No. 24-7196

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PERIDOT TREE, INC., a California corporation, and
KENNETH GAY

Plaintiffs and Appellants,

v.

CITY OF SACRAMENTO and DAVINA SMITH,

Defendants and Appellees.

On Appeal from the United States District Court
for the Eastern District of California
No. 2:22-cv-000289-KJM-SCR
Hon. Kimberly J. Mueller

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* CALIFORNIA STATE ASSOCIATION OF COUNTIES AND LEAGUE OF CALIFORNIA CITIES IN SUPPORT OF APPELLEES

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Counsel for Amici Curiae

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *amici* California State Association of Counties and League of California Cities have no parent corporations and no stock.

STATEMENT OF *AMICI* PURSUANT TO RULE 29(a)(4)(E)

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), *amici* certify that no counsel for a party authored this brief in whole or in part, no party nor a party's counsel contributed money that was intended to fund preparing or submitting this brief, and no person – other than *amici*, their members or their counsel – contributed money that was intended to fund preparing or submitting this brief.

MOTION FOR LEAVE TO FILE AMICUS BRIEF

Pursuant to Federal Rule of Appellate Procedure 29(a)(3) and Circuit Rules 29-2 and 29-3, *Amici Curiae* respectfully seek leave to file the attached amicus brief supporting appellee.

Appellees consent to the filing. Appellants oppose the filing for the following reasons, as documented in the attached Exhibit A, an email exchange between *amici* counsel and appellants' attorney of record: "There have been plenty of amicus briefs filed to circuits on this issue, including to the Ninth Circuit in the Washington appeal now pending, and no more amicus briefs are needed.

Moreover, the Ninth Circuit does not provide an adequate increase to the word limit in response to amicus briefs to allow Appellants to adequately respond."

Amici's brief is relevant and helpful to the disposition of the case because the brief provides legal and contextual information regarding the impact a ruling in favor of appellants would have on the city and county jurisdictions *amici* represent. Among the information provided in the brief is the reason *amici* support the district court's order and its finding related to the dormant Commerce Clause. Additionally, *amici* discuss the impact an opposite decision by this court would have on the jurisdictions *amici* represent.

Because the brief will assist the Court, this motion should be granted, and the attached brief filed.

Date: April 23, 2025

Respectfully submitted,

/s/ Taylor W. Kayatta

Counsel for Amici Curiae

No. 24-7196

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PERIDOT TREE, INC., a California corporation, and
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BRIEF OF CALIFORNIA STATE ASSOCIATION OF COUNTIES AND LEAGUE OF CALIFORNIA CITIES AS *AMICI CURIAE* IN SUPPORT OF APPELLEES AND AFFIRMANCE

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INTRODUCTION AND INTEREST OF *AMICI*

Amici California State Association of Counties and League of California Cities respectfully request that this Court reject appellants' appeal of the United States District Court's order, affirm the judgment below, and conclude that the dormant Commerce Clause does not apply to the recreational marijuana[1] market.

As appellants note in declining to consent to this brief, this case and others like it in this circuit and in other circuits have been well briefed. We will not repeat all those arguments this Court is certainly familiar with. The issues have been hashed out at various levels of the judicial system, with some splits of opinion but a substantial trend (particularly amongst courts in the Ninth Circuit) toward a recognition that the dormant Commerce Clause does not apply to the recreational marijuana market. The time is ripe to decide this question once and for all to provide clear guidance both for local government at the front lines of regulating the recreational marijuana market and for prospective entrants into this market.

The District Court properly interpreted the constitutional questions when it found that the dormant Commerce Clause does not apply to federally prohibited markets like the marijuana market that the City of Sacramento has engaged in. This decision allows local jurisdictions to engage in these markets in a manner that

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[1] The terms "marijuana" and "cannabis" are used interchangeably in this brief, whether in the body of the brief or in any citations.

addresses local needs while furthering federal interests in restricting interstate commerce in federally prohibited activity.

The California State Association of Counties (CSAC) is a non-profit corporation. The membership consists of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case is a matter affecting all counties.

The League of California Cities (Cal Cities) is an association of 472 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. Cal Cities is advised by its Legal Advocacy Committee, comprised of 25 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies those cases that have statewide or nationwide significance. The Committee has identified this case as having such significance.

