

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ALBANY

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COALITION FOR ACCESS TO REGULATED  
& SAFE CANNABIS,

Plaintiff-Petitioner,

-against-

NEW YORK STATE CANNABIS CONTROL  
BOARD, NEW YORK STATE OFFICE OF  
CANNABIS MANAGEMENT, TREMAINE WRIGHT,  
in her official capacity as the Chairwoman of the New  
York State Cannabis Control Board, and CHRIS  
ALEXANDER, in his official capacity as Executive  
Director of the New York State Office of Cannabis  
Management,

Defendants-Respondents.

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: **VERIFIED PETITION**

Plaintiff-Petitioner COALITION FOR ACCESS TO REGULATED & SAFE CANNABIS (the “Coalition” or “Plaintiff-Petitioner”), by and through its undersigned counsel, hereby commences this hybrid Article 78 and declaratory judgment proceeding, pursuant to New York Civil Practice Rules and Procedure (“CPLR”) §§ 7803(1), 7803(2), and 3001 against Defendants-Respondents the NEW YORK STATE CANNABIS CONTROL BOARD (“CCB”), the NEW YORK STATE OFFICE OF CANNABIS MANAGEMENT (“OCM”), TREMAINE WRIGHT, in her official capacity as Chairwoman of the New York State Cannabis Control Board, and CHRIS ALEXANDER, in his official capacity as Executive Director of the New York State Office of Cannabis Management (collectively the “Defendants-Respondents”).

## PRELIMINARY STATEMENT

1. This hybrid Article 78 and declaratory judgment proceeding seeks to put an end to Defendants-Respondents' unconstitutional venture into legislative policymaking and to compel CCB and OCM to perform their executive duties as the entities responsible for creating a safe and regulated cannabis marketplace in the State of New York.

2. On March 31, 2021, the Marihuana Regulation and Taxation Act (the "MRTA")<sup>1</sup> was signed into law by then-Governor Andrew Cuomo, who proclaimed at the time that "(t)his landmark legislation provides justice for long-marginalized communities, embraces a new industry that will grow the economy, and establishes substantial safety guards for the public."<sup>2</sup>

3. To that end, the MRTA legalized cannabis for adult-use and established OCM as an independent agency within the Division of Alcoholic Beverage Control,<sup>3</sup> and entrusted OCM (and CCB, the entity that oversees OCM) with, *inter alia*, (i) launching New York's adult-use cannabis program; (ii) creating a safe, licensed, and regulated cannabis industry; (iii) generating sufficient tax revenue through cannabis sales to re-invest in communities disproportionately harmed by federal and state drug policies; and (iv) "reduc[ing] the illegal drug market ... and reduc[ing] the participation of otherwise law-abiding citizens in the illicit market."<sup>4</sup>

4. Rather than perform the tasks required by the MRTA – which would promote a safe and regulated cannabis industry for medical patients and adult-use consumers alike – CCB and OCM have improperly assumed the role of the Legislature to impose their own policies over those

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<sup>1</sup> The Marihuana Regulation and Taxation Act ("MRTA") (Chapter 92 of the Laws of 2021) (signed March 31, 2021).

<sup>2</sup> See Rich Mendez, *Governor Cuomo Signs Bill to Legalize Recreational Marijuana in New York*, CNBC (March 30, 2021), [bit.ly/3ZQ2YKo](https://www.cnn.com/2021/03/30/politics/cuomo-signs-bill-legalize-marijuana/index.html), a true and correct copy of which is attached hereto as Exhibit 1.

<sup>3</sup> See MRTA § 8.

<sup>4</sup> See MRTA §§ 2; 99-ii(3)(f); 99-kk.

of New York’s elected officials and, by extension, their constituents. This unconstitutional overreach violates the separation of powers doctrine.<sup>5</sup>

5. For example, in order to provide New Yorkers with adequate outlets to buy legally grown and processed cannabis – such that the MRTA would achieve the goal of “reduc[ing] participation of otherwise law-abiding citizens in the illicit market”<sup>6</sup> – New York’s Legislature required CCB and OCM to open “the initial adult use retail dispensary license application period . . . *for all applicants at the same time.*”<sup>7</sup>

6. CCB and OCM, however, disregarded the Legislature’s clear and unequivocal requirement. Instead, CCB and OCM, *sua sponte*,<sup>5</sup> created an entirely new licensing category, called the Conditional Adult-Use Retail Dispensary (the “CAURD”) license, and limited eligibility for this special, yet legally impermissible, early-access license to only “justice-involved individuals”<sup>8</sup> who own a profitable “qualifying business”<sup>9</sup>. Then, Defendants-Respondents (i) opened the adult-use retail dispensary application period for only these CAURD applicants, and

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<sup>5</sup> See N.Y. CONST. art. III, § 1.

