

# A HIGH FOR ALABAMIANS, BUT A LOW FOR THE COMMERCE CLAUSE

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*Note*

## INTRODUCTION

On May 17, 2021, Alabama Governor Kay Ivey signed into law the Darren Wesley ‘Ato’ Hall Compassion Act (the Compassion Act),<sup>1</sup> making Alabama the thirty-seventh state to legalize medical marijuana.<sup>2</sup> Many hailed the bill as a success,<sup>3</sup> considering that legalizing any sort of marijuana, let alone medical marijuana, seemed impossible almost ten years ago.<sup>4</sup> The Compassion Act legalizes only medical marijuana.<sup>5</sup> However, as Governor Ivey noted, it was an “important first step”<sup>6</sup> since “[m]edical research indicates that the administration of medical cannabis can successfully treat various medical conditions and alleviate the symptoms of various medical conditions.”<sup>7</sup>

The Compassion Act is quite unique in its own ways though. In the Compassion Act, the Alabama legislature explicitly stated, “It is not the intent of this chapter to provide for or enable recreational use of marijuana in the State of Alabama.”<sup>8</sup> Thus, throughout the Compassion Act, the legislature installed safeguards to ensure that Alabama’s legalization of medical marijuana does not lead to the legalization of recreational marijuana.<sup>9</sup>

One such safeguard is the residency requirement to apply for a license. As part of Alabama’s regulation of medical marijuana, the legislature provided, “All functions and activities relating to the production of medical cannabis . . . shall be licensed.”<sup>10</sup> To gain a license, the applicant must provide “[r]ecords indicating that a majority of ownership is attributable to an individual or individuals with proof of residence in [Alabama] for a continuous period of no

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1. ALA. CODE § 20-2A-1 (1975).

2. Chandelis Duster, *Alabama GOP Governor Signs Medical Marijuana Bill into Law*, CNN (May 17, 2021, 3:12 PM), <https://www.cnn.com/2021/05/17/politics/alabama-medical-marijuana-law/index.html>.

3. *See id.* (“Marijuana advocates praised the law . . . calling it a victory for the state.”).

4. *See, e.g.*, Kim Chandler, *Pot Bills Win Shroud Award for the Deadest Bill of 2013 Session*, AL.COM (May 21, 2013, 2:19 AM), [https://www.al.com/wire/2013/05/pot\\_bill\\_win\\_shroud\\_award\\_for.html](https://www.al.com/wire/2013/05/pot_bill_win_shroud_award_for.html). However, in the years leading up to the legalization of medical marijuana in 2021, Alabama saw more success in establishing marijuana programs. *See* ALA. CODE § 13A-12-214.3 (1975) (allowing people with seizure disorders or other debilitating medical conditions to use cannabidiol to treat certain medical conditions).

5. § 20-2A-7.

6. Mike Cason, *Gov. Kay Ivey Signs Alabama’s Medical Marijuana Bill*, AL.COM (May 18, 2021, 10:43 AM), <https://www.al.com/news/2021/05/gov-kay-ivey-signs-alabamas-medical-marijuana-bill.html>.

7. § 20-2A-2(2).

8. *Id.* § 20-2A-2(1).

9. *See id.* § 20-2A-2(7), (10)–(14).

10. *Id.* § 20-2A-50(a).

less than 15 years preceding the application date.”<sup>11</sup> This residency requirement has been a problem for other states in light of the negative implication of the Commerce Clause, also known as the dormant Commerce Clause. The next question is whether the Compassion Act’s residency requirement is likely to be struck down too.

This Note will analyze the Compassion Act’s implications with the dormant Commerce Clause. Part I will provide an overview of the Compassion Act. Part II will proceed in three subparts. Subpart A will discuss reasons states have instituted residency requirements in regulating their medical cannabis programs. Subpart B will discuss general dormant Commerce Clause precedent. Then, Subpart C will bring together Subparts A and B by providing an overview of how some federal courts have analyzed medical marijuana residency requirements under the dormant Commerce Clause. Part III will then use the precedent discussed in Part II to determine whether Alabama’s residency requirement can survive constitutional scrutiny. Finally, Part IV will discuss potential alternatives to the legally murky residency requirement.

## I. THE DARREN WESLEY ‘ATO’ HALL COMPASSION ACT

The Compassion Act, named after Representative Laura Hall’s son who died of AIDS,<sup>12</sup> was sponsored by Senator Tim Melson (R-Florence) and Representative Mike Ball (R-Madison).<sup>13</sup> First and foremost, the Compassion Act allows Alabama residents to purchase, possess, or use medical cannabis to treat a variety of illnesses.<sup>14</sup> The Act accomplishes this purpose through the creation of the Alabama Medical Cannabis Commission (the Commission), which is charged with both “making medical cannabis derived from cannabis grown in Alabama available to registered qualified patients,” “licensing facilities that process, transport, test, or dispense medical cannabis,” and “administer[ing] and enforc[ing]” the Compassion Act.<sup>15</sup>

However, the Commission must enforce the Compassion Act in a manner consistent with the Alabama legislature’s intent to not “provide for or enable recreational use of marijuana . . .”<sup>16</sup> To ensure that the use of medical cannabis does not turn into the use of recreational cannabis, the Commission enforces the Compassion Act in four ways. First, only “registered qualified patient[s]” are allowed to use medical cannabis.<sup>17</sup> To qualify as a registered qualified

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11. *Id.* § 20-2A-55(a)(10).

12. Michelle Key, *Medical Cannabis Bill Passes Senate, To Go to Ivey for Signage*, THE OBSERVER (May 13, 2021), <https://opelikaobserver.com/medical-cannabis-bill-passes-senate-to-go-to-ivey-for-signage/>.

13. Mike Cason, *What’s in Alabama’s Medical Marijuana Bill?*, AL.COM (May 10, 2021, 10:53 AM), <https://www.al.com/news/2021/05/whats-in-alabamas-medical-marijuana-bill.html>.

14. § 20-2A-30(a).

15. *Id.* § 20-2A-22(a)–(b).

16. *Id.* § 20-2A-2(1).

