No. 26-____

IN THE

Supreme Court of the United States

PERIDOT TREE WA, INC., ET AL.,

Petitioners,

v.

WASHINGTON STATE LIQUOR AND CANNABIS CONTROL BOARD, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the dormant Commerce Clause's nondiscrimination principle applies to state and municipal cannabis-licensing schemes.

PARTIES TO THE CONSOLIDATED PROCEEDINGS

In *Peridot Tree WA, Inc. v. Washington State Liquor and Cannabis Control Board and William Lukela*, Petitioner is Peridot Tree WA, Inc., a Washington corporation. Respondents are the Washington State Liquor and Cannabis Control Board and William Lukela.

In *Peridot Tree, Inc. and Kenneth Gay v. City of Sacramento and Davina Smith*, Petitioners are Peridot Tree, Inc., a California corporation, and Kenneth Gay. Respondents are the City of Sacramento, California and Davina Smith.

CORPORATE DISCLOSURE STATEMENT UNDER RULE 29.6

Peridot Tree WA, Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.

Peridot Tree, Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.

Kenneth Gay is an individual.

RELATED PROCEEDINGS

Peridot Tree WA, Inc. v. Washington State Liquor and Cannabis Control Board and William Lukela, No. 3:23-cv-06111-TMC, U.S. District Court for the Western District of Washington. Judgment entered May 31, 2024.

Peridot Tree WA, Inc. v. Washington State Liquor and Cannabis Control Board and William Lukela, No. 24-3481, U.S. Court of Appeals for the Ninth Circuit. Judgment entered January 2, 2026. Petition for Rehearing En Banc denied April 13, 2026.

Peridot Tree, Inc. and Kenneth Gay v. City of Sacramento and Davina Smith, No. 2:22-cv-00289-KJM-SCR, U.S. District Court for the Eastern District of California. Judgment entered November 21, 2024.

Peridot Tree, Inc. and Kenneth Gay v. City of Sacramento and Davina Smith, No. 24-7196, U.S. Court of Appeals for the Ninth Circuit. Judgment entered January 2, 2026. Petition for Rehearing En Banc denied April 13, 2026.

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OPINIONS BELOW

The Ninth Circuit's opinion in the two consolidated appeals is reported at 162 F.4th 1179 and reproduced at App. 1a–23a.

The opinion of the U.S. District Court for the Eastern District of California in *Peridot Tree, Inc. v. City of Sacramento, et al.* is reproduced at App. 24a–40a.

The opinion of the U.S. District Court for the Western District of Washington in *Peridot Tree WA, Inc. v. Washington State Liquor and Cannabis Control Board, et al.* is reproduced at App. 41a–53a.

JURISDICTION

The Ninth Circuit entered judgment on January 2, 2026 and denied Petitioners' Petition for Rehearing En Banc on April 13, 2026. On June 4, 2026, Justice Kagan granted Petitioners' Application (No. 25A1344) to extend the deadline to file a petition for a writ of certiorari to September 10, 2026. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions at issue are reproduced at App. 55a–59a.

INTRODUCTION

These consolidated cases present a circuit split on an important question of constitutional law: whether the dormant Commerce Clause's nondiscrimination principle applies to state and municipal cannabis-licensing schemes.[1] This Court should resolve that question now. The issue has arisen frequently in courts across the country and will continue to do so. States continue to enact discriminatory licensing laws that will spur future lawsuits. This petition is the ideal vehicle to resolve this circuit split because the consolidated cases raise a pure question of law, and no facts can resolve or moot it.

In the decision below, the Ninth Circuit held the Controlled Substances Act ("CSA") exempts state cannabis-licensing schemes from the dormant Commerce Clause simply because it makes cannabis "illegal under federal law." *Peridot Tree WA, Inc. v. Wash. State Liquor & Cannabis Control Bd.*, 162 F.4th 1179, 1188 (9th Cir. 2026). In so holding, the court upheld residency requirements enacted by Respondents the State of Washington and City of Sacramento, California that unquestionably would be unconstitutional if applied to any other legal market.

It is settled that state laws imposing residency requirements on "those seeking to operate any retail business in the State" violate the nondiscrimination

[1] The dormant Commerce Clause applies equally to municipalities and states. *Dean Milk Co. v. City of Madison, Wis.*, 340 U.S. 349, 354 & n.4 (1951). All references to "States" hereinafter refer also to municipalities.

principle. *Tennessee Wine & Spirits Retailers Ass'n v. Thomas*, 588 U.S. 504, 539 (2019). In *Tennessee Wine*, this Court struck down Tennessee's two-year durational-residency requirement for retail liquor licenses because the law "discriminate[d] on its face against nonresidents"—and condemned that State's other more restrictive residency provisions as "so plainly based on unalloyed protectionism" that no party would defend them. *Id.* at 539.

The Ninth Circuit's ruling created a circuit split. The First and Second Circuits held the dormant Commerce Clause applies to state cannabis-licensing schemes. Those circuits recognize that dispensation from the nondiscrimination principle requires a "clear expression of approval by Congress" authorizing protectionism "in unmistakably clear terms." *Ne. Patients Grp. v. United Cannabis Patients & Caregivers of Me.*, 45 F.4th 542, 552, 554 (1st Cir. 2022); *accord Variscite NY Four, LLC v. N.Y. State Cannabis Control Bd.*, 152 F.4th 47, 61 (2d Cir. 2025).

The CSA is "a mine-run criminal penalty" that "conveys no intention" to exempt cannabis markets from the dormant Commerce Clause. *Variscite*, 152 F.4th at 61. Thus, it does not satisfy the "requirement that Congress must be 'unmistakably clear' about its 'intent and policy'" to "consent to this kind of rank protectionism." *Ne. Patients Grp.*, 45 F.4th at 551, 554 (citations omitted).

The Ninth Circuit attempted to sidestep this Court's clear-expression rule by positing that "the dormant Commerce Clause need not be extended to facilitate interstate commerce that is illegal under federal law." *Peridot Tree*, 162 F.4th at 1188. It reasoned that applying the nondiscrimination principle to cannabis-licensing schemes contradicts Commerce Clause principles by "encouraging . . . a market for a good that Congress has already expressly declared to be illegal." *Id.* at 1188-89 (citations omitted).

The Ninth Circuit's ruling is wrong at its foundation. Courts do not *extend* the dormant Commerce Clause. Rather, it "has long been recognized as a self-executing limitation" on state power to burden interstate commerce. *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 87 (1984). It applies by "its own force" to *any* "state regulation of commerce." *Dennis v. Higgins*, 498 U.S. 439, 450 (1991). Only Congress may "exempt[] state statutes" from the nondiscrimination principle—by expressing its intent and policy to sustain state legislation from attack under the Commerce Clause in "unmistakably clear" terms. *Maine v. Taylor*, 477 U.S. 131, 139 (1986) (citation omitted). The CSA contains no such authorization. It is a criminal prohibition designed to eradicate the cannabis market, and "[a] prohibition intended to eradicate an interstate market is not a license for states to incubate intrastate markets in the same product." *Variscite*, 152 F.4th at 62 (emphasis omitted). Federal illegality does not authorize discrimination. The Ninth Circuit's contrary premise inverts the clear-expression rule.

