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. 2:20-cv-00208

PLAINTIFFS' REPLY IN SUPPORT OF PRELIMINARY INJUNCTION AND OPPOSITION TO THE CITY'S MOTION TO DISMISS

INTRODUCTION

According to the City, the unusual legal status of marijuana means that the City is not constrained by the normal Constitutional rules when regulating its legal marijuana market. There are two overarching problems with this argument. First, the State of Maine has taken the position before this Court that the Constitution's dormant Commerce Clause does in fact apply to state regulation of marijuana businesses. *See* 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). With the State having come to that conclusion, it is unclear what basis a municipality has for taking a contrary position. Second, the City makes much of the fact that marijuana remains technically illegal under federal law. But if the City is going to issue licenses for the sale of marijuana, it cannot simultaneously claim the right to discriminate against non-residents on the ground that

the market it is setting up is illegal under federal law. The City has authorized a market in marijuana, and the usual constitutional rules apply. Because the City's residency preference is unconstitutional and will cause Plaintiffs irreparable harm, a preliminary injunction should be granted and the City's motion to dismiss denied.

ARGUMENT

I. Portland's legal marijuana market must comply with the United States Constitution and its dormant Commerce Clause.

The City argues that the dormant Commerce Clause does not apply to the challenged ordinance because "the Constitution does not protect contraband, including marijuana." (Def.'s Mot. Dismiss at 8.) This argument, at its most general level, is obviously wrong. A marijuana business operating in Portland could not, for example, discriminate against employees based on race or gender. Likewise, the City could not pass a law forbidding marijuana businesses from engaging in public demonstrations. As noted by another federal district court, "the [Controlled Substances Acts'] prohibition on cannabis does not immunize defendants from federal laws." *Siva Enterprises v. Ott*, 2018 WL 6844714, at *5 (C.D. Cal. Nov. 5, 2018) (refusing to dismiss Lanham Act claim), nor does it somehow strip participants in legal state markets of their constitutional protections.

a. The Controlled Substances Act does not authorize the City to discriminate against non-residents.

The City offers several arguments as to why the dormant Commerce Clause, in particular, does not apply to the challenged ordinance. The City's first argument is that Congress already regulates marijuana nationwide, and the dormant Commerce Clause only applies when Congress "has not affirmatively acted." (Def's Mot. Dismiss at 8.) Congress has made marijuana illegal federally, the argument goes, and thus the

dormant Commerce Clause does not apply to laws that legalize marijuana at the state and local level. This argument is mistaken, because in order to "redefine the distribution of power over interstate commerce" in a particular industry, Congress must explicitly "permit the states to regulate the commerce in a manner which would not otherwise be permissible." *S. Pac. Co. v. State of Ariz. ex rel. Sullivan*, 325 U.S. 761, 769 (1945). In *Houlton Citizens' Coal. v. Town of Houlton*, 175 F.3d 178 (1st Cir. 1999), a case cited by the City, the First Circuit explains that "[t]he dormant Commerce Clause does not affect state or local regulations *directly authorized by Congress*, but, rather, acts as a brake on the states' authority to regulate in areas in which Congress has not affirmatively acted." *Id*. at 184 (emphasis added). Because Congress has never passed any law which regulates state-legal marijuana markets in any way, obviously Congress has not "directly authorized" the City to award marijuana licenses in a manner that discriminates against non-residents.

