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Legal Sidebar

# State Marijuana Laws and the Dormant Commerce Clause

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Federal law classifies marijuana as a controlled substance under the federal Controlled Substances Act (CSA) and, thus, criminalizes many marijuana-related activities. Despite these federal prohibitions, a majority of U.S. states have adopted laws permitting certain types of marijuana sales and other marijuana-related activities. The state and local laws authorizing marijuana-related activities vary considerably. Some favor local residents over nonresidents by, for instance, only allowing or prioritizing the approval of licenses to operate marijuana dispensaries for individuals who have resided in the state for a certain period of time. Some of these state and local marijuana laws that favor local residents have been challenged as unconstitutional under the "Dormant" Commerce Clause of the U.S. Constitution, which bars states from implementing protectionist commercial policies.

This Legal Sidebar provides an overview of federal regulation of marijuana, including the Department of Justice's (DOJ's) April 2026 final order easing some federal restrictions on medical marijuana. It then provides an overview of Dormant Commerce Clause jurisprudence and analyzes several conflicting U.S. Court of Appeals decisions assessing the constitutionality of state and local marijuana laws that favor in-state residents under the Dormant Commerce Clause.

## Federal Regulation of Marijuana

Congress passed the CSA in 1970 to establish a uniform legal framework over drugs and other substances that pose a risk of abuse and dependence. The CSA classifies covered substances into one of five schedules, where Schedule I substances are subject to the most stringent restrictions and substances in Schedules II-V are subject to decreasing levels of restriction. In 1970, Congress classified marijuana as a Schedule I controlled substance. Schedule I drugs are statutorily considered to have "a high potential for abuse" with "no currently accepted medical use in treatment in the United States." The CSA criminalizes the manufacture, sale, possession, and distribution of Schedule I substances, except to the extent they are used for federally approved research. Substances in Schedules II-V are considered to have legitimate medical purposes for which they may be used, subject to the CSA's restrictions. CSA violators can be subject to significant imprisonment and criminal fines. Federal authorities can also confiscate, through civil or criminal asset forfeiture proceedings, all proceeds derived from, and any real or personal property involved in or traceable to, sales that violate the CSA. Additionally, federal anti-money laundering (AML)

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laws (i.e., Sections 1956 and 1957 of the criminal code) criminalize the handling of proceeds derived from manufacturing and sales in violation of the CSA. Violators of the AML laws can be subject to imprisonment and criminal and civil fines, administrative enforcement actions, and asset forfeiture.

An April 2026 DOJ final order rescheduled from Schedule I to Schedule III a subset of medical marijuana and medical marijuana-derived products. The order specifically applies to marijuana and marijuana-derived products that are either approved by the federal Food and Drug Administration (FDA) "or are subject to a state-issued license to manufacture, distribute, and/or dispense marijuana or products containing marijuana for medical purposes." The order also "establish[es] a new registration pathway for state-licensed medical marijuana entities seeking federal DEA registration as manufacturers, distributors, and/or dispensers" to comply with the CSA.

As discussed more fully in this Legal Sidebar, there currently are no FDA-approved marijuana-derived products that could fall within the scope of the DOJ's rescheduling order. DEA is, however, beginning to process state medical marijuana dispensaries' applications for registration. Additionally, the DOJ final order did not alter the Schedule I classification for marijuana used *recreationally* (also known as *adult use marijuana*). As a result, all state-authorized recreational marijuana use currently remains unlawful under federal law. The order does appear to provide a mechanism for some medical marijuana regimes to come into compliance in the future. Until such compliance occurs, however, all state authorized medical marijuana activities also remain unlawful under federal law.

Nevertheless, the federal government has not prioritized enforcement of federal marijuana laws against individuals and entities that comply with state law. Additionally, since fiscal year 2015, Congress has included provisions in annual appropriations laws barring DOJ from expending funds to prevent states that have legalized medical marijuana from implementing their medical marijuana regimes.