17. *Id.* § 20-2A-7(a).

patient, the patient must meet three conditions in the Compassion Act: (1) they must be certified by a registered certifying physician as having a qualified medical condition;<sup>18</sup> (2) they are registered with the Commission;<sup>19</sup> and (3) they have been issued a valid medical cannabis card by the Commission.<sup>20</sup> If a patient qualifies as a registered qualified patient under the Compassion Act, they may only purchase up to sixty daily dosages of medical cannabis and may not renew their supply more than ten days before the sixty-day period ends.<sup>21</sup> Second, only physicians that are registered and certified by the Commission may prescribe medical cannabis to qualified registered patients.<sup>22</sup> For a physician to gain certification, the physician must, among other requirements, “[c]omplete a four-hour course related to medical cannabis and complete a subsequent examination.”<sup>23</sup> Then, to requalify for certification, the physician must “complete a two-hour refresher course” every two years.<sup>24</sup> The third way the Commission enforces the Compassion Act is through the creation of the Alabama Medical Cannabis Patient Registry System that tracks all the required qualifications by, among other ways, receiving and recording physical certifications,<sup>25</sup> receiving and tracking qualified patient registration,<sup>26</sup> and tracking “purchases of medical cannabis at dispensaries by date, time, amount, and type.”<sup>27</sup> Finally, the Commission oversees the cultivation, process, and dispensing of medical cannabis by “regulat[ing] medical cannabis from seed to sale”<sup>28</sup> and “licens[ing] and regulat[ing] all aspects of medical cannabis.”<sup>29</sup> Specifically, the Commission must establish a statewide seed-to-sale tracking system that tracks the medical cannabis from the time it grows from a seed into a plant to when the medical cannabis is sold to a registered qualified patient.<sup>30</sup> Additionally, the Commission oversees the licensing scheme for all aspects of medical cannabis (excluding cultivation), which allows applicants to gain a license to become a cultivator, processor, secure transporter, state testing

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18. *Id.* § 20-2A-30(a)(1)(a). The Alabama legislature lists sixteen conditions that fall under the definition of “qualifying medical condition.” *Id.* § 20-2A-3(21). As long as a registered qualified patient suffers from any of the conditions or exhibits symptoms of any of the conditions listed, the patient may have a qualified medical condition. *Id.*

19. *Id.* § 20-2A-30(a)(1)(b).

20. *Id.* § 20-2A-30(a)(1)(c).

21. *Id.* § 20-2A-30(d).

22. *Id.* § 20-2A-31(a)–(b).

23. *Id.* § 20-2A-31(a)(2).

24. *Id.*

25. *Id.* § 20-2A-35(a)(1).

26. *Id.* § 20-2A-35(a)(2).

27. *Id.* § 20-2A-35(a)(6).

28. *Id.* § 20-2A-50(a).

29. *Id.* § 20-2A-50(b).

30. *Id.* § 20-2A-54(a).

laboratory, dispensary, or an integrated facility.<sup>31</sup> Similar to physicians, the licensees are subject to background checks<sup>32</sup> and must have the requisite skill and expertise to carry out the duties the license requires.<sup>33</sup> These four ways allow the Commission to regulate every aspect of the legalization of medical cannabis to not just ensure that those who could benefit from medical cannabis receive it but also prevent medical cannabis from turning into recreational cannabis.

In addition to these four main ways of regulation, the Compassion Act also contains numerous safeguards that prevent a “shift from medical cannabis usage to recreational marijuana usage.”<sup>34</sup> The first safeguard is the definition of medical cannabis, which the Alabama legislature limited to derivatives such as “[o]ral tablet[s], . . . [g]el, oil, cream, or other topical preparation[, and] . . . [l]iquid or oil for administration using an inhaler.”<sup>35</sup> Thus, commonplace usages of cannabis through “smoking, combustion, or vaping” or ingestion of the cannabis through a “food product that has medical cannabis baked, mixed, or otherwise infused into the product, such as cookies or candies” are not part of the definition of medical cannabis and are prohibited uses.<sup>36</sup> Another important safeguard concerns dispensaries and cultivators. A licensed dispensary must be equipped with surveillance cameras focused on the point of entry and operate on a continuous basis.<sup>37</sup> Licensed cultivators must monitor all individuals entering and exiting their facilities by video surveillance.<sup>38</sup> Other safeguards include criminal penalties for any individual who diverts medical cannabis from any registered or licensed individual or entity,<sup>39</sup> and the requirement that all employees who might have “access to cannabis, a medical cannabis facility, or related equipment or supplies . . . submit to a state and national criminal background check.”<sup>40</sup>

Seemingly, the main safeguard against recreational marijuana use is the residency requirement to apply for a license to participate in the Alabama medical cannabis market.<sup>41</sup> To gain a license, the applicant must show that a majority of the ownership is attributable to an individual or individuals with

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31. *Id.* § 20-2A-50. The Alabama Department of Agriculture and Industries licenses and regulates the cultivation of cannabis. *Id.* § 20-2A-50(b).

32. *Id.* § 20-2A-55(b).

33. *See id.* § 20-2A-53(a)(3).

34. *Id.* § 20-2A-2(14).

35. *Id.* § 20-2A-3(14)(a).

36. *Id.* § 20-2A-3(14)(b).

37. *Id.* § 20-2A-64(d)(2).

38. *Id.* § 20-2A-62(d)(2).

39. *Id.* § 20-2A-8(a)(1). An individual who does divert medical cannabis is guilty of a Class B Felony. *Id.* § 20-2A-8(a)(2).

40. *Id.* § 20-2A-59(a).

41. The requirement seems to be the main safeguard because the Alabama legislature expressly highlights this requirement in its legislative findings. *Id.* § 20-2A-2(11) (“Requiring licensees to prove a history of residency within the state for a period of time . . .”).

proof of residence in Alabama for a continuous period of no less than fifteen years.<sup>42</sup> This requirement, as stated by the Alabama legislature, is directly related to “avoiding an influx of companies engaged in the recreational production of marijuana” because the government has a “substantial interest in protecting its residents from the dangers of recreational marijuana.”<sup>43</sup> Effectively, the residency requirement ensures that out-of-state companies engaged in any sort of cannabis production, let alone recreational production, cannot enter the state and participate in Alabama’s health care market for cannabis. As a result, the requirement clearly implicates the dormant Commerce Clause.

## II. RESIDENCY REQUIREMENTS AND THE DORMANT COMMERCE CLAUSE

### A. *Other States’ Licensing Requirements and Their Reasons*

Other states have utilized licensing requirements like Alabama’s in their medical cannabis programs. For instance, in 2014, Oregon instituted a medical marijuana program that required residency for two years.<sup>44</sup> However, in 2016—only a mere two years later—the Oregon legislature repealed the requirement.<sup>45</sup> Similarly, in 2018, Missouri residents voted “yes” in support of Missouri Amendment 2, the Medical Marijuana and Veteran Healthcare Services Initiative, which legalized cannabis for medical purposes.<sup>46</sup> The Amendment contained a one-year residency requirement for owners of dispensaries.<sup>47</sup> By implementing the residency requirement, Missouri hoped to provide an exclusive opportunity for Missouri businesses. As noted by one dispensary owner, Amendment 2 was “structured [for] Missouri business owners,” and the original residency requirement would mean that a majority of the medical cannabis enterprises would be locally owned.<sup>48</sup> However, in 2021, a federal district court in Missouri issued a permanent injunction against the residency

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42. *Id.* § 20-2A-55(a)(10).

43. *Id.* § 20-2A-2(11).