<sup>6</sup> MRTA § 2.

<sup>7</sup> MRTA § 10(19) (emphasis added).

<sup>8</sup> As OCM’s website provides, a “justice-involved individual” is someone who has been convicted of a New York marijuana-related offense before March 31, 2021, or whose parent, spouse, child, legal guardian, or dependent has been convicted of a New York cannabis-related offense before then. OCM also has allotted twenty-five licenses to non-profits (i) evidencing a history of creating vocational opportunities for incarcerated individuals and (ii) operating a separate profitable social enterprise which fulfills the parent non-profits social mission. See NYS OFFICE OF CANNABIS MANAGEMENT, CAURD INFORMATION, <https://cannabis.ny.gov/caurd-info> (last visited Mar. 10, 2023); see also 9 NYCRR § 116.4 (a)(2)(i) (final rules for CAURD license). This subordinate licensing category is arbitrary, capricious, or *ultra vires*.

<sup>9</sup> To be a “qualifying business,” a justice-involved individual has to own at least ten (10) percent and it has to have realized profits for at least two years. See NYS OFFICE OF CANNABIS MANAGEMENT, CAURD INFORMATION, <https://cannabis.ny.gov/caurd-info> (last visited Mar. 10, 2023); see also 9 NYCRR § 116.4(a)(2)(iii) (final rules for CAURD license).

(ii) postponed indefinitely the licensing of hundreds of additional dispensaries necessary to satisfy consumer demand.

7. Leaving aside (for the moment) the fact that many individuals impacted by the War on Drugs may not fall within the CAURD program, and the fact that the program violates the U.S. Constitution's Dormant Commerce Clause,<sup>10</sup> Defendants-Respondents' decision to create the exclusive CAURD category in the first instance, and then provide those applicants with the first opportunity to obtain an adult-use retail dispensary license, violates (i) the MRTA's plain and unambiguous provisions, and (ii) New York State's separation of powers doctrine.

8. Defendants-Respondents' arbitrary and capricious foray into legislative policymaking has (i) harmed those individuals the MRTA was designed to benefit (*e.g.*, veterans, women-owned businesses, distressed hemp farmers and those communities most affected by the War on Drugs to name just a few), and (ii) diverted Defendants-Respondents' attention from the enforcement tasks with which the MRTA entrusts them. As a result, Defendants-Respondents have allowed New York's illicit market to flourish, putting medical patients and adult-use consumers at risk and robbing communities impacted by the War on Drugs of critical tax revenue. Thus, as of this writing, only four licensed adult-use retail dispensaries are open in the entire State of New York.<sup>11</sup> Meanwhile, thousands of illicit retailers are selling unregulated, untested, and

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<sup>10</sup> The United States Court for the Northern District of New York has already issued a preliminary injunction enjoining a portion of the CAURD program because the program "will have a discriminatory effect on out-of-state residents seeking a CAURD license." *Variscite NY One v. New York*, 1:22-cv-1013 (GLS/DJS), 2022 WL 17257900, at \*19 (N.D.N.Y. Nov. 10, 2022).

<sup>11</sup> Notably, Defendants-Respondents could expand the adult-use retail dispensary market by 1000% by simply permitting the current registered organizations to convert their medical dispensaries into dual-use dispensaries. See Mona Zhang, *Inside New York's Struggling Weed Real Estate Experiment*, POLITICO (Feb. 6, 2023), <https://www.politico.com/news/2023/02/05/new-york-weed-real-estate-00080188> ("the fastest way to launch a recreational weed market is to allow medical marijuana dispensaries to start serving adult-use customers, which is the path recently taken in nearby states such as Connecticut and Rhode Island"), a true and correct copy of which is attached hereto as Exhibit 2. In other jurisdictions that have transitioned from a legal medical cannabis market to an adult-use market, medical cannabis licensees have (i) stewarded the first sales of adult-use cannabis, (ii) figured as

untaxed cannabis products of questionable origin and dubious safety across the State. In fact, it is estimated that there are 1,400 stores retailing illicit cannabis in New York City alone.<sup>12</sup>

9. These illegal commercial operations sell mislabeled and counterfeit products that bear famous trademