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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PERIDOT TREE WA, INC., *Plaintiff - Appellant*, v. WASHINGTON STATE LIQUOR AND CANNABIS CONTROL BOARD; WILLIAM LUKELA, *Defendants - Appellees*.	No. 24-3481 D.C. No. 3:23-cv-06111-TMC OPINION

Appeal from the United States District Court for the Western District of Washington
Tiffany M. Cartwright, District Judge, Presiding

PERIDOT TREE, INC.; KENNETH GAY, *Plaintiffs - Appellants*, v. CITY OF SACRAMENTO; DAVINA SMITH, *Defendants - Appellees*.	No. 24-7196 D.C. No. 2:22-cv-00289-KJM-SCR

Appeal from the United States District Court for the Eastern District of California Kimberly J. Mueller, District Judge, Presiding

Argued and Submitted June 3, 2025 Seattle, Washington

Filed January 2, 2026

Before: Johnnie B. Rawlinson, Daniel A. Bress, and Patrick J. Bumatay, Circuit Judges.

Opinion by Judge Bress

SUMMARY*

Dormant Commerce Clause

In these consolidated appeals, the panel affirmed the judgments of two district courts dismissing actions challenging, under the dormant Commerce Clause, cannabis licensing dispensary schemes in the City of Sacramento and the State of Washington, which require a person to have been a resident of the area for a specified period of time to be eligible for a cannabis dispensary license.

Both district courts held that the dormant Commerce Clause does not apply to residency requirements for cannabis dispensaries because marijuana is illegal under federal law.

Affirming the judgments of the district courts, the panel declined to extend the dormant Commerce Clause to interstate commerce in a drug market that Congress has declared illegal. Mindful of the Supreme Court's directive that extreme caution is warranted before a court deploys its implied authority under the dormant Commerce Clause, the panel saw insufficient license in Supreme Court precedent to use the judge-made dormant Commerce Clause to promote a constitutional right to interstate commerce that is unlawful under federal law.

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

COUNSEL

Jeffrey M. Jensen (argued), Jeffrey M. Jensen PC, Beverley Hills, California; Christian Kernkamp, Kernkamp Law APC, Los Angeles, California; for Plaintiff-Appellant.

Tera M. Heintz (argued), Deputy Solicitor General; Penny Allen, Senior Counsel; Samantha Hellwig and Jonathan Pitel, Assistant Attorneys General; Robert W. Ferguson, Washington Attorney General; Office of the Washington Attorney General, Olympia, Washington; Lee H. Roistacher (argued), Dean Gazzo Roistacher LLP, Solana Beach, California; Andrea M. Velasquez, Supervising Deputy City Attorney; Susan A. Wood, City Attorney; Sacramento Office of the City Attorney, Sacramento, California; for Defendants-Appellees.

Jason Horst, Horst Legal Counsel PC, Walnut Creek, California, for Amicus Curiae Alliance for Sensible Markets.

Taylor Kayatta and Arthur J. Wylene, Rural County Representatives of California, Sacramento, California, for Amici Curiae California State Association of Counties and League of California Cities.

OPINION

BRESS, Circuit Judge:

Marijuana remains illegal under federal law, but many states have legalized its sale and use for medicinal and recreational purposes. To ensure proper oversight over marijuana sales, these states and localities have adopted a variety of rules governing cannabis dispensaries. As part of these regimes, certain jurisdictions require a person to have been a resident of that area for a specified period of time to be eligible for a cannabis dispensary license, or else give priority to these persons when issuing licenses. We are asked to decide whether two of these cannabis dispensary licensing regimes—those of the State of Washington and the City of Sacramento—violate the dormant Commerce Clause.

We hold that the dormant Commerce Clause does not apply here. Mindful of the Supreme Court's directive that "'extreme caution' is warranted before a court deploys" its "implied authority" under the dormant Commerce Clause, *Nat'l Pork Producers Council v. Ross*, 598 U.S. 356, 390 (2023) (quoting *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 310 (1997)), we decline to extend the dormant Commerce Clause to interstate commerce in a drug market that Congress has declared illegal. Although we appreciate that judges on other courts are divided on this question, we see insufficient license in Supreme Court precedent to use the judge-made dormant Commerce Clause to promote a constitutional right to interstate commerce that is unlawful under federal law. The two district courts in these cases both reached the same conclusion. In both cases, we therefore affirm.

I

A

Under the federal Controlled Substances Act (CSA), it is unlawful "to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance," including marijuana. 21 U.S.C. § 841(a)(1); *see* 21 U.S.C. § 812(c) (classifying marijuana as a Schedule I substance); *Patients Mut. Assistance Collective Corp. v. Comm'r of Internal Revenue*, 995 F.3d 671, 674 (9th Cir. 2021). Marijuana's classification under the CSA reflects a congressional determination about marijuana's "high potential for abuse, lack of any accepted medical use, and absence of any accepted safety for use in medically supervised treatment." *Gonzales v. Raich*, 545 U.S. 1, 14 (2005) (citing 21 U.S.C. § 812(b)(1)).

Despite this longstanding federal prohibition, many states have legalized marijuana for adult medicinal and recreational purposes. *See, e.g.*, *Raich*, 545 U.S. at 5; *Standing Akimbo, LLC v. United States*, 141 S. Ct. 2236, 2237 (2021) (statement of Thomas, J., respecting the denial of certiorari); *Peridot Tree, Inc. v. City of Sacramento*, 94 F.4th 916, 921 (9th Cir. 2024). In response, Congress has sent "mixed signals." *Peridot Tree*, 94 F.4th at 923. For the last approximately ten years, Congress has included a version of the Rohrabacher-Farr Amendment in its appropriation to the U.S. Department of Justice. *See, e.g.*, Consolidated Appropriations Act of 2024, Pub. L. No. 118-42, § 531, 138 Stat. 25 (2024); *Standing*

Akimbo, 141 S. Ct. at 2237 (statement of Thomas, J.); *Peridot Tree*, 94 F.4th at 923–24; *United States v. Kleinman*, 880 F.3d 1020, 1027 (9th Cir. 2017); *Northeast Patients Grp. v. United Cannabis Patients & Caregivers of Maine*, 45 F.4th 542, 547–48 (1st Cir. 2022). This appropriations rider provides that "[n]one of the funds made available under this Act to the Department of Justice may be used . . . to prevent [specified states] from implementing their own laws that authorize the use, distribution, possession, or cultivation of medical marijuana." Consolidated Appropriations Act of 2024, 138 Stat. at 174.

For its part, the DOJ in recent times has not made marijuana an enforcement priority. *See, e.g.*, *Peridot Tree*, 94 F.4th at 924. Recently, on December 18, 2025, the President signed an Executive Order concerning the use of marijuana for medical purposes. *See* Increasing Medical Marijuana and Cannabidiol Research, Executive Order (Dec. 18, 2025), https://www.whitehouse.gov/presidential-actions/2025/12/increasing-medical-marijuana-and-cannabidiol-research/. As part of this Executive Order, the President directed the Attorney General to "take all necessary steps to complete the rulemaking process related to rescheduling marijuana to Schedule III of the CSA . . . in accordance with Federal law." *Id.* The Executive Order further directs the Executive Branch to "work with the Congress to update the statutory definition of final hemp-derived cannabinoid products to allow Americans to benefit from access to appropriate full-spectrum [cannabidiol] products while preserving the Congress's intent to restrict the sale of products that pose serious health risks." *Id.*

Nevertheless, at this time, marijuana remains illegal under the CSA.

California legalized recreational cannabis in 2016, and many counties and cities then passed ordinances to regulate its sale, production, and purchase. *Peridot Tree*, 94 F.4th at 921. These measures were designed to "prevent state-level legalization from harming local communities" while also creating business opportunities for "those negatively affected by marijuana's past criminalization." *Id.* Sacramento's Cannabis Opportunity Reinvestment and Equity (CORE) Program is the city's mechanism for licensing marijuana dispensaries (medical and recreational). *Id.* The CORE Program established five different classifications for licensing purposes, two of which are relevant here:

> Classification 1. A current or former resident of the City of Sacramento who previously resided or currently resides in a low-income household and was either: a) arrested or convicted for a cannabis related crime in Sacramento between the years 1980 and 2011; or is b) an immediate family member of an individual described in subsection a of Classification 1 or Classification 2.
>
> Classification 2. A current or former resident of the City of Sacramento who has lived in a low-income household for at least five (5) years, between the years of 1980 and 2011 in the following zip codes: [¶] 95811, 95815, 95817, 95820, 95823, 95824, 95826, 95828, and 95818.

Both of these Classifications require participants to be current or former Sacramento residents. The other Classifications pertaining to businesses are keyed to the Classification 1 and 2 criteria.

After implementing the CORE Program, Sacramento set aside ten storefront cannabis dispensary permits specifically for Classification 1 and 2 participants only. *See Peridot Tree*, 94 F.4th at 922. A city ordinance limited the total number of permits to 40, and the other 30 had already been granted, so the only people eligible to apply for an available permit were those who met the residency requirement. *Id.*

Like California, Washington has also legalized marijuana, doing so in 2012 through a voter initiative known as Initiative Measure 502. This Measure authorized the Washington State Liquor & Cannabis Board ("LCB") to regulate the cannabis market. RCW §§ 69.50.331(4), .342, .345 (2013). Since 2015, Washington has imposed a six-month residency requirement for cannabis dispensary licenses. *Id.* § 69.50.331(1)(b) (2015). In 2020, Washington created the Social Equity Program in an effort "to reduce barriers to entry to the cannabis industry for individuals and communities most adversely impacted by the enforcement of cannabis-related laws." 2020 Wash. Sess. Laws Ch. 236 § 1(1). Under this program, which bears similarities to the Sacramento regime that we discussed above, the LCB now reserves retail cannabis licenses exclusively for social equity applicants. RCW § 69.50.335(1)(a), (2)(a).