44. OR. REV. STAT. § 475B.070(2)(b) (2015) (repealed 2016).

45. 2016 Or. Laws ch. 24 p. 1.

46. *Missouri Amendment 2, Medical Marijuana and Veteran Healthcare Services Initiative (2018)*, BALLOTPEDIA, [https://ballotpedia.org/Missouri\\_Amendment\\_2\\_Medical\\_Marijuana\\_and\\_Veteran\\_Healthcare\\_Services\\_Initiative\\_\(2018\)](https://ballotpedia.org/Missouri_Amendment_2_Medical_Marijuana_and_Veteran_Healthcare_Services_Initiative_(2018)) (last visited Jan. 16, 2023); *see also About Us*, MO. DEPT. OF HEALTH & SENIOR SERVS., DIV. OF CANNABIS REGUL., <https://health.mo.gov/safety/cannabis/about-us.php> (last visited Jan. 16, 2023); MO. CONST. art. XIV.

47. *See* Gregory J. Holman, *Federal Judge Removes Missouri’s Residency Requirement for Marijuana Business Owners*, SPRINGFIELD NEWS-LEADER (Oct. 13, 2021, 8:05 AM), <https://www.news-leader.com/story/news/local/missouri/2021/10/11/federal-judge-blocks-residency-requirement-missouri-marijuana-business-owners/6088977001/>.

48. Sydney Moran & Emilee Kuschel, *Missouri Medical Marijuana Residency Requirement Dropped*, OZARKSFIRST.COM (Oct. 15, 2021, 10:50 PM), <https://www.ozarksfirst.com/news/local-news/missouri-medical-marijuana-residency-requirements-dropped/>.

requirement, effectively eliminating any type of residency requirement.<sup>49</sup> In yet another example, Maine, through its medical cannabis program, instituted a general residency requirement that barred any out-of-state entity from participating in Maine's medical cannabis market.<sup>50</sup> Maine's residency requirement was also deemed unconstitutional.<sup>51</sup>

States like Oregon, Missouri, and Maine tend to institute residency requirements for a variety of reasons, but the main reasons tend to fall under one of three umbrellas: propping up in-state businesses so they can receive economic benefits from a government-controlled cannabis industry (such as Missouri's residency requirement, which was driven by wanting to have Missouri businesses control a majority of the medical cannabis market); "detering conversion of cannabis inventory to the black market; and . . . avoiding retaliation by the federal government."<sup>52</sup> Yet, these reasons have their pitfalls. For instance, one reason Oregon might have instituted its residency requirement was to protect residents from large out-of-state interests.<sup>53</sup> However, the same residency requirements that protect smaller entities from large corporations also hurts these smaller entities because they lose out on crucial funding and capital that can come from outside the state.<sup>54</sup> As for the other two reasons, though courts have recognized such interests as valid,<sup>55</sup> courts have also said that these interests can be served by other safeguards found in medical cannabis statutes.<sup>56</sup> In the end, these interests eventually boil down to states wanting to protect their in-state interests by keeping everything within the state. In theory, such a strategy could work, but in practice, states are effectively closing their market off from any out-of-state interests, thus creating a semblance of protectionism that implicates the dormant Commerce Clause.

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49. Mike Fourcher, *In Just Eight Minutes, Missouri Cannabis License Residency Requirements Overturned by Permanent Federal Injunction*, GROWN IN (Oct. 11, 2021), <https://grownin.com/2021/10/11/in-just-eight-minutes-missouri-cannabis-license-residency-requirements-overturned-by-permanent-federal-injunction/>. For an analysis of the dormant Commerce Clause challenge to Missouri's residency requirement, see *infra* notes 106–116.

50. ME. STAT. tit. 22, § 2428(6)(H) (2022) ("All officers or directors of a dispensary must be residents of [Maine]."), *invalidated by* *Ne. Patients Grp. v. United Cannabis Patients & Caregivers of Me.*, 45 F.4th 542, 544 (1st Cir. 2022).

51. See *Ne. Patients Grp.*, 45 F.4th at 544. For more discussion about the case, see *infra* text accompanying notes 132–147.

52. Joseph Cioffi et al., *State Residency Rules Up in Smoke as Cannabis Industry Grows*, REUTERS (Nov. 5, 2021, 9:52 AM), <https://www.reuters.com/legal/litigation/state-residency-rules-up-smoke-cannabis-industry-grows-2021-11-05/>.

53. *Hearing Before the Joint Committee on Marijuana Legalization on H.B. 4014*, 2016 Sess., 78th Legis. Assemb. 2 (Or. 2016) (statement of Jonathan Manton, Or. SunGrown Growers' Guild).

54. ALLIE HOWELL, RESIDENCY REQUIREMENTS FOR MARIJUANA LICENSURE 4 (2019), <https://reason.org/wp-content/uploads/residency-requirements-marijuana-licensure.pdf>.

55. See *infra* text accompanying notes 106–125.

56. See *infra* text accompanying notes 106–125.

### B. *The Dormant Commerce Clause*

The dormant Commerce Clause arises out of the Commerce Clause, which allows Congress to regulate “Commerce . . . among the several States.”<sup>57</sup> The Supreme Court has “sensed a negative implication in the provision” that implicitly restrains a state’s authority.<sup>58</sup> This negative implication of the Commerce Clause gives rise to the dormant Commerce Clause.<sup>59</sup> Some scholars and even Justices have denounced the dormant Commerce Clause’s existence, noting that it “has no basis in the Constitution,”<sup>60</sup> the “application of the negative Commerce Clause turns solely on policy considerations” in some cases,<sup>61</sup> and there is inconsistency in dormant Commerce Clause analysis.<sup>62</sup>

However, even though scholars have noted the inconsistency and incoherence in dormant Commerce Clause jurisprudence,<sup>63</sup> two main themes underlie the dormant Commerce Clause and provide the reasons for its necessity. The first is avoiding economic protectionism. As noted by the Court in *Camps Newfoundland/Owatonna, Inc. v. Town of Harrison*, when the United States was an independent confederation, a state was “free to adopt measures fostering its own local interests without regard to possible prejudice to nonresidents.”<sup>64</sup> This led not only to conflicting regulations but also to disharmony among the states,<sup>65</sup> particularly when states would protect their own economic interests at the expense of other states. Therefore, the dormant Commerce Clause steps in to ensure that states do not “plac[e] burdens on the flow of commerce across [their] borders that commerce wholly within those borders would not bear.”<sup>66</sup> The other reason, which is similar to protecting against economic protectionism, is to preserve national unity. The idea behind prohibiting states from burdening interstate commerce with protectionist rules

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57. U.S. CONST. art. I, § 8, cl. 3.

58. *Dep’t of Revenue v. Davis*, 553 U.S. 328, 337 (2008).

59. *Id.*

60. Martin H. Redish & Shane V. Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 DUKE L.J. 569, 574; *see also id.* at 571 (“[T]he simple fact is that there is no dormant commerce clause to be found within the text or textual structure of the Constitution.”).

