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## INTERSTATE COMMERCE IN CANNABIS

ROBERT A. MIKOS\*

### ABSTRACT

*A growing number of states have authorized firms to produce and sell cannabis within their borders, but not across state lines. Moreover, many of these legalization states have barred nonresidents from owning local cannabis firms. Thus, while cannabis commerce is booming, it remains almost entirely intrastate. This Essay provides the first analysis of the constitutionality of these state restrictions on interstate commerce in cannabis. It challenges the conventional wisdom that the federal ban on marijuana gives legalization states free rein to discriminate against outsiders in their local cannabis markets. It also debunks the justifications that states have proffered to defend such discrimination, including the notion that barring interstate commerce is necessary to forestall a federal crackdown on state-licensed cannabis industries. This Essay concludes that the restrictions legalization states now impose on interstate commerce in cannabis likely violate the Dormant Commerce Clause. It also examines the ramifications of this legal conclusion for the future of the cannabis market in the United States, and it suggests that without the barriers that states have erected to protect local firms, a new breed of large, national cannabis firms concentrated in a handful of cannabis-friendly states is likely to dominate the cannabis market. This development could dampen the incentive for new states to legalize cannabis and further diminish minority participation in the cannabis industry. Congressional legislation may be necessary to address these concerns, because individual states have only limited capacity to shape the national market and the firms that compete therein.*

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## INTRODUCTION

By the end of 2020, more than thirty states had legalized cannabis containing tetrahydrocannabinol (“THC”) for at least some purposes.<sup>1</sup> Each of these states has authorized firms to produce and sell cannabis within its borders. In 2019, those state-licensed firms did a brisk business, selling more than \$13 billion worth of cannabis.<sup>2</sup>

However, none of that \$13 billion of cannabis is now being sold (legally) across state lines.<sup>3</sup> Instead, each legalization state now has its own, hermetically sealed local cannabis market, supplied entirely by cannabis cultivated and processed inside the state. For example, the \$1.75 billion worth of cannabis that was sold by Colorado-licensed stores in 2019 was all grown and processed by firms located inside Colorado.<sup>4</sup> These state-based markets for cannabis contrast with the national markets that now exist for virtually every other consumer good. From bananas to beer, few of the goods we see on store shelves today are grown, processed, or manufactured locally.

The lack of interstate commerce in cannabis is commonly attributed to the federal government’s marijuana ban. Notwithstanding the dramatic liberalization of state law over the past twenty-five years, federal law continues to ban the production, possession, and sale of marijuana.<sup>5</sup> The conventional wisdom is that interstate commerce in cannabis—and the development of a national cannabis market—cannot develop until Congress or the President repeals the federal ban and removes this barrier.<sup>6</sup>

<sup>1</sup> See Robert A. Mikos, *Marijuana Reforms Win Big at the Polls*, MARIJUANA L. POL’Y & AUTH. BLOG (Nov. 4, 2020), <https://my.vanderbilt.edu/marijuanalaw/2020/11/marijuana-reforms-win-big-at-the-polls/> [<https://perma.cc/F7UT-2UD6>]. Throughout the Essay, I use “cannabis” and “marijuana” interchangeably to refer to cannabis plants or products that contain the psychoactive chemical THC. See generally Robert A. Mikos & Cindy D. Kam, *Has the “M” Word Been Framed? Marijuana, Cannabis, and Public Opinion*, 14 PLOS ONE 1 (2019), <https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0224289> [<https://perma.cc/9KEV-QH44>] (analyzing terms used to describe cannabis). This definition excludes “hemp,” which is commonly defined as cannabis that contains only trace amounts of THC. E.g., 7 U.S.C. § 1639o (defining hemp as cannabis and cannabis extracts that contain less than 0.3% THC by dry weight).

<sup>2</sup> Chris Hudock, *U.S. Legal Cannabis Market Growth*, NEW FRONTIER DATA (Sept. 8, 2019), <https://newfrontierdata.com/cannabis-insights/u-s-legal-cannabis-market-growth/> [<https://perma.cc/MQB6-9EKJ>]; see also ARCVIEW MKT. RSCH. & BDSA, *THE STATE OF LEGAL CANNABIS MARKETS* 12 (8th ed. 2020) (estimating industry sales of \$12.4 billion in the United States in 2019).

<sup>3</sup> Out-of-state cannabis is sold on the black market, even in legalization states.

<sup>4</sup> *Marijuana Sales Reports*, COLO. DEP’T OF REVENUE, <https://cdor.colorado.gov/data-and-reports/marijuana-data/marijuana-sales-reports> [<https://perma.cc/6WQT-G6JG>] (last visited Apr. 13, 2021) (reporting sales figures for Colorado-licensed shops).

<sup>5</sup> See 21 U.S.C. §§ 841, 844.

<sup>6</sup> E.g., Johnny Green, *Oregon Is About to OK Cannabis Exports. What’s Next?*, LEAFLY (June 12, 2019), <https://www.leafly.com/news/politics/oregon-is-about-to-ok-cannabis-exports-whats-next> [<https://perma.cc/H3E6-98YP>] (“Skeptics feel the prospects of the federal government allowing cannabis to be exported from Oregon remain far-fetched.”); Kyle

But the conventional wisdom is wrong. The federal government, by itself, has not stopped the interstate cannabis market from developing. Neither federal law nor federal law enforcement policy treats state-authorized cannabis commerce differently just because the activity crosses state lines—i.e., just because it is interstate.<sup>7</sup> Given that the federal marijuana ban has not stopped \$13 billion (and growing) in intrastate cannabis commerce, the ban cannot so easily explain the present dearth of interstate cannabis commerce.

The true culprit—the real reason we do not have interstate commerce in cannabis today—is that the states have not allowed it to develop. Even as states have grown increasingly tolerant of the commercial production and distribution of marijuana, they have staunchly resisted interstate commerce in the drug. Every legalization state now prohibits the sale of cannabis across state lines.<sup>8</sup> What is more, many legalization states also bar nonresidents from owning or operating the local cannabis businesses that supply local markets.<sup>9</sup>

Legalization states have imposed these restrictions on interstate commerce in cannabis to protect the local cannabis industry and the economic benefits associated therewith from out-of-state competition.<sup>10</sup> Those economic benefits, after all, have proven to be a potent selling point for cannabis legalization. For example, before South Dakota voters approved a measure to legalize recreational cannabis in the state, proponents had assured them that “[a]ll marijuana sold in South Dakota must be grown and packaged inside our borders,

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Jaeger, *Congressional Bill Would Allow Marijuana Imports and Exports Between Legal States*, MARIJUANA MOMENT (June 27, 2019), <https://www.marijuanamoment.net/congressional-bill-would-allow-marijuana-imports-and-exports-between-legal-states/> [https://perma.cc/NXL5-4L9C] (“Transporting cannabis across state lines is strictly prohibited under current federal law. The Justice Department described such activity as an enforcement priority even under a now-rescinded Obama-era memo intended to generally respect state marijuana policies.”); Frank Kummer, *With Legalization Come Hopes that Cannabis Could Be a Lucrative Crop in New Jersey*, PHILA. INQUIRER (Nov. 9, 2020), <https://www.inquirer.com/science/climate/new-jersey-marijuana-cannabis-legalization-farming-agriculture-20201109.html> (“Because marijuana is illegal at the federal level, it can’t be transported across state lines.”); Polly Trotsky, *Here’s What Oregon’s New Cannabis Export Measure Means for California*, CAL. WEED BLOG (June 16, 2019), <https://californiaweedblog.com/2019/06/16/what-oregons-export-measure-means-for-california/> [https://perma.cc/Z8UC-8XBJ] (suggesting that federal government would block interstate sales because “[p]reventing the transportation of cannabis across state lines has been a focus for the Justice Department since before the Obama administration”).

<sup>7</sup> See *infra* Section II.A.2 (discussing claims that states have restricted interstate commerce in cannabis to appease the federal government).

<sup>8</sup> See *infra* Part I (explaining that legalization states have restricted interstate commerce in cannabis by prohibiting interstate sales).

<sup>9</sup> See *infra* Part I (explaining that some states have limited the ability of nonresidents to own and operate local cannabis facilities).

<sup>10</sup> See *infra* Section II.A.

which will lead to hundreds of jobs for construction workers, plumbers, electricians, HVAC workers, laborers, and retail workers.”<sup>11</sup>

If they were applied to almost any other product—from bananas to beer—the restrictions that states have imposed on interstate commerce in cannabis would clearly be unconstitutional. The Dormant Commerce Clause (“DCC”) establishes a strong default rule against state protectionism.<sup>12</sup> To date, however, the federal marijuana ban has given legalization states a convenient excuse for imposing their restrictions on interstate commerce in cannabis. In particular, states have claimed (1) that they must bar interstate commerce in cannabis to appease the federal government or, in the alternative, (2) that by banning marijuana, Congress has implicitly overridden the DCC’s antiprotectionism default rules and authorized them to discriminate against interstate commerce in cannabis.<sup>13</sup>

But several nascent lawsuits are now testing these claims. Multistate cannabis firms are challenging the constitutionality of state residency requirements for cannabis licenses. Indeed, Maine has already agreed to drop its residency requirement in response to one of these lawsuits, and a federal court has enjoined a similar local requirement as violative of the DCC.<sup>14</sup> These may be just the first chips to fall in a legal battle that could fundamentally alter the structure of the cannabis industry.

This Essay provides the first detailed analysis of the constitutionality of state restrictions on interstate commerce in cannabis. Part I surveys the two main ways that legalization states now restrict interstate commerce in cannabis. Part II then shows that these restrictions are likely unconstitutional under the DCC. It explains that legalization states have no constitutionally sufficient justification for discriminating against interstate commerce in cannabis. It also shows that Congress has not authorized legalization states to disregard the DCC’s nondiscrimination principle in regulating cannabis commerce (a point that leading congressional reform proposals would make even clearer). But Part II also explains that the DCC allows states to regulate cannabis evenhandedly, even to ban all commerce in cannabis; states just cannot discriminate against outside economic interests when regulating the drug.

To the extent these state restrictions on interstate commerce in cannabis are unconstitutional, it is likely to spell the demise of the strange, state-based cannabis markets we have today and the rise of a national cannabis market in which local firms must compete with out-of-state firms. Part III discusses the implications of this development for the future of the cannabis industry,

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<sup>11</sup> KEA WARNE, OFF. OF THE S.D. SEC’Y OF STATE, SOUTH DAKOTA 2020 BALLOT QUESTIONS (2020), <https://sdsos.gov/elections-voting/assets/2020BQPamphletColorVersion.pdf> [<https://perma.cc/45MX-JK8B>].

<sup>12</sup> See *infra* Part II (arguing that the DCC probably renders state restrictions on interstate commerce of cannabis unconstitutional).

<sup>13</sup> See *infra* Sections II.A-B (explaining reasons why states have claimed that they must restrict interstate commerce of cannabis).

<sup>14</sup> See *infra* notes 154-157 and accompanying text (discussing litigation over Maine’s residency requirement).

including the industry's structure and how it will be governed. For example, interstate commerce is likely to facilitate consolidation of the cannabis industry, which could further reduce minority participation therein—and heighten social equity concerns regarding cannabis reforms.

### I. HOW STATES RESTRICT INTERSTATE COMMERCE IN CANNABIS

States have directly restricted interstate commerce in cannabis in two main ways. First, every legalization state currently prohibits interstate sales of cannabis. These states permit cannabis to be sold in the state only if it has been produced in state. In other words, every legalization state now bans the importation of cannabis produced elsewhere. In similar fashion, legalization states do not allow any cannabis produced in the state to be sold outside the state. That is, they ban the exportation of locally produced cannabis. Oregon's adult-use cannabis law is illustrative. The statute provides that "[a] person may not import marijuana items into this state or export marijuana items from this state."<sup>15</sup> Oregon's ban has some teeth, as violations may carry a sanction of up to five years' imprisonment.<sup>16</sup>

Second, most legalization states also limit the ability of nonresidents to own and operate local cannabis businesses. These states make state residency a requirement for acquiring or holding a state-issued cannabis business license. The requirements vary in their particulars (for example, the term of residency required for securing a license), but Maine's requirement for adult-use cannabis licenses is illustrative. Under the Maine law, an applicant who is a natural person "must be a resident."<sup>17</sup> The statute defines "resident" as someone who has filed income tax returns in the state "in each of the 4 years prior" and who spends "more than 183 days of the taxable year" in Maine.<sup>18</sup> If the applicant is a business entity, every "officer, director, manager and general partner" must be a Maine resident, and a majority of the entity must be owned by Maine residents.<sup>19</sup>

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<sup>15</sup> OR. REV. STAT. § 475B.227(2) (2020); *see also, e.g.*, MINN. STAT. § 152.33(1a)(2) (2021) ("In addition to any other applicable penalty in law, the commissioner may levy a fine of \$250,000 against a manufacturer and may immediately initiate proceedings to revoke the manufacturer's registration, . . . if . . . in intentionally transferring medical cannabis to a person other than allowed by law, [the manufacturer] . . . transported or directed the transport of medical cannabis outside of Minnesota."); CAL. CODE REGS. tit. 16, § 5416(b) (2021) ("A delivery employee shall not leave the State of California while possessing cannabis goods."); COLO. CODE REGS. § 212-3-3-615(E)(8) (2021) ("A Delivery Motor Vehicle must not leave the State of Colorado while any amount of Regulated Marijuana is in the Delivery Motor Vehicle.").

<sup>16</sup> OR. REV. STAT. § 475B.227(3)-(4) (specifying grades of offenses); *id.* § 161.605 (specifying sanctions for different grades of offenses).

<sup>17</sup> ME. STAT. tit. 28-B, § 202(2) (2021).

<sup>18</sup> *Id.* § 102(48).

<sup>19</sup> *Id.* § 202(2)(A)-(B).