In 2022, the LCB adopted the Social Equity Program criteria. To be considered, applicants must meet the following criteria:

> (b) At least a 51 percent majority, or controlling interest, in the applicant, must be held by a person, or persons, who has or have resided in Washington state for six months prior to the application date, consistent with RCW 69.50.331, and meets at least two of the following qualifications:
>
> (i) Qualification 1: The social equity applicant or applicants have lived in a disproportionately impacted area in Washington state for a minimum of five years between 1980 and 2010; or
>
> (ii) Qualification 2: The social equity applicant or a family member of the applicant has been arrested or convicted of a cannabis offense; or
>
> (iii) Qualification 3: The social equity applicant's household income in the year prior to submitting the application was less than the median household income within the state of Washington as calculated by the United States Census Bureau.

Wash. Admin. Code § 314-55-570(2) (2022). "Disproportionately impacted area" means: "a census tract within Washington state where community members were more likely to be impacted by the war on drugs. The board will provide maps to identify disproportionately impacted areas." *Id.* § 314-55-570(1)(a). The LCB posted maps identifying disproportionately impacted areas in Washington by decade, from 1980 to 2010. Applicants are awarded points according to a scoring rubric—40 points for having lived in a disproportionately impacted area, and 20 to 40 additional points if they have lived in the area for longer periods of time. Washington amended its social equity provision effective January 2025, but in ways that are immaterial to this case. *See id.* § 314-55-570(4) (2025).

B

Kenneth Gay is a resident of Michigan and the majority owner of Peridot Tree, Inc., a California corporation, and Peridot Tree WA, a Washington corporation. The Peridot Tree entities are the plaintiffs in these two cases. We will refer to them in the singular, as Peridot.

Peridot applied for a license in King County, Washington through the Social Equity Program. On September 17, 2023, the LCB notified Peridot that its application would not be considered because Peridot failed to meet the minimum residency qualifications. Peridot asserts that it met all application requirements except those favoring Washington residents. A similar story played out in Sacramento. Peridot claims it met Sacramento's requirements for CORE Classification 1 and 2, except for the residency requirement, which was the reason its application to operate a Sacramento cannabis dispensary was rejected.

Peridot filed substantially identical lawsuits under 42 U.S.C. § 1983 claiming that the Sacramento and Washington cannabis dispensary licensing schemes violated the dormant Commerce Clause by preferring in-state interests over out-of-state competitors. The Sacramento case had a prior trip to our court on a different issue involving abstention. *See Peridot Tree*, 94 F.4th at 924. Ultimately, the district courts in both cases dismissed Peridot's suits under Rule 12(b)(6) and denied Peridot's requests for preliminary injunctions.

Both district courts held that the dormant Commerce Clause does not apply to residency requirements for cannabis dispensaries because marijuana is illegal under federal law. The district court in the Western District of Washington, for example, concluded that the dormant Commerce Clause does not "protect an interstate market that Congress affirmatively prohibited, given that protecting this market would facilitate illegal interstate activity. Peridot cannot use the dormant Commerce Clause to demand a constitutional right to participate in an illegal interstate market." The district court in the Eastern District of California reasoned similarly in an equally thoughtful opinion on this question of first impression in the Ninth Circuit.

We consolidated these cases for oral argument and now issue this single opinion that resolves both appeals. We review dismissals under Rule 12(b)(6) de novo. *See, e.g.*, *Pardini v. Unilever U.S., Inc.*, 65 F.4th 1081, 1084 (9th Cir. 2023).

II

A

The Constitution's Commerce Clause gives Congress the power to "regulate Commerce . . . among the several States." U.S. CONST. art. I, § 8, cl. 3. Although it is an affirmative grant of power to Congress, the Supreme Court has interpreted the Commerce Clause to impliedly preclude certain state laws that restrain interstate commerce. *See, e.g.*, *Pork Producers*, 598 U.S. at 368; *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 588 U.S. 504, 514 (2019). This "'negative' aspect of the Commerce Clause prevents the States from adopting protectionist measures and thus preserves a national market for goods and services." *Tenn. Wine & Spirits Retailers Ass'n*, 588 U.S. at 514 (quoting *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273 (1988)).

The "very core" of the dormant Commerce Clause is that States may not discriminate against interstate commerce through "regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *Pork Producers*, 598 U.S. at 369 (first quoting *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 581 (1997), and then quoting *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 337–38 (2008)). A law that discriminates against interstate commerce is "'virtually *per se invalid*' and will survive only if it 'advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.'" *Dep't of Revenue of Ky.*, 553 U.S. at 338 (citation omitted) (quoting *Oregon Waste Sys., Inc. v. Dep't of Env'tl*

Quality of Ore., 511 U.S. 93, 99, 101 (1994)); *see also South Dakota v. Wayfair, Inc.*, 585 U.S. 162, 173 (2018); *Flynt v. Bonta*, 131 F.4th 918, 923 (9th Cir. 2025). By presumptively prohibiting discrimination against interstate commerce, the dormant Commerce Clause inhibits States from "restrain[ing] the free exchange of goods and services in an interstate market." *Flynt*, 131 F.4th at 923; *see also Pork Producers*, 598 U.S. at 369; *South Dakota*, 585 U.S. at 173; *Dep't of Revenue of Ky.*, 553 U.S. at 337–38.

In analyzing the legal question in this case, we are guided by two key aspects of the Supreme Court's dormant Commerce Clause jurisprudence. First, "the proposition that the Commerce Clause by its own force restricts state protectionism is deeply rooted in" the Supreme Court's case law. *Tenn. Wine & Spirits Retailers Ass'n*, 588 U.S. at 515. It is our role as an inferior court to apply this case law, faithful to its moorings and objectives.

Second, although the dormant Commerce Clause is based on longstanding precedent, the Supreme Court has also instructed that we must tread cautiously when considering whether to invalidate state laws under the court-inferred dormant Commerce Clause. As the Supreme Court recently reiterated, "'extreme caution' is warranted before a court deploys this implied authority." *Pork Producers*, 598 U.S. at 390 (quoting *Gen. Motors Corp.*, 519 U.S. at 310). In *Pork Producers*, the Supreme Court's latest word in this area, the Court "decline[d] th[e] invitation" to fashion "new and more aggressive constitutional restrictions on the ability of States to regulate goods sold within their borders." *Id.* at 364. As the Court made clear, "[p]reventing state officials from enforcing a democratically adopted state law in the name of the dormant Commerce Clause is a matter of 'extreme delicacy.'" *Id.* at 390 (quoting *Conway v. Taylor's Executor*, 66 U.S. 603, 634, 1 Black 603 (1861)). This caution about overriding democratically enacted laws through the "implied judicial power" of the dormant Commerce Clause, *id.*, is itself deeply rooted in the Court's longstanding guidance in this area, which has historically emphasized this same point. *See, e.g.*, *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 343–45 (2007); *Gen. Motors Corp.*, 519 U.S. at 309– 10; *S.C. State Highway Dep't v. Barnwell Bros.*, 303 U.S. 177, 190–91 (1938); *Conway*, 66 U.S. at 634, 1 Black 603.

B

This case raises the question of whether the dormant Commerce Clause even applies to state restrictions on an interstate market that Congress has deemed unlawful. Is there, in effect, an implied constitutional right to engage in illegal interstate commerce? The Supreme Court has never answered this question. But two other circuits have, as have a number of district courts. Although other circuits have held that the dormant Commerce Clause applies to marijuana even though it is illegal under federal law, judges on those courts have disagreed and would have held otherwise. Numerous district courts, meanwhile, have aligned themselves with those dissenting views and have concluded that the dormant Commerce Clause does not apply to protectionist marijuana laws. Before turning to the question ourselves, we review what others have said on the issue.

The first circuit to address this issue was the First Circuit in *Northeast Patients Group*, 45 F.4th at 542. That case concerned a dormant Commerce Clause challenge to a Maine law requiring that officers and directors of medical marijuana dispensaries operating in Maine be Maine residents. *Id.* at 544. Over a dissent, the First Circuit held that the Maine law violated the dormant Commerce Clause.

The First Circuit began by explaining that if Maine's residency requirement "were applied to a lawful market," it would not survive dormant Commerce Clause scrutiny because it would not be "narrowly tailored to serve a legitimate local purpose." *Id.* at 546. The court then concluded that it made no difference that "federal law makes participation in the market to which the residency requirement applies illegal." *Id.* at 546–47.

