UNITED STATES DISTRICT COURT
DISTRICT OF MAINE
PORTLAND

NPG, LLC d/b/a WELLNESS CONNECTION, and HIGH STREET CAPITAL PARTNERS, LLC,	)	
Plaintiffs,	)	CIVIL ACTION NO. 2:20-cv-00208
v.	)	
CITY OF PORTLAND,	)	
Defendants.	)	

DEFENDANT'S MOTION TO DISMISS AND OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

The City of Portland (the "City" or "Portland") moves to dismiss the complaint filed against it by NPG, LLC and High Street Capital Partners, LLC (together, "Wellness"), and also opposes Wellness's Motion for Preliminary Injunction.

INTRODUCTION

The State of Maine and the City of Portland are on the cusp of allowing the brand-new industry of adult use (recreational) marijuana to move forward. Over the period of more than a year, the City worked diligently through an ordinance drafting process that resulted in a licensing program that balances the need for a robust, well-regulated market, but also prevents over-saturation of that market. It does this by limiting the number of new adult use and medical marijuana retail stores to 20 in the City, and requiring a 250' buffer between those stores. Those 20 licenses are awarded via a "weighted lottery," where licenses are distributed first to those who earn the most points for various favorable attributes pursuant to a matrix adopted by the City in its ordinance. Factors include minimum working capital, experience in a highly regulated industry, successful business experience, and Maine residency, among other factors.

Defendant NPG, LLC has been operating Wellness Connection, a medical marijuana

dispensary, in the City of Portland for nearly a decade. Wellness – regardless of ownership – could continue running its profitable dispensary without obtaining one of the 20 new licenses. However, Wellness wants to enter the adult use market and now demands that this Court put the weight of its thumb on the scale to benefit Wellness in its new hoped-for endeavor. Wellness demands this before it has been denied an adult use license. In fact, Wellness demands this before it has even applied for a license or has been qualified to apply for an adult use license.

Whether or not Wellness ultimately is granted an adult use license depends on many unpredictable factors, including whether Wellness gains conditional approval for an adult use retail store from the State and the number, qualifications, and locations of other applicants, just to name a few unknowns. Given this positioning, it is clear that Wellness lacks standing and that this case is not ripe for judicial review.

The more fundamental flaw, however, is that Wellness has failed to even state a claim for which this Court can grant relief. Wellness has asserted that two categories of the matrix favor in-state residents over out-of-state residents in violation of the "dormant" Commerce Clause. However, even if that was true, Wellness would still not have a viable claim under the Commerce Clause. This is because Congress has exercised *its* jurisdiction under the Commerce Clause to regulate the interstate (and intrastate) trade of marijuana and has specifically made it illegal. Wellness cannot hold up the Constitution to defend its illegal activity.

Even if Wellness could get past its lack of standing, this case's lack of ripeness, and the lack of a federal remedy for its complaints, Wellness anyway does not qualify for a preliminary injunction in this case. It cannot show likelihood of success on the merits, cannot show irreparable harm as any harm is purely economic, and the public's interest in moving forward the adult use marijuana program vastly outweighs any potential harm to Wellness.

BACKGROUND

Marijuana Regulation at the State Level

For more than 20 years, medical marijuana has been legal in Maine, and for more than ten years, medical marijuana dispensaries have been allowed to operate. 22 M.R.S. § 2428. In 2016, Maine voters passed a referendum to make adult use (recreational) marijuana legal in the state. Since that time, the State of Maine has been working to implement that referendum's directive. In 2017, the Maine Legislature passed a comprehensive set of statutes regulating adult use marijuana, and in 2019, the Office of Marijuana Policy ("OMP") passed rules to implement those statutes. Title 28-B Maine Revised Statutes; 18-691 Code of Maine Regulations.

The Maine statutes allow a municipality to specifically prohibit any or all adult use marijuana businesses in its jurisdiction, or to adopt rules governing those businesses that the municipality sees fit. If a municipality does allow adult use businesses, an applicant must first obtain conditional approval from the State of Maine. 28-B M.R.S. § 402(1) ("A person seeking to operate a marijuana establishment within a municipality may not request local authorization . . . and a municipality may not accept as complete the person's request for local authorization unless . . . The person has been issued by the department a conditional license to operate the marijuana establishment."). The applicant must then get "local authorization" from the municipality, which means that the business has been fully approved by the municipality. The business must then go back to the State for a more rigorous review of its operating plans and procedures before getting final approval from both the State and the municipality.