Some states have recently begun to relax their residency requirements to attract much-needed capital investment into their local cannabis industries.<sup>20</sup> However, even when nonresidents may hold cannabis licenses, they cannot import or export the drug; they must conduct their business activities within the state's borders, just like everyone else. Even multistate operators, such as Cresco Labs and Vireo Health, must adhere to these rules. These firms have acquired licenses from several legalization states, but they must operate separate production facilities in each of those states. They are not allowed to ship cannabis across state lines, even to their own subsidiaries. Indeed, Minnesota recently punished two officials from Vireo Health, a Minnesota-licensed medical cannabis producer, for allegedly smuggling \$500,000 worth of cannabis oil out of the state to shore up Vireo's New York operation, which was struggling to meet production quotas imposed by the state of New York.<sup>21</sup>

The limits on out-of-state ownership of local cannabis businesses constitute another state-imposed restriction on interstate commerce. Instead of limiting the flow of cannabis across state lines (the object of the import and export bans discussed above), these laws limit the flow of capital across state lines. They prevent individuals from investing funds in cannabis business ventures in other states.

Together, these two types of state restrictions have created substantial barriers to interstate commerce in cannabis and have helped to subdue the rise of a national cannabis market. As the next Part details, however, these state restrictions are probably unconstitutional.

## II. WHY STATE RESTRICTIONS ARE (PROBABLY) UNCONSTITUTIONAL

The enforceability of state restrictions on interstate commerce in cannabis rests on the application of the DCC, a doctrine of federal constitutional law that promotes the development of a national market and the free flow of goods, services, and capital across state borders.<sup>22</sup> The doctrine severely limits the states' ability to erect barriers to interstate commerce.<sup>23</sup> As the Supreme Court has explained,

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<sup>20</sup> *E.g.*, H.B. 20-1080, 72d Gen. Assemb., 2020 Reg. Sess. (Colo. 2020) (repealing Colorado's residency requirement for managers and employees of marijuana licensed businesses).

<sup>21</sup> *State v. Owens*, 930 N.W.2d 1, 7 (Minn. Ct. App. 2019); *see also* David Robinson, *Medical Marijuana in New York: Deal Reached on Smuggling Charges by Ex-Vireo Health Workers*, LOHUD (Oct. 24, 2019, 3:42 PM), <https://www.lohud.com/story/news/2019/10/24/medical-marijuana-new-york-deal-reached-over-smuggling-charges-vireo-health/4086184002/> (noting that Minnesota added new penalties for transporting cannabis across state lines in response to *State v. Owens*).

<sup>22</sup> State regulations may implicate other constitutional provisions as well, but this Essay focuses on the DCC because it imposes the most salient and potent constraints on state power to regulate interstate commerce in cannabis.

<sup>23</sup> *E.g.*, *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449, 2459 (2019) (observing that the DCC "prevents the States from adopting protectionist measures and thus preserves a national market for goods and services"). The DCC thus resembles congressional



Our system, fostered by the Commerce Clause, is 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.<sup>24</sup>

This Part demonstrates that state restrictions on interstate commerce in cannabis probably violate the DCC. To begin, state laws that discriminate against nonresidents, like the laws surveyed in Part I, are virtually *per se* invalid.<sup>25</sup> Such laws are unconstitutional unless a state can show that discriminating against outsiders is necessary to serve a legitimate, nonprotectionist purpose (e.g., protecting the local environment from invasive species).<sup>26</sup> Section II.A demonstrates that legalization states currently have no constitutionally adequate reason to bar imports (or exports) of cannabis or to exclude nonresidents from owning and operating local cannabis businesses.

Of course, Congress may authorize states to discriminate against interstate commerce,<sup>27</sup> and states may be operating on the assumption that the federal marijuana ban gives them free license to bar outsiders from local cannabis markets. But this assumption has gone untested, and Section II.B argues that it is likely unfounded. Neither the federal marijuana ban nor any other federal action provides the “unmistakably clear” congressional approval required to uphold otherwise invalid state regulations of interstate commerce.<sup>28</sup> In any event, as Section II.B explains, proposals currently being considered by Congress to legalize marijuana at the federal level would dissolve any authorization conferred by the federal ban. Simply put, if Congress adopts any of the reforms now on the table—and likely, even if it does not—the DCC will force legalization states to open their doors to cannabis imports and exports and to permit nonresidents to own and operate local cannabis businesses on the same terms as residents.

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preemption of state law, although it operates even when Congress has not legislated—i.e., when Congress’s Commerce Clause power lays dormant. Importantly, however, the DCC also operates when Congress *has* legislated. Thus, the mere fact that Congress has regulated some activity—like the sale of marijuana—does not automatically suspend operation of the DCC’s default rules. Rather, as discussed below, Congress must specifically—and very clearly—authorize states to block interstate commerce. *See infra* Section II.B.

<sup>24</sup> *H. P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 539 (1949).

<sup>25</sup> *E.g.*, *Granholt v. Heald*, 544 U.S. 460, 476 (2005) (“State laws that discriminate against interstate commerce face ‘a virtually *per se* rule of invalidity.’” (quoting *City of Phila. v. New Jersey*, 437 U.S. 617, 624 (1978))).

<sup>26</sup> *E.g.*, *Maine v. Taylor*, 477 U.S. 131, 138 (1986) (holding that when a state law discriminates against interstate commerce “‘either on its face or in practical effect,’ the burden falls on the State to demonstrate both that the statute ‘serves a legitimate local purpose,’ and that this purpose could not be served as well by available nondiscriminatory means” (quoting *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979))).

<sup>27</sup> *Id.* (“It is well established that Congress may authorize the States to engage in regulation that the Commerce Clause would otherwise forbid.”).

<sup>28</sup> *S.-Cent. Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 91 (1984).

Although this Essay focuses on state laws that discriminate against outside economic interests, Section II.C briefly considers the constitutionality of state cannabis laws that put insiders and outsiders on an equal footing. While neutral laws can burden interstate commerce, they are unconstitutional only if that burden is “clearly excessive” relative to their local benefits.<sup>29</sup> Section II.C suggests that, at least for the time being, state cannabis laws should survive DCC scrutiny so long as they treat insiders and outsiders alike. However, it also posits that idiosyncratic cannabis regulations might become vulnerable to DCC challenge as state laws begin to converge.

A. *States Lack a Sufficient Justification to Discriminate Against Interstate Commerce in Cannabis*

The restrictions discussed in Part I are plainly discriminatory. Legalization states regulate cannabis differently based on where it is produced or where it will be shipped. These states also treat business owners differently based on their residency.

It will be very difficult for legalization states to demonstrate that they have a constitutionally sufficient justification for imposing these discriminatory restrictions. Indeed, the Supreme Court has previously invalidated state laws that are nearly identical to the state laws surveyed in Part I, including state laws banning the importation and exportation of other goods (e.g., milk),<sup>30</sup> as well as state laws that make residency a requirement for owning or operating a local business (e.g., liquor stores).<sup>31</sup>

This Section considers the three most plausible reasons why states have adopted their restrictions on interstate commerce in cannabis: (1) protecting the local cannabis industry from out-of-state competition, (2) appeasing the federal government, and (3) safeguarding public health. It explains why none of these purposes would suffice to uphold state restrictions against a DCC challenge.

1. Protecting the Local Cannabis Industry

Economic protectionism constitutes the most straightforward reason legalization states have restricted interstate commerce in cannabis. States have banned imports to protect local cannabis firms—and the jobs they produce—from out-of-state competition. In similar fashion, these states have banned nonresidents from owning and operating local cannabis businesses to reserve the potential profits associated with this new industry for local entrepreneurs and

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<sup>29</sup> *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

<sup>30</sup> *E.g.*, *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 356 (1951) (holding that local ordinance prohibiting sale of milk bottled outside city limits violated DCC); *H. P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 544-45 (1949) (holding that state law limiting sale of local milk to out-of-state bottler violated DCC).

<sup>31</sup> *Tenn. Wine & Spirits Retailers Ass’n v. Thomas*, 139 S. Ct. 2449, 2476 (2019) (holding that state law requiring two years of residency to obtain liquor store license violated DCC).

investors.<sup>32</sup> (Because export bans limit market opportunities for local producers, they seem less likely to be motivated by protectionism and might instead reflect a genuine desire to appease the federal government and show comity toward other states that have not yet legalized cannabis.)<sup>33</sup>

It is hardly surprising that states would want to protect the local cannabis industry from out-of-state competition. Legalization is commonly touted as a means of creating new jobs and economic opportunities within a state.<sup>34</sup> To

<sup>32</sup> *E.g.*, *NPG, LLC v. City of Portland*, No. 2:20-cv-00208, 2020 WL 4741913, at \*2 (D. Me. Aug. 14, 2020) (noting that avowed purpose of city's residency requirement was to "advantage or give a slight preference for individuals and entities that have been Maine residents" and to "allow[] the local market to grow before there was an opportunity for outside investment to come in" (alteration in original) (quoting *Portland City Council – 5/18/20*, PORTLAND MEDIA CTR., at 3:42:52, 3:45:15, <https://reflect-pmc-me.cablecast.tv/CablecastPublicSite/show/15380?channel=1> (last visited Apr. 13, 2021)); Complaint for Declaratory Judgment and Petition for Review of State Agency Action ¶ 56, *United Cannabis Patients & Caregivers of Me. v. Me. Dep't of Admin. & Fin. Servs.*, No. 1:20-cv-00388 (D. Me. Oct. 19, 2020) [hereinafter *United Cannabis Patients* Complaint] (seeking to reinstate Maine's residency requirement and claiming that "[t]he Residency Requirement's limited eligibility for adult use marijuana establishments for Maine residents was intended to provide an economic advantage to Plaintiffs that is diminished by the Department's issuance of active licenses to the Parties-in-Interest"); Complaint for Declaratory and Injunctive Relief ¶ 3, *NPG, LLC v. Dep't of Admin. & Fin. Servs.*, No. 1:20-cv-00107 (D. Me. Mar. 20, 2020) [hereinafter *NPG* Complaint] (noting that Maine's licensing authority had expressly acknowledged that the state's marijuana licensing program was designed to "[e]nsure that economic opportunities afforded by marijuana legalization is [sic] available chiefly for the citizens of Maine" (alterations in original)); ALLIE HOWELL, REASON FOUND., RESIDENCY REQUIREMENTS FOR MARIJUANA LICENSURE 3 (2019), <https://reason.org/wp-content/uploads/residency-requirements-marijuana-licensure.pdf> [<https://perma.cc/9KP6-Y3P5>] ("Residency requirements are . . . a form of economic protectionism for state residents."); Dan Adams, *Maine Aims to Keep Recreational Pot Business Local*, BOS. GLOBE, May 9, 2019, at A1 (quoting member of Maine Cannabis Industry Association: "We don't want out-of-state corporate businesses here running our cannabis industry"); *id.* at A1 (quoting director of Maine's Office of Marijuana Policy: "We were lucky enough to be able to learn from other states, where we saw big companies coming in, gobbling up the industry, and pushing out small businesses and locals . . . We're doing our best to ensure that doesn't happen here"); Jackie Borchardt, *Ohio Medical Marijuana Entrepreneurs Want Residency Requirement for Business Licenses*, CLEVELAND.COM (Jan. 11, 2019), [https://www.cleveland.com/metro/2017/03/ohio\\_medical\\_marijuana\\_entrepr.html](https://www.cleveland.com/metro/2017/03/ohio_medical_marijuana_entrepr.html) (quoting owner of state-licensed medical cannabis business: "Allowing people from outside the state [to get Ohio marijuana licenses] is not benefiting Ohio or Ohioans or our unemployment").

<sup>33</sup> See *infra* Section II.A.2 (discussing states' professed desire to appease federal law enforcement).

<sup>34</sup> *E.g.*, COREY STAPLETON, MONT. SEC'Y OF STATE, 2020 VOTER INFORMATION PAMPHLET 64 (2020), <https://sosmt.gov/wp-content/uploads/SOS-Web-Version-VIP-10.125x8-1.pdf> [<https://perma.cc/J9X8-CBZE>] ("I-190 will create new industry and new jobs for Montanans who need work."); WARNE, *supra* note 11; *Foster Economic Development*, NJ CAN 2020, <https://www.njcan2020.org/economic-development/> [<https://perma.cc/MDF2-FLG5>] (last visited Apr. 13, 2021) ("Legalizing cannabis for adult use will reduce costs, create jobs, and generate revenue for New Jersey.").

ensure that cannabis is produced locally and that residents thus capture the wages and profits attributed to cultivation and processing, states have shielded local industries from out-of-state competition.<sup>35</sup>

Indeed, proponents of cannabis reforms have been remarkably unabashed about their intent to shield local firms from the cutthroat pressures of the national marketplace. For example, in the 2020 election, the official voter pamphlet for South Dakota's marijuana legalization measure brazenly informed voters that "[a]ll marijuana sold in South Dakota must be grown and packaged inside our borders, which will lead to hundreds of jobs for construction workers, plumbers, electricians, HVAC workers, laborers, and retail workers."<sup>36</sup> Such candor is rare given the obvious constitutional problems posed by protectionism, but it might be attributable to the mistaken belief that Congress has authorized states to engage in protectionism.<sup>37</sup>

While protecting local economic interests from out-of-state competition has obvious appeal to local voters and politicians, it is not a legitimate purpose for state regulation. The Supreme Court has warned that "[s]tates may not enact laws that burden out-of-state producers or shippers simply to give a competitive advantage to in-state businesses."<sup>38</sup> Thus, to the extent that state restrictions on interstate commerce in cannabis are motivated by protectionism—as appears to be the case—they are plainly unconstitutional under the DCC.

## 2. Appeasing the Federal Government

Apart from protecting their local industries from competition, some states have suggested that restricting interstate commerce is necessary to forestall a federal crackdown on their state-licensed cannabis industries. While federal law continues to ban the production and distribution of marijuana, the federal government has tolerated state-licensed cannabis activities for several years. Since the Cole Memorandum was issued in 2013, for example, the federal Department of Justice ("DOJ") has signaled that it would not prosecute businesses that cultivate and distribute marijuana in strict compliance with state

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For studies estimating the number of jobs created by legalization, see, for example, RCG ECON. & MARIJUANA POL'Y GRP., NEVADA ADULT-USE MARIJUANA: ECONOMIC & FISCAL BENEFITS ANALYSIS, at ES-3 (2016), <https://rcgecon.com/wp-content/uploads/2012/01/2016-7-12-Final-NV-MJ-Initiative-Rpt-v.2.pdf> [<https://perma.cc/P77R-CFZ9>] (estimating that marijuana legalization would generate more than 41,000 new jobs in Nevada); WILL COOPER, ELIZA JOHNSTON & KATIE SEGAL, ICF INT'L, THE ECONOMIC IMPACTS OF MARIJUANA SALES IN THE STATE OF CALIFORNIA 13 (2016), <https://www.icf.com/insights/health/economic-impact-of-marijuana-sales-in-california> [<https://perma.cc/8MZE-37RR>] (estimating marijuana legalization would generate up to 103,000 new jobs in California).

