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MONTANA EIGHTH JUDICIAL DISTRICT COURT, CASCADE COUNTY

JANELLE YATSKO AND DALE YATSKO, Petitioners, vs. CITY OF GREAT FALLS, Respondent.	Cause No.: ADV-22-0308 David J. Grubich **BRIEF IN SUPPORT OF APPLICATION FOR PRELIMINARY INJUNCTION**

State law prevents the City of Great Falls from prohibiting adult-use cannabis dispensaries from doing business. Section 16-12-301(1), MCA. In this case, the City has ignored the law and refuses to process a Safety Inspection Certificate ("SIC") application for Petitioners Dale and Janelle Yatsko (the "Yatskos") that would allow them to operate a state-licensed dispensary in city limits. The City's refusal to process the Yatskos' SIC application is preempted by state law.

The Yatskos are entitled to preliminary injunctive relief on two independent grounds. First, the Yatskos have made out a prima facie case that they are entitled to the relief requested. *See* § 27-19-201(1), MCA. It is well-established that "[a] local government with self-

government powers is prohibited the exercise of any power in any manner inconsistent with state law or administrative regulation in areas of law affirmatively subjected by law to state regulation or control." Section 7-1-113(1), MCA. *See also* Mont. Const., Art. XI, Sec. 6 (limiting local self-governing powers to those that do not conflict with state statute). Whether adult-use cannabis dispensaries may operate in the City of Great Falls is an "area[] of law affirmatively subjected by law to state regulation or control." Section 7-1-113(1), MCA. State law authorizes adult-use cannabis dispensaries to operate in Great Falls; the City's conflicting policy is preempted.

Second, the Yatskos are entitled to preliminary relief because they have constitutionally-protected interests in the supremacy of state law over unlawful local regulations, and they continue to suffer injury from the City's invasion of those constitutional protections. The "loss of a constitutional right constitutes irreparable harm for the purpose of determining whether a preliminary injunction should be issued." *Mont. Cannabis Indus. Ass'n v. State* ("*MCIA*"), 2012 MT 201, ¶ 15, 296 P.3d 1161, 366 Mont. 224 (citing *Elrod v. Burns*, 427 U.S. 347, 373 (1976)).

After a show cause hearing, the Court should grant the application and issue a preliminary injunction.

I. BACKGROUND

Montana voters approved Initiative 190 ("I-190") in the 2020 general election. I-190 legalized and regulated the cultivation and sale of adult-use cannabis statewide. Cascade County voters overwhelmingly approved I-190. The initiative was even more popular in the City of Great Falls, with as many as 71% of voters in some precincts voting for the measure.

After the passage of I-190, the Montana Legislature met in early 2021 to adopt comprehensive, statewide changes to the structure of adult-use cannabis regulation. The

legislature chose to adopt a system of "green" and "red" counties through House Bill 701 (codified in pertinent part at §§ 16-12-301, *et seq.*, MCA). Section 16-12-301, MCA, establishes that the cultivation and sale of adult-use marijuana is legal in counties where a majority of voters cast their ballots in favor of I-190 ("green counties"). In counties where I-190 did not receive a majority of the votes, the law prohibits the cultivation and sale of adult-use cannabis unless the local electorate approves it through another, subsequent election ("red counties").

The legislature established a comprehensive, statewide scheme for marijuana regulation and assigned principal regulatory control to the Montana Department of Revenue through the newly created Cannabis Control Division. *See, e.g.*, § 16-12-103, MCA ("The department [of revenue] shall license and regulate the cultivation, manufacture, transport, and sale of marijuana as allowed by this chapter and shall administer and enforce this chapter."). The Department enjoys broad authority to regulate, license, and monitor the cultivation and sale of adult-use cannabis, as well as primary enforcement authority. *See* §§ 16-12-101, *et seq.*, MCA. State law establishes whether adult-use cannabis dispensaries are legal within a certain county, and it empowers local jurisdictions to enact additional "public health, safety, or welfare" regulations in areas where dispensaries are legal. Section 16-12-301(2)(a), MCA. For example, state law specifically authorizes local governments to conduct "inspections of licensed premises." *Id.*

Pertinent here, the statute provides only one mechanism to prohibit the cultivation and sale of adult-use cannabis in green counties altogether: by holding an election under § 16-12-301(7)(a), MCA. Otherwise, "[m]arijuana businesses located in counties in which the majority of voters voted to approve Initiative Measure No. 190 in the November 3, 2020, general election are not subject to the local government approval process" (a referendum election). Section 16-

12-301(1)(e), MCA. Cascade County is a "green" county and the City of Great Falls has had no referendum election in which voters have opted to make the city "red."

