UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

NPG, LLC d/b/a Wellness Connection, and High Street Capital Partners, LLC, Plaintiffs, v. City of Portland, Maine, Defendant.	Civil Action No. **INJUNCTIVE RELIEF SOUGHT**

MOTION FOR PRELIMINARY INJUNCTION
WITH INCORPORATED MEMORANDUM OF LAW

Plaintiffs move for the entry of a preliminary injunction, pursuant to Fed. R. Civ. P. 65(a), enjoining the City from enforcing the residency preference in section 35-14(f)(4) of the City of Portland Code of Ordinances because it violates the Commerce Clause of the United States Constitution.

FACTUAL BACKGROUND

There is a vibrant marijuana industry in the United States. Marijuana is legal for adult use in 11 states and for medical use in 33 states.[1] 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*

[1] *See* Jeremy Berke and Skye Gould, *Legal Marijuana Just Went on Sale in Illinois. Here Are All the States Where Cannabis is Legal*, Business Insider (Jan. 1, 2020).

States Attorneys: Guidance Regarding Federal Marijuana Enforcement, Office of the Deputy Attorney General (Aug. 29, 2013).[2]

Medical marijuana has been legal in Maine since 1999. *See* 22 M.R.S. § 2383-B (1999) (amended in 2009 by L.D. 975). Adult use marijuana was legalized by citizen referendum in 2016, and the legislature then created the framework in Title 28-B that governs its commercial cultivation, production, and sale. *See* L.D. 1719 (128th Legis. 2018) (subsequently amended in part). After promulgating additional rules to govern the industry, Maine's Office of Marijuana Policy began accepting applications for the adult use market in December 2019.

Selling marijuana at a retail location in Maine requires a license from both the State and the host municipality. *See* 28-B M.R.S. § 402. The City of Portland, which will be one of Maine's most lucrative markets, has adopted an ordinance to permit up to 20 adult use retail stores. This ordinance creates a competitive process that uses a points matrix to award the 20 available licenses. Portland, Me., Code § 35-14(f)(4). The matrix, reproduced in **Exhibit A**, makes available 34 total points, 5 of which are awarded to an applicant that is "[a]t least 51% owned by individual(s) who have been a Maine resident for at least five years," and 4 of which are awarded to an applicant that is "[o]wned by individual(s) who have previously been licensed by the State of Maine or a Maine municipality for non-marijuana related business, with no history of violations or

[2] 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).

license suspensions or revocations for minimum of 5 years." The 20 applicants with the highest scores will receive licenses, except that if two applicants are within 250 feet of each other, then only the applicant with the higher score will receive a license.

Nine of the 34 points in Portland's points matrix—more than 25% of the total—are awarded based on criteria that favor Maine residents. Because it discriminates against non-residents, Portland's points matrix violates the dormant Commerce Clause of the U.S. Constitution. The City Council adopted the matrix a week after the State of Maine announced that it would no longer be enforcing the residency requirement in Maine's adult use marijuana statute, a decision made in response to a lawsuit by Plaintiff NPG, LLC d/b/a Wellness Connection ("Wellness Connection"), and on the advice of the Attorney General that the state residency requirement "is subject to significant constitutional challenges and is not likely to withstand such challenges." Stipulation of Dismissal, *NPG, LLC, et al. v. Dep't of Admin. and Fin. Servs., et al.*, Civil Action No. 1:20-cv-00107-NT (filed May 11, 2020). This caused the City's lawyer to offer an amendment that would have removed the residency preference from the points matrix. The City Council rejected the amendment and instead doubled down on the residency preference, making clear that the purpose of the residency preference was to "advantage or give a slight preference for individual and entities that have been Maine residents," and to "allow the local market to grow before there was an opportunity for outside investment." Portland City Council Meeting (May 18, 2020) at 3:42:52 – 3:43:30; 3:45:15 – 3:47:20.[3]

[3] Available at https://reflect-pmc-me.cablecast.tv/CablecastPublicSite/show/15380?channel=1.

The backdrop to the Council's decision to create a residency preference is that competition for licenses in Portland is expected to be fierce, because the licenses will be valuable. The medical marijuana industry in Maine is already highly lucrative, with retail sales reaching $111.6 million last year, making it the state's third largest industry.[4] And as lucrative as Maine's medical marijuana program has been, it is expected to be largely replaced by the state's adult use market.[5] Portland will be the prime adult use location in Maine, given its size and status as a tourist destination. Portland has been the most profitable medical marijuana market in the State, and this is likely to also be the case for adult use sales. *See Declaration of Ron A. MacDonald*, ¶¶ 7-8, attached as **Exhibit B**.

