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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PORTLAND DIVISION

JEFFERSON PACKING HOUSE, LLC,

Plaintiff,

v.

TINA KOTEK, in her official capacity as Governor of the State of Oregon, ELLEN ROSENBLUM, in her official capacity as Attorney General of the State of Oregon, and STEVE MARKS, in his official Capacity as Executive Director of the Oregon Liquor and Cannabis Commission,

Defendants.

Case No. 3:22-cv-01776-AR

DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S COMPLAINT

Fed. R. Civ. P. 12(b)(1), (6)

CERTIFICATE OF CONFERRAL

Pursuant to L.R. 7-1(a)(1)(A), defense counsel certifies that the parties made a good faith effort to resolve the dispute in this motion by telephone but were unable to do so.

MOTION

Plaintiff Jefferson Packing House, LLC, is an Oregon recreational marijuana wholesaler challenging Oregon statutes that prohibit the exportation of marijuana and marijuana products.

Plaintiff alleges that ORS 475C.001(2)(c) and ORS 475C.229 (which Plaintiff refers to as Oregon's "export ban") violate the dormant Commerce Clause. (Compl., Dkt. #1, ¶ 8). Plaintiff seeks declaratory and injunctive relief under 42 U.S.C. § 1983 and 28 U.S.C. § 2201, in the form of a declaration that Oregon's export ban is unconstitutional and an injunction forbidding the State from enforcing it. (*Id.* at p. 8). Put differently, Plaintiff asks the Court to exercise its equitable powers to abolish Oregon's export ban and open the State's borders to the exportation of marijuana and marijuana products, to give Plaintiff "the opportunity to market and sell [its] products in other states." (*Id.* at ¶ 7).

If this case involved state regulations relating to marionberries, there would be little debate as to whether the dormant Commerce Clause applies. Marionberries are part of a national market, where state regulations might unduly burden or discriminate against otherwise lawful interstate commerce. But this case is not about the commerce of marionberries. It is about the commerce of marijuana, a substance that Congress exercised its affirmative Commerce Clause power to eliminate from any form of lawful interstate commerce. 21 U.S.C. § 801 et seq.; *see* 21 U.S.C. §§ 812(c)(10) (listing marijuana as Schedule 1 controlled substance), 841(a)(1) (criminalizing the possession, use and distribution of marijuana).

Against this backdrop, Defendants move to dismiss this case for two reasons. First, Defendants move to dismiss this case under Federal Rule of Civil Procedure 12(b)(1) because Plaintiff lacks standing under Article III. Plaintiff lacks standing because federal law, like Oregon law, prohibits the exportation of marijuana and marijuana products. As such, Plaintiff's alleged injuries are not likely to be redressed by the relief that it is seeking. Second, Defendants move to dismiss this case under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim, because the dormant Commerce Clause does not apply. That doctrine prohibits states from treating interstate and intrastate commerce differentially. Here, however, there is no interstate commerce to treat differentially. Indeed, Congress exercised its Commerce Clause powers to *forbid* interstate commerce of marijuana.

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This motion is based on the following memorandum of law and the pleadings on file.

MEMORANDUM OF LAW

I. Statement of Facts.

A. Plaintiff's claims.

Plaintiff Jefferson Packing House, LLC, "is an Oregon limited liability company, located in Jackson County, Oregon, that holds a recreational marijuana wholesaler license under Oregon law." (Compl., Dkt. #1, ¶ 9). Plaintiff alleges that it "would export marijuana and marijuana products to other states with legal marijuana programs if Oregon's export ban did not prohibit it from doing so." (*Id.* at ¶ 10). Plaintiff alleges that Oregon's export ban "significantly limit[s Plaintiff's] available customer base and drastically increase[es] its costs by preventing it from taking advantage of economies of scale." (*Id.* at ¶ 11). Plaintiff alleges that Oregon's export ban "significantly limit[s] the universe of potential customers it can reach" and prevents it from "increas[ing] its ability to profit." (*Id.* at ¶ 28).