The State of Montana already licenses Petitioners, Janelle and Dale Yatsko, to operate Green Creek Dispensary, located in Cascade County outside Great Falls' city limits. Exhibit A, Affidavit of Janelle Yatsko ("Yatsko Aff."), ¶¶ 3-5. The State of Montana first licensed the Yatskos to cultivate and dispense medical cannabis 14 years ago. *Id.*, ¶ 4. After the passage of I-190 and House Bill 701, the State of Montana, Department of Revenue, Cannabis Control Division licensed the Yatskos to cultivate and dispense adult-use cannabis. *Id.*, ¶ 5.

In early 2022, the Yatskos secured a location within the City of Great Falls to operate a second location of their adult-use cannabis dispensary. *Id.*, ¶ 6. The State of Montana, Department of Revenue, Cannabis Control Division confirmed through its inspector that the proposed location complies with state law site requirements. *Id.*, ¶ 7.

On February 10, 2022, the Yatskos completed a Safety Inspection Certificate application provided by the City of Great Falls and sought to obtain an inspection of their proposed adult-use dispensary site within city limits. *Id.*, ¶ 8; Exhibit B, SIC Application. Great Falls Fire Rescue personnel did not process the application and referred the Yatskos to the City Attorney. Yatsko Aff, ¶ 8. The Yatskos met with the Deputy City Attorney who refused to process or otherwise assist them with their application. *Id.*, ¶ 9. On February 24, 2022, the Yatskos, through counsel, contacted the City of Great Falls to confirm its position that it refused to process the application. *Id.*, ¶ 11.

On March 16, 2022, City Manager Greg Doyon responded to the Yatskos and denied their permit application. Citing Great Falls City Ordinance 3054, now OCCGF 17.20.3.070, Doyon wrote that "the City's zoning regulations [were] enacted specifically to prohibit any

medical marijuana activities inside the City" and that "[a]lthough the State of Montana has now legally authorized certain activities relating to adult-use marijuana," the City would deny the permit because "there have been no changes on the federal law front with respect to marijuana-related activities." Exhibit C, Letter from Greg Doyon ("City Manager Letter").

On March 21, 2022, the Yatskos appealed the City Manager's decision. Yatsko Aff., ¶ 13. On March 25, 2022, the City Attorney notified the Yatskos that the Great Falls City Commission would consider the Yatskos' appeal at a special meeting on April 19, 2022. *Id.*, ¶ 14. On April 19, 2022, the City Commission held its special meeting and denied the Yatskos' appeal. *Id.*, ¶ 15. The City simultaneously ordered staff to begin preparation for a referendum election under § 16-12-301(7)(a), MCA, to ask Great Falls voters whether to make Great Falls a "red" jurisdiction—something only possible because Great Falls is, under current law, "green." *Id.*

The Yatskos have all necessary clearances from the State of Montana to operate their second location within Great Falls city limits, apart from the SIC application, and could be operational within weeks of their SIC application being processed by the City. *Id.*, ¶ 16.

II. LEGAL STANDARD

A preliminary injunction should issue when any one of the grounds enumerated in § 27-19-201, MCA is met. *See Weems v. State by & through Fox*, 2019 MT 98, ¶ 17, 395 Mont. 350, 440 P.3d 4; *Stark v. Borner* (1987), 226 Mont. 356, 359, 735 P.2d 314, 316. Two grounds are relevant here.

First, a preliminary injunction is warranted when an applicant is "entitled to the relief demanded and the relief or any part of the relief consists in restraining the commission or continuance of the act complained of, either for a limited period or perpetually." § 27-19-201(1),

MCA. In the context of constitutional challenge, an applicant need only establish a prima facie case of a violation of her rights; indeed, "the trial court should restrict itself to determining whether the applicant has made a sufficient case to warrant preserving a right in status quo until a trial on the merits can be had." *Weems*, ¶ 18 (internal quote omitted).