The City makes passing reference to pre-prohibition era Supreme Court decisions which illustrate that a discriminatory state law must be directly authorized by Congress in order to survive a dormant Commerce Clause challenge. *See* Def.'s Mot. Dismiss at 8, *citing Pabst Brewing Co. v. Crenshaw*, 198 U.S. 17, 24-25 (1905) & *In re Rahrer*, 140 U.S. 545, 562 (1891). These cases dealt with the interplay between state regulation of imported liquors, the dormant Commerce Clause, and an act of Congress known as the Wilson Act. The Wilson Act was Congress's response to a series of late 19th century Supreme Court decisions striking down, on Commerce Clause grounds, state laws regulating the sale of imported liquors. The Wilson Act provided that imported liquors "should be subject to the operation and effect of state laws to the same extent and in the same manner as though the liquors had been produced in the state," *In re Rahrer*, 140

U.S. at 562-63, and thus permitted states to regulate imported liquors, something the dormant Commerce Clause had previously forbidden. *See Pabst Brewing*, 198 U.S. at 24-26. However, state laws banning imported liquor altogether while permitting the sale and consumption of domestic liquor remained unconstitutional, since the Wilson Act was intended to achieve "uniformity of treatment under state laws," not to foster protectionism. *Scott v. Donald*, 165 U.S. 58, 100 (1897) (explaining that "such legislation is void as a hindrance to interstate commerce, and an unjust preference of the products of the enacting state as against similar products of the other states"). These cases demonstrate that the dormant Commerce Clause prohibits state and local laws targeting non-residents unless those laws are explicitly authorized by Congress.

Unlike the regulations targeting imported liquor in the Wilson Act cases, the residency preference in the City's ordinance is not authorized, directly or indirectly, by Congress. The Controlled Substances Act does not authorize Portland to permit commercial marijuana sales, or to award marijuana licenses with a preference for Maine residents. Because Portland's ordinance is not "directly authorized by Congress," *Houlton Citizens' Coal.*, 175 F.3d at 184, its "unjust preference" for Maine residents is "void as a hindrance to interstate commerce." *Scott*, 165 U.S. at 100.

b. The challenged ordinance does not regulate "contraband."

The City next argues that the dormant Commerce Clause does not apply because marijuana is contraband, and thus is "not within the protection afforded by the Commerce Clause." (Def.'s Mot. Dismiss at 9.) This argument is also wrong for several reasons, most notably because the challenged ordinance does not regulate interstate commerce in marijuana, but instead regulates who may own marijuana-related businesses in Maine.

If the challenged ordinance outlawed importing marijuana from other states, then the City's argument would be a good one. Marijuana moving in interstate commerce is not permitted under Maine law or federal law and, therefore, meets the definition of "contraband" established by federal courts: "property which is subject to seizure under the state's police power." *See Predka v. Iowa*, 186 F.3d 1082, 1084 (8th Cir. 1999) (finding marijuana seized by Iowa to be contraband since "state law makes it unlawful to possess with intent to distribute a controlled substance"); *Vance v. W.A. Vandercook Co.*, 170 U.S. 438, 448 (1898) (stating that "if all alcoholic liquors, by whomever are held, are declared [by the state] contraband, they cease to belong to commerce, and are within the jurisdiction of the [state's] police power"). But the residency preference in the challenged ordinance has nothing to do with the movement of marijuana across state lines. Granting the relief Plaintiffs seek would not result in a single marijuana leaf crossing a single state line; to the contrary, the only thing crossing state lines would be investment dollars. Money derived from or invested in Portland's legal cannabis industry is not contraband under the laws of Maine or Portland (which both have legal marijuana markets) and is not "subject to seizure under the state's police power." *See Predka*, 186 F.3d at 1084. This should be apparent to the City from the fact that it has legalized marijuana, is issuing licenses for its sale, and is letting non-residents participate in this market (albeit at a significant disadvantage).

The federal government's approach to intrastate marijuana markets also belies the City's argument that its legal marijuana market deals in contraband. A federal court in Colorado has explained that the "nominal federal prohibition against possession of marijuana conceals a far more nuanced (and perhaps even erratic) expression of federal policy," which it described as "an ambivalence towards enforcement of the Controlled

Substances Act in circumstances where a person or entity's possession and distribution of marijuana was consistent with well-regulated state law." *Green Earth Wellness Ctr., LLC v. Atain Specialty Ins. Co.,* 163 F. Supp. 3d 821, 832-33 (D. Colo. 2016) (rejecting claim that marijuana grown in compliance with state law falls under contraband exclusion in insurance policy). The federal government is not treating Maine's or Portland's commercial marijuana market as if it were illegal, and the market is unmistakably legal under state law. This market is not dealing in contraband.