Plaintiff brings its claims in this case under the United States Constitution's dormant Commerce Clause, 42 U.S.C. § 1983, and 28 U.S.C. § 2201. Plaintiff claims that ORS 475C.001(2)(c) and ORS 475C.229 unduly burden and discriminate against interstate commerce. (*Id.* at ¶¶ 8, 16-37).

B. Oregon's export ban.

Federal law prohibits, with criminal penalties, the cultivation, sale, or possession of marijuana that has any connection to interstate commerce. Oregon, like a number of other states, has legalized such conduct for medical and adult (recreational) use wholly within the State. The Adult and Medical Use of Cannabis Act at ORS 475C.005 to 475C.525 was established in part to "establish a comprehensive regulatory framework concerning marijuana under existing state law" and to "permit persons licensed, controlled and regulated by this state to legally manufacture and sell marijuana to persons 21 years of age and older." ORS 475C.001(1)(c)–(d). ORS 475C.229 prohibits the out-of-state exportation of marijuana and marijuana products.

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1. ORS 475C.001(2)(c).

ORS 475C.001(2)(c) provides in relevant part: "The People of the State of Oregon intend that the provisions of ORS 475C.005 to 475C.525, together with other provisions of state law, will . . . Prevent the diversion of marijuana from this state to other states . . . ."

Although Plaintiff alleges that ORS 475C.001(2)(c) is part of Oregon's export ban (Compl., Dkt. #1, ¶ 16), ORS 475C.001(2)(c) does not impose any ban on the exportation of marijuana or marijuana products. It expresses an intent to prevent the diversion of marijuana from this state to other states. In other words, an intent to prevent criminal behavior. *See also, e.g.*, ORS 475C.177(1)–(2)(a) (providing that "The Oregon Liquor and Cannabis Commission [('OLCC')] shall develop and maintain a system for tracking the transfer of marijuana items between premises for which licenses have been issued" for purposes including "[p]reventing the diversion of marijuana items to criminal enterprises, gangs, cartels and other states[.]"); ORS 475C.181 ("Except as otherwise provided by law, [OLCC] has any power, and may perform any function, necessary for the commission to prevent the diversion of marijuana from licensees to a source that is not operating legally under the laws of this state."); ORS 475C.185 (granting OLCC the authority to "seize marijuana items from a licensee if circumstances create probable cause for the commission to conclude that the licensee has . . . [e]ngaged, or is engaging, in the unlawful diversion of marijuana items[.]").

2. ORS 475C.229.

Under ORS 475C.229(2), "A person may not . . . export marijuana items from this state." A violation may be classified as a Class A misdemeanor, Class B violation, or Class C felony, depending on factors set forth in the statute. ORS 475C.229(3)–(4).

C. Controlled Substances Act.

Federal law prohibits all commerce in marijuana via the Controlled Substances Act at 21 U.S.C. §§ 801-904.

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Under the Controlled Substances Act, marijuana[1] is a Schedule I controlled substance. 21 U.S.C. § 812(c)(10). Distribution of Schedule I controlled substances is illegal under the Act, which provides:

> Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—
>
> (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance . . . .

21 U.S.C. § 841(a)(1).

II. Applicable Legal Standards for Rule 12(b) motions.

A. Rule 12(b)(1).

Under Federal Rule of Civil Procedure 12(b)(1), a defendant may move to dismiss a case for "lack of subject-matter jurisdiction." Fed. R. Civ. P. 12(b)(1). In a Rule 12(b)(1) motion, a defendant may raise justiciability issues like standing. *See, e.g.*, *In re Apple iPhone Antitrust Litig.*, 846 F.3d 313 (9th Cir. 2017) (raising standing). The legal standard that applies to a Rule 12(b)(1) motion depends on whether it asserts a facial challenge or a factual challenge.

A facial challenge asserts that "the allegations contained in a complaint are insufficient on their face to invoke federal jurisdiction." *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). When—as here—a defendant brings a facial challenge, the Court resolves the Rule 12(b)(1) motion "as it would a motion to dismiss under Rule 12(b)(6): Accepting the plaintiff's allegations as true and drawing all reasonable inferences in the plaintiff's favor, the court determines whether the allegations are sufficient as a legal matter to invoke the court's jurisdiction." *Leite v. Crane Co.*, 749 F.3d 1117, 1121 (9th Cir. 2014). The court need not, however, "accept conclusory allegations or legal characterizations as true." *Oregon Wild v. Connor*, Case No. No. 6:09-CV-00185-AA, 2012 WL 3756327, *1 (D. Or. Aug. 27, 2012).