61. *United Haulers Ass’n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 349 (2007) (Thomas, J., concurring) (“[A]pplication of the negative Commerce Clause turns solely on policy considerations, not on the Constitution. Because this Court has no policy role in regulating interstate commerce, I would discard the Court’s negative Commerce Clause jurisprudence.”).

62. *Am. Trucking Ass’ns v. Mich. Pub. Serv. Comm’n*, 545 U.S. 429, 439 (2005) (Scalia, J., concurring) (agreeing with the majority that Michigan’s flat fee on trucks that engage in purely intrastate commerce does not violate the negative Commerce Clause and “reach[ing] that determination without adverting to various tests from our wardrobe of ever-changing negative Commerce Clause fashions”).

63. *See* Brannon P. Denning, *Reconstructing the Dormant Commerce Clause Doctrine*, 50 WM. & MARY L. REV. 417, 427 (2008).

64. *Camps Newfoundland/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 571 (1997).

65. *Id.* (quoting *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 224 (1824) (Johnson, J., concurring)).

66. *Am. Trucking Ass’ns*, 545 U.S. at 433 (quoting *Okla. Tax Comm’n v. Johnson Lines, Inc.*, 514 U.S. 175, 180 (1995)).



is that the Constitution “was framed upon the theory that the peoples of the several states must sink or swim together.”<sup>67</sup> Thus, states could not “jeopardiz[e] the welfare of the Nation as a whole” by implementing rules that burden the national market for goods and services.<sup>68</sup> Essentially, the dormant Commerce Clause restricts state protectionism and helps foster a free-trade scheme that the Framers envisioned when drafting the Constitution.<sup>69</sup>

The Court’s framework first looks at whether the law or regulation in question facially discriminates against interstate commerce.<sup>70</sup> If so, the law is per se invalid unless the state shows that the law or regulation “advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.”<sup>71</sup>

For instance, in *West Lynn Creamery, Inc. v. Healy*,<sup>72</sup> the Supreme Court found that a Massachusetts regulation requiring all milk dealers in Massachusetts to pay a premium payment into a fund that would be disbursed only to in-state milk producers violated the dormant Commerce Clause.<sup>73</sup> The Court found that the premium payment’s purpose and effect were to “enable higher cost Massachusetts dairy farmers to compete with lower cost dairy farmers in other [s]tates,” as that would make milk produced outside of Massachusetts more expensive.<sup>74</sup> Essentially, the premium payment would benefit the in-state interests—specifically, the interests of in-state milk producers—at the expense of out-of-state milk producers. Massachusetts argued, among other things, that the “incidental burden” that the premium payment had on the market was “outweighed by the ‘local benefits’ of preserving the Massachusetts dairy industry” from collapse.<sup>75</sup> But, the Supreme Court rejected this argument, noting that “[p]reservation of local industry by protecting it from the rigors of interstate competition is the hallmark of the economic protectionism that the Commerce Clause prohibits.”<sup>76</sup> Since the law facially discriminated against out-of-state interests and there were other means to advance Massachusetts’s purpose,<sup>77</sup> the Supreme Court struck down the requirement.

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67. *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 523 (1935).

68. *Am. Trucking Ass’n*, 545 U.S. at 433 (quoting *Johnson Lines, Inc.*, 514 U.S. at 180).

69. *See generally* *Tenn. Wine & Spirits Retailers Ass’n v. Thomas*, 139 S. Ct. 2449, 2460 (2019) (“And without the dormant Commerce Clause, we would be left with a constitutional scheme that those who framed and ratified the Constitution would surely find surprising.”).

70. *Dep’t of Revenue v. Davis*, 553 U.S. 328, 338 (2008).

71. *Id.* (quoting *Or. Waste Sys., Inc. v. Dep’t of Env’t Quality*, 511 U.S. 93, 101 (1994)). However, if the law is not facially discriminatory, the law stands so long as it does not impose burdens on interstate trade that are clearly excessive in relation to local putative benefits. *See id.* at 338–39.

72. *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186 (1994).

73. *Id.* at 188.

74. *Id.* at 194.

75. *Id.* at 204–05 (quoting Brief for Respondent at 42, *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186 (1994) (No. 93-141)).

76. *Id.* at 205.

77. *See id.* at 210–12 (Scalia, J., concurring).

In virtually all cases but one involving facial discrimination, the Supreme Court has “reflexively” invalidated the law.<sup>78</sup> The one case, *Maine v. Taylor*,<sup>79</sup> involved Maine’s import ban on live baitfish.<sup>80</sup> The Supreme Court found that even though the law facially discriminated against out-of-state baitfish,<sup>81</sup> Maine had a legitimate interest in protecting its unique and fragile fisheries that could not be served by available nondiscriminatory means.<sup>82</sup> Imported live baitfish posed two significant threats to Maine’s fisheries. First, Maine’s population of wild fish would be placed at risk by parasites prevalent in out-of-state baitfish that was not common in Maine wild fish.<sup>83</sup> Second, the nonnative species could disturb Maine’s aquatic ecology by competing with native fish for food or habitat.<sup>84</sup> Maine’s interest in protecting its fisheries through a discriminatory method also withstood scrutiny for two other reasons. First, the Court found no clear error with the district court’s findings that there was no other nondiscriminatory way to protect its fisheries since there were no satisfactory ways to test the out-of-state baitfish for parasites or commingled species.<sup>85</sup> Second, the Court found no protectionist intent on behalf of Maine, as the reasons Maine put forth were not “merely a sham” or a “*post hoc* rationalization.”<sup>86</sup> The Court’s ruling in *Maine v. Taylor* shows the stringency that facially discriminatory laws face. The Court found not just a lack of protectionist intent but also enough evidence in the record to indicate that no other alternative existed besides discriminating against out-of-state baitfish,<sup>87</sup> thus clearly portraying the stringent barrier states must overcome to keep their facially discriminatory laws.

### C. Current Residency Requirement Precedent

Only a handful of federal courts around the country have heard challenges to medical cannabis residency requirements, but the rulings from the district courts tend to either skirt the dormant Commerce Clause issue or directly decide the dormant Commerce Clause issue. For example, in *Original Investments, LLC v. Oklahoma*,<sup>88</sup> the United States District Court for the Western District of Oklahoma heard a challenge to the residency requirement in the Oklahoma

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78. Ronald J. Krotoszynski, Jr., *On the Importance of Being Earnest: Contrasting the Dangers of Makeweights with the Virtues of Judicial Candor in Constitutional Adjudication*, 74 ALA. L. REV. 243, 289 (2022).

79. *Maine v. Taylor*, 477 U.S. 131 (1986).

80. *Id.* at 132–33.

81. *Id.* at 138.

82. *Id.* at 148.

83. *Id.* at 141.