Additionally, the Ninth Circuit's assumption that applying the nondiscrimination principle to cannabis-licensing schemes "encourag[es]" States to create markets "for a good that Congress has . . . declared to be illegal" is backwards. When considering whether to legalize cannabis—or other vices—lawmakers must weigh the costs and benefits of such markets. Immunizing cannabis markets from the nondiscrimination principle tilts that balance in favor of legalization because the State's constituents will reap all the profits.

Moreover, the Ninth Circuit's contention that applying the dormant Commerce Clause to state cannabis-licensing schemes burdens federal interests by "further open[ing]" cannabis markets is at odds with the federal government's own regulatory actions. *See Peridot Tree*, 162 F.4th at 1189. As this Court recently recognized, "the federal government has not just tolerated [state cannabis markets]; it helped fuel them." *United States v. Hemani*, 146 S. Ct. 1677, 1693 (2026). It has openly permitted "the production and sale of marijuana when done in accord with state law, and it has allowed a multi-billion-dollar marijuana business to develop." *Id.* at 1701 (Alito, J., concurring).

The Department of Justice's recent order rescheduling medical cannabis under the CSA does not warrant further percolation. The DOJ's order moves cannabis from Schedule I to Schedule III only for sellers who hold a state medical-marijuana license and register with the DEA. *See* Schedules of Controlled Substances: Rescheduling of Food and Drug Administration Approved Products Containing Marijuana from Schedule I to Schedule III; Corresponding Change to Permit Requirements, 91 Fed. Reg. 22714, 22721-22 (Apr. 28, 2026) (to be codified at 21 C.F.R. pt. 1301). Cannabis otherwise remains illegal under federal law. Thus, the rescheduling order does not alter the question presented here. Likewise, any future broader rescheduling of cannabis from Schedule I to Schedule III will not resolve the circuit split. A Schedule III drug may be sold only under a prescription. 21 U.S.C. §§ 822-23, 829(b), 841(a)(1). Recreational cannabis is not sold under a prescription. Thus, recreational cannabis will remain nominally illegal under federal law even if the DOJ more broadly reschedules cannabis from Schedule I to Schedule III.

Finally, the ruling below conflicts with this Court's precedents addressing the nondiscrimination principle's intersection with the Twenty-first Amendment. That Amendment "grants the States virtually complete control" over alcohol sales within their borders. *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 346 (1987). But even this broad constitutional grant of power cannot "displace the rule that States may not give a discriminatory preference to their own [residents]." *Granholm v. Heald*, 544 U.S. 460, 486 (2005). The Twenty-first Amendment leaves to each State the choice of how to regulate its own liquor market (or whether to permit such a market to exist at all). But the nondiscrimination principle commands that a State exercising that power "must do so on evenhanded terms." *Id.* at 493.

If the nondiscrimination principle does not wane in the face of the *Constitution's* delegation of primacy over liquor regulation to the States, the CSA's prohibition of cannabis—which confers no power to the States—cannot implicitly displace it. The Twenty-first Amendment cases thus embody the principle that the States decide whether and under what system alcohol is sold within their borders. But the nondiscrimination principle governs who may compete in any market a State creates.

For these reasons and others explained below, this Court should grant the petition and reverse the decision of the United States Court of Appeals for the Ninth Circuit.

STATEMENT OF THE CASE

Responding to the seismic shift in state and federal policy, Respondents, the State of Washington and the City of Sacramento, California, enacted cannabis-licensing schemes. Like many other jurisdictions, these schemes favor residents by "requir[ing] a person to have been a resident" of the jurisdiction "for a specified period of time to be eligible for a cannabis dispensary license." *Peridot Tree*, 162 F.4th at 1181.

Washington's scheme requires prospective dispensary owners to reside in Washington for six months before applying for a license. Wash. Rev. Code § 69.50.331(1)(b); Wash. Admin. Code § 314-55-570(2)(b). Sacramento licenses new cannabis dispensaries through its Cannabis Opportunity Reinvestment and Equity Program classifications 1 and 2. *Peridot Tree*, 162 F.4th at 1182-83. Those classifications require that the applicant be "a current or former resident of the City of Sacramento." *Id.*

Kenneth Gay, a Michigan resident, is the majority owner of Petitioners Peridot Tree WA, Inc., a Washington corporation, and Peridot Tree, Inc., a

California corporation. *Id.* Petitioners applied for dispensary licenses in Washington and Sacramento respectively. Both jurisdictions rejected these applications based solely on Mr. Gay's residency. *Id.* at 1183-84.

Petitioners filed actions in the Western District of Washington and the Eastern District of California, respectively, seeking declaratory and injunctive relief on the ground that the schemes violate the dormant Commerce Clause. Both district courts dismissed under Rule 12(b)(6), each holding that the dormant Commerce Clause does not apply to cannabis-licensing schemes because cannabis is federally illegal under the CSA. *Id.* at 1184-85.

The Ninth Circuit consolidated the appeals and affirmed the district courts in a single published opinion. It held "the dormant Commerce Clause need not be extended to facilitate interstate commerce that is illegal under federal law." *Id.* at 1188. The court acknowledged that its holding created a circuit split with the First and Second Circuits. *Id.* at 1185-88. The court denied rehearing en banc on April 13, 2026.

The petition presents a pure question of law on undisputed facts: both Petitioners were excluded from the licensing processes solely because of their majority owner's state of residence.

REASONS FOR GRANTING THE PETITION

The opinion below created a circuit split on an important constitutional question that is arising frequently as a question of first impression in courts beyond the First, Second, and Ninth Circuits.

The question at bar is pending in the Fourth Circuit.[2] Numerous district courts in other circuits have wrestled with the question—reaching inconsistent results—in cases that were not appealed.[3] Other jurisdictions have enacted protectionist laws that are ripe for challenge, including Alabama, Arkansas, Delaware, the District of Columbia, Nebraska, and New Jersey.[4] Indeed, Nebraska imposed residency requirements on medical-cannabis licenses *after* the DOJ rescheduled medical cannabis.[5]

Irreparable damage to the burgeoning cannabis market will occur if the Court allows this question to percolate longer. Nearly all States with legal

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[2] *Jensen v. Md. Cannabis Admin., No.* 25-2276 (4th Cir.).

[3] *E.g.*, *Toigo v. Dep't of Health & Senior Servs.*, 549 F. Supp. 3d 985 (W.D. Mo. 2021) (applying dormant Commerce Clause); *Lowe v. City of Detroit*, 544 F. Supp. 3d 804 (E.D. Mich. 2021) (applying dormant Commerce Clause); *Finch v. Treto*, 606 F. Supp. 3d 811, 834 (N.D. Ill. 2022) (concluding dormant Commerce Clause likely applies, but plaintiffs waited too long to file lawsuit; appeal to Seventh Circuit decided on same basis); *Fluresh, LLC v. City of Grand Rapids, No.* 1:25-CV-252, 2025 WL 1122034 (W.D. Mich. Apr. 16, 2025) (declining to apply dormant Commerce Clause); *Original Invs., LLC v. Oklahoma*, 542 F. Supp. 3d 1230 (W.D. Okla. 2021) (declining to apply equitable powers under dormant Commerce Clause).