Amici's member counties and cities have enacted local marijuana regulatory programs, which are closely intertwined with the "closed loop" regulatory system established by the State of California. Some of these programs include equity

components similar to those challenged in this case. *Amici* thus have considerable interest in determining whether, when, and how the federal courts will apply dormant Commerce Clause scrutiny to local marijuana regulations. Relief in the manner requested by appellees will ensure that cities and counties can address local needs as they continue navigating this activity that is allowed at the local level while remaining federally prohibited.

ARGUMENT

I. This Court should affirm the District Court's conclusion that the dormant Commerce Clause does not apply to local regulation of the federally prohibited recreational marijuana market.

In its November 21, 2024 order that appellant appeals, the Eastern District Court concluded that "the plaintiffs cannot assert a constitutional right to participate in a national marijuana market because Congress attempted to eliminate that market by passing the federal Controlled Substances Act… [and in doing so, Congress] effectively permits cities and states to favor local businesses operating in a market Congress has attempted to eliminate." *Peridot Tree, Inc. v. City of Sacramento*, 2024 U.S. Dist. LEXIS 212202, *2, 2024 WL 4857648. This decision was correctly decided and should be affirmed.

A. The dormant Commerce Clause does not apply to the recreational marijuana market.

The dormant Commerce Clause, quite simply, does not apply to a market that the Federal government has declared to be prohibited. Federal constitutional protections for commerce cannot apply to commercial activity that the Federal government expressly prohibits. As the record in this case shows, it is undisputed that the Federal government prohibits the use and sale of marijuana. While it has not always enforced its laws against marijuana, the Federal government has never declared any aspect of a recreational marijuana market to be permitted. State and

local action that places marijuana in a pseudo-legal status by permitting it under state law does not change this Federal prohibition, nor undermine its force.

To begin with, the First Circuit Court of Appeals' decision in *Ne. Patients Grp. v. United Cannabis Patients & Caregivers of Me.*, 45 F.4th 542 (2022), was incorrectly decided. Contrary to the appellant's protestations, this court can and should decline to follow it. Judge Gelpi's dissent ("*Gelpi* dissent") in that case more accurately concludes that the dormant Commerce Clause does not apply to prohibited marijuana markets, and that analysis should be embraced here. "[The] 'fundamental objective' of the dormant Commerce Clause to preserve a competitive national market is inapplicable, because Congress has already outlawed the national market for marijuana. While the majority assumes that the national marijuana market is sufficiently akin to legal interstate markets for our ordinary dormant Commerce Clause jurisprudence to apply, I believe that illegal markets are constitutionally different in kind, and thus disagree that the Commerce Clause protects the free-flowing operation of national markets that Congress has already made illegal through its Commerce Clause power." *Id.* at 559 (quoting General Motors Corp. v. Tracy, 519 U.S. 278, 299 (1996)).

The reasons to follow the *Gelpi* dissent rather than the majority opinion have been well briefed in this case and we will not repeat them. We instead refer the

Court to subsequent judicial decisions that have considered the First Circuit's decision and found it to be improperly decided:

The Washington Western District Court freely cited the *Gelpi* dissent as it came to its conclusion that "[the] dormant Commerce Clause does not apply to federally illegal markets such as this one and Congress has clearly stated its intent for no interstate cannabis market to exist." *Brinkmeyer v. Wash. State Liquor & Cannabis Bd.*, 2023 U.S. Dist. LEXIS 20564, *33, 2023 WL 1798173 (2023). That same Court reached the same conclusion in another case currently pending before this Circuit: "This Court agrees with the analysis in *Brinkmeyer* and Judge Gelpí's *Northeast Patients Group* dissent. The purpose of the dormant Commerce Clause is to preserve a competitive interstate market. […] [It] makes little sense why the dormant Commerce Clause would protect an interstate market that Congress affirmatively prohibited, given that protecting this market would facilitate illegal interstate activity." *Peridot Tree WA Inc. v. Wash. State Liquor & Cannabis Control Bd.*, 2024 U.S. Dist. LEXIS 3213, *26, 2024 WL 69733 (citations omitted).

The District Court in Maryland has similarly followed the *Gelpi* dissent. In a decision briefed, argued, and currently pending in the Fourth Circuit Court of Appeals, the lower court concludes: "Though it is admittedly a close call, this Court now joins with those courts across the country that have found that the

dormant Commerce Clause does not apply to state recreational marijuana laws. In so doing, this Court finds Judge Gelpí's dissent in Northeast Patients Group particularly persuasive." *Jensen v. Md. Cannabis Admin.*, 719 F. Supp. 3d 466, 483, 2024 U.S. Dist. LEXIS 33001, *27, 2024 WL 811479 (2024).