<sup>35</sup> Much of the cannabis production that is now dispersed across legalization states is likely to shift to a few producer states, once the door to interstate commerce is opened. See *infra* notes 173-179 (discussing how climate, regional reputation for cannabis production, and early legalization will drive production to select states).

<sup>36</sup> WARNE, *supra* note 11.

<sup>37</sup> See *infra* Section II.B.

<sup>38</sup> *Granholm v. Heald*, 544 U.S. 460, 472 (2005).

law.<sup>39</sup> Legalization states have relied on this federal forbearance to establish their regulated cannabis industries.<sup>40</sup>

Even though the federal government now politely ignores \$13 billion worth of marijuana commerce that takes place within individual states, some state officials claim that the federal government would not overlook *any* marijuana commerce that took place *between* the states.<sup>41</sup> The source of this purported fear is a single line in the aforementioned Cole Memorandum warning that the DOJ might not forebear from prosecuting marijuana activities that implicate federal enforcement priorities, one of which is “[p]reventing the diversion of marijuana from states where it is legal under state law in some form to other states.”<sup>42</sup> Thus,

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<sup>39</sup> Memorandum from James M. Cole, Deputy Att’y Gen., DOJ, to All U.S. Att’ys (Aug. 29, 2013) [hereinafter Cole Memorandum], <https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf> [<https://perma.cc/XBF6-SLGZ>]. Although Attorney General Jeff Sessions rescinded the Cole Memorandum in January 2018, the DOJ has continued to adhere to a nonenforcement policy toward state-authorized cannabis activities. See Robert A. Mikos, *The Evolving Federal Response to State Marijuana Reforms*, 26 WIDENER L. REV. 1, 10-11 (2020) [hereinafter Mikos, *Evolving Federal Response*].

<sup>40</sup> See Mikos, *Evolving Federal Response*, *supra* note 39, at 11 (demonstrating that states began to authorize commercial production and sale of cannabis only after DOJ signaled it would no longer prosecute such activities, beginning in 2009).

<sup>41</sup> *E.g.*, HOWELL, *supra* note 32, at 1 (“Many marijuana regulations are justified as necessary to comply with the federal government’s marijuana enforcement priorities laid out in the Cole Memo . . . .”); Ben Adlin, *Midwest’s Cross-Border MMJ Proposal Is ‘Absolute Lunacy,’ Poses Nationwide Threat*, LEAFLY (May 16, 2017), <https://www.leafly.com/news/politics/midwests-cross-state-mmj-proposal-is-absolute-lunacy> [<https://perma.cc/3Y5Y-K6AP>] (observing that interstate commerce in cannabis “is illegal and enforceable under the Cole memo,” according to John Hudak); Patrick McGreevy, *California’s Pot Surplus Vexes States*, L.A. TIMES, Oct. 2, 2017, at A1 (quoting California Assemblyman Tom Lackey: “If we want to avoid intervention from the federal government, we need to do everything we can to crack down on illegal activity and prevent cannabis from being exported out of state”).

In similar fashion, the desire to appease the federal government may have also motivated Colorado to (temporarily) impose discriminatory limits on the amount of marijuana that nonresidents could purchase at state-licensed retail marijuana stores. See JACK FINLAW & BARBARA BROHL, TASK FORCE REPORT ON THE IMPLEMENTATION OF AMENDMENT 64: REGULATION OF MARIJUANA IN COLORADO 50 (2013), [https://www.colorado.gov/pacific/sites/default/files/A64TaskForceFinalReport%5B1%5D\\_1.pdf](https://www.colorado.gov/pacific/sites/default/files/A64TaskForceFinalReport%5B1%5D_1.pdf) [<https://perma.cc/29PX-2CHC>] (“In order to discourage the diversion of legally-purchased marijuana out of Colorado, reduce the likelihood of federal scrutiny of Colorado’s adult-use marijuana industry, and support harmonious relationships with Colorado’s neighboring states, an appropriate limit should be placed on the amount of marijuana or marijuana-infused products that can be purchased by out-of-state consumers.”); see also Brannon P. Denning, *One Toke Over the (State) Line: Constitutional Limits on “Pot Tourism” Restrictions*, 66 FLA. L. REV. 2279, 2290 (2014) (suggesting that Colorado’s discriminatory purchase limits were inspired by concerns that volume sales to nonresidents might prompt the federal government “to take a more proactive enforcement role than it is currently inclined to take”).

<sup>42</sup> Cole Memorandum, *supra* note 39, at 1, 3 (suggesting that legalization states could address federal enforcement priorities, and thereby reduce likelihood of federal enforcement

so the argument goes, states must bar local firms from engaging in any cannabis commerce across state lines to avoid provoking a federal crackdown on their cannabis industries.

Two examples serve to illustrate how fears of federal reprisal may have shaped state regulation of interstate commerce in cannabis. In 2017, Iowa officials declined to implement a provision of state law that would have supplied Iowa patients with low-THC medical cannabis imported from Minnesota.<sup>43</sup> Lawmakers from both Iowa and Minnesota supported the proposal, which was intended to speed Iowa patients' access to the drug, as it can take years for a state cannabis industry to become operational.<sup>44</sup> However, Iowa officials balked after the Iowa State Attorney General advised them that importing the drug from another state might cause Iowa's program to "come under increased scrutiny from the federal government."<sup>45</sup> Fanning these fears, John Hudak of the Brookings Institution warned that the proposal

should not just be alarming in Minnesota and Iowa . . . [but] should alarm every state that's relying on this very fragile framework that's keeping medical marijuana together. . . . What they are proposing is illegal under federal law. . . . The idea that the Sessions Justice Department would allow this is absolute lunacy. And because of that, this is a truly terrible idea. . . . The last thing the marijuana industry wants is to rock the boat in a way that would irritate Jeff Sessions.<sup>46</sup>

Likewise, in 2019, when Oregon was faced with a massive surplus of cannabis, the state legislature passed a law permitting local firms to export their wares to other states—but, critically, only if the federal government approved.<sup>47</sup>

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actions, by "implementing effective measures to prevent diversion of marijuana outside of the regulated system and to other states").

<sup>43</sup> House File 524 added Section 124E.13, which provides, in relevant part, that "[t]he department of public health shall . . . select and license by December 1, 2017, up to two out-of-state medical cannabidiol dispensaries from a bordering state to sell and dispense medical cannabidiol to a patient or primary caregiver in possession of a valid medical cannabidiol registration card issued under this chapter." H. File 524, 87 Gen. Assemb., Reg. Sess. § 17 (Iowa 2017).

<sup>44</sup> Adlin, *supra* note 41.

<sup>45</sup> Barbara Rodriguez, *AG Tells Agency to Halt Part of Iowa's Medical Marijuana Law*, DES MOINES REG. (Sept. 11, 2017, 10:55 AM), <https://www.desmoinesregister.com/story/news/2017/09/10/ag-tells-agency-halt-part-iowas-medical-marijuana-law/651151001/>.

<sup>46</sup> Adlin, *supra* note 41 (quoting Professor Jonathan Adler: "I cannot see the federal government looking favorably on this sort of thing . . . [Attorney General] Sessions has shown himself to be quite hostile to state experimentation or flexibility in this area").

<sup>47</sup> An Act Relating to Cannabis, ch. 464, 2019 Or. Laws 464. The statute (Senate Bill 582) stipulates that Oregon licensed firms could send or receive cannabis interstate, once either "(a) Federal law is amended to allow for the interstate transfer of marijuana items between authorized marijuana-related businesses; or (b) The United States Department of Justice issues an opinion or memorandum allowing or tolerating the interstate transfer of marijuana items between authorized marijuana-related businesses." *Id.* § 3(1). SB 582 also requires the approval of the other state(s) involved in the transaction. *Id.* § 2.

This condition was added to address concerns that exporting cannabis out of Oregon “[c]ould increase risk of enforcement action or federal intervention.”<sup>48</sup>

But this professed desire to appease the federal government does not justify the restrictions that states have imposed on interstate commerce in cannabis for two broad reasons. First, the danger of a federal crackdown has been grossly overblown, suggesting the states’ professed fears are either unfounded or disingenuous—i.e., only a cover for the states’ true, protectionist motivations. Simply put, there is little (if any) evidence that the federal government objects to interstate commerce in cannabis or that it could do much to punish states that allowed interstate sales even if it did object.

To begin, Congress has not targeted interstate commerce in marijuana for special opprobrium. Congress has banned all commerce in marijuana,<sup>49</sup> reflecting its judgment that the intrastate and interstate markets for the drug are inextricably intertwined.<sup>50</sup> The belief that the federal government is fixated on interstate shipments of cannabis reflects an outdated, miserly view of the scope of Congress’s Commerce Clause authority.<sup>51</sup> For more than eighty years, the Supreme Court has recognized that Congress may regulate activity even if it is “local and though it may not be regarded as commerce” as long as it “exerts a substantial economic effect on interstate commerce.”<sup>52</sup> Congress exercised that power to its utmost when it passed the federal marijuana ban, “believing that failure to regulate the intrastate manufacture and possession of marijuana would leave a gaping hole in the [Controlled Substances Act].”<sup>53</sup> In short, Congress has given no indication that it would be more troubled by interstate sales of marijuana than it would be troubled by the voluminous marijuana sales that now take place within dozens of states.

Just as important, the DOJ has not threatened to enforce the federal ban more aggressively against interstate versus intrastate sales of marijuana. The DOJ has adopted a policy of nonenforcement toward commercial marijuana activities authorized by state law, and it has not categorically excluded interstate commercial activities from that policy, notwithstanding the Cole Memorandum. Read closely, the Cole Memorandum suggests only that the DOJ might intervene if a party ships marijuana from “where it is legal under state law in some form to other states,”<sup>54</sup> i.e., to states where it is not legal. The quoted language of the Memorandum seems to envision a scenario where, for example, a Colorado-licensed firm ships marijuana to Nebraska, one of a dwindling number of states

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<sup>48</sup> MIKE GETLIN, OR. INDUS. PROGRESS ASS’N, PREPARING FOR NATIONWIDE CANNABIS COMMERCE: SECURING A PATH FORWARD FOR OREGON 7 (2019) (PowerPoint), <https://olis.oregonlegislature.gov/liz/2019R1/Downloads/CommitteeMeetingDocument/157525> [<https://perma.cc/A8QL-HXBZ>].

<sup>49</sup> The federal ban is found in the Controlled Substances Act (“CSA”), 21 U.S.C. § 841.

<sup>50</sup> See *Gonzales v. Raich*, 545 U.S. 1, 2 (2005).

<sup>51</sup> See Adlin, *supra* note 41 (quoting John Hudak: “Interstate commerce is explicitly a federal power”).

<sup>52</sup> *Wickard v. Filburn*, 317 U.S. 111, 125 (1942).

<sup>53</sup> *Gonzales*, 545 U.S. at 22.

<sup>54</sup> Cole Memorandum, *supra* note 39, at 1.

that continues to prohibit marijuana outright. But the Cole Memorandum does not suggest that the DOJ would prosecute parties who ship marijuana between two states “where it is legal under state law,” i.e., between two legalization states.<sup>55</sup> The Cole Memorandum also says absolutely nothing about interstate investment in cannabis firms, making it a particularly slender reed on which to base state residency requirements for cannabis licenses.<sup>56</sup>

The states’ hypercautious interpretation of the Cole Memorandum is also out of keeping with their interpretation of earlier DOJ enforcement guidance. The DOJ first signaled that it would tolerate state-authorized medical marijuana activities in 2009 in guidance known as the Ogden Memorandum.<sup>57</sup> On its face, the Ogden Memorandum was far more circumspect than the Cole Memorandum. While it suggested that federal prosecutors should not prosecute medical marijuana patients acting in compliance with state law,<sup>58</sup> it promised no such forbearance toward medical marijuana suppliers even if they complied with state law. In fact, the Memorandum stated that “prosecution of commercial enterprises that unlawfully market and sell marijuana for profit continues to be an enforcement priority of the Department.”<sup>59</sup> Nonetheless, the states

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<sup>55</sup> *Id.* Likewise, guidance issued by the Financial Crimes Enforcement Network (“FinCEN”) regarding marijuana banking does not necessarily evince federal hostility toward interstate commerce in cannabis writ large. FIN CRIMES ENF’T NETWORK, DEP’T OF THE TREAS., BSA EXPECTATIONS REGARDING MARIJUANA-RELATED BUSINESSES (Feb. 14, 2014), <https://www.fincen.gov/sites/default/files/guidance/FIN-2014-G001.pdf> [<https://perma.cc/K4Q8-PD2Y>]. To be sure, the guidance cautions that both “engag[ing] in international or interstate activity” and being owned or managed by people who “reside outside the state” constitute “red flags” that require banks to file special Marijuana Priority Suspicious Activity Reports. *See id.* at 5-7. However, these activities might constitute red flags only because they currently violate *state* law, and the guidance makes compliance with state law a condition for obtaining, or providing, banking services. *See id.* In other words, the FinCEN guidance does not necessarily warn against interstate commerce because the federal government objects to it.

<sup>56</sup> *See* Cole Memorandum, *supra* note 39. Commentators have failed to cite any evidence that the federal government would object to interstate investment in cannabis businesses, even if it objects to interstate shipments of cannabis. *See* FINLAW & BROHL, *supra* note 41, at 33 (claiming, without substantiation, that “residency requirements will also position the new regulatory framework to better withstand federal scrutiny, given that they discourage out-of-state residents from moving to Colorado expressly to establish an adult-use marijuana business”). Just because a cannabis business located in State A is owned by a resident of State B does not mean that the business will try to sell cannabis in State B. Put another way, nonresident ownership does not, by itself, suggest that a cannabis business will flout state law.