84. *Id.*

85. *Id.* at 146.

86. *Id.* at 148–50.

87. *Id.* at 151.

88. *Original Invs., LLC v. Oklahoma*, 542 F. Supp. 3d 1230 (W.D. Okla. 2021).

Medical Marijuana and Patient Protection Act, which prohibited non-residents from receiving a marijuana business license and from owning more than twenty-five percent of any entity that had a medical marijuana license.<sup>89</sup> Rather than resolving the issue on the constitutional ground, the district court instead granted the defendant's motion to dismiss on illegality grounds.<sup>90</sup> Since the Controlled Substances Act prohibits the production or distribution of marijuana,<sup>91</sup> the district court—based on the general principle that a “court [should not] use its equitable power to facilitate illegal conduct”<sup>92</sup>—held that it would not use its equitable power to facilitate conduct that is illegal under federal law.<sup>93</sup> Essentially, the plaintiff sought relief to engage in activities—i.e., enter the medical cannabis market—that Congress expressly declared illegal; if the court granted the equitable relief, its ruling would facilitate criminal activity.<sup>94</sup> The district court also rejected the plaintiff's contention that the state was engaging in its own wrongdoing by discriminating against non-residents in violation of the dormant Commerce Clause.<sup>95</sup> The court stated that the defendant's illegality defense was based on the plaintiff's pursuit of a decree to gain a medical marijuana business license,<sup>96</sup> and denying the plaintiff equitable relief would not result in Oklahoma profiting on its alleged wrongdoing.<sup>97</sup> Thus, the district court would not allow the plaintiff to engage in the medical cannabis market.<sup>98</sup>

The Western District of Oklahoma is not the only district court to take this route, as the United States District Court for the Eastern District of California utilized similar reasoning to abstain from exercising jurisdiction over the issue. In *Peridot Tree, Inc. v. City of Sacramento*,<sup>99</sup> the district court resolved the issue of whether Sacramento's general residency requirement to gain a storefront cannabis dispensary permit violated the dormant Commerce Clause by simply “postpon[ing] its exercise of . . . jurisdiction.”<sup>100</sup> The court abstained from exercising jurisdiction after finding that the Controlled Substances Act was

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89. *Id.* at 1231.

90. *Id.* at 1233.

91. See Controlled Substances Act, 21 U.S.C. § 841(a)(1) (“[I]t shall be unlawful for any person . . . to manufacture [or] distribute . . . a controlled substance . . . .”); *id.* § 802(6) (defining “controlled substance” to mean a drug included in Schedule I of the Controlled Substances Act); 21 C.F.R. § 1308.11(d)(23) (1973) (including “marihuana” on Schedule I of the Controlled Substances Act).

92. *Original Inns.*, 542 F. Supp. 3d at 1233 (quoting *Fourth Corner Credit Union v. Fed. Rsv. Bank of Kan. City*, 861 F.3d 1052, 1054 (10th Cir. 2017)).

93. *Id.*

94. *Id.* at 1235.

95. *Id.* at 1233–35.

96. *Id.* at 1234.

97. *Id.*

98. *Id.* at 1237.

99. *Peridot Tree, Inc. v. City of Sacramento*, No. 22-cv-00289, 2022 WL 10629241 (E.D. Cal. Oct. 18, 2022).

100. *Id.* at \*1.

Congress “effectively [saying] there should be no interstate commerce in marijuana.”<sup>101</sup> Therefore, the court hesitated in granting relief and instead found that state courts were better positioned to resolve the issue since the dispute revolved around California’s efforts into marijuana regulation.<sup>102</sup>

In both *Original Investments* and *Peridot*, the district courts refused to resolve the issue of whether the residency requirements violated the dormant Commerce Clause because of the dynamic between state marijuana regulations and the federal government’s prohibition. Clearly, both courts felt it was better to not touch the issue than to try resolving the issue and run into potential policy issues that would inevitably arise from analyzing the requirement’s implications with the dormant Commerce Clause.<sup>103</sup> However, both opinions do provide some insight into how strong the constitutional argument is against residency requirements. The *Peridot* court noted that the plaintiffs’ claim “rest[ed] on a shaky constitutional foundation”<sup>104</sup> while the *Original Investments* court noted that the plaintiff’s claim was not frivolous, citing another district court case heard by the same judge that found the provisions of an Oklahoma law that allowed in-state wineries but not out-of-state wineries to ship wine directly to retailers and restaurants in Oklahoma unconstitutional under the dormant Commerce Clause.<sup>105</sup> Nevertheless, both courts’ key distinctions were that marijuana was federally illegal, which raises the question of how courts that tackle the dormant Commerce Clause issue answer that question.

The Western District of Missouri directly analyzed the dormant Commerce Clause issue prevalent in residency requirements in *Toigo v. Department of Health and Senior Services*.<sup>106</sup> In *Toigo*, the court heard a challenge to Missouri’s one-year residency requirement for businesses who wanted a license to operate a medical marijuana facility.<sup>107</sup> Relying on *Tennessee Wine and Spirits Retailers Ass’n v. Thomas*,<sup>108</sup> the district court held that there were other non-discriminatory methods to achieve Missouri’s chief interest in implementing the residency

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101. *Id.* at \*7.

102. *Id.* at \*11. *Peridot Tree* is not officially resolved yet, as the plaintiffs appealed the district court’s abstention from the case to the United States Court of Appeals for the Ninth Circuit. Notice of Appeal from a Judgment or Order of a United States District Court, *Peridot Tree, Inc. v. City of Sacramento*, No 22-cv-00289 (E.D. Cal. Nov. 15, 2022), ECF No. 37.

103. Since the time of writing, another district court has chosen the same route as the *Original Investments* and *Peridot Tree* courts. See *Brinkmeyer v. Wash. State Liquor & Cannabis Bd.*, No. C20-5661, 2023 WL 1798173, at \*13 (W.D. Wash. Feb. 7, 2023) (finding that the six-month residency requirement in Washington’s cannabis licensing scheme does not violate the dormant Commerce Clause since “[t]he dormant Commerce Clause does not apply to federally illegal markets such as [Washington’s] and Congress has clearly stated its intent for no interstate cannabis market to exist” (footnote omitted)).

104. *Peridot Tree, Inc.*, 2022 WL 10629241 at \*7.

105. *Original Invs., LLC v. Oklahoma*, 542 F. Supp. 3d 1230, 1237 (W.D. Okla. 2021) (citing *Action Wholesale Liquors v. Okla. Alcoholic Beverages L. Enf’t Comm’n*, 463 F. Supp. 2d 1294 (W.D. Okla. 2006)).

106. *Toigo v. Dep’t of Health & Senior Servs.*, 549 F. Supp. 3d 985 (W.D. Mo. 2021).

107. *Id.* at 988.