Plaintiff Wellness Connection plans to apply for an adult use retail license in Portland. *Id.* ¶ 6. Wellness Connection is currently 100 percent owned by Plaintiff High Street Capital Partners, LLC ("High Street"), a Delaware entity that is at least 95 percent owned by non-Maine residents who have never held licenses in Maine to operate non-marijuana related businesses. Declaration of Kevin Murphy, ¶¶ 4-5, attached as **Exhibit C**. Because Wellness Connection is 100 percent owned by High Street, a non-resident corporation that does not have the previous Maine licenses the points matrix is looking for, it is at a major disadvantage with respect to the 9 of the 34 points to be awarded to applicants who meet the two residency-related criteria.

Portland's marijuana ordinance takes effect on June 17, 2020. The City has not yet announced when it will begin accepting applications and awarding licenses, but it is

[4] *See* Penelope Overton, *State's Medical Marijuana Market Much Bigger than Anyone Realized*, Portland Press Herald (Feb. 24, 2019).
[5] *See* Lori Valigra, *How the First Year of Maine's Recreational Marijuana Market Will Likely Roll Out*, Bangor Daily News (Jun. 17, 2019).

expected to do so in the coming weeks. A preliminary injunction is needed before the City begins awarding licenses; otherwise licenses will be awarded with an unconstitutional preference given to Maine residents, an injury that cannot be redressed in the future with monetary damages.

ARGUMENT

Courts weigh four factors in ruling on a motion for preliminary injunction: (1) the plaintiff's likelihood of success on the merits; (2) the potential for irreparable harm to the plaintiff if injunctive relief is denied; (3) the potential hardship to the defendant and the balance of harms; and (4) the public interest. *See, e.g.*, *Esso Standard Oil Co. v. Monroig-Zayas*, 445 F.3d 13, 18 (1st Cir. 2006). Because the residency preference is unconstitutional under binding Supreme Court precedent, and the other factors support preliminary injunctive relief, this motion should be granted.

A. Plaintiffs are likely to succeed on the merits of their claims because the residency preference discriminates on its face against non-residents.

The first and "most important part of the preliminary injunction assessment" is the likelihood of success on the merits. *Jean v. Massachusetts State Police*, 492 F.3d 24, 27 (1st Cir. 2007). This factor favors Plaintiffs because Portland's points matrix treats residents and non-residents differently by giving a very significant advantage in the competition for licenses to open adult use marijuana businesses—9 of the 34 available points—to entities that are "[a]t least 51% owned by individual(s) who have been a Maine resident for at least five years" (5 points), and are "[o]wned by individual(s) who have previously been licensed by the State of Maine or a Maine municipality for non-marijuana related business" (4 points) (Portland, Me., Code § 35-14(f)(4)). This residency preference is unconstitutional because it explicitly favors

Maine 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 that applicants for a license to operate a liquor store 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").

"The core purpose of the dormant Commerce Clause is to prevent states and their political subdivisions from promulgating protectionist policies." *Houlton Citizens' Coal. v. Town of Houlton*, 175 F.3d 178, 188 (1st Cir. 1999). "Protectionism . . . is forbidden under the dormant Commerce Clause." *Camps Newfound,* 520 U.S. at 588. Application of the dormant Commerce Clause is straightforward where a law discriminates against nonresidents on its face. "In the jurisprudence of the dormant Commerce Clause, a finding of facial discrimination is almost always fatal." *Houlton Citizens' Coal.*, 175 F.3d at 185; *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). The key principle is that "in matters of foreign and interstate commerce there are no state lines." *West v. Kansas Natural Gas Co.*, 221 U.S. 229, 255 (1911) (quotation marks omitted).

Portland's points matrix is unconstitutional because it "plainly favors" Mainers over non-residents. *Tennessee Wine*, 139 S. Ct at 2462. The City reserves 5 of the 34 available points for Mainers, and another 4 points for applicants who have been licensed by Maine or a Maine municipality in a non-marijuana-related industry—a category that

further favors in-state applicants. The result is that the points matrix gives Mainers a major advantage over non-residents in winning more than a quarter of the total available points in the competition to obtain one of Portland's 20 coveted licenses. That is unconstitutional.