The First Circuit recognized that notwithstanding the CSA, there "is an established, albeit illegal, interstate market" in marijuana. *Id.* at 547 (emphasis removed) (quoting *Raich*, 545 U.S. at 18). It rejected the notion that through the CSA, Congress had effectively displaced the dormant Commerce Clause in this area or otherwise consented to protectionist state measures, believing any such congressional intent could not be sufficiently discerned. *Id.* at 548–56. Nor did it matter to the dormant Commerce Clause analysis that marijuana is illegal under federal law. In the First Circuit's view, "given the long-held understanding that the dormant Commerce Clause has a negative aspect, there would seem to be no basis for our declining to enforce the dormant Commerce Clause unless there were a reason for us to think that Congress" has articulated a contrary intent, which Congress had not done. *Id.* at 556–57.

Judge Gelpí issued a forceful dissent. Judge Gelpí "disagree[d] that the test we have developed for the mine-run of dormant Commerce Clause cases applies automatically or with equal vigor when the market in question is illegal as a matter of federal law." *Id.* at 558 (Gelpí, J., dissenting). In his view, "the principles that animate the dormant Commerce Clause" do not apply in this context. *Id.* A central rationale of the dormant Commerce Clause is maintaining "an unencumbered 'national market.'" *Id.* at 559 (quoting *Gen. Motors Corp.*, 519 U.S. at 299). That "'fundamental objective'" is "inapplicable" when "Congress has already outlawed the national market for marijuana." *Id.* (quoting *Gen. Motors Corp.*, 519 U.S. at 299). Judge Gelpí would have held that "illegal markets are constitutionally different in kind," and that the dormant Commerce Clause should thus not be understood to "protect[] the free-flowing operation of national markets that Congress has already made illegal." *Id.* That was especially true considering that by the logic of the majority opinion, the dormant Commerce Clause would promote the free exchange of heroin, fentanyl, or any other illicit good that a state might try to legalize. *Id.*

The Second Circuit in *Variscite NY Four, LLC v. New York State Cannabis Control Bd.*, 152 F.4th 47 (2d Cir. 2025), was the second federal court of appeals to address this issue. It considered a dormant Commerce Clause challenge to a New York law that prioritized New York residents for marijuana dispensary licenses. *Id.* at 52, 54–55. Like the First Circuit, the Second Circuit held that this regime violated the dormant Commerce Clause, although once again, the panel was not unanimous in its decision. *Id.* at 65–66.

The *Variscite NY Four* majority began by explaining that the dormant Commerce Clause is "expressed through a bright-line rule: 'the Commerce Clause prohibits the enforcement of state laws driven by economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.'" *Id.* at 60 (quoting *Pork Producers*, 598 U.S. at 369). The court acknowledged that the "fundamental objective" of maintaining a national market free of state interference "applies with some irony in the context of *illicit* markets." *Id.* (quoting *Gen. Motors Corp.*, 519 U.S. at 299). But in the court's view, "that objective should not be conflated with the rule itself." *Id.* It was thus of "no constitutional import" that marijuana is illegal at the federal level. *Id.* (quoting *Raich*, 545 U.S. at 19 n.29). And exempting illegal markets from the dormant Commerce Clause would produce market distortion if Congress later legalized marijuana, for at that point States would have "bake[d] in advantages for their residents." *Id.* at 61. Nor, the Second Circuit concluded, had Congress sufficiently expressed its intent to bless protectionist state regimes in this area. *Id.* at 61–63.

Chief Judge Livingston dissented, describing the majority's conclusion as "obviously wrong." *Id.* at 66 (Livingston, C.J., dissenting). In Chief Judge Livingston's view, "[w]hen Congress criminalizes a market," we should "presume that it authorizes states to enact their own laws that aid that objective, whether by banning, restricting, or burdening those transactions." *Id.* at 67. And we should "not interpret a doctrine implied from the Commerce Clause—an affirmative grant of power to Congress—to *require* states to enact laws that promote the very interstate commerce Congress wants to eradicate." *Id.*[1]

The First and Second Circuits are presently the only federal courts of appeals to evaluate whether the dormant Commerce Clause applies to protectionist marijuana laws. At the district court level, the views of the dissents in these cases have found greater purchase. A few district courts, like the First and Second Circuits, have held that the dormant Commerce Clause invalidates discriminatory cannabis laws. *See NPG, LLC v. City of Portland, Maine*, 2020 WL 4741913, at *9–10 (D. Me. Aug. 14, 2020); *Finch v. Treto*, 606 F. Supp. 3d 811, 831–33 (N.D. Ill. 2022). But many other district courts—including the two decisions on review here—have held that the dormant Commerce Clause does not apply to marijuana given its status as an illegal drug under federal law. *See Charm City Hemp, LLC v. Moore*, 2025 WL 2165173, at *22–23 (D. Md. July 30, 2025); *Fluresh, LLC v. City of Grand Rapids*, 2025 WL 1122034, at *8 (W.D. Mich. Apr. 16, 2025); *Variscite, Inc. v. City of L.A.*, 2025 WL 433448, at *3 (C.D. Cal. Feb. 4, 2025); *Jensen v. Maryland Cannabis Admin.*, 719 F. Supp. 3d 466, 483 (D. Md. 2024), *aff'd by* 151 F.4th 169 (4th Cir. 2025); *Variscite NY Four, LLC v. New York State Cannabis Control Bd.*, 2024 WL 406490, at *12 (N.D.N.Y. Feb. 2, 2024), *overruled by*

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[1] The Fourth Circuit recently resolved a dormant Commerce Clause challenge to a Maryland cannabis licensing law. *See Jensen v. Maryland Cannabis Admin.*, 151 F.4th 169 (4th Cir. 2025). But the court held that the law did not discriminate against out-of-state interests. *Id.* at 176–77. The court did not reach "the question of whether the Dormant Commerce Clause applies to the marijuana market." *Id.* at 177 n.3.

152 F.4th 47; *Brinkmeyer v. Washington State Liquor & Cannabis Board*, 2023 WL 1798173, at *9–13 (W.D. Wash. Feb. 7, 2023); *Original Invs., LLC v. State of Oklahoma*, 542 F. Supp. 3d 1230, 1231 (W.D. Okla. 2021); *see also Ctrl Alt Destroy v. Elliott*, 2025 WL 790963, at *8 (S.D. Cal. Mar. 12, 2025) (bolstering holding under unclean hands doctrine by relying on the "numerous district courts" that "have held that the protections afforded by the dormant Commerce Clause do not apply to the commercial cannabis industry, a federally illegal market").

Just as both district courts below did, many of these district courts have relied on Judge Gelpí's dissent in the First Circuit case. *See, e.g.*, *Fluresh*, 2025 WL 1122034, at *8; *Jensen*, 719 F. Supp. 3d at 483. As one district court wrote, the goal of the dormant Commerce Clause—"'preserv[ing] a national market for competition undisturbed by preferential advantages conferred by a State upon its residents'"—is "not served by encouraging such a market for a good that Congress has already expressly declared to be illegal and against the public interest." *Jensen*, 719 F. Supp. 3d at 483 (quoting *Northeast Patients Grp.*, 45 F.4th at 558–59 (Gelpí, J., dissenting)).

C

There is force to the argument that through the CSA, Congress expressed an intent to permit protectionist state regimes that restrict interstate commerce in marijuana, and that the usual test for assessing this congressional intent should be relaxed when Congress has made the good in question illegal. *See Variscite NY Four*, 152 F.4th at 67–70 (Livingston, C.J., dissenting); *Northeast Patients Grp.*, 45 F.4th at 559 (Gelpí, J., dissenting)). But we conclude as an antecedent matter that the dormant Commerce Clause need not be extended to facilitate interstate commerce that is illegal under federal law.

The Supreme Court has never extended the dormant Commerce Clause in this manner or suggested that it should be so extended. Instead, the Court has explained that the "fundamental objective" of the dormant Commerce Clause is to "preserv[e] a national market for competition undisturbed by preferential advantages conferred by a State upon its residents or resident competitors." *Gen. Motors Corp.*, 519 U.S. at 299. That "fundamental objective" of preserving "'free private trade in the national marketplace,'" *id.* at 287, 299 (quoting *Reeves, Inc. v. Stake*, 447 U.S. 429, 437 (1980)), surely wanes when the national marketplace is prohibited under federal law.

When considering the dormant Commerce Clause, "it is the responsibility of the judiciary to determine whether action taken by state or local authorities unduly threatens the values the Commerce Clause was intended to serve." *Wardair Canada, Inc. v. Florida Dep't of Revenue*, 477 U.S. 1, 7 (1986). And when "Congress has already outlawed the national market for marijuana," we do not see why the Constitution would insist that we "protect[] the free-flowing operation" of illegal interstate commerce. *Northeast Patients Grp.*, 45 F.4th at 559 (Gelpí, J., dissenting). The dormant Commerce Clause reflects an anti-discrimination rule, to be sure, but the Supreme Court has not said that the rule must blindly apply in all contexts. And it is not too much to think that the "premise" of the Clause's negative component is the existence of a legally valid market that federal law does not proscribe. *Id.* Nothing in dormant Commerce Clause precedent requires us to indulge the "obvious 'irony' of applying a doctrine implied from an affirmative grant of power to Congress to preserve a national market that Congress does not want to exist." *Variscite NY Four*, 152 F.4th at 70 (Livingston, C.J., dissenting) (quotations omitted).

