STATE OF MICHIGAN
IN THE COURT OF CLAIMS

VIRIDIS LABORATORIES, LLC, a Michigan limited liability company, and VIRIDIS NORTH, LLC, a Michigan limited liability company,

Plaintiffs,

v.

Case No. 21-000219-MB

Hon. Christopher M. Murray

MICHIGAN MARIJUANA REGULATORY AGENCY, a Michigan state agency, ANDREW BRISBO, Individually, JULIE KLUYTMAN, Individually, DESMOND MITCHELL, Individually, and CLAIRE PATTERSON, Individually,

Defendants.

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[11/30/2021] MOTION AND BRIEF OF THE MICHIGAN CHAMBER OF COMMERCE FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

The Michigan Chamber of Commerce ("Michigan Chamber"), by its attorneys, Miller, Canfield, Paddock and Stone, P.L.C., respectfully moves this Court for leave to file an *amicus curiae* brief. In support of this motion, the Michigan Chamber states as follows:

1. The Michigan Chamber is a nonprofit corporation representing over 4,000 members, all of whom are private enterprises engaged in an array of civic, professional, commercial, industrial, and agricultural activity in Michigan. Its membership includes businesses big and small, trade associations, and local chambers of commerce representing all 83 Michigan counties and employing over a million Michiganders.

2. Using its voice to advance member priorities through legislative, legal, and political action, the Michigan Chamber's ultimate goal is to achieve policies that benefit members, their employees, and in turn the people of the State of Michigan. With this goal in mind, the Michigan Chamber has participated in lawsuits to ensure that courts are aware of how business is conducted in Michigan and are mindful of the impact court decisions have on business operations and economic development.

3. As set forth in the attached proposed *amicus curiae* brief, the Michigan Chamber is deeply concerned about the impact of what appears to be an extreme and unconstitutional government overreach by the Michigan Marijuana Regulatory Agency ("MRA") in this case and the consequences of such excessive action for Michigan businesses within the industry.

4. In organizing and conducting their operations within this State, Michigan businesses implicitly rely on the principle that administrative agencies will follow their own rules and statutory mandates when acting and will operate within the lines laid down by the Legislature in endowing those agencies with authority to act. The MRA's failure to abide by those basic tenets in this case not only jeopardizes Plaintiffs' business and its employees' livelihoods but also risks

setting a dangerous precedent and creating a hostile business climate for many of the Michigan Chamber's constituent members.

5. The Michigan Chamber respectfully asks the Court to grant leave to file an *amicus curiae* brief addressing these important issues, and accept the attached proposed *amicus curiae* brief (attached as Exhibit 1).

6. Pursuant to Local Rule 2.119(A)(2), on November 29, 2021, undersigned counsel sought concurrence in the relief sought in this motion from Plaintiffs and Defendants. By way of email dated November 30, 2021, counsel for Plaintiffs concurred with this motion. Counsel for Defendants have not affirmatively indicated whether they concur, making this motion necessary.

WHEREFORE, the Michigan Chamber of Commerce respectfully requests that the Court grant its request to participate as *amicus curiae* in this case and accept the attached proposed brief for filing.

Respectfully submitted,

Miller, Canfield, Paddock and Stone, P.L.C.

By: */s/Scott R. Eldridge*

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Dated: November 30, 2021

CERTIFICATE OF SERVICE

I hereby certify that on November 30, 2021, I caused the foregoing document to be electronically filed with the Clerk of the Court using the electronic filing system which will send notification of such filing to all attorneys of record.

By: */s/Scott R. Eldridge*

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EXHIBIT 1

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[11/30/2021] PROPOSED *AMICUS CURIAE* BRIEF OF
THE MICHIGAN CHAMBER OF COMMERCE IN SUPPORT OF PLAINTIFFS

STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Michigan Chamber of Commerce (the "Michigan Chamber") submits this amicus curiae brief to the Court in *Viridis Laboratories, LLC, et al v Michigan Marijuana Regulatory Agency, et al.*

The Michigan Chamber is a nonprofit corporation representing over 4,000 members, all of whom are private enterprises engaged in an array of civic, professional, commercial, industrial, and agricultural activity in Michigan.[1] Its membership includes businesses big and small, trade associations, and local chambers of commerce representing all 83 Michigan counties. In total, the members of the Michigan Chamber employ over a million Michiganders. Since its founding in 1959, the Michigan Chamber has sought to engage decision makers at all levels of government with the hope that the continual development of law and public policy will keep Michigan economically competitive and make Michigan an attractive destination for world-class employers and talent.