[4] *See*, *e.g.*, Ala. Code § 20-2A-55; Code Ark. R. 006.28.1-IV; Del. Code Ann. tit. 4, § 1336; D.C. Code § 7-1671.01(20C); N.J. Admin. Code § 17:30-6.7(c).

[5] 238 Neb. Admin. Code § 1-004.

cannabis markets limit the number of licenses they issue.[6] If this Court does not restore dormant Commerce Clause protection before these schemes are fully implemented, "States [will] be free today to bake in advantages for their residents should Congress later legalize the market, and protectionism would, in the end, have '[]disturbed' a 'national market for competition' through 'preferential advantages conferred by [the] State upon its residents or resident competitors.'" *Variscite*, 152 F.4th at 61 (quoting *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 299 (1997)) (alterations in original).

This petition is the ideal vehicle to resolve the circuit split because the consolidated cases clearly present the issue and it is purely a question of law.

I. THE COURTS OF APPEALS ARE DIVIDED

A. The First Circuit Held the Nondiscrimination Principle Applies to Cannabis-Licensing Schemes

Northeast Patients Group v. United Cannabis Patients & Caregivers of Maine, 45 F.4th 542 (1st Cir. 2022), was the first Court of Appeals opinion to address whether the nondiscrimination principle applies to state cannabis-licensing schemes. The court confronted a Maine law requiring owners of medical-cannabis dispensaries to be Maine residents.

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[6] *See*, *e.g.*, Practical Law Commercial Transactions, *Marijuana Regulation and Licensing in the US: Overview*, Thomson Reuters, http://www.westlaw.com (last visited Aug. 7, 2026) (login and search required) (recognizing "most states subject marijuana licenses" to "[l]imits on the number of licenses held").

Id. at 545. Maine conceded its requirement would trigger the nondiscrimination principle's "virtually per se rule of invalidity" if it were applied to a federally legal market. *Id.* at 546. Thus, the only question was whether the dormant Commerce Clause applies to cannabis markets. The court answered with a decisive *yes*.

Maine argued the CSA exempts cannabis-licensing schemes from the nondiscrimination principle because "it is impossible for there to be an interstate market in any good that, under federal law, is contraband throughout the country." *Id.* at 547. The court rejected that contention for two reasons.

First, it found Maine's argument that there is no interstate cannabis market to be self-defeating because Maine's residency requirement "reflects the reality" that an interstate market exists. *Id.* It "indicates that the market is so robust that, absent [Maine's] residency requirement, it would be likely to attract entrants far and wide." *Id.*

Second, the CSA does not exempt state cannabis-licensing schemes from the nondiscrimination principle. *Id.* at 551. To do so "Congress must be 'unmistakably clear' . . . about its 'intent and policy to sustain state legislation from attack under the [dormant] Commerce Clause.'" *Id.* (cleaned up). "Nothing on the face of the CSA purports to bless interstate discrimination" with the clarity required to authorize "this kind of rank protectionism." *Id.* at 554.

Judge Gelpí dissented. He acknowledged residency requirements "incontestably constitute[]

protectionist legislation." *Id.* at 558 (Gelpí, J., dissenting). But he argued the clear-expression rule should not apply to cannabis-licensing schemes because the only way Congress could authorize protectionism "would be to speak out of both sides of its mouth" by "simultaneously illegalizing marijuana while affirmatively granting states the power to burden interstate commerce in a manner which would otherwise not be permissible." *Id.* at 559 (cleaned up).

Judge Gelpí further opined that the dormant Commerce Clause's objective of "preserv[ing] a national market for competition undisturbed by preferential advantages conferred by a State upon its residents" is not served by barring protectionist cannabis-licensing laws because the CSA "outlawed the 'national market for marijuana.'" *Id.* at 559.

The majority rejected Judge Gelpí's reading. It concluded the argument that the clear-expression rule "is categorically inapplicable when Congress seeks to eradicate a national market through a federal criminal statute" contradicts this Court's precedents. *Id.* at 551. Indeed, preventing Balkanization and trade wars among the states "'was a principal reason for the adoption of the Constitution.'" *Id.* at 553 (quoting *Tennessee Wine & Spirits Retailers Ass'n v. Thomas*, 588 U.S. 504, 515 (2019)).

B. The Second Circuit Held the Nondiscrimination Principle Applies to Cannabis-Licensing Schemes

Variscite NY Four, LLC v. New York State Cannabis Control Board, 152 F.4th 47 (2d Cir. 2025), was the second Court of Appeals opinion to address whether the nondiscrimination principle applies to cannabis-licensing schemes. It was also the first to assess the dormant Commerce Clause's application to a recreational-cannabis market. *Id.* at 52-53.

New York argued the nondiscrimination principle "does not bear upon its licensure scheme" because the CSA classifies cannabis as "a federally illegal drug." *Id.* at 53. The court rejected this argument for two reasons.

First, "'congressional intent must be unmistakably clear'" in order to exempt State regulations from the nondiscrimination principle. *Id.* at 61 (quoting *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 91 (1984)). For a federal statute to convey such intent, it "must clearly allow the state to engage in such activity"—i.e., "it must approve *the protectionism itself*." *Id.* (internal quotation marks omitted) (emphasis in original).

The CSA, however, is "a mine-run criminal penalty" that "conveys no such intention." *Id.* Its objective "was 'eradicat[ing] the 'marijuana market' and 'eliminating commercial transactions in the interstate market in their entirety.'" *Id.* at 62 (citation omitted). "A prohibition intended to eradicate an *inter*state market is not a license for states to incubate *intra*state markets in the same product." *Id.* (emphasis in original).

Second, the court held that the public policy animating the dormant Commerce Clause requires its application to cannabis-licensing schemes. "If federally illegal markets were constitutionally different," States could evade the nondiscrimination principle "in any market where a federal prohibition is nominal: on the books, but unenforced—perhaps even a candidate for repeal." *Id.* at 60. Thus, States could "bake in advantages for their residents should Congress later legalize the market, and protectionism would, in the end, have '[]disturbed' a 'national market for competition' through 'preferential advantages conferred by [the] State upon its residents or resident competitors.'" *Id.* at 61 (quoting *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 299 (1997)) (alterations in original).

Chief Judge Livingston dissented. In her view, the CSA's intent to eradicate cannabis markets clearly expresses Congress's intent to authorize States to regulate the market in a protectionist manner. *Id.* at 69 (Livingston, C.J., dissenting). She contended such laws aid the CSA's objectives by "discourag[ing] interstate commercial transactions to some extent." *Id.* at 69.

