No. 22-16783

IN THE UNITED STATES COURT OF APPEAL
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 an Order of the United States District Court for the Eastern District of California
No. 2:22-cv-00289-KJM-DB
Honorable Kimberly J. Mueller

BRIEF OF AMICI CURIAE CALIFORNIA STATE ASSOCIATION OF COUNTIES AND LEAGUE OF CALIFORNIA CITIES SUPPORTING APPELLEES AND AFFIRMANCE

[All Parties Have Consented. FRAP 29(a)]

Arthur J. Wylene (SBN 222792)
General Counsel
Rural County Representatives of California
1215 K Street, Suite 1650
Sacramento, CA 95814
Tel: (916) 447-4806
awylene@rcrcnet.org

Jennifer B. Henning (SBN 193915)
Litigation Counsel
California State Association of Counties
1100 K Street, Suite 101
Sacramento, CA 95814-3941
Tel: (916) 327-7535
jhenning@counties.org

Attorneys for Amici Curiae

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(a)(4)(A), *amici curiae* League of California Cities ("Cal Cities") and California State Association of Counties ("CSAC") make the following disclosures: (1) Cal Cities has no parent corporation, nor is owned in any part by any publicly held corporation; and (2) CSAC has no parent corporation, nor is owned in any part by any publicly held corporation.

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

Pursuant to Fed. R. App. P. 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 the brief, and no person – other than *amici*, their members or their counsel – contributed money that was intended to fund preparing or submitting the brief.

STATEMENT CONCERNING CONSENT TO FILE [F.R.A.P. Rule 29(a)(2), Circuit Rule 29-3]

All parties have consented to the filing of this brief.

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I. INTERESTS OF AMICI CURIAE

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, administered by the County Counsels' Association of California and 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 affects all counties.

The League of California Cities (Cal Cities) is an association of 477 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 24 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 identified this case as having such significance.

Amici's member counties and cities have enacted local cannabis 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 state and local cannabis regulations.

II. INTRODUCTION: THE ELEPHANT IN THE ROOM

Appellants repeatedly profess that they "bring a narrow challenge that seeks narrow relief" (Appellants' Opening Brief ("AOB"), p. 4), but this ignores the elephant in the room. This case is nominally about residency requirements in one city's cannabis equity program, but there are much larger implications lying only slightly beneath the surface. The plain fact is that federal cannabis prohibition, and the utterly unique state-federal detente thus engendered, have resulted in the creation of state regulatory schemes that universally include restrictions on interstate cannabis activities likely difficult to justify in any other context. Appellant's invitation for the federal courts to blind themselves to this reality, and subject state cannabis regulations to ordinary dormant commerce clause scrutiny in the first instance, rather than as a last resort, threatens disruptive consequences far beyond the confines of this case.

Abstention, in any form, denies no one their day in court – and does not, as Appellants allege, "greenlight government violations of constitutional rights." (AOB, p. 56.) Rather, the abstention doctrines respect federalism and state sovereignty by ensuring that the federal courts inject themselves into sensitive areas of social policy only when necessary, and only after the state courts have

definitively resolved any questions of state law that could "reduce the contours" of federal intervention.

All of these ingredients are present here. The District Court's observation that "[t]his case does not fit neatly within any single abstention doctrine the Supreme Court has recognized" was perhaps more right than it knew, as this case independently qualifies for abstention under not one, but *two* of the recognized doctrines. Both doctrines, *Pullman* abstention[1] and *Thibodaux* abstention,[2] apply the courts' equitable discretion to defer federal court involvement in cases involving sensitive social policy questions, where relevant aspects of state law remain unclear. As discussed in greater detail below, there are few social policy questions more sensitive than cannabis regulation in general (and equity programs in particular), and state law indeed remains unclear on key points that may narrow or even eliminate any dormant commerce clause questions.

In particular, while not specifically noted by the District Court, the California Constitution provides its own protections for "intercity" businesses and scrutinizes local regulatory activities that may impact the "regional welfare" beyond their boundaries – specifically including residency requirements. The

[1] *Railroad Commission v. Pullman Co.,* 312 U.S. 496 (1941).

[2] *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25 (1959).

contours of these doctrines are not identical with the dormant commerce clause, and their application often involves highly discretionary judicial determinations of "reasonableness." Until the propriety of Sacramento's actions is judged by under these state laws, and the policies, interests, and rules of the State of California are thus distilled, federal court involvement is both premature and unnecessary.

In sum, "[s]ome form of abstention was plainly justified,"[3] and the District Court was entirely correct to stay this matter. The order below should therefore be affirmed.