Using its voice to advance member priorities through legislative, legal, and political action, the Michigan Chamber's ultimate goal is to achieve policies that benefit members, their employees, and in turn the people of the State of Michigan. The Michigan Chamber and its members share the same objective: to create jobs in Michigan and improve the quality of life for Michigan families. With this goal in mind, the Michigan Chamber has participated in lawsuits to ensure that courts are aware of how business is conducted in Michigan and are mindful of the impact court decisions have on business operations and economic development.

[1] No counsel for a party to this action has authored this brief in whole or in part, and no party or counsel for a party or any individual other than the amicus curiae, its members, or its counsel, has made a monetary contribution intended to fund the preparation or submission of this brief.

The Michigan Chamber is deeply concerned about the impact of what appears to be an extreme and unconstitutional government overreach by the Michigan Marijuana Regulatory Agency ("MRA") in this case and the consequences of such excessive action for Michigan businesses within the industry. In organizing and conducting their operations within this State, Michigan businesses implicitly rely on the principle that administrative agencies will follow their own rules and statutory mandates when acting and will operate within the lines laid down by legislation endowing those agencies with authority to act. The MRA's failure to abide by those basic tenets in this case not only jeopardizes Plaintiffs' business and its employees' livelihoods but also risks setting a dangerous precedent and creating a hostile business climate for many of the Michigan Chamber's constituent members. Therefore, the Michigan Chamber respectfully supports the Plaintiffs' requests for relief in this matter.

INTRODUCTION

Administrative agencies are creatures of statute, born of Legislative decree and cabined always by their own regulations and rulemaking procedures, the limitations and requirements imposed by the Legislature and legislation, and the commands of due process. The Michigan Marijuana Regulatory Agency ("MRA")'s action here runs afoul of each of those strictures and constitutes precisely the type of super-legislative fiat that administrative agencies lack the authority to issue. While state agencies serve an important role in overseeing industry through the promulgation of reasonable (and reasoned) administrative regulations, the MRA's recall bulletin and effective suspension of Plaintiffs' licenses depart from that goal in a shocking and uniquely overbroad way that subverts the democratic process and tramples the structural and constitutional lines enforced by the separation of powers doctrine in three ways.

First, the MRA lacks any inherent power and is constrained by the authority delegated to it by the Legislature and legislation; yet the MRA's vague rationale for issuing the recall bulletin is not grounded in its existing authority and instead represents an attempt to promulgate new Legislative standards outside the statutory and Constitutionally mandated processes. *Second*, while the MRA does have authority to promulgate rules to implement Michigan's marihuana regulatory laws[2] in compliance with the Administrative Procedures Act ("APA"), it chose instead to circumvent that process by issuing a "bulletin." Since that recall bulletin is, in force and effect, a legislative rule, it is void for failure to comply with the APA. *Third*, and in addition to the problems with the new substantive regulations that the MRA has attempted to impose on Plaintiffs, the MRA has unconstitutionally attempted to revoke or suspend Plaintiffs' duly issued testing

[2] Medical Marihuana Facilities Licensing Act ("MMFLA"), MCL 333.27101 *et seq*, and Michigan Regulation and Taxation of Marihuana Act ("MRTMA"), MCL 333.27951 *et seq*.

licenses without due process of law. For these reasons, the Michigan Chamber respectfully submits that the Court should enter the temporary restraining order and preliminary injunctive relief sought by Plaintiffs.

ARGUMENT

I. THE MRA IS CONSTRAINED BY ITS LEGISLATIVE MANDATE AND LACKS THE AUTHORITY TO IMPOSE EXTRA-STATUTORY CONDITIONS ON MARIHUANA BUSINESSES.