[1] The Controlled Substances Act defines "the term 'marihuana' [as] . . . all parts of the plant Cannabis sativa L., whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin." 21 U.S.C. § 802(16)).

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A factual challenge asserts that subject-matter jurisdiction does not exist, independent of what is stated in the complaint. *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000). In contrast with a facial challenge, a court taking up a factual challenge "may look beyond the complaint to matters of public record," *id.*, and extrinsic evidence, *Safe Air for Everyone*, 373 F.3d at 1039.

"Once challenged, the party asserting subject matter jurisdiction has the burden of proving its existence." *Rattlesnake Coal. v. Env't Prot. Agency*, 509 F.3d 1095, 1105 n.1 (9th Cir. 2007). "If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action." Fed. R. Civ. P. 12(h)(3).

B. Rule 12(b)(6).

Under Federal Rule of Civil Procedure 12(b)(6), a defendant may move to dismiss a plaintiff's complaint for "failure to state a claim upon which relief may be granted." Fed. R. Civ. P. 12(b)(6). A Rule 12(b)(6) motion tests a complaint's legal sufficiency. *North Star Int'l. v. Arizona Corp. Comm'n*, 720 F.2d 578, 581 (9th Cir. 1983). "A Rule 12(b)(6) dismissal may be based on either a lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." *Johnson v. Riverside Healthcare Sys., LP*, 534 F.3d 1116, 1121–22 (9th Cir. 2008) (quotation marks omitted). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citations and quotations omitted).

A court must accept as true all material allegations in a complaint and construe the allegations in the complaint in the light most favorable to the plaintiff. *Lazy Y Ranch Ltd. v. Behrens*, 546 F.3d 580, 588 (9th Cir. 2008). However, a court need not accept as true legal conclusions, conclusory allegations, unwarranted deductions of fact, or unreasonable inferences. *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988, amended by 275 F.3d 1187 (9th Cir. 2001). A court may also consider certain materials outside of the complaint, such as matters of judicial notice. *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003).

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III. Legal Argument.

A. Plaintiff lacks Article III standing because its alleged injuries are not likely to be redressed by the relief that it is seeking.

Article III, section 2, of the United States Constitution limits federal jurisdiction to "cases" and "controversies." *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 37 (1976). To satisfy the "irreducible constitutional minimum of standing," a plaintiff must show an "injury in fact" that is fairly traceable to the challenged action of the defendant and likely to be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). "The party invoking federal jurisdiction bears the burden of establishing these elements." *Id.* at 561. Here, Plaintiff cannot meet this jurisdictional prerequisite because its alleged injuries are not likely to be redressed by the relief that it is seeking in this case.

Redressability requires that it be "be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Id.* To demonstrate redressability, litigants must show that they "personally would benefit in a tangible way from the court's intervention." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 134 (1998). "Relief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court; that is the very essence of the redressability requirement." *Id.* at 107; *c.f.*, *McNamara v. City of Chicago*, 138 F.3d 1219, 1221 (7th Cir. 1998) ("A plaintiff who would have been no better off had the defendant refrained from the [allegedly] unlawful acts of which the plaintiff is complaining does not have standing under Article III of the Constitution to challenge those acts in a suit in federal court.").

As relevant here, both Oregon law and federal law prohibit interstate commerce in marijuana. *See* ORS 475C.001(2)(c); ORS 475C.229; 21 U.S.C. § 802(16), 812(b)(1), 812(c)(10), 841(a)(1). Thus, an order striking down Oregon's export ban is unlikely to redress Plaintiff's alleged injury (alleged limits on its available customer base and its inability to take advantage of economies of scale (Compl., Dkt. #1, ¶¶ 11, 28)) because—even without Oregon's export ban—it would still be illegal under federal law for Plaintiff to export marijuana and marijuana products to other states. *See Renne v. Geary*, 501 U.S. 312, 318–19 (1991) (finding