The contours of the dormant Commerce Clause are not so rigid as to be unable to account for the fact that marijuana is illegal under federal law. *See Flynt*, 131 F.4th at 923 ("As a judge-made and enforced doctrine, the strictures of the dormant Commerce Clause have ebbed and flowed over time through case law, with the Supreme Court refining the doctrine's proper scope."). "[E]xtreme caution" and "extreme delicacy" are the orders of the day when considering whether to extend the protections of the dormant Commerce Clause. *Pork Producers*, 598 U.S. at 390 (quotations omitted). The caution that the Supreme Court has counseled reflects not only hesitancy about the ability of courts to fashion principled rules to govern interstate commerce, but the fact that any invocation of the dormant Commerce Clause amounts to a judicial intrusion on a democratically enacted law. *See id.* Here, extending the dormant Commerce Clause to cannabis dispensary licensing regimes would override the democratic process twice over, first by potentially invalidating state and local laws governing marijuana dispensaries, and then by countermanding Congress's own judgment about the harmfulness of the controlled substance in question. The extreme caution we must exercise when working with this implied doctrine would seem at its apex when confronted with the prospect of hammering in a regulatory regime through the blunt force object of a per se rule of invalidity, which would force states to open up their marijuana markets even further once they have opened them partway.

The mixed signals that the federal government has sent about marijuana legalization at the state level do not change our calculus. It is true that Congress has used its power of the purse to limit DOJ interference with state medical marijuana regimes, *see, e.g.*, Consolidated Appropriations Act of 2024, 138 Stat. at 174, and that federal enforcement, if it can be called that, reflects a non-enforcement approach. But our assessment of the dormant Commerce Clause's reach cannot turn on how much the political branches still believe in the laws that are on the books. "[I]n our constitutional order, it's Congress that passes laws, Congress that saw fit to enact 21 U.S.C. § 841, and Congress that in § 841 made the distribution of marijuana a federal crime." *Feinberg v. C.I.R.*, 808 F.3d 813, 816 (10th Cir. 2015) (Gorsuch, J.). That is enough to tell us that the national marketplace Peridot seeks to further open is one that federal law disallows.

There is an ongoing debate in our country, at both the national and local levels, about whether marijuana should be legalized and, if so, what kinds of regulatory schemes should govern. But when Congress has made the national marketplace illegal, the premises of the dormant Commerce Clause do not require the courts to leapfrog the political process and inaugurate free trade in the market for marijuana dispensary licenses. And we are uncertain where the contrary logic would take us, if for example, a state were to legalize even more harmful drugs, such as heroin. *See Northeast Patients Grp.*, 45 F.4th at 559

(Gelpí, J., dissenting) ("My reluctance to join my colleagues in extending constitutional solicitude to protecting an illegal market is heightened if one were to imagine extending the same logic to relieve burdens on the illicit trade in other Schedule I controlled substances, such as heroin, fentanyl, or cocaine, or indeed most any other black market in goods or services which Congress has determined is harmful to the public interest."). A doctrine of constitutional law that catapults a state's legalization of an illicit drug into dormant Commerce Clause protection would have courts facilitating, if not creating, the very national marketplaces that Congress has disallowed. This is a far cry from what the dormant Commerce Clause set out to do.

In reaching a different conclusion, the Second Circuit expressed concern that without the protections of the dormant Commerce Clause, "States would then be free today to bake in advantages for their residents should Congress later legalize the market." *Variscite NY Four*, 152 F.4th at 61. But the possibility that Congress might one day legalize marijuana or that marijuana may at some point become reclassified under the CSA provides no basis for the judicial enabling of a marketplace that is presently not supposed to exist as a matter of federal law. *See Raich*, 545 U.S. at 19 (discussing "the federal interest in eliminating commercial transactions in the interstate market in their entirety"). We are not persuaded that the dormant Commerce Clause requires us to contradict Congress's judgment and protect an illegal national marketplace from state restrictions.

The judgments of the district courts are **AFFIRMED.**

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

Peridot Tree, Inc. and Kenneth Gay, *Plaintiffs,* v. City of Sacramento and Davina Smith, *Defendants.*	No. 2:22-cv-00289-KJM-SCR ORDER

The federal government's policy on marijuana use and distribution was once clear and "comprehensive." *Gonzales v. Raich*, 545 U.S. 1, 10 (2005). Today, however, as one Justice put it a few years ago, the federal policy has become "a half-in, half-out regime that simultaneously tolerates and forbids local use of marijuana." *Standing Akimbo, LLC v. United States*, 141 S. Ct. 2236–37 (2021) (Statement of Thomas, J., respecting the denial of certiorari). This inherently "contradictory" policy sometimes "conceals traps for the unwary." *Id.*

In this case, for example, a prospective marijuana dispensary and its majority shareholder allege the City of Sacramento, California has discriminated against them in violation of the "dormant" aspect of the Constitution's Commerce Clause. Ordinarily, the Commerce Clause implicitly preserves free and open national markets from state and local protectionism. *See Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 588 U.S. 504, 514 (2019). As explained in this order, however, the plaintiffs cannot assert a constitutional right to participate in a national marijuana market because Congress attempted to eliminate that market by passing the federal Controlled Substances Act. Even if the result is counter-intuitive, in that it effectively permits cities and states to favor local businesses operating in a market Congress has attempted to eliminate, this court cannot ignore federal law, and it cannot second-guess the Attorney General's or a local prosecutor's decisions about how to allocate their limited resources. The court thus **grants** the city's motion to dismiss, and **denies** the plaintiffs' motion for a preliminary injunction.

I. BACKGROUND

In 2016, California voters passed a ballot initiative known as Proposition 64, which changed state laws that had made it a crime to use marijuana recreationally. *See generally* Control, Regulate and Tax Adult Marijuana Act, 2016 Cal. Legis. Serv. A-92 (West). Many local governments within California, including Sacramento, then began passing regulations and ordinances about where and how marijuana could be produced, sold and used. The Sacramento City Council adopted what it called the "CORE" Program, for "Cannabis Opportunity Reinvestment and Equity." *See* Sacramento City Council Res. No. 2020-0338 (Oct. 13, 2020) & No. 2018-0323 (Aug. 9, 2018). The purpose of the CORE program is reducing "barriers of entry and participation" in the cannabis industry to those who "have been negatively impacted by the disproportionate law enforcement of cannabis related crimes." Res. No. 2018-0323 at 19. Under this program, a person cannot obtain a permit to operate a cannabis dispensary in Sacramento unless that person is a "current or former resident," among other requirements. *See id.* at 23; Res. No. 2020-338.

Peridot Tree, Inc., is a California company. First Am. Compl. ¶ 1, ECF No. 12. Kenneth Gay is its majority shareholder. *Id.* ¶ 2. They applied for a dispensary license and asked to participate in the process, but the City rejected their application because Gay has never lived in Sacramento. *See id.* ¶¶ 17–22. According to his complaint, he otherwise meets the requirements of the CORE program. *Id.* ¶¶ 18–19. Peridot and Gay filed this lawsuit after the City rejected their permit application. *See id.* ¶¶ 22. They claim the City's program is unconstitutional because it discriminates against out-of-state applicants, and they seek declaratory judgment to the same effect. *Id.* ¶¶ 23–31. In addition to a declaration, their complaint requests damages, an injunction, costs, fees, and whatever other relief the court deems appropriate. *Id.* at 10 (prayer for relief).

The City moved to dismiss the complaint for failure to state a claim; Peridot and Gay then sought a preliminary injunction barring the City from issuing licenses under its CORE program. Both motions are fully briefed.[1] The court also directed the parties to submit supplemental briefs about whether the court should abstain from adjudicating their dispute, which the parties filed.[2] After a hearing, the court determined it had jurisdiction over the dispute but declined to exercise that jurisdiction and stayed the case. *See* Prev. Order, ECF No. 36. Peridot and Gay appealed, and the Ninth Circuit held this court could not abstain. *See Peridot Tree, Inc. v. City of Sacramento*, 94 F.4th 916, 935–36 (2024). But the circuit took care to make clear it was not weighing in on the merits of the parties' underlying dispute and the dormant Commerce Clause. *See id.* at 936 & n.10. On remand, this court permitted the parties to file supplemental briefs, which they have now done, and the court held a further hearing. *See* Mins., ECF No. 50; Pls.' Suppl. Br. on Remand, ECF No. 55; Defs.' Suppl. Br. on Remand, ECF No. 52. Jeffrey Jenson

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[1] *See generally* Mot. Dismiss, ECF No. 13; Mem. Dismiss, ECF No. 13-1; Opp'n Dismiss, ECF No. 15; Reply Dismiss, ECF No. 17; Mot. Prelim. Inj., ECF No. 26; Opp'n Prelim. Inj., ECF No. 28; Reply Prelim. Inj., ECF No. 29.

[2] *See generally* Order (May 17, 2022), ECF No. 19; Pls.' Suppl. Abstention Br., ECF No.21; Defs.' Suppl. Abstention Br., ECF No. 20.

appeared for Gay and Peridot, and Andrea Velasquez appeared for the defense.

II. DISCUSSION

The parties' most fundamental dispute after remand is whether the Constitution prohibits state and local governments from giving local marijuana businesses and entrepreneurs advantages over non-local competitors. There is no obvious answer. Neither the Ninth Circuit nor the Supreme Court has weighed in, and the question has divided other federal courts. Many of these courts have written thorough and thoughtful decisions, which the parties have summarized well in their post-remand briefs. The court here summarizes the most persuasive arguments for each side.