The majority rebutted these contentions, observing that "the dissent's analysis blurs two distinct inquiries: (1) which state laws the dormant Commerce Clause would prohibit absent congressional action, and (2) which subset of laws the CSA has exempted from that prohibition." *Id.* at 62. Without Congress's explicit consent to enact protectionist legislation, the nondiscrimination principle "forbid[s] New York from enacting any protectionist measure in the interstate marijuana market—whether a total ban or a lesser restriction." *Id.* Thus, "[t]he dispositive question is . . . which (if any) protectionist measures Congress has authorized New York to enact nevertheless." *Id.*

C. The Ninth Circuit Held Cannabis-Licensing Schemes Are Immune from the Nondiscrimination Principle

Peridot Tree WA, Inc. v. Washington State Liquor & Cannabis Control Board, 162 F.4th 1179 (9th Cir. 2026), was the third and most recent Court of Appeals opinion to address whether the nondiscrimination principle applies to cannabis-licensing schemes. The decision created a circuit split by holding the dormant Commerce Clause does not apply to such schemes because cannabis is illegal under the CSA. *Id.* at 1188. The court rested its decision on five premises drawn heavily from the First and Second Circuit dissents.

First, notwithstanding that the CSA does not contain an unmistakably clear expression of Congress's intent to exempt state-licensed cannabis markets from the nondiscrimination principle, the court "decline[d] to extend" the dormant Commerce Clause to such markets because they are "presently not supposed to exist as a matter of federal law." *Id.* at 1181, 1189-90.

Second, the court concluded that subjecting cannabis-licensing schemes to the nondiscrimination principle contradicts the Commerce Clause's aims by "encouraging . . . a market for a good that Congress has already expressly declared to be illegal." *Id.* at 1188-89.

Third, the court contended that protectionist cannabis-licensing laws do not violate the dormant Commerce Clause because such laws "'aid [the CSA's] objective'" by enabling States to open their cannabis markets "partway." *Id.* at 1187, 1189 (quoting *Variscite*, 152 F.4th at 67 (Livingston, C.J., dissenting)).

Fourth, the court posited that the nondiscrimination principle does not apply to laws governing *intrastate* cannabis markets because such laws do not "'restrain[] the free exchange of goods and services in an *interstate* market.'" *Id.* at 1184 (citing *Ne. Patients Grp.*, 45 F.4th at 559 (Gelpí, J., dissenting)) (emphasis added).

Fifth, the court asserted that applying the nondiscrimination principle to cannabis-licensing schemes would be "a judicial intrusion on a democratically enacted law" as condemned by *National Pork Producers Council v. Ross*, 598 U.S. 356 (2023). *Peridot Tree*, 162 F.4th at 1189.

The Ninth Circuit is thus in clear conflict with the First and Second Circuits.

II. THE NINTH CIRCUIT'S RULING RESTS ON FALLACIOUS PREMISES

Each of the five premises the Ninth Circuit rested its opinion on is fallacious. Indeed, they all share a common flaw: each treats federal illegality as congressional authorization to discriminate. The dormant Commerce Clause, however, applies by "its own force" to any "state regulation of commerce" unless Congress exempts the market in unmistakably clear terms. *Dennis v. Higgins*, 498 U.S. 439, 450 (1991). A federal statute enacted to eradicate a market is the antithesis of a statute authorizing States to reserve the profits of that market for their residents.

A. The CSA Does Not Displace the Nondiscrimination Principle

The Ninth Circuit's first premise is that the CSA exempts cannabis markets from the nondiscrimination principle because such markets are "presently not supposed to exist as a matter of federal law." *Peridot Tree WA, Inc. v. Wash. State Liquor & Cannabis Control Bd.*, 162 F.4th 1179, 1189-90 (9th Cir. 2026). That reading both violates this Court's settled precedents and conflicts with its recent assessment of Congress's views of cannabis.

"Congress may authorize the States to engage in regulation that the [dormant] Commerce Clause would otherwise forbid." *Maine v. Taylor*, 477 U.S. 131, 138 (1986). But courts may "not assume that it has done so unless such an intent is clearly expressed." *Hillside Dairy Inc. v. Lyons*, 539 U.S. 59, 66 (2003). Thus, "for a state regulation to be removed from the reach of the dormant Commerce Clause, congressional intent must be unmistakably clear" and "no such authorization may be implied." *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 90-91 (1984).

To satisfy this standard, a federal statute must show that "Congress affirmatively contemplate[d]" permitting the "otherwise invalid state legislation." *Id.* at 91. "The fact that [a] state policy . . . appears to be consistent with federal policy—or even that state policy furthers the goals [the Court] might believe that Congress had in mind is an insufficient indicium of congressional intent." *Id.* at 92. Courts "have no authority to rewrite legislation based on mere speculation as to what Congress 'probably had in mind.'" *New England Power Co. v. New Hampshire*, 455 U.S. 331, 343 (1982).

For example, *Hillside Dairy* confronted California regulations governing the pricing and pooling of milk that discriminated against out-of-state dairies. 539 U.S. at 64. The Ninth Circuit held that Congress immunized these regulations from dormant Commerce Clause scrutiny by enacting a law empowering California to "regulat[e] the composition and labeling of milk." *Id.* The Ninth Circuit read this language broadly to shield *all* laws that "relate to the sale of fluid milk" from the nondiscrimination principle. *Id.* at 66.

This Court unanimously disagreed.[7] While Congress "unambiguously expresse[d]" the intent to exempt "California's compositional and labeling laws," this exemption must be read narrowly and cannot be extended to "pricing and pooling laws," notwithstanding the close relation between these subjects. *Id.*

[7] Justice Thomas agreed Congress had "not clearly express[ed] an intent to insulate California's pricing and pooling laws from a Commerce Clause challenge," but dissented because he believed the dormant Commerce Clause has no basis in the Constitution's text. *Hillside Dairy*, 539 U.S. at 68 (Thomas, J., concurring in part and dissenting in part).

Here, the Ninth Circuit repeated its mistake in *Hillside Dairy* by concluding the CSA—which does not unambiguously express the intent to shield *any* laws from the nondiscrimination principle—*broadly* authorizes protectionist licensing laws because they purportedly "'aid [the CSA's] objective'" of eradicating cannabis markets. *Peridot Tree*, 162 F.4th at 1187 (quoting *Variscite NY Four, LLC v. N.Y. State Cannabis Control Bd.*, 152 F.4th 47, 67 (2d Cir. 2025) (Livingston, C.J., dissenting)).

The clear-expression rule "is not . . . merely a wooden formalism." *South-Central Timber Dev., Inc.*, 467 U.S. at 92. It is a bulwark against protectionism animated by the foundational premise of the Constitutional Convention of 1787. *Id.* The Constitution "was designed to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation." *Id.*

Only Congress may exempt a market from dormant Commerce Clause scrutiny because "when Congress acts, all segments of the country are represented, and there is significantly less danger that one State will be in a position to exploit others." *Id.* "[R]equiring a clear expression of approval by Congress ensures that there is, in fact, such a collective decision and reduces significantly the risk that unrepresented interests will be adversely affected by restraints on commerce." *Id.*

The CSA contains no "unmistakably clear" authorization to enact protectionist regulations. *Variscite*, 152 F.4th at 61. As *Hillside Dairy* instructs, the fact that both the CSA and State laws proscribing nonresident ownership of cannabis businesses "relate to" prohibitions against cannabis sales "is by no means sufficient" to "unambiguously express[]" consent to enact protectionist laws. 539 U.S. at 66.