The scope of the MRA's overreach in this case is, quite simply, staggering. With a stroke of the pen—and no notice or opportunity for public comment—the MRA has implemented an entirely new system of standards and procedures for recalling marihuana products. That new system apparently includes: (1) procedures for how the MRA determines what number of failed test results will trigger a product recall; (2) how the MRA decides the scope of the product recall; (3) a new requirement that a testing company maintain and produce testing logbooks on demand; (4) the options available to downstream supply chain participants for remediating products potentially affected by the failed tests; (5) whether and under what conditions the original testing company may continue testing operations or may be summarily prohibited from doing so; and (6) whether licensees other than the original tester can also be penalized for failed tests. In the process, the MRA has unilaterally taken off the market nearly $230 million in product and gifted Plaintiffs' rivals in the market a competitive windfall.

Nothing in either the MMFLA, MRTMA, or the implementing rules gives the MRA such sweeping authority. As a threshold principle, it is well-established that an agency has no inherent authority of its own. *Oshtemo Charter Tp v Kalamazoo Co Rd Comm*, 302 Mich App 574, 584; 841 NW2d 135 (2013). "Administrative agencies are a creation of the Legislature, and their powers are accordingly limited to those that the Legislature chooses to delegate to them through statute." *Fellows v Mich Comm for the Blind*, 305 Mich App 289, 297; 854 NW2d 482 (2014);

Fisher v Kalamazoo Regional Psychiatric Hosp, 329 Mich App 555, 561; 942 NW2d 706 (2019) ("'The power and authority to be exercised by boards or commissions must be conferred by clear and unmistakable language, since a doubtful power does not exist.'"). Courts therefore "carefully limit the powers of administrative agencies to ensure that they do not abuse or make baseless expansions of the limited powers delegated to them by the Legislature." *Herrick Dist Library v Library of Mich*, 293 Mich App 571, 582; 810 NW2d 110 (2011).

Here, the MRA has run roughshod over those baseline limiting principles. Neither the MMFLA nor the MRTMA gives the MRA the express power to issue product recalls. The only administrative rule mentioning recalls is Rule 420.502, which merely provides that "[t]o ensure access to safe sources of marihuana products, the agency, if alerted in the statewide monitoring system, may place an administrative hold on marihuana products, recall marihuana products, issue safety warnings, and require a marihuana business to provide information material or notifications to a marihuana customer at the point of sale." Mich Admin Code, R 420.502(2). But this rule again provides no standards that the MRA must apply to determine when and under what conditions to issue a recall, nor does it even require notice or otherwise provide any protections to the licensees whose business may be affected by the recall. See MCL 333.27407(2) (requiring due process with respect to the suspension or revocations of license); MCL 24.292(1) (same); compare Mich. Admin. Rule 420.704(6) (MRA must prove by preponderance of evidence that sufficient grounds exist for the intended action to suspend or revoke a license).

With no statutory or regulatory basis to ground it, the MRA's recall bulletin unconstitutionally exceeds the scope of the agency's Legislatively approved mandate and improperly attempts to wrest additional Legislative power to the MRA in violation of basic separation of powers principles. Here again, it is a basic tenet of administrative law that "'an

administrative agency may not, under the guise of its rule-making power, abridge or enlarge its authority or exceed the powers given to it by the statute, the source of its power.'" *Jackson v Secy of State*, 105 Mich App 132, 139; 306 NW2d 422 (1981). Yet that is exactly what the MRA has done by issuing its recall "bulletin."

Put simply, the Legislature and legislation granted the MRA the power to take certain actions—for example, to "inspect and examine all premises of marihuana facilities," and to "[c]onduct periodic audits of marihuana facilities." See, e.g. MCL 333.27303(1)(c)(i), (1)(*i*).[3] Likewise, the legislation is very specific about the areas in which the MRA was to promulgate rules—for example, the "[t]esting, packaging, and labeling standards, procedures, and requirements for marihuana," the "use of the statewide monitoring system to track all marihuana transfers," and "quality control standards, procedures, and requirements." MCL 333.27206(g)-(h); MCL 333.27958(1)(e). The power to issue sweeping—and potentially industry crippling—product recalls was not among them. Nevertheless, the MRA took it upon itself to read that authority into the statutes, without even testing its recall procedures in the notice-and-comment process. But "[a]n agency may not confer power upon itself," and "our system does not permit agencies to act unlawfully even in pursuit of desirable ends." *Ala Ass'n of Realtors v Dep't of Health & Human Servs*, 141 S Ct 2485, 2490 (2021); *La Pub Serv Comm v FCC*, 476 US 355, 357; 106 S Ct 1890; 90 L Ed 2d 369 (1986).

