

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

VARISCITE NY ONE, INC.,

Plaintiff,

v.

STATE OF NEW YORK; NEW YORK STATE
OFFICE OF CANNABIS MANAGEMENT;
AND CHRISTOPHER ALEXANDER,

Defendants.

COMPLAINT FOR

- 1. 42 U.S.C. § 1983
DORMANT COMMERCE
CLAUSE**
- 2. DECLARATORY
JUDGMENT**

Civil Action No.: 1:22-cv-1013 (GLS/DJS)

INTRODUCTION

Plaintiff Variscite NY One, Inc. (“Plaintiff”) brings this action against defendants State of New York (the “State”); New York State Office of Cannabis Management (“OCM”); and Christopher Alexander (collectively, “Defendants”).

PARTIES

1. Plaintiff Variscite NY One, Inc. is a corporation organized under the laws of the State of New York.
2. Defendant State of New York is a U.S. State.
3. Defendant New York Office of Cannabis Management is an office of the State of New York.

4. Defendant Christopher Alexander is the Executive Officer of the New York Office of Cannabis Management. Plaintiff sues Mr. Alexander in his official capacity.

JURISDICTION AND VENUE

5. The Court has subject matter jurisdiction over the matters asserted herein under 28 U.S.C. section 1331 because the action involves questions under the United States Constitution.

6. The Court has personal jurisdiction over the OCM because it is a citizen of New York.

7. The Court has personal jurisdiction over Mr. Alexander because, on information and belief, he is a domiciliary of New York and he took the actions complained of herein while in New York.

8. Venue is proper in this Judicial District under 28 U.S.C. section 1391(b)(1) because on information and belief, OCM is a division of the State, the laws and regulations challenged herein were passed in Albany, and Defendants performed the actions complained of herein while within this Judicial District.

RELEVANT FACTS

A. The CAURD Application Program Favors New York Residents

a. The Cannabis Law

9. On March 31, 2021, the State of New York enacted the Marihuana Regulation & Taxation Act, with the short title of “Cannabis Law.” NY CANBS § 1.¹

10. Under Section 3 of the Cannabis Law, a person (including an entity) is allowed to be an “applicant” for a cannabis license if that person “has a significant presence in New York state, either individually or by having a principal corporate location in the state; is incorporated or otherwise organized under the laws of this state; or a majority of the ownership are residents of this state.” NY CANBS § 3.

¹ The Cannabis Laws and Cannabis Regulations are different for nonprofit and tax-paying entities. This Complaint focuses on the laws and regulations for tax-paying entities.

11. Under Section 11 of the Cannabis Law, the OCM and the executive director have the power to prescribe the form of applications for cannabis licenses. NY CANBS § 11(4).

b. The Cannabis Regulations

12. On August 3, 2022, the OCM adopted part 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”). N.Y. Comp. Codes R. & Regs. tit. 9, § 116.1, *et seq.* That section governs conditional adult-use retail dispensary (“CAURD”) licenses, and the CAURD Application Program to award the licenses.

13. Section 116.4(a) of the Cannabis Regulations lists the “minimum requirements [that] must be met to become an eligible applicant” for an adult-use recreational cannabis dispensary license.

14. Under Section 116.4(a)(1), an applicant must have “(i) a significant presence in New York State, either individually or by having a principal corporate location in the state; (ii) it is incorporated or otherwise organized under the laws of New York State; or (iii) a majority of the ownership of the applicant are residents of New York State by being physically present in the state no less than 180 calendar days during the current year or 540 calendar days over the course of three years[.]” N.Y. Comp. Codes R. & Regs. tit. 9, § 116.4(a)(1).

15. Under Section 116.4(a)(2), if an applicant is an entity with one or more individual owners, the applicant must have one or more “justice involved” individual owners who collectively hold at least 51% of the equity of the applicant. A justice involved individual “(a) was convicted of a marihuana-related offense in New York State prior to the thirty-first of March two thousand twenty-one; (b) had a parent, legal guardian, child, spouse, or dependent who was convicted of a marihuana-related offense in New York State prior to the thirty-first of March two thousand twenty-one; or (c) was a dependent of an individual who was convicted of a marihuana-related offense in New York State prior to the thirty-first of March two thousand twenty-one[.]” N.Y. Comp. Codes R. & Regs. tit. 9, § 116.4(a)(2)(i).