The Ninth Circuit sought to sidestep the clear-expression rule by concluding "as an antecedent matter that the dormant Commerce Clause need not be extended to facilitate interstate commerce that is illegal under federal law." *Peridot Tree*, 162 F.4th at 1188. This assertion is incorrect because courts do not "extend" the nondiscrimination principle. Rather, "the [dormant] Commerce Clause *of its own force* imposes limitations on state regulation of commerce and is the source of a right of action in those injured by regulations that exceed such limitations." *Dennis v. Higgins*, 498 U.S. 439, 450 (1991) (emphasis added).

The Ninth Circuit's purported distinction is no distinction at all. Holding that the nondiscrimination principle does not extend to state cannabis-licensing schemes because cannabis is illegal under the CSA is no different from holding that the CSA exempts cannabis-licensing schemes from the dormant Commerce Clause. But the CSA lacks the required "unmistakably clear" statement of congressional intent to authorize State protectionism.

Likewise, the Ninth Circuit's assumption that protectionist cannabis laws "'aid [the CSA's] objective'" by allowing States "to open up their marijuana markets . . . partway" is unavailing for two reasons. *See Peridot Tree*, 162 F.4th at 1187 (quoting *Variscite*, 152 F.4th at 67 (Livingston, C.J., dissenting)).

First, as discussed in more detail below, allowing States to enact protectionist licensing schemes incentivizes States to license the sale of cannabis and other federally illegal goods. *See* Part II-B. *Second*, the fact that a "state policy . . . appears to be consistent with federal policy—or even that state policy furthers the goals [the Court] might believe that Congress had in mind—is an insufficient indicium of congressional intent" to dispense the State from the nondiscrimination principle. *South-Central Timber Dev., Inc.*, 467 U.S. at 92.

Seeking to avoid the clear-expression rule, Judge Gelpí's First Circuit dissent argues that the rule does not apply to state cannabis-licensing schemes because "the only way Congress could . . . authorize the state" to employ protectionist regulations "would be to speak out of both sides of its mouth" by "simultaneously illegalizing marijuana while affirmatively granting states the power [to create such markets]." *Ne. Patients Grp. v. United Cannabis Patients & Caregivers of Me.*, 45 F.4th 542, 559 (1st Cir. 2022) (Gelpí, J., dissenting).

This conclusion ignores the fact that Congress frequently speaks out of both sides of its mouth about cannabis. As the Ninth Circuit conceded, "the federal government" has sent "mixed signals" regarding "marijuana legalization at the state level." *Peridot Tree*, 162 F.4th at 1189. Indeed, as this Court recently recognized, "the federal government has not just tolerated [state cannabis markets]; it helped fuel them." *United States v. Hemani*, 146 S. Ct. 1677, 1693 (2026). Thus, Judge Gelpí's assumption that the federal government views cannabis markets as verboten is "at odds with its own regulatory actions." *Id.*

Judge Gelpí's contention also ignores the anti-commandeering doctrine. The federal government "has substantial powers to govern the Nation directly" but "the Constitution" does not "confer upon Congress the ability to require the States to govern according to [its] instructions." *New York v. United States*, 505 U.S. 144, 162 (1992). Thus, "even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts." *Id.* at 166 (citation omitted). This is a core power "reserved to the States" by the Tenth Amendment. *Id.* at 155.

Consequently, even ignoring the federal government's tacit encouragement of state cannabis markets, Congress would not "speak out of both sides of its mouth" if it authorized States that choose to decriminalize cannabis under their own laws to fashion protectionist licensing schemes. It would simply be recognizing the constitutional limits on its own power.

Murphy v. NCAA, 584 U.S. 453 (2018), confirms this point. In *Murphy*, this Court invalidated a federal law under the anti-commandeering rule that made "it 'unlawful' for a State or any of its subdivisions" to "license, or authorize by law" any type of "sports gambling." *Id.* at 460-61. This Court reasoned that "there is simply no way to understand [a] provision prohibiting state authorization [of a market] as anything other than a direct command to the States." *Id.* at 480. Indeed, "[a] more direct affront to state sovereignty is not easy to imagine." *Id.* at 474. It is "as if federal officers were installed in state legislative chambers and were armed with the authority to stop legislators from voting on any offending proposals." *Id.*

Each State decides for itself whether to "license, or authorize" cannabis sales and use under its own law. But a State's constitutionally protected choice to open a market carries with it no entitlement to allocate that market on protectionist terms. Once the market exists, the nondiscrimination principle entitles nonresidents to compete in it "on equal terms." *Tennessee Wine & Spirits Retailers Ass'n v. Thomas*, 588 U.S. 504, 534 (2019).

B. Exempting Federally Proscribed Goods from the Nondiscrimination Principle Incentivizes States to Foster Markets for Such Goods

The Ninth Circuit's opinion rests on its assumption that applying the nondiscrimination principle to cannabis-licensing schemes will "encourag[e] . . . a market for a good that Congress has already expressly declared to be illegal and against public interest." *Peridot Tree*, 162 F.4th at 1188-89 (citing *Ne. Patients Grp.*, 45 F.4th at 558 (Gelpí, J., dissenting)).

This might be a reason for Congress to exempt cannabis licensing from the dormant Commerce Clause, but it is not a basis for the courts to refuse to apply it. Moreover, the Ninth Circuit's reasoning is backwards: immunizing federally illegal markets from the nondiscrimination principle creates strong incentives for States to foster such markets. Cannabis markets—like all vice markets—produce externalities whose costs must be weighed against the benefits in determining whether to legalize them. These externalities will fall both on the legalizing State and its neighbors.

States wrestling with the decision whether to permit such markets—federally legal or otherwise—look to their own economic self-interest to decide whether, in the aggregate, the benefits outweigh the costs. Immunizing laws regulating such markets from the nondiscrimination principle tilts that balance in favor of legalization.

Securing "economic benefits" for state residents has "proven to be a potent selling point for cannabis legalization." Robert A. Mikos, *Interstate Commerce in Cannabis*, 101 B.U. L. Rev. 857, 860 (2021). This selling point will naturally become stronger if legislators can reserve the profits from such ventures for their constituents. This encourages otherwise skeptical lawmakers to authorize such markets because the regulating State will share the harm with its neighboring states without sharing any of the offsetting profits.

Tellingly, Washington and Sacramento crafted their schemes to maximize profits flowing to their own residents. Both authorize licensees to sell cannabis products to nonresidents. *See* Wash. Admin. Code § 314-55-150; Cal. Code Regs. tit. 4, § 15404.[8] This ensures that the harms—but not the benefits—resulting from their schemes will be shared with neighboring states.