[3] The MRA may argue that the Section 303(1)(n) of the MMFLA (allowing the agency to "[t]ake any other reasonable or appropriate action to enforce this act and rules") authorizes the recall. MCL 333.27303(1)(n). While this vague catchall may give the MRA the ability to promulgate rules, pursuant to the APA, articulating the standards the agency will use to issue recalls, it does not authorize the MRA to invent those rules out of whole cloth on an *ad hoc* basis. But that is exactly what the MRA has done here: invented its own internal recall rules, failed to disclose those rules to the public or to any relevant stakeholder, and then applied them to Plaintiffs' detriment.

To sum it up, the MRA has blocked hundreds of millions of dollars' worth of commerce by issuing a scant two-page memo without any public notice, untethered to any discernible Legislative or regulatory standard, on the basis of a mere six potentially inconsistent testing samples from only one of the two licensed Plaintiffs. Neither the MMFLA nor the MRTMA contemplates such an expansive exercise of Legislative authority by the MRA, and the MRA's recall bulletin is void as exceeding its statutory and Constitutional authority. Reaching a contrary conclusion would invite other administrative agencies to engage in similarly sweeping and overbroad attempts to steer their respective industries without any Legislative oversight.

II. THE MRA'S RECALL BULLETIN IS VOID FOR FAILURE TO FOLLOW THE APA'S NOTICE AND COMMENT PROCESS FOR RULEMAKING.

Even if the MRA had authority in the abstract to issue the type of sweeping recall notice that it did in this case, it failed to follow the required APA notice-and-comment process for promulgating rules to do so. Again, the MRA did not simply issue a recall bulletin—rather, it implicitly made the determinations: (1) that six out of ten randomly selected samples with potentially inconsistent test results justifies a recall (2) of *all* product tested by that particular testing company (3) for a *three-month period*, (4) as well a recall of *all* product tested by a separate testing company, operating under a *separate* license, for the same three-month period, none of whose samples returned potentially concerning results; (5) that the testing company's competitors would be delegated the lucrative task of performing secondary testing; (6) that the only alternative is returning the product for retesting or its complete destruction; and (7) that the MRA need not specify control conditions for retesting.

But the MRA failed to follow any discernible statutory or regulatory guidelines in making those determinations. No procedures currently exist in either the MMFLA, MRTMA, or their implementing regulations for determining when a recall is authorized, necessary, or appropriate.

Despite having rulemaking authority, the MRA never bothered to promulgate rules governing recalls. Now it appears to be trying to kill two birds with one stone by issuing both the rules and the recall in a two-page bulletin. But the APA is very clear about the procedures that must be followed for issuing rules. A rule is any "agency regulation, statement, standard, policy, ruling, or instruction of general applicability that implements or applies law enforced or administered by the agency…" MCL 24.207. By statute, administrative rules are subject to various procedural requirements, including that "*before* the adoption of a rule, an agency, or the office, shall give notice of a public hearing and offer a person an opportunity to present data, views, questions, and arguments," and an agency representative "shall" be present during that public hearing and "shall" participate in the discussion. MCL 24.241(1), (5) (emphasis added). The APA requires an agency to utilize formal notice-and-comment rulemaking procedures when establishing policies that "do not merely interpret or explain the statute or rules from which the agency derives its authority," but rather "establish the substantive standards implementing the program." *Faircloth v Family Indep Agency*, 232 Mich App 391, 403-04; 591 NW2d 314 (1998).

The Michigan Supreme Court has explained the importance of the APA's notice-and-comment rulemaking procedures:

> The extensive notice and hearing procedures mandated by the APA are calculated to invite public participation in the rule-making process, prevent precipitous action by the agency, prevent the adoption of rules that are illegal or that may be beyond the legislative intent, notify affected and interested persons of the existence of the rules, and make the rules readily accessible after adoption.
>
> More important, the APA is essential to the preservation of a democratic society. Put simply, without public oversight and scrutiny of legislative action undertaken by administrative agencies, such agencies would rule without the normal safeguards of our republic. Indeed, the APA is a bulwark of liberty by ensuring that the law is promulgated by persons accountable directly to the people.

