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# THE DORMANT COMMERCE CLAUSE AND THE LEGALIZATION OF CANNABIS

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BY: HANNAH THOMPSON

In 2021, Rep. Jerrold Nadler (D-NY) reintroduced the Marijuana Opportunity Reinvestment and Expungement Act (“MORE Act”) in the House of Representatives.[1] A virtually identical version of the bill passed in the House in 2020 but only made it as far as the Finance Committee in the Senate.

[2] The 2021 MORE Act passed the House Judiciary Committee in September 2021 and its return

to the House floor is expected to be soon.[3] The MORE Act is a landmark bill which effectively “removes marijuana from the list of scheduled substances under the Controlled Substances Act and” decriminalizes possession, distribution, and manufacture of cannabis.[4] The Act also provides for “a process to expunge convictions” related to cannabis offenses and “establishes a trust fund to support programs for individuals ... affected by the War on Drugs.”[5]

While the MORE Act provides for several regulatory measures relating to the legalization of cannabis, there is one significant legal issue not addressed in the bill: the dormant commerce clause (“DCC”).[6] The dormant commerce clause is a doctrine inferred from the commerce clause of the Constitution.[7] While Congress has the authority to regulate interstate commerce, the DCC provides that states may not impose burdens on interstate commerce.[8] The DCC is intended to prohibit state protectionism and encourage the free flow of goods among the states.[9] Notably, Congress may suspend the DCC and permit states to restrict interstate commerce in some circumstances.[10]

Congress should consider suspending the DCC in the MORE Act because allowing state protectionism relating to the production and sale of cannabis would allow states to create their own programs focused on alleviating the racially disproportionate effects of the War on Drugs.[11] The bill supports this goal, as evidenced by the decriminalization of cannabis, the trust fund for marginalized communities, and the process for expungements.[12] Suspending the DCC would strengthen the bill and provide an additional measure to reduce the racially disparate impacts of the decades-long criminalization of cannabis.[13]



The War on Drugs has produced racially disparate effects in the United States, one of which is the “mass incarceration of people of color.”[14] A study by the American Civil Liberties Union (ACLU) found that Black people are “3.64 times more likely to be arrested for [cannabis] possession than white” people, despite similar rates of usage across the two demographics.[15] It is this type of injustice that the MORE Act is supposed to remedy, according to Rep. Nadler’s press release.[16]

Currently, thirty-seven states and four U.S. territories allow for the medical use of cannabis, and eighteen states, two territories, and the District of Columbia have authorized recreational cannabis.[17] Because the Controlled Substances Act still prohibits cannabis at the federal level[18], businesses cannot sell cannabis products across state lines.[19] As a result, businesses generally grow, cultivate, and sell marijuana all within one state’s borders, creating several intrastate markets as opposed to one large interstate market.[20] Further, because the legalization of marijuana has occurred in some states, each legalized state has created its own unique regulatory regime.[21]

As a part of these unique regulatory regimes, some legalized states have imposed residency requirements for obtaining cannabis licenses.[22] For instance, Maine required medical cannabis businesses to be owned by Maine residents.[23] In Detroit, licenses were issued pursuant to a program that gave preference to legacy applicants.[24] One way to qualify as a legacy applicant, the individual must have lived in Detroit for ten of the last thirty years and have a marijuana conviction.

[25] The purported reason for this policy was to favor Detroit residents who were negatively affected by the War on Drugs, particularly minority communities.[26] Similar licensing programs have appeared in Oklahoma and Missouri as well.[27]

These licensing residency requirements likely violate the DCC.[28] In a nearly identical case, the Supreme Court struck down a Tennessee law that imposed a two-year residency requirement for liquor store licenses in *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*.[29] Under DCC jurisprudence, a state law that facially gives preference to in-state residents may still be upheld if the state shows that the law is narrowly tailored to advance a legitimate local purpose.[30] In *Tenn. Wine & Spirits*, the state argued that the residency requirement provided a better opportunity to determine an applicant's fitness to sell alcohol.[31] The Court rejected this argument and held that a less discriminatory alternative could have helped determine an applicant's fitness to sell alcohol.[32]

In August 2021, a district court in Maine held that the state's residency requirement for cannabis licenses unduly restricted interstate commerce and violated the DCC, and that decision is currently being appealed to the 1st Circuit.[33] It is possible that Maine could pursue an argument that the law is narrowly tailored to reduce racial disparities imposed from the War on Drugs, but the effectiveness of this argument is unclear given that the Supreme Court rejected the "fitness to sell alcohol" argument in *Tenn. Wine & Spirits*.[34] Maine has also argued that because cannabis is still banned federally, that there exists no interstate market for cannabis and thus the DCC cannot apply, which the trial court rejected.[35]

Congress should suspend the DCC in the MORE Act to avoid this time-consuming litigation.[36] Clearly, both Congress and legalized states are trying to combat the disproportionate impacts from drug enforcement through the MORE Act and these licensing requirements.[37] By allowing states to pursue licensing programs designed to favor local individuals who have suffered from the disparities of drug enforcement, Congress could better achieve this end.

[1] Marijuana Opportunity Reinvestment and Expungement Act, H.R. 3617, 117th Cong. (2021).