If their aim was truly "aiding the CSA's objectives," they would prohibit sales to nonresidents but permit nonresidents to own cannabis businesses. This would mitigate externalities flowing to neighboring states while allowing residents of those states a share of the income derived from such markets to offset transboundary harms. But Respondents chose the opposite approach, revealing their true motives.

The economic realities discussed herein also expose the fallacy in the Ninth Circuit's slippery-slope contention that applying the nondiscrimination principle to cannabis-licensing schemes will encourage States to "promote the free exchange of heroin, fentanyl, or . . . other illicit good[s]." *See Peridot Tree,* 162 F.4th at 1186 (citation omitted).

As with gambling and cannabis, the anticommandeering rule denies Congress the power to prevent States from legalizing heroin or fentanyl under their own laws. But if any State chose to do so, federal law enforcement agencies would no doubt

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[8] These aspects of Sacramento's scheme are governed by Cal. Bus. & Prof. Code § 26013 and regulations promulgated pursuant thereto.

utilize their own substantial powers to enforce the federal ban.[9]

Even if the federal government lacked the ability to quell state-sanctioned markets for heroin or fentanyl, allowing States to issue licenses only to their residents will only encourage the creation of such markets without aiding any federal objectives.

C. Protectionist Cannabis-Licensing Schemes Do Not Advance the CSA's Objectives

The Ninth Circuit's third faulty premise is that the dormant Commerce Clause does not prohibit protectionist cannabis-licensing laws because such laws "'aid [the CSA's] objective.'" *Peridot Tree*, 162 F.4th at 1187 (quoting *Variscite*, 152 F.4th at 67 (Livingston, C.J., dissenting)). In its view, requiring States to regulate evenhandedly will "force [them] to

[9] The Ninth Circuit's ruling also incentivizes States to regulate goods in a manner inconsistent with federal law in order to shield otherwise federally lawful markets from the nondiscrimination principle. The potential implications for the tobacco industry illustrate this moral hazard. Federal law bars tobacco sales to anyone under twenty-one. 21 U.S.C. § 387f(d)(3). Under the Ninth Circuit's reasoning, a State could shield tobacco licenses from the nondiscrimination principle by authorizing licensees to sell to buyers *one day* younger than twenty-one. The decision below thus hands the States a blueprint for evading the Constitution: license *some* conduct that federal law forbids, and reserve the market to residents. This new-found power has no limiting principle.

open up their marijuana markets even further once they have opened them partway." *Id.* at 1189.

This Court rejected nearly identical arguments in *Granholm v. Heald*, 544 U.S. 460 (2005). *Granholm* confronted Michigan and New York laws that made in-state wineries eligible "for a license that allows direct shipment to in-state consumers," but denied such licenses to nonresident vintners. *Id.* at 470. The States argued these laws were immune from the nondiscrimination principle because they furthered an "aim" of Section 2 of the Twenty-first Amendment. *Id.* at 484. Section 2 empowers States "to promote temperance" and "combat the perceived evils of an unrestricted traffic in liquor." *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 276 (1984).[10]

Michigan and New York argued that the restriction furthered these aims because "direct shipping" of wine may "increase the risk of underage drinking." *Granholm*, 544 U.S. at 490. This argument failed because a "discriminatory ban on direct shipping" does nothing to curb underage drinking since "minors are just as likely to order wine" made by in-state vintners "as from out-of-state ones." *Id.* at 490.

Likewise, limiting cannabis licenses to residents will do nothing to further the CSA's aims. Individuals who abuse cannabis are just as likely to purchase it

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[10] The import of this Court's rulings on the intersection of the Twenty-first Amendment and the nondiscrimination principle is discussed in greater detail in Part IV.

from businesses owned by residents as from businesses owned by nonresidents.

D. Dormant Commerce Clause Scrutiny Is Not Limited to Transactions Involving People or Goods Crossing State Lines

The Ninth Circuit's fourth faulty premise is that the nondiscrimination principle has no application to laws governing *intrastate* markets that do not involve the passage of people or goods across state lines. The court derived this premise from the tenet that "[a] central rationale of the dormant Commerce Clause is maintaining an unencumbered national market." *Peridot Tree*, 162 F.4th at 1186 (cleaned up). Because the licensing schemes at issue only permit the sale of cannabis products grown and manufactured in-state, the court concluded they do not implicate dormant Commerce Clause scrutiny because they do not "'restrain[] the free exchange of goods and services in an interstate market.'" *Id.* at 1184 (citation omitted).

But physical passage of goods or persons over state lines is not required to trigger the nondiscrimination principle. The dormant Commerce Clause "prohibits state discrimination against all 'out-of-state economic *interests*.'" *Tennessee Wine*, 588 U.S. at 534 (emphasis in original). A law "contradict[s] dormant Commerce Clause principles" if it "deprive[s] *citizens* of their right to have access to the markets of other States on equal terms." *Id.* (emphasis in original). Thus, the assumption that the exchange of goods in a "national marketplace" is a *sine qua non* of dormant Commerce Clause protection is erroneous.

E. ***Ross*'s Admonition that Courts Should Tread Cautiously in Applying the Dormant Commerce Clause Referred to the *Pike* Doctrine**

The Ninth Circuit's final faulty premise is that applying the nondiscrimination principle to cannabis-licensing schemes is "a judicial intrusion on a democratically enacted law" that contradicts *National Pork Producers v. Ross'*s admonition that courts should "tread cautiously when considering whether to invalidate state laws under . . . the dormant Commerce Clause." *Peridot Tree*, 162 F.4th at 1185, 1189.

Ross's statement cited by the Ninth Circuit referred only to suits arising under "the *Pike* line of cases." *Ross*, 598 U.S. at 391. *Pike* is about situations where state and local laws do *not* discriminate against out-of-staters. The licensing schemes in this case discriminate against nonresidents on their faces, so "the virtually per se rule of invalidity provides the proper legal standard here, not the *Pike* balancing test." *Or. Waste Sys., Inc. v. Dep't of Env't Quality*, 511 U.S. 93, 100 (1994). The Ninth Circuit itself acknowledged as much. *See Peridot Tree*, 162 F.4th at 1185-86.

Pike governs challenges to state laws that "regulate[] even-handedly to effectuate a legitimate"—i.e., *non-protectionist*—"local public interest," but incidentally "burden interstate commerce." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).[11] *Ross* recognized that *Pike* requires "delicacy" because it does "not implicate the nondiscrimination principle at the core of this Court's dormant Commerce Clause cases." 598 U.S. at 390-91. But delicacy is not warranted "where the infraction is clear"—i.e., when the challenged regulation violates "this Court's core dormant Commerce Clause teachings" banning "discriminatory state legislation." *Id.* at 390.