OMP has been issuing conditional licenses since March of 2019. *See* Maine Office of Marijuana Policy Press Release, *Office of Marijuana Policy Issues Maine's First Conditional Licenses for Adult Use Marijuana Establishments* (March 13, 2019), attached as Exhibit A. Although OMP has delayed its final launch of the adult use marijuana industry, it has been encouraging municipalities to complete

the local authorizations as expeditiously as possible to allow OMP to complete the licensing process with applicants, "and move Maine that much closer to identifying a retail sales launch date." Erik Gunderson, Director OMP, letter to Municipal Official (June 24, 2020), attached as Exhibit B.

Marijuana Regulation in Portland

On May 18, 2020, the City Council passed Chapter 35 of the City of Portland Code of Ordinances ("City Code"), which governs the licensing of marijuana businesses in Portland. That night, the City Council heard public comment before deliberating on, and ultimately adopting, Chapter 35. Chapter 35 went into effect on June 17, 2020.

In Chapter 35, the City has capped the number of marijuana retail stores, both adult use and medical, at 20 total. City Code § 35-43(i). A few pre-existing medical retail stores/dispensaries – including Wellness – are allowed to remain in operation in addition to the 20 new licenses allowed under Chapter 35. City Code § 35-43(i)(1). If, however, Wellness or another pre-existing store wants to convert to adult use retail, it must apply for one of the 20 retail licenses. City Code § 35-43(i)(2).

To distribute the 20 retail licenses, the City Manager has established a window of time to apply for the first round of licensing. *See* City Code § 35-14(f)(1), That application window opened on July 1, 2020 and will close on August 31, 2020. In order to be considered in the first round of licensing, an applicant must have a complete application submitted before August 31, 2020. *See id.* Similarly, the applicant must meet all minimum qualifications at the time of application, including holding a conditional license from the State of Maine for an adult use retail store; having owners and managers with no disqualifying convictions or violations; meeting minimum age requirements; and not having owners or managers holding any disqualifying profession. City Code §§ 35-18, 35-19. Additionally, the proposed location must be at least 500' from an existing public school, private school, or public preschool. City Code § 14-411.

If an applicant submits a complete application on time and has no disqualifications, that

applicant is then scored according to the following matrix:

At least 51% owned by socially and economically disadvantaged individual(s), as defined further by regulations to be promulgated by the City Manager based off of the Small Business Association Section 8(a) regulations.	6
At least 51% owned by individual(s) who have been a Maine resident for at least five years.	5
Owned by individual(s) with experience running a business in a highly regulated industry, such as marijuana, liquor, banking, etc. with no history of violations or license suspensions or revocations.	6
Owned 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 license suspensions or revocations for a minimum of 5 years	4
Owned by individual(s) who have been a registered caregiver in the State of Maine for at least two years.	3
Ownership of proposed retail location by applicant; or at least five year lease for proposed retail location.	4
Evidence of at least $150,000 in liquid assets	2
Business plan committing to social and economic development, by including three or more of the following: 1. Create at least five (5) full-time jobs paying a minimum of $15/hr; 2. Provide PTO (or vacation/sick time) and health benefits to employees; 3. Provide at least one annual training around diversity, cultural awareness, sexual harassment, or workplace violence. Training must be in addition to any required by the State or City; 4. Annual contribution of 1% net profits as a restricted donation to the City for youth education on substance use education and prevention.	4

City Code § 35-14(f)(3). The applicant with the highest score will receive the first tentative approval, allowing that applicant to proceed with the licensing process. City Code § 35-14(f)(4). The applicant with the second highest score will similarly receive the second tentative approval, so long as it is not located within 250' of the first applicant. *Id.*; City Code § 35-43(h). If applicants with the same score are either located within 250' of each other, or if there are not enough retail licenses for all with the same score, then tentative approval will be awarded by a lottery. City Code § 35-14(f)(4).

Once tentative approval is awarded to an applicant, the applicant will have one year to obtain all required final approvals from the City and the State. City Code§ 35-14(f)(5). If the applicant fails to do so, it forfeits its tentative approval, which will then be redistributed to applicants on a waiting

list. *Id.*

Wellness Connection

Wellness has run a successful medical marijuana dispensary in Portland for nearly ten years. Under the City's licensing ordinance, Wellness can continue to run that dispensary, just as it has, by simply applying for a license. *See* City Code § 35-43(i)(1). However, if Wellness wants to convert instead to a retail store selling adult use marijuana, it must throw its hat in the ring with all other retail hopefuls and apply for one of the City's 20 retail licenses. City Code § 35-43(i)(2).

