IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

(1) ORIGINAL INVESTMENTS, LLC, d/b/a DANK'S WONDER EMPORIUM, a Washington limited liability company, **Plaintiff,** **v.** **(1) THE STATE OF OKLAHOMA;** **(2) THE OKLAHOMA STATE DEPARTMENT OF HEALTH;** **(3) COLONEL LANCE FRYE, M.D., INTERIM COMMISSIONER OF THE OKLAHOMA STATE DEPARTMENT OF HEALTH;** **(4) THE OKLAHOMA MEDICAL MARIJUANA AUTHORITY; and** **(5) DR. KELLY WILLIAMS, PhD, INTERIM DIRECTOR OF THE OKLAHOMA MEDICAL MARIJUANA AUTHORITY,** **Defendants.**	**Case No. Civ-2020-820-F**

PLAINTIFF ORIGINAL INVESTMENTS, LLC'S
MOTION FOR JUDGMENT ON THE PLEADINGS
AND BRIEF IN SUPPORT

Plaintiff Original Investments, LLC d/b/a Dank's Wonder Emporium ("Original Investments") seeks declaratory and injunctive relief from OKLA. STAT. TIT. 63 § 427.14(E)(7) (the "Residency Statute") because this statute unconstitutionally prohibits non-residents from receiving an Oklahoma medical marijuana business license and from owning more than twenty-five percent of an Oklahoma company that holds a medical marijuana business license. The Residency Statute violates the dormant Commerce Clause

of the United States Constitution by favoring Oklahoma residents over non-residents, and so the Court should enter judgment on the pleadings pursuant to FEDERAL RULE OF CIVIL PROCEDURE 12(c) for Original Investments.

BACKGROUND

There is a vibrant marijuana industry in the United States. Marijuana is legal for adult use in fifteen states and for medical use in thirty-six states. *See* Jeremy Berke and Shayanne Gal, *All the states where marijuana is legal – and 5 more that just voted for it*, Business Insider (Nov. 6, 2020). In the general election earlier this month, four more states voted by referendum to legalize adult use sales, and another state voted to create a medical cannabis program. *Id*. The federal government has not stood in the way of legalization at the state level, but instead has let marijuana sellers that comply with state law go about their business. *See Memorandum for all United States Attorneys: Guidance Regarding Federal Marijuana Enforcement*, Office of the Deputy Attorney General (Aug. 29 2013).[1]

The State of Oklahoma also enjoys a vibrant and lucrative marijuana industry, with marijuana sales expected to exceed $700 million by year's end. *See* Eli McVey, *Medical marijuana sales in Oklahoma near $300 million in first five months of 2020*, Marijuana Business Daily (June 9, 2020). Through the end of July, the State had already received

[1] This federal policy is expressed in a document known as the Cole Memorandum. The Cole Memorandum, issued during the Obama administration, was purportedly "rescinded" by Attorney General Sessions, *see Memorandum for all United States Attorneys: Marijuana Enforcement*, Office of the Attorney General (Jan. 4, 2018), but current U.S. Attorney General William Barr has told Congress that the Justice Department is "operating under my general guidance that I'm accepting the Cole Memorandum for now." *Review of the FY2020 Budget Request for DOJ*, 116th Cong. (Apr. 10, 2019) (testimony of William Barr, Att'y Gen. of the United States).

more than $80 million in tax revenues in 2020 from marijuana sales. *See* Samantha Vicent, *Growing like a weed: Oklahoma's medical marijuana taxes this year already nearly 1.5 times the amount in all of 2019*, Tulsa World (Oct. 11, 2020).

Original Investments, a Washington company owned by Washington residents, wishes to participate in Oklahoma's medical marijuana market on equal footing with Oklahoma residents. It cannot do so at the moment, given the Residency Statute and related regulations. This lawsuit aims to remove the discriminatory residency requirement that currently prevents Original Investments from obtaining an Oklahoma marijuana business license.

ARGUMENT AND AUTHORITIES

A. Judgment on the pleadings is appropriate in this case.

FED. R. CIV. P. 12(c) allows a party to "move for judgment on the pleadings . . . [a]fter the pleadings are closed." "Judgment on the pleadings is appropriate only when the moving party has clearly established that no material issue of fact remains to be resolved and the party is entitled to judgment as a matter of law." *Sanders v. Mountain Am. Fed. Credit Union*, 689 F.3d 1138, 1141 (10th Cir. 2012). The Wright & Miller treatise explains that a motion for judgment on the pleadings "has utility when all material allegations of fact are admitted or not controverted in the pleadings and only questions of law remain to be decided by the district court." 5C Wright & Miller, *Federal Practice and Procedure: Civil 3d* § 1367; *see also Bethel v. Am. Int'l Mfg. Corp.*, 768 F. Supp. 327, 328 (W.D. Okla. 1991) ("This issue represents solely a question of law; therefore, resolution pursuant to Fed. R. Civ. P. 12(c) is appropriate.").

