

New York Faces Another Setback in Cannabis Social Equity Case

Federal Appeals Court Rules New York Discriminated Against Out-of-State Cannabis Applicants

New York's already embattled marijuana licensing program faced yet another setback this week when a federal appellate court ruled that the state's prioritization of certain applicants in a recent cannabis license round unconstitutionally discriminated against out-of-state residents.

In a 2-1 decision issued on August 12, the 2nd U.S. Circuit Court of Appeals found that New York's practice of giving priority to applicants with cannabis convictions under state law amounted to a form of economic protectionism prohibited by the U.S. Constitution's dormant commerce clause.

The ruling sends the case back to a lower court, adding yet another layer to New York's already complex legal and regulatory challenges in launching a fully functioning adult-use cannabis market.

Court Finds State's Social Equity Preference Violated Dormant Commerce Clause

The appellate panel concluded that New York's licensing criteria favored residents in a way that could not be justified under the Constitution. Writing for the majority, Judge Dennis Jacobs stated that the dormant commerce clause "prohibits state protectionism unless Congress clearly authorizes specific protectionist laws," and that Congress had given no such authorization to New York.

In practical terms, the court found that giving applicants with cannabis convictions in New York "a leg up" over those with convictions in other jurisdictions created an unconstitutional barrier to interstate competition — even in an industry that remains federally illegal.

Attorneys for the Office of Cannabis Management (OCM) had argued that the dormant commerce clause does not apply to cannabis because marijuana is still prohibited under federal law. The lower court initially agreed and dismissed the case, but the appellate panel reversed that decision.

Longtime Cannabis Litigator Behind the Challenge to New York's Rules

The lawsuit was filed in December 2023 by Beverly Hills-based attorney Jeffrey Jensen, who has been a central figure in multiple challenges to New York's cannabis laws. Jensen is no stranger to these battles — in 2022, he successfully sued over the state's Conditional Adult Use Recreational Dispensary (CAURD) program, delaying permits and hindering the launch of New York's \$1.5 billion legal cannabis market.

In the most recent case, Jensen's companies, Variscite Four and Variscite Five applied for cannabis retail permits during licensing windows in November and December 2023. His legal argument centered on the claim that the Constitution prohibits states from giving preferential treatment to their own residents in a way that disadvantages out-of-state applicants.

The OCM's decision at the time to prioritize applicants with a cannabis-related conviction in New York was the specific provision challenged in this lawsuit.

Ruling Could Influence Cannabis Social Equity Programs in Other States

While the ruling may not create immediate disruption in New York's current licensing process — which has already been altered to address earlier criticisms legal observers say the decision could have far-reaching consequences nationwide.

According to attorney Jeff Schultz of Foley Hoag, the ruling may prompt lawmakers and regulators in other states to “reexamine the constitutionality of prioritizing individuals with state-level cannabis convictions for licensing purposes.”

Several states with robust cannabis markets such as Florida and Ohio currently have no social equity programs. If the decision's reasoning is applied broadly, it could make such programs legally vulnerable in states that use residency or conviction location as a deciding factor.

Broader Licensing Troubles Still Plague New York Cannabis Market

This latest setback is only one of many obstacles facing the rollout of New York's cannabis program. Recently, the OCM announced it would re-evaluate more than 100 licensed retail dispensaries that regulators say are too close to schools. Legal experts have suggested that this matter represents a much larger potential disruption to the market than the appellate court's decision.

In response to earlier lawsuits, New York regulators have already abandoned plans to limit permit awards in the November and December 2023 application queues. Instead, they are reviewing thousands of applications, a process that could take years, with some estimates projecting it may not conclude until the next decade.

At the same time, regulators have expressed concerns that they may be permitting too many retail locations, which could oversaturate the market and force some stores to close.

Dormant Commerce Clause Disputes Could Reach the U.S. Supreme Court

The tension between state level cannabis regulations and the dormant commerce clause is not unique to New York. Attorney Fatima Afia of Rudick Law Group noted that other Jensen related cases are pending in the 4th and 9th Circuit Courts of Appeals. If those courts issue rulings that conflict with the 2nd Circuit's decision, the legal question may ultimately be decided by the U.S. Supreme Court.

Such a case could carry enormous implications, potentially opening the door to interstate cannabis commerce if the Court were to strike down state residency protections and restrictions on out-of-state business

participation. This could radically reshape the economics of the legal marijuana industry in the United States.

Impact on Social Equity Goals and the Future of Cannabis Licensing

New York initially designed its social equity provisions to address the disproportionate impact of past cannabis prohibition on state residents, particularly those with convictions under New York law. Advocates saw this as a critical step toward building a more inclusive cannabis industry.

However, critics argue that favoring in-state convictions creates an uneven playing field for out-of-state entrepreneurs who also suffered from cannabis criminalization. The appellate ruling underscores the difficulty states face in balancing social equity objectives with constitutional commerce protections.

For Now, Little Change in New York's Day-to-Day Licensing Process

Despite the high-profile nature of the ruling, immediate changes in New York's licensing process are unlikely. Regulators have already modified the application review structure, and the ongoing evaluation of thousands of pending applications remains the focus.

The larger question is whether this ruling will create a chilling effect on other states considering similar equity-focused licensing preferences and whether national cannabis policy might eventually shift toward more uniform, federally guided rules.

With the cannabis industry continuing to expand and legal challenges mounting, the intersection of state regulation, federal law, and constitutional principles is becoming an increasingly complex battleground. The latest appellate decision adds yet another precedent that will shape how states approach cannabis licensing in the years ahead.

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