Second, an injunction is warranted when "the commission or continuance of some act during the litigation would produce a great or irreparable injury to the applicant." § 27-19-201(2), MCA. "For the purposes of a preliminary injunction, the loss of a constitutional right constitutes an irreparable injury." *Driscoll v. Stapleton*, 2020 MT 247, ¶ 15, 401 Mont. 405, 473 P.3d 386; *see also Weems*, ¶ 25.

III. ARGUMENT

A. Section 16-12-301, MCA, preempts the City's ban on adult-use dispensaries

The Yatskos are entitled to preliminary injunctive relief under § 27-19-201(1), MCA, because they have made out a prima facie case that state law preempts the City's ban on adult-use cannabis dispensaries.

The City of Great Falls is a political subdivision of the State of Montana. Section 7-1-4121(15), MCA. Though the City has self-governing powers, the Montana Constitution limits the exercise of those powers to the extent they conflict with state statute. Mont. Const., Art. VI, Sec. 6. Where there is a conflict between state statute and the policy of a self-governing local government, state statute prevails and the contrary local policy yields. *Id. See also City of Missoula v. Fox*, 2019 MT 250, ¶ 24, 397 Mont. 388, 450 P.3d 898 (invalidating city ordinance that conflicted with state law). Montana's local government statutes, codified in Title 7, reflect the same principle. "Consistency with state regulation" is "required," even for local jurisdictions with self-government powers: "A local government with self-government powers is prohibited

the exercise of any power in a manner inconsistent with state law or administrative regulation in any area affirmatively subjected by law to state regulation or control." Section 7-1-113(1), MCA.

Courts routinely enforce the Constitution's requirement that state statute preempts conflicting local regulation. In *City of Helena v. Svee*, for example, the Montana Supreme Court held that state building codes preempted and invalidated a City of Helena zoning ordinance that created conflicting requirements for certain buildings. 2014 MT 311, 377 Mont. 158, 339 P.3d 32 (upholding summary judgment in favor of plaintiff and remanding for an award of attorney fees). The Court held that the City's ordinance was preempted and invalid even though another state statute granted the City authority to regulate some matters in the affected policy area. *Svee*, ¶ 12. Because the City's zoning ordinance trammeled on areas "affirmatively subjected by law to state regulation or control"—building codes—it was preempted by contrary state law. *Id.*, ¶ 16 (quoting § 7-1-113(1), MCA).

The same principles control the outcome in this case. State law—§ 16-12-301(1), MCA—"affirmatively subject[s] by law to state regulation or control" whether adult-use cannabis dispensaries may operate in a county. The City of Great Falls is in a green county. Under § 16-12-301(1)(e), MCA, the Yatskos are not required to undergo another election before they may operate their lawful, state-licensed business—they are, under the plain text of the statute, "not subject to the local government approval process" that would apply in a red county. *Id.* State law gives the City of Great Falls only one means to prohibit adult-use cannabis dispensaries from doing business in the City: ask its voters in a referendum election under subsection (7). Unless and until the voters in Great Falls speak, the City is in a "green" jurisdiction under state law and may not ban adult-use dispensaries.

Indeed, the City appears to recognize that its ban on adult-use cannabis dispensaries runs afoul of state law. Responding to the Yatskos, the City Manager acknowledged the change in state law, and instead sought refuge in federal statute by arguing that the City would not allow the operation of businesses not authorized by federal law. *See* Exhibit C (City Manager Letter). To the extent the City seeks to revive its federal law argument before this Court, it fails on even a cursory analysis. As a political subdivision of the State of Montana, the City of Great Falls is subordinate to state law and has no authority to pick and choose between state and federal law—it is a component of the state and bound by its laws. Mont. Const., Art. XI, Sec. 6.

The City can regulate adult-use cannabis dispensaries; it can zone them; it can inspect them; it can enact a wide range of public safety regulations affecting them. It has had over 19 months to develop such regulations since the passage of I-190. But state law makes it clear that the only way the City can prohibit dispensaries from doing business is through a referendum election that has not occurred. State law makes Great Falls a "green" jurisdiction where dispensaries are permitted to operate, unless and until the City's electorate says otherwise.

The Yatskos have made out more than a prima facie case that they are "entitled to the relief demanded" under § 27-19-201(1). Preliminary relief should issue.