<sup>57</sup> Memorandum from David W. Ogden, Deputy Att’y Gen, DOJ, to Selected U.S. Att’y’s (Oct. 19, 2009) [hereinafter Ogden Memorandum], <https://www.justice.gov/sites/default/files/opa/legacy/2009/10/19/medical-marijuana.pdf> [<https://perma.cc/958G-6Y7U>].

<sup>58</sup> *Id.* at 2 (“[P]rosecution of individuals with cancer or other serious illnesses who use marijuana as part of a recommended treatment regimen consistent with applicable state law . . . is unlikely to be an efficient use of limited federal resources.”).

<sup>59</sup> *Id.*; *see also* Robert A. Mikos, *A Critical Appraisal of the Department of Justice’s New Approach to Medical Marijuana*, 22 STAN. L. & POL’Y REV. 633, 638-39 (2011) (analyzing limits of Ogden Memorandum).



(conveniently) interpreted the Ogden Memorandum as giving them the green light to establish their regulated medical marijuana industries.<sup>60</sup> If the states misread the Ogden Memorandum, the DOJ never corrected them or sought to shut down their newly approved cannabis industries.

In any event, even if the DOJ did (for some unknown reason) object to all interstate commerce in cannabis, there is very little the agency could do to stop such commerce or to lash out against cannabis industries in states that dare to allow interstate transactions. The DOJ's enforcement resources are extremely limited.<sup>61</sup> Realistically, the agency could prosecute no more than a fraction of the cannabis buyers and sellers who would be willing to engage in interstate transactions.<sup>62</sup> Indeed, congressional budget riders might prevent the DOJ from prosecuting anyone who buys or sells medical marijuana interstate with the blessing of state law.<sup>63</sup>

Tellingly, states have failed to identify the specific actions that they fear the DOJ would take if the states removed their restrictions on interstate commerce in cannabis. Consider the terse statement from the Iowa Attorney General's office, warning that importing nonpsychoactive CBD from Minnesota might draw "increased scrutiny from the federal government."<sup>64</sup> The Iowa Attorney General did not mention any concrete measures that it thought the DOJ would take in response to the aborted plan, perhaps because it seems implausible (to put it mildly) to believe that then-U.S. Attorney General Jeff Sessions would have prosecuted Iowans who accepted those shipments, given that Sessions had

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<sup>60</sup> Mikos, *Evolving Federal Response*, *supra* note 39, at 11 ("The states interpreted [the Ogden memorandum] . . . as giving them the green light to set up a legal, but highly regulated, commercial marijuana industry. . . . [S]tarting in 2009, an increasing share of medical marijuana states authorized the commercial production and distribution of marijuana . . .").

Curiously, the states banned interstate commerce in cannabis from the moment they first authorized the commercial production and distribution of cannabis, even though the Ogden Memorandum did not mention any special concern over interstate commerce (it did not mention interstate commerce at all), and even though the Cole Memorandum and its language, which supposedly warned against interstate commerce, had not yet been written. *See* Ogden Memorandum, *supra* note 57; Cole Memorandum, *supra* note 39. The fact that state restrictions predate the Cole Memorandum suggests that the states' avowed reliance on the Cole Memorandum may be disingenuous—i.e., states may be using the Memorandum to obscure the protectionist motivations behind their restrictions on interstate commerce. *See supra* notes 32-38 and accompanying text (discussing state protection of local marijuana industry).

<sup>61</sup> *See* Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the States' Overlooked Power to Legalize Federal Crime*, 62 VAND. L. REV. 1419, 1433-36 (2009).

<sup>62</sup> *See id.*

<sup>63</sup> Since 2014, Congress has attached riders to the DOJ's budget, prohibiting the agency from prosecuting anyone acting in compliance with state medical marijuana laws. *See* Consolidated Appropriations Act, 2020, Pub. L. No. 116-93, § 531, 133 Stat. 2317, 2431; *see also* *United States v. McIntosh*, 833 F.3d 1163, 1178 (9th Cir. 2016) (discussing riders and their effects); *see also*. Like the federal ban, the riders make no categorical distinction between interstate and intrastate commerce in marijuana. *See* Consolidated Appropriations Act § 531.

<sup>64</sup> *See* Rodriguez, *supra* note 45.

yet to lift a finger against hundreds of companies that were openly selling more potent recreational marijuana in violation of federal law (in blue states, no less). Ultimately, the warnings about DOJ reprisals are just too vague and too oblivious of the agency's limited enforcement capacity to justify state bans on interstate commerce in cannabis under the DCC.

The extremely low probability that the DOJ would end the states' cannabis programs—or even try to do that—if the states dared to permit cross-border sales or investments undermines the case for state restrictions on interstate commerce in cannabis. To the extent it is unfounded, the states' professed desire to appease the DOJ should be heavily discounted in DCC analysis. Allowing a state to erect trade barriers based on unfounded concerns about interstate commerce would gut the protections afforded by the DCC. The improbability of DOJ reprisals also suggests that the states' professed fears may not be genuinely held. In other words, they might simply serve as a convenient pretext to conceal the states' true protectionist motives—motives states must know are illegitimate and indefensible. Either way, the supposed purpose of appeasing the DOJ cannot justify the discriminatory measures states have adopted to regulate cannabis commerce.

Second, even assuming the states' fears of DOJ reprisal are genuine and well-founded, permitting states to discriminate against outsiders because of DOJ enforcement policy raises a distinct separation-of-powers objection. As discussed more below, only Congress can authorize the states to restrict interstate commerce.<sup>65</sup> Congress, after all, wields the power to regulate "Commerce among the several States."<sup>66</sup> It seems obvious that the DOJ could not simply issue a proclamation declaring that states may bar outsiders from participating in their local cannabis markets, because that proclamation would usurp Congress's exclusive authority to confer such permission. It logically follows that the DOJ cannot do the same thing by another means. Namely, it cannot use enforcement threats to supply the states with a convenient, nonprotectionist excuse for restricting interstate commerce in cannabis because that would be tantamount to authorizing the states to restrict such commerce.<sup>67</sup> After all, states would be allowed to discriminate against interstate commerce in cannabis as if Congress has authorized them to do so (even though it had not). Thus, to avoid this separation-of-powers concern, states should not be able to

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<sup>65</sup> See *infra* Section II.B.1 (discussing congressional authorization under DCC).

<sup>66</sup> U.S. CONST. art. I, § 8.

<sup>67</sup> It is easy to imagine other scenarios in which the DOJ might try to use enforcement threats to usurp Congress's exclusive power to turn off the DCC's nondiscrimination default rule. Imagine, for example, that the DOJ disagreed with a Supreme Court decision invalidating on DCC grounds a state residency requirement for liquor stores. If the DOJ wanted to help the state resuscitate that requirement, it could simply threaten vague legal action against the state's entire liquor industry unless the state barred nonresidents from owning liquor businesses. For example, the agency could threaten to investigate firms in the industry for a wide variety of all-too-common federal offenses—antitrust, racketeering, wire fraud, etc.—unless the state "agreed" to keep outside investors out of its liquor market.

use discretionary enforcement choices made by the DOJ to justify their restrictions on interstate commerce.

### 3. Safeguarding Public Health

The states might offer a third reason for restricting interstate commerce: safeguarding public health from the dangers of cannabis. Although many states have legalized cannabis, even these states remain somewhat wary of the drug. To address their health concerns, legalization states have adopted a slew of regulations governing the content, packaging, and labeling of cannabis products.<sup>68</sup> These states might argue that they simply cannot trust that cannabis produced elsewhere—or cannabis produced or sold by nonlocals—will meet the exacting standards imposed by such regulations.

While concerns for public health are legitimate, the Supreme Court has repeatedly rejected the idea that the location of a business or the residency of its owners bears any relation to these concerns. In *Dean Milk Co. v. City of Madison*,<sup>69</sup> for example, the Court struck down a local ordinance banning the sale of milk pasteurized and bottled more than five miles from the city center as violative of the DCC.<sup>70</sup> Madison claimed that it could not determine whether milk bottled outside its city limits was pasteurized safely, but the Court rejected the claim out of hand.<sup>71</sup> The Court noted that Madison officials could either rely upon public health inspectors in other jurisdictions to ensure the safety of milk bottled in nonlocal facilities or inspect those distant facilities themselves (and at the bottlers' expense).<sup>72</sup> The Court concluded,

In . . . erecting an economic barrier protecting a major local industry against competition from without the State, Madison plainly discriminates against interstate commerce. This it cannot do, even in the exercise of its unquestioned power to protect the health and safety of its people, if reasonable nondiscriminatory alternatives, adequate to conserve legitimate local interests, are available.<sup>73</sup>

Similarly, in *Tennessee Wine & Spirits Retailers Ass'n v. Thomas*,<sup>74</sup> the Court quashed a state law that imposed a two-year residency requirement for liquor store licenses.<sup>75</sup> Among other things, the state argued that its residency requirement gave it “a better opportunity to determine an applicant’s fitness to sell alcohol and guard[ed] against ‘undesirable nonresidents’ moving into the

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<sup>68</sup> See ROBERT A. MIKOS, MARIJUANA LAW, POLICY, AND AUTHORITY 446-62, 499-501 (2017) [hereinafter MIKOS, MARIJUANA LAW, POLICY, AND AUTHORITY].

<sup>69</sup> 340 U.S. 349 (1951).

<sup>70</sup> *Id.* at 356.

<sup>71</sup> *Id.* at 353-54.

<sup>72</sup> *Id.* at 354-56.

<sup>73</sup> *Id.* at 354 (footnote omitted).

<sup>74</sup> 139 S. Ct. 2449 (2019).

<sup>75</sup> *Id.* at 2476.

State for the purpose of operating a liquor store.”<sup>76</sup> But the Court dismissed this justification, observing that “[t]he State can thoroughly investigate applicants without requiring them to reside in the State for two years before obtaining a license.”<sup>77</sup> It noted that “the Commerce Clause did not permit the States to impose protectionist measures clothed as police-power regulations.”<sup>78</sup>

In similar fashion, it is difficult to see how either banning imports or limiting nonresident ownership of local cannabis businesses helps to advance the states’ legitimate interest in ensuring the safety of cannabis products.<sup>79</sup> States can demand that all cannabis products—including those produced out of state—satisfy the same testing, labeling, and packaging requirements that apply to locally produced goods. They thus have no need to ban all imports of cannabis products. In similar fashion, states can subject nonresidents to the same criminal background checks they run for local cannabis license applicants. They thus have no need to make residency a requirement for holding a cannabis license. Because states have nondiscriminatory means to pursue their legitimate interest in safeguarding public health, their discriminatory restrictions on interstate commerce in cannabis are unconstitutional.

#### B. *Congress Has Not Authorized State Restrictions*

The upshot of the prior Section is that legalization states lack a constitutionally sufficient reason to bar interstate commerce in cannabis. Thus, the only way these states can defend their restrictions is by demonstrating that Congress has authorized them.

While the Supreme Court has recognized that Congress may override the DCC’s default rules, it has insisted that congressional authorization “must be

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<sup>76</sup> *Id.* at 2475 (quoting Brief for Petitioner at 10, *Tenn. Wine & Spirits*, 139 S. Ct. 2449). The state of Washington has used similar reasoning to defend its residency requirement for cannabis businesses. See Board’s Response to Motion for Preliminary Injunction at 5, *Brinkmeyer v. Wash. State Liquor & Cannabis Bd.*, No. 3:20-cv-05661 (W.D. Wash., Aug. 24, 2020), ECF No. 11 (“The domicile of marijuana business owners in Washington ensures that a sufficient background check can occur.”).

<sup>77</sup> *Tenn. Wine & Spirits*, 139 S. Ct. at 2475. Notably, the Court rejected this and other public health justifications, even though it reviewed Tennessee’s discriminatory requirement under the more forgiving DCC test applicable only to state alcohol regulations by virtue of Section 2 of the Twenty-First Amendment. *Id.* at 2474 (“Section 2 gives the States regulatory authority that they would not otherwise enjoy, but . . . ‘mere speculation’ or ‘unsupported assertions’ are insufficient to sustain a law that would otherwise violate the Commerce Clause.” (quoting *Granholm v. Heald*, 544 U.S. 460, 490, 492 (2005))); see also U.S. CONST. amend. XXI, § 2 (“The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.”).

<sup>78</sup> *Tenn. Wine & Spirits*, 139 S. Ct. at 2468.

<sup>79</sup> See *NPG, LLC v. City of Portland*, No. 2:20-cv-00208, 2020 WL 4741913, at \*11 (D. Me. Aug. 14, 2020) (rejecting city’s claim that its residency preference for cannabis licenses was necessary “to ensure that the City understood the amount and quality of oversight and could easily verify any past violations” of an applicant).

unmistakably clear.”<sup>80</sup> Tellingly, in the last seventy-five years, the Supreme Court has found only two instances in which Congress has authorized state discrimination against out-of-state economic interests.<sup>81</sup> More commonly, the Court has found evidence of congressional authorization to be lacking, even when Congress has banned the very same interstate activity the state has sought to block.<sup>82</sup>

This Section considers, in turn, three possible sources of authorization for state bans on interstate commerce in cannabis: (1) the federal marijuana ban, (2) congressional spending riders, and (3) DOJ enforcement guidance. It explains why, for various reasons, none of these actions now authorizes states to discriminate against the importation (or exportation) of cannabis or the nonresident ownership of local cannabis businesses, at least with the clarity demanded by the Court. In any event, even if Congress has somehow previously authorized such discrimination, that authorization will almost certainly disappear once Congress legalizes cannabis under federal law. None of the leading reform proposals Congress is now considering contemplates giving states the power to discriminate against interstate commerce in cannabis.

### 1. The Federal Marijuana Ban

The most obvious candidate for congressional authorization is the federal marijuana ban found in the Controlled Substances Act (“CSA”).<sup>83</sup> Defenders of state restrictions on interstate commerce have assumed that, because the CSA bans all commerce in marijuana, it implicitly authorizes states to discriminate against interstate commerce in the drug.<sup>84</sup> For example, in response to a recent

<sup>80</sup> S.-Cent. Timber Dev., Inc. v. Wunnicke, 467 U.S. 82, 91 (1984).