III. TWO DOCTRINES, ALIKE IN DIGNITY: *PULLMAN* AND *THIBODAUX*

Appellants' suggestion that the federal courts have generally refused to abstain from deciding constitutional challenges to state or local cannabis business regulations is simply mistaken. To the contrary, when the District Courts have been asked to abstain, they do so – one way or the other. (*See, e.g.*, *Brinkmeyer v. Wash. State Liquor & Cannabis Bd.*, 2020 U.S. Dist. LEXIS 184331 (W.D.Wash. 2020); *Cornerstone Health & Wellness v. Long Beach*, 2013 U.S. Dist. LEXIS 193900 (C.D.Cal. 2013); *MediGrow LLC v. Natalie M. Laprade Med. Cannabis Comm'n*, 487 F.Supp.3d 364 (D.Md. 2020).) Strikingly, *not a single* decision

[3] *Isthmus Landowners Ass'n v. California*, 601 F.2d 1087, 1090 (9th Cir. 1979).

cited by Appellants actually considered any question of abstention,[4] and these decisions are simply not authority for propositions not considered. (*Cooper Indus. v. Aviall Servs.*, 543 U.S. 157, 170 (2004); *Sakamoto v. Duty Free Shoppers, Ltd*., 764 F.2d 1285, 1288 (9th Cir. 1985).)

The District Court relied upon general principles of comity and federalism, rather than formulaic application of any particular abstention doctrine. While this approach is entirely consistent with the Supreme Court's repeated admonitions against rigid formalism in this area (*see, e.g*., *Quackenbush v. Allstate Ins. Co*., 517 U.S. 706, 727-728 (1996)), such flexibility turns out to be unnecessary in this case, as the facts, law, and social policy issues implicated here fall squarely within both the *Pullman* and *Thibodaux* doctrines as applied by the Ninth Circuit.

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[4] *Finch v. Treto*, 606 F.Supp.3d 811 (N.D.Ill. 2022) comes closest – but the approach taken by that court actually undermines Appellant's arguments (and is indeed strikingly reminiscent of the District Court in this case):

> "Second, the Department urges this court to abstain from entertaining Plaintiffs' request regarding the 2021 lotteries. Although the Department concedes that no specific abstention doctrine fits well here, it contends that, given the state court's ongoing review of the Department's final administrative decision, this court should deny Plaintiffs' motion under the broader principles of equity, comity, and federalism... The court is uncertain that either doctrine squarely applies here, *but nevertheless agrees that concern for the interplay between the state and federal cases counsels against the disruptive relief that Plaintiffs have requested*..." (*Id.* at pp. 839-840.)

A. LAND USE UNDER *PULLMAN*: TYPICALLY AN EXCEPTIONAL CASE

Ironically, if this were somewhat *less* exceptional a case, the propriety of *Pullman* abstention would be immediately obvious. The fact that this matter involves cannabis regulation – an entirely unique and immensely sensitive area of social policy – perhaps obscures the fact that this is also a *land use* case. At bottom, Appellant's complaint is that they have wrongfully been denied permission to operate a storefront retail premises. *That* fact pattern is well known to Ninth Circuit jurisprudence, and a virtually automatic candidate for abstention.

"*Pullman* abstention is an equitable doctrine that allows federal courts to refrain from deciding sensitive federal constitutional questions when state law issues may moot or narrow the constitutional questions. It is appropriate where (1) the federal constitutional claim touches a sensitive area of social policy, (2) constitutional adjudication plainly can be avoided or narrowed by a definitive ruling by a state court, and (3) a possibly determinative issue of state law is doubtful." (*Gearing v. City of Half Moon Bay*, 54 F.4th 1144, 1147 (9th Cir. 2022.)

"*Pullman* abstention does not exist for the benefit of either of the parties but rather for the rightful independence of the state governments and for the smooth working of the federal judiciary...When a court abstains in order to avoid unnecessary constitutional adjudication...it is not seeking to protect the rights of

one of the parties; it is seeking to promote a harmonious federal system by avoiding a collision between the federal courts and state (including local) legislatures." (*San Remo Hotel v. City & County of San Francisco*, 145 F.3d 1095, 1105 (9th Cir. 1998).) Thus, the doctrine may be raised *sua sponte* – and the fact that the complaining party did not raise (or is unaware of) the possibly determinative issues of state law is entirely irrelevant. (*International Brotherhood of Electrical Workers, Local Union No. 1245 v. Public Service Com*., 614 F.2d 206, 213 n.2 (9th Cir. 1980)). *See also, C-Y Dev. Co. v. Redlands,* 703 F.2d 375, 378 (9th Cir. 1982).