The first of these arguments begins with the motivation behind the constitutional rule at the basis of Peridot's and Gay's complaint, which rests on the "dormant" Commerce Clause. The Commerce Clause gives Congress "Power... To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3. The dormant Commerce Clause is a prohibition the Supreme Court has long inferred from the Commerce Clause and its history. Under that rule, the Constitution implicitly "prohibits state laws that unduly restrict interstate commerce" and "preserves a national market for goods and services." *Tenn. Wine & Spirits*, 588 U.S. at 514.

"[R]emoving state trade barriers was a principal reason for the adoption of the Constitution." *Id.* at 515. States had "notoriously obstructed the interstate shipment of goods." *Id.* "[I]n order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation." *Granholm v. Heald*, 544 U.S. 460, 472 (2005) (quoting *Hughes v. Oklahoma*, 441 U.S. 322, 325–26 (1979)). The purpose of these efforts, as the Supreme Court once wrote, was to ensure that "every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his exports, and no foreign state will by customs duties or regulations exclude them." *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 539 (1949). "In light of this background, it would be strange if the Constitution contained no provision curbing state protectionism, and at this point in the Court's history, no provision other than the Commerce Clause could easily do the job." *Tenn. Wine & Spirits*, 588 U.S. at 516. And so, today, "if a state law discriminates against out-of-state goods or nonresident economic actors, the law can be sustained only on a showing that it is narrowly tailored to 'advance a legitimate local purpose.'" *Id.* at 518 (alterations omitted) (quoting *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 338 (2008)).

This rule generally makes good sense in cases about a variety of interstate markets, from live bait to hydroelectric power, and even in rather abstract disputes about the incentives created by a state's system for taxing personal income. *See generally*, *e.g.*, *id.* (alcoholic drinks); *Comptroller of Treasury of Md. v. Wynne*, 575 U.S. 542 (2015) (personal income tax); *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269 (1988) (motor vehicle fuel); *Maine v. Taylor*, 477 U.S. 131 (1986) (live bait); *New England Power Co. v. New

Hampshire, 455 U.S. 331 (1982) (hydroelectric power). But the dormant Commerce Clause is an odd choice of legal doctrine to apply to the interstate marijuana market. By virtue of Congress's decision to place marijuana in Schedule I of the Controlled Substances Act, "the manufacture, distribution, or possession of marijuana became a criminal offense." *Gonzales*, 545 U.S. at 14. Could it be for a federal court to infer from the Commerce Clause that the Constitution protects the free flow of commerce in a market that Congress has made criminal? Many other federal courts have concluded in recent years that the answer must be no. *See, e.g.*, *Jensen v. Md. Cannabis Admin.*, 719 F. Supp. 3d 466, 480, 483–85 (D. Md. Feb. 27, 2024), *appeal filed*, No. 24-1216 (4th Cir. Mar. 13, 2024); *Variscite NY Four, LLC v. N.Y. State Cannabis Control Bd.*, No. 23-01599, 2024 WL 406490, at *12 (N.D.N.Y. Feb. 2, 2024), appeal filed, No. 24-384 (2d Cir. Feb. 15, 2024); *Brinkmeyer v. Wash. State Liquor & Cannabis Bd.*, No. 20-5661, 2023 WL 1798173, at *10–11 (W.D. Wash. Feb. 7, 2023), *appeal dismissed*, No. 23-35162 (9th Cir. Apr. 11, 2023); *Original Invs., LLC v. State*, 542 F. Supp. 3d 1230, 1234–36 (W.D. Okla. 2021).[3]

[3] This court also rejected a constitutional challenge to the federal scheduling of marijuana in 2015. *See United States v. Pickard*, 100 F. Supp. 3d 981, 988 (E.D. Cal. 2015) ("Having approached defendants' constitutional challenges to marijuana's Schedule I status with an open mind, the court had to be prepared to grant their motion to dismiss if the law and facts supported that decision. At some point in time, in some court, the record may support granting such a motion. But having carefully considered the facts and the law as relevant to this case, the court concludes that on the record in this case, this is not the court and this is not the time.").

This is certainly not the first case about commerce in an illegal interstate market, but relatively few cases predate the marijuana disputes that have arisen in recent years. One of the few older cases was about the Crime Control Act of 1994, which made it a federal crime for some businesses "knowingly to transmit in interstate commerce information for the purpose of procuring interests in an out-of-state lottery." *Pic-A-State PA, Inc. v. Commonwealth of Pennsylvania*, 42 F.3d 175, 177–78 (3d Cir. 1994) (citing Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103–322, § 320905, 108 Stat. 1796, 2126). A Pennsylvania law similarly barred sales of "any interest in a lottery of another state or government." *Id.* at 177 (quoting Pa. Stat. Ann. tit. 72, § 3761-9(c) (Supp. 1994)). A Pennsylvania company argued the state law was unconstitutional under the Commerce Clause. *See id.* The district court enjoined the state law, and the Third Circuit reversed. *See id.* at 177, 180. "Where Congress has proscribed certain interstate commerce," it wrote, "Congress has determined that that commerce is not in the national interest." *Id.* at 179. "[I]t does not offend the purpose of the Commerce Clause for states to discriminate or burden that commerce." *Id.* If that rule governs this case, Sacramento's CORE program would stand.

But there are important differences between the Commerce Clause, on the one hand, which gives Congress its own affirmative powers—such as the power to pass the Controlled Substances Act—and the dormant Commerce Clause, on the other hand, which implicitly limits what states and local governments can do. The First Circuit Court of Appeals made this observation in a case about medical marijuana dispensaries in 2022. *See Ne. Patients Grp. v. United Cannabis Patients & Caregivers of Me.*, 45 F.4th 542, 548–50 (1st Cir. 2022). Put another way, the Commerce Clause "bounds the power of Congress," whereas the dormant Commerce Clause limits "only the powers of the states." *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 423 (1946). It is one thing to ask whether Congress has preempted a state law; it is another to ask whether states can interfere with interstate commerce. *See, e.g.*, *Ne. Patients Grp.*, 45 F.4th at 548 ("[P]reemption by a federal statute and prohibition by the dormant Commerce Clause are distinct rather than coterminous means by which federal law may limit state lawmaking that substantially burdens interstate commerce."). In this sense, Congress's decision to employ its Commerce Clause power to regulate interstate marijuana markets does not necessarily demonstrate that states and local governments are freed from any limits imposed by the dormant Commerce Clause. *See id.*

Although this distinction is logically sound, it is hard to make it fit a case like this one. No one contends Congress lacked authority as a general matter to impose criminal penalties on those who distribute marijuana. The Supreme Court has in fact confirmed Congress was acting within its constitutional authority under the Commerce Clause when it passed the Controlled Substances Act and added marijuana to the list of substances that are subject to the strictest federal criminal prohibitions. *See Raich*, 545 U.S. at 22. Nor does anyone suggest in this case that the Controlled Substances Act preempts Sacramento's CORE program or its local preferences. Rather, both sides are assuming, one way or another, that the Controlled Substances Act is no obstacle to their plans. The City contends it has authority to put the CORE program into practice despite any federal prohibitions. Peridot and Gay presumably would rather avoid a federal indictment.

Rather, the disjunction in this case follows from the implicit assumption underlying the Supreme Court's dormant Commerce Clause cases—that the market in question is a legal or desirable one, as the dissenting judge observed in a First Circuit case also involving marijuana, albeit medical marijuana dispensaries, *Ne. Patients Grp. See* 45 F.4th at 558–59 (Gelpí, J. dissenting). In this case, it would defy common sense "to find that the dormant Commerce Clause, drawn from Congress' power to regulate interstate commerce, prevents the states from passing laws which inhibit a market which Congress has already declared prohibited." *Jensen*, 719 F. Supp. 3d at 483. It is true, as the First Circuit majority concluded in the *Northeast Patients Group* case, that Congress's decision to regulate a particular market does not inherently displace the dormant Commerce Clause prohibition. *See* 45 F.4th at 549. But in the case of the interstate market for marijuana, medical or recreational, it is difficult to see what Congress intended to leave of that market, at this time, given the provisions of the Controlled Substances Act. Congress has exercised its Commerce Clause authority to prohibit the private, local, non-commercial cultivation and use of marijuana for medical purposes, even when in compliance with state law. *See Raich*, 545 U.S. at 7, 19. As the Supreme Court has found, Congress intended to "eliminat[e] commercial transactions in the interstate market in their entirety." *Id.* at 19. In short, there is no permissible interstate market to protect from state interference.

Underscoring the mismatch between this case and the traditional dormant Commerce Clause rule, other federal courts around the country have struggled when governmental defendants have asked them to apply an exception to the dormant Commerce Clause's prohibition in marijuana cases. Ordinarily, "[w]hen a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, [federal courts] have generally struck down the statute without further inquiry." *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 579 (1986). But "Congress may use its powers under the Commerce Clause to 'confer upon the States an ability to restrict the flow of interstate commerce that they would not otherwise enjoy.'" *New England Power Co.*, 455 U.S. at 340 (alterations omitted) (quoting *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 44 (1980)). Some courts thus have considered whether the Controlled Substances Act permits states to "restrict the flow of commerce" by passing protectionist marijuana distribution laws. *See, e.g.*, *Ne. Patients Grp.*, 45 F.4th at 551–56; *Brinkmeyer*, 2023 WL 1798173, at *11–13.