<sup>81</sup> Prudential Ins. Co. v. Benjamin, 328 U.S. 408, 427-36 (1946) (finding that the McCarran-Ferguson Act authorized discriminatory state tax imposed on out-of-state insurance firms); Ne. Bancorp, Inc. v. Bd. of Governors of the Fed. Rsrv. Sys., 472 U.S. 159, 169-75 (1985) (finding that the Douglas Amendment to the Bank Holding Company Act authorized state restrictions on acquisition of local banks by out-of-state banks).

<sup>82</sup> E.g., *Tenn. Wine & Spirits*, 139 S. Ct. at 2462-76 (rejecting claim that Section 2 of Twenty-First Amendment and related statutes authorized state restrictions on nonresident ownership of liquor stores); *Maine v. Taylor*, 477 U.S. 131, 137-40 (1986) (rejecting claim that Lacey Act Amendments, 16 U.S.C. §§ 3371-3378, authorized state ban on importation of out-of-state baitfish).

<sup>83</sup> 21 U.S.C. §§ 841, 844.

<sup>84</sup> See, e.g., *United Cannabis Patients Complaint*, *supra* note 32, ¶¶ 63-72 (demanding that Maine reinstate its residency requirement for cannabis licensees because “Congress invoked its Commerce Clause power to pass the Controlled Substances Act rendering marijuana a federally scheduled drug that cannot lawfully be exchanged in interstate commerce”); see also *Sladek v. Town of Palmer Lake*, No. 13-cv-02165, 2014 WL 789080, at \*5 (D. Colo. Feb. 27, 2014) (reasoning that local ordinance banning all recreational marijuana shops “cannot burden interstate commerce, incidentally or otherwise, because federal law prohibits the sale of marijuana”); Scott Bloomberg, *Frenemy Federalism*, 56 U. RICH. L. REV. (forthcoming 2022) (on file with author) (suggesting that courts should presume that Congress authorized state discrimination to preserve the fragile truce state and federal officials have struck over marijuana policy).

lawsuit challenging Oklahoma’s residency requirement for medical cannabis licenses, the state reasoned that the DCC “presumes a national market” and thus “cannot be applied to state marijuana laws because Congress has exercised its commerce power to make illegal the interstate market for marijuana—that is, the commerce power is not ‘dormant.’”<sup>85</sup>

For several reasons, however, this assumption is unwarranted. In banning all cannabis commerce, Congress did not necessarily authorize states to discriminate against nonresident economic interests. In other words, Congress did not necessarily intend to give states the freedom to ban nonresidents from producing and selling marijuana, while leaving their own residents free to engage in those same activities.

First, the Supreme Court has previously rejected the bald claim that states may disregard the DCC’s nondiscrimination principle when regulating a congressionally proscribed activity. Consider, for example, the Lacey Act Amendments of 1981, which make it a federal crime to “to import, export, transport, sell, receive, acquire, or purchase in interstate or foreign commerce . . . any fish or wildlife taken, possessed, transported, or sold in violation of any law or regulation of any State or in violation of any foreign law.”<sup>86</sup> In *Maine v. Taylor*,<sup>87</sup> the Court held that the Lacey Act did not authorize states to ban the importation of live baitfish, in disregard of the DCC.<sup>88</sup> The Court explained that while the Lacey Act “clearly provide[s] for federal enforcement of valid state and foreign wildlife laws, . . . nothing in the text or legislative history of the Amendments . . . suggests Congress wished to validate state laws that would be unconstitutional without federal approval.”<sup>89</sup> The takeaway from *Taylor* and other cases involving similar laws is that a federal ban on interstate commerce in some good, by itself, does not give states authorization to discriminate against such commerce.<sup>90</sup>

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<sup>85</sup> See Defendant’s Response to Plaintiff’s Motion for Judgment on the Pleadings at 1, *Original Invs., LLC v. Oklahoma*, No. 5:20-cv-00820 (W.D. Okla., Dec. 21, 2020) [hereinafter *Original Invs.* Defendant’s Response], ECF No. 23; see also Board’s Response to Motion for Preliminary Injunction, *supra* note 76, at 12 (“Because *Gonzales* found that Congress had authority in the DCC to enact the CSA, it logically follows that no DCC right can exist in the very activity CSA prohibits.”).

<sup>86</sup> 16 U.S.C. § 3372(a)(2)(A).

<sup>87</sup> 477 U.S. 131 (1986).

<sup>88</sup> *Id.* at 139. The Maine law at issue in the case provided that “[a] person is guilty of importing live bait if he imports into this State any live fish, including smelts, which are commonly used for bait fishing in inland waters.” *Id.* at 132 n.1.

<sup>89</sup> *Id.* at 139. The *Taylor* Court thus subjected the Maine law to strict scrutiny under the DCC. *Id.* at 140. Although Maine was able to demonstrate that its law was necessary to serve a legitimate purpose (protecting the local environment), *id.* at 148, the case demonstrates that the Court sets a very high bar for showing that Congress has absolved the states of the need to defend discrimination against challenge under the DCC.

<sup>90</sup> For example, the Court has held that similar language found in the Twenty-First Amendment likewise does not suspend the nondiscrimination principle of the DCC when states regulate the market for alcohol. See *supra* note 77. It recognized that while the

Second, Congress provided no indication that it intended to suppress the DCC's nondiscrimination principle when it comes to interstate commerce in cannabis.<sup>91</sup> As discussed above, the CSA does not distinguish between intrastate and interstate commerce in cannabis; the statute bans all cultivation and distribution of the drug—i.e., all commerce in the drug.<sup>92</sup> Indeed, one federal court has already rejected the claim that the CSA gives legalization states free rein to discriminate against nonresidents in the cannabis market. Emphasizing the plain language of the CSA, the court reasoned that “the Act nowhere says that states may enact laws that give preference to in-state economic interests. In other words, although the Controlled Substances Act criminalizes marijuana, it does not affirmatively grant states the power to ‘burden interstate commerce “in a manner which would otherwise not be permissible.””<sup>93</sup>

On this basis, the court enjoined a city's preference for in-state residents in the award of local adult-use cannabis licenses, thereby allowing an out-of-state corporation to compete for those licenses on an equal footing with local corporations.<sup>94</sup> Lacking any clear statement of a congressional intent to expand the states' regulatory authority, the CSA does not absolve the states of the duty to abide the DCC's nondiscrimination norm.<sup>95</sup>

Third, and relatedly, there is no obvious reason why Congress would have wanted to give states the power to discriminate against interstate commerce in

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Amendment “gives each State leeway in choosing the alcohol-related public health and safety measures that its citizens find desirable,” it is “not a license to impose all manner of protectionist restrictions on commerce in alcoholic beverages.” *Id.* at 2457. Thus, the Court has held that states may not impose a residency requirement for obtaining a state liquor store license, *id.* at 2476, nor may states ban only out-of-state wineries from selling wine directly to consumers, *Granholm v. Heald*, 544 U.S. 460, 493 (2005).

<sup>91</sup> The CSA's preemption clause suggests that Congress wanted to preserve state authority to regulate controlled substances. *See* 21 U.S.C. § 903 (“No provision of this subchapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, unless there is a positive conflict between that provision of this subchapter and that State law so that the two cannot consistently stand together.”). *See generally* Robert A. Mikos, *Preemption Under the Controlled Substances Act*, 16 J. HEALTH CARE L. & POL'Y 5 (2013) (providing detailed analysis of CSA's preemption language). This language, however, merely preserves the regulatory authority that states would otherwise have under the DCC; it does not expand that authority to allow states to disregard the DCC.

<sup>92</sup> *See supra* Section II.A.2.

<sup>93</sup> *NPG, LLC v. City of Portland*, No. 2:20-cv-00208, 2020 WL 4741913, at \*10 (D. Me. Aug. 14, 2020) (footnote omitted) (quoting *New England Power Co. v. New Hampshire*, 455 U.S. 331, 341 (1982)).

<sup>94</sup> *Id.* at \*12.

<sup>95</sup> It is plainly not the case, as some have suggested, that the DCC is inapplicable any time Congress has regulated, i.e., “when the commerce power is ‘active’” rather than dormant. *Original Invs.* Defendant's Response, *supra* note 85, at 9-10. Otherwise, courts would not insist upon “unmistakably clear” evidence that Congress wanted to override the default rules of the DCC. *S.-Cent. Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 91 (1984).

cannabis—in fact, it is not even obvious that Congress contemplated the possibility. The CSA recognizes the practical reality that local and interstate drug activities are inextricably intertwined.<sup>96</sup> Even if cannabis is produced and distributed within the borders of a single state, as was the case in *Gonzales v. Raich*,<sup>97</sup> those local activities can affect the broader national market for cannabis, not to mention other controlled substances for which cannabis might serve as a substitute.

Supposing that Congress wanted to quash all commerce in cannabis when it passed the CSA, it is difficult to see how giving states the option of banning only interstate commerce in cannabis would necessarily advance that goal. For example, state laws that only bar the sale of imported cannabis, but not local cannabis, merely shift the locus of where cannabis is produced. Those import bans will not necessarily diminish the total volume of cannabis sold (as the booming intrastate markets in cannabis demonstrate).<sup>98</sup> In other words, state bans on imports merely ensure that cannabis is produced by local firms rather than by growers based in other cannabis-friendly states.<sup>99</sup>

Critically, states do not need Congress's authorization to impose neutral regulations on cannabis commerce. Prohibition states may ban the sale of all cannabis without running afoul of the DCC.<sup>100</sup> Thus, there is no validity to the claim that forcing legalization states to allow interstate commerce in cannabis would necessarily force prohibition states to do the same.<sup>101</sup> Likewise, legalization states could regulate the labeling, packaging, and testing of cannabis products without running afoul of the DCC as long as they do not impose different rules based on where the cannabis was produced.

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<sup>96</sup> See *supra* notes 50-53 and accompanying text.

<sup>97</sup> 545 U.S. 1, 7 (2005).

<sup>98</sup> I recognize, of course, that state import bans should have some negative impact on the overall size of the cannabis market because there are efficiency gains from interstate commerce in cannabis. See *infra* Part III. But it seems far-fetched to suppose that Congress would authorize state discrimination against interstate commerce in cannabis solely on the basis of the possible efficiency costs that such discrimination would inflict on the market.

<sup>99</sup> See *infra* Section III.B (describing how interstate cannabis market would result in some states becoming producers for other consumer states). Indeed, in defending another restriction on interstate commerce, the state of Washington has argued (ironically) that its residency requirement for cannabis licenses helps to “preserve Washington’s marijuana industry.” Board’s Response to Motion for Preliminary Injunction, *supra* note 76, at 25 (emphasis added). Preserving a state’s local cannabis market hardly seems consistent (to put it mildly!) with the goals of the CSA.

<sup>100</sup> The DCC might impose one constraint on prohibition states’ regulatory authority: it might prevent them from blocking shipments of marijuana that are merely passing through the state (i.e., shipments that are destined for another state). States have no obvious interest in preventing such pass-through shipments.

<sup>101</sup> See *Original Invs.*, Defendant’s Response, *supra* note 85, at 19 (claiming without support that “[i]f the dormant Commerce Clause protects the marijuana market in Oklahoma, then it must also do so in Kansas to our north and in Texas to our south—where state law still prohibits marijuana”).



The absence of any plausible reason to enable states to discriminate against interstate commerce also distinguishes cannabis from the two instances where the Court found that Congress had authorized state discrimination. The first instance involved the McCarran-Ferguson Act ("MFA") of 1945.<sup>102</sup> For decades prior to the adoption of the MFA, the Supreme Court had held that insurance did not involve interstate commerce.<sup>103</sup> As a result, the business of insurance was not subject to the nondiscrimination principle of the DCC, and the states were free to favor local insurance firms over their out-of-state rivals. But in 1944, the Court reversed its precedents and held that insurance was within the purview of Congress's Commerce Clause power.<sup>104</sup> This change prompted DCC challenges to state laws that discriminated against out-of-state insurance firms.<sup>105</sup> Congress then quickly intervened by passing the MFA, which, among other things, declared that "the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States."<sup>106</sup> The Court interpreted the plain language of the MFA as restoring the power states had previously enjoyed to discriminate against out-of-state firms in the business of insurance.<sup>107</sup> The Court thus upheld discriminatory state taxes levied on out-of-state insurance firms.<sup>108</sup>

The Court found a second instance of congressional authorization in the Douglas Amendment to the National Bank Holding Company Act. The Amendment prohibits the Federal Reserve from approving the acquisition of a bank by an out-of-state bank or bank holding company, unless the acquisition "is specifically authorized by the . . . State in which [the bank to be acquired] is located."<sup>109</sup> Pursuant to the statute, some states had "selectively authorize[d]" acquisitions by firms located in the same region, effectively discriminating against New York banks.<sup>110</sup> The New York banks challenged the state

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<sup>102</sup> See 15 U.S.C. §§ 1011-1015.

<sup>103</sup> The history of the MFA is discussed at length in *Prudential Insurance Co. v. Benjamin*, 328 U.S. 408, 411-16 (1946).

<sup>104</sup> *United States v. Se. Underwriters Ass'n*, 322 U.S. 533, 553 (1944).

<sup>105</sup> See, e.g., *Prudential Ins.*, 328 U.S. at 418.

<sup>106</sup> 15 U.S.C. § 1011.

<sup>107</sup> *Prudential Ins.*, 328 U.S. at 431 (holding that Congress "clearly put the full weight of its power behind existing and future state legislation to sustain it from any attack under the commerce clause to whatever extent this may be done with the force of that power behind it").

<sup>108</sup> *Id.* (reasoning that the MFA manifests Congress's judgment "that uniformity of regulation, and of state taxation, are not required in reference to the business of insurance by the national public interest" and that it followed that Congress had determined that "state taxes, which in its silence might be held invalid as discriminatory, do not place on interstate insurance business a burden which it is unable generally to bear" (footnote omitted)).

<sup>109</sup> *Ne. Bancorp, Inc. v. Bd. of Governors of the Fed. Rsrv. Sys.*, 472 U.S. 159, 163 (1985) (quoting 12 U.S.C. § 1842(d) (1988)).

