845 F.3d at 500 (ruling a threat of prosecution was not sufficiently imminent to satisfy the Article III injury-in-fact requirement where preconditions to enforcement had not yet occurred).

Notwithstanding the informal policy described by Plaintiffs, Defendant "has not disclaimed any intention ever to enforce [the CSA]" against persons like Plaintiffs. *N.H. Right to Life PAC v. Gardner*, 99 F.3d 8, 17 (1st Cir. 1996). Unlike the plaintiffs in *Reddy*, who faced no risk of criminal prosecution for their intended conduct and could not even face civil enforcement until after a specific buffer zone was defined and marked, Plaintiffs have already engaged in conduct proscribed by the CSA, a statute containing many provisions that continue to be actively enforced. A voluntary exercise of prosecutorial discretion applied to one type of violation does not neutralize the otherwise credible threat of prosecution that exists whenever a valid statute has been violated. *Gardner*, 99 F.3d at 15 (explaining that a threat of enforcement can be sufficient to establish standing "even though the official charged with enforcement responsibilities has not taken any enforcement action against the plaintiff and does not presently intend to take any such action").

2. Traceability

The court next considers whether Plaintiffs' Complaint sufficiently alleges that either the threat of prosecution or the economic injuries they identify are traceable to the challenged portions of the

CSA. *See Dep't of Educ. v. Brown*, 600 U.S. 551, 561 (2023). An injury is "fairly traceable" if there is "'a causal connection between the injury and the conduct complained of.'" *Id.* (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). There is a direct, causal connection between the threat of prosecution Plaintiffs face and the challenged portions of the CSA. Plaintiffs have alleged they variously engage in the cultivation, manufacture, distribution, and possession of marijuana, wholly within Massachusetts and the CSA makes such activity a federal crime. In the absence of any dispute regarding redressability, the court finds Plaintiffs have demonstrated that they have standing under Article III to challenge the portions of the CSA applicable to intrastate activities related to marijuana. *See FDA*, 144 S. Ct. at 1556 ("Government regulations that require or forbid some action by the plaintiff almost invariably satisfy both the injury in fact and causation requirements. So in those cases, standing is usually easy to establish.").

The court also finds Plaintiffs have shown there is a causal connection between their economic injuries and the CSA. "The requirement that an alleged injury be fairly traceable to the defendant's action does not mean that the defendant's action must be the final link in the chain of events leading up to the alleged harm." *Wine & Spirits Retailers, Inc. v. Rhode Island*, 418 F.3d 36, 45 (1st Cir. 2005). On the other hand, "the 'line of causation . . . must not be too speculative or too attenuated." *FDA*, 144 S. Ct. at 1557. Courts must use care in determining whether the causal chain is strong enough to sustain standing despite independent actions by third parties. *Dantzler*, 958 F.3d at 47-48. "[T]he fact that the deleterious effect of a statute is indirect will not by itself defeat standing." *Wine & Spirits Retailers, Inc.*, 418 F.3d at 45. However, "the plaintiff must show that the 'third parties will likely react in predictable ways' that in turn will likely injure the plaintiffs." *FDA*, 144 S. Ct. at 1557.

When credited, Plaintiffs' detailed allegations about their financial injuries meet that burden. Though individual decisions by specific third parties are the final link in the causal chain, the economic injury actually flows from the multitude of similar decisions made by many third parties, all responding

to the CSA. In the aggregate, the decisions have caused a predictable "downstream injury to plaintiffs" by dramatically reducing their options for obtaining business services compared to the options available to non-marijuana businesses. *Id.* Though the third-party decisions are not directly compelled by the CSA, they are all foreseeable responses to the risks and uncertainties the CSA imposes on transactions with state-regulated marijuana businesses and, together, they inflict a common injury on Plaintiffs. *See id.* at 1557-58. For these reasons, the court finds the Plaintiffs' economic injuries provide an additional basis for standing.

B. Failure to State a Claim

The court turns to the government's arguments that this Complaint should be dismissed "for failure to state claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 570 (2007)); Fed. R. Civ. P. 12(b)(6). "Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* at 679. The court accepts all well-pleaded factual allegations and draws all reasonable inferences in Plaintiff's favor, but "do[es] not credit legal labels or conclusory statements." *Cheng v. Neumann*, 51 F.4th 438, 443 (1st Cir. 2022). Dismissal is appropriate if the complaint fails to establish at least one "material element necessary to sustain recovery under some actionable legal theory." *N.R. by and through S.R. v. Raytheon Co.,* 24 F.4th 740, 746 (1st Cir. 2022) (internal quotations omitted). A legal theory is actionable to the extent it does not conflict with binding precedent. *See Lyman v. Baker*, 954 F.3d 351, 370 (1st Cir. 2020) (affirming dismissal of claim foreclosed by controlling case). Defendant argues Plaintiffs' Complaint provides an insufficient basis for this court to find the CSA, as applied to Plaintiffs, either exceeds the authority

Congress has under the Commerce Clause and Necessary and Proper Clause or violates Plaintiffs' rights to due process under the Fifth Amendment. The court addresses each argument in turn.