The parties have agreed that this case can be most efficiently resolved through competing Rule 12(c) motions because the only issue for the Court to decide is whether the Residency Statute violates the federal Constitution. The parties have stipulated to all relevant facts, including that Original Investments, LLC is a non-resident corporation owned by non-residents and is therefore barred by Oklahoma's Medical Marijuana and Patient Protection Act from obtaining a medical marijuana business license. *See* Joint Status Report and Discovery Plan, filed Oct. 5, 2020, Doc No. 19. Rule 12(c) provides the appropriate avenue to resolve this case because the only question for the Court is whether Oklahoma is allowed to discriminate against Original Investments based on the company's residency, or whether doing so is unconstitutional.

B. Oklahoma's durational residency requirement is unconstitutional.

Oklahoma's Medical Marijuana and Patient Protection Act excludes non-Oklahoma residents from the State's medical marijuana market. Specifically, the Act requires that

> b. any applicant applying as an individual shall show proof that the applicant is an Oklahoma resident pursuant to paragraph 11 of this subsection, and
>
> c. any applicant applying as an entity shall show that seventy-five percent of all members, managers, executive officers, partners, board members or any other form of business ownership are Oklahoma residents pursuant to paragraph 11 of this subsection.

OKLA. STAT. TIT. 63 § 427.14(E)(7). Paragraph 11 of this subsection of the Act goes on to define an Oklahoma resident as follows:

> In order to be considered an Oklahoma resident for purposes of a medical marijuana business application, all applicants shall provide proof of Oklahoma residency for at least two

> years immediately preceding the date of application or five years of continuous Oklahoma residency during the preceding twenty-five years immediately preceding the date of application.

Id.

Oklahoma's residency requirement for its medical marijuana market is unconstitutional because it explicitly favors Oklahoma residents and discriminates against non-residents. That conclusion is clear from two centuries of Supreme Court jurisprudence dealing with the dormant Commerce Clause, culminating in *Tennessee Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449 (2019).

In *Tennessee Wine*, the United States Supreme Court struck down a Tennessee law requiring applicants for a license to operate a liquor store to have resided in the state for the prior two years. *Id*. at 2457. The Court declared that Tennessee's two-year residency requirement "plainly favors Tennesseans over nonresidents," *id*. at 2462, and that its "predominant effect" is "simply to protect" Tennesseans "from out-of-state competition." *Id*. at 2476. This violated the dormant Commerce Clause, the "primary safeguard against state protectionism." *Id.* at 2461. The opinion went on to reject the argument that the dormant Commerce Clause applies differently to alcohol than to other commodities. *Id.*

The decision in *Tennessee Wine* has ample precedential support. The Commerce Clause addresses the problem that existed "[d]uring the first years of our history as an independent confederation," when "the National Government lacked the power to regulate commerce among the States." *Camps Newfound/Owatonna v. Town of Harrison*, 520 U.S. 564, 571 (1997). "Because each State was free to adopt measures fostering its own local

interests without regard to possible prejudice to nonresidents . . . a conflict of commercial regulations, destructive to the harmony of the States ensued." *Id*. (quotation marks omitted). To solve this problem, the Commerce Clause "not only granted Congress express authority to override restrictive and conflicting commercial regulations adopted by the States, but . . . it also . . . effected a curtailment of state power." *Id*. (citing with approval Justice Johnson's observation in *Gibbons v. Ogden*, 9 Wheat. 1 (1824) (opinion concurring in judgment), that "[i]f there was any one object riding over every other in the adoption of the constitution, it was to keep the commercial intercourse among the States free from all invidious and partial restraints"); *Hughes v. Oklahoma*, 441 U.S. 322, 325 (1979) (the Commerce Clause reflects "a central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation").

Given the history and purpose of this constitutional doctrine, it makes sense that "[p]rotectionism . . . is forbidden under the dormant Commerce Clause." *Camps Newfound*, 520 U.S. at 588. If a law discriminates against non-residents on its face, it is likely invalid because "the evil of protectionism can reside in legislative means as well as legislative ends." *Hughes*, 441 U.S. at 337. "At a minimum such facial discrimination invokes the strictest scrutiny of any purported legitimate local purpose and of the absence of nondiscriminatory alternatives." *Id*.; *see also Camps Newfound*, 520 U.S. at 575 ("State laws discriminating against interstate commerce on their face are virtually per se invalid.")