This Court should embrace the analysis and conclusions of the *Gelpi* dissent as other courts have done and expressly conclude that the dormant Commerce Clause does not apply to the recreational marijuana market.

B. The time is ripe to clarify the applicability of the dormant Commerce Clause in the Ninth Circuit.

As discussed above, the First Circuit has found that the dormant Commerce Clause can apply to state and local marijuana markets, but subsequent courts (including those in this Circuit) have declined to follow this decision. It is imperative that this court provides clear guidance on this constitutional question.

Courts have consistently held that circuit splits and serious questions should be addressed as they come before a court. In this case, a circuit split exists since lower courts have already expressly declined to follow the First Circuit decision. "As a general rule, 'we decline to create a circuit split unless there is a compelling reason to do so.' [citation]. This is especially true where the rules at issue 'are best applied uniformly.'" *Padilla-Ramirez v. Bible*, 882 F.3d 826, 836-837, 2018 U.S. App. LEXIS 3602, *23-24 (quoting *Kelton Arms Condo. Owners Ass'n, Inc. v. Homestead Ins. Co.*, 346 F.3d 1190, 1192 (9th Cir. 2003).) However, "even though

it may create discord…, we must give effect to Congress's purpose as we understand it… If uniformity is required, we are content to leave it to the Supreme Court to harmonize the resulting split of authority." *Ibid.*

The question here is a serious one. At stake is whether the marijuana markets that exist in Sacramento and in many other state and local jurisdictions in the Ninth Circuit can continue to exist in their current form. As discussed below, jurisdictions like Sacramento established and designed their marijuana markets for specific purposes. These are not traditional open markets that incidentally limit who can participate in them; instead, they are necessarily insular markets that offer products in the face of federal prohibitions for the specific purpose of addressing issues and concerns related to the federal prohibition and local enforcement action. These markets exist just as much to address local issues and concerns as to provide a commodity to the public. Opening these markets up to interstate commerce, as appellant requests, would frustrate their very purpose as well as Congress' prohibition on marijuana.

This Court should embrace the reasoning of Judge Gelpi's dissent to the 9th Circuit and conclude that the dormant Commerce Clause does not apply to the recreational marijuana market.

II. Local government has a compelling interest in enacting local policies and ordinances that address local issues while advancing federal policy of discouraging interstate commerce in a federally prohibited activity.

As has been well briefed in this case and in other cases cited to this Court, the history of marijuana regulation in this country has been complex. As a Schedule I drug, marijuana has been and remains federally prohibited. However, the demand for marijuana has not abated. Many have been caught up in the so-called War on Drugs. As states including California have sought to move away from this war, they have allowed local jurisdictions to create marijuana markets in the face of the federal prohibition. As these local jurisdictions created said markets, they did so with a stated intent to address local issues and concerns.

A. City and county government policies around who can participate in their recreational marijuana markets allow them to address issues and concerns that are specific to each jurisdiction.

Marijuana is a product that people want, even as the federal government has prohibited its sale or use. This has had significant impacts on our society, which local government has seen firsthand as it sits on the front lines of navigating this paradox. Local government entities have enforced federal drug laws through their police and legal systems, have jailed offenders, and have spent considerable treasure trying to support communities disrupted by illicit drug activity. When voters and legislatures in states including California decided to no longer participate in the prohibition of marijuana, they did so with the clear knowledge of

the interests and impact to their local communities. Jurisdictions like Sacramento that established medicinal and recreational marijuana markets under these state laws have done so with the express intent of addressing local concerns.

Cities and counties—local government—are in the best position to understand their own history with prohibitions on marijuana, and are therefore best situated to address the issues they have observed. This is a delicate area that must be narrowly targeted in order to function. Restricting access to marijuana markets to those a particular local government entity has identified as being affected by its own historical practices is such narrow tailoring.

We call the Court's attention to Sacramento's stated purpose of its marijuana program. Sacramento specifically designed its program to address what it perceives as the negative impacts of disproportionate enforcement of marijuana related regulation that occurred in its jurisdiction before the adoption of Proposition 64 (The Adult Use of Marijuana Act of 2016). It is specifically targeted "to assist individuals who have been negatively impacted by the disproportionate enforcement of cannabis-related crimes by providing them with assistance and an opportunity to participate in the new cannabis industry." Sacramento City Council Res. No. 2020-0388 (Oct. 13, 2020). The City's purpose statements are locally tailored and designed to address concerns the city council identified within their jurisdiction.