This Court does "not hesitate" to strike down democratically enacted laws that benefit local interests "by burdening their out-of-state competitors." *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 193 (1994). That includes the residency requirements in *Tennessee Wine*. This is because the democratic process is not an adequate check on state laws "whose purpose or effect is to gain for those within the state an advantage at the expense of those without." *S.C. State Highway Dep't v. Barnwell Bros.*, 303 U.S. 177, 185 n.2 (1938).

III. RESCHEDULING CANNABIS DOES NOT ALTER THE QUESTION PRESENTED

The DOJ recently rescheduled medical cannabis from Schedule I to Schedule III of the CSA, provided it is sold by a state-licensed dispensary that registers with the DEA. *See* Schedules of Controlled

[11] A law subjected to the *Pike* test triggers "a deferential 'balancing test.'" *Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me.*, 520 U.S. 564, 596 (1997) (Scalia, J., dissenting). Such a law will be sustained unless "the burden on [interstate] commerce is clearly excessive in relation to the putative local benefits." *Pike*, 397 U.S. at 142.

Substances: Rescheduling of Food and Drug Administration Approved Products Containing Marijuana from Schedule I to Schedule III; Corresponding Change to Permit Requirements, 91 Fed. Reg. 22714, 22721-22 (Apr. 28, 2026) (to be codified at 21 C.F.R. pt. 1301). The DOJ is also considering broader rescheduling of cannabis from Schedule I to Schedule III. Neither action alters the question presented.

Neither the April rescheduling order nor any future rescheduling order can lift the veil of nominal illegality that shrouds recreational-cannabis markets. A Schedule III drug may be sold only under a prescription issued for a legitimate medical purpose. 21 U.S.C. §§ 822-23, 829(b); 21 C.F.R. § 1306.04(a). Recreational cannabis, however, is not sold under a medical prescription and will remain nominally illegal under federal law even if cannabis is more broadly rescheduled from Schedule I to Schedule III. The DOJ confirmed that "[i]f marijuana is transferred into schedule III, the manufacture, distribution, dispensing, and possession of marijuana would remain subject to the applicable criminal prohibitions of the CSA." Schedules of Controlled Substances: Rescheduling of Marijuana, 89 Fed. Reg. 70148, 70149 (Aug. 29, 2024).

The Executive Branch can continue to exercise its prosecutorial discretion not to enforce the CSA's proscriptions and can even expand its non-enforcement policies. But recreational cannabis will remain illegal under federal law. The Ninth Circuit made clear that its "assessment of the dormant Commerce Clause's reach" does not "turn on how much the political branches still believe in the laws that are on the books." *Peridot Tree WA, Inc. v. Wash. State Liquor & Cannabis Control Bd.*, 162 F.4th 1179, 1189 (9th Cir. 2026). Thus, the circuit split will persist as long as cannabis remains illegal under the CSA.

Moreover, the DOJ's rescheduling of medical cannabis created a perverse incentive. California reacted to the rescheduling by separating its licensing scheme into medical and recreational components and allowing its licensed businesses to hold both types of licenses. Cal. Code Regs. tit. 4, § 15000.2 (effective June 4, 2026). Thus, Sacramento's medical-cannabis licenses now attach to a federally legal channel. Sacramento's licensing scheme is half federally legal, and the dormant Commerce Clause should apply to the medical half.

Washington, by contrast, has no medical-cannabis program. Its licensed dispensaries sell only one class of cannabis, which can be purchased by any person twenty-one years or older. Wash. Admin. Code § 314-55-150. Because Washington's scheme lacks a medical component, its entire cannabis market remains illegal under the CSA. Thus, under the Ninth Circuit's opinion, Washington's entire cannabis program is exempt from the dormant Commerce Clause—even as to patients purchasing cannabis for medical purposes.

In other words, Sacramento is punished for complying with federal law as much as possible, and the nondiscrimination principle should apply to its medical licenses. Washington is rewarded for not complying with federal law at all, and its entire licensing scheme is immune from the nondiscrimination principle.[12]

IV. THE RULING BELOW CONTRADICTS THIS COURT'S DECISIONS ADDRESSING THE DORMANT COMMERCE CLAUSE'S INTERSECTION WITH THE TWENTY-FIRST AMENDMENT

The ruling below contradicts this Court's rulings addressing the nondiscrimination principle's application to state liquor licensing laws enacted under Section 2 of the Twenty-first Amendment. Section 2 "grants the States virtually complete control" over intrastate alcohol sales. *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 346 (1987). But even that broad constitutional grant of power is not strong enough to "displace the rule that States may not give a discriminatory preference to their own [citizens]." *Granholm v. Heald*, 544 U.S. 460, 486 (2005).

"[T]he constitution is superior to any ordinary act of the legislature." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 178 (1803). If the nondiscrimination principle does not wane in the face of the Constitution's delegation of primacy over liquor

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[12] Despite the rescheduling, Sacramento continues to impose its residency requirement on medical cannabis licenses. Sacramento is not alone. In the wake of federal rescheduling, States continue to enforce laws restricting medical-cannabis licenses to their own residents. For example, two months after rescheduling, Nebraska enacted a law reserving licenses to individuals who "have been a resident of Nebraska for no less than four years." 238 Neb. Admin. Code § 1-004 (effective July 6, 2026).

regulation to the States, the CSA's disapproval of cannabis—which confers no power to the States—cannot displace it.

A. The Twenty-first Amendment Gives States Virtually Complete Control Over Alcohol Licensing

Section 2 of the Twenty-first Amendment commands that "[t]he transportation or importation into any State . . . for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." U.S. Const. amend. XXI, § 2. It "created an exception to the normal operation of the Commerce Clause." *Craig v. Boren*, 429 U.S. 190, 206 (1976).

Section 2 empowers each State to determine "which liquor can come into its territory and what will be done with it after it gets there." *United States v. Frankfort Distilleries, Inc.*, 324 U.S. 293, 299 (1945). This is "the core § 2 power." *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 712-13 (1984). The Twenty-first Amendment did not "'repeal' the Commerce Clause wherever regulation of intoxicating liquors is concerned." *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 330 (1964). But it "limits" the Commerce Clause's affirmative "grant of power to Congress" to regulate the importation and sale of alcohol within a state's borders. *Carter v. Virginia*, 321 U.S. 131, 137 (1944).

For example, the Commerce Clause empowers Congress to "preempt" local laws "banning from the State" particular articles of commerce. *Nat'l Pork Producers Council v. Ross*, 598 U.S. 356, 381-83

(2023). Congress possesses (but has not exercised) the power to "preempt . . . state laws" banning "pork products derived from practices its voters consider 'cruel.'" *Id.* (citation omitted). The Commerce Clause also empowers Congress to preempt state laws licensing "the practice of professions within [a state's] boundaries." *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 108-09 (1992). But the Twenty-first Amendment limits these powers as they relate to liquor.

Congress cannot override a state law banning whiskey: "the State's authority under the Twenty-first Amendment" to regulate "the importation of intoxicants . . . is transparently clear." *Craig*, 429 U.S. at 207. Likewise, Congress lacks the power to replace a State's liquor-licensing laws with its own scheme. Section 2 "grants the States virtually complete control over . . . how to structure the liquor distribution system." *324 Liquor Corp.*, 479 U.S. at 346.