But there are no clear answers to this question. One reason is that for the exception to apply, Congress must make its intentions "unmistakably clear." *Taylor*, 477 U.S. at 138–39 (quoting *S. Pac. Co. v. Ariz. ex re. Sullivan*, 325 U.S. 761, 769 (1945)). This requirement makes sense in cases about legal markets. Because "the free flow of interstate trade" played such an "important role" in the states' original decision to unite, courts demand clarity from

Congress when it decides to promote some other interest instead. *See id.* But a clear statement seems an absurd demand to make of Congress when it has criminalized a market—a clear enough statement to the contrary. We cannot "expect Congress to speak out of both sides of its mouth on this issue, simultaneously illegalizing marijuana while affirmatively granting states the power to 'burden interstate commerce in a manner which would otherwise not be permissible.'" *Ne. Patients Grp.*, 45 F.4th at 559 (Gelpí, J., dissenting) (quoting *New England Power Co.*, 455 U.S. at 341). Courts also have found the congressional permission exception a poor fit for marijuana cases because the parties invoking the exception are the states and local governments who would like to permit and encourage local marijuana markets. "[I]t can hardly be said that a state effort to protect a market in medical marijuana from out-of-state competition necessarily advances Congress's evident goal... of preventing entry into that market." *Id.* at 554 (majority op.). The Congressional permission exception simply does not fit in marijuana cases, further supporting the conclusion the dormant Commerce Clause simply is not designed for cases about illegal interstate markets.

That said, this court acknowledges that some of the Supreme Court's own decisions suggest the dormant Commerce Clause applies very broadly, perhaps even to markets for illegal substances. For example, in *City of Philadelphia v. New Jersey*, the Court considered whether the dormant Commerce Clause invalidated a New Jersey law that prohibited imports of "any solid or liquid waste" without the state's approval. *See* 437 U.S. 617, 618–19 (1978). The Supreme Court held that even though New

Jersey was attempting quite literally to keep other states' garbage out, its law fell "squarely within the area that the Commerce Clause puts off limits to state regulation." *Id.* at 628. The Commerce Clause applies to "efforts by one State to isolate itself in the stream of interstate commerce from a problem shared by all." *Id.* at 629. "All objects of interstate trade merit Commerce Clause protection; none is excluded by definition at the outset." *Id.* at 622; *see also, e.g.*, *Granholm*, 544 U.S. at 472 (stating without qualification that "[r]ivalries among the States are thus kept to a minimum, and a proliferation of trade zones is prevented"); *Chem. Waste Mgmt., Inc. v. Hunt*, 504 U.S. 334, 340 & n.3 (1992) (confirming interstate commerce in "solid waste" with "particularly noxious and dangerous propensities" was subject to dormant Commerce Clause rule, even if waste had "no value"). Adopting this mode of reasoning, the First Circuit majority in *Northeast Patients Group* believed that courts should not "ignore the potential for a trade war to be destructive whenever its genesis could be traced to a single state's effort to attain predominance in a market that federal law deems unlawful." 45 F.4th at 553. "The potential for any trade war—including one started in that way—to escalate and have knock-on effects would seem rather strongly to counsel against" limiting the dormant Commerce Clause to legitimate or conventional markets. *Id.*

While understanding the argument well, this court is not persuaded because it does not overcome the simple fact that Congress long ago passed a comprehensive criminal law with the intent of eliminating all commercial marijuana transactions, and Congress has never rescinded that law despite repeated suggestions that it should. While it is possible in the meantime a broader trade war could begin with a dispute about marijuana distribution, no party has cited evidence to show an interstate trade war is at risk of erupting. And even if a dispute about marijuana markets did spill over into other markets—including those unencumbered by the Controlled Substances Act—then the parties to that broader dispute could ask the courts to intervene. The Controlled Substances Act likely would be no hurdle to a case about such a broader dispute. If, over time, Congress grew concerned—in a way it has not to date—that marijuana conflicts were frequently erupting into unacceptable trade wars, it could amend the Controlled Substances Act or pass other legislation.

Relatedly, as noted in the introduction of this order, courts have pointed out the Controlled Substances Act, even if not rescinded or amended, is no longer the broad and comprehensive ban it once was. The Executive and Legislative branches have taken conflicting and sometimes ambiguous positions about recreational and medical marijuana use. *See, e.g.*, *Peridot Tree*, 94 F.4th at 923; *Ne. Patients Grp.*, 45 F.4th at 553; *Feinberg v. C.I.R.*, 808 F.3d 813, 814 (10th Cir. 2015); *United States v. Canori*, 737 F.3d 181, 183–84 (2d Cir. 2013). Since 2015, Congress has barred the United States Department of Justice from using appropriated funds "to prevent any [states] from implementing their own laws that authorize the use, distribution, possession, or cultivation of medical marijuana." *Ne. Patients Grp.*, 45 F.4th at 547–48 (quoting Consolidated Appropriations Act, 2023, Pub. L. No. 117-103, § 531, 136 Stat. 49 (2022)); *see also* Consolidated Appropriations Act, 2024, Pub. L. No.

118-42, § 531, 138 Stat. 25 (2024). For many years, the Department of Justice has issued similar guidance to local prosecutors, counseling them not to devote resources to prosecutions against people who have complied with state marijuana laws, for example. *See Peridot Tree*, 94 F.4th at 923–24. The President of the United States has "pardoned all U.S. citizens and lawful permanent residents who 'committed the offense of simple possession of marijuana in violation of the Controlled Substances Act.'" *Id.* at 924 (quoting Proclamation No. 10467, 87 Fed. Reg. 61,441 (Oct. 6, 2022)). The same Administration also proposed to move marijuana from Schedule I to Schedule III. *See* U.S. Dep't of Justice, "Justice Department Submits Proposed Regulation to Reschedule Marijuana" (May 16, 2024).[4] And as Peridot and Gay point out, Congress confirmed Merrick Garland as Attorney General after he made clear he did not anticipate devoting resources to the prosecution of "those who are complying with the laws in states that have legalized and are effectively regulating marijuana." Pls.' Suppl. Brief on Remand at 7–8.

In addition to these and other "mixed messages" from the federal government, *Feinberg*, 808 F.3d at 814, courts also have contended with the reality that interstate marijuana markets appear to have thrived despite the purportedly strict federal prohibition. *See, e.g.*, *Ne. Patients Grp.*, 45 F.4th at 547–48. This trend appears to have begun even before the Supreme Court issued its decision in *Raich* in 2005. At least nine states, including California, had

[4] https://www.justice.gov/opa/pr/justice-department-submits-proposed-regulation-reschedule-marijuana (visited Nov. 20, 2024).

by then authorized the use of marijuana for medicinal purposes. *See* 545 U.S. 5 & n.1. California's authorization dates to the 1990s. *See id.* at 5 & n.3.

There may be some point at which the federal criminal prohibition loses meaning or force by falling to "desuetude." *Cf.*, *e.g.*, *Poe v. Ullman*, 367 U.S. 497, 501–02, 508–09 (1961) (declining to adjudicate constitutional dispute about state-law contraceptive ban that had not been enforced for "more than three-quarters of a century since its enactment"); *United States v. Elliott*, 266 F. Supp. 318, 325–26 (S.D.N.Y. 1967) (describing desuetude as "civil law doctrine rendering a statute abrogated by reason of its long and continued non-use"). But it is unclear when that point might arrive, if ever. *Cf., e.g.*, Ebba Brunnstrom, *Abortion and the Mails: Challenging the Applicability of the Comstock Act Laws Post-Dobbs*, 55 Colum. Hum. Rts. L. Rev. 1, 23 (2023) ("The idea of desuetude is compelling, especially for those unenforced statutes that implicate fairness and morality, but the doctrine has no history of real application in the context of criminal law."); Hillary Greene, *Undead Laws: The Use of Historically Unenforced Criminal Statutes in Non-Criminal Litigation*, 16 Yale L. & Pol'y Rev. 169, 169 (1997) ("The American legal system has yet to develop a coherent policy delineating when or if historically unenforced penal statutes can be invoked in non-penal contexts."). On this record, it is impossible to conclude we as a society have arrived there. As noted, Congress has not repealed or modified the Controlled Substances Act. Neither the Legislative nor Executive branch has changed the scheduling of marijuana in a way that permits interstate commercial distribution for both recreational and medical use. *See, e.g.*, *Brinkmeyer*, 2023 WL 1798173, at *12. Nor do federal prosecutors eliminate a criminal prohibition by exercising their discretion and allocating resources away from investigating and prosecuting some marijuana offenses. *See, e.g.*, *Jensen*, 719 F. Supp. 3d at 484–85.

Finally, the court hesitates to employ its equitable powers as Peridot and Gay request. *See* First. Am. Compl. ¶¶ 28, 31 (requesting injunctive and declaratory relief). Federal district courts cannot employ their equitable powers if doing so would effectively revisit decisions Congress made when it passed the Controlled Substances Act. *United States v. Oakland Cannabis Buyers' Co-Op*, 532 U.S. 483, 497–98 (2001). "[A] court sitting in equity cannot 'ignore the judgment of Congress, deliberately expressed in legislation.'" *Id.* at 497 (quoting *Virginian R. Co. v. Ry. Emps*, 300 U.S. 515, 551 (1937)).