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"reason to doubt" that invalidating a state constitutional provision would redress voters' alleged First Amendment injury because an unchallenged state statute "might be construed" to prohibit the same conduct as the challenged provision); *Harp Adver. Ill., Inc. v. Vill. of Chicago Ridge*, 9 F.3d 1290, 1291-3 (7th Cir. 1993) (rejecting First Amendment challenge to ordinances regulating billboards for lack of redressability because even if the ordinances were declared unconstitutional, a separate unchallenged ordinance would independently prevent plaintiff from erecting the proposed billboard); *Midwest Media Prop. L.L.C. v. Symmes Twp.*, 503 F.3d 456, 461-63 (6th Cir. 2007) (same).

Moreover, to satisfy Article III's redressability requirement, a litigant must "show that there would be a 'change in a legal status'" as a consequence of a favorable decision "and that a 'practical consequence of that change would amount to a significant increase in the likelihood that the plaintiff would obtain relief that directly redresses the injury suffered.'" *Renee v. Duncan*, 686 F.3d 1002, 1013 (9th Cir. 2012) (quoting *Utah v. Evans*, 536 U.S. 452, 464 (2002)). "There is no standing if, following a favorable decision, whether the injury would be redressed would still depend on 'the unfettered choices made by independent actors not before the courts.'" *Novak v. U.S.*, 795 F.3d 1012, (9th Cir. 2015) (quoting *ASARCO Inc. v. Kadish*, 490 U.S. 605, 615 (1989)). Here, any relief that Plaintiff would take from a declaration that Oregon's export ban is unconstitutional and an injunction forbidding the State from enforcing it is inextricably linked to the independent discretionary actions of third parties who are not before the Court (*i.e.*, federal law enforcement agents charged with enforcing the Controlled Substances Act, who may still prevent Plaintiff from selling marijuana across state lines). Accordingly, Plaintiff's claim is too speculative to satisfy Article III's redressability requirement.

In sum, the Court should dismiss this case for lack of subject matter jurisdiction because Plaintiff lacks Article III standing for its claims. Plaintiff cannot establish that its injuries are likely to be redressed by the relief that it is seeking. Even if Plaintiff were to win this case, it would still be illegal under federal law for Plaintiff to export marijuana and marijuana products.

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B. Plaintiff fails to state a claim for relief because the dormant Commerce Clause does not apply.

The Commerce Clause grants Congress the power "[t]o regulate interstate commerce . . . among the several States." U.S. Const. art. I, § 8, cl. 3. This affirmative grant of authority to Congress also has a "negative" or "dormant" aspect, which prohibits a state from enacting legislation that unduly burdens or discriminates against interstate commerce when Congress has not acted to regulate the matter—that is, when Congress's power lies dormant. *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449, 2465 (2019).

When Congress has not acted to regulate a matter of interstate commerce, state laws that discriminate against out-of-state businesses and products are presumptively invalid. *See Granholm v. Heald*, 544 U.S. 460, 492–93 (2005). "[T]he absence of federal legislation," is the common thread in dormant Commerce Clause cases, *City of Philadelphia v. New Jersey*, 437 U.S. 617, 623 (1978), based on the idea that Congress generally "has left it to the courts to formulate the rules to preserve the free flow of interstate commerce." *S. Dakota v. Wayfair*, 138 S. Ct. 2080, 2089–90 (2018) (quotation marks omitted). But "when Congress exercises its power to regulate commerce by enacting legislation, the legislation controls." *Id.*

Here, Congress has exercised its power to regulate interstate commerce of marijuana, and the dormant Commerce Clause therefore does not apply. Specifically, Congress has explicitly prohibited that market entirely. The Controlled Substances Act categorically prohibits any cultivation, transport, sale, or possession of marijuana that has any effect on interstate commerce. 21 U.S.C. § 801 et seq.; *see Gonzales v. Raich*, 545 U.S. 1, 12-22 (2005). The dormant Commerce Clause cannot apply to protect a national and free market among the States in a commodity for which Congress has declared that there shall be no interstate market at all.