B. The City's ban injures the Yatskos' constitutionally protected interests

Independently, the Yatskos are entitled to preliminary injunctive relief under § 27-19-201(2), MCA, which provides that relief should issue if "it appears that the commission or continuance of some act during the litigation would produce a great or irreparable injury to the applicant." "For the purposes of a preliminary injunction, the loss of a constitutional right constitutes an irreparable injury." *Driscoll*, ¶ 15.

The Yatskos have a fundamental constitutional right to be free from the operation of local policies that violate the Montana Constitution and state statute. The most fundamental right guaranteed by the Montana Constitution is the right of citizens to live and work under government whose powers conform to the structures set forth in the constitution itself. "[T]he constitution is 'the fundamental and paramount law' and the fundamental 'theory of every [constitutional] government' is 'that an act of [a] legislature, repugnant to the constitution, is void.'" *McLaughlin v. Montana State Legislature*, 2021 MT 178, ¶ 63, 405 Mont. 1, 493 P.3d 980, (McKinnon, J. specially concurring) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177, (1803)). Likewise, legislative and other acts by local governments that are preempted by state law invade the rights established by the Montana Constitution and are void. *Montana-Dakota Utilities Co. v. City of Billings*, 2003 MT 332, ¶ 15, 318 Mont. 407, 80 P.3d 1247 (invalidating local ordinance under Montana Constitution and statute).

Article XI of the Montana Constitution creates a constitutionally protected interest in the supremacy of state law over conflicting local policies. Article XI empowers local governments to exercise the powers of self-government through Section 5. In the same breath, Article XI, Section 6 limits those powers by subjecting them to the requirements of the Constitution and state statute, mandating consistency, and requiring that local polices yield wherever there is a conflict. This constitutional structure does not exist to serve the interests of government; it guarantees a particular government structure for the benefit of the people, who under the Montana Constitution are the source of all government power. Mont. Const., Art. II, Secs. 1-2.

While Article XI creates the constitutional interest in the supremacy of state law over inconsistent local policy, Article II—the Declaration of Fundamental Rights—secures it. Article II, Sections 1 and 2 guarantee citizens like the Yatkos the right to live and work under the form

of government provided in the Constitution. *E.g.*, Mont. Const., Art. II, Sec. 2 ("All political power is vested in and derived from the people. All government of right originates with the people, is founded upon their will only, and is instituted solely for the good of the whole."). A local government policy that violates, or is preempted by, state law upends the structure of government guaranteed in the Constitution by subordinating state law to local policy. It denies affected citizens their fundamental right to government as provided in the Constitution—the heart of the rule of law, and the basic benefit of the "bargain" of popular sovereignty under the Constitution.

In this case, the subordination of state law to a preempted local policy violates other rights protected by Article II as well. The City's unlawful conduct burdens the Yatskos' rights to "acquiring, possessing and protecting property" and to pursue employment under Article II, Section 3, as well as the Yatskos' fundamental right to due process secured in Article II, Section 17. *Wiser v. State, Dep't of Com.*, 2006 MT 20, ¶ 21, 331 Mont. 28, ¶ 21, 129 P.3d 133, ¶ 21 ("This Court has held that [Art. II Sec. 3] provides a fundamental right to the citizen to pursue employment."); *see Wadsworth v. State*, 275 Mont. 287, 302, 911 P.2d 1165, 1173 (1996) (right to employment secured by Article II, Section 3).

It is well-established that the "loss of a constitutional right constitutes irreparable harm for the purpose of determining whether a preliminary injunction should be issued." *MCIA*, ¶ 15. Here, the Yatskos have made out a prima facie case that the City's ban on dispensaries and refusal to process their SIC application invades their constitutionally-protected interests. Accordingly, "the commission or continuance of some act during the litigation would produce a great or irreparable injury to the applicant" absent preliminary relief under § 27-19-201(2), MCA.

IV. CONCLUSION

The Yatskos have made out a prima facie case that they independently satisfy two bases for preliminary relief under § 27-19-201(1) and -(2). The Court should set a show cause hearing and, following the hearing, grant the application and enter a preliminary injunction.

Respectfully submitted this 27th day of June, 2022.

/s/ Raphael Graybill
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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing Brief in Support of Application for Preliminary Injunction is 2956 words, excluding the caption, certificates of service and compliance, signature lines, and attachments, as calculated by the undersigned's word processing program.

/s/ Raphael Graybill
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the above was duly served upon the following on the 27th day of June, 2022, by hand delivery and email.

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