Finally, the 'contraband' cases cited by the City actually prove the Plaintiffs' point, since the state actions being challenged—and upheld—in those cases sharply contrast with the City's residency preference at issue here. The City explains its contraband argument by citing the following statement from *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): "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." (Def.'s Mot. Dismiss at 9.) What the City neglects to mention is that this decision concerned the illegal import of billions of untaxed cigarettes, in violation of both federal and New York law, and that the quoted passage was part of a broader discussion rejecting the argument that the dormant Commerce Clause prevents New York from exercising its police powers to seize illegal cigarettes. *Id.* New York's effort to stop the flow of billions of untaxed cigarettes into the state is nothing like the residency preference in Portland's challenged ordinance.

A common theme running through all of these dormant Commerce Clause cases is that states cannot create opportunities for their residents that are not available to outsiders. This means that Portland is free to ban marijuana altogether within its

borders. It is also free to legalize marijuana, as it has done, with the federal government not lifting a finger in response. What the City is not free to do is legalize marijuana, establish a commercial market for it, and then award licenses for entering that market in a manner that facially discriminates against non-residents. As the State of Maine recognized last month in the context of its residency requirement, this violates the dormant Commerce Clause.

II. The City's points matrix violates the dormant Commerce Clause.

After arguing that the Constitution does not apply to its marijuana regulations at all, the City argues that even if it does, these regulations are not prohibited by the dormant Commerce Clause. Specifically, the City contends that Plaintiffs have not demonstrated a likelihood of success on the merits because "the points for Maine residency and experience with being a compliant Maine business owner are only two factors among many in the ordinance matrix," and "those points are only a piece of a much broader licensing scheme" that includes other factors too. (Def's Mot. Dismiss at 15-16.) The City is of course correct that "the licensing ordinance as a whole should be examined to determine if it impermissibly discriminates against out-of-state applicants." *Id.* at 16. But that examination reveals, unmistakably, that it does impermissibly discriminate. The points matrix "plainly favors" Mainers over non-residents. *Tennessee Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct 2449, 2462 (2019). This is discrimination against out-of-staters, plain and simple.

The City cites *Wine and Spirits Retailers, Inc. v. Rhode Island*, 481 F.3d 1 (1st Cir. 2007), for the proposition that "'a regulation that burdens some interstate firms does not, by itself, establish a claim of discrimination against interstate commerce.'" (Def.'s Mot. Dismiss at 16 (quoting *Wine and Spirits*).) But while the regulation in *Wine*

and Spirits "may have had a negative impact on [the plaintiff's] business model," the Court found no Commerce Clause violation because "the statutory scheme at issue here does not favor in-state interests at all." *Id.* at 14. Here, the City's points matrix favors in-state interests on its face.

The City fares no better with *Walgreen Co. v. Rullan*, 405 F.3d (1st Cir. 2005), a case that—as explained in Plaintiffs' motion—supports Plaintiffs, not the City. *See id.* at 55–56 (upholding dormant Commerce Clause challenge to certificate-of-need requirement that did not discriminate against out-of-staters on its face, but that was implemented so as to favor in-state companies). As for *Houlton Citizens' Coalition v. Town of Houlton*, 175 F.3d 178 (1st Cir. 1999), granting unequal access to a local market does "*automatically*" violate the dormant Commerce Clause (Def.'s Mot. Dismiss at 16)—and this is why the substantial favoritism the City affords to out-of-state applications is unconstitutional here. The City makes the conclusory charge that Plaintiffs are engaged in "blindly applying precedent whose facts are very different from the present factual circumstances" (*id.* at 16), but it fails to identify any material factual differences. That leaves the City to point out that the two residency-related factors are not the *only* factors it considers, but it cites no authority to support the proposition that this somehow makes the matrix constitutionally permissible. *See Houlton Citizens' Coal.*, 175 F.3d at 188 (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*") (emphasis added); *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 275 (1988) (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").