(quotation marks omitted); *Action Wholesale Liquors v. Oklahoma Alcoholic Beverage Laws Enf't Comm'n*, 463 F. Supp. 2d 1294, 1304 (W.D. Okla. 2006) (striking down Oklahoma law because "[i]t is…obvious from the terms of the challenged Oklahoma laws that the preference they create for in-state wineries economically benefits in-state wineries and economically hurts, or causes detriment to, out-of-state wineries").

There does exist "the possibility that a State may validate a statute that discriminates against interstate commerce by showing that it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 278 (1988). But "the standards for such justification are high." *Id*. When a state law discriminates on its face against non-residents, as does the Residency Statute, it "is virtually per se invalid . . . and will survive only if it advances a legitimate local purpose that cannot be adequately served by reasonable non-discriminatory alternatives." *Dep't of Revenue v. Davis,* 553 U.S. 328 (2008) (citations and quotation marks omitted); *see also Tennessee Wine*, 139 S. Ct. at 2461–62 ("Under our dormant Commerce Clause cases, if a state law discriminates against out-of-state goods or nonresident economic actors, the law can be sustained only on a showing that it is narrowly tailored to advanc[e] a legitimate local purpose.") (quotation marks omitted). The state bears the burden of showing a legitimate local purpose and the lack of reasonable non-discriminatory alternatives. *See Direct Mktg. Ass'n v. Brohl*, 814 F.3d 1129, 1136 (10th Cir. 2016) ("[A]s a general matter, state regulation that discriminates against interstate commerce will survive constitutional challenge only if the state shows 'it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory

alternatives"). The state's burden is not easy to meet; this Court has described the possibility of justifying discriminatory state laws as "an exception to the per se prohibition against such discrimination. *Action Wholesale Liquors*, 463 F.Supp. 2d at 1305. To meet its burden the state must present "'concrete record evidence," not "mere speculation," that "the discrimination is demonstrably justified" and "that a States' nondiscriminatory alternatives will prove unworkable." *Granholm v. Heald*, 544 U.S. 460, 492–93 (2005).

Oklahoma's residency requirement is unconstitutional because it "plainly favors" Oklahomans over non-residents. *Tennessee Wine*, 139 S. Ct at 2462. It is a durational residency requirement, very similar to the one struck down in *Tennessee Wine*, which on its face reserves the enormous economic opportunities of Oklahoma's medical marijuana market for long-term residents. The result is that non-residents and out-of-state companies like Original Investments are largely excluded from the industry. Because the law facially discriminates against non-residents, it is "virtually per se invalid." *Camps Newfound*, 520 U.S. at 575. The self-evident purpose of the law, to benefit Oklahomans first and foremost, belies any other possible justification. *See Or. Waste Sys. v. Dep't of Envtl. Quality*, 511 U.S. 93, 101 (1994) ("The State's burden of justification is so heavy that facial discrimination by itself may be a fatal defect.") (quotation marks omitted). As with the durational residency requirement struck down in *Tennessee Wine*, the challenged Oklahoma statute is unconstitutional.

C. The usual constitutional rules apply to state marijuana regulation.

The Residency Statute is subject to the same constitutional rules as any other state law. Contrary to any argument the State may make, the constitutional analysis of

Oklahoma's residency requirement is unaffected by the unusual status of marijuana under federal law. The nominal federal prohibition on marijuana does not relieve Oklahoma of its constitutional obligations when regulating its medical marijuana market.

Though marijuana remains technically illegal in the federal statute books, these federal laws are not enforced with respect to the type of commerce that Oklahoma's Medical Marijuana and Patient Protection Act permits. *See supra* 2. In fact, far from prohibiting marijuana businesses, the federal government regulates, oversees, and profits from their operations in all sorts of ways. Marijuana businesses must pay taxes to the Internal Revenue Service.[2] They must comply with requirements of the Occupational Safety and Health Administration.[3] Banks can serve marijuana-related businesses, so long as they meet certain reporting requirements of the Treasury Department. *BSA Expectations Regarding Marijuana-Related Businesses*, FIN-2014-G001, Financial Crimes Enforcement Network, U.S. Treasury Department (Feb. 14, 2014). And the Rohrabacher-Farr Amendment, passed in 2014 and renewed by Congress each year since, prohibits the U.S. Department of Justice from using federal funds to interfere with the implementation

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[2] Section 280E of the U.S. tax code states that a marijuana business is "obligated to pay federal income tax," though it cannot deduct the cost of goods sold. This means that marijuana businesses that are legal under state law must pay a disproportionate share of their revenues to the IRS each year. The IRS obviously benefits from this scheme; it collected $4.7 billion in taxes from cannabis companies in 2017, for example, while the entire industry reported under $13 billion in total sales that year. *See* Sean Williams, *The IRS is Seeing Green on Marijuana's Dime*, The Motley Fool (Nov. 20, 2018).