108. *Tenn. Wine & Spirits Retailers Ass’n v. Thomas*, 139 S. Ct. 2449 (2019); see also *infra* notes 117–125.

requirement.<sup>109</sup> Missouri had an interest in protecting against the diversion of marijuana to other states and preventing medical marijuana from being used recreationally.<sup>110</sup> More specifically, the residency requirement would make background checks on Missouri residents easier and would be less costly than background checks on out-of-state residents.<sup>111</sup> While the court found the interest to be valid, Missouri's means to implement its interest were not.<sup>112</sup> The court did not believe that a one-year residency requirement "would actually ease DHSS's burden" as "[a]n applicant could rack up an extensive criminal history and record of financial misdeeds in Kansas, move to Missouri, and one year and one day later apply for a license to operate a medical marijuana facility."<sup>113</sup> Additionally, the court found other non-discriminatory means, some that were already in Missouri's medical cannabis scheme, that would serve Missouri's interest, such as tracking marijuana from seed to sale, requiring constant video surveillance of all medical marijuana facilities, allowing the government broad access to business records, and conducting criminal background checks of all facility owners and employees in the industry.<sup>114</sup> Finally, the court found that the residency requirement did nothing to actually prevent an illegal diversion into other states.<sup>115</sup> Therefore, the court granted the preliminary injunction.<sup>116</sup>

The Supreme Court has also provided precedent, albeit in the alcohol context, for the vitality of residency requirements in light of the dormant Commerce Clause. In *Tennessee Wine and Spirits Retailers Ass'n v. Thomas*,<sup>117</sup> the Court heard a challenge to Tennessee's two-year residency requirement for an applicant to gain a liquor license.<sup>118</sup> In its analysis, the Court found that the facially discriminatory residency requirement violated the dormant Commerce Clause.<sup>119</sup> The Court noted that Tennessee's interest in regulating alcohol in accordance with the public health and safety of its residents, as long as it was not based on mere speculation or unsupported assertions, was a valid interest.<sup>120</sup>

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109. *Toigo*, 549 F. Supp. 3d. at 992–93.

110. *Id.* at 993.

111. *Id.* at 991–92.

112. *Id.* at 992.

113. *Id.* at 992–93.

114. *Id.* at 993.

115. *Id.* ("[I]t is far from clear how a durational residency requirement actually hinders the diversion of medical marijuana away from its intended purpose.")

116. *Id.* at 996. The district court eventually granted a permanent injunction against the residency requirement in an infamous hearing. Fourcher, *supra* note 49.

117. *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449 (2019).

118. *Id.* at 2457. Tennessee's licensing scheme had other residency requirements, such as a ten-year residency requirement to renew a license. *Id.* However, the Court only analyzed the two-year residency requirement to gain a license after the United States Court of Appeals for the Sixth Circuit struck down the ten-year requirement as a "blatant violation[] of the Commerce Clause." *Id.*

119. *Id.*

120. *Id.* at 2474. The Court came to this conclusion in light of Tennessee's authority under section 2 of the Twenty-First Amendment to address alcohol-related public health and safety issues. *Id.* Hence, the

However, the residency requirement had a highly attenuated relationship to Tennessee's interest.<sup>121</sup> For starters, the requirement did not give Tennessee "a better opportunity to determine an applicant's fitness to sell alcohol and guard[] against 'undesirable nonresidents' moving into the State" since Tennessee could thoroughly investigate applicants without requiring them to live in the state for two years.<sup>122</sup> Moreover, there were other methods to maintain oversight and promote the state's interests, such as through on-site inspections, audits, and criminal background checks.<sup>123</sup> In fact, there were more effective methods that Tennessee did not utilize; as the Court noted, the application required residency to gain a license but did not require that the applicant be educated about liquor sales.<sup>124</sup> In conclusion, even though Tennessee had legitimate interests, the State could not make the necessary showing that the requirement did not burden interstate commerce.<sup>125</sup>

*Toigo* and *Tennessee Wine and Spirits* provide an example of how courts that have directly tackled the dormant Commerce Clause issue have analyzed the residency requirement's constitutionality. A key difference between the *Toigo* court and the *Original Investments* and *Peridot* courts, besides the approach the courts took, is the emphasis on the federal prohibition of marijuana. The *Toigo* court rationalized the illegality of marijuana with the Commerce Clause by noting that "[c]ourts have applied the dormant [C]ommerce [C]lause to marijuana facilities."<sup>126</sup> To support this proposition, the district court cited *NPG, LLC v. City of Portland*,<sup>127</sup> in which the United States District Court for the District of Maine used an analysis similar to the *Toigo* court to strike down Portland's residency requirement in its medical cannabis program,<sup>128</sup> and *South-Central Timber Development, Inc. v. Wunnicke*,<sup>129</sup> which, contrary to the *Toigo* court's belief, did not hold that the Controlled Substances Act does not grant states the power to burden interstate commerce in substances regulated by the Act.<sup>130</sup> Even though there is no express permission to the states from Congress to

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Court analyzed whether Tennessee's interest in public health and safety justified the two-year residency requirement. *Id.*

121. *Id.*

122. *Id.* at 2475.

123. *Id.*

124. *Id.*

125. *Id.* at 2476.

126. *Toigo v. Dep't of Health & Senior Servs.*, 549 F. Supp. 3d 985, 990 (W.D. Mo. 2021).

127. *NPG, LLC v. City of Portland*, No. 20-cv-00208, 2020 WL 4741913 (D. Me. Aug. 14, 2020).

128. *Toigo*, 549 F. Supp. 3d at 990 (citing *NPG*, 2020 WL 4741913, at \*8–11).

129. *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82 (1984).

130. *Toigo*, 549 F. Supp. 3d at 990 (citing *South-Central Timber*, 467 U.S. at 87–88). *South-Central Timber* actually held, among other holdings, that Congress did not provide an affirmative expression of federal approval to states restricting the exportation of timber from state land in a manner similar to the federal government's policy concerning timber on federal land to states concerning primary-manufacture requirements on timber taken from federal land. *South-Central Timber*, 467 U.S. at 90–92.

regulate commerce in cannabis through the Controlled Substances Act,<sup>131</sup> the differences between the district courts' approaches highlight a key question of how much the Controlled Substances Act's prohibition of marijuana use and distribution matters to wholly intrastate systems that were in place in states like Oklahoma and Missouri and are in place in Alabama.