<sup>110</sup> *Id.*

restrictions under the DCC.<sup>111</sup> Notably, the Court held that, on its own, the express language of the Douglas Amendment quoted above was too equivocal to authorize state discrimination.<sup>112</sup> The Court noted that while the Amendment plainly authorizes states to ban all bank acquisitions, it “does not specifically indicate that a State may partially lift the ban,” for example, to bar acquisitions only by banks located in certain states.<sup>113</sup> Nonetheless, the Court found that “the legislative history of the Amendment supplies a sufficient indication of Congress’ intent” to authorize state discrimination against interstate banking.<sup>114</sup> In particular, the Court relied on a statement by the legislation’s sponsor explaining that “bank holding companies would be permitted to acquire banks in other States ‘only to the degree that State laws expressly permit them.’”<sup>115</sup> The Court thus held that state laws barring acquisitions by banks located in some states (but not others) were valid and enforceable.<sup>116</sup>

With the CSA, by contrast, there is no similar story to tell: no hint in the legislative history or text of the statute explaining why Congress would have welcomed discriminatory state regulation of controlled substances, no long-standing history of state discrimination against interstate commerce in cannabis or other drugs, and so forth.<sup>117</sup>

Fourth, suggesting that a federal ban on commerce in some good necessarily authorizes states to discriminate against interstate commerce in that good could erode the nondiscrimination principle of the DCC. The critical insight here is that every federal statute passed pursuant to the Commerce Clause could be described as a ban on commerce in nonconforming goods and, thus, authorization for the states to discriminate in the market for such goods. To illustrate, consider the Food, Drug, and Cosmetic Act (“FDCA”), which requires all food sold in interstate commerce to be labeled in conformance with detailed federal regulations specifying, for example, the relative size of the font used to list calories.<sup>118</sup> Put another way, the FDCA bans the sale of improperly labeled foods. But if a ban necessarily confers authorization to discriminate, it would follow that the FDCA also authorizes states to bar the importation of improperly labeled foods (e.g., because the font size used was too small), even if they allow the sale of identically mislabeled foods when produced locally. In other words, the argument that a federal ban on cannabis necessarily gives states authorization to discriminate against out-of-state cannabis interests opens the door to states erecting protectionist trade barriers in a variety of other, heavily regulated markets by using sundry minor, technical violations of federal law as an excuse

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<sup>111</sup> *Id.* at 165-66.

<sup>112</sup> *Id.* at 169.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 171 (quoting 102 CONG. REC. 6858 (1956) (statement of Sen. Paul Douglas)).

<sup>116</sup> *Id.* at 173.

<sup>117</sup> It is particularly difficult to imagine why Congress would ever have approved of state laws that bar nonresidents from owning state-licensed cannabis businesses.

<sup>118</sup> 21 C.F.R. § 101.36 (2020).

to protect local firms from out-of-state competition. There would be no easy way to limit this excuse—i.e., no easy way for a court to distinguish between congressional bans that authorize state discrimination and congressional bans that do not.

In sum, defenders of state restrictions have simply assumed that the federal marijuana ban necessarily authorizes states to discriminate against interstate commerce in cannabis, but this assumption does not hold up upon closer scrutiny.

## 2. The Congressional Spending Rider

Spending riders provide a second possible source of congressional authorization. Since 2014, Congress has attached a rider to the DOJ's annual appropriations declaring, in relevant part, that "[n]one of the funds made available in this Act to the Department of Justice may be used . . . to prevent States from implementing their own State laws that authorize the use, distribution, possession, or cultivation of medical marijuana."<sup>119</sup> In a nutshell, the rider bars the DOJ from prosecuting individuals for activities, like cultivating or selling marijuana, that are authorized by state medical marijuana laws.<sup>120</sup>

The spending rider, however, does not authorize states to discriminate against interstate commerce in marijuana. For one thing, the rider does not confer any specific authority on the states at all. It merely blocks the DOJ from enforcing the federal ban when the state has permitted the activity in question.<sup>121</sup> If anything, the states could use the rider to block federal prosecutions of interstate commerce in medical marijuana. For example, by legalizing the importation and exportation of medical marijuana, states could immunize interstate commerce in cannabis from federal prosecution. But nothing in the rider gives states the additional authority to discriminate against such commerce under state law.

In any event, whatever authority is conferred by the spending rider applies only to medical marijuana. Congress has not yet barred the DOJ from prosecuting individuals acting in compliance with state recreational cannabis laws. Indeed, in its decision invalidating Portland's local residency preferences, noted above, the federal court observed that Congress's spending rider was irrelevant because the case involved adult-use marijuana licenses, not medical marijuana licenses.<sup>122</sup> Thus, at most, the rider might authorize states to bar the importation and exportation of medical cannabis and to bar nonresidents from obtaining medical cannabis licenses. It would not give them authority to

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<sup>119</sup> Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, § 538, 128 Stat. 2130, 2217 (2014). Congress has renewed the rider in every budget cycle since 2014. See Jeff Vanderslice, *Alive Again: The Two-Pronged Strategy for Federal Marijuana Policy Reform*, CATO INST.: CATO AT LIBERTY BLOG (June 28, 2019, 12:18 PM), <https://www.cato.org/blog/alive-again-two-pronged-strategy-federal-marijuana-policy-reform> [<https://perma.cc/Y3GQ-LSK8>].

<sup>120</sup> See *United States v. McIntosh*, 833 F.3d 1163, 1178 (9th Cir. 2016).

<sup>121</sup> See *id.*

<sup>122</sup> *NPG, LLC v. City of Portland*, No. 2:20-cv-00208, 2020 WL 4741913, at \*12 n.15 (D. Me. Aug. 14, 2020).

discriminate against interstate commerce in the broader recreational cannabis market.

### 3. DOJ Enforcement Guidance

Even before Congress tied the agency's hands with the aforementioned spending rider, the DOJ had declined to enforce the federal marijuana ban against activities authorized by state marijuana laws, including both medical and adult-use marijuana laws.<sup>123</sup> As discussed above, the Cole Memorandum suggested that the DOJ would not pursue legal action against state-authorized marijuana activities unless the activities implicated certain federal priorities, including “[p]reventing the diversion of marijuana from states where it is legal under state law in some form to other states.”<sup>124</sup>

The Cole Memorandum, however, cannot authorize state restrictions against interstate commerce in cannabis any more than it can provide states a legitimate reason for imposing those restrictions.<sup>125</sup> While the Court has recognized that Congress may authorize states to impair interstate commerce, the DOJ has no such power. Suggesting that the DOJ could somehow authorize states to engage in conduct otherwise forbidden by the DCC would enable the agency to usurp Congress's exclusive Commerce Clause authority.<sup>126</sup> This suggestion is all the more dangerous given the comparative ease with which the DOJ can issue internal enforcement guidance like the Cole Memorandum. Congress, of course, must overcome a gauntlet of daunting procedural hurdles to pass legislation that supplies the “unmistakably clear” language needed to authorize state discrimination under the DDC.<sup>127</sup>

The Cole Memorandum does not purport to interpret the federal marijuana ban—indeed, it expressly disavows any such intent.<sup>128</sup> Hence, even if the Memorandum can be interpreted as expressing the DOJ's own wariness toward interstate commerce in cannabis, it does not suggest that Congress shares that view or that the CSA somehow authorizes states to treat interstate commerce in

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<sup>123</sup> Although the DOJ's nonenforcement policy is widely associated with the Cole Memorandum, the policy predates that Memorandum and has outlived it as well. See generally Mikos, *Evolving Federal Response*, *supra* note 39 (discussing shifts in federal enforcement practices over time).

<sup>124</sup> Cole Memorandum, *supra* note 39, at 1.

<sup>125</sup> See *supra* Section II.A.2 (explaining why appeasing the DOJ is not a valid reason to sustain state discrimination against interstate commerce in cannabis).

<sup>126</sup> In recent cases, for example, courts have rejected the Attorney General's attempts to impose new conditions on sanctuary cities' receipt of federal grant funds, reasoning that “the executive branch has usurped the power of the legislature to determine spending and to set conditions on that spending.” *City of Chicago v. Barr*, 961 F.3d 882, 920 (7th Cir. 2020).

<sup>127</sup> See, e.g., Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549, 1609 (2000) (“[T]he ultimate political safeguard may be the procedural gauntlet that any legislative proposal must run and the concomitant difficulty of overcoming legislative inertia.”).

<sup>128</sup> See Cole Memorandum, *supra* note 39, at 4 (noting that the guidance does not provide a legal defense to a violation of federal law, nor does it create any enforceable rights).

cannabis differently than they treat intrastate commerce in the drug. The Cole Memorandum simply signals how the DOJ plans to prioritize the use of its own, rather limited, law enforcement resources; that is not the same thing as congressional authorization.

#### 4. Congressional Reform Proposals Would Remove Any Authorization That Now Exists

Even if the federal ban on marijuana does somehow authorize states to discriminate against interstate commerce in cannabis, that authorization will disappear if Congress passes any of the leading federal reform proposals now on the table.

Consider, first, the Strengthening the Tenth Amendment Through Entrusting States Act (“STATES Act”), which would empower states to turn off the federal marijuana ban within their borders.<sup>129</sup> In relevant part, it declares that the CSA “shall not apply to any person acting in compliance with State law relating to the manufacture, production, possession, distribution, dispensation, administration, or delivery of marihuana.”<sup>130</sup> Importantly, however, the STATES Act does not also empower the states to protect their local cannabis industries from interstate competition if they choose to legalize intrastate commerce in cannabis. And as the case law discussed earlier demonstrates, federal statutes that incorporate state bans into federal law do not suspend the DCC’s nondiscrimination principle.<sup>131</sup> Congress needs to specifically authorize state discrimination, but the STATES Act does not do that—in fact, the proposal is utterly silent regarding interstate commerce in cannabis.

Another leading proposal, the Marijuana Opportunity Reinvestment and Expungement Act of 2019 (“MORE Act”), is similarly silent regarding interstate commerce in cannabis.<sup>132</sup> The MORE Act would legalize marijuana federally—without regard to state law—by ordering the Attorney General to deschedule marijuana and natural THC.<sup>133</sup> Because the MORE Act does not mention interstate commerce in cannabis and because it does not even prohibit marijuana activities that violate state law (as does the STATES Act), it is even more obvious that states would lack congressional authorization to discriminate against interstate commerce in cannabis if Congress adopts this proposal in its present form.

In fact, there is only one proposal now before Congress that expressly addresses interstate commerce in cannabis: the State Cannabis Commerce Act (“SCCA”).<sup>134</sup> This very limited bill provides, in relevant part, that

[n]o funds authorized or appropriated by Federal law . . . shall be expended to prevent any State from implementing any law of the State

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<sup>129</sup> H.R. 2093, 116th Cong. (2019).

<sup>130</sup> *Id.* sec. 2, § 710(b).

<sup>131</sup> See *supra* notes 80–82 and accompanying text.

<sup>132</sup> S. 2227, 116th Cong. (2019).

<sup>133</sup> *Id.* § 2.

<sup>134</sup> H.R. 3546, 116th Cong. (2019).

that . . . authorizes the use, distribution, possession, or cultivation of marijuana . . . in the State; or . . . authorizes the transportation of marijuana across the border of the State if . . . [the sending State and the receiving State have both authorized] such transportation.<sup>135</sup>

As should be clear, the language of the SCCA is nearly identical to the language found in the congressional spending riders discussed above.<sup>136</sup> It differs primarily in the fact that it blocks enforcement of the federal marijuana ban against state-authorized recreational marijuana activities and, likely needlessly,<sup>137</sup> explicitly bars enforcement of the federal marijuana ban against interstate commerce in marijuana permitted by state law.

While the SCCA would make it crystal clear that the states could authorize interstate commerce in cannabis, it would not necessarily give them authority to disregard the DCC. Like the spending riders discussed earlier, the SCCA, on its face, does not give states authority to discriminate against interstate commerce in cannabis; it merely precludes the DOJ (and other federal agencies) from taking legal action against interstate shipments that have been authorized by the states involved. The SCCA could thus be interpreted to clarify that federal agencies retain the power to prosecute shipments bound for a prohibition state (i.e., a state that does not allow any commerce in cannabis) or shipments that otherwise do not conform to local law (e.g., a shipment of marijuana edibles into a state that has prohibited that type of cannabis product). Based on Supreme Court case law interpreting similar language in other federal statutes, the language of the SCCA would not constitute a clear enough indication of Congress's intent to authorize state discrimination against interstate commerce in cannabis.<sup>138</sup>

In short, extant proposals to reform federal marijuana law could eliminate the states' authorization to restrict interstate commerce in cannabis (assuming such authorization now exists). While each proposal limits application of the federal ban, none of them grants authority with the requisite "unmistakably clear" language the states need to discriminate against out-of-state cannabis or cannabis entrepreneurs.

### C. *The Status of Other, Nondiscriminatory State Cannabis Laws (Including Outright Prohibition)*

States laws that discriminate against interstate commerce in cannabis are probably unconstitutional under the DCC. But what about state laws that regulate cannabis more evenhandedly, i.e., laws that do not distinguish between insiders and outsiders in the cannabis market?

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<sup>135</sup> *Id.* § 2(b).

<sup>136</sup> *See supra* Section II.B.2.

<sup>137</sup> *See supra* note 63 and accompanying text (explaining that the spending riders likely already bar the DOJ from taking legal action against interstate sales of medical marijuana that have been authorized by state law).

<sup>138</sup> *See supra* notes 28, 107-110 and accompanying text.

While neutral state laws could impair interstate commerce in cannabis, such laws are reviewed under the *Pike* balancing test, which asks whether the burden imposed on interstate commerce is “clearly excessive” in comparison to the legitimate local benefits of a regulation.<sup>139</sup> This test is far easier to satisfy than the strict scrutiny-like test that applies to discriminatory state laws. For this reason, it seems likely that neutral state laws would survive any DCC challenge—at least for now.