In enacting the Controlled Substances Act, Congress, exercising its Commerce Clause power, "devised a closed regulatory system" in which "the manufacture, distribution, or possession of marijuana became a criminal offense." *Gonzales*, 545 U.S. at 13–14. Congress

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exercised that power precisely to "exclud[e] Schedule I drugs [(which include marijuana[2])] entirely from the market." *Id.* at 26; *see also* 21 U.S.C. §§ 812(b)-(c), 841(a)(1). By deeming marijuana a Schedule I controlled substance, Congress expressly and unambiguously declared that marijuana cannot be an object of trade or commerce for any purpose. *See Gonzales*, 545 U.S. at 27 ("The [Controlled Substances Act] designates marijuana as contraband for *any* purpose." (emphasis in original)).

In other words, not only is there is no congressional silence from which the Court can infer that Congress intended to preserve a free interstate market for marijuana and marijuana products, but also there is Congressional action under the Commerce Clause to foreclose that market entirely. As the Eighth Circuit has put it, "marijuana is contraband and thus not an object of interstate trade protected by the Commerce Clause." *Predka v. Iowa*, 186 F.3d 1082, 1085 (8th Cir. 1999). Because the dormant Commerce Clause "protects the [particular] interstate market, not particular interstate firms," *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 127-28, as far as dormant Commerce Clause protections go, an illicit market is the same as no market at all. Without a legal national market, it makes no sense to pursue the dormant Commerce Clause's "fundamental objective" of "preserving a national market for competition." *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 299-300 (1997); *see also Tenn. Wine*, 139 S. Ct. at 2459 (noting that the function of the dormant Commerce Clause is to "preserve[] a national market for goods and services").

Here, Oregon's export ban does not "impede[] free private trade in the national marketplace" or "interfere with the natural functioning of the interstate market" or "prohibit access to an interstate market" because there is no national marketplace for marijuana or marijuana products. *Cf. Gen. Motors Corp.*, 519 U.S. at 287. Plaintiff's dormant Commerce Clause claims thus fail as a matter of law because the rationale underlying the clause—to promote a free market for a product if Congress has not regulated it—does not apply. Congress

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[2] 21 U.S.C. § 812(c)(10).

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has made clear that marijuana shall not be a part of interstate commerce. Thus, the Court should dismiss this case with prejudice. Fed. R. 12(b)(6).

IV. Conclusion.

For the foregoing reasons, the Court must dismiss Plaintiff's Complaint for lack of subject matter jurisdiction and failure to state a claim for relief.

DATED January 20, 2023.

Respectfully submitted,

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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

JEFFERSON PACKING HOUSE, LLC, Plaintiff, v. TINA KOTEK, in her official capacity as Governor of the State of Oregon, ELLEN ROSENBLUM, in her official capacity as Attorney General of the State of Oregon, and CRAIG PRINS, in his official Capacity as Interim Executive Director of the Oregon Liquor and Cannabis Commission, Defendants.	Case No. 3:22-cv-01776-AR **PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION TO DISMISS** **REQUEST FOR ORAL ARGUMENT**

Article 1, Section 8, Clause 3 of the U.S. Constitution gives Congress the power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." Defendants argue that in passing the Controlled Substances Act ("CSA"), which lists marijuana as a Schedule I narcotic, Congress "exercised its affirmative Commerce Clause power to *eliminate* [marijuana] from

any form of lawful interstate commerce." Defendants' Motion to Dismiss Plaintiff's Complaint ("MTD"), p. 2 (emphasis supplied). Therefore, Defendants argue, "there is no interstate commerce [in marijuana] to treat differentially" from intrastate commerce. *Id.*

Defendants argument is fundamentally unsound, because Congress' criminal regulation of an area of commerce does not "eliminate" that area as a subject of the Commerce Clause, much less "eliminate" commerce in that area.

The word "commerce" as used in the US Constitution is subject to varying interpretations; some argue that it applies to only trade or exchange, while others claim it applies to a broader range of social and commercial interaction between citizens of different states. Given that range, it is not debatable that the production, processing, and sale of an agricultural product fits squarely within the definition of "commerce" as understood by the framers of the US Constitution. As a result, if the illegality of marijuana were not a factor in the analysis (as we argue herein), it is also not debatable that transactions involving marijuana, an illegal agricultural product, are within the purview of the Commerce Clause.

