

Calif. Cannabis Decision Deepens Commerce Clause Divide

By **Andrew Kline, Conrad Sproul and Tommy Tobin** (January 28, 2025)

The U.S. District Court for the Eastern District of California's November decision in *Peridot Tree Inc. v. City of Sacramento* is the latest in a string of federal cases across the country considering whether the dormant commerce clause applies to the state-regulated marijuana industry.[1]

The dormant commerce clause is a constitutional provision that bars states from placing undue burdens on interstate commerce.

Courts have reached differing conclusions as to whether the dormant commerce clause applies to marijuana. The catch is that while the clause prohibits burdens on interstate commerce, marijuana is illegal at the federal level. So, states have created their own state-legal intrastate marketplaces, but there is no legal interstate market.[2]

Most federal courts to consider the issue have held that the dormant commerce clause prohibits states from restricting out-of-staters' participation in state-legal marijuana markets. But in *Peridot Tree*, the Eastern District of California joined a small but growing minority of courts that have found the dormant commerce clause inapplicable to state-regulated marijuana.

What does the dormant commerce clause have to do with marijuana?

States that have legalized marijuana have done so only within their state jurisdictions. As such, all state-legal marketplaces have enacted laws restricting interstate transport or sale of marijuana. Many states have also limited the participation of out-of-state entities in local markets.[3]

At first glance, these protectionist regulations seem to violate the dormant commerce clause. But there is an open question regarding whether the clause should apply to state-regulated marijuana where no legal interstate market exists. So, the question is this: Does the Constitution protect a form of interstate commerce that does not exist? Various federal courts have grappled with this paradox, and no consensus has yet emerged.

Northeast Patients Group v. United Cannabis Patients and Caregivers of Maine is the leading appellate ruling so far. In that 2022 case, the U.S. Court of Appeals for the First Circuit concluded that the dormant commerce clause does apply to the state-regulated marijuana industry and struck down Maine's discriminatory regulations.[4] The First Circuit reasoned that, though it is illegal, there is nevertheless an interstate market in marijuana and that federal criminalization does not give states free rein to favor domestic producers.[5]

District courts from Maryland to Michigan have adopted the majority view that the dormant commerce clause applies to regulated marijuana, and that states, therefore, may not



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discriminate against out-of-state businesses.[6]

Some other federal courts have taken a different approach, finding that the clause cannot protect an interstate market that Congress has attempted to eliminate entirely.

In a February 2023 order in *Brinkmeyer v. Washington State Liquor and Cannabis Board*, the U.S. District Court for the Western District of Washington concluded that since "citizens do not have a legal interest in participating in a federally illegal market," there was no right for the dormant commerce clause to protect.[7]

The U.S. District Court for the Northern District of New York issued a similar decision last year in *Variscite NY Four LLC v. NY State Cannabis Control Board*, reasoning that:

Given that the national market for cannabis is illegal, it would make little sense to apply the dormant Commerce Clause to New York's cannabis licensing scheme. Doing so would only encourage out-of-state participation in the New York cannabis market, which would be contrary to Congress's exercise of Commerce Clause power in enacting the CSA.[8]

Variscite is now on appeal to the U.S. Court of Appeals for the Second Circuit.

Other federal courts have chosen to abstain from ruling, given the federal illegality of cannabis. In August 2022, for example, the U.S. District Court for the Western District of Washington concluded in *Shelton v. Liquor and Cannabis Board Washington* that ordering declaratory relief would mean that the federal court was requiring activity that not legal under federal law.[9]

Peridot Tree Inc. v. City of Sacramento

In November 2024, the Eastern District of California added support to the minority position that the dormant commerce clause does not protect interstate trade in marijuana, expanding the rift among federal courts.[10]

Sacramento had enacted an ordinance known as the Cannabis Opportunity Reinvestment and Equity program, intended to provide opportunities to groups disproportionately affected by the war on drugs.[11] Among other criteria, CORE requires that licenses to sell marijuana be granted only to current or former Sacramento residents.[12]