III. CONCLUSION

This court joins those that have concluded "[t]he dormant Commerce Clause does not apply to federally illegal markets" because "Congress has clearly stated its intent for no interstate cannabis market to exist." *Brinkmeyer*, 2023 WL 1798173, at *13. The court **dismisses the complaint without leave to amend**, and **denies** the motion for a preliminary injunction **as moot**. The Clerk of Court is directed to **close** this case.

This order resolves ECF Nos. 13, 26.

IT IS SO ORDERED.

DATED: November 20, 2024.

/s/ Kimberly J. Mueller

SENIOR UNITED STATES DISTRICT JUDGE

APPENDIX C

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA**

PERIDOT TREE WA, INC., *Plaintiff,* v. WASHINGTON STATE LIQUOR AND CANNABIS CONTROL BOARD; WILLIAM LUKELA, *Defendants.*	Case No. 3:23-cv-06111-TMC ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

I. INTRODUCTION

This case arises from Plaintiff Peridot Tree WA Inc.'s challenge to Washington state's residency restrictions for retail cannabis licenses under the dormant Commerce Clause of the United States Constitution. The Court previously denied Peridot's motion for a preliminary injunction, concluding it was unlikely to succeed on the merits of its dormant Commerce Clause claim because Congress has exercised its affirmative Commerce Clause power to declare the interstate cannabis market illegal. *See* Dkt. 33. Defendants Washington State Liquor and Cannabis Control Board (LCB) and William Lukela then moved to dismiss, arguing that the Court's legal reasoning in denying the preliminary injunction requires dismissal of the entire case as a matter of law. Dkt. 43. Having reviewed the parties' briefs and the balance of the record, the Court agrees with Defendants. The Court therefore ADOPTS its reasoning in its Order Denying Motion for Preliminary Injunction ("Preliminary Injunction Order") (Dkt. 33), GRANTS the motion to dismiss, and DISMISSES all claims.

II. BACKGROUND

Peridot brought this case challenging a retail cannabis program established by the Washington State legislature known as the Social Equity Program. *See* Dkt. 1. The program awards retail cannabis licenses to those "most adversely impacted by the enforcement of cannabis-related laws." 2020 Wash. Sess. Laws Ch. 236 § 1(1). It aims "to reduce barriers to entry to the cannabis industry for individuals and communities" and "establish[] a cannabis industry that is equitable and accessible to those most adversely impacted by the enforcement of drug-related laws, including cannabis-related laws." *Id.* The LCB administers the program and oversees the application process. *See* RCW 69.50.335; WAC 314-55-570 (2022). Each applicant must meet the following criteria to be considered for the Social Equity Program:

> (b) At least a 51 percent majority, or controlling interest, in the applicant, must be held by a person, or persons, who has or have resided in Washington state for six months prior to the application date, consistent with RCW 69.50.331, and meets at least two of the following qualifications:
>
> > Qualification 1: The social equity applicant or applicants have lived in a disproportionately impacted area in Washington state for a minimum of five years between 1980 and 2010; or
> >
> > Qualification 2: The social equity applicant or a family member of the applicant has been arrested or convicted of a cannabis offense; or
> >
> > (iii) Qualification 3: The social equity applicant's household income in the year prior to submitting the application was less than the median household income within the state of Washington as calculated by the United States Census Bureau.

WAC 314-55-570(2). "Disproportionately impacted area" means:

> [A] census tract within Washington state where community members were more likely to be impacted by the war on drugs. These areas are determined using a standardized statistical equation to identify areas of high unemployment, low income, and demographic indicators consistent with populations most impacted by the war on drugs, including areas with higher rates of arrest for drug charges. The board will provide maps to identify disproportionately impacted areas. The maps will reflect census tracts from different time periods to account for gentrification.

WAC 314-55-570(1)(a). The LCB posted maps identifying disproportionately impacted areas in Washington by decade from 1980 to 2010. Dkt. 7-3 at 1. The LCB evaluates applications according to the following rubric:

Social Equity Application Scoring Rubric		
Category	**Eligibility Requirements**	**Point Scale**
	1. Lived in a disproportionately impacted area (DIA)	40
	1a. How long have you lived in a DIA? 5y – 10y = 20 points 10 + years = 40 points	40

Social Equity Application Scoring Rubric		
Category	**Eligibility Requirements**	**Point Scale**
	2. Convicted of a drug offense? (Self)	10
	2a. Convicted of a cannabis offense? (Self)	40
	3. Convicted of a drug offense? (Family)	5
	3a. Convicted of a cannabis offense? (Family)	5
	4. If you were convicted of a cannabis offense, what type of sentence did you receive: Fine = 10 points Served probation = 20 points Confined to home = 40 points Served time in jail or prison = 80 points	80
	5. Did you or your family member's incarceration keep you from getting employment?	5
	6. Did you lose your home or ability to purchase a home or rent a home as a result of your convictions or arrests?	5

Social Equity Application Scoring Rubric		
Category	**Eligibility Requirements**	**Point Scale**
	7. Is your household income less than the median household income within the state of Washington as calculated by the United States Census Bureau?	40
	8. Did you own or operate a medical cannabis dispensary or collective garden, licensed as a business, prior to July 1, 2016 (10 points)? or Did you own and operate a medical cannabis dispensary or collective garden licensed as a business in a DIA (30 points)?	10 30 in a DIA
	9. Have you held or do you currently hold 51 percent majority/controlling interest of a state cannabis (marijuana) retailer license? No = 10 points Yes = 0 points	10
	Total Maximum Points	**310 points**

WAC 314-55-570(3)(c)(viii).

Peridot's action challenges program application criteria that "that require a person to be a resident of Washington for six months before obtaining a cannabis business License" or "that provide a preference to Washington residents over out-of-state residents for the Application Program for Licenses." Dkt. 1 at 5–7. Peridot argues that these criteria violate the dormant Commerce Clause because they discriminate against out-of-state applicants. *Id.*

Shortly after filing its complaint, Peridot filed a motion for temporary restraining order and preliminary injunction (Dkt. 6). The Court denied the motion, holding that Peridot established Article III standing to seek injunctive relief but did not establish any of the four elements required to obtain a preliminary injunction: (1) a likelihood of success on the merits, (2) a likelihood of irreparable harm in the absence of preliminary relief, (3) that the balance of equities favors the plaintiff, and (4) that an injunction is in the public interest. Dkt. 33 at 15–24; *Geo Group, Inc. v. Newsom*, 50 F.4th 745, 753 (9th Cir. 2022) (en banc) (citing *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)). The Court determined that Peridot was unlikely to succeed on the merits because the dormant Commerce Clause does not apply to federally illegal markets, including Washington's cannabis market. Dkt. 33 at 15–20 (following the reasoning in *Brinkmeyer v. Washington State Liquor & Cannabis Board*, No. C20-5661 BHS, 2023 WL 1798173, at *11 (W.D. Wash. Feb. 7, 2023), *appeal dismissed*, No. 23-35162, 2023 WL 3884102 (9th Cir. Apr. 11, 2023), and *Northeast Patients Group v. United Cannabis Patients & Caregivers of Maine*, 45 F.4th 542 (1st Cir. 2022) (Gelpí, J. dissenting)).

Defendants then moved to dismiss under Federal Rule of Civil Procedure 12(b)(6). Dkt. 43.

Peridot responded with three arguments for why the Court should depart from its analysis in the Preliminary Injunction Order. Dkt. 44. First, Peridot argues that a plaintiff does not need to have a federally protected property right for the dormant Commerce Clause to apply. *Id.* at 4. Second, it argues that in addition to preserving a national competitive market, another purpose of the dormant Commerce Clause is to prevent trade wars between states. *Id.* at 5. Third, it argues that the Court should apply *Northeast Patients Group* here because Washington law does not treat medical cannabis differently than recreational cannabis and Washington allows interstate commerce in its cannabis market to a greater extent than Maine has. *Id.* at 6–11 (citing 45 F.4th at 543). Peridot also points out that the Ninth Circuit cited the Cole Memorandum's approach to *medical* cannabis in its recent opinion reversing the Eastern District of California's decision to abstain from a cannabis license challenge pertaining to *recreational* cannabis use. *Id.* at 7 (citing *Peridot Tree, Inc. v. City of Sacramento*, 94 F.4th 916 (9th Cir. 2024)).

III. DISCUSSION

A. Legal Standard

Federal Rule of Civil Procedure 8(a)(2) requires that a complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Under Rule 12(b)(6), the Court may dismiss a complaint for "failure to state a claim upon which relief can be granted." Rule 12(b)(6) motions may be based on either the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory. *Shroyer v. New Cingular Wireless Servs., Inc.*, 622 F.3d 1035, 1041 (9th Cir. 2010) (citation omitted). Here, LCB contends that Peridot's dormant Commerce Clause theory is not legally cognizable.

The Court "must accept as true all factual allegations in the complaint and draw all reasonable inferences in favor of the nonmoving party." *Retail Prop. Tr. v. United Bhd. of Carpenters & Joiners of Am.*, 768 F.3d 938, 945 (9th Cir. 2014). But the Court is "not bound to accept as true a legal conclusion couched as a factual allegation." *Twombly*, 550 U.S. at 555.