Wellness has closely followed and participated in the public process of drafting the City's marijuana ordinance. In fact, at the Council hearing on May 18, 2020, Charlie Langston, the General Manager of Wellness Connection testified "Wellness connection is owned 51% by Mainers, that is not an issue for us." *See* Portland City Council Meeting (May 18, 2020) @ 2:31:35 to 2:35:06. He did, however, encourage the Council to revisit the buffer between stores, disagreed with the matrix points for caregivers, and testified that the City would "run into a lot of problems" with the 20-store cap. *Id.* Tellingly, his written public comment also did not raise any concerns with respect to the residency points or business experience points in the matrix.[1] A copy of Mr. Langston's written commentary is attached as Exhibit C.

Although Wellness has stated its intention to apply for an adult use marijuana license in Portland, it is not yet qualified to do so. Before an applicant can apply to the City for an adult use permit, it must first obtain conditional approval from OMP, which it has not yet done. *See* Affidavit of Ron A. MacDonald, ¶ 5 ("Wellness Connection has submitted applications to Maine's Office of Marijuana Policy for multiple retail licenses in Maine's adult use marijuana program."); 28-B M.R.S. § 402(1) (prohibiting a municipality from accepting an application for local authorization until an

[1] Generally speaking, a failure to object may be considered to be apparent consent. *See Harbor Houses Condo. Ass'n v. IDC Clambakes, Inc. (In re IDC Clambakes, Inc.),* 727 F.3d 58, 69 (1st Cir. 2013) (objection to project at permitting stage on other grounds, but not on claimed trespass, could be considered implied consent to trespass).

applicant has a conditional license).

ARGUMENT

As an initial matter, Wellness's complaint should be dismissed for failure to state a claim, for lack of standing, and because this case is unripe for review. However, even if Wellness was able to surmount all of those deficiencies, it is still not entitled to a preliminary injunction enjoining the City from implementing its adult use marijuana retail licensing ordinance.

I. MOTION TO DISMISS

The City respectfully requests that this Court dismiss the case that Wellness has brought and save the judicial resources that this case would otherwise require.

A. Standard of Review

The First Circuit has recognized that a motion to dismiss on grounds of standing or ripeness under Rule 12(b)(1), and a motion to dismiss for failure to state a claim upon which relief can be granted under Rule 12(b)(6) share the same standard of review. *Hochendoner v. Genzyme Corp.*, 823 F.3d 724, 730 (1st Cir. 2016) ("Although review of a Rule 12(b)(6) dismissal for failure to state a claim and review to ensure the existence of standing are conceptually distinct, the same basic principles apply in both situations."). "Just as the plaintiff bears the burden of plausibly alleging a viable cause of action . . . so too the plaintiff bears the burden of pleading facts necessary to demonstrate standing." *Id.* (internal citations omitted). "Neither conclusory assertions nor unfounded speculation can supply the necessary heft." *Id.* at 731.

At this stage, this Court must "take the complaint's well-pled (i.e., non-conclusory, non-speculative) facts as true, drawing all reasonable inferences in the pleader's favor, and see if they plausibly narrate a claim for relief." *Lyman v. Baker*, 954 F.3d 351, 360 (1st Cir. 2020), *quoting, Schatz v. Republican State Leadership Comm.,* 669 F.3d 50, 55 (1st Cir. 2012). However, in doing so, this Court recognizes that "Plausible, of course, means something more than merely possible," and must also

"isolate and ignore statements in the complaint that simply offer legal labels and conclusions." *Id.*

Applying this standard, it is clear that Wellness has not stated a claim upon which this Court has the authority to grant relief, and that this Court lacks jurisdiction due to Wellness's lack of standing and the lack of ripeness of this controversy.

B. The Constitution Does Not Protect Contraband, Including Marijuana.

At its core, Wellness's suit asks this Court to invoke the United States Constitution to protect its illegal business activity. This request is not supported by the Constitution, federal law, or federal precedent, and this case must be dismissed with prejudice.

The Commerce Clause provides that "Congress shall have Power . . . [t]o regulate Commerce . . . among the several States." Constitution, Art. I, § 8, cl. 3. The Supreme Court has long held that "this Clause also prohibits state laws that unduly restrict interstate commerce," which is referred to as the "dormant" Commerce Clause. *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449, 2459 (2019). However, not all laws that "unduly restrict interstate commerce" run afoul of the dormant Commerce Clause. Instead, "Dormant Commerce Clause restrictions apply only when Congress has not exercised its Commerce Clause power to regulate the matter at issue." *Id.* at 2465; *Houlton Citizens' Coal. v. Town of Houlton*, 175 F.3d 178, 184 (1st Cir. 1999) (the dormant Commerce Clause "acts as a brake on the states' authority to regulate in areas in which Congress has not affirmatively acted"); *see also Pabst Brewing Co. v. Crenshaw*, 198 U.S. 17, 24-25 (1905), *quoting, In re Rahrer,* 140 U.S 545, 562 (1891) ("No reason is perceived why, if Congress chooses to provide that certain designated subjects of interstate commerce shall be governed by a rule which divests them of that character at an earlier period of time than would otherwise be in case, it is not within its competency to do so.").