Moreover, the Ninth Circuit has developed a relatively relaxed approach toward *Pullman* abstention in land use cases. Even without the particular sensitivity of *cannabis* facilities, "[w]e have long held that land use planning is a sensitive area of social policy that meets the first requirement for *Pullman* abstention." (*Gearing, supra,* 54 F.4th at p. 1150.)

The second and third *Pullman* factors turn upon the existence and effect of state law questions, and the Ninth Circuit's caution here is marked: "The second factor requires that the constitutional question in the federal claim could be mooted or narrowed by a definitive ruling on the state law issues. *It is sufficient if the answers to the relevant state-law questions may reduce the contours of the federal litigation*." (*Gearing, supra,* 54 F.4th at p. 1150.) "Because of the

localized and complex nature of land-use regulations, *we generally require only a minimal showing of uncertainty in land-use cases*." (*Id.* at p. 1151.)

Further, when considering local land use regulations, the caselaw is exquisitely clear that the state law questions potentially at issue include not only facial interpretation of the applicable local enactment (i.e., Sacramento's CORE resolutions), but also any applicable limits that state law may place upon local action. In a very long series of cases, functionally quite similar to the present matter, this court has declined to adjudicate challenges to local land use decisions (involving both large-scale regulatory schemes and individual permits) where the action could be argued to contravene some provision state law; where it might be set aside by the state courts as an abuse of discretion; or even where the local regulation simply has not yet been challenged in the state courts. In addition to *Gearing* and *San Remo*, noted above, these include:

- *Rancho Palos Verdes Corp. v. Laguna Beach*, 547 F.2d 1092, 1095 (9th Cir. 1976) ["California courts have yet to decide the precise extent to which the state and its municipalities may limit the development of private property. Moreover, recently enacted statutes might be authoritatively interpreted by the California courts to serve as a basis for finding that the defendants acted beyond their statutory authority..."].
- *Sederquist v. Tiburon*, 590 F.2d 278, 282 (9th Cir. 1978).

- *Santa Fe Land Improv. Co., v. City of Chula Vista* , 596 F.2d 838, 840–841 (9th Cir. 1978) ["Although Santa Fe does not directly raise the point, the state courts may possibly find that the city has exceeded its authority based upon Cal. Gov't Code § 65912...That Santa Fe did not specifically raise the question does not foreclose consideration of the issue as a basis for abstention"].
- *Isthmus Landowners Ass'n v. California*, supra, 601 F.2d at p. 1091 ["This comprehensive land use regulatory scheme presents complex and difficult issues of state law. In order to avoid needless conflict with the administration by a state of its own affairs, state rather than federal courts should ordinarily be the first to construe the provisions of an integrated state regulatory program"].
- *C-Y Dev. Co., supra,* 703 F.2d at pp. 378-379 ["Although C-Y has not raised the point, another issue of state law involved in this case is whether the city has exceeded its authority based upon Cal. Gov't Code § 65912"].
- *Kollsman v. Los Angeles,* 737 F.2d 830, 834, 837 (9th Cir. 1984) ["[A]bstention appropriate in case involving recently enacted web of statutes that attempts to grapple with difficult land use problems"].
- *Pearl Inv. Co. v. San Francisco,* 774 F.2d 1460, 1464 (9th Cir. 1985) ["A state court might find that the Commission failed to comply with

mandatory procedures and accordingly might order the application approved as filed. *See,* Cal. Gov't Code §§ 65943, 65950..."]

- *Sinclair Oil Corp. v. County of Santa Barbara*, 96 F.3d 401, 409-410 (9th Cir. 1996) ["[T]he Plan itself has not yet been challenged in the state courts. In a somewhat similar case, this Court observed that a local government's enactment of land use regulations is by nature a question turning on the peculiar facts of each case in light of the many applicable local and state-wide land use laws..."].[5]

What, then, are the state law questions that might "reduce the contours" of Appellants' dormant commerce clause claim? To the experienced practitioner of California land use law, three such issues are initially apparent.

The first arises under a line of California cases addressing residency requirements *per se*, and judges the validity of such restrictions under a judge-made combination of the equal protection and privileges and immunities clauses of the California Constitution (Cal. Const., art. I, § 7), and the organic limitations inherent in the constitutional "police power" (Cal. Const., art. XI, § 7) under

[5] As Appellants will doubtless note, none of these cases involved a dormant commerce clause challenge (regulatory takings being the most popular argument); however, this is of no moment. This court has held *Pullman* abstention equally applicable to dormant commerce clause challenges, where the requisite criteria are met. (*Potrero Hills Landfill, Inc. v. County of Solano*, 657 F.3d 876, 888-890 (9th Cir. 2011).)

which "local, police, sanitary, and other ordinances and regulations" are enacted. (*See, e.g.*, *McClain v. South Pasadena*, 318 P.2d 199 (Cal.Ct.App. 1957); *People v. Housman*, 210 Cal.Rptr. 186 (Cal.Super.Ct. 1984).)

Summing up the standards derived from these provisions, California courts have emphasized the discretionary, case-by-case nature of these determinations (which are thus intrinsically "uncertain" for purposes of *Pullman* analysis):

> "All differentiation by municipal regulation as to nonresidents is not constitutionally prohibited and void. It is only when the municipal regulation discriminates unreasonably that it violates constitutional requirements...*There is no arbitrary formula by which the reasonableness of a regulation such as that in question can be tested*. Its validity depends, to a considerable extent, on surrounding circumstances and its purposes and operation. Regard must be had for its object and necessity." (*McClain, supra*, 318 P.2d at pp. 207-208.)

The second state law question implicated here likewise derives from the organic limits of local agencies' constitutional "police power," and is specific to land use cases like this one. In *Associated Home Builders etc., Inc. v. City of Livermore*, 557 P.2d 473 (Cal. 1976), the California Supreme Court "clarif[ied] the application of the traditional police power test to an ordinance which significantly affects nonresidents of the municipality." The court explained that in such cases, the ordinance must be reasonably related to "the regional welfare." (*Id*. at pp. 607-608.) "[T]he proper constitutional test…inquires whether the ordinance reasonably relates to the welfare of [the nonresidents] it significantly affects." (*Id.* at p. 607.)

As with the prior issue, application of the "regional welfare doctrine" represents an exercise of judicial discretion, the outcome of which can only be regarded as deeply uncertain for present purposes. As articulated by the California Supreme Court, "the process by which a trial court may determine whether a challenged restriction reasonably relates to the regional welfare" is replete with discretionary features best applied by state courts in the first instance: "The first step...is to forecast the probable effect and duration of the restriction...The second step is to identify the competing interests affected by the restriction...[T]he final step is to determine whether the ordinance, in light of its probable impact, represents a reasonable accommodation of the competing interests." (*Associated Home Builders, supra*, 557 P.2d at pp. 488-489.)

The third issue potentially present on this record arises from the line of cases culminating in *Los Angeles v. Shell Oil Co*., 480 P.2d 953 (Cal. 1971), which principally concern local taxation:

> "[I]t is clear that in spite of the absence of a specific "commerce clause" in our state Constitution, other provisions in that Constitution – notably those provisions forbidding extraterritorial application of laws and guaranteeing equal protection of the laws...combine with the equal protection clause of the federal Constitution to proscribe local taxes which operate to unfairly discriminate against intercity businesses..." (*Shell Oil Co*., 480 P.2d at pp. 959-963)

While these cases contain some of the broadest language, the extent to which they apply (if at all) outside the context of tax apportionment is unclear,

nor is the application of these (very generally stated) principles to Sacramento's CORE program readily apparent. As above, these are questions best presented to the California courts before leaping to adjudicate federal constitutional issues.

In sum, the second and third *Pullman* factors are clearly met, especially when viewed through the lens applied to land use cases by the Ninth Circuit. The foregoing state law issues unquestionably have the potential to entirely avoid the federal constitutional question, i.e., if Sacramento's actions are found to violate the California Constitution. Even if Sacramento's residency requirements are upheld under state law, the state courts' application of these standards, and the attendant articulation and balancing of the state's social policy interests, will necessarily "reduce the contours" of any federal questions remaining. *Pullman* abstention is thus appropriate on its own terms, and provides an independent and adequate basis to affirm the District Court.

B. THE SHIP OF THIBODAUX PARADOX[6]

The same equitable principles – and concern for federalism and comity – underlying *Pullman* abstention have given rise to several other related, but

[6] See *Estabrook v. Mazak Corp.* (In. 2020) 140 N.E.3d 830, 834 [discussing the ancient "Ship of Theseus Paradox" posed by Plutarch to explore the "longstanding philosophical issue of 'object identity', which asks what properties define an object"].) As will appear, legal doctrines, like mythological ships, may undergo such change and variation as to create perplexing questions of proper identification. (See Sir Matthew Hale, *The History of the Common Law of England* (1st ed. 1713), pp. 59-60.)

distinct abstention doctrines. One such branch is headed by *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). As explained by the Supreme Court, there are two circumstances in which a federal court should apply "the *Burford* doctrine":

> "Where timely and adequate state-court review is available, a federal court sitting in equity must decline to interfere with the proceedings or orders of state administrative agencies: (1) when there are difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar; or (2) where the exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern." (*New Orleans Public Serv., Inc. v. Council of the City of New Orleans*, 491 U.S. 350, 361 (1989) quoting *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 814 (1976).)