These are specifically *local* concerns, experienced locally, which Sacramento has a compelling interest in addressing – but cannot do so through solutions that disregard locality. Even if ordinary dormant Commerce Clause analysis applied, marijuana programs such as this would survive that scrutiny.

B. State and local governments have a compelling interest in maintaining a "closed loop" regulatory system for federally-illegal marijuana – which includes limiting the interstate transport of both marijuana products and the monetary proceeds thereof.

While the Appellant claims that "this lawsuit is not about cannabis products crossing state lines" (Open. Brief at p. 3), that is incorrect on several levels. Most fundamentally, any holding that ordinary dormant Commerce Clause analysis applies to the marijuana market would ineluctably mean that every extant state and local marijuana regulatory system would be required to make a specific, case-by-case demonstration that its particular restrictions on movement of marijuana across jurisdictional lines satisfy strict scrutiny. Even if all of these restrictions survive (and as set forth below, they should), the impact would be immediate and the burden severe.

On a more granular level, even if eliminating state and local governments' ability to regulate marijuana marketplace participants (i.e., through residency requirements) would not implicate the actual movement of marijuana across state lines, it plainly *would* have other overwhelmingly negative effects on their ability to effectively regulate this federally illegal commodity.

The *Ne. Patients Grp.* majority (and some commentators) have simply assumed that each state's establishment of "its own insular, intrastate marijuana marketplace" (Bloomberg & Mikos, *Legalization Without Disruption: Why Congress Should Let States Restrict Interstate Commerce in Marijuana*, 2022 Pepp. L. Rev. 837, 852 (2022)) – and the associated features such as import and export restrictions, residency provisions, etc. – are just "simple economic protectionism" for which "a virtually per se rule of invalidity has been erected." (*Ne. Patients Grp., supra*, 45 F.4th at p. 546.) However, not all discrimination with respect to interstate commerce is "protectionism" – and while conventional commerce clause analysis subjects such regulations to strict scrutiny, this scrutiny is not "fatal in fact" where a legitimate non-protectionist purpose can be demonstrated. (See, Denning, *One Toke Over the (State) Line: Constitutional Limits on "Pot Tourism" Restrictions*, 66 Fla.L.Rev. 2279, 2293 (2014).)

"[L]ocal regulation that discriminates against interstate trade...must serve a *legitimate local purpose*, and the purpose must be one that *cannot be served as well by available nondiscriminatory means*." (*Maine v. Taylor*, 477 U.S. 131, 140 (1986). [upholding Maine's ban on importing baitfish, which served environmental purposes].) Here, the legitimate non-protectionist purposes for restricting interstate marijuana activities (including their economic components) are patently obvious. In addition to having received unambiguous direction to this effect from the federal

executive branch (James A. Cole, Deputy Att'y Gen. of the U.S., *Memorandum for All United States Attorneys* (Aug. 29, 2013))[2] – which included explicit threats of legal action against states that failed to adequately control interstate marijuana activities – the larger reality is that the federal prohibition of marijuana has numerous collateral effects for legalizing states that only a "closed loop" system can adequately control.

The federal prohibition – and the fact that marijuana remains strictly controlled or entirely illegal in many states – has created a robust black market unmatched by any legal commodity. The threats of "diversion" (of marijuana from the state-legal market into the black market) and "inversion" (vice-versa) are ever-present. These risks magnify dramatically when the marijuana products themselves, the economic proceeds, and the market participants cross state lines and leave the legalizing state's regulatory (and enforcement) jurisdiction.

These concerns are exacerbated by the fact that the mechanisms of federal and interstate cooperation that protect public health and safety with regard to legal commodities simply don't exist in this context. To take but one example, nearly anything that may legally be ingested (whether recreationally or medicinally) is covered by a complex web of interlocking federal and state laws to ensure product

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[2] <https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>

safety and accurate labelling (overseen, in most cases, by the federal Food and Drug Administration). As a result of federal prohibition, this scheme does not reach state-legal marijuana products, leaving each state to develop – and endeavor to enforce – its own entirely separate mechanisms to protect public health. (*See generally*, O'Connor & Lietzan, *The Surprising Reach of FDA Regulation of Cannabis Even After Rescheduling*, 68 Am. U.L. Rev. 823 (2019); Lazzeri, *California Cannabis Regulations and the Federal Food, Drug & Cosmetic Act: A Product Liability Perspective of Edible Cannabis*, 16 Hastings Bus. L.J. 65 (2020).) Similarly, lack of clarity at the federal level and policy differences among states have stymied interjurisdictional cooperation on any subject relating to marijuana, leading more often to conflict than cooperation. (*See, e.g.*, *Nebraska v. Colorado* (2016) 577 U.S. 1211 [attempt by Nebraska and Oklahoma to sue Colorado over the latter's enactment of recreational marijuana laws].)