Even a cursory examination of these basic tenets of Commerce Clause law reveals one of the fatal flaws in Wellness's argument: Congress has regulated commerce of marijuana "among the several States," and has chosen to prohibit it. *The Controlled Substances Act*, 21 U.S.C. § 801 *et seq.* (hereinafter

the "CSA"); *see also Gonzales v. Raich,* 545 U.S. 1, 22 (2005) (upholding Congress's ability to regulate both interstate and intrastate marijuana under the CSA).[2] As one court very succinctly summarized, "like the rule that one cannot maintain a valid possessory interest in contraband, it is also well-established that contraband is not within the protection afforded by the Commerce Clause." *New York v. Grand River Enters. Six Nations, Ltd.,* No. 14-CV-910A(F), 2020 U.S. Dist. LEXIS 44451, at *33-34 (W.D.N.Y. Mar. 10, 2020) (citing cases); *Pabst Brewing Co.*, 198 U.S. at 29, *quoting Vance v. Vandercook, No. 1,* 170 U.S. 438, 447 (1989) ("if all alcoholic liquors, by whomsoever held, are declared contraband, they cease to belong to commerce, and are within the jurisdiction of the police power").

Marijuana has been, and remains, a Schedule I drug under the CSA. 21 C.F.R. § 1308.11(d)(23). Under the CSA, a Schedule I drug "has high potential for abuse;" "has no currently accepted medical use in treatment in the United states;" and "[t]here is a lack of accepted safety for use of the drug or other substance under medical supervision." 21 U.S.C. § 812(b)(1). The CSA makes it illegal to "manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance." 21 U.S.C. § 841(a)(1).

Wellness tries to circumvent the basic fact that it is invoking this Court's power to protect an illegal activity by painting a picture that the federal government has tacitly accepted marijuana businesses in states that have legalized the sale of the drug. In doing so, it relies on an outdated – and since rescinded[3] – Memorandum from Deputy Attorney General James Cole; the fact that marijuana

[2] The intrastate commerce of marijuana is also illegal at the federal level. In fact, in enacting the CSA, Congress specifically found that, "Incidents of the traffic [in controlled substances], which are not an integral part of the interstate or foreign flow, such as manufacture, local distribution, and possession, nonetheless have a substantial and direct effect upon interstate commerce." 21 U.S.C. § 801(3). It further found that, "Federal control of the intrastate incidents of the traffic in controlled substances is essential to the effective control of the interstate incidents of such traffic." 21 U.S.C. § 801(6).

[3] On January 4, 2018 Attorney General Jefferson Sessions issued his own memo on marijuana enforcement. Jefferson B. Sessions, III, *Att'y Gen., Memorandum for all United States Attorneys: Marijuana Enforcement* (Jan. 4, 2018) (hereinafter the "Sessions Memo"). In his memo, Attorney General Sessions stated that the CSA, as well as other federal legislation, "reflect Congress's determination that marijuana is a dangerous drug and that marijuana activity is a serious crime." *Id.* Specifically referencing the Cole memo, Attorney General Sessions stated unequivocally that, "Given the Department's

businesses must comply with federal tax and worker safety rules; the assertion that banks may serve marijuana businesses; and that the U.S. Department of Justice is prevented from spending federal funds on interfering with state *medical* marijuana laws. However, none of these change the fact that marijuana remains prohibited in interstate commerce.[4]

In sum, Congress has exercised its right to regulate marijuana under the Commerce Clause, and has chosen to prohibit it. "Contraband is not within the protection afforded by the Commerce Clause," and Wellness, therefore, cannot make out a case for protection under the dormant Commerce Clause, and this case must be dismissed with prejudice. *See Grand River Enters. Six Nations, Ltd.,* 2020 U.S. Dist. LEXIS 44451, at *33-34.

C. Wellness Does Not Have Standing to Pursue this Case.

Even if the Commerce Clause did extend to protect a business peddling an illegal substance, Wellness does not have standing to pursue its claim.