The principal exemplar of the first such circumstance listed by *Colorado River* was *Thibodaux, supra*, with the result that this species of abstention is considered by some courts (and commentators) to be an independent doctrine ("*Thibodaux* abstention"), and by others to be a subspecies of *Burford*. "Courts and commentators alike are split on whether *Thibodaux* is a separate abstention doctrine, as opposed to a special form of *Burford* abstention." (*Hawthorne Sav. F.S.B. v. Reliance Ins. Co.*, 421 F.3d 835, 846 n.9 (2005).)

This point would be of merely semantic interest, except for the fact that the Ninth Circuit has put a restrictive gloss on what it terms "*Burford* abstention." Under Circuit precedent, "*Burford* abstention...and is only appropriate where (1) the state has concentrated suits involving the local issue in a particular court; (2)

the federal issues are not easily separable from complicated state law issues with which the state courts may have special competence; and (3) federal review might disrupt state efforts to establish a coherent policy." (*Poulos v. Caesars World, Inc.*, 379 F.3d 654, 674 (2004).)

These criteria – specifically, the requirement that "the state has concentrated suits involving the local issue in a particular court" – have vexed at least one District Court considering application of *Burford* to cannabis litigation (*Left Coast Ventures, Inc. v. Bill's Nursery Inc.*, 2019 U.S. Dist. LEXIS 210736 (W.D.Wash. 2019)), and if strictly applicable to the *Thibodaux* branch of abstention doctrine would have precluded abstention in *Thibodaux* itself (which involved no such specialized court).[7]

While the Ninth Circuit has never explicitly stated this point, this court appears among those who treat "*Thibodaux* abstention" as a separate doctrine, rather than "a special form of *Burford* abstention" – thus avoiding the foregoing tension. "*Thibodaux* abstention" is among the rarest of birds, but when properly presented this court has unambiguously analyzed the doctrine separately from

[7] While this case involves local cannabis land use regulations, rather than California state cannabis licensure, it is nonetheless noteworthy that California created precisely such a specialized tribunal to resolve state-level cannabis licensing disputes, and concentrated review of those disputes in the higher courts. (*See*, Cal. Bus. & Prof. Code, §§ 26040 et seq.)

Burford, and without the restrictive gloss applied to the latter. (*City of Tucson v. United States W. Communs*., 284 F.3d 1128, 1135 (9th Cir. 2002).)[8]

Thibodaux counsels federal forbearance in cases that are "intimately involved with sovereign prerogative" (*Thibodaux, supra*, 360 U.S. at p. 28), with due regard for "avoiding the hazards of serious disruption by federal courts of state government or needless friction between state and federal authorities." (*Ibid*.) The key components of this doctrine are one or more unsettled questions of state law, upon which the federal courts can make only "a dubious and tentative forecast" (*id.* at p. 29), and the need to maintain "harmonious federal-state relations in a matter close to the political interests of a State." (*Ibid*.)[9]

[8] While differing in nomenclature, this approach is substantively consistent with those courts that have considered *Thibodaux* to be merely "the first of the *Burford* abstention rationales." Those courts, while treating *Thibodaux* as a species of *Burford*, have not subjected cases under that branch to the restrictive gloss applicable to other *Burford* cases (such as the requirement of a special court). (*See, e.g., International College of Surgeons v. City of Chicago*, 153 F.3d 356, 362-364 (7th Cir. 1998).)

[9] *Thibodaux* was a diversity case, involving no federal questions (merely unclear state law); however, there is no indication in the caselaw of either this Circuit or the Supreme Court that its rationale is thus limited, and at least one other Circuit has applied the doctrine where primarily federal constitutional questions were presented. (*Neal v. Brim*, 506 F.2d 6 (5th Cir. 1975).) Indeed, the Supreme Court's mandate that cases falling under *Thibodaux* be stayed rather than dismissed (*Quackenbush supra*, 517 U.S. at pp. 719-720) plainly contemplates the prospect of federal questions remaining after completion of the state proceedings.

Thibodaux itself involved eminent domain proceedings, and in the years since has been much more frequently raised by litigants than applied by courts. However, if there was ever another circumstance "involving uniquely state specific subject matter" (*Superior Beverage Co. v. Schieffelin & Co*., 448 F.3d 910, 917 (6th Cir. 2006)), cannabis regulation is it. States' ability to regulate cannabis in the face of federal prohibition stems from that most fundamental "sovereign prerogative," the Tenth Amendment's "anti-commandeering" doctrine. (*See, Safe Sts. All. v. Hickenlooper*, 859 F.3d 865, 918 (10th Cir. 2017 (Hartz, J. concurring)). The prospect of federal courts commanding state actions where they cannot be commandeered, and determining the scope of cannabis activities a state must tolerate when defying the federal will – or which actors it must admit to this tolerance – should not be hazarded lightly.