The dormant Commerce Clause "exists as the inverse of the Commerce Clause."[13] It "is applicable" only to commercial activities "that Congress *could* regulate." *Nat'l Ass'n of Optometrists & Opticians LensCrafters, Inc. v. Brown*, 567 F.3d 521, 524 (9th Cir. 2009) (emphasis added). This raises a fundamental question answered by *Granholm* and *Tennessee Wine*: if Section 2 assigns primary regulatory power over intrastate liquor markets to

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[13] *Leading Case, Dormant Commerce Clause—Interstate Commerce—State Law—Extraterritoriality*—National Pork Producers Council v. Ross, 137 Harv. L. Rev. 330, 331 (2023).

the States, how can state laws regulating such markets be subject to the dormant Commerce Clause? This Court held the nondiscrimination principle constrains state action even when Congress's power to regulate interstate commerce is not absolute.

B. The Twenty-first Amendment Does Not Displace the Nondiscrimination Principle

Granholm confronted laws that made in-state wineries eligible "for a license that allows direct shipment to in-state consumers," but denied such licenses to nonresident winemakers. 544 U.S. at 470. Because these laws govern "the regulation of the physical importation of alcoholic beverages for use by [state] residents," the defendant-regulators argued that the Twenty-first Amendment displaced the nondiscrimination principle.[14] This Court disagreed.

Section 2 empowers States "to maintain an effective and uniform system for controlling liquor by regulating its transportation, importation, and use." *Granholm*, 544 U.S. at 484. But it does not "displace the rule that States may not give a discriminatory preference" to their residents. *Id.* at 486. That is because the nondiscrimination principle "is essential to the foundations of the Union" and "reflect[s] a central concern of the Framers that was an immediate reason for calling the Constitutional Convention. . . ." *Id.* at 472.

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[14] Brief for *Petitioner, Michigan Beer & Wine Wholesalers Ass'n v. Heald* (July 29, 2004) (No. 03-1120), 2004 WL 1720079, at *12.

Tennessee Wine confronted a Tennessee law that reserved liquor licenses for resident-owned businesses. *Tennessee Wine & Spirits Retailers Ass'n v. Thomas*, 588 U.S. 504, 510 (2019). The defendant sought to distinguish *Granholm* because that case involved laws regulating goods exchanged in an interstate market.[15] It posited that "a different rule applies to state laws that regulate in-state alcohol distribution" because such laws regulate intrastate sales, not people or goods crossing state lines. *Tennessee Wine*, 588 U.S. at 533.

This Court rejected that argument because the nondiscrimination principle "prohibits state discrimination against . . . 'out-of-state economic *interests*'" and affords nonresidents the right to participate in intrastate '"markets of other States on equal terms."' *Id.* at 534 (emphasis in original). Such laws are unconstitutional even if no people or goods cross a state line. *Id.*

The nondiscrimination principle restrains States in essentially the same way as the Equal Protection Clause and the First Amendment. *Id.* at 519. The Equal Protection Clause bars laws prohibiting "the importation of alcohol for sale to persons of a particular race." *Id.* The First Amendment bars laws denying liquor licenses to people "who expressed an unpopular point of view." *Id.* Similarly, States may not exercise their power to regulate liquor in ways

[15] Brief for *Petitioner, Tennessee Wine & Spirits Retailers Ass'n v. Byrd* (Nov. 13, 2018) (No. 18-96), 2018 WL 5962887, at *13.

that "violate the 'nondiscrimination principle. . . .'" *Id.* at 533.

C. The Ruling Below Is Incompatible with *Granholm* and *Tennessee Wine*

The Ninth Circuit's conclusion that the CSA immunizes cannabis-licensing schemes from the nondiscrimination principle contradicts *Granholm* and *Tennessee Wine* for several reasons.

First, if the Twenty-first Amendment's grant of "virtually complete control" over intrastate liquor licensing schemes[16] does not "outweigh the dormant Commerce Clause,"[17] it defies logic to conclude that a mere statute—which does not confer *any* power to States to license cannabis sales, much less to do so in a protectionist manner—does so. "[T]he constitution is superior to any ordinary act of the legislature." *Marbury*, 5 U.S. (1 Cranch) at 178.

Second, *Tennessee Wine* refutes the contention that the nondiscrimination principle "wanes" when applied to the sale of goods in a purely intrastate marketplace. *See Peridot Tree WA, Inc. v. Wash. State Liquor & Cannabis Control Bd.*, 162 F.4th 1179, 1188 (9th Cir. 2026). It held the dormant Commerce Clause "prohibits state discrimination against all 'out-of-state economic *interests*'" and affords nonresidents the right to participate in intrastate "'markets of other States on equal terms.'" *Tennessee Wine*, 588 U.S. at 534 (emphasis in original).

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[16] *324 Liquor Corp.*, 479 U.S. at 346.

[17] *Tennessee Wine*, 588 U.S. at 532.

Third, the ruling below ignores *Tennessee Wine's* holding that the nondiscrimination principle restrains State power in the same way as the Equal Protection Clause and the First Amendment. The nondiscrimination principle gives all Americans the "right to have access to the markets of other States on equal terms [with State residents]." *Granholm*, 544 U.S. at 473. This right "is essential to the foundations of the Union." *Id.* at 472.

Finally, just as it is illogical to assume that the Twenty-first Amendment's empowerment of States "to promote temperance" immunizes protectionist liquor laws from the nondiscrimination principle,[18] it makes no sense to assume that the CSA implicitly removes state laws "encouraging" cannabis markets but restricting profits to residents from the anti-protectionism rule.[19] Protectionist laws do not further any goals of the Twenty-first Amendment or the CSA.

V. THIS CASE IS AN IDEAL VEHICLE FOR RESOLVING THE CIRCUIT SPLIT CONCERNING THIS IMPORTANT QUESTION OF CONSTITUTIONAL LAW

The circuit split is not over an academic or infrequent issue. It concerns a live controversy unfolding across numerous states that has been addressed by numerous lower courts.

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[18] *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 276 (1984).

[19] *See Peridot Tree*, 162 F.4th at 1187-88 (citation omitted).

These consolidated cases provide the ideal vehicle to decide this important question. They arise from a final judgment of the Ninth Circuit on a pure question of law that was previously addressed—and resolved differently—by the First and Second Circuits. Neither consolidated case presents any issue of fact that could complicate or moot the case.

Nothing would be gained from further percolation. The arguments on each side have been exhaustively scrutinized: five court of appeals opinions—three majorities and two dissents—have addressed the arguments from every angle. The lines are firmly drawn. Additional decisions would add nothing but delay while protectionist schemes multiply.

Allowing the question to percolate further will cause permanent damage because cannabis licenses are finite. If States issue licenses under the Ninth Circuit's ruling, they will "bake in advantages for their residents" that will plague the market even if the federal government later legalizes cannabis. *Variscite*, 152 F.4th at 61.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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