Only one circuit court has attempted to resolve this key issue while directly analyzing whether a medical cannabis residency requirement violated the dormant Commerce Clause. In *Northeast Patients Group v. United Cannabis Patients and Caregivers of Maine*,<sup>132</sup> the United States Court of Appeals for the First Circuit dealt with Maine's medical cannabis program, which contained a general requirement that the officers and directors of all sellers of medical cannabis in Maine be residents.<sup>133</sup> Interestingly, the defendants did not dispute the lower court's finding that the residency requirement violated the dormant Commerce Clause.<sup>134</sup> However, even though the main question in front of the court was whether the residency requirement violated the dormant Commerce Clause,<sup>135</sup> the First Circuit spent a majority of its opinion addressing and rejecting the defendant's argument in favor of the residency requirement.<sup>136</sup> The defendants first argued that the residency requirement does not implicate the dormant Commerce Clause since there is no interstate market in illegal federal contraband.<sup>137</sup> In response, the First Circuit cited *Gonzales v. Raich*<sup>138</sup> to state there is an interstate market since Congress had the power to enact the Controlled Substances Act through the Commerce Clause.<sup>139</sup> Moreover, the First Circuit noted that notwithstanding *Gonzales v. Raich*, Maine's medical cannabis market would attract out-of-state participants, as its scheme allowed out-of-state visitors to use medical cannabis, even if out-of-state sellers could not enter the market.<sup>140</sup> Second, the First Circuit rejected the argument that the dormant Commerce Clause is a nullity since Congress chose to regulate marijuana through the Commerce Clause.<sup>141</sup> According to the First Circuit, this argument was wrong since Congress did not preempt a state's regulation of marijuana.<sup>142</sup> Instead, the dormant Commerce Clause can still bar a state's regulation in an area that Congress has chosen to exercise power in.<sup>143</sup> Third,

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131. Robert A. Mikos, *Interstate Commerce in Cannabis*, 101 B.U. L. REV. 857, 875, 876–82 (2021).

132. *Ne. Patients Grp. v. United Cannabis Patients & Caregivers of Me.*, 45 F.4th 542 (1st Cir. 2022).

133. *Id.* at 544.

134. *Id.* at 546.

135. *Id.* at 544.

136. *Id.* at 547–58.

137. *Id.* at 547.

138. *Gonzales v. Raich*, 545 U.S. 1 (2005).

139. *Ne. Patients Grp.*, 45 F.4th at 547–48 (citing *Gonzales*, 545 U.S. at 5).

140. *Id.* at 547.

141. *Id.* at 548.

142. *Id.* at 549–50.

143. *Id.* at 549.

the First Circuit found that nothing in the Controlled Substances Act expressly blessed states to engage in interstate discrimination in the market for medical cannabis.<sup>144</sup> Finally, the First Circuit addressed the *Original Investments* approach to refuse providing equitable relief to seemingly facilitate illegal conduct.<sup>145</sup> In an apparent rejection of the *Original Investments* reasoning, the First Circuit found that it would still have jurisdiction to provide a remedy since it was equally inequitable not to remedy the resulting dormant Commerce Clause violation.<sup>146</sup>

The dissent in *Northeast Patients Group* both highlighted the federal illegality of marijuana and sided with the rationale of the *Original Investments* and *Peridot* courts by noting that Congress, through the Controlled Substances Act, made the interstate market for marijuana illegal.<sup>147</sup> However, the First Circuit's approach to implicate the dormant Commerce Clause makes more sense than the *Original Investment* court's approach. For starters, the fact that Congress enacted a federal law that prohibits the distribution of marijuana shows that there *is* an interstate market in marijuana since Congress cannot prohibit something that is not in existence. Secondly, Congress has not expressly allowed states to regulate in a manner which would otherwise not be permissible, as shown by the federal government's "mixed messages" about its marijuana enforcement policies.<sup>148</sup> Therefore, even though there is a legitimate question about the impact that the federal law has on a state's residency requirement in its medical cannabis program, states likely must still adhere to the dormant Commerce Clause. Thus, the analysis from *Northeast Patients Group*, *Tennessee Wine and Spirits*, *Toigo*, and general dormant Commerce Clause jurisprudence will likely play a crucial role in determining whether Alabama's residency requirements in its medical cannabis program can survive.

### III. ALABAMA'S RESIDENCY REQUIREMENT LIKELY VIOLATES THE DORMANT COMMERCE CLAUSE

As noted above, any applicant applying for a license to participate in Alabama's medical cannabis program must provide "[r]ecords indicating that a majority of ownership is attributable to an individual or individuals with proof of residence in [Alabama] for a continuous period of no less than fifteen years preceding the application date."<sup>149</sup> To start, the residency requirement is facially discriminatory, as it distinguishes between in-state residents and out-of-state residents in a manner similar to residency requirements in Missouri, Oklahoma,

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144. *Id.* at 551.

145. *Id.* at 557–58.

146. *Id.*

147. *Id.* at 558–59 (Gelpí, J., dissenting).

148. *See, e.g.,* *Feinberg v. Comm'r*, 808 F.3d 813, 814 (10th Cir. 2015) (“This case owes its genesis to the mixed messages the federal government is sending these days about the distribution of marijuana.”).

149. ALA. CODE § 20-2A-55(a)(10) (1975).



and Tennessee. In fact, Alabama's residency requirement might be even more of a "blatant violation[]" of the dormant Commerce Clause than the ten-year residency requirement in Tennessee's licensing scheme since Alabama requires fifteen years of residency.<sup>150</sup>

Assuming there is no blatant violation of the dormant Commerce Clause and going along with the Court's analysis of facially discriminatory regulations, the next question is whether Alabama can show that there are no other means to advance its legitimate local interest. Alabama's local interest here is seen in the Compassion Act's legislative findings, as the legislature instituted the residency requirement to "avoid[] an influx of companies engaged in the recreational production of marijuana" since "the state has a substantial interest in protecting its residents from the dangers of recreational marijuana."<sup>151</sup> Alabama's interest is likely valid. One could make the argument that avoiding the influx of companies engaged in recreational production of marijuana is protectionist, as the legislature essentially closes its borders to out-of-state companies. But, this argument is weakened by the fact that the borders are closed to out-of-state companies who produce cannabis for recreational use. Additionally, Alabama likely did not create this interest based on mere speculation or unsupported assertions. The legislative findings clearly indicate that the legislature discovered "a pattern in states that have legalized the use of medical cannabis . . . ; frequently, in the years following authorization of medical use, recreational marijuana is subsequently authorized."<sup>152</sup> Simply based on these two findings, Alabama's interest is valid. It is functionally similar to Maine's interest in *Maine v. Taylor* as it is supported by factfinding like Maine's interest. Additionally, Alabama's protection of its residents from the dangers of recreational cannabis is as valid as Missouri's interest in preventing recreational use of marijuana.

Even though Alabama's interest is likely valid, its means to achieve this interest is likely not narrowly tailored. Essentially, there are other methods, many of which are contained in the Compassion Act, that might serve Alabama's interest better. For example, Alabama requires that the medical cannabis be tracked from seed to sale,<sup>153</sup> which the *Toigo* court mentioned as a much more effective alternative than requiring residency.<sup>154</sup> Additionally, Alabama requires constant video surveillance be in place in all cultivator and dispensary facilities,<sup>155</sup> requires all officers and employees of any licensed entity to submit to national and state background checks,<sup>156</sup> and gives the Commission

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150. *See* *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449, 2457 (2019).