Further, as explained in detail by the District Court, federal and state policies on this issue "collide at virtually every turn." Injecting the additional element of dormant commerce clause litigation will not improve this conflict or promote "harmonious federal-state relations." Additional friction and "serious disruption" are not merely a possible outcome of premature federal adjudication, but an absolute certainty. *Thibodaux* abstention is both authorized and warranted here, and provides another independent basis for affirming the District Court.

IV. THIS IS THE LAND OF CONFUSION: CANNABIS, COMMERCE, AND CONGRESS

A. CANNABIS *REALLY IS* DIFFERENT

A common element shared by both *Pullman* and *Thibodaux* is the existence of a sensitive area of social policy that would be disrupted – perhaps drastically – by premature federal court intervention. As noted above, cannabis regulation is unquestionably such an area. The sheer number of ballot initiatives, bills, court cases, law reviews, scholarly studies, and media articles devoted to this topic are beyond counting. Cannabis legalization is said to be *both* an improvident scourge upon health and safety,[10] *and* a necessary curative to the war on drugs, that will improve public health, economic prosperity, and tax revenues.[11] To call the issue merely "sensitive" would be a gross understatement.

Moreover, the particular aspect of cannabis regulation at issue in this case, social equity programs, touches upon an especially delicate area. "Given the

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[10] *See, e.g.*, Office of National Drug Control Policy, *Fact Sheet: Marijuana Legalization*, October 2010 <https://www.ojp.gov/pdffiles1/ondcp/mj_legal.pdf>

[11] *See, e.g.*, White House, *Statement from President Biden on Marijuana Reform*, October 6, 2022 <https://www.whitehouse.gov/briefing-room/statements-releases/2022/10/06/statement-from-president-biden-on-marijuana-reform/>; Kris Krane, *Cannabis Legalization Is Key To Economic Recovery, Much Like Ending Alcohol Prohibition Helped Us Out Of The Great Depression*, Forbes, May 26, 2020 <https://www.forbes.com/sites/kriskrane/2020/05/26/cannabis-legalization-is-key-to-economic-recovery-much-like-ending-alcohol-prohibition-helped-us-out-of-the-great-depression/?sh=4fd71cd43241>

central role they played in the War on Drugs, many states have concluded that legalization alone is insufficient to rectify the inequities they caused. These states have thus established comprehensive social equity programs, one of the main objectives of which is to increase the rate of minority ownership of marijuana businesses – literally building equity in the state's marijuana marketplace." (Bloomberg & Mikos, *Legalization Without Disruption: Why Congress Should Let States Restrict Interstate Commerce in Marijuana*, 2022 Pepp. L. Rev. 839 (2022).) Determination of the specific inequities a particular state or local entity may have caused through its historic drug enforcement practices, identification of the individuals and communities harmed, and development of the appropriate remedial measures are no less "intimately involved with sovereign prerogative" than eminent domain.

Likewise, the impact of allowing premature commerce clause challenges to proceed would be more than merely disruptive. In August 2021, Professors Bloomberg and Mikos (authors of the foregoing article) submitted a letter to Congress in which they outlined "five ways in which the [Dormant Commerce Clause] would negatively disrupt existing state cannabis programs," including:

- "The DCC would eviscerate a key component of state social equity programs."
- "The DCC would create dangerous gaps in the regulation of the cannabis industry."

- "The DCC would trigger a race to the bottom among the states."
- "The DCC would greatly diminish the value of investments entrepreneurs have made in existing state cannabis programs."
- "The DCC would prematurely end ongoing experiments states are conducting in the regulation of cannabis markets."

(Bloomberg & Mikos, *Letter to Sen. Cory Booker, et al*., August 27, 2021 <https://my.vanderbilt.edu/marijuanalaw/files/2021/08/Bloomberg-and-Mikos-Comments-on-CAOA.pdf>)

While the professors' ultimate conclusion (in both the letter and article) that dormant commerce clause scrutiny would necessarily be fatal to state cannabis regulations is debatable (see below), the threats they identify from such federal involvement are very real. The first of these threats is directly implicated in this case, and – Appellants' protestations notwithstanding – the remainder would follow closely behind any decision of this court allowing a dormant commerce clause challenge to proceed at this time. (*See also,* Bloomberg, *Frenemy Federalism*, 56 U. Rich. L. Rev. 367, 370 (2022).)