1. Commerce Clause

"In our federal system, the National Government possesses only limited powers," which do not include the power to criminalize an "act committed wholly within a State" unless the act has "some relation to the execution of a power of Congress, or to some matter within the jurisdiction of the United States." *Bond v. United States*, 572 U.S. 844, 854 (2014) (internal quotation omitted). Article I, § 8, of the Constitution vests Congress with authority "'[t]o make all Laws which shall be necessary and proper for carrying into Execution' its authority to 'regulate Commerce with foreign Nations, and among the several states.'" *Raich*, 545 U.S. at 5 (quoting Art. 1, § 8). In *Raich*, the Supreme Court reaffirmed the already well-established view that the authority Congress enjoys under the Commerce Clause permits the regulation of local, non-commercial activity, if there is a rational basis from which Congress could have concluded that such activity would substantially affect interstate commerce. *Id.* at 22. More specifically, the Supreme Court held that "[t]he CSA is a valid exercise of federal power, even as applied to" the *Raich* plaintiffs because Congress had a rational basis for concluding that even their limited, non-commercial cultivation and use of marijuana, if "taken in the aggregate" could "substantially affect interstate commerce." *Id.* Notably, the Supreme Court deferred to the legislative process by inquiring only whether Congress could rationally conclude the plaintiffs' conduct had a substantial affect on interstate commerce, rather than whether the plaintiffs could prove that it did not. *Id.*

This court must apply the same analytic framework in this case because Plaintiffs' Commerce Clause claim is legally identical to the claim in *Raich*. *See Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484 (1989) (explaining that only the Supreme Court can overrule its own decisions and

lower courts must apply a precedent with direct application, even if there is a basis for believing the precedent has been undermined by later developments). As in *Raich*, the question this court must answer is not whether, as a factual matter, Plaintiffs' activities substantially affect interstate commerce, but simply whether Congress had a rational basis to so conclude. *Raich*, 545 U.S. at 22. Since Congress is not required "to legislate with scientific exactitude," conflicts between actual data about how state-sanctioned intrastate marijuana markets interact with the illicit interstate marijuana market and congressional findings, or an absence of relevant findings, do not establish that Congress lacked a rational basis for using the CSA to criminalize the type of conduct alleged by Plaintiffs. *Id.* at 17.

Logically, if, as the Supreme Court found in *Raich*, an aggregation of limited, non-commercial marijuana activity provided that rational basis, this court must find the same to be true of Plaintiffs' larger-scale, commercial activities. *See Ne. Patients Grp. v. United Cannabis Patients and Caregivers of Me.*, 45 F. 4th 542, 547 (1st Cir. 2022) (noting that an intrastate medical marijuana market that welcomes customers from other states is part of a larger, interstate medical marijuana market). As Plaintiffs' own allegations demonstrate, they operate on a scale that far exceeds the activities at issue in *Raich* and *Wickard*. Their businesses, together with other Massachusetts marijuana businesses, necessarily impact interstate commerce in ways that would only increase were they to obtain the relief they seek. They consume utilities and supplies; utilize the internet and a variety of business services; recruit and train employees; and serve consumers, including individuals who travel from other states to obtain marijuana in Massachusetts.

Given the scale of Plaintiffs' operations, the court cannot find Congress lacks a rational basis for concluding Plaintiffs' activities substantially affect interstate commerce without ignoring the Supreme Court's broadly-worded holding in *Raich*. To reach a different outcome would require this court to independently determine that the underlying analysis in *Raich* cannot survive the developments in intrastate regulatory schemes and federal enforcement policy alleged by Plaintiffs.

Since only the Supreme Court can overrule *Raich*, this court concludes that Congress has authority under the Commerce Clause to regulate Plaintiffs' wholly-intrastate, state-sanctioned marijuana activities and dismisses their as-applied challenge to the CSA. Plaintiffs' argument, that the factual differences between their allegations and those considered in *Raich* simply permit this court to avoid application of *Raich* and substitute its own Commerce Clause analysis, has no realistic persuasive force.

2. Substantive Due Process

Plaintiffs' substantive due process challenge to the CSA is also dismissed for failure to state a claim. There is simply no precedent for concluding that Plaintiffs enjoy a fundamental right to cultivate, process, and distribute marijuana. No such right is enumerated in the Constitution and, on remand following *Raich*, a sympathetic Ninth Circuit concluded there was no unenumerated right to use marijuana for medical purposes and the issue "remain[ed] in 'the arena of public debate and legislative action.'" *Raich v. Gonzalez* ("*Raich Remand*"), 500 F.3d 850, 866 (9th Cir. 2007) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 720 (2007)). The Ninth Circuit acknowledged that positive views about the medical uses for marijuana had been growing, but explained "that legal recognition has not yet reached the point where a conclusion can be drawn that the right to use medical marijuana is 'fundamental' and 'implicit in the concept of ordered liberty.'" *Id.* Although many more states have since legalized marijuana, for both medical purposes and adult use, there is still no national consensus on this issue. Even if there were universally applicable laws permitting the cultivation, processing, and distribution of marijuana, legalization alone neither requires nor permits this court to recognize a fundamental right to engage in such conduct. *See e.g. Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215, 256-57 (2022) (ruling there is no fundamental right to obtain an abortion, despite fifty years of federal caselaw legalizing abortion and recognizing such a fundamental right). In the absence of a fundamental right to engage in the cultivation, processing, and distribution of marijuana, Plaintiffs

cannot prevail on their substantive due process claim. *See Hernández-Gotay v. United States,* 985 F.3d 71, 81 (1st Cir. 2021) (rejecting procedural and substantive due process challenges to a federal statute outlawing cock fighting where the statute did not infringe any cognizable liberty interest and had survived a Commerce Clause challenge).

IV. CONCLUSION

For the foregoing reasons, the Defendant's Motion to Dismiss (Dkt. No. 29) is ALLOWED and this case may now be closed.

It is So Ordered.

/s/ Mark G. Mastroianni
MARK G. MASTROIANNI
United States District Judge