[2] Marijuana Opportunity Reinvestment and Expungement Act, H.R. 3884, 116th Cong. (2020).

[3] Tommy Tobin & Andrew Kline, *A Sleeping Giant: How the Dormant Commerce Clause Looms Over the Cannabis Marketplace*, Yale L. & Pol'y Rev. Inter Alia (Jan. 3, 2022), [https://ylpr.yale.edu/inter\\_alia/sleeping-giant-how-dormant-commerce-clause-looms-over-cannabis-marketplace#\\_ftn23](https://ylpr.yale.edu/inter_alia/sleeping-giant-how-dormant-commerce-clause-looms-over-cannabis-marketplace#_ftn23) [<https://perma.cc/A692-Z5K8>].

[4] H.R. 3617, 117th Cong. (2021).

[5] *Id.*

[6] Tobin & Kline, *supra* note 3.

[7] *Id.*

[8] *E.g.*, Tenn. Wine & Spirits Retailers Ass'n v. Thomas, 139 S. Ct. 2449, 2459 (2019).

[9] *Id.*

[10] *E.g.*, W. & S. Life Ins. Co. v. State Bd. of Equalization of Cal., 451 U.S. 648, 652 (1981) (“In the exercise of this plenary authority, Congress may ‘confer upon the States an ability to restrict the flow of interstate commerce that they would not otherwise enjoy.’”)

[11] *See* Marijuana Opportunity Reinvestment and Expungement Act, H.R. 3617, 117th Cong. (2021).

[12] *Id.*

[13] *A Tale of Two Countries: Racially Targeted Arrests in the Era of Marijuana Reform*, Am. Civ. Liberties Union Res. Report (2020),

[https://www.aclu.org/sites/default/files/field\\_document/marijuanareport\\_03232021.pdf](https://www.aclu.org/sites/default/files/field_document/marijuanareport_03232021.pdf)

[<https://perma.cc/A74T-Q9MB>].

[14] *The Drug War, Mass Incarceration and Race*, Drug Pol’y Alliance (June 2015),

[https://www.unodc.org/documents/ungass2016/Contributions/Civil/DrugPolicyAlliance/DPA\\_Fact\\_Sheet\\_Drug\\_War\\_Mass\\_Incarceration\\_and\\_Race\\_June2015.pdf](https://www.unodc.org/documents/ungass2016/Contributions/Civil/DrugPolicyAlliance/DPA_Fact_Sheet_Drug_War_Mass_Incarceration_and_Race_June2015.pdf) [<https://perma.cc/L67Z-7WTB>].

[15] *A Tale of Two Countries: Racially Targeted Arrests in the Era of Marijuana Reform*, *supra* note 13.

[16] Press Release, Congressman Jerry Nadler Official Website Nadler, Blumenauer, Lee, Jackson Lee, Jeffries, and Velazquez Reintroduce Comprehensive Marijuana Reform Legislation (May 28, 2021) (on file with author).

[17] *State Medical Cannabis Laws*, Nat’l Conf. St. Legislatures (Feb. 3, 2022),

<https://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx> [<https://perma.cc/86L4-JBYZ>].

[18] *See* 21 U.S.C. §§ 841, 844 (2018).

[19] Robert A. Mikos, *Interstate Commerce in Cannabis*, 101 B.U. L. Rev. 857, 862-63 (2021).

[20] *Id.*

[21] *Id.*

[22] *Id.*

[23] *Id.* at 862.

[24] *See generally City opens applications for Legacy Detroiter status for recreational marijuana licenses, lists city owned properties available discount sale to Detroiters*, City Detroit (Jan. 25, 2021), <https://detroitmi.gov/news/city-opens-applications-legacy-detroiter-status-recreational-marijuana-licenses-lists-city-owned> [<https://perma.cc/5YQS-E3NS>].

[25] *Id.*

[26] Diana Jones, *Detroit Pot Licensing Scheme 'Likely Unconstitutional'*, Law360 (June 17, 2021, 6:03 PM), <https://www.law360.com/articles/1395187> [<https://perma.cc/K7LX-2XSG>].

[27] Mikos, *supra* note 19, at 888.

[28] *Id.*, Ne. Patients Grp. v. Me. Dep't of Admin. & Fin. Servs., No. 1:20-cv-00468-NT, 2021 WL 3560840, at \*6 (D. Me. Aug. 11, 2021).

[29] *Tenn. Wine & Spirits Retailers Ass'n*, 139 S. Ct. at 2476.

[30] *Id.* at 2461.

[31] *Id.* at 2475.

[32] *Id.*

[33] Ne. Patients Grp., at \*6 .

[34] *See Tenn. Wine & Spirits Retailers Ass'n*, 139 at 2475.

[35] Ne. Patients Grp., 1:20-cv-00468-NT at \*4.

[36] *Id.*

[37] Marijuana Opportunity Reinvestment and Expungement Act, H.R. 3617, 117th Cong. (2021). Mikos,, *supra* note 19.

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620 SOUTH LIMESTONE, LEXINGTON, KY, 40508, UNITED STATES (859) 257-4747 ARTICLES.KJEANRL@GMAIL.COM (MAILTO:ARTICLES.KJEANRL@GMAIL.COM)