Abstention, under either *Pullman* or *Thibodaux* will not necessarily avoid this result in the end. As noted, abstention under these doctrines does not preclude a federal forum if the state courts' resolution of state law fails to eliminate the federal issues. However, it *will* ensure that risking such consequences is the last resort, not undertaken needlessly – and that any eventual federal adjudication is based upon a clearly articulated body of state law,

definitively determined by the state courts, which will allow for precise decision-making and avoidance of unintended consequences.

B. WHOSE COMMERCE IS IT ANYWAYS?

When determining whether to abstain, the novelty and difficulty of the federal constitutional questions (potentially) presented are also not irrelevant. Affirming the abstention order in *C-Y Dev. Co., supra,* 703 F.2d at p. 380, this court noted that "C-Y's complaint contains difficult constitutional issues of first impression...In reaching these decisions the court would be breaking new ground in constitutional law, and perhaps unnecessarily so." That is most certainly the case here as well.

While Appellants blithely assert that "[n]o genuine argument can be made that the City of Sacramento's application program for storefront dispensary cannabis licenses is constitutional" (AOB, p. 19), this simply isn't so. Cannabis is not like pork, eggs, liquor, milk, or even garbage – unlike those objects of interstate commerce, cannabis is wholly contraband under federal law. It is not legal to possess, consume, buy, sell, or transport. The proceeds of commercial cannabis activities cannot be deposited in a bank or moved across state lines without risk of seizure. This has both direct and indirect effects on the proper commerce clause analysis.

The direct effects argument is simple: A "Commerce Clause argument must fail because the marijuana was contraband, that is, property that is unlawful to possess, and as such not an object of interstate trade protected by the Commerce Clause." (*Predka v. Iowa*, 186 F.3d 1082, 1084 (8th Cir. 1999). See also Chin, *Policy, Preemption and Pot: Extraterritorial Citizen Jurisdiction*, 58 B.C. L. Rev. 929, 941-942 (2017).)[12]

This is the argument addressed – and rejected – by the majority in *Northeast Patient Group v. United Cannabis Patients & Caregivers of Maine*, 45 F.4th 542 (1st Cir. 2022). Judge Gelpi's vigorous dissent (*id.* at pp. 558-560) provides the best critique of that decision, to which only one point will be added. As noted by the *Ne. Patients Grp.* Majority, the Third Circuit's decision in *Pic-A-State PA, Inc. v. Commonwealth of Pennsylvania*, 42 F.3d 175 (3rd Cir. 1994) upheld a state statute prohibiting the sale of out-of-state lottery tickets, on the grounds that such sales were prohibited by federal statute:

> "Where Congress has proscribed certain interstate commerce, Congress has determined that that commerce is not in the national interest. Where such a determination has been made by Congress, it does not offend the purpose of the Commerce Clause for states to discriminate or burden that commerce." (*Id*. at p. 179.)

[12] In addition to cannabis (*see, Brinkmeyer, supra*, 2023 U.S. Dist. LEXIS 20564), there is a lengthy series of state cases applying this rationale to other forms of proscribed interstate activities (namely online solicitation of minors) and finding them unprotected by the dormant commerce clause. (*See, e.g.*, *State v. Alangcas*, 345 P.3d 181, 202-203 (Haw. 2015).)

The *Ne. Patients Grp.* majority distinguished *Pic-A-State* on the grounds that the state law at issue there was consistent with and aided Congress' prohibitory objectives, whereas Maine's residency requirement "in no sense aids the policy expressed by Congress in the CSA." (*Ne. Patients Grp., supra,* 45 F.4th at pp. 550, 555.) The vice of this reasoning is that it makes the scope of federally-protected "commerce" depend upon the state's actions, rather than those of Congress. Where *Congress* has forbidden certain species of interstate trade, the question of whether those activities are given federal protection under the commerce clause should not depend upon the purposes and policies of *any particular state's* limitations upon that very same trade.

Phrased differently, any state-imposed limitations upon interstate cannabis activities further Congressional objectives to a greater extent than would *an absence* of such limitations. Does the fact that a state has elected to aid Congress' policy in part, where in cannot be commandeered in full, create a federally enforceable right to undermine *both* sovereigns' objectives? That cannot be the right answer.

The complete federal prohibition of cannabis has indirect effects upon dormant commerce clause analysis as well. Even if the usual dormant commerce clause protections apply to cannabis (i.e., as if Congress had said nothing on the subject), the outcome here is not so clear as Appellants would believe. 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, *supra*, 2022 Pepp.L.Rev. at p. 852) – 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 cannabis 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))[13] – which included explicit threats of legal action against states that failed to adequately control interstate cannabis activities – the larger reality is that the federal prohibition of cannabis has numerous collateral effects for legalizing states that only a "closed loop" system can adequately control.