Under federal law, transactions in marijuana are considered "trafficking," a term commonly understood to mean illegal commerce. Congress exercised its authority under the Commerce Clause in enacting the CSA, defining commerce in marijuana as "trafficking;" as a result, both commerce and illegal commerce ("trafficking") are within the purview of the Commerce Clause. Because illegal commerce and commerce are both within the purview of the Commerce Clause, they are both within the purview of the dormant Commerce Clause. As a result, illegal commerce in marijuana is within the purview of the dormant Commerce Clause; *ipso facto,* the CSA did not "eliminate" such illegal commerce.

Put perhaps less pedantically, the CSA did not "eliminate" commerce in marijuana any more than a criminal statute "eliminates" the acts or conduct it forbids. Instead, the CSA *regulates* commerce in marijuana by making commerce involving marijuana punishable by criminal penalties. While Congress certainly intended the CSA to eliminate and/or reduce actual transactions involving marijuana, it did not intend the CSA to effect the removal of Congress' Constitutional authority over the conceptual subject area of interstate commerce in marijuana, as Defendants argue. Indeed, the CSA does not, either expressly or impliedly, delegate to the States any authority to regulate interstate commerce, much less remove such regulation from Congress' Constitutional purview.

By the same token, while Plaintiff has certainly suffered economic injuries which are not redressable by this Court as a result of Oregon's unconstitutional export ban, the injuries that *are* redressable in this forum are not Plaintiff's monetary losses for future interstate marijuana sales; instead, Plaintiff's redressable injuries derive from its right to operate its business – federally legal or not – free of unconstitutional state laws such as the export ban.

As a result, Defendants' motion should be denied.

A. Plaintiff's injuries will be redressed by the relief it seeks because it will no longer be unconstitutionally restrained by state law.

Defendants claim that Plaintiff's injuries are not redressable because "[e]ven if Plaintiff were to win this case, it would still be illegal under federal law for Plaintiff to export marijuana and marijuana products." MTD, p. 8.

This argument fails to address Plaintiff's injuries that are actually redressable in this forum. In particular, Plaintiff's injuries that are redressable by this Court are not traceable or attributable to some hypothetical revenue it might realize from future interstate commerce in marijuana, licit or

otherwise. Instead, Plaintiff's injuries arise out of the fact that it must operate in an environment where Oregon law unconstitutionally regulates the commerce (illegal or not) in which Plaintiff desires to engage, including competing with out of state marijuana businesses, accessing out of state customers, and taking advantage of economies of scale.

"When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group ... the 'injury in fact' is the inability to compete on an equal footing in the ... process, not the loss of [the benefit]." *Northeastern Florida Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville,* 508 U.S. 656, 666 (1993), *citing Turner v. Fouche,* 396 U.S. 346, 362 (1970) ("We may assume that the [plaintiffs] have no right to be appointed to the … board of education. But [they] do have a federal constitutional right to be *considered* for public service without the burden of invidiously discriminatory disqualifications."); *see also MGM Resorts International Global Gaming Development, LLC v. Malloy,* 861 F.3d 40, 45 (2d. Cir. 2017) ("[T]he standing inquiry for dormant Commerce Clause and equal protection claims is the same.").

Here, Plaintiff has established and pled an "injury in fact" because Plaintiff has pled that it is "able and ready" to compete for the benefit.[1] *Id.; see also Carney v. Adams,* 141 S. Ct. 493, 500 (2020); *Gratz v. Bollinger,* 539 U.S. 244, 262 (2003); *see also Adarand Constructors, Inc. v. Pena,* 515 U.S. 200, 211 (1995). Put another way, the dormant Commerce Clause does not guarantee that

[1] Moreover, the relief in this case would not conflict with federal law. Enjoining Defendants from enforcing Oregon's export laws "would not compel any party to violate federal law, award any illegally derived profits, or entangle this court in the production, sale, or distribution of cannabis." *Finch v. Treto,* 22 C 1508, 2022 WL 2073572, at *14 (ND Ill June 9, 2022). Instead, it would simply prevent Oregon from regulating interstate commerce in marijuana in a manner it has not been authorized by Congress to undertake.