The City suggests that it limited the four points available to previously licensed businesses to those previously licensed *in Maine* "to ensure that the City understood the amount and quality of oversight and could easily verify any past violations." (Def.'s Mot. Dismiss at 17.) But it offers no evidence, or even real argument, to support that claim. While it is possible to save "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," the "standards for such justification are high." *New Energy*, 486 U.S. at 278; *see also Tennessee Wine*, 139 S. Ct. at 2461–62 (a law that "discriminates against out-of-state goods or nonresident economic actors" can only be sustained "on a showing that it is narrowly tailored to advanc[e] a legitimate local purpose") (quotation marks omitted). The burden is on the City to make this showing, and "discriminatory state laws rarely satisfy this exacting standard." *See Family Winemakers of California v. Jenkins*, 592 F.3d 1, 9 (1st Cir. 2010); *see also id.* at 17 (requiring "'concrete record evidence,'" not "'sweeping assertion[s]' or 'mere speculation,' . . . that the discriminatory aspects of [the] challenged policy are necessary to achieve its asserted objectives"). The City has not met its burden to show that it cannot achieve its legitimate objectives by non-discriminatory means.

III. Plaintiffs will be irreparably harmed absent a preliminary injunction.

The City describes the argument that Plaintiffs will be irreparably harmed if they are denied a license due to the City's unconstitutional ordinance as "overly dramatic" and having "no basis in reality." (Def.'s Mot. Dismiss 18.) And it cites authority for the

proposition that "a partial loss of business" does not constitute irreparable harm. (*Id.*) But if Plaintiffs are denied a license due to the unconstitutional residency requirement, they will not suffer a partial loss of business; instead, the adult-use business they would have opened will fail to come into existence at all. *See NACM-New England, Inc. v. Nat'l Ass'n of Credit Mgmt., Inc.*, 927 F.3d 1, 5 (1st Cir. 2019) (stating that injunctive relief is permissible where the existence of the movant's business is threatened). These are not "unsubstantiated fears" (*id.* at 17); they are inescapable facts.

The City tries to distinguish *Starlight Sugar, Inc. v. Soto*, 114 F.3d 330 (1st Cir. 1997)—where the First Circuit "recognized that the loss of a unique or fleeting business opportunity can constitute irreparable injury" because "the potential value of an evanescent business opportunity may be extremely difficult to measure, after the fact" (*id.* at 332)—by pointing out that the denial of a license "could easily be remedied by further government action" (Def.'s Mot. Dismiss at 18). But because "'timing is everything' in business," *Starlight Sugar Inc. v. Soto*, 909 F. Supp. 853, 862 (D.P.R. 1995), *aff'd*, 114 F.3d 330 (1st Cir. 1997), the lost profits caused by the denial of the opportunity to participate in Portland's emerging and lucrative marijuana market at the moment of its creation—not months or years later, after protracted litigation forces the City to change its position—would be very hard to measure after the fact. In other words, even if Plaintiffs were to obtain a license down the road, that would not remedy the injury caused by not having had a license when the market launched, the key moment for establishing a customer base and goodwill. And even if Plaintiffs could be made whole by receiving a license later, it is unclear how the Court could impose that remedy without either taking away a license the City had granted to someone else or

disregarding the limit the City has imposed on the number of licensed marijuana businesses in Portland.

As for the City's observation that Plaintiffs have another business that is "apparently thriving," and not "on the verge of insolvency" (Def.'s Mot. Dismiss at 18), this case is about the injury to the new business Plaintiffs wish to start. Plaintiffs may have other profitable business, but the injury caused by the denial of the opportunity to participate in the new adult use market from day one would still be irreparable.