The City's residency preference is not saved by the fact that it does not absolutely prohibit the issuance of licenses to non-Maine entities. "[I]f a state law has either the purpose or effect of significantly favoring in-state commercial interests over out-of-state interests, the law will 'routinely' be invalidated 'unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism.'" *Walgreen Co. v. Rullan*, 405 F.3d 50, 55–56 (1st Cir. 2005) (upholding dormant Commerce Clause challenge to certificate-of-need requirement that was implemented so as to favor in-state companies where, "of those applicants forced to endure the hearing process, the Secretary has granted certificates to ninety percent of the local applicants but only to fifty-eight percent of out-of-Commonwealth applicants"). A law can be facially discriminatory even when it "does not involve a total prohibition." *Camps Newfound*, 520 U.S. at 578 (holding that a Maine statute that "provide[d] a strong incentive for affected entities not to do business with nonresidents" violated the dormant Commerce Clause). The question is "whether the challenged regulation confers an advantage upon in-state economic interests—either directly or through imposition of a burden upon out-of-state interests—vis-a-vis out-of-state competitors." *Stephen D. DeVito, Jr. Trucking, Inc. v. Rhode Island Solid Waste Mgmt. Corp.*, 770 F. Supp. 775, 782 (D.R.I.), *aff'd sub nom. DeVito v. Rhode Island Solid Waste Mgmt. Corp.*, 947 F.2d 1004 (1st Cir. 1991) (alternations omitted); *see also Houlton Citizens' Coal.*, 175 F.3d at 188 (the commerce clause is not violated "if local legislation leaves all

comers with equal access to the local market," and if "in-state and out-of-state bidders are allowed to compete freely on a level playing field").

In short, the distinction between "total elimination" of out-of-state products and the placing of out-of-state products "at a substantial commercial disadvantage . . . makes no difference for purposes of Commerce Clause analysis." *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 275 (1988) (striking down tax credit that benefited local producers over non-residents). Because Portland's residency preference significantly favors in-state commercial interests and disadvantages non-residents—and it is evident from the language and history of the provision that it was intended to do just that—the residency preference, although not an absolute prohibition, is unconstitutional.

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.* If plaintiffs meet their burden, then "a discriminatory law 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 legitimate local purposes and the lack

of non-discriminatory alternatives, and discriminatory state laws rarely satisfy this exacting standard." *Family Winemakers of California v. Jenkins*, 592 F.3d 1, 9 (1st Cir. 2010). To meet this burden a state or municipality must present "'concrete record evidence,' and not 'sweeping assertion[s]' or 'mere speculation,' to substantiate its claims that the discriminatory aspects of its challenged policy are necessary to achieve its asserted objectives." *Id.* at 17 (quoting *Granholm v. Heald*, 544 U.S. 460, 492–93 (2005)).

Portland cannot demonstrate a legitimate local purpose for the residency preference in its points matrix. The City Council was clear that the point of the residency preference is to "allow the local market to grow before there was an opportunity for outside investment to come in," and to "advantage . . . individuals and entities that have been Maine residents, local businesses, smaller businesses." Portland City Council Meeting, supra at 3, at 3:42:52 – 3:43:30; 3:45:15 – 3:47:20. *See Family Winemakers of California*, 592 F.3d at 14 (looking to statements made by various Massachusetts legislators to determine that intent was to benefit the local wine industry). Because the points matrix facially discriminates against non-residents, it is "virtually per se invalid." *Camps Newfound,* 520 U.S. at 575. And because Portland has been explicit that discrimination against non-residents is the whole point of the residency preference, it cannot overcome the *per se* rule of invalidity. *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).

Although marijuana remains illegal in the federal statute books, federal marijuana laws are not enforced with respect to the type of commerce the Portland

ordinance permits. *See supra* at 1-2. In fact, far from prohibiting their operation, the federal government regulates, oversees, and profits from marijuana businesses in all sorts of ways. Marijuana businesses must pay taxes to the Internal Revenue Service.[6] They must comply with requirements of the Occupational Safety and Health Administration.[7] 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 of state medical marijuana laws. *See* Pub. L. No. 113-235, § 538, 128 Stat. 2130, 2217 (2014). Because the federal government has, in practice, accepted intrastate sales of marijuana, 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.

---

[6] 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 portion 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).

[7] 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).

To be clear, the injunction Plaintiffs seek would not allow the interstate sale of marijuana products, or change any aspect of Portland's marijuana law other than the criteria for awarding licenses. With respect to the residency preference, Portland's ordinance already permits non-residents to participate in its marijuana market; the injunction Plaintiffs seek would simply put them on equal footing with residents in the competition to obtain one of Portland's 20 licenses. In all other respects, Portland's marijuana laws would remain unchanged.

The Supreme Court has held that regulation of marijuana "is squarely within Congress' commerce power . . . ." *Gonzales v. Raich*, 545 U.S. 1, 19 (2005). Since the Commerce Clause gives Congress the power to regulate marijuana, it also bars states and municipalities from discriminating against nonresidents with respect to commerce in marijuana. *See Hughes v. Oklahoma,* 441 U.S. 322, 326 n.2 (1979) ("[T]he definition of 'commerce' is the same when relied on to strike down or restrict state legislation as when relied on to support some exertion of federal control or regulation."); *Houlton Citizens' Coal.*, 175 F.3d at 184 (this same principal applies to local government). The current state of federal marijuana policy is unsettled (*see* testimony of Attorney General Barr cited *supra* note 2), but that does not give Portland a license to engage in unconstitutional discrimination. As the Supreme Court has made clear, "[a]ll objects of interstate trade merit Commerce Clause protection; none is excluded by definition at the outset." *Philadelphia v. New Jersey*, 437 U.S. 617, 622 (1978); *see also Oregon Waste Sys., Inc.*, 511 U.S. at 99 ("[D]iscrimination simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter. If a restriction on commerce is discriminatory, it is virtually *per se* invalid.").

The bedrock rule that "[p]rotectionism . . . is forbidden under the dormant Commerce Clause" (*Camps Newfound,* 520 U.S. at 588) is not somehow suspended or attenuated simply because the federal government regulates marijuana too. If states and localities elect to permit this form of commerce, they are not free to discriminate against citizens of other states. *See id.* 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."). This is why Maine recently decided not to enforce its ban on non-resident participation in the State's adult use marijuana market. The State acknowledged, on the advice of the Attorney General, that such a residency restriction "is subject to significant constitutional challenges and is not likely to withstand such challenges." Stipulation of Dismissal, *NPG, LLC et al. v. Dep't of Admin. and Fin. Servs., et al.,* Civil Action No. 1:20-cv-00107-NT (filed May 11, 2020).

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 and localities to experiment with marijuana policy, and that experimentation must adhere to the requirements of constitutional law.

B. Plaintiffs will experience irreparable harm if a preliminary injunction is not granted.

Because Portland's residency preference discriminates against non-residents on its face and is therefore *per se* invalid, Plaintiffs are very likely to succeed on the merits of their claim. That means they can "show somewhat less in the way of irreparable harm and still garner preliminary injunctive relief." *See EEOC v. Astra USA, Inc.*, 94 F.3d 738, 743 (1st Cir. 1996) ("[W]hen the likelihood of success on the merits is great, a movant can show somewhat less in the way of irreparable harm and still garner

preliminary injunctive relief."); *Vaqueria Tres Monjitas, Inc. v. Irizarry*, 587 F.3d 464, 485 (1st Cir. 2009) ("[T]he measure of irreparable harm is not a rigid one; it has been referred to as a sliding scale, working in conjunction with a moving party's likelihood of success on the merits."). That said, independent from the benefit of the sliding scale, Plaintiffs will suffer concrete irreparable harm in the absence of an injunction.

If injunctive relief is not granted, Plaintiffs will be injured because of the significant disadvantage they face, as companies owned by non-residents, in obtaining a retail marijuana license in Portland. If Portland is permitted to award its 20 retail marijuana licenses using the unconstitutional residency preference, then even if Plaintiffs eventually win this lawsuit on the merits, the victory will have little practical effect, since all available licenses will have already been allocated. Plaintiffs will in all likelihood be without a license, and without recourse to recover damages against the City, as it is not possible to measure lost profits in the context of a start-up business in a new market. The only way to avoid this harm to Plaintiffs is to enjoin the use of the unconstitutional residency preference in Portland's points matrix before any licenses are awarded.

While in many cases "economic damages can be remedied by compensatory awards, and thus do not rise to the level of being irreparable," courts have held that "some economic losses can be deemed irreparable." *Id.* The First Circuit has "recognized that the loss of a unique or fleeting business opportunity can constitute irreparable injury." *Starlight Sugar, Inc. v. Soto*, 114 F.3d 330, 332 (1st Cir. 1997). "[A]s a practical matter the potential value of an evanescent business opportunity may be extremely difficult to measure, after the fact." *Id.*

Plaintiffs will be irreparably injured if they are denied an equal opportunity to participate in, and profit from, Portland's emerging and lucrative marijuana market. The injury caused by unconstitutional limitations on the opportunity to take advantage of the unique and fleeting business opportunity offered by Portland's retail marijuana market at the moment of its creation would be irreparable. *See id.*; *see also Starlight Sugar Inc. v. Soto*, 909 F. Supp. 853, 862 (D.P.R. 1995), *aff'd*, 114 F.3d 330 (1st Cir. 1997) ("[R]ecognizing that '*timing is everything' in business*, the First Circuit has recognized that the frustration of a business opportunity can constitute irreparable injury.") (citing *Hyde Park Partners v. Connolly*, 839 F.2d 837, 853 (1st Cir. 1988)) (emphasis added); *Springfield Terminal Co. v. United Transp. Union*, 688 F. Supp. 68, 69 (D. Me. 1988) (stating that the well-established principle that the loss of first amendment freedom constitutes irreparable injury "is plainly applicable to other prospective denials of constitutional rights in which a constitutionally protected opportunity would be irretrievably lost if temporary injunctive relief were not granted.").

Further supporting the conclusion that Plaintiffs' injuries would be irreparable is the First Circuit's observation that "*harm to goodwill*, like harm to reputation, is the type of harm not readily measurable or fully compensable in damages—and for that reason, more likely to be found 'irreparable.'" *K-Mart Corp. v. Oriental Plaza, Inc.*, 875 F.2d 907, 915 (1st Cir. 1989). At a new market's inception, of course, goodwill has yet to be created; indeed, the essential task for entrants into a new market is to create goodwill that did not previously exist. If harm to goodwill is not readily measurable or fully compensable in damages, the same must be true of the denial of the opportunity to participate on equal terms in establishing goodwill in a market in the first place. That

too constitutes irreparable harm. *See Vaqueria Tres Monjitas, Inc.*, 587 F.3d at 485 ("[W]e have held that the irreparable harm requirement may be met upon a showing that 'absent a restraining order, [a party] would lose incalculable revenues and sustain harm to its goodwill.'") (quoting *Ross–Simons of Warwick, Inc. v. Baccarat, Inc.*, 102 F.3d 12, 19 (1st Cir. 1996)).

If Plaintiffs are denied a license because of the residency preference they will lose the opportunity to establish goodwill in Portland's new adult use marijuana market. Portland has been the most lucrative market in Maine for the sale of medical marijuana, which makes sense given its population and attraction as a tourist destination. MacDonald Decl. ¶¶ 7-8. The City is expected to maintain this position in Maine's adult use market. Limiting the opportunities for Plaintiffs to create a brand, build a reputation, and establish customer loyalty in Portland at the adult use market's inception would harm them in ways that cannot be reduced to a monetary damages award. *See Vaqueria Tres Monjitas, Inc.*, 587 F.3d at 485.

Although it is not a bright-line rule that a deprivation of a constitutional right necessarily constitutes an irreparable injury, "the best approach is to consider the deprivation of a plaintiff's rights under the dormant commerce clause (or any other constitutional provision) as *a factor* in assessing irreparable injury." *Starlight Sugar*, 909 F. Supp. at 862 (emphasis in original); *see also Vaqueria Tres Monjitas*, 587 F.3d at 484–85 ("[I]t cannot be said that violations of plaintiffs' rights to due process and equal protection *automatically* result in irreparable harm.") (emphasis in original). Other courts have held that a violation of the dormant commerce clause constitutes irreparable harm. *See* Wright, et al., Federal Practice and Procedure § 2948.1 (3d ed. 2013) ("When an alleged deprivation of a constitutional right is involved, most courts hold that no

further showing of irreparable injury is necessary."); *see, e.g.*, *Kendall-Jackson Winery, Ltd. v. Branson*, 82 F. Supp. 2d 844, 878 (N.D. Ill. 2000) (concluding that a violation of the dormant Commerce Clause constitutes irreparable injury); *Midwest Title Loans, Inc. v. Ripley*, 616 F. Supp. 2d 897, 908 (S.D. Ind. 2009), *aff'd sub nom. Midwest Title Loans, Inc. v. Mills*, 593 F.3d 660 (7th Cir. 2010) (same); *Am. Libraries Ass'n v. Pataki*, 969 F. Supp. 160, 167–68 (S.D.N.Y. 1997) ("Deprivation of the rights guaranteed under the Commerce Clause constitutes irreparable injury. Thus, by demonstrating that the Act threatens their rights under the Commerce Clause . . . the plaintiffs have shown both irreparable injury and a likelihood of success on the merits." (citation omitted)); *C & A Carbone, Inc. v. Town of Clarkstown*, 770 F. Supp. 848, 854 (S.D.N.Y. 1991) (stating that where plaintiffs demonstrate that they were deprived of constitutional rights under the Commerce Clause, such a depravation "unquestionably constitutes irreparable injury"). Given the loss of a unique and fleeting business opportunity at issue here, this Court should do the same.

C. The balance of harms weighs in favor of a preliminary injunction.

The irreparable injury to Plaintiffs if injunctive relief is denied and Plaintiffs go on to prevail on the merits would, as just explained, be severe. In contrast, the injury to the City of Portland if injunctive relief is granted and Plaintiffs do not prevail on the merits would be much more limited: Portland could still proceed to issue licenses, just not through a system that significantly advantages Maine residents over non-residents. Even if Portland were to put the licensing process on hold until the Court ultimately decides this case on the merits, the City would not be harmed by this delay, since adult use sales in Portland cannot begin until the State issues final licenses, and the State has

yet to provide a concrete timeline for the launch of the adult use market.[8] The balance of harms therefore favors Plaintiffs.

D. A preliminary injunction would serve the public interest.

The First Circuit has made clear that, if a statute is unconstitutional, "the public interest would be adversely affected by denial of . . . an injunction" against its enforcement. *Hyde Park Partners, L.P. v. Connolly*, 839 F.2d 837, 854 (1st Cir. 1988) (affirming preliminary injunction issued in dormant Commerce Clause challenge). This Court has said that "[g]iven the likely unconstitutionality" of a law, "the public interest is best served by the issuance of a preliminary injunction" against its enforcement, as "[i]t is hard to conceive of a situation where the public interest would be served by enforcement of an unconstitutional law or regulation." C*ondon v. Andino, Inc.*, 961 F. Supp. 323, 331 (D. Me. 1997). As explained above, the residency preference in Portland's licensing matrix is unconstitutional. The public interest therefore favors the injunction Plaintiffs seek.

The public interest also favors an injunction because otherwise Portland will distribute its 20 retail marijuana licenses using an unconstitutional points matrix while this legal challenge is pending. If the Court declined to issue an injunction now, and then ultimately decided on the merits that the residency preference was unconstitutional, that would be a largely meaningless decision, because the licenses would have already been awarded. A preliminary injunction will preserve the status quo and avoid the awarding of valuable licenses in an unconstitutional manner while this case is pending.

[8] *See* Ed Morin, *New Roadblock Emerges as Maine Moves to Launch Retail Marijuana Sales*, Bangor Daily News, (May 11, 2020).

CONCLUSION

The requirements for obtaining preliminary injunctive relief have been met. The Court should therefore grant this motion and order preliminary injunctive relief.

/s/ Matthew Warner
Matthew Warner, Maine Bar No. 4823
Alexandra Harriman, Maine Bar No. 6172
Attorneys for NPG Portland, LLC d/b/a Wellness Connection

Preti Flaherty Beliveau & Pachios LLP
One City Center
P.O. Box 9546
Portland, ME 04112-9546
207.791.3000
mwarner@preti.com
aharriman@preti.com

/s/ Michael D. Traister
Michael D. Traister, Esq.
Murray Plumb & Murray, P.A.
75 Pearl Street, P.O. Box 9785
Portland, ME 04101-5085
207.773.5651
mtraister@mpmlaw.com

Thomas O'Rourke (PA 308233)
Cozen O'Connor
1650 Market Street, Suite 2800
Philadelphia, PA 19103
215-665-5585
tmorourke@cozen.com
Pro hac vice application forthcoming

Attorneys for High Street Capital Partners, LLC

June 15, 2020

CERTIFICATE OF SERVICE

I hereby certify that on June 15, 2020, I electronically filed the Motion for Preliminary Injunction with the Clerk of Court by electronic mail and will send notification of such filing(s) to the counsel of record.

/s/ Matthew Warner
Matthew S. Warner, Maine Bar No. 4823
Attorneys for NPG, LLC d/b/a Wellness Connection

Preti Flaherty Beliveau & Pachios LLP
One City Center
P.O. Box 9546
Portland, ME 04112-9546
207.791.3000
mwarner@preti.com

June 15, 2020