## Dormant Commerce Clause Overview

The Commerce Clause, Article I, Section 8, Clause 3 of the Constitution, empowers Congress "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." The Clause, in conjunction with the Supremacy Clause, authorizes Congress to pass laws that preempt conflicting state laws regulating commerce. The Supreme Court has explained that, "[a]lthough the [Commerce] Clause is framed as a positive grant of power to Congress," as opposed to an express limit on states' rights, it may still at times bar state laws that unduly restrict interstate commerce even in areas in which Congress has not acted, or is "dormant." This so-called Dormant Commerce Clause jurisprudence "prevents the States from adopting protectionist measures and thus preserves a national market for goods and services."

The Supreme Court currently assesses the Dormant Commerce Clause using two legal standards. First, the Court has determined that a state economic regulation that discriminates against out-of-state goods or actors is per se invalid unless "it is narrowly tailored to 'advanc[e] a legitimate local purpose'" or it falls within a narrow exception that applies when either the state itself participates in a market or Congress has authorized the discriminatory law in question. Congressional intent to allow states to engage in activities that would otherwise run afoul of the Dormant Commerce Clause generally must "be unmistakably clear." Second, the Court will invalidate facially nondiscriminatory statutes that promote "legitimate local interests" if "the burden on interstate commerce clearly exceeds the local benefits."

The Supreme Court has stressed that "'extreme caution' is warranted before a court deploys this implied theory." The Court continued, "Preventing state officials from enforcing a democratically adopted state law in the name of the dormant Commerce Clause is a matter of 'extreme delicacy,' something courts should do only 'where the infraction is clear.'"

## The Circuit Split over the Application of the Dormant Commerce Clause to State and Local Marijuana Laws

### Second Circuit: *Variscite NY 4 v. N.Y. State Cannabis Control Board*

In *Variscite NY 4*, the U.S. Court of Appeals for the Second Circuit (Second Circuit) held that New York State's marijuana legalization law likely violated the Dormant Commerce Clause. The Second Circuit therefore vacated a federal district court's order denying the plaintiff's request for a preliminary injunction against the state's dispensary licensure procedures under that law.

New York law legalizes the use of marijuana by adults and establishes a program for the regulation of marijuana "production, manufacturing, distribution, and sale" to be overseen by the New York Cannabis Control Board (NY Board). The New York law allows anyone to apply for a marijuana dispensary license, but permits certain applicants to jump ahead of others if that applicant, or their close relative, had been convicted of marijuana-related charges under New York state law.

Beginning in August 2022, the NY Board initiated the Conditional Adult-Use Retail Dispensary (CAURD) application program. The CAURD program first started accepting applications in August 2022 and was only applicable to entities with "a significant presence in" the state, that were "incorporated or otherwise organized under" state law, or that were majority-owned by New York residents. Multiple lawsuits successfully challenged this initial application process on both Dormant Commerce Clause and state law grounds, resulting in multiple preliminary injunctions that halted the CAURD program.

In September 2023, after these court rulings, the NY Board initiated a new application program open to both in-state and out-of-state applicants. The NY Board separated the applicants under this new program into two groups: a November Pool of applicants that had already secured a dispensary location and a December Pool consisting of all other applicants. The November Pool predominately consisted of those who had previously applied in the CAURD program. The NY Board received thousands of applications, but at the time the application window closed on December 18, 2023, it estimated that only 250 dispensary licenses would be provided to applicants in the November Pool and 450 licenses would be provided to the December Pool. In accordance with state law, the NY Board prioritized applicants and majority owners of applicants that

> (a) [were] a member of a community disproportionately impacted by the enforcement of cannabis prohibition;
>
> (b) ha[ve] an income lower than eighty percent of the median income of the county in which the applicant resides; and
>
> (c) w[ere] convicted of a marihuana-related offense prior to the effective date of this chapter, or had a parent, guardian, child, spouse, or dependent, or w[ere] a dependent of an individual who, prior to the effective date of this chapter, was convicted of a marihuana-related offense.

New York implements the third requirement through a regulation that defines a "marihuana-related offense" as one arising under New York's former marijuana prohibitions. Applicants that met the three prioritization conditions had "triple the chance" to receive a license compared with those applicants that did not meet the prioritization conditions.

Each of the *Variscite NY 4* plaintiffs met the first two prioritization conditions, but their marijuana-related convictions were under California law, not New York law, so they did not qualify for priority under the New York licensing standards. The plaintiffs filed suit in a New York federal district court alleging that, by favoring New York residents over others, the New York marijuana application program is unconstitutional under the Dormant Commerce Clause. Shortly thereafter, the plaintiffs sought a preliminary injunction that would bar the NY Board from issuing marijuana dispensary licenses. The district court denied the plaintiffs' petition, ruling that the Dormant Commerce Clause is inapplicable to commerce that federal law criminalizes. The plaintiffs appealed to the Second Circuit.