To begin with, the federal prohibition – and the fact that cannabis 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 cannabis from the state-legal market into the black market) and "inversion" (vice-versa) are ever-present. These risks magnify dramatically when the cannabis 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 safety and accurate labelling (overseen, in most cases, by the

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

federal Food and Drug Administration). As a result of federal prohibition, this scheme does not reach state-legal cannabis 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 cannabis, 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 cannabis laws].)[14]

[14] Appellants assertion that "California has no interest in preventing this lawsuit..." (AOB, pp. 49-50) could not be more inaccurate. The referenced state law (Cal. Bus. & Prof. Code §§ 26301 et seq.) authorizes the Governor to enter into agreements with other cannabis-friendly states allowing interstate cannabis activities under certain conditions. Contrary to Appellants suggestion, this tightly controlled coordination of state regulatory systems is very far from an open "interstate flow of cannabis products" – and would be equally disserved by dormant commerce clause adjudication that was blind to the unique realities of cannabis. (*See, Great Atlantic & Pacific Tea Co. v. Cottrell* (1976) 424 U.S. 366, 380.)

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 cannabis commerce – all of it – in-state can health and safety be protected.

The specific "discriminatory" feature at issue here, i.e., the residency provisions of Sacramento's equity program, is supported by yet another legitimate, non-protectionist purpose. Ironically, it was the leading commentators expressing dormant commerce clause concerns who laid out some of the best reasons why this feature should survive strict scrutiny:

> At the core of these social equity programs lies a law that facially discriminates against non-residents. States determine who qualifies as a social equity applicant based in part on whether they reside in an area that has been disproportionately impacted by the state's drug policies. Since those disproportionate impact areas (DIAs) are invariably defined as communities within the state, it follows that social equity applicants necessarily must be residents of the state.
> ***
> [S]tates do not have a good alternative to using DIAs within the state as the basis for determining who qualifies as a social equity applicant...explicit racial preferences would likely violate another constitutional provision: the Equal Protection Clause...The other alternative (aside from racial classifications) that states have is using nationwide DIAs instead of in-state DIAs for determining eligibility for social equity benefits...However, the use of nationwide DIAs would be undesirable and impractical in several other respects. Most significantly, a state has little-to-no interest in rectifying the harms created by other states' discriminatory drug policies...Even if a state wanted to forge ahead with a social equity

> program to remediate the wrongs committed by other states, there is a thorny issue of how it would determine what constitutes a DIA in every other state...Moreover, the effects of past discrimination vary considerably from state to state. What type of benefits may be appropriate to remedy the effects of discrimination caused by one state may be insufficient (or excessive) to rectify the effects caused by another state. (Bloomberg & Mikos, *supra*, 2022 Pepp.L.Rev. at pp. 871-873.)

For all of these reasons, this court could simply conclude that Sacramento's challenged regulations do not violate the dormant commerce clause – and that Appellants have thus failed to state a claim – as an alternative grounds for resolving this matter (*Las Vegas v. Clark County*, 755 F.2d 697, 705 (9th Cir. 1984)), but it need not do so at this juncture. It is sufficient to note that these questions are novel, difficult, and would greatly benefit from definitive clarification of the applicable state law prior to resolution.

V. CONCLUSION

The order of the District Court staying this matter pending Appellants' Appellants' pursuit of their claims in state court should be AFFIRMED.

Dated: May 1, 2023

Respectfully submitted,

By: /s/ Jennifer Bacon Henning

Jennifer Bacon Henning, SBN 193915

Counsel for Amici Curiae
California State Association of Counties
and League of California Cities

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, *amici curiae* are not aware of any related cases pending in this Court.

CERTIFICATE OF COMPLIANCE WITH RULE 32(g)(1)

I am an attorney for *amici curiae* League of California Cities and the California State Association of Counties. This brief contains 6,495 words excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and it complies with the word limit of Fed. R. App. P. 29(a)(5).

The brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman font.

Dated: May 1, 2023

Respectfully submitted,

By: /s/ Jennifer Bacon Henning

Jennifer Bacon Henning, SBN 193915

Counsel for Amici Curiae
California State Association of Counties
and League of California Cities

9th Circuit Case Number 22-16783

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on May 1, 2023.

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

Dated: May 1, 2023

By: /s/ Jennifer Bacon Henning

Jennifer Bacon Henning, SBN 193915

Counsel for Amici Curiae
California State Association of Counties
and League of California Cities