Consider, first, state laws that ban all sales of cannabis, rather than just the sales of imported cannabis. These bans create an obvious barrier to interstate commerce in cannabis—after all, no cannabis may be sold in these states, regardless of where it is produced or by whom. However, courts have upheld analogous state bans on the sale of a variety of other controversial products, including foie gras,<sup>140</sup> horsemeat,<sup>141</sup> shark fins,<sup>142</sup> “deleterious exotic wildlife,”<sup>143</sup> and even cats and dogs.<sup>144</sup> Critical to the outcome in each of these cases was the fact that the states had adopted “blanket prohibition[s]” that treated “both intrastate and interstate trade” of these items equally.<sup>145</sup> Applying the *Pike* balancing test, these courts found that the burdens the state bans imposed on interstate commerce did not clearly outweigh their legitimate local benefits, including, for example, an interest in preventing horse theft—the rationale given for Texas’s ban on the sale of horsemeat for human consumption.<sup>146</sup> The upshot from these cases is that state laws that ban all cannabis commerce probably do not violate the DCC as long as they apply equally to local and nonlocal cannabis and cannabis entrepreneurs. In other words, just because a state must allow outsiders to compete in its local cannabis market after it legalizes the drug does not mean that a state must legalize cannabis in the first place.

Now consider nondiscriminatory regulations that legalization states have imposed on cannabis products sold in state. Each legalization state has imposed its own, quirky set of requirements concerning how cannabis products must be tested, packaged, and labeled.<sup>147</sup> For example, most states require cannabis producers to imprint a special symbol on cannabis edibles, but almost every one of those states mandates the use of a different symbol (which, ironically, are called “universal” symbols).<sup>148</sup> These regulations are designed to protect consumers from the potential harmful consumption of cannabis. For example,

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<sup>139</sup> *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

<sup>140</sup> *Ass’n des Eleveurs de Canards et d’Oies du Quebec v. Harris*, 729 F.3d 937, 948 (9th Cir. 2013).

<sup>141</sup> *Empacadora de Carnes de Fresnillo, S.A. de C.V. v. Curry*, 476 F.3d 326, 336 (5th Cir. 2007).

<sup>142</sup> *Chinatown Neighborhood Ass’n v. Harris*, 794 F.3d 1136, 1147 (9th Cir. 2015).

<sup>143</sup> *Pac. Nw. Venison Producers v. Smitch*, 20 F.3d 1008, 1010, 1016 (9th Cir. 1994).

<sup>144</sup> *Just Puppies, Inc. v. Frosh*, 457 F. Supp. 3d 497, 502 (D. Md. 2020).

<sup>145</sup> *Empacadora*, 476 F.3d at 335.

<sup>146</sup> *Id.* at 336.

<sup>147</sup> See MIKOS, MARIJUANA LAW, POLICY, AND AUTHORITY, *supra* note 68, at 456-62.

<sup>148</sup> See *id.* at 459.

the universal symbols are supposed to warn consumers that an otherwise innocuous-looking product such as a chocolate bar contains a psychoactive substance.<sup>149</sup> But differences in state regulations can also burden interstate commerce in cannabis, even if that is not necessarily their intended purpose. The differences in state laws make it more difficult for firms to conduct business across state lines. Consider a hypothetical cannabis edible producer: even if this company were not barred from shipping its products across state lines, it would still need to manufacture a different set of products for each state where it did business (e.g., affixing them with a different “universal symbol” for each state), sacrificing some of the economies of scale it might achieve if it were allowed to make a single product for all markets.

Notwithstanding the burdens they impose, these idiosyncratic state regulations should be safe from DCC challenge for the time being. When it comes to neutral state regulations, the DCC tends to punish outlier states that impose different regulations than those that most other states have adopted.<sup>150</sup> So far, however, there is no dominant state approach to regulating the testing, packaging, and labeling of cannabis products. Hence, it cannot be said that one state’s nondiscriminatory cannabis regulations burden interstate commerce, when the blame could as easily be laid upon another state.

To be sure, there is a movement afoot to harmonize state cannabis regulations.<sup>151</sup> If this movement takes hold and a large majority of states adopts a common approach to an issue—such as what symbol to imprint on cannabis-infused edibles—the DCC might force outlier states to follow suit and adopt the same regulation. For example, if nearly all legalization states follow Colorado’s approach and require cannabis infused edibles to be imprinted with the letters “! THC,”<sup>152</sup> a state like Washington would have a difficult time justifying why it was instead requiring manufacturers to imprint an image of the cannabis leaf on edibles.<sup>153</sup> But until such convergence emerges—or until Congress adopts legislation preempting state regulations—states appear to have wide latitude to

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<sup>149</sup> *Id.*

<sup>150</sup> See, e.g., *Kassel v. Consol. Freightways Corp.*, 450 U.S. 662, 671-75 (1981) (noting costs of Iowa’s unusually short limit on truck length); *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 529-30 (1959) (noting costs of unique Illinois mud flap rules for trucks).

<sup>151</sup> See Kyle Jaeger, *Marijuana Regulators from 19 States Form Group to Coordinate Legalization Implementation*, MARIJUANA MOMENT (Nov. 12, 2020), <https://www.marijuanamoment.net/marijuana-regulators-from-19-states-form-group-to-coordinate-legalization-implementation/> [<https://perma.cc/3ACQ-WJAE>].

<sup>152</sup> *Marijuana Enforcement Division Adopts a Single Universal Symbol and Streamlines Packaging and Labeling Requirements*, COLORADO.GOV (Mar. 12, 2018), <https://www.colorado.gov/pacific/marijuana/news/marijuana-enforcement-division-adopts-single-universal-symbol-and-streamlines-packaging-and-labeling-requirements> [<https://perma.cc/RM3J-MJCG>] (announcing universal “! THC” symbol for all marijuana products).

<sup>153</sup> WASH. STATE LIQUOR & CANNABIS BD., *PACKAGING AND LABELING GUIDE FOR MEDICALLY COMPLIANT AND RECREATIONAL MARIJUANA* 16-17 (2019), [https://lcb.wa.gov/sites/default/files/publications/Marijuana/LIQ-1420-Packaging-and-Labeling-Guide-201912\\_FINAL2.pdf](https://lcb.wa.gov/sites/default/files/publications/Marijuana/LIQ-1420-Packaging-and-Labeling-Guide-201912_FINAL2.pdf) [<https://perma.cc/2HRW-BE6R>].



impose the cannabis regulations they deem fit, so long as they apply the same regulations to all cannabis regardless of where it is produced and to all cannabis entrepreneurs regardless of their residency.

### III. HOW INTERSTATE COMMERCE WILL CHANGE THE CANNABIS MARKET

The prior Part demonstrated that discriminatory state restrictions on interstate commerce in cannabis are vulnerable to DCC challenges. Indeed, out-of-state cannabis companies have recently filed lawsuits challenging residency licensing requirements in Maine, Missouri, Oklahoma, and Washington.<sup>154</sup> In response to one of these suits, Maine agreed to abandon its residency requirement for adult-use licenses after the state Attorney General concluded that the requirement “is subject to significant constitutional challenges and is not likely to withstand such challenges.”<sup>155</sup> In a related lawsuit, a federal judge enjoined the city of Portland, Maine, from applying its own residency preferences for adult-use cannabis licenses.<sup>156</sup> As discussed above, the judge concluded that the requirement likely violated the DCC and had not been authorized by Congress.<sup>157</sup>

Should these suits and others like them prove successful (as seems likely), they portend the demise of the peculiar state-based cannabis markets that state restrictions on interstate commerce have preserved. In the future, it is very likely that cannabis producers will face competition not just from local rivals but also from producers located in other states.

This Part considers how this shift to a national cannabis market will likely affect the cannabis industry in the United States and some of the implications that shift has for cannabis law and policy.<sup>158</sup>

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<sup>154</sup> See Complaint for Declaratory and Injunctive Relief, *Toigo v. Dep’t of Health & Senior Servs.*, No. 2:20-cv-04243 (W.D. Mo. Dec. 11, 2020), ECF No. 1 (challenging Missouri’s one-year residency requirement for medical cannabis licenses); Complaint, *Original Invs., LLC v. Oklahoma*, No. 5:20-cv-00820 (W.D. Okla. Aug. 14, 2020), ECF No. 1 (challenging Oklahoma’s two-year residency requirement for medical cannabis licenses); Petition for Declaratory Judgment, *Brinkmeyer v. Wash. State Liquor & Cannabis Bd.*, No. 20-2-01568-34 (Sup. Ct., Thurston Cnty., Wash., June 8, 2020) (challenging Washington’s six-month residency requirement for adult-use cannabis licenses); *NPG* Complaint, *supra* note 32 (challenging Maine’s two-year residency requirement for adult-use cannabis licenses); see also Complaint for Declaratory and Injunctive Relief, *NPG, LLC v. City of Portland*, No. 2:20-cv-00208, 2020 WL 4741913 (D. Me. June 15, 2020) (challenging city’s residency preference for adult-use cannabis licenses).

<sup>155</sup> Stipulation of Dismissal at 1, *NPG, LLC v. Dep’t of Admin. & Fin. Servs.*, No. 1:20-cv-00107 (D. Me. May 11, 2020). A group of Maine residents has filed a lawsuit asking a judge to reinstate the residency requirement. See *United Cannabis Patients* Complaint, *supra* note 32, ¶ 1.

<sup>156</sup> *NPG*, 2020 WL 4741913, at \*11.

<sup>157</sup> *Id.* at \*10-11; see also *supra* notes 32, 79, 93, 122 and accompanying text.

<sup>158</sup> This Essay focuses on one segment of the industry—cannabis production—which includes both cultivation and processing but does not explicitly consider the effects interstate commerce will have on other segments of the market, such as retail distribution or the provision of ancillary services.

### A. *Interstate Commerce Will Spur Industry Consolidation*

Opening the doors to interstate commerce will likely spur consolidation of the cannabis industry. In many states today, the industry is highly fragmented, with hundreds of firms cultivating and/or processing cannabis for local consumers. Colorado alone, for example, has issued more than 1,000 licenses to cultivate and/or process cannabis.<sup>159</sup> Some states have even mandated this fragmentation by capping the size of individual cannabis licensees.<sup>160</sup>

By contrast, the emerging national market will likely favor larger producers that can take full advantage of economies of scale in the cultivation and processing of cannabis.<sup>161</sup> For example, a firm with a 1,000,000 square foot grow warehouse should be able to produce a gram of cannabis for less, on average, than it costs a firm with a 100,000 square foot warehouse to produce that same gram. Although firms can already achieve some economies of scale in state-based cannabis markets,<sup>162</sup> even the largest of those state markets is only a small slice of the national market. It thus seems reasonable to expect the biggest producers in the national cannabis market to be larger than the biggest producers that now serve any state cannabis market.

The beer industry provides one example of what the cannabis industry might look like down the road. The beer market is now dominated by a handful of colossal brewers. In 2019, the top three brewers alone accounted for more than 73% of all the beer sold in the United States.<sup>163</sup>

Consolidation is not necessarily a bad thing. For example, absent industry collusion, consumers should benefit from the lower prices offered by larger, more efficient firms. But consolidation also has some potentially worrisome effects.

For one thing, consolidation will drive many small business owners out of the cannabis market. To be sure, there will still be some craft—i.e., small—

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<sup>159</sup> *MED Resources and Statistics*, COLO. DEP'T OF REVENUE, <https://www.colorado.gov/pacific/enforcement/med-resources-and-statistics> [<https://perma.cc/BPM8-JJBU>] (last updated Oct. 1, 2020).

<sup>160</sup> MIKOS, MARIJUANA LAW, POLICY, AND AUTHORITY, *supra* note 68, at 445 (discussing state efforts to regulate industry structure).

<sup>161</sup> See ANGELA HAWKEN & JAMES PRIEGER, BOTECH ANALYSIS CORP., ECONOMIES OF SCALE IN THE PRODUCTION OF CANNABIS 36-37 (2013), [https://lcb.wa.gov/publications/Marijuana/BOTECH%20reports/5c\\_Economies\\_Scale\\_Production\\_Cannabis\\_Oct-22-2013.pdf](https://lcb.wa.gov/publications/Marijuana/BOTECH%20reports/5c_Economies_Scale_Production_Cannabis_Oct-22-2013.pdf) [<https://perma.cc/2W5F-Q5ZM>] (acknowledging that economies of scale exist but suggesting that scale advantages in the cannabis industry may be smaller than some have estimated).

<sup>162</sup> For example, multistate operators like Cresco Labs can already consolidate some back-office functions, such as accounting and brand development. However, these firms cannot consolidate their production while states ban interstate shipments of cannabis. See *supra* note 21 and accompanying text (discussing Minnesota prosecution of two Vireo Health officials for allegedly smuggling cannabis oil from the firm's Minnesota operation to its New York operation).

<sup>163</sup> *Industry Fast Facts*, NAT'L BEER WHOLESALERS ASS'N, <https://www.nbwa.org/resources/industry-fast-facts> [<https://perma.cc/JJ2B-RGLH>] (last visited Apr. 13, 2021).

producers in the national market, largely because there is consumer demand for so-called craft weed.<sup>164</sup> But if the experience of the beer industry is any indication, these craft cannabis producers will capture only a small slice of the total market. In 2019, for example, there were 6,400 operational brewers in the United States.<sup>165</sup> But, excluding the top five, the rest combined accounted for just 21% of the total \$120 billion beer market.<sup>166</sup>

Relatedly, consolidation could further dampen minority participation in the cannabis industry. The rate of minority ownership in state-based cannabis industries is already quite low, due in part to the large amount of capital required to build a successful cannabis business—presently, more than \$1 million.<sup>167</sup> Consolidation will only exacerbate this barrier to entry because it will take even more capital to build a successful cannabis business in the emerging national market. For example, the largest firm in the Canadian national market, Canopy Growth, currently has a market capitalization of more than \$10 billion.<sup>168</sup>

The states probably cannot forestall consolidation on their own. Some states have tried to limit consolidation in their own cannabis markets by capping the size of individual firms, as noted above. Once those states can no longer block cannabis imports, however, those caps will likely prove ineffective. If anything, the caps will just put local producers at a competitive disadvantage vis-à-vis out-of-state rivals that do not face such constraints.<sup>169</sup> Similarly, while states have tried to boost minority participation in their own markets, those efforts might prove futile in a national market. For example, some states have given applicants from disadvantaged groups (including racial minorities) preference when

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<sup>164</sup> See RYAN STOA, *CRAFT WEED: FAMILY FARMING AND THE FUTURE OF THE MARIJUANA INDUSTRY* 9 (2018).