IV. Plaintiffs have standing because they are harmed by the ordinance, and the controversy is ripe now.

The City contends that Plaintiffs lacks standing and that their claims are not ripe, relying largely on the fact that Wellness Connection has not yet been denied a license. "[S]tanding asks 'who' may bring a claim, [and] ripeness concerns 'when' a claim may be brought." *Nulankeyutmonen Nkihtaqmikon v. Impson*, 503 F.3d 18, 32 (1st Cir. 2007). In terms of "who" may bring this claim, Plaintiffs are better situated than anyone to challenge the discriminatory points matrix because it denies them the opportunity to compete on equal terms with residents. Wellness Connection has obtained a conditional license from the state, and it intends to apply for a retail license in Portland, all while being entirely owned by non-resident High Street. Because Wellness Connection is disqualified, based on residency alone, from more than 25% of the points available in Portland's competitive licensing process, it (and its non-resident owner, High Street) is being harmed now by the City's unequal treatment, and is therefore ideally situated to challenge this ordinance. This is especially true because no one has been denied a license yet, and under the City's reasoning, no one can challenge the constitutionality of the ordinance until licenses are awarded. That is not how the standing doctrine works.

As for when this claim should be brought, any challenge to the City's points matrix that will afford meaningful relief must occur now, *before* licenses are issued. This will be less disruptive to the licensing process and the launch of Portland's market, and will ensure that the City is issuing licenses in a constitutional manner. But if the Court waits, and does not consider the constitutionality of the points matrix until licenses have been awarded and applications denied, then it will be required to either unwind the licensing process or order the City to issue additional licenses beyond the 20 authorized by the City Council.

a. Plaintiffs have demonstrated that they will be injured by the challenged ordinance.

The City claims that Plaintiffs do not meet the "injury-in-fact" requirement for standing, "which helps to ensure that the plaintiff has a personal stake in the outcome of the controversy." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158, 134 (2014) (quotation marks omitted). But for a plaintiff challenging a licensing scheme like the City's points matrix, the "injury-in-fact" is the inability to compete on an equal footing, whether or not the application is ultimately denied. *Gratz v. Bollinger*, 539 U.S. 244, 260–68 (2003) (determining that a plaintiff had standing to seek prospective relief related to a University's use of race in admissions despite not applying because he had demonstrated that he was able and ready to apply); *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville, Fla.*, 508 U.S. 656, 666 (1993) ("When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing. The 'injury in fact' in an equal

protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit."). This is the appropriate analysis to apply in this case. *See, e.g.*, *Conservation Force, Inc. v. Manning*, 301 F.3d 985, 990 n.3 (9th Cir. 2002) (determining that there was an injury sufficient to confer standing in a dormant Commerce Clause challenge related to permits issued to nonresidents by applying this inquiry); *All. for Clean Coal v. Miller*, 44 F.3d 591, 594 (7th Cir. 1995) (finding standing based on inability to compete on an equal footing in a dormant Commerce Clause challenge despite absence of evidence of specific lost deals); *see also MGM Resorts Int'l Glob. Gaming Dev., LLC v. Malloy*, 861 F.3d 40, 45 (2d Cir. 2017) (stating that the standing inquiry for dormant Commerce Clause and equal protection claims is the same).

For example, in *Byrd v. Tennessee Wine & Spirits Retailers Ass'n*, No. 3:16-CV-02738, 2017 WL 1021296, at *3 (M.D. Tenn. Mar. 16, 2017), a decision ultimately upheld by the Supreme Court, *see Tennessee Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449 (2019), the court considered whether plaintiffs had standing to challenge a residency requirement based on the dormant Commerce Clause. The court explained that "for standing purposes, [plaintiffs] need only show that they are able and ready to apply for a retail package store license and that a discriminatory policy prevents them from doing so on an equal basis." *Byrd*, 2017 WL 1021296, at *3 (alterations and quotation marks omitted). Because "the crux of the dormant Commerce Clause challenge to the residency requirement is that it allegedly impermissibly favors Tennessee interest, not allowing non-residents to obtain a retail package store license on equal footing as Tennessee residents," plaintiffs had standing. *Id.* at *3.