151. § 20-2A-2(11).

152. *Id.* § 20-2A-2(14).

153. *See id.* § 20-2A-54.

154. *See Toigo v. Dep't of Health & Senior Servs.*, 549 F. Supp. 3d 985, 993 (W.D. Mo. 2021).

155. *See* § 20-2A-62(d)(2), -64(d)(2).

156. *See id.* § 20-2A-59(a).

“all powers necessary and proper” to investigate any person associated with any licensed entity and inspect and examine the premises and relevant records of the licensed entity.<sup>157</sup> Each of these alternatives is mentioned in *Toigo* and even *Tennessee Wine and Spirits* as a method that helps keep “undesirable nonresidents”<sup>158</sup> like companies that engage in the recreational production of cannabis out of the state. Furthermore, the Compassion Act contains additional safeguards that are not mentioned by other courts but are just as effective. For starters, the definition of medical cannabis is tremendously limited and expressly excludes common methods of ingesting cannabis.<sup>159</sup> Alabama caps the number of licenses it gives out for each type of participant in the Alabama medical cannabis market.<sup>160</sup> Alabama’s law requires the creation of the Alabama Medical Cannabis Patient Registry System that, *at a minimum*, would register essentially all the information related to the qualified patient and registered physician.<sup>161</sup> Alabama also makes distribution, possession, manufacturing, or use of medical cannabis that has been diverted from a registered qualified patient a Class B Felony,<sup>162</sup> thus equating the diversion of medical cannabis for any purpose to other crimes such as manslaughter, second-degree rape, and second-degree domestic violence.<sup>163</sup> Finally, like the Court in *Tennessee Wine and Spirits* and the *Toigo* court both noted, Alabama’s residency requirement does nothing to prevent the distribution of recreational marijuana by those already inside Alabama. Thus, the alternative means present in the statute, combined with the residency requirement’s lack of effectiveness, indicates that even if Alabama’s requirement does not seem protectionist, there are much more effective means to achieving its interest besides facially discriminating against out-of-state entities.

Alabama would likely argue that there is no interstate commerce in illegal contraband, thus alluding to the argument that persuaded the *Original Investments* and *Peridot* courts. Moreover, Alabama would likely point to its “wholly intrastate system . . . of medical cannabis” to show that the dormant Commerce

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157. *Id.* § 20-2A-52(a).

158. *See* Tenn. Wine & Spirits Retailers Ass’n v. Thomas, 139 S. Ct. 2449, 2475 (2019).

159. *See* § 20-2A-3(14).

160. *See id.* § 20-2A-62(b) (“[T]he commission shall issue no more than 12 cultivator licenses.”); *id.* § 20-2A-63(b) (“The commission shall issue no more than four processor licenses.”); *id.* § 20-2A-64(b) (“The commission shall issue no more than four dispensary licenses.”); *id.* § 20-2A-67(b) (“The commission may issue no more than five integrated facility licenses.”). *See generally* Gregory S. Toma, *License to Sell: The Constitutionality of Durational Residency Requirements for Retail Marijuana Licenses*, 47 *FORDHAM URB. L.J.* 1439, 1473 (2020) (providing a short discussion on states and localities being able to cap the number of retail marijuana licenses in a manner similar to states capping the number of retail liquor licenses).

161. *See* § 20-2A-35.

162. *Id.* § 20-2A-8(a)(2).

163. *See id.* § 13A-6-3(b) (classifying manslaughter as a Class B Felony); *id.* § 13A-6-62(b) (classifying rape in the second degree as a Class B Felony); *id.* § 13A-6-131(b) (classifying domestic violence in the second degree as a Class B felony). The sentence for a Class B felony can be between two and twenty years. *Id.* § 13A-5-6(a)(2).

Clause is not implicated.<sup>164</sup> However, as the First Circuit pointed out in *Northeast Patients Group*, the fact that Congress exercised its powers under the Commerce Clause to regulate cannabis shows that there was some interstate cannabis market to regulate, even if the activities occur fully within one state. Moreover, Congress has not provided any sort of congressional assent to allow states to regulate however they wish in this area.<sup>165</sup> Finally, like the First Circuit noted, it is not equitable to leave a potential dormant Commerce Clause violation unremedied if such a violation occurred. Therefore, Alabama's residency requirement likely violates the dormant Commerce Clause.

#### IV. ALTERNATIVES THAT SERVE ALABAMA'S INTERESTS

Even if Alabama's residency requirement ends up not passing constitutional muster, Alabama still has a legitimate state interest in preventing the recreational use of marijuana within its borders. Besides the safeguards already in place within the Compassion Act, there are other methods better than a residency requirement<sup>166</sup> that Alabama could implement that might work just as well or even better. In fact, Alabama legislators would not have to look further than its current alcohol regulations.<sup>167</sup> For instance, one scholar has suggested imposing civil liability through dram shop laws that would allow the state to reach across state borders to force cannabis dispensaries to pay for harms created within the state.<sup>168</sup> To work in Alabama, the "gram shop" laws would work by imposing liability on both in-state and out-of-state entities that sell to individuals that cause personal harm to someone within the state, and the heightened liability exposure from a third party would deter all entities from engaging in any sort of recreational cannabis sale or distribution.<sup>169</sup> In the end, though, as more courts grapple with this issue, it is clear that residency requirements likely would not pass constitutional scrutiny under the dormant Commerce Clause.

#### CONCLUSION

Based on general dormant Commerce Clause principles as well as persuasive authority from federal courts around the country, Alabama's residency requirement in the Compassion Act likely violates the dormant

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164. *Id.* § 20-2A-2(10).

165. *See* *Ne. Patients Grp. v. United Cannabis Patients & Caregivers of Me.*, 45 F.4th 542, 549–551 (1st Cir. 2022).

166. Evidence shows that residency requirements do little to protect against the introduction of recreational marijuana. *See* Toma, *supra* note 160, at 1465.

167. *See* Jessica Berch, *Reefer Madness: How Non-Legalizing States Can Revamp Dram Shop Laws to Protect Themselves from Marijuana Spillover from Their Legalizing Neighbors*, 58 B.C. L. REV. 863, 880 (2017).

168. *See id.* at 880–85.

169. *See id.* at 880, 885.

Commerce Clause. Yet, all might not be lost. As counties around Alabama begin authorizing medical cannabis dispensaries within the Act's limits and the Alabama Medical Cannabis Commission continues reviewing applications for licenses, much can be done to alleviate the pain that future medical cannabis users currently deal with while also preventing a wildfire spread of recreational cannabis across the state. By placing more resources into these alternative measures that are narrowly tailored to meet the legitimate state interest, Alabama can ensure that those who require medical marijuana to alleviate their critical health concerns can do so while protecting against the dangers of recreational marijuana.

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