Testimony of Daniel Walker, Preti Flaherty Beliveau & Pachios
On behalf of Wellness Connection of Maine
in Conditional Support of
LD 1837, Resolve, Regarding Legislative Review of Chapter 1: Adult Use Marijuana, a Late-filed Major Substantive Rule of the Department of Administrative and Financial Services, Office of Marijuana Policy

Joint Standing Committee on Veterans and Legal Affairs
June 10, 2019

Senator Luchini, Representative Schneck, and Members of the Veterans and Legal Affairs Committee,

My name is Dan Walker and I am a lawyer at the firm Preti Flaherty. I am testifying today on behalf of Wellness Connection of Maine. As you have heard, Wellness Connection supports these provisional rules, though only on the condition that several changes proposed by my colleague Sara Moppin are included in the rules approved by the Legislature.

As most of you know, Wellness Connection of Maine is currently the largest legitimate marijuana business in the State of Maine. It operates four of the eight medical marijuana dispensaries in Maine and has been a good corporate citizen and role model for Maine's medical marijuana industry for the past eight years. It should not surprise anyone that WCM wants to participate in the adult use market and has been planning for this new market for years now.

We are very concerned that the residency requirements in the current form of the rules will provide a serious obstacle to Wellness Connection's entry to the adult use market. This would be a perverse result of rules which, presumably, are intended to encourage participation by good actors.

My colleague Sara Moppin has provided you with a redline of the rules which indicates our proposed changes.

Though Wellness views the changes outlined in Sara's testimony as necessary given the current form of the rules, we remain concerned that even with these changes, the rules remain somewhat confusing, will continue to give the department broad discretion in dealing with applications and licensed establishments, and are therefore unpredictable. We think that the Legislature can help provide clarity by, in addition to making our requested changes, adopting a statement of purpose to be printed with the rules in their final form:

> **STATEMENT OF PURPOSE**
> In adopting these major substantive rules, it is the intent of the Legislature that these rules strictly adhere to the residency requirement established in 28-B MRS 202(2)(B) that "A majority of the shares, membership interests, partnership interests or other equity ownership interests as applicable to the business entity must be held or owned by natural persons who are residents or business entities whose owners are all natural persons who are residents." This requirement is unambiguous, and these rules cannot and do not impose any additional restrictions on the relationship between a Maine marijuana establishment and a non-resident. In particular, these rules should not be read to limit the amount or percentage of marijuana establishment revenues that flow to non-Maine residents or out-of-state companies as a result of any arms-length legitimate business transaction.

This statement of purpose will clarify that the department does not have any discretion to impose residency-related requirements on marijuana establishments that are not explicit in Title 28-B.

THE RESIDENCY REQUIREMENTS IN TITLE 28-B ARE UNCONSTITUTIONAL

Regrettably, if the provisional rules are not sufficiently changed by the legislature, Wellness or one of its partners will be forced to the sue the state on the grounds that the residency requirement in statute and rule is unconstitutional. The OMP has stated on its website that the residency requirements are intended to "ensure that economic opportunities afforded by marijuana legalization are available, chiefly, for the citizens of Maine.'" This is plainly unconstitutional since the U.S. Supreme Court has often stated that "[s]hielding in-state industries from out-of-state competition is almost never a legitimate local purpose, and state laws that amount to simple economic protectionism consequently have been subject to a virtually per se rule of invalidity." *Maine v. Taylor*, 477 U.S. 131 (1986). See, also, *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978); *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 471 (1981). Because both the statute, 28-B MRS § 202(2), and the rules have a clear protectionist purpose, which the OMP has confirmed in its written statements, they are unconstitutional.

If a lawsuit is necessary, we have informed OMP that Wellness cannot afford to be shut out of the market, and so it will also seek a preliminary injunction preventing the adult use program from going into effect until the legal challenge is resolved. We certainly hope none of this is necessary, but at this point it is up to the legislature to make the needed changes to the rules.

CONCLUSION

Wellness Connection of Maine is exactly the type of business that the State of Maine should want participating in the adult use market. We have consistently operated by the letter of the law in the medical market for the past eight years, and have been a leading voice for responsible regulation and enforcement. The legislature should make the necessary changes, and adopt WCM's proposed statement of intent, to ensure that WCM and other similar businesses are not significantly disadvantaged in Maine's new adult use market.

Thank you for the opportunity to testify today, and I will be happy to answer any questions you may have.