States' interest in addressing these public health and safety hazards is unquestionably legitimate and non-protectionist. Further, the absence of any cooperative regulatory framework with *either* the national government *or* other states leaves no apparent nondiscriminatory means available to serve these needs. Only by keeping marijuana commerce – all of it – in-state can health and safety be protected.

C. Local policies that discourage out of state participation in their recreational cannabis markets further the interests of federal policy in this area.

Unlike other commodities or markets of interstate commerce, marijuana is wholly contraband under federal law. It is not legal to possess, consume, buy, sell, or transport. The proceeds of commercial marijuana activities cannot be deposited into a federally licensed bank or moved across state lines. The federal government's position on marijuana is clear: there should be no market for this commodity. Thus, any locally imposed limitations upon interstate marijuana activities further Congressional objectives to a greater extent than would an absence of such limitations.

Ordinances like the one in Sacramento challenged here further the federal government's position by limiting the marijuana market. Under Sacramento's ordinance, marijuana is available for purchase at storefront dispensaries in the city or for local delivery. Sacramento does not inject marijuana into a larger market than is necessary to advance its local purposes of making marijuana available locally and focusing the benefits of this market on local communities harmed by prior actions in criminalizing this same market.

CONCLUSION

For the foregoing reasons, the order of the district court should be affirmed, and this Court should expressly hold that the dormant Commerce Clause does not apply to the recreational marijuana market.

Date: April 23, 2025

Respectfully submitted,

/s/ Taylor W. Kayatta
Taylor W. Kayatta

Counsel for Amici

CERTIFICATE OF COMPLIANCE

This brief contains 3,208 words, including words manually counted in any visual images, and excluding the items exempted by FRAP 32(f). The brief's type size and typeface comply with FRAP 32(a)(5) and (6).

I certify that this brief is an **amicus** brief and complies with the word limit of FRAP 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).

/s/ Taylor W. Kayatta
Taylor W. Kayatta

Counsel for Amici

CERTIFICATE OF SERVICE

I certify that on April 23, 2025, I caused the foregoing documents entitled **MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF APPELLEES** and **BRIEF OF *AMICI CURIAE* IN SUPPORT OF APPELLEES AND AFFIRMANCE** to be filed with the Clerk of the court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Date: April 23, 2025

/s/ Taylor W. Kayatta
Taylor W. Kayatta

Counsel for Amici

EXHIBIT A

Taylor Kayatta

From: Jeff Jensen <jeff@jensen2.com>
Sent: Monday, April 14, 2025 1:45 PM
To: Taylor Kayatta
Cc: Arthur J. Wylene
Subject: Re: Peridot Tree v. City of Sacramento - Consent to Filing Amicus Brief

Taylor,

Appellants do not consent to the filing of an amicus brief. There have been plenty of amicus briefs filed to circuits on this issue, including to the Ninth Circuit in the Washington appeal now pending, and no more amicus briefs are needed. Moreover, the Ninth Circuit does not provide an adequate increase to the word limit in response to amicus briefs to allow Appellants to adequately respond, and I have never had luck getting the Ninth Circuit to increase the word limit.

On Mon, Apr 14, 2025 at 11:21 AM Taylor Kayatta <tkayatta@rcrcnet.org> wrote:

> Mr. Jensen,
>
> The Rural County Representatives of California intends to file an amicus brief in the 9th Circuit Case No. 24-7196 in support of appellees the City of Sacramento and Davina Smith. Our intention is to file this brief in concert with the California State Association of Counties and the League of California Cities.
>
> Consistent with Circuit Rule 29-3, I am seeking your consent to file this brief.
>
> Thank you,
>
> **Taylor William Kayatta**
> Deputy General Counsel
> Rural County Representatives of California (RCRC)
> 1215 K Street, Suite 1650, Sacramento, CA 95814