JPH will profit from its interstate dealings and ability to be free from state restraint in accessing out-of-state markets, and it may not even guarantee that JPH's owner will not be prosecuted for doing so. However, the dormant Commerce Clause *does* protect JPH's right to engage in those activities on an equal footing with out-of-state marijuana businesses, absent Congress' "unmistakably clear intent to allow otherwise discriminatory regulations." *United Egg Producers v. Dep't of Agric. of P.R.,* 77 F.3d 567, 570 (1st Cir. 1996) ("Absent, at least, an affirmatively stated grant of permission to non contiguous jurisdictions of the United States to require egg-labeling, we are unable to conclude that appellants have met their burden of showing that Congress' intent to allow Puerto Rico to enact protectionist egg-labeling regulations was "unmistakably clear.").

This conclusion illuminates the wrongheadedness of Defendants' argument that Plaintiff's relief is tied to the "independent discretionary actions of third parties who are not before the Court (i.e., federal law enforcement agents …)." Whether or not Plaintiff is ultimately targeted by federal law enforcement is irrelevant to the relief sought here, which is to be free of unconstitutional state laws burdening commerce, and to have the opportunity to engage in commerce on equal footing with actors in other states.[2]

Further, while not strictly relevant to the controlling analysis on this issue as set forth above and herein, it is just as illegal under federal law for Plaintiff (or any other licensed Oregon marijuana business) to transact business in marijuana entirely within Oregon as it is for Plaintiff to export marijuana out-of-state. Notwithstanding the fact that each gram of marijuana transacted in Oregon's

[2] Indeed, the state-to-state patchwork of marijuana legality results in exactly what the Commerce Clause is designed to prevent: that some states are favored at the expense of others. Some "limited license" states produce fiefdoms kept artificially insulated from competition by their state-imposed restriction on interstate commerce.

state-legal system is meticulously tracked from seed-to-sale, and that all of the tens of thousands of state-legal but federally illegal marijuana trafficking transactions which occur daily in Oregon are extensively documented, federal law enforcement has never once attempted to prosecute a state-legal business in unambiguous compliance with state law. Thus, as a practical matter, there is no reason to think federal law enforcement would prosecute interstate transfers of cannabis which fully complied with the laws of all states involved; at the very least, it is not "likely." Moreover, even if that were not true, executive branch prosecutorial discretion cannot authorize a state to restrict interstate commerce, especially when that state has set up an entire state-legal, protectionist marijuana market, extracting significant tax revenue from that market, all in violation of federal law, and then claim that its actions are insulated from dormant Commerce Clause "protection" on the grounds that the plaintiff desires to engage, on an interstate basis, in substantively the same conduct that the state expressly condones and raises taxes from on an intrastate basis.

To an extent, Defendants' argument is a species of an unclean hands argument: Plaintiff's injuries are not redressable because what it is asking to be able to do is illegal under federal law. And Defendants expect this Court to pay no attention to the fact that Oregon has set up its own entire regulatory system in violation of federal law. "If the "unclean hands" notion has any purchase here, both parties have "unclean hands" in that they are engaging with the business of distributing a controlled substance, but only one party has soiled the federal Constitution." *Finch v. Treto,* 2022 WL 2073572, at *14 (ND Ill June 9, 2022).

B. The Dormant Commerce Clause applies to marijuana whether illegal or not.

Defendants argue that "marijuana is contraband and thus not an object of interstate trade protected by the Commerce Clause" because "an illicit market is the same as no market at all," and

therefore, "without a legal national market, it makes no sense to pursue the dormant Commerce Clause's fundamental objective of preserving a national market for competition."

To address the thrust of Defendants' argument head on, whether or not a particular article of commerce is illicit or not has no bearing on whether it "affects interstate commerce" and therefore is irrelevant to the question of whether it is outside the realm of dormant Commerce Clause protection. *See City of Philadelphia v. New Jersey,* 437 U.S. 617, 622 (1978) (explaining that "[a]ll objects of interstate trade merit Commerce Clause protection; none is excluded by definition at the outset,").

Moreover, with respect to marijuana in particular, this question has been definitively answered since at latest *Gonzales v. Raich*, 545 U.S. 1 (2005). While the thrust of *Gonzales* was about the reach of the Commerce Clause (it is often cited for the proposition that the Commerce Clause power reaches even purely intrastate noncommercial transactions), essential to the holding is the conclusion that transactions in marijuana, legal or not, are "commerce" and thus a proper subject of the Commerce Clause – and therefore also of the dormant Commerce Clause. This is also the conclusion of many of the courts to touch on the subject. For example:

> "Illinois has affirmatively facilitated its cannabis industry through protectionist laws; it has not prohibited or regulated marijuana as "deleterious" or "injurious" contraband. And because this industry has been legalized by Illinois (and many other states), it is likely to affect interstate commerce, no matter its federal status. The Department points to no authority holding that an item of commerce is outside the Commerce Clause's scope, even where legal and promoted under state law."

Finch v. Treto, 2022 WL 2073572, at *14 (ND Ill June 9, 2022).

The primary case relied upon by Defendants is *Predka v. Iowa,* 186 F.3d 1082, 1085 (8th Cir. 1999), which they cite for the proposition that, "marijuana is contraband and thus not an object of interstate trade protected by the Commerce Clause." The *Predka* opinion, in turn, relies on *Ziffrin,*

Inc. v. Reeves, 308 U.S. 132 (1939), which "reject[ed a] Commerce Clause challenge to state statute making it unlawful to possess intoxicants except under very limited circumstances and declar[ed] unlawfully possessed intoxicants contraband." *Predka, citing Ziffrin,* 308 U.S. at 139. *Ziffrin* was abrogated in 2005 by *Granholm v. Heald,* 544 U.S. 460 (2005), on the grounds that the 21st Amendment did not supersede Commerce Clause regulation of liquor. The reasoning of *Granholm* is instructive here, in that the CSA also does not supersede Commerce Clause regulation of marijuana.

In addition to the fact that the legality of marijuana does not affect whether commerce in marijuana is a proper subject of the Commerce Clause, it is important to remember that a national market for marijuana already exists, albeit via interstate commerce in all of the other appurtenances to the sale of marijuana: intellectual property, skilled labor, grow supplies, professional services, marketing and advertising, packaging, tracking, construction and trades, finance, insurance, and many more. This reality further illuminates the futility and illogic of attempting to isolate one product from the reach of the dormant Commerce Clause for whatever reason, including that it is illegal under federal law. Commerce is a holistic concept, and the idea that the Commerce Clause should be turned off and on for certain substances may or may not be useful on an academic level but must give way to reality in the final account.

Oregon affects and restricts interstate commerce within the federally illegal cannabis market by preventing the state-to-state transfer of marijuana. The dormant Commerce Clause prevents Oregon from doing so, because the Constitution gave Congress the power to regulate all commerce, and the dormant commerce clause restricts such regulation away from the states without "unmistakably clear intent" otherwise. Indeed, *Gonzales* indicates that Congress *did not* intend to delegate regulation of interstate commerce in marijuana to the states: "Given the enforcement

difficulties that attend distinguishing between marijuana cultivated locally and marijuana grown elsewhere and concerns about diversion into illicit channels, we have no difficulty concluding that Congress had a rational basis for believing that failure to regulate the intrastate manufacture and possession of marijuana would leave a gaping hole in the CSA." *Gonzales v. Raich*, 545 U.S. at 2-3.

It is clear that Congress has expressed, in the CSA, its intention to functionally eliminate actual transactions in marijuana in the United States. But in so expressing its intention, Congress did not actually "eliminate" interstate commerce in cannabis, and clearly did not delegate to the states the right to regulate any interstate commerce occurring despite such intention, especially not when the states seeking vindication for such protectionist laws have legalized marijuana commerce within their borders.

Based upon the foregoing, Plaintiff requests that Defendants' motion be denied. If Defendants' motion is granted, in whole or in part, Plaintiff requests leave to amend its complaint in order to remediate any pleading defects identified in the Court's order.

Respectfully submitted this 17th day of March, 2023.

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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing on the parties herein by notice of electronic filing using the CM/ECF system.

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DATED this 17th day of March, 2023.

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