Am Federation of State, Co & Mun Employees (AFSCME), AFL-CIO v Dept of Mental Health, 452 Mich 1, 14-15; 550 NW2d 190 (1996) (internal quotation marks omitted).

While the MRA may try to paint its recall notice as a mere guidance document ("an agency statement or declaration of policy that the agency intends to follow, that does not have the force or effect of law, and that binds the agency but does not bind any other person," MCL 24.203(7)), the label an agency gives to a directive is not determinative of whether the APA applies. *Am Federation*, 452 Mich at 9. Otherwise, it would be all too easy for an agency to sidestep the APA's extensive procedural protections—exactly what the MRA has tried to do here.

Moreover, there can be no doubt that the MRA intended for its recall bulletin to have the force and effect of law. The bulletin does not give recipients an option to simply proceed with selling the recalled product; rather, all product must either be destroyed, retested, or returned. Consequently, the MRA's bulletin has the effect of shelving two-thirds of the industry's inventory, stretching back three months. See *Genetski v Benson*, Summary Disposition Op & Order, Case No. 20-000216-MM (Mich Ct Cl, March 9, 2021), pp 8-14 (Murray, J) (concluding that Secretary of State's signature verification standards for absentee ballots were administrative "rule" improperly published as guidance document outside notice-and-comment procedures). Yet the MRA has never made any public effort to explain why six potentially inconsistent samples justify such a massive recall, nor has it explained its post-recall decision to divert secondary testing business to Plaintiffs' competitors. In short, the entire process through which the MRA decided to issue and has proceeded with the recall bulletin is hopelessly opaque and insulated from public scrutiny—the very result the APA's notice-and-comment process was designed to prevent.

Since the MRA issued the recall bulletin without following the statutory procedures, the Court should hold that agency action to be void and without legal effect. See *Schinzel v Marquette Prison Warden*, 123 Mich App 763, 765; 333 NW2d 348 (1983) ("Because the policy directive was not properly promulgated pursuant to the Administrative Procedures Act, it is without legal

authority. The rulemaking procedures of the Administrative Procedures Act may not be circumvented."); see also *Mich Charitable Gaming Ass'n v Michigan*, 310 Mich App 584, 594; 873 NW2d 827 (2015) ("An agency's failure to follow the process outlined in the APA renders a rule invalid."). Failing to correct the MRA's actions here could have severe consequences if other regulatory agencies adopt the same tactic to skirt around the APA's procedural safeguards.

III. THE MRA'S SHUTDOWN OF PLAINTIFFS' TESTING FACILITIES AND EFFECTIVE SUSPENSION OF THEIR LICENSES VIOLATES NOT ONLY THE APA BUT ALSO DUE PROCESS.

The MRA's failure to comply with the APA infects yet another aspect of its action against Plaintiffs: its abrupt suspension of their licenses. Namely, while trying to dodge the notice-and-comment process for its recall rules, the MRA has simultaneously refused to abide by its own licensing regulations and summarily precluded Plaintiffs from continuing to test product. Indeed, the MRA *has* actually promulgated rules for restricting and suspending licenses—very detailed ones. In the ordinary course, the MRA would typically issue a notice of a violation to the licensee of a potential violation, conduct an investigation, and issue a formal complaint, which then triggers the licensee's right to a compliance conference or contested case hearing. See Mich Admin Code R 420.805-420.808; Mich Admin Code R 420.704. Additionally, while the agency may summarily suspend a license "upon a determination that the safety or health of patrons or employees is jeopardized by continuing a marihuana business' operation," MCL 333.27407(2); Mich Admin Code R 420.806(3), the statute and the rules are very clear that "a *prompt* post-suspension hearing must be held to determine if the suspension should remain in effect…," MCL 333.27407(2) (emphasis added); Mich Admin Code R 420.705(1); see also MCL 24.292.