Here, Wellness Connection has alleged that it intends to apply for an adult use retail license in Portland, that it is 100% owned by non-Maine residents, and that it will be at a significant disadvantage in the City's licensing process because of the matrix's residency-related criteria. It has shown further evidence of its intent by already being actively involved in the medical marijuana business in the City and by applying for and receiving a conditional license from the state to pursue an adult use license in Portland. The City does not deny that it plans to use the matrix to award licenses in a manner that favors in-state applicants over non-residents. Taking the facts alleged in the complaint as true, *see Portland Pipe Line Corp. v. City of S. Portland*, 164 F. Supp. 3d 157, 175 (D. Me. 2016) (this Court views the facts in the light most favorable to plaintiffs in evaluating standing), the points matrix is denying Plaintiffs the opportunity to participate in Portland's licensing process on equal footing with other applicants, free of the unconstitutional disadvantage the points matrix creates by basing over 25% of the available points on residency. This is an injury-in-fact.

Because Plaintiffs are injured by the inability to compete on equal footing with Maine residents, the Court need not entertain the "contingencies" the City argues must occur for there to be injury. *See Gratz*, 539 U.S. at 260–61 (rejecting dissenting argument that future injury is too conjectural or hypothetical and reasoning instead that whether plaintiff actually applied is not determinative of ability to seek relief); *Byrd*, 2017 WL 1021296, at *2 (rejecting argument that "plaintiffs do not have standing to challenge the residency requirement unless the Commission would grant them a license but for that requirement," because plaintiffs are harmed by the "discriminatory policy" that prevents them from applying for a license "on an equal basis"). But even if the many contingencies identified by the City were relevant to Plaintiffs' standing, they would not

matter here since these contingencies are either implausible or entirely hypothetical, and do not change the fact that Wellness Connection is at substantial risk of being denied a license based on the residency of its owner, High Street.

For starters, since the City filed its Motion to Dismiss, Wellness Connection has obtained its conditional license from the state, and thus meets the pre-condition to applying for a retail license with Portland. *See* Conditional License attached as Exhibit A. Portland also claims that it may not even receive 20 applications, and thus the points matrix may not be used at all. This is all but inconceivable, since the State has already issued 21 conditional licenses to applicants who have identified Portland as their planned retail location, and more than 20 conditional licenses to applicants who did not specify a location and could apply to any municipality for a retail license, including Portland.[1] The high demand for retail licenses in the City is not surprising, as Portland will be Maine's most lucrative market for marijuana. *See* MacDonald Declaration (Ex. B to Pl.s' Mot. for Prel. Inj.) ¶¶ 7-8. The City suggests that some applicants could make a mistake in filling out the application, or could select a retail location next to a school, or that applicants could have a disqualifying criminal record, and this could reduce the number of valid applications to the point where the points matrix is not used. Any of these things *could* happen (although there is no reason to think that they will), but this does not change the fact that Wellness Connection still faces the "substantial risk," *Portland Pipe Line*, 164 F. Supp. 3d at 179-80, that the City will use the unconstitutional points matrix to award licenses, particularly because more than 20 applicants have already confirmed their intent to apply for one of the 20 coveted licenses in Portland.

[1] *See* the list of conditional licenses issued to date, available online at https://www.maine.gov/dafs/omp/open-data/adult-use.

The two principal cases cited by the City to support its position that Plaintiffs lack standing until they are denied a license are inapplicable here. *Cherry Hill Vineyard, LLC v. Baldacci*, 505 F.3d 28 (1st Cir. 2007) doesn't even address standing, but goes straight to the merits of the plaintiffs' dormant Commerce Clause challenge. And in *Wine And Spirits Retailers, Inc. v. Rhode Island*, 481 F.3d 1 (1st Cir. 2007) the plaintiffs were in-state corporations who "could not conceivably have suffered any cognizable harm as a result of" the challenged residency requirement. *Id.* at 11-12. Plaintiffs here are in a far different position, since Wellness Connection and High Street are both directly injured by the challenged ordinance, as their chance of receiving a license is substantially reduced by the residency preference in the City's points matrix.