[3] Cannabis business Curaleaf Nj, Inc., for example, was recently fined by OSHA for certain violations in New Jersey. *See* Occupational Safety and Health Administration Inspection 1417453.015 (Mar. 2, 2020).

of state medical marijuana laws. *See* Pub. L. No. 113-235, § 538, 128 Stat. 2130, 2217 (2014). Because the federal government has accepted intrastate sales of marijuana in practice, but has not formally endorsed them, the real action in marijuana regulation is at the state and local level. There is no reason why state and local regulators should not be required to observe the same constitutional requirements in their regulation of marijuana that govern regulation of local markets generally.

The bedrock rule of the dormant Commerce Clause, that "[p]rotectionism . . . is forbidden," *Camps Newfound/Owatonna*, 520 U.S. at 588, is not somehow suspended or attenuated with respect to state regulation simply because the federal government regulates marijuana too. *See Philadelphia v. New Jersey*, 437 U.S. 617, 622 (1978) ("All objects of interstate trade merit Commerce Clause protection; none is excluded by definition at the outset"). If states elect to permit this form of commerce, they are not free to discriminate against citizens of other states. *See Camps Newfound/Owatonna*, 520 U.S. at 578 ("By encouraging economic isolationism, prohibitions on out-of-state access to in-state resources serve the very evil that the dormant Commerce Clause was designed to prevent."). The dormant Commerce Clause applies to state cannabis regulations just like it applies to any other state laws.

Recent decisions by the State of Maine and the federal court in Maine support this conclusion. In May 2020, Maine decided not to enforce the durational residency requirement in its adult use cannabis statute after a non-resident corporation sued the State arguing that the residency requirement violated the dormant Commerce Clause. Maine's decision was based on its determination that the residency requirement "is subject to

significant constitutional challenges and is not likely to withstand such challenges." *NPG, LLC v. Dep't of Adm. & Fin. Services, et al*, Civil Action No. 1:20-cv-00107, Doc. 9 (D. Me. May 11, 2020). Several months later, in a different lawsuit, the federal court in Maine issued a preliminary injunction preventing Portland, Maine from using residency-related criteria when awarding its municipal cannabis licenses. The court rejected the City's argument that "licensing of marijuana retail stores operates in a unique dimension" outside the bounds of the dormant Commerce Clause, and held that "the dormant Commerce Clause likely restricts the City's licensing of marijuana retail stores" in a manner that favors state residents. *See NPG, LLC v. City of Portland*, 2020 WL 4741913, at *9-10 (D. Me. Aug. 14, 2020). These decisions in Maine are consistent with the commonsense principle that the dormant Commerce Clause applies to state cannabis regulations in the same way it applies to any other type of state law.

In sum, the unique legal status of marijuana does not mean that the usual constitutional rules do not apply. The federal government has permitted states to experiment with marijuana policy, and that experimentation must adhere to the requirements of the U.S. Constitution. If the federal government wished to single out interstate actors to be excluded from participating in Oklahoma's marijuana market, it could do so, but that is not a step the State of Oklahoma is constitutionally permitted to take.

CONCLUSION

This case is not about marijuana crossing state lines. That is illegal and may remain so for the foreseeable future. This case is about Oklahoma treating everyone the same,

regardless of residency, when it comes to participating in its intrastate marijuana market. Oklahoma already permits non-residents to hold up to twenty-five percent ownership in a licensed marijuana business; Original Investments is simply asking the Court to allow non-residents to participate in this intrastate market on equal terms with Oklahomans. In all other respects, Oklahoma's marijuana laws would remain unchanged. Because Oklahoma's residency requirement is unconstitutional, Original Investments requests that this Court enter judgment on the pleadings in its favor.

Dated the 23rd day of November, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of November, 2020, I electronically transmitted the foregoing document to the Clerk of Court using the ECF System for filing. I further certify that a true and correct copy of the foregoing document was sent via the ECF System to the following persons who are registered participants.

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