B. The Court declines to depart from its reasoning in the Preliminary Injunction Order.

Defendants argue that the Court should dismiss all claims because even taking Peridot's allegations as true, its dormant Commerce Clause challenge to the Social Equity Program fails as a matter of law because "there is no constitutional right to engage in activity that Congress has declared illegal." Dkt. 43 at 10. Peridot offers several arguments as to why the Court should depart from its analysis in the Preliminary Injunction Order. Dkt. 44 at 4–11. But none of these arguments persuasively show the Court's analysis of the dormant Commerce Clause was incorrect.

First, Peridot argues that a federally protected property right need not exist for the dormant Commerce Clause to apply. Dkt. 44 at 4. It contends that "a federal property right is irrelevant because Plaintiff has not brought a due process claim." *Id.* The dormant Commerce Clause does not apply because

Congress has affirmatively made the interstate cannabis market illegal through its Commerce Clause power. The Court's determination that the dormant Commerce Clause does not protect an illegal interstate market does not turn on the presence or absence of an underlying property right.

Second, Peridot argues that the purpose of the dormant Commerce Clause is to prevent trade wars between the states, which it claims are already beginning in the cannabis market. Dkt. 44 at 5. The Court does not deny that one goal of the dormant Commerce Clause is to prevent trade wars. *See Granholm v. Heald*, 544 U.S. 460, 473 (2005) ("Allowing States to discriminate against out-of-state wine 'invite[s] a multiplication of preferential trade areas destructive of the very purpose of the Commerce Clause.'" (quoting *Dean Milk Co. v. Madison*, 340 U.S. 349, 356 (1951))). But that does not overcome the fact that Congress has exercised its Commerce Clause power to declare the entire interstate market for cannabis illegal. Just as "it makes little sense why the dormant Commerce Clause would protect an interstate market that Congress affirmatively prohibited," Dkt. 33 at 19, it makes little sense why the dormant Commerce Clause would prevent trade wars within that illegal interstate market.

Third, Peridot argues that the Court should follow the First Circuit's majority opinion in *Northeast Patients Group* because "the fact that Northeast Patients Group involved medical cannabis whereas this case involves both medical and adult use cannabis provides no distinction for purposes of the dormant Commerce Clause." Dkt. 44 at 9 (citing 45 F.4th at 543). Although the Court noted the distinction between medical cannabis in *Northeast*

Patients Group and recreational cannabis in this case, that distinction was not the Court's primary basis for departing from *Northeast Patients Group*. *See* Dkt. 33 at 18 (citing *Ne. Patients Grp.*, 45 F.4th at 553–56). As the Court explained, it found the dissent more persuasive than the majority in its analysis of the Commerce Clause:

> But more importantly [than the distinction between medical and recreational cannabis] from this Court's perspective, the majority decided *Northeast Patients Group* over a dissenting opinion in which Judge Gelpí persuasively argued that the dormant Commerce Clause does not apply to federally illegal markets: "The Commerce Clause does not recognize an interest in promoting a competitive market in illegal goods or services or forestalling hypothetical interstate rivalries in the same." [*Ne. Patients Grp.*, 45 F.4th at 559 (Gelpí, J., dissenting)]. Judge Gelpí reasoned that the dormant Commerce Clause presumes that "the public interest is best served by maintaining an unencumbered 'national market for competition' in legal goods and services. However, it makes little sense to retain this presumption when Congress has explicitly acted to make the market in question illegal." *Id.*
>
> (internal citations omitted). He contended that "illegal markets are constitutionally different in kind" than

> legal markets, and thus disagreed with the majority "that the Commerce Clause protects the free-flowing operation of national markets that Congress has already made illegal through its Commerce Clause power." *Id.*

Id. at 18–19. Whether Washington restricts interstate cannabis sales more or less than Maine does has no bearing on this Court's analysis for the same reason.

Plaintiff also argues that medical and recreational cannabis are not distinguishable here because the Ninth Circuit's opinion in *City of Sacramento* discussed the Cole memorandum's position on *medical* cannabis even though the case pertained to *recreational* cannabis use. Dkt. 43 at 7 (citing *City of Sacramento*, 94 F.4th at 923–24). That the Ninth Circuit discussed the federal government's approach to medical cannabis in the factual background section of *City of Sacramento* has no bearing on this Court's decision to reject the majority's reasoning in *Northeast Patients Group*. The Ninth Circuit made clear that it was *not* addressing the merits of Peridot's Commerce Clause challenge, but rather remanding the case to the Eastern District of California, while acknowledging that lower courts have divided on the merits. 94 F.4th at 936.

Peridot argues further that Attorney General Merrick Garland's confirmation process demonstrates "that Congress contemplates an interstate market in adult use cannabis free from criminal enforcement" because during Attorney General Garland's confirmation hearing he "assured Congress that the Department of Justice would not prosecute people who comply with state cannabis programs." Dkt. 33 at

8. Peridot also points to President Biden's recent State of the Union Address in which President Biden mentioned pardoning those convicted for cannabis possession and his proposed rescheduling of cannabis under the Controlled Substances Act. *Id.* at 9. But these statements do not change the present legality of the interstate cannabis market under federal law and thus do not change the Court's decision.

Finally, at least two other district courts have followed this Court's reasoning since it denied Peridot's motion for preliminary injunction. *See Variscite NY Four, LLC v. New York State Cannabis Control Bd.*, No. 123CV01599AMNCFH, 2024 WL 406490 (N.D.N.Y. Feb. 2, 2024); *Jensen v. Maryland Cannabis Admin.*, No. CV 24-0273-BAH, 2024 WL 811479 (D. Md. Feb. 27, 2024).

The Court therefore adopts its analysis of the merits of Peridot's dormant Commerce Clause challenge from the Preliminary Injunction Order (Dkt. 33), concludes that Peridot's claims fail as a matter of law, and dismisses Peridot's complaint under Rule 12(b)(6).

IV. CONCLUSION

For the foregoing reasons, the Court GRANTS Defendants' motion to dismiss (Dkt. 43) and DISMISSES all claims with prejudice. The Clerk is directed to enter judgment in favor of Defendants.

Dated this 31st day of May, 2024.

Tiffany M. Cartwright
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PERIDOT TREE WA, INC., Plaintiff - Appellant, v. WASHINGTON STATE LIQUOR AND CANNABIS CONTROL BOARD and WILLIAM LUKELA, Defendants - Appellees.	No. 24-3481 D.C. No. 3:23-cv-06111-TMC Western District of Washington, Tacoma ORDER
PERIDOT TREE, INC. and KENNETH GAY, Plaintiffs - Appellants, v. CITY OF SACRAMENTO and DAVINA SMITH, Defendants - Appellees.	No. 24-7196 D.C. No. 2:22-cv-00289-KJM-SCR Eastern District of California, Sacramento

Before: RAWLINSON, BRESS, and BUMATAY, Circuit Judges.

All judges unanimously voted to deny the petitions for rehearing en banc. The petitions were circulated to the judges of the Court, and no judge requested a vote for en banc consideration. Fed. R. App. P. 40. The petitions for rehearing en banc, No. 24-3481, Dkt. 60; No. 24-7196, Dkt. 56, are denied.

APPENDIX E

U.S. Const. art. 1, § 8, cl. 3

"Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

APPENDIX F

21 U.S.C. section 844(a)

It shall be unlawful for any person knowingly or intentionally to possess a controlled substance unless such substance was obtained directly, or pursuant to a valid prescription or order, from a practitioner, while acting in the course of his professional practice, or except as otherwise authorized by this subchapter or subchapter II.

APPENDIX G

Washington Revised Code Annotated section 69.50.331(b)

No license of any kind may be issued to: (i) A person under the age of 21 years; (ii) A person doing business as a sole proprietor who has not lawfully resided in the state for at least six months prior to applying to receive a license; (iii) A partnership, employee cooperative, association, nonprofit corporation, or corporation unless formed under the laws of this state, and unless all of the members thereof are qualified to obtain a license as provided in this section; or (iv) A person whose place of business is conducted by a manager or agent, unless the manager or agent possesses the same qualifications required of the licensee.

APPENDIX H

Sacramento City Council Resolution No. 2018-0323(6)

Program Eligibility. To be admitted into the CORE Program, an applicant must provide documentation, as described in section 7 below, that sufficiently demonstrates that the applicant satisfies any one of the following Classifications: a. Individuals. An individual that is eligible to participate in the program is either: i. Classification 1. A current or former resident of the City of Sacramento who previously resided or currently resides in a low-income household and was either: a) arrested or convicted for a cannabis related crime in Sacramento between the years 1980 and 2011; or is b) an immediate family member of an individual described in subsection a of Classification 1 or Classification 2. ii. Classification 2. A current or former resident of the City of Sacramento who has lived in a low-income household for at least five (5) years, between the years of 1980 and 2011 in the following zip codes: 95811, 95815, 95817, 95820, 95823, 95824, 95826, 95828, and 95818.

APPENDIX I

Sacramento City Council Resolution No. 2020-0338(E)

On January 14, 2020, the City Council determined that: i) all storefront permits should be issued to an individual or a group of individuals in classifications 1 or 2 of the City's CORE Program; ii) at least 51% of the ownership interest in and profits from these new storefronts must be allocated to participants that meet classifications 1 or 2 of the CORE Program for a period of 10 years from issuance of the permit; and iii) CORE Program participants be given three years from selection to apply for and operate a storefront dispensary.