The First Circuit has stated that "no principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *Dantzler, Inc. v. Empresas Berríos Inventory and Operations, Inc.* 958 F.3d 38, 46 (1st Cir. 2020). This constitutional limitation requires that plaintiffs show that they have standing to sue in federal court. *Id.* To show standing, Wellness must establish, among other factors, that "an injury in fact which is 'concrete and particularized' and 'actual or imminent, not conjectural or

well-established general principles, previous nationwide guidance specific to marijuana enforcement is unnecessary and is rescinded, effective immediately." *Id.*

[4] Despite Wellness's aspirations, Congress has repeatedly declined to change the illegal nature of marijuana at the federal level. In response to the Sessions Memo, a bill was proposed to enshrine in federal law the Cole Memo's basic tenets of non-enforcement of most federal marijuana crimes. That bill that was referred to the House Committee on the Judiciary on January 11, 2019, but has seen no action in more than a year and a half. *Sensible Enforcement of Cannabis Act of 2019*, H.R. 493, 116th Congress. Similar legislation either legalizing marijuana or requiring federal non-enforcement of existing marijuana laws, has also not progressed at the federal level despite repeated attempts. *See, e.g., Strengthening the Tenth Amendment Through Entrusting States Act,* S. 1028, 116th Congress (referred to committee over one year ago); *Marijuana Opportunity Reinvestment and Expungement Act of 2019*, H.R. 3884/ S2227, 116th Congress (reported out of committee more than seven months ago with no further action); *Marijuana Revenue and Regulation Act*, S. 420, 116th Congress (referred to committee over one year ago).

hypothetical . . .'" *Id.* at 47*, quoting Ma. v. U.S. Dep't of Health & Human Servs.*, 923 F.3d 209, 221-22 (1st Cir. 2019). Ultimately, because standing is an "indispensable part of the plaintiff's case, each element must be supported . . . with the manner and degree of evidence required at the successive stages of litigation." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). Because standing determines whether the federal court has proper jurisdiction over a case, "conclusory assertions or unfounded speculation [by the plaintiffs] will not suffice" in establishing standing. *Dantzler, Inc.,* 958 F.3d at 47.

Focusing on the first prong, an injury is "concrete" if the harm is "real, and not abstract." *Id.* at 47. For the harm to be "particularized," "the plaintiff must have been affected in a personal and individual way by the injurious conduct." *Id., quoting Hochendoner*, 823 F.3d at 731 (internal quotation marks omitted). The harm "must either have happened or there must be a sufficient threat of it occurring to be actual or imminent." *Id.*

The First Circuit has found that a plaintiff has standing to bring a claim asserting a violation of the dormant Commerce Clause only where the plaintiff has provided evidence of actual cognizable harm directly attributable to the contested governmental action. *See Cherry Hill Vineyard, LLC v. Baldacci*, 505 F.3d 28, 37 (1st Cir. 2007) (stating that plaintiff's failed to show a "single penny of loss attributable to the allegedly discriminatory" law and that "the mere fact that a statutory regime has a discriminatory *potential* is not enough to trigger strict scrutiny under the dormant commerce clause."); *Wine and Spirits Retailers, Inc. v. Rhode Island*, 481 F.3d 1, 12 (1st Cir. 2007) (holding that plaintiffs could not bring a claim challenging a residency requirement because plaintiffs "failed to show *any* cognizable harm, direct or indirect.").

In this case, Wellness claims that the City's marijuana ordinance disadvantages it, which *might* lead to it being denied an adult use marijuana retail license, and which *might*, in turn, cause Wellness irreparable injury. However, at this juncture, Wellness's argument is nothing more than conclusory speculation: Wellness has not been denied an adult use marijuana retail license, has not even applied

for such a license, and is not even qualified to apply for such a license given that it does not yet have a conditional license from the State of Maine.

Even assuming that Wellness is able to obtain a conditional license from the state, submit a full and complete application to the City in time, and not have any disqualifications under the provisions of the City Code for licensure, there are numerous other events that would need to happen in order for Wellness to be denied a license. First, Portland must have more than 20 other applicants apply for a marijuana retail license. Second, at least 20 of those applicants must have their appropriate state licenses. Third, those applicants must all have fully complete applications. Fourth, those applicants must not otherwise be disqualified due to criminal record, civil violations, proximity to a school, or other factors. Fifth, those applicants must qualify for more points than Wellness under the scoring matrix. Sixth, those applicants must not be located within 250' of another applicant with more matrix points. And finally, those applicants must successfully open their stores within one year of the City's tentative approval. *All* of these contingencies must take place in order for Wellness to present a ripe controversy, which is the very definition of a case that is unfit for review.

As such, no harm to Wellness has occurred or is even sufficiently imminent to provide it standing. Similar to *Cherry Hill Vineyard* and *Wine Retailers*, Wellness has not put forth any evidence of actual harm, nor have they asserted any facts that would demonstrate more than mere "potential" of harm. Because Wellness has no "concrete" or "particularized" injury and cannot establish a sufficient threat of imminent harm, its assertions are conclusory at best. As such, Wellness does not have standing to bring this suit and it must be dismissed.

D. Ripeness

In addition to Wellness's lack of standing, this case is not ripe for judicial review. "In general, standing and ripeness inquiries overlap." *McInnis-Misenor v. Maine Med. Ctr.,* 319 F.3d 63, 69 (1st Cir. 2003). The "basic rationale [of the ripeness doctrine] is to prevent the courts, through avoidance of

premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967). "The overlap [between standing and ripeness] is most apparent in cases that deny standing because an anticipated injury is too remote." *McInnis-Misenor,* 319 F.3d at 69.

The ripeness doctrine requires the court to assess "fitness" of the case for review and "hardship" to the plaintiff if the court declines such review. *Verizon New England, Inc. v. International Broth of Elec. Workers, Local No. 2322.*, 651 F.3d 176, 188 (1st Cir. 2011). Here, Wellness fails both prongs of the ripeness review.

1. <u>This case is not fit for review because the claim depends on a series of uncertain events that may or may not occur in the future.</u>

In determining fitness for review, "the critical question . . . is whether the claim involves uncertain and contingent events that may not occur as anticipated or may not occur at all." *Ernst & Young v. Depositors Econ. Prot. Corp.*, 45 F.3d 530, 536 (1st Cir. 1995). "This conclusion reflects an institutional awareness that the fitness requirement has a pragmatic aspect: issuing opinions based on speculative facts or a hypothetical record is an aleatory business, at best difficult and often impossible." *Id.* "Federal courts cannot -- and should not -- spend their scarce resources in what amounts to shadow boxing. Thus, if a plaintiff's claim . . . depends upon future events that may never come to pass, or that may not occur in the form forecasted, then the claim is unripe." *Id.* at 537.

In determining whether a case meets the "fitness" requirements for ripeness, courts look to whether or not the alleged events have occurred. In the context of challenges to a licensing scheme, where a plaintiff has filed suit over an anticipated denial of a license or permit, the courts have generally required the plaintiff to have actually applied for and been denied that license or permit. *E.g., Nat'l Advert. Co. v. City of Miami,* 402 F.3d 1335, 1340 (11th Cir. 2005) (plaintiff's "claim is not ripe because

[plaintiff] failed to obtain a final denial of its applications"); *Hightower v. City of Bos.,* 822 F. Supp. 2d 38, 54 (D. Mass. 2011) (case was not fit for review because plaintiff had not even applied for a concealed carry license). The exception to this general rule is where it would be futile for the applicant to do so. *E.g. Ramos v. P.R. Med. Examining Bd.,* 491 F. Supp. 2d 238, 242 (D.P.R. 2007) (where lack of residency was absolute bar to licensure, non-residents did not need to apply because "it is clear" that their applications would be denied).

As described above, there is no question that Wellness's claim "depends upon future events that may never come to pass, or that may not occur in the form forecasted, then the claim is unripe." *See Ernst & Young*, 45 F.3d at 537. This is not the case where it would be "futile" for Wellness to apply, as residency is not an absolute bar but instead is one of many factors. *See Ramos,* 491 F. Supp. 2d at 242. All of these factors make this the very definition of a case that is unfit for review.

2. There is no hardship to Wellness if this Court declines to review this case.

In assessing the "hardship" prong of the ripeness inquiry, the court looks to whether "the challenged action 'creates a direct and immediate dilemma' for the parties." *Verizon*, 651 F.3d at 188, *quoting W.R. Grace & Co. v. EPA*, 959 F.2d 360, 364 (1st Cir. 1992). The court may also consider "whether granting relief would serve a useful purpose, or . . . whether the sought-after declaration would be of practical assistance in setting the underlying controversy to rest." *Id.*

Courts have not granted relief where there is a "looming future event that would either offer further clarity or render the entire issue moot." *Pharmaceutical Research and Mfrs. Of America v. Nicholas*, 353 F. Supp. 2d 231, 243 (D. RI 2005). Although it might be useful to know whether a particular statutory scheme would "pass scrutiny if implemented," this is not the "type of 'useful purpose' or 'practical assistance'" that the courts originally had in mind when formulating the framework for determining "hardship." *Id.*

In this particular case, there is no impediment to Wellness moving forward without a decision

from this Court, and a decision will not change the parties' behavior moving forward. Wellness will apply for its adult use marijuana license (or not if it does not receive conditional approval from the state) regardless of the outcome of this case. As in *Nicholas*, the only "useful purpose" and "practical assistance" that is achieved by remedying this case before knowing whether Plaintiffs have actually been denied a license is to assess whether the ordinance would "pass scrutiny." However, as the court indicated, such a determination should not be part of the "hardship" analysis. *See Nicholas*, 353 F. Supp. 2d at 243. Ultimately, this case is not ripe for review and should be dismissed by this Court.

II. PRELIMINARY INJUNCTION

A. Standard of Review

Injunctive relief is "an extraordinary remedy never awarded as a matter of right." *Winter v. Natural Resource Defense Council, Inc.*, 555 U.S. 7, 24 (2008). Before granting a preliminary or permanent injunction, a court must find that four criteria are met:

(1) that plaintiffs will suffer irreparable harm if the injunction is not granted;
(2) that such injury outweighs any harm which granting the injunctive relief would inflict on the defendants;
(3) that plaintiffs have exhibited a likelihood of success on the merits; and
(4) that the public interest will not be adversely affected by granting the injunction.

Borinquen Biscuit Corp. v. M.V. Trading Corp., 443 F.3d 112, 115 (1st Cir. 2006).

B. Wellness Cannot Show a Likelihood of Success on the Merits.

First, and perhaps most importantly, Wellness cannot show a likelihood of success on the merits of its claim. Even if Wellness could get beyond the challenges that it does not have standing, this case is not yet ripe for review, and the Commerce Clause does not protect marijuana businesses, Wellness still cannot show a likelihood of success in proving that the City's marijuana licensing ordinance violates the dormant Commerce Clause. First, the points for Maine residency and experience with being a compliant Maine business owner are only two factors among many in the ordinance matrix to assign points to an applicant. Even then, those points are only a piece of a much

broader licensing scheme that includes Maine conditional licensure, satisfactory criminal history, no disqualifying violations, application completeness, distance from schools, and distance from other licensees.

Wellness asks this Court to narrowly focus its analysis on two small pieces of a much larger licensing scheme, but that is not what the Constitution requires. Instead, the licensing ordinance as a whole must be examined to determine if it impermissibly discriminates against out-of-state applicants. In that broader context, Wellness cannot show impermissible discrimination and cannot show a likelihood of success on the merits.

The First Circuit has made clear that "a regulation that burdens some interstate firms 'does not, by itself, establish a claim of discrimination against interstate commerce.'" *Wine and Spirits Retailers, Inc.*, 481 F.3d at 15. While courts have stated that "equal access to the local market does not offend the Dormant Commerce Clause," it does not follow that if access is unequal, there is *automatically* a violation of the Commerce Clause. *Houlton Citizens Coalition,* 175 F.3d at 188. In fact, the "Supreme Court has cautioned that the dormant Commerce Clause inquiry should be undertaken by 'eschew[ing] formalism for a sensitive, case-by-case analysis of purposes and effects." *Walgreen Co. v. Rullan*, 405 F.3d 50, 55 (1st Cir. 2005), *quoting*, *West Lynn Creamery*, *Inc. v. Healy*, 512 U.S. 186, 201 (1994).

In blindly applying precedent whose facts are very different from the present factual circumstances, Wellness ignores the importance of the City's multiple-factor matrix and other requirements in determining whether an applicant is granted a marijuana license. Unlike the regulations in *Camps Newfound/Owatonna v. Town of Harrison* 520 U.S. 564, 578 (1997) (tax imposed only on out-of-state entities), and *Tenn. Wine and Spirits Retailers Assoc.,* 139 S. Ct. at 2457 (prohibition on out-of-state entities from holding license), which gave an automatic or absolute benefit to in-state, in Portland's licensing ordinance, residency is only one factor among many. In fact, other factors may tend to favor out-of-state entities, such as the factor for experience in a highly regulated industry such

as marijuana. In Maine, the only marijuana businesses that would qualify for that factor are dispensaries, or out-of-state companies that had legally run sophisticated marijuana operations.

Additionally, the points for a Maine or locally licensed business with no violations were intended to favor successful, compliant business owners. The reason for limiting it to local licensing was to ensure that the City understood the amount and quality of oversight and could easily verify any past violations.

In addition to the reasons why this case should be dismissed, Wellness has also met its burden to show a likelihood of success on the merits and is not entitled to a preliminary injunction.

C. Irreparable Harm

As the moving party, Wellness also has the burden to present evidence sufficient to support its claim of irreparable injury. *Ross-Simons of Warwick, Inc. v. Baccarat*, Inc., 217 F.3d 8, 13 (1st Cir. 2000) (describing irreparable harm as "an essential prerequisite" for issuance of a preliminary injunction). "If it is not likely that plaintiff will succeed on the merits, it is equally unlikely that he will suffer irreparable harm. That is to say, constitutional injury cannot occur if there is not a constitutional violation." *Wagner v. City of Holyoke*, 100 F. Supp. 2d 78, 82 (D. Mass. 2000) (internal quotations omitted).

"The necessary concomitant of irreparable harm is the inadequacy of traditional legal remedies. The two are flip sides of the same coin: if money damages will fully alleviate harm, then the harm cannot be said to be irreparable." *K-Mart Corp. v. Oriental Plaza, Inc.,* 875 F.2d 907, 914 (1st Cir. 1989). "In addition, the irreparable harm must be concrete; that is, it 'must be grounded on something more than conjecture, surmise, or a party's unsubstantiated fears of what the future may have in store.'" *Surplec, Inc. v. Me. Pub. Serv. Co.*, 495 F. Supp. 2d 147, 150 (D. Me. 2007), *quoting, Charlesbank Equity Fund II, Ltd. P'ship v. Blinds To Go, Inc.,* 370 F.3d 151, 162 (1st Cir. 2004). In fact, even the existence of "*some* degree of irreparable harm" does not conclusively justify a preliminary injunction.

See Bl(a)ck Tea Soc'y v. City of Boston, 378 F.3d 8, 15 (1st Cir. 2004) (emphasis added) (upholding the denial of a preliminary injunction while still recognizing that "a burden on protected speech always causes some degree of irreparable harm"). Injunctive relieve is not appropriate "where the plaintiff will experience only a partial loss of business short of complete destruction." *Id.*, *quoting, Augusta News Co. v. News America Pub., Inc.,* 750 F. Supp. 28, 32 (D. Me. 1990).

Wellness complains that it will suffer irreparable harm because 1) the City may have granted all of its marijuana licenses by the time this Court adjudicates this dispute on the merits; and 2) any delay in allowing it to enter the market may result in the loss of goodwill, which is immeasurable. Both assertions are overly dramatic and have no basis in reality.

Wellness cites to *Starlight Sugar v. Soto* for the proposition that irreparable harm can be shown where there is a potential loss of a "unique or fleeting business opportunity." However, in that case, the fleeting nature of the business opportunity was due to an impending shortage of sugar supply. *Starlight Sugar v. Soto*, 114 F.3d 330, 332 (1st Cir. 1997). An impending shortage of a hard good is vastly different than the potential shortage of a government created license, which shortage could easily be remedied by further government action. Similarly, Wellness's cries of loss of goodwill are not convincing. Unlike the companies in *Vaqueria Tres Monjitas, Inc. v. Irizarry,* that were on the verge of insolvency due to the challenged government actions, Wellness's current business – as one of the only currently legal marijuana retail fronts in Portland – is apparently thriving. Wellness has not alleged that it is on the verge of insolvency, and, "Injunctive relieve is not appropriate 'where the plaintiff will experience only a partial loss of business short of complete destruction.'" *See Surplec, Inc.*, 495 F. Supp. 2d at 150.

D. Both the City and the Public will be Harmed by the Granting of a Preliminary Injunction.

Ordinarily, the harm to the defendant and the harm to the public in granting a preliminary injunction are analyzed separately. However, here, where the defendant is a public entity, the harm is

the same. In analyzing the harm to the public, the Court must "inquire whether there are public interests beyond the private interests of the litigants that would be affected by the issuance or denial of injunctive relief." *Everett J. Prescott, Inc. v. Ross,* 383 F. Supp. 2d 180, 193 (D. Me. 2005).

In 2016, Portland voters voted overwhelmingly in favor of legalizing adult use marijuana, and many residents and business owners have made it clear that they are eagerly anticipating the opening of the adult use market. In addition, certain business owners have been planning and investing in business infrastructure in anticipation of the adult use market opening. If an injunction is granted, none of the City's adult use marijuana retail hopefuls will be able to move forward with their business plans and their licensing. If the State opens the adult use market in the fall, as anticipated, Portland will not be able to participate in that market. To hold up the business plans of at least 19 other applicants, and thwart the public will, is the very definition of harming the public interests.

Wellness is not entitled to a preliminary injunction.

CONCLUSION

For all of the reasons stated above, the City of Portland respectfully requests that this Court dismiss the present case on the grounds that Plaintiffs have failed to state a claim for which this Court can grant relief, Plaintiffs lack standing, and this case is not yet ripe for adjudication. If this Court does not see fit to dismiss the case entirely, the City requests that it deny the Plaintiffs' Motion for a Preliminary Injunction, as Plaintiffs cannot show a likelihood of success on the merits, have demonstrated no irreparable harm, and the public interest weighs in favor of denying the motion.

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