UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

NORTHEAST PATIENTS GROUP; HIGH STREET CAPITAL PARTNERS, LLC	)	
Plaintiffs-Appellees	)	
v.	)	
UNITED CANNABIS PATIENTS AND CAREGIVERS OF MAINE,	)	Docket Nos. 21-1719; 21-1759
Defendant-Appellant	)	
MAINE DEPARTMENT OF ADMINISTRATIVE AND FINANCIAL SERVICES; and KIRSTEN FIGUEROA	)	
Defendants-Appellants	)	

APPELLANT'S MOTION
FOR REHEARING EN BANC

Appellant United Cannabis Patients and Caregivers of Maine ("United Cannabis") hereby petitions pursuant to Fed. R. App. P. 35(b) for rehearing en banc of the split-decision judgment entered August 17, 2022.

The appeal presents an exceptionally important question regarding the extension of constitutional Commerce Clause protections to interstate drug commerce that Congress specifically "sought to eradicate," *Gonzales v.*

Raich, 545 U.S. 1, 19 n.29 (2005), through the Controlled Substances Act, 21 U.S.C. §§ 801-904 (the "CSA"). No other federal court of appeals has decided this novel question.

Rehearing en banc is appropriate because the Court's majority opinion erred in applying the dormant Commerce Clause to protect interstate marijuana activities derived from Maine's state-exclusive market based upon the novel conclusion that any market in existence—lawful or illicit—is entitled to Commerce Clause protection.

A. The Dormant Commerce Clause Has Limited Application.

At issue on appeal is the constitutionality of a Maine statute requiring that all officers or directors of for-profit medical marijuana dispensaries operating in Maine's intrastate medical marijuana market must be Maine residents. *See* 22 M.R.S. § 2428(6)(H). Appellants assert that the facially protectionist state statute does not offend the Commerce Clause because Congress's exercise of its plenary commerce power sought to eradicate any lawful, national common market for marijuana through the CSA.

The dormant Commerce Clause presumes that any "state law discriminat[ing] against out-of-state goods or nonresident economic actors," impedes the national markets of interstate commerce unless the

challenged law "is narrowly tailored to advance a legitimate local purpose," *Tennessee Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449, 2461 (2019). This presumption exists to "preserve[] a national market for goods and services," *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273 (1988), because "many subjects of potential federal regulation under that power inevitably escape congressional attention because of their local character and their number and diversity," *City of Philadelphia v. New Jersey*, 437 U.S. 617, 623 (1978) (internal quotations omitted).

At bottom, the dormant Commerce Clause's purpose is to protect "the Commerce Clause's overriding requirement of a national common market." *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 350 (1977) (internal quotations omitted).

B. Extending Dormant Commerce Clause Protections to Federal Contraband Circumvents Congress's Regulation of Commerce.

The Court's majority opinion errs in its conclusion that the dormant Commerce Clause applies to protect any national market, even if that market is illicit. *See Op.* at 10-11. No court has previously applied the dormant Commerce Clause in such manner to promote and preserve illicit

markets that were the very target of Congress's exercise of the plenary commerce power.

The majority opinion bases its application of the dormant Commerce Clause on its observation that an interstate market for federal contraband, in fact, continues to exist, "as the persistence of interstate black markets of various kinds all too clearly demonstrates." Op. at 10-11. And, the Court notes, "nothing in the record in this case indicates that, due to the CSA, there is no interstate market in medical marijuana." Op. at 11.

Such analysis applies the dormant Commerce Clause based upon an observation that Congress's effort to eradicate marijuana from interstate commerce was not completely effective, evinced by the continued existence of illicit black markets. Such application of the dormant Commerce Clause based upon performance of congressional regulation rather than the intent of congressional regulation would allow the dormant Commerce Clause to circumvent Congress's plenary power to regulate the nation's commerce.

In fact, the interstate marijuana market is not one that "escape[d] congressional attention," *City of Philadelphia v. New Jersey*, 437 U.S. at 623, thereby warranting dormant Commerce Clause protection in lieu of express congressional regulation. Rather, Congress's adoption of the CSA

evinces its "decisions [to] exclude[e] Schedule I drugs entirely from the market, " *Gonzales v. Raich*, 545 U.S. at 26. Persistence of an interstate black market for marijuana despite Congress's adoption of the CSA therefore cannot negate Congress's underlying intent to eradicate interstate marijuana commerce. *See id.*

The majority's opinion applies the dormant Commerce Clause based upon its conclusion that Congress's effort to eradicate marijuana from interstate commerce was not completely effective, evinced by the continued existence of illicit black markets. Application of the Commerce Clause, however, is tied to Congress's *intent* to regulate an article of commerce, not performance outcomes of Congress's attempted regulation.

In contrast, the dissenting opinion recognizes that dormant Commerce Clause protections cannot be construed to extend to the marijuana market already regulated by Congress. "[T]he national market for marijuana is unlike the markets for liquor licenses or egg products in one crucial regard: it is illegal." Op. at 39. Consequently, "the test we have developed for the mine-run of dormant Commerce clause cases [cannot] apply automatically or with equal vigor when the market in question is illegal as a matter of federal law." *Id.*

While many states have adopted medical marijuana markets despite the federal prohibition, this conglomeration of siloed state markets cannot give rise to the type of national common market that triggers the dormant Commerce Clause's application. Each state market operates separately and apart from every other state market in order to avoid any interstate exchange of federal contraband. Each state sells marijuana manufactured exclusively in that state and sold exclusively in that state. Thus, Congress's recognition of the separate state marijuana markets in the Rohrabacher-Farr Amendments added to the federal budget in recent years cannot be construed as an authorization of interstate marijuana commerce, as the majority opinion asserts. *See Op.* at 17.

Because no national common market for marijuana commerce lawfully exists, Maine's regulation of its intrastate marijuana market cannot and does not run afoul of the dormant Commerce Clause. For the aforementioned reasons, Appellant United Cannabis Patients and Caregivers of Maine respectfully petitions pursuant to Fed. R. App. P. 35(b) for rehearing en banc of the split-decision judgment entered August 17, 2022.

Dated: August 31, 2022

/s/ James G. Monteleone
James G. Monteleone

Attorney for Appellant United Cannabis Patients and Caregivers of Maine

BERNSTEIN SHUR
100 Middle Street/P.O. Box 9729
Portland, Maine 04014
207-774-1200
jmonteleone@bernsteinshur.com

CERTIFICATE OF SERVICE

I hereby certify that on August 31, 2022, I electronically filed this document with the Clerk of the Court using the CM/ECF system that will send notification of such filing to all attorneys of record.

/s/ James G. Monteleone
James G. Monteleone