Reuters Legal News

9th Circuit says Dormant Commerce Clause does not apply to cannabis, sparking circuit split

By Alexander Malyshev, Esq., and Sarah Ganley, Esq., Carter Ledyard & Milburn LLP

MARCH 12, 2026

The 9th U.S. Circuit Court of Appeals kicked off 2026 by deepening one of the most consequential fault lines in US cannabis law. Its January 2 decision in *Peridot Tree WA, Inc. v. Washington State Liquor & Cannabis Control Board*, 162 F.4th 1179 (9th Cir. 2026), held that the Dormant Commerce Clause — a constitutional doctrine barring states from discriminating against interstate commerce — does not apply to state cannabis markets because cannabis remains federally illegal under the Controlled Substances Act (CSA).

Out-of-state operators frozen out of lucrative cannabis markets have filed suit in federal courts across the country, pressing a deceptively simple constitutional question: Can states play favorites in a market that Congress says should not exist at all?

The ruling puts the 9th Circuit squarely at odds with the 1st and 2nd Circuits, both of which have held the opposite. The result is a circuit split that makes Supreme Court review of the issue increasingly likely, and that carries immediate consequences for a $38 billion industry (https://bit.ly/3OVdn6W) operating across 40 states.

The question: Does the Constitution protect a market that Congress says shouldn't exist?

Cannabis regulation in the United States runs on a basic tension. Twenty-four states and the District of Columbia have legalized recreational cannabis use for adults. Meanwhile, 40 states permit some form of medical cannabis. Although rescheduling has been widely discussed, for now cannabis remains a Schedule I controlled substance under the CSA, classified alongside drugs like heroin and deemed to have no accepted medical use.

The disconnect between federal and state law has resulted in a patchwork of state licensing regimes, many of which include residency requirements or preferences for in-state applicants. That protectionism has not gone unnoticed or unchallenged.

Out-of-state operators frozen out of lucrative cannabis markets have filed suit in federal courts across the country, pressing a deceptively simple constitutional question: Can states play favorites in a market that Congress says should not exist at all? Three federal circuits have now weighed in and they do not agree.

Three circuits, two answers

The 1st U.S. Circuit Court of Appeals addressed the issue first in *Northeast Patients Group v. United Cannabis Patients & Caregivers of Maine*, 45 F.4th 542 (1st Cir. 2022). There, the court concluded that the Dormant Commerce Clause does apply to state-regulated cannabis markets and struck down a provision in Maine's medical cannabis law requiring that medical dispensary officers and directors be state residents.

In so holding, the court found that an interstate cannabis market exists as a matter of fact (even if cannabis remains federally illegal), and that federal criminalization does not give states license to discriminate against out-of-state economic interests.

The 2nd U.S. Circuit Court of Appeals reached the same conclusion a few years later in *Variscite NY Four, LLC v. New York State Cannabis Control Board*, 152 F.4th 47 (2d Cir. 2025), when it invalidated New York's "Extra Priority" cannabis licensing scheme, which favored applicants with New York-specific cannabis convictions (effectively a residency proxy).

The court held that the Dormant Commerce Clause applies despite federal prohibition, reasoning that exempting illegal markets from Dormant Commerce Clause scrutiny would allow states to entrench advantages for their own residents that could distort competition if federal law later changed.

The 9th Circuit went the other way. In *Peridot Tree*, a three-judge panel considered consolidated challenges to residency requirements in Washington State's and Sacramento, California's recreational cannabis licensing schemes.

Thomson Reuters is a commercial publisher of content that is general and educational in nature, may not reflect all recent legal developments and may not apply to the specific facts and circumstances of individual transactions and cases. Users should consult with qualified legal counsel before acting on any information published by Thomson Reuters online or in print. Thomson Reuters, its affiliates and their editorial staff are not a law firm, do not represent or advise clients in any matter and are not bound by the professional responsibilities and duties of a legal practitioner. Nothing in this publication should be construed as legal advice or creating an attorney-client relationship. The views expressed in this publication by any contributor are not necessarily those of the publisher.