Plaintiffs have shown that they are ready and able to apply for an adult use license under the City's ordinance—having already taken affirmative steps to do so such as applying for and receiving a conditional license from the state—but that they will be at a significant disadvantage in competing for one of 20 licenses as a result of the points matrix's residency preferences. The fact that Plaintiffs, as with any other party who could possibly bring this lawsuit, have not yet been denied an adult use license by the City is no barrier to bringing this challenge. The City will use its points matrix to issue licenses, and the matrix's unconstitutional residency preferences does create an uneven playing field for Plaintiffs. This is the harm that gives Plaintiffs standing.

b. Both the fitness and the hardship prongs of the ripeness inquiry weigh in Plaintiffs' favor.

Like the City's contention that Plaintiffs do not have standing, its argument that this case should be dismissed as unripe is also unpersuasive. "The doctrine of ripeness asks whether an injury that has not yet happened is sufficiently likely to happen to

warrant judicial review." *Smith v. Aroostook Cty.*, 376 F. Supp. 3d 146, 155 (D. Me.), *aff'd*, 922 F.3d 41 (1st Cir. 2019) (alterations and quotation marks omitted). The purpose of this doctrine is "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." *Id.* "To determine whether a case is ripe for review, a federal court must evaluate the fitness of the issue presented and the hardship that withholding immediate judicial consideration will work." *Rhode Island Ass'n of Realtors, Inc. v. Whitehouse*, 199 F.3d 26, 33 (1st Cir. 1999). While both fitness and hardship must be satisfied, "a strong showing on one may compensate for a weak one on the other." *McInnis-Misenor v. Maine Med. Cntr.*, 319 F.3d 63, 70 (1st Cir. 2003).

i. Plaintiffs' claims are fit for review now because Plaintiffs have been injured, their claims are legal in nature, the parties are adverse, and Plaintiffs seek specific and conclusive relief.

"Fitness, the First Circuit has written, 'typically involves subsidiary queries concerning finality, definiteness, and the extent to which resolution of the challenge depends upon facts that may not yet be sufficiently developed.'" *Portland Pipe Line Corp.*, 164 F. Supp. 3d at 174 (quoting *Ernst & Young v. Depositors Econ. Prot. Corp.*, 45 F.3d 530, 535 (1st Cir. 1995)). The First Circuit has also noted three factors to consider: (1) "whether the claim involves uncertain and contingent events that may not occur as anticipated or may not occur at all;" (2) "the extent to which the claim is bound up in the facts," as "[c]ourts are more likely to find a claim ripe if it is of an intrinsically legal nature, . . . and less likely to do so if the absence of a concrete factual situation seriously inhibits the weighing of competing interests;" and (3) "the presence or absence of adverseness," which focuses on "whether all affected parties are before the court . . . and whether the controversy as framed permits specific relief through a decree of a

conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." *Riva v. Com. of Mass.*, 61 F.3d 1003, 1009–10 (1st Cir. 1995) (quotation marks omitted).