16. Under Section 116.4(a)(2), the applicant must provide proof of the justice involved individual’s residence at the time of the individual’s arrest or conviction. N.Y. Comp. Codes R. &

Regs. tit. 9, § 116.4(a)(2)(ii). Plaintiff believes on information and belief, and thereon alleges, that Defendants will score an applicant higher if the individual's residence at the time of the individual's arrest or conviction was in New York.

17. Section 116.4(c) sets forth the criteria by which Defendants will evaluate the CAURD applications. N.Y. Comp. Codes R. & Regs. tit. 9, § 116.4(c).

18. Under Section 116.4(c)(1), the application criteria includes whether the justice involved individual himself/herself (as opposed to a relative) was convicted of a cannabis crime under New York law. N.Y. Comp. Codes R. & Regs. tit. 9, § 116.4(c)(1).

19. Under Section 116.4(c)(2), the application evaluation criteria includes whether the justice involved individual's primary residence at the time of the arrest or conviction (i) had a historically high rates of arrest, conviction, or incarceration for marijuana-related offenses or (ii) had historically low median income. N.Y. Comp. Codes R. & Regs. tit. 9, § 116.4(c)(2)(i-ii). Plaintiff believes on information and belief, and thereon alleges, that Defendants will score an applicant higher if the individual's residence at the time of the individual's arrest or conviction with a historically high rate of arrest, conviction, or incarceration for Marijuana-related offenses and historically low median income was in New York.

20. Under Section 116.4(c)(2), the application evaluation criteria includes whether the justice involved individual lived-in housing provided by New York Public Housing Authority. N.Y. Comp. Codes R. & Regs. tit. 9, § 116.4(c)(2)(iii).

c. Frequently Asked Questions Document

21. The OCM published a *Conditional Adult-Use Retail Dispensary Frequently Asked Questions* document. That document provides the question: "What documents can I provide to prove a significant New York State presence?" It then provides the answer that "Applicants are required to have a significant New York State presence or to otherwise satisfy the definition of applicant in the Cannabis Law and may be asked to submit documentation to prove such. If you are asked to submit documentation, acceptable documentation includes:

- Proof of the individual with sole control’s residency in New York State (any residency document listed in Question 10);
- Checking, savings, retirement, or brokerage statements showing assets in New York State;
- Tax filings showing assets, accounts, or property in New York State;
- Deeds, titles, mortgage documents, or homeowner warranties showing property ownership in New York State; or
- Any other proof of New York State presence as determined by the Office.”

d. The Cannabis License Application

22. Defendants required applicants to submit their applications online through Defendants’ New York Business Express application website. Defendants accepted applications through the system from August 25, 2022, through September 26, 2022.

23. The login page for the New York Business Express application website provides an “Overview” of the application requirements. It states: “To be eligible as an individual or as a taxable entity, applicants must meet all of the following requirements: - A significant presence in New York State - Majority of the retail dispensary business is owned and controlled by a justice involved person (or people) with qualifying business ownership experience -” It also provides a definition of justice involved person: “Justice Involved means someone who has been convicted of a marijuana-related offense in New York State before 3/31/2021 or is the spouse, child, legal guardian, or dependent of someone who has been convicted of a marijuana-related offense in NYS before 3/31/2021.”

24. Applicants must log into the New York Business Express application website to submit their applications. The application for taxable entities requires the applicant to check a box stating that a person with sole control over the applicant has a significant New York presence. If the applicant does not check that box, the applicant will not be allowed to proceed to the next webpage of the application. Instead, the applicant will receive the error message: “The business principal with sole

control over the CAURD applicant must have significant presence in New York State to be eligible for a CAURD license.”

25. The application for taxable entities also requires the applicant to list individuals owning at least 51% total equity of the applicant who are justice involved. The application again explains that “A justice-involved individual is an applicant or an individual with ownership interest in an applicant that has been convicted of a marihuana-related offense in New York State before March 31, 2021, or is the parent, spouse, child, guardian, or dependent of someone who has been convicted of a marihuana-related offense in New York State before March 31, 2021.”