<sup>165</sup> *Industry Fast Facts*, *supra* note 163.

<sup>166</sup> *Id.* The vast majority of brewers (nearly 4,600 of the total number) brew fewer than 1,000 barrels each year. *Id.*

<sup>167</sup> See generally, e.g., MARIJUANA BUS. DAILY, WOMEN & MINORITIES IN THE CANNABIS INDUSTRY (2019), [https://mjbizdaily.com/wp-content/uploads/2019/07/women-and-minorities\\_FINAL.pdf](https://mjbizdaily.com/wp-content/uploads/2019/07/women-and-minorities_FINAL.pdf) [<https://perma.cc/29QQ-KL2R>].

<sup>168</sup> See Connor Smith, *Buy Canopy Growth for Its Leading Market Share and Management Team, Analyst Says*, BARRON'S (Apr. 24, 2020, 6:13 PM), <https://www.barrons.com/articles/canopy-growth-stock-leading-market-share-51587760005>.

<sup>169</sup> Not all states cap the size of licensed producers. See Robert A. Mikos, *Cases to Watch: California Growers Association vs. California Department of Food and Agriculture*, MARIJUANA L., POL'Y & AUTH. BLOG (Feb. 3, 2018), <https://my.vanderbilt.edu/marijuanalaw/2018/02/cases-to-watch-california-growers-association-vs-california-department-of-food-and-agriculture/> [<https://perma.cc/3GPX-R5ND>]. And even for states that do impose size caps, it is far from clear whether they could apply them to nonlocal firms seeking to sell their wares in the local market. Cf. generally Mark Bobrowski, *The Regulation of Formula Businesses and the Dormant Commerce Clause Doctrine*, 44 URB. LAW. 227 (2012) (discussing constitutionality of local restrictions on large formula—e.g., chain—businesses); Brannon P. Denning & Rachel M. Lary, *Retail Store Size-Capping Ordinances and the Dormant Commerce Clause Doctrine*, 37 URB. LAW. 907 (2005) (discussing constitutionality of local ordinances capping size of big-box retailers).

awarding scarce state cannabis production licenses.<sup>170</sup> However, those social justice licensing programs will be less effective when firms no longer need a local license to sell their wares inside the state (i.e., when they can produce cannabis under license from another state that does not give preference to disadvantaged groups).

Thus, if we want to limit industry consolidation, boost minority participation in the cannabis market, or shape the cannabis market in other ways, it will likely take congressional legislation to get the job done. For example, Congress could authorize the states to discriminate against interstate commerce in cannabis and thereby preserve the control the states now wield over the structure and demographics of their local cannabis industries. Or Congress could cap the size of producers throughout the nation.<sup>171</sup> As it stands, however, Congress does not even appear to recognize the impending rise of interstate commerce in cannabis and the challenges it will pose to state regulators.

### B. *Interstate Commerce Will Shift the Locus of Cannabis Production*

Apart from fostering the consolidation of the cannabis industry, the advent of interstate commerce will also cause at least some of the industry's production to shift to a small number of producer states (i.e., states that produce more cannabis than they consume). Firms located in these producer states have several possible competitive advantages vis-à-vis firms located in consumer states (i.e., states that consume more than they produce).

First, the climate in a small number of states is ideally suited for outdoor cultivation of cannabis—think of the Emerald Triangle region in California and Oregon.<sup>172</sup> Outdoor cultivation allows producers in these states to avoid some of the costs peculiar to indoor cultivation, such as the costs of electricity and grow lights. One survey found that the cost of outdoor cultivation was only about one-fourth that of indoor cultivation.<sup>173</sup> To be sure, there will still be segments of the market for which indoor cultivation is superior, say, because it gives cultivators

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<sup>170</sup> MIKOS, MARIJUANA LAW, POLICY, AND AUTHORITY, *supra* note 68, at 454 n.1, 521-25 (discussing use of racial preferences in award of cannabis licenses); *see also* Robert A. Mikos, *UPDATE: State Judge Holds Use of Race in Ohio Medical Marijuana Licensing Unconstitutional*, MARIJUANA L., POL'Y & AUTH. BLOG (Nov. 20, 2018), <https://my.vanderbilt.edu/marijuanalaw/2018/11/update-state-judge-holds-ohio-medical-marijuana-licensing-system-unconstitutional/> [<https://perma.cc/SN7L-BWYY>].

<sup>171</sup> There are myriad other steps Congress could take to address the impact the rise of the national market will have on the cannabis industry. *See, e.g.*, Adam J. Smith, *Can Interstate Commerce Help Solve the Cannabis Industry's Equity Problem?*, MERRY JANE (Nov. 12, 2019), <https://merryjane.com/culture/can-interstate-commerce-help-solve-the-cannabis-industrys-equity-problem/> [<https://perma.cc/FA6M-CTQ6>] (suggesting that social equity licensees could be given exclusive rights to distribute imported cannabis, as means of boosting minority participation in the emerging national cannabis market).

<sup>172</sup> Green, *supra* note 6.

<sup>173</sup> CANNABIS BUS. TIMES, 2020 STATE OF THE INDUSTRY REPORT, at S9 (2020), <http://giecdn.blob.core.windows.net/fileuploads/document/2020/05/29/soi%20book%20-%20high%20res.pdf> [<https://perma.cc/JG7A-UF26>].

more consistent control over growing conditions, and thus, over the characteristics of the plant. But the cost advantages of outdoor cultivation should cause at least some production to shift from colder climates, where cannabis can only be grown indoors, to warmer states. As one Oregon state lawmaker remarked when sponsoring Oregon's bill to legalize cannabis exports, "The future of this industry is that cannabis will primarily be grown where it grows best . . ." <sup>174</sup>

Second, some regions have created a strong reputation for producing high-quality cannabis. For example, since the 1960s, the Emerald Triangle Region in California has pioneered the development of new strains of cannabis. <sup>175</sup> Because of the region's reputation, consumers throughout the country already seek out cannabis from the Emerald Triangle, just as they seek out Napa Valley wines or Michigan blueberries. California has even adopted regulations to protect the state's reputational advantage by creating a system for certifying the geographic origin of cannabis products, known as appellations. <sup>176</sup> Allowing consumers to buy out-of-state products on the licit market should benefit producers based in regions like the Emerald Triangle, shifting some production away from local firms that now supply consumer states. <sup>177</sup>

Third, producers located in states that were first to legalize, such as Colorado (2012), Washington (2012), and Oregon (2014), should have a first-mover advantage compared to producers located in states that legalized later (or have yet to do so). Producers in those early adopting states already have several years of operational experience under their belts, while firms in many recent adopting states—not to mention firms from states that have not legalized—may not have even harvested their first crops yet. <sup>178</sup> Indeed, Oregon has recognized the advantage that established producers will have on the national market. Being prepared to export cannabis as soon as interstate sales begin was one of the primary rationales behind the passage of the state's 2019 export law. <sup>179</sup>

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<sup>174</sup> Green, *supra* note 6 (quoting Oregon State Senator Floyd Prozanski).

<sup>175</sup> See Emily Witt, *How Legalization Changed Humboldt County Marijuana*, *NEW YORKER* (May 20, 2019), <https://www.newyorker.com/news/dispatch/how-legalization-changed-humboldt-county-weed> (detailing growers of "top-shelf, premium cannabis" in Humboldt County).

<sup>176</sup> *Cannabis Appellations Program*, CAL. DEP'T OF FOOD & AGRIC.: CALCANNABIS CULTIVATION LICENSING, <https://www.cdfa.ca.gov/calcanabis/appellations.html> [<https://perma.cc/D7HW-E434>] (last visited Apr. 13, 2021); see also STOA, *supra* note 164, at 15-16 (discussing value of appellations to cannabis industry).

<sup>177</sup> See Adam Smith, *Welcome Back!*, CRAFT CANNABIS ALL. (Nov. 12, 2019), <https://www.craftcannabisalliance.org/news/2019/11/12/welcome-back> [<https://perma.cc/PX5J-HHSA>].

<sup>178</sup> See David Powell, Rosalie Liccardo Pacula & Mireille Jacobson, *Do Medical Marijuana Laws Reduce Addictions and Deaths Related to Pain Killers?* 35 *tbl.A1* (Nat'l Bureau of Econ. Rsch., Working Paper No. 21345, 2015), [https://www.nber.org/system/files/working\\_papers/w21345/w21345.pdf](https://www.nber.org/system/files/working_papers/w21345/w21345.pdf) [<https://perma.cc/ZQ93-8NVX>] (detailing time needed to establish marijuana industries in sampling of medical marijuana states).

<sup>179</sup> See Green, *supra* note 6.

The shift in the locus of production will be reinforced by the economies of scale dynamics discussed above. To the extent that multistate operators can reduce their costs by consolidating their production, they will not want to spread their production across multiple states as they are now required to do. Consider the operations of Anheuser-Busch InBev. The company controls nearly 40% of the domestic beer market,<sup>180</sup> but it brews all its beer at just twelve locations in eleven states.<sup>181</sup> Put another way, while Budweiser beer is sold in every state, it is not brewed in every state. It is far more economical for Anheuser-Busch InBev to make its beer at a small number of large breweries that can take full advantage of the economies of scale to brewing.

The shift in the locus of production will have some important ramifications for marijuana law and policy. One is that the economic benefits of legalization, and more particularly, the jobs associated with the production of cannabis, will not be evenly distributed across legalization states. Producer states will capture a disproportionate share of those benefits. This realization could somewhat diminish the incentive for new states to legalize cannabis. After all, these states may have already missed the boat on creating a viable, local cannabis industry and the jobs associated therewith.<sup>182</sup>

Once production becomes mobile, states will also compete to lure more producers to their jurisdictions. States already compete for a variety of other industries, using the promise of tax breaks, infrastructure spending, and other inducements to attract corporate investment and relocation. Apart from these tactics, states might also try to lure cannabis producers by relaxing the regulations they impose on them. Currently, states impose a bevy of regulations on cannabis cultivation and processing, specifying, among other things, what solvents may be used in extracting THC, the minimum age for trimmers, and the types of energy that may be used to power grow lights.<sup>183</sup>

Although such regulations add to the cost of producing cannabis, states currently have wide latitude to impose them because producers cannot leave the state. Thus, currently, the only competition state regulators need to worry about is the black market. But with the advent of interstate commerce, producers will be able to move to the state that imposes the least onerous regulations on cannabis production. Ultimately, this dynamic could create a race to the bottom, with states competing to relax their controls and thereby attract (or keep) more cannabis jobs.

Once again, addressing these concerns may require congressional legislation. Under the Constitution, states have limited power to regulate how goods are

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<sup>180</sup> *Industry Fast Facts*, *supra* note 163 (noting a market share of 39.9% in 2019).

<sup>181</sup> *Breweries and Tours*, ANHEUSER-BUSCH, <https://www.anheuser-busch.com/about/breweries-and-tours.html> [<https://perma.cc/4M2U-QZJW>] (last visited Apr. 13, 2021).

<sup>182</sup> See *supra* note 34 and accompanying text (noting how promise of new jobs has helped spur legalization in states).

<sup>183</sup> See MIKOS, MARIJUANA LAW, POLICY, AND AUTHORITY, *supra* note 68, at 446-62, 499-501 (discussing how states regulate the production of cannabis).

produced outside their borders, even when those goods are sold in the state.<sup>184</sup> Congress could authorize states to bar imports and thereby preserve each state's control over how cannabis is produced for the local market—and its share of cannabis related jobs. Or, Congress could establish a floor of regulations that would apply to producers nationwide to forestall a race to the bottom among legalization states.<sup>185</sup> But again, extant federal reform proposals do not address issues like these that are likely to arise with the advent of interstate commerce in cannabis.

#### CONCLUSION

Although many states have opened the door to the intrastate production and sale of cannabis, they have simultaneously shut the door on interstate commerce in the drug. Every legalization state now bans the importation of cannabis from other states, and many of them bar outsiders from owning local cannabis businesses as well. These discriminatory laws have spawned a multitude of state-based cannabis industries, one for each state that has legalized the drug.

The state laws that maintain these local industries, however, are legally questionable. The discriminatory restrictions states have imposed on interstate commerce in cannabis are likely unconstitutional under the DCC. For one thing, Congress has not suspended the operation of the DCC's nondiscrimination default rules. The federal ban on all marijuana commerce simply does not give legalization states license to discriminate against outside cannabis firms and investors. In addition, states lack a credible legitimate rationale for quashing interstate commerce in cannabis when they permit intrastate commerce in the same. In short, to the extent that states allow any commerce in cannabis, they likely must put outside firms and investors on an equal footing with locals.

Opening the door to interstate sales and investment could have far-reaching implications for the burgeoning cannabis industry in the United States. First, it will likely cause most production to migrate to a small number of producer states that have a comparative advantage in cultivating and processing cannabis because of hospitable climate, early adoption of reforms, lax regulations, and/or established reputations. This shift in the locus of production could reduce the incentives for new states to legalize cannabis, because they will not necessarily capture the production jobs once promised by cannabis reforms. The emergence of a national cannabis market will also likely favor large producers that can take advantage of economies of scale in cultivating and processing cannabis. The

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<sup>184</sup> Cf. *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 521 (1935) (“New York has no power to project its legislation into Vermont by regulating the price to be paid in that state for milk acquired there.”). To be clear, the states can still regulate the goods themselves—e.g., by dictating how cannabis is packaged or labeled when sold in state. But they likely cannot regulate the type of energy that was used to grow the cannabis or the age of the employees who trimmed the buds. Those matters are probably the exclusive dominion of the state where those production activities take place.

<sup>185</sup> See generally William W. Buzbee, *Asymmetrical Regulation: Risk, Preemption, and the Floor/Ceiling Distinction*, 82 N.Y.U. L. REV. 1547 (2007).

ensuing consolidation of production could further diminish minority participation in the cannabis industry because the capital required for entry will be even higher than it is today in isolated state markets.

Only Congress could address these developments satisfactorily, as the states individually do not wield enough influence over the national market. But to forestall industry migration and consolidation, Congress would need to do more than simply legalize marijuana federally. It would either need to clearly authorize state protectionism or play a more proactive role in the regulation of the cannabis industry than is now envisioned by leading federal reform proposals.