Plaintiff Peridot Tree was denied a license to sell marijuana in Sacramento because the owner has never lived in Sacramento.[13] Initially, the district court abstained from exercising its jurisdiction because of the sharp tensions between state and federal marijuana policies.[14]

However, the U.S. Court of Appeals for the Ninth Circuit concluded that the district court could not refuse to exercise jurisdiction simply because the constitutional issues are tricky.[15] Although the district court had hoped to allow California state courts to take the first stab at the issue, the appellate court noted that a decision by a state court would not avoid the need to resolve the federal dormant commerce clause issue, so the district court might as well decide it now.[16]

On remand, the district court decided that the dormant commerce clause did not apply.[17] The dormant commerce clause, the court reasoned, is based on the "implicit assumption ... that the market in question is a legal ... one." [18] But here, the court found, "there is no

permissible interstate market to protect from state interference." [19]

The court acknowledged that the federal government has eased its enforcement of federal marijuana laws and taken a hands-off approach toward state activity. [20] But, the court also found that although the executive branch has prosecutorial discretion, federal courts do not and must enforce federal law as written. [21]

On Nov. 27, Peridot Tree filed an appeal with the Ninth Circuit. [22]

The Ninth Circuit's appellate ruling is especially important given the existing Brinkmeyer and Shelton cases from the circuit's district courts. The new Peridot Tree appeal presents an opportunity for the Ninth Circuit to address this prior precedent, provide guidance to the district judges on this issue that has split courts across the country. Potentially, the Ninth Circuit could join the First Circuit's approach, applying the dormant commerce clause to existing cannabis regulations.

What's next?

The federal-state conflict remains, and the recent decision in Peridot Tree has done little to clear up a split in the nation's federal courts. At least five federal courts, including the First Circuit, are in favor of dormant commerce clause protection in state-regulated marijuana markets, and two courts — the Western District of Washington and now the Eastern District of California — have found that the dormant commerce clause doesn't apply to federally unlawful activities that cannot legally cross state lines.

The coming year may see new appellate rulings on this federal court split. The Second Circuit heard oral argument in the Variscite matter in December, and a ruling is anticipated within months. The Fourth Circuit was scheduled to hear argument in a dormant commerce clause case, *Jensen v. Md. Cannabis Administration*, on Jan. 28. [23]

Now, the Ninth Circuit's Peridot Tree case adds to the array of appellate courts considering the interplay between the dormant commerce clause and cannabis. Especially if these appellate courts reach differing conclusions, the split among federal courts could find its way before the U.S. Supreme Court.

So, what are legislators and state cannabis regulators to do? Amid the ongoing debate on the dormant commerce clause's application to cannabis, policymakers — especially those within the First Circuit — should consider the dormant commerce clause's application to cannabis rules that may favor in-state residents over out-of-staters.

Past dormant commerce clause challenges have targeted social equity rules and residency requirements for cannabis licensures or investments, and these policies may be targets for further litigation. As part of their decision-making and analysis, policymakers should incorporate lessons learned from the current state of dormant commerce clause litigation to best mitigate risks of similar challenges.

Looking further ahead, there's also the prospect of future federal regulation of cannabis. If Congress exercises its powers under the commerce clause to legalize or deschedule cannabis, current state laws and regulatory structures may be seen as impediments to interstate commerce. [24] Clearly articulated powers between the federal and state systems are critical to ensure thoughtful oversight over a potential interstate market for cannabis. [25]

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[1] *Peridot Tree Inc. v. City of Sacramento*, No. 2:22-cv-00289-KJM-SCR, 2024 U.S. Dist. LEXIS 212202 (E.D. Cal. Nov. 20, 2024).

[2] See Tommy Tobin & Andrew Kline, *What Justices' Pork Ruling Means for Interstate Cannabis*, Law360 (Aug. 9, 2023), <https://www.law360.com/articles/1709076/what-justices-pork-ruling-means-for-interstate-cannabis>.