26. The application further explains that a justice involved individual must have a cannabis conviction under New York law: “For the justice-involved criteria, unless otherwise prohibited under Cannabis Law Section 137, a marihuana-related offense is defined as: An offense described under article 221 of the New York State Penal Law (Offenses Involving Marihuana) prior to its repeal on March 31, 2021; or An offense described under article 220 or section 240.36 of the Penal Law where the substance involved was marihuana, that occurred prior to the creation of article 221 in 1977; or An arrest for an offense as described above that ultimately led to a conviction for another offense, such as non-drug offense, violation, or misdemeanor, by means of a plea deal or other mechanism.”

27. The application requires applicants to check a box for yes or no to the question: “Has the above owner been convicted of a marihuana-related offense in New York State before March 31, 2021, or are they the parent, spouse, child, guardian, or dependent of someone who has been convicted of a marihuana-related offense in New York State before March 31, 2021?” If the applicant selects no, the applicant will not be allowed to proceed to the next webpage of the application, and instead will receive the error message: “In order to be eligible for a CAURD license, an individual with sole control must hold at least 30% of the entity and meet all CAURD eligibility criteria and justice involved individuals [sic] must hold at least 51% of the entity.”

28. On the next webpage of the application, the applicant must upload documentation of the justice involved individual’s conviction for the New York marijuana crime.

29. The application also asks, “Has the applicant or does the applicant intend to apply for New York State certified Minority-Owned Business, Woman-Owned Business, Minority Woman-Owned Business or Service Disabled Veteran-Owned Business status?”

B. The CAURD Application Program Requires Applicants to Select up to Five Geographic Areas

30. Defendants required CAURD applicants to select up to five geographic regions of New York State for which the application would be considered. Defendants divided the State into fourteen geographic regions: 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.

C. Plaintiff Satisfies All Application Requirements Except the Unconstitutional New York Preferences

31. Plaintiff applied in the CAURD Application Program. Plaintiff is 51% owned by an individual who has a cannabis conviction under Michigan law. At the time of his arrest and conviction, he lived in an area that (i) had a historically high rates of arrest, conviction, or incarceration for marihuana-related offenses and (ii) had historically low median income according to a study published by the State of Michigan. Plaintiff satisfies all requirements of the Cannabis Law and Cannabis Regulations to apply in the CUARD Application Program except that its 51% owner’s cannabis conviction occurred under Michigan law rather than New York law and he has no significant connection to New York. If Plaintiff is selected for a license, the 51% owner will have sole control, as defined in the Cannabis Regulations.

32. Plaintiff’s 51% owner owned more than 10% of a business that was profitable for more than two years.

33. Plaintiff identified the following five geographic areas in its CAURD Program Application: Finger Lakes; Central New York; Western New York; Mid-Hudson; and Brooklyn.

FIRST CAUSE OF ACTION

(Dormant Commerce Clause, 42 U.S.C. § 1983)

(Plaintiff Against All Defendants)

34. Plaintiff realleges and incorporates herein by reference each of the allegations set forth in the preceding paragraphs of the Complaint as though fully set forth herein.

35. A state, including its subdivisions, may not enact laws that discriminate against citizens of other states. *See, e.g., Tennessee Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449 (2019); *Fulton Corp. v. Faulkner*, 516 U.S. 325, 116 S. Ct. 848 (1996); *Oregon Waste Sys., Inc. v. Dep't of Env'tl. Quality of State of Or.*, 511 U.S. 93 (1994); *Dean Milk Co. v. Madison*, 340 U.S. 349 (1951).

36. Defendants enacted laws and regulations that provide a preference to New York residents over out-of-state residents for applications for storefront retail dispensary cannabis licenses. In doing so, Defendants violated the dormant Commerce Clause of the United States Constitution.

37. Defendants violated Plaintiff's rights by depriving Plaintiff of the opportunity to fairly compete for a license to operate a storefront retail cannabis dispensary, in violation of the dormant Commerce Clause.

38. Injunctive relief is necessary to prevent Defendants from enforcing the Cannabis Law or Cannabis Regulations, and the CAURD Application Program they created, that favors New York residents over out-of-state residents.