In a 2-1 decision, the Second Circuit vacated the district court's decision denying the plaintiff's request for a preliminary injunction, finding that the plaintiffs were likely to succeed on the merits of their claims. The court explained that the "core" of Supreme Court Dormant Commerce Clause jurisprudence "is an antidiscrimination principle 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" (internal quotations omitted). The primary purpose of this rule, according to the Second Circuit, is to "preserve a national market for competition." The court noted the irony behind applying this objective to federally illegal marijuana markets, but, in its view, the Supreme Court, in *Gonzales v. Raich*, had determined that the illegal nature of marijuana activities "is of no constitutional import" for purposes of the affirmative Commerce Clause. The Second Circuit concluded that "[t]he same holds true for the dormant Commerce Clause," otherwise states would be authorized "to bake in advantages for their residents" that would disrupt competition in the national market should Congress subsequently choose to legalize and regulate it.

The court then turned to the congressional authorization exception to the Dormant Commerce Clause's anti-discrimination principle. According to the court, "To privilege state protectionist legislation, Congress must do more than disapprove of an interstate market: it must approve *the protection itself*" (emphasis in original). The court held that Congress's criminalization of marijuana activities does not amount to an "unmistakably clear" *authorization* of New York's protectionist marijuana law. The Second Circuit explained that the New York statute's provision of priority to individuals with marijuana convictions under New York law benefits New York residents over out-of-staters and is discriminatory under the Dormant Commerce Clause. Thus, it would only be constitutional if it were the only "means to advance a legitimate local purpose," a standard the court noted the state "d[id] not attempt to satisfy." The court, therefore, held that the plaintiffs were likely to succeed on the merits of their claims involving New York's preferential treatment for in-state residents in the December Pool.

### First Circuit: *Northeast Patients Group v. United Cannabis Patients and Caregivers of Maine*

*Northeast Patients Group* involved an appeal from a federal district court order granting summary judgment for the plaintiffs, holding that the Maine Medical Marijuana Act of 2009 (Maine Marijuana Act) violates the Dormant Commerce Clause. The Maine Marijuana Act establishes a medical marijuana market but requires that, for a dispensary to be authorized to cultivate and sell medical marijuana in the state, all officers and directors of the dispensary must be Maine residents. In a 2-1 decision, the First Circuit affirmed the lower court's order, holding that the state's residency requirement violated the Dormant Commerce Clause.

The defendants in this case did not dispute the fact that the Maine Marijuana Act's residency requirement would violate the Dormant Commerce Clause if marijuana were a *legal* market. Instead, they argued that the Maine law complies with the Dormant Commerce Clause "because federal law makes participation in the market to which the residency requirement applies *illegal*" (emphasis added).

First, the defendants reasoned that the Dormant Commerce Clause only bars states from "unjustifiably [] discriminat[ing] against or burden[ing] the interstate flow of articles of commerce." In the defendant's view, there cannot be an interstate commercial market in an article of commerce that is illegal under federal law.

The First Circuit disagreed, noting that, despite the CSA, there clearly is an interstate medical marijuana market in Maine because the Maine Marijuana Act "affirmatively encourages out-of-staters to participate in the medical marijuana market as customers." Further, the First Circuit noted that the Supreme Court's holding in *Raich* that the CSA constituted a valid exercise of Congress's Commerce Clause authority relied, in part, on the fact that marijuana is "a fungible commodity for which there is an established, albeit illegal, interstate market."