[3] Tommy Tobin & Andrew Kline, *A Sleeping Giant: How the Dormant Commerce Clause Looms over the Cannabis Marketplace*, Yale L. & Pol'y Rev. Inter Alia (Jan. 3, 2022), https://yalelawandpolicy.org/inter_alia/sleeping-giant-how-dormant-commerce-clause-looms-over-cannabis-marketplace; Tommy Tobin & Andrew Kline, *Dormant Commerce Clause Issues Are Evolving in Cannabis*, Law360 (Mar. 27, 2023), <https://www.law360.com/articles/1589960>.

[4] *Northeast Patients Group v. United Cannabis Patients and Caregivers of Maine*, 45 F.4th 542 (1st Cir. 2022).

[5] *Id.* at 547.

[6] *Lowe v. City of Detroit*, 544 F. Supp. 3d 804, 815-16 (E.D. Mich. 2021); *Toigo v. Dep't of Health & Senior Servs.*, 549 F. Supp. 3d 985, 990-94 (W.D. Mo. 2021); *Finch v. Treto*, 606 F. Supp. 3d 811, 831-34 (N.D. Ill. 2022), *aff'd in part, dismissed in part*, 82 F.4th 572, 577 (7th Cir. 2023); *Jensen v. Md. Cannabis Admin.*, 719 F. Supp. 3d 466, 483-84 (D. Md. 2024).

[7] *Id.* at *10-11.

[8] *Variscite N.Y. Four, LLC v. N.Y. State Cannabis Control Board*, No. 1:23-cv-01599 (AMN/CFH), 2024 U.S. Dist. LEXIS 18357, at *22-29 (N.D.N.Y. Feb. 2, 2024).

[9] *Shelton v. Liquor & Cannabis Bd. of the State of Wash.*, No. 21-5135, 2022 WL 2651617, at *5 (W.D. Wash. Aug. 16, 2022).

[10] *Peridot Tree Inc. v. City of Sacramento*, No. 2:22-cv-00289-KJM-SCR, 2024 U.S. Dist. LEXIS 212202 (E.D. Cal., Nov. 21, 2024).

[11] See generally *Sacramento City Council Res. No. 2020-0338* (Oct. 13, 2020) & *No. 2018-0323* (Aug. 9, 2018).

[12] Sacramento City Council Res. No. 2018-0323 at 23.

[13] Id.

[14] Id. at *8-13 ("In this case, federal and state policies collide at virtually every turn.").

[15] Peridot Tree Inc. v. City of Sacramento, 94 F.4th 916, 936 (9th Cir. 2024) ("[Q]uestions may occur which we would gladly avoid; but we cannot avoid them." (quoting Cohens v. Virginia, 19 U.S. 264, 404 (1821))).

[16] Id. at 927-28.

[17] Peridot Tree, 2024 U.S. Dist. LEXIS 212202.

[18] Id. at *10.

[19] Id. at *11.

[20] Id. at *1/1-/28.

[21] Id. at *2.

[22] Peridot Tree Inc. v. City of Sacramento, No. 24-7196 (9th Cir.).

[23] Jensen v. Md. Cannabis Admin., No. 24-1216 (4th Cir.)

[24] Tobin & Kline, A Sleeping Giant: How the Dormant Commerce Clause Looms over the Cannabis Marketplace, at 1.

[25] See Andrew Kline, Barak Cohen & Yoko Miyashita, Federal Cannabis Descheduling Bill Needs More Clarity, LAW360 (Jul. 6, 2021), <https://www.perkinscoie.com/images/content/2/4/v3/244605/Federal-CannabisDescheduling-Bill-Needs-More-Clarity.pdf> ("While we should all support the descheduling of marijuana, the establishment of industry guardrails, and robust social equity reforms, we must regulate responsibly, and that will take time to get right. Congress must ensure that it puts in place a thoughtful regulatory plan before intoxicating products are shipped over borders or across state lines.").