39. Injunctive relief is necessary to prevent Defendants from processing any applications for a storefront cannabis dispensary license Defendants received in the CAURD Application Program because the residency preferences violate the United States Constitution and subject Plaintiff to serious, concrete, and irreparable injuries.

SECOND CAUSE OF ACTION

(Declaratory Relief, 28 U.S.C. § 2201)

(Plaintiff Against All Defendants)

40. Plaintiff realleges and incorporates herein by reference each of the allegations set forth in the preceding paragraphs of the Complaint as though fully set forth herein.

41. The CAURD Application Program violates the dormant Commerce Clause of the United States Constitution. An actual controversy exists between Plaintiff and Defendants as to whether Defendants may enforce the residency requirements. A further controversy exists as to whether Defendants may process any applications for a storefront cannabis dispensary license Defendants received from the CAURD Application Program Defendants implemented from August 25 to September 26, 2022.

42. Declaratory relief is necessary to resolve this dispute.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for relief as follows:

1. For the first claim, an injunction:
 - a. Prohibiting Defendants from processing any applications for storefront cannabis dispensary licenses from the CAURD Application Program held from August 25 to September 26, 2022.
 - b. Prohibiting Defendants from enforcing the any portions of the Cannabis Law or Cannabis Regulations that favor New York residents over out-of-state residents, including:
 - i. NY CANBS § 3, which requires an applicant to have a significant presence in New York.
 - ii. N.Y. Comp. Codes R. & Regs. tit. 9, § 116.4(a)(1), which requires an applicant to have a significant presence in New York.
 - iii. N.Y. Comp. Codes R. & Regs. tit. 9, § 116.4(a)(2)(i) and N.Y. Comp. Codes R. & Regs. tit. 9, § 116.4(c)(1), which require an applicant to have one or more “justice involved” individual owners who collectively hold at least 51% of the equity of the applicant. A justice involved individual “(a) was convicted of a marijuana-

related offense in New York State prior to the thirty-first of March two thousand twenty-one; (b) had a parent, legal guardian, child, spouse, or dependent who was convicted of a marihuana-related offense in New York State prior to the thirty-first of March two thousand twenty-one; or (c) was a dependent of an individual who was convicted of a marihuana-related offense in New York State prior to the thirty-first of March two thousand twenty-one[.]”

- iv. N.Y. Comp. Codes R. & Regs. tit. 9, § 116.4(c)(2)(iii) which favors in the application evaluation criteria justice involved individuals who lived in housing provided by New York Public Housing Authority.
 - v. Prohibit Defendants from evaluating applications under N.Y. Comp. Codes R. & Regs. tit. 9, § 116.4(a)(2)(ii) or N.Y. Comp. Codes R. & Regs. tit. 9, § 116.4(c)(2)(i-ii) in a manner that favors New York residences over out-of-state residences when considering the justice involved individual’s residence at the time of arrest or conviction.
 - vi. Prohibit Defendants from evaluating applications in a manner that favors New York State certified Minority-Owned Business, Woman-Owned Business, Minority Woman-Owned Business or Service-Disabled Veteran-Owned Business status.
2. For the second claim, a declaration that:
- a. The Cannabis Law violates the dormant Commerce Clause, including NY CANBS § 3.
 - b. The Cannabis Regulations violate the dormant Commerce Clause, including N.Y. Comp. Codes R. & Regs. tit. 9, § 116.4(a)(1); N.Y. Comp. Codes R. & Regs. tit. 9, § 116.4(a)(2)(i); N.Y. Comp. Codes R. & Regs. tit. 9, § 116.4(c)(1); N.Y. Comp. Codes R. & Regs. tit. 9, § 116.4(c)(2)(iii); N.Y. Comp. Codes R. & Regs. tit. 9, § 116.4(a)(2)(ii); N.Y. Comp. Codes R. & Regs. tit. 9, § 116.4(c)(2)(i-ii).
 - c. Favoring New York State certified Minority-Owned Business, Woman-Owned Business, Minority Woman-Owned Business or Service-Disabled Veteran-Owned Business status violates the dormant Commerce Clause.
 - d. The CAURD Application Program violates the dormant Commerce Clause.
3. An award of attorneys’ fees and costs.

4. For such other and further relief as this Court shall deem appropriate.

Dated: September 26, 2022

Respectfully submitted,

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