The defendants also argued that the Maine Marijuana Act did not violate the Dormant Commerce Clause because Congress consented to the law's residency requirement. While acknowledging that Congress has the power to authorize Maine to impose a discriminatory residency requirement, the First Circuit determined that Congress had not done so. The First Circuit recounted Supreme Court Dormant Commerce Clause jurisprudence indicating that Congress typically must be "unmistakably clear" when providing a state consent to impose protectionist measures. The only meaningful distinction between those Supreme Court cases and the one at hand is that the marijuana market is illegal. The First Circuit noted its skepticism that "Congress need not be as clear in blessing state protectionism as we usually demand" simply because participation in the market is unlawful under federal law. To the contrary, the First Circuit considered Congress's repeated enactment of funding restrictions to prevent DOJ from halting state marijuana activities as an indication of Congress's awareness of the existence of an interstate medical marijuana market. In the court's view, this undermined the defendants' contention that an exception to the "unmistakably clear" consent requirement is warranted in this case. The court concluded that neither the CSA nor DOJ appropriations restrictions clearly provide Congress's consent for Maine's discriminatory residency requirement.

Even working under the assumption that the "unmistakably clear" requirement does not apply to unlawful markets, however, the First Circuit determined that there is "nothing in this record that could support the conclusion that Congress did mean to bless such protectionist measures here."

## Ninth Circuit: *Peridot Tree v. Washington State Liquor and Cannabis Control Board*

In *Peridot Tree*, a unanimous three-judge panel of the United States Court of Appeals for the Ninth Circuit (Ninth Circuit) affirmed a district court's decision declining to apply the Dormant Commerce Clause to a marijuana market that is illegal under federal law. *Peridot Tree* involved consolidated Dormant Commerce Clause challenges to both Washington State's and the City of Sacramento's marijuana laws. Both laws limit or prioritize eligibility for acquiring dispensary licenses to companies owned or controlled by individuals who meet various Washington State or city residency requirements.

The Ninth Circuit stated that its legal analysis in the case was guided by the Supreme Court's "deeply rooted" and "longstanding" guidance to "tread cautiously when considering whether to invalidate state laws under the court inferred dormant Commerce Clause." The Ninth Circuit viewed the question before it as whether the Dormant Commerce Clause provides an "implied constitutional right to engage in illegal interstate commerce." The court concluded the answer is no.

The chief purpose of the Dormant Commerce Clause is to "preserve[] a national market for goods and services," but in the Ninth Circuit's view that constitutional protection does not extend to a national marijuana market that Congress has outlawed. "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.'" The Ninth Circuit explained that the Supreme Court's most recent Dormant Commerce Clause opinion stressed that the Clause's protections should only be extended with "extreme caution" and "extreme delicacy," because its "invocation . . . amounts to a judicial intrusion on a democratically enacted law." The Ninth Circuit decided that "extreme caution" was warranted in this context because invoking the Dormant Commerce Clause in this case would require the court to "override" both state and local marijuana dispensary laws, as well as Congress's criminalization of marijuana under the CSA. The Ninth Circuit dismissed the Second Circuit's concerns about states baking in protections for in-state residents in a marketplace that Congress might someday authorize. Such concerns, in the Ninth Circuit's opinion, "provide[] no basis for the judicial enabling of a marketplace that is presently not supposed to exist as a matter of federal law." As a result, the Ninth Circuit held the Dormant Commerce Clause inapplicable to the Washington and Sacramento marijuana laws.

## Considerations for Congress

Although the Supreme Court has yet to grant a writ of certiorari, the circuit split regarding the impact of the Dormant Commerce Clause on state licensure of marijuana dispensaries likely increases the odds that the Court will review this issue at some point. The fact that all the cases discussed above were decided when all relevant state marijuana activities remained illegal under federal law, however, might make the Court less likely to grant certiorari. Instead, the Court might choose to wait to see how future lower court Dormant Commerce Clause analysis in this space evolves as a result of DOJ's April 2026 order rescheduling some state medical marijuana activities. Regardless, Congress does not need to wait for court action—Congress has the power to address the issue itself. As the Supreme Court has explained, "Congress has undoubted power to . . . either permit the states to regulate the commerce in a manner which would otherwise not be permissible or exclude state regulation."

Congress could thus pass legislation providing states and localities an "unmistakably clear" authorization to implement protectionist marijuana policies. Congress could also do the opposite and expressly bar states and localities from implementing marijuana-related laws that favor in-state residents over nonresidents. Similarly, Congress could establish a federal regulatory system applicable to marijuana activities that fits more closely within the Supreme Court's existing Dormant Commerce Clause jurisprudence, as opposed to the current status where the Court has never weighed in on how the Clause applies to activities that are illegal under federal law.

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