Thomson Reuters™

The plaintiffs — entities majority-owned by a Michigan resident — alleged that they met all substantive licensing criteria except for residency requirements that favored local or in-state applicants. The plaintiffs argued that these residency rules were classic economic protectionism prohibited under Dormant Commerce Clause.

Both trial courts dismissed the claims. The 9th Circuit affirmed, holding that the Dormant Commerce Clause does not apply to state or local laws restricting licensing in a market that Congress has deemed illegal (*i.e.*, state-legal cannabis markets).

In holding that the Dormant Commerce Clause does not apply to state-legal cannabis markets, the panel invoked the Supreme Court's recent instruction in *National Pork Producers Council v. Ross*, 598 U.S. 356 (2023) (a Dormant Commerce Clause challenge to California's ban on selling pork from pigs raised in conditions the state deems "cruel"), that courts should exercise "extreme caution" before deploying the Dormant Commerce Clause.

The panel also explicitly rejected the 2nd Circuit's forward-looking logic in *Variscite*, writing that "the possibility that Congress might one day legalize marijuana or that marijuana may at some point become reclassified under the CSA provides no basis for the judicial enabling of a marketplace that is presently not supposed to exist as a matter of federal law."

The practical fallout of the 9th Circuit's decision is immediate. Within the 9th Circuit — covering California, Washington, Oregon, Nevada, Arizona, and four other states — residency preferences for cannabis licenses are not subject to scrutiny under the Dormant Commerce Clause. In the 1st and 2nd Circuits, however, they remain vulnerable to challenge. For multi-state operators and investors, the constitutionality of a licensing regime now depends on where it sits on the map.

The appellants in *Peridot Tree* have until March 17, 2026, to petition for en banc rehearing before the full 9th Circuit. But the real question is what happens after that. A three-way circuit split on a question of this magnitude is the kind of conflict that ordinarily attracts Supreme Court review. That said, the Court has historically been reluctant to grant review in cases involving cannabis regulation.

The impact of rescheduling

As significant as it is, the split could ultimately become moot before the Supreme Court has a chance to weigh in depending on the pace and outcome of the Trump Administration's rescheduling efforts.

On December 18, 2025, President Trump signed an executive order (https://bit.ly/4uo1Mxp) directing the Attorney General to expedite the rescheduling of cannabis from Schedule I of the CSA to the less restrictive Schedule III. If successful, rescheduling would undercut the central premise of the 9th Circuit's opinion in *Peridot Tree*: that Congress has determined cannabis has no accepted medical use and has sought to eliminate its interstate market. If cannabis is ultimately moved to Schedule III, a category defined by recognized medical utility, that reasoning falters.

The timing of any such rescheduling remains murky, and the outcome is far from guaranteed. Even on an accelerated timeline, rescheduling must still proceed through notice-and-comment rulemaking, potential administrative hearings, interagency review, and publication of a final rule. As we saw with the Biden Administration's failed rescheduling efforts, there is also a risk that litigation or political resistance could delay or derail the process.

For now, the constitutionality of residency-based restrictions or preferences in state licensing regimes remains a game of chance.

Alexander Malyshev and Sarah Ganley are regular, joint contributing columnists on legal issues in the cannabis industry for Reuters Legal News and Westlaw Today.

About the authors

Alexander Malyshev (L) is a partner at **Carter Ledyard & Milburn LLP** and the chair of its cannabis, hemp and CBD industry group. He contributed the chapter, "Banking and Investment Considerations for Cannabis Businesses" in "Health Care and the Business of Cannabis: Legal Questions and Answers" (American Health Law Association 2021). He can be reached at malyshev@clm.com. **Sarah Ganley** (R) is an associate in the litigation department of the firm and can be reached at ganley@clm.com. The authors are based in New York.

This article was first published on Reuters Legal News and Westlaw Today on March 12, 2026.

© 2026 Thomson Reuters. This publication was created to provide you with accurate and authoritative information concerning the subject matter covered, however it may not necessarily have been prepared by persons licensed to practice law in a particular jurisdiction. The publisher is not engaged in rendering legal or other professional advice, and this publication is not a substitute for the advice of an attorney. If you require legal or other expert advice, you should seek the services of a competent attorney or other professional. For subscription information, please visit legalsolutions.thomsonreuters.com.