This procedure makes sense, since "[o]nce given, a license becomes a protected property interest" that may not be suspended without appropriate due process protections. *Maxwell v Dep't of Environmental Quality*, 264 Mich App 567, 571-72; 692 NW2d 68 (2004); *Bundo v City of*

Walled Lake, 395 Mich 679, 695-96; 238 NW2d 154 (1976). See also *M & S, Inc v Attorney General*, 165 Mich App 301, 305; 418 NW2d 441 (1987) ("Agencies may, consistent with the principles of due process, summarily suspend a license without hearing if necessary to protect the public interest. Naturally, the proceedings may not stop with the issuance of a summary suspension.") (internal citation omitted). "It is the general rule that due process 'requires some kind of a hearing before the State deprives a person of liberty or property.'" *Johnson v Morales*, 946 F3d 911, 921 (CA 6, 2020). That entails an opportunity to be heard "at a meaningful time and in a meaningful manner." *Armstrong v Manzo*, 380 US 545, 552; 85 S Ct 1187; 14 L Ed 2d 62 (1965). A narrow exception to the pre-deprivation rule exists only where "'the government provided adequate post-deprivation process.'" *Johnson v City of Saginaw, Mich*, 980 F3d 497, 510 (CA 6, 2020).

But the MRA has not even offered to provide those due process protections. Instead, the MRA has unilaterally decreed that Plaintiffs may not conduct *any* microbial testing of marihuana products whatsoever, in effect preventing them from conducting any business at all. Plaintiffs are marihuana testing companies; their entire business operation involves testing marihuana product for compliance with the marihuana statutes and the MRA's own regulations, and their share of the testing market suggests that they do so with competence and quality. Yet without even a formal notice, the MRA has effectively shut down both Plaintiffs in their entirety—despite the fact that *no* sample tested by Viridis North, LLC ever failed a secondary test. What is more, the MRA seems to have imposed this suspension on both Plaintiffs indefinitely, as it remains unclear what conditions the MRA is demanding each Plaintiff satisfy in order to resume testing. Nor has the MRA provided—or even offered to provide—either of the Plaintiffs with a post-deprivation hearing. In short, neither Plaintiff has received any process at all, let alone due process.

The MRA's regulatory overreach in this case is astounding. It has shuttered two lawful businesses, one of which has never even been accused of falling short on safety standards, for an indefinite amount of time, without identifying any exigent or ongoing public health risk. All the while, the MRA is encouraging and facilitating the redistribution of Plaintiffs' market share to their competitors for "retesting" of three months' worth of product and all testing going forward—based on a mere six potentially inconsistent samples, out of thousands. At the same time, the MRA has failed to provide Plaintiffs with any hearing or to clearly articulate the standards that either Plaintiff must meet to resume testing. The MRA's attempt to act as a czar of Michigan's marihuana industry exceeds both its statutory and Constitutional authority and sets a dangerous precedent for other regulated industries. Respectfully, the Court should conclude that the MRA's effective suspension of Plaintiffs' testing licenses does not comport with the demands of due process.

CONCLUSION

Michigan's administrative law jurisprudence rejects government overreach. The MRA, as a state agency, is constrained by the contours of its enabling statutes and the boundaries of the federal and State Constitutions. Rather than following those mandates, the MRA instead chose to act outside the scope of its statutory authority to issue its own unilateral decrees, first by announcing a standardless and excessive recall, and then by effectively prohibiting Plaintiffs from operating without any opportunity for a hearing. The MRA's actions here lack a reasoned basis and run contrary to law. This honorable Court should grant the relief sought by Plaintiffs and reconfirm the well-settled principle that administrative agencies may not create law or act outside of the bounds of their authority granted by the legislative branch of government simply to suit the agency's own preferences for how a statute should be enforced or industry regulated.

Respectfully submitted,

Miller, Canfield, Paddock and Stone, P.L.C.

By: */s/Scott R. Eldridge*

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Dated: November 30, 2021

CERTIFICATE OF SERVICE

I hereby certify that on November 30, 2021, I caused the foregoing document to be electronically filed with the Clerk of the Court using the electronic filing system which will send notification of such filing to all attorneys of record.

By: */s/Scott R. Eldridge*

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