As discussed above, Wellness Connection is ready to apply for a license, but the City's points matrix significantly reduces Wellness Connection's chance of obtaining one of the 20 licenses based on residency alone. This is an injury to Wellness Connection (and its owner High Street) now and is not dependent on future contingencies or a change in circumstances. *See Gratz*, 539 U.S. at 260–68. Plaintiffs' claims are also entirely legal in nature, challenging the constitutionality of the points matrix. These claims are not "bound up in the facts" and should be decided before the City has awarded licenses and Plaintiffs' injuries are more difficult to remedy. *See Riva*, 61 F.3d at 1011 (reasoning that a claim was ready for adjudication where plaintiff "mounts a facial challenge to the state law," which makes his claim "unabashedly legal;" where "the controversy is narrowly defined and is susceptible to specific relief, adequate to conclude the matter, without speculation or reference to hypothetical facts, and without much risk that the court's opinion will prove superfluous;" and where "the case is fully adverse"). As for the third factor, the presence of adverseness, Plaintiffs and the City are squarely adverse now. Wellness Connection has obtained a conditional license from the state and is prepared to apply for one of the City's 20 retail licenses. The City is awarding these licenses in a manner that obviously disadvantages companies like Wellness Connection that are wholly owned by non-residents. A decision for Plaintiffs on the merits would afford "specific relief" by leveling the playing field and eliminating the unconstitutional factors in the City's points matrix before the matrix is used to award licenses.

ii. Withholding judgment until after the licenses are issued would impose hardship on Plaintiffs.

"The hardship prong evaluates the extent to which withholding judgment will impose hardship—an inquiry that typically turns upon whether the challenged action creates a direct and immediate dilemma for the parties." *McInnis-Misenor*, 319 F.3d at 70 (quotation marks omitted); *see also Smith*, 376 F. Supp. 3d at 155 (stating that the hardship prong "concerns the harm to the parties seeking relief that would come to those parties from the withholding of a decision." (alterations and quotation marks omitted)). "Though the hallmark of cognizable hardship is usually direct and immediate harm, other kinds of injuries occasionally may suffice. For example, if the operation of a challenged statute is inevitable, ripeness is not defeated by the existence of a time delay before the statute takes effect." *Ernst & Young v. Depositors Econ. Prot. Corp.*, 45 F.3d 530, 536 (1st Cir. 1995).

Here, withholding judgment at this time will impose hardship because the City intends to issue licenses this summer, and once the licenses are issued, the harm cannot easily be redressed. If the Court waits until after the 20 licenses have been issued to determine that the ordinance is unconstitutional, would the remedy be to rescind licenses that have been issued to entities owned by Maine residents in order to put businesses owned by non-residents on equal footing? Or would the Court order the City to issue more than 20 licenses, thereby undoing the licensing scheme that the City spent "more than a year" drafting in order to "balance[] the need for a robust, well-regulated market" with "prevent[ing] the over-saturation of that market"? (Def.'s Mot. Dismiss at 1.) These challenges in crafting a remedy after the fact can be avoided by deciding the constitutional question now.

Because hearing this case after licenses have been issued would create serious hardship, deprive Plaintiffs of the unique and fleeting business opportunity available only at a market's inception, and make it much more difficult for the Court to fashion a meaningful remedy, the Court should find that this case is ripe now. *See McInnis-Misenor*, 319 F.3d at 70 ("The greater the hardship, the more likely a court will be to find ripeness.").

V. The balancing of harms and the public interest weigh in Plaintiffs' Favor

The City argues that because "Portland voters voted overwhelmingly in favor of legalizing adult use marijuana" in 2016, it would be harmful to the City and contrary to the public interest if the issuance of licenses were delayed. (Def.'s Mot. Dismiss at 18-19.) But if the points matrix is unconstitutional, the interests of the City and the public would be better served by fixing that problem now than by issuing licenses under an unlawful system. Either way, the Court will have to resolve the constitutional question, and the best time to do that is before actions are taken that may then have to be undone. There is no reason why it would cause more delay to simply decide the constitutional question now, before licenses are issued, than to put off the legal battle for another day.

CONCLUSION

Because the City's residency preference is unconstitutional and would cause Plaintiffs irreparable harm, their motion for a preliminary injunction should be granted and the City's motion to dismiss should be denied.

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July 20, 2020

CERTIFICATE OF SERVICE

I hereby certify that on July 20, 2020, I electronically filed the Complaint for Declaratory and Injunctive Relief with the Clerk of Court by electronic mail and will send notification of such filing(s) to the counsel of record.

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