

Federal Judge in NY Issues Preliminary Injunction to Block Retail Cannabis Licenses on Constitutional Grounds

Article By:

Ross A. Honig

Hannah Zelcer

On November 10, 2022, in the matter [*Variscite NY One, Inc. v. State of New York, et al.*](#), the U.S. District Court for the Northern District of New York granted the plaintiff's a motion for a preliminary injunction against the State of New York ("NYS"), the New York State Office of Cannabis Management ("OCM"), and the Executive Officer of the OCM, Christopher Alexander issuing any cannabis licenses under NYS's conditional adult-use retail dispensary ("CAURD") application program in 5 of the state's 14 geographic regions.

Background

In a prior [article](#), we covered the New York Seeding Opportunity Initiative ("SOI"), a regulation aimed at providing key opportunities for farmers, entrepreneurs and individuals that have been disproportionately impacted by the War on Drugs. Notably, the proposed regulation would give individuals that meet certain criteria the first opportunity to apply for a conditional adult-use cannabis license under New York's CAURD program held from August 25 to September 26, 2022 ("CAURD"). Applicants were able to select up to five geographic regions of NYS for which their application would be considered, including: Brooklyn; Capital Region; Central New York; Finger Lakes; Long Island; Manhattan; Mid-Hudson; Mohawk Valley; North Country; Queens; Southern Tier; Staten Island; the Bronx; and Western New York.

Pursuant to order 116 of Chapter II of Subtitle B of Title 9 of the Official Compilation of Codes, Rules and Regulations of the State of New York (the "Cannabis Regulations"), to become eligible for a CAURD license, applicants must meet certain criteria which includes, but is not limited to:

1. having a demonstrable and significant presence in New York;
2. being "justice involved," which means an individual that prior to the passage of the [Marihuana Regulation and Tax Act](#) ("MRTA") on March 31, 2021:
 - was convicted in NYS for a cannabis related offense; or

-
- had a parent, legal guardian, child, spouse or dependent that was convicted in NYS for a cannabis related offense; or
 - was a dependent of an individual convicted in NYS for a cannabis related offense; and
3. if the applicant is, or is controlled by a nonprofit organization, at least 51% or more of the applicant must be owned by an individual that satisfies the criteria set forth in (1) and (2) above.

Variscite NY One, Inc. v. State of New York et al.,

The plaintiff in *Variscite NY One, Inc. v. State of New York, et al.*, is a corporation organized under the laws of NYS and is 51% owned by an individual that was convicted of a cannabis related offense. However, because the conviction was under Michigan law, the plaintiff was ineligible to apply for a CAURD license despite meeting all other criteria.

Similar to a successful challenge to a Maine statute prohibiting non-residents from owning medical marijuana businesses in Maine^[1] and a challenge to a City of Detroit program granting application preferences to so-called “legacy” residents,^[2] the plaintiff commenced an action against the defendants alleging that the requirements for eligibility to apply and receive a CAURD license will have a discriminatory effect on out-of-state residents and thus, violates Article I, Section 8, Clause 3 of the U.S. Constitution, which grants Congress the power to regulate interstate commerce and prohibits the states from discriminating against the commerce of other states (the “Dormant Commerce Clause”).

Under established law, a state regulation that discriminates against out-of-state goods or non-residents can only be sustained on a showing that it is narrowly tailored to advance a legitimate local purpose.^[3] Here, the plaintiff argued that the Cannabis Regulations are not narrowly tailored because there are nondiscriminatory methods that could address the ramifications of cannabis criminalization and benefit the entire community rather than just those applicants meeting the eligibility requirements. According to the Court’s decision, the defendants failed to even attempt to make the requisite showing that the Cannabis Regulations are narrowly tailored to a legitimate local purpose.

Thus, the Court granted the plaintiff’s motion for a preliminary injunction and enjoined the defendants from issuing any cannabis licenses under CAURD in the Finger Lakes, Central New York, Western New York, Mid-Hudson and Brooklyn regions because:

1. the harm in this case infringes on constitutional rights and therefore, is considered an irreparable harm which cannot be adequately compensated through a monetary award;
2. the injunction will balance the hardships of the plaintiff and any other applicants because no applications have been granted or denied yet; and
3. the Court determined that it is in the public’s interest to enjoin an unconstitutional policy, regulation, or ordinance when constitutional alternatives are available.

In response to this decision, on November 22, 2022, the defendants filed a notice of motion with the Court that upon a date to be scheduled by the Court, they will make a motion for an order to (i) grant

defendants' motion to modify the Court's decision and injunction; and in the alternative (ii) grant defendants' motion for a stay of the injunction, pending appeal.

In the interim, on November 21, 2022, the New York State Cannabis Control Board (the "Cannabis Control Board") approved a total of 36 CAURD licenses to 28 entrepreneurs and 8 nonprofit organizations. Of those 36 licenses, 13 were issued to applicants in the New York City region, 7 in the Long Island region and the remaining 8 to applicants in the other regions unaffected by the *Variscite* case. Another 139 CAURD licenses are anticipated to be issued to individual and nonprofit applicants on a rolling basis. According to a recent [New York Time's article](#), regulators were prepared to issue 18 licenses in the regions covered by the injunction, which included Albany, Brooklyn and Buffalo.

Additionally, on November 21, 2022, the Cannabis Control Board also announced it has approved a comprehensive adult-use regulation package that outlines the rules that licensees must abide by.

FOOTNOTES

[1] [*Northeast Patients Group, d/b/a Wellness Connection of Maine; High Street Capital Partners, LLC vs. United Cannabis Patients and Caregivers of Maine*](#), Case No. 21-1719 (1st Cir., 2022)

[2] [*Lowe vs. City of Detroit*](#), Case No. 21-CV-10709 (East Dist. Mich. – Southern Div.)

[3] *Tenn. Wine & Spirits Retailers Assn v. Thomas*, 139 S. Ct. 2449 (2019)

Copyright © 2025, Sheppard Mullin Richter & Hampton LLP.

National Law Review, Volume XII, Number 332

Source URL: <https://natlawreview.com/article/federal-judge-ny-issues-preliminary-injunction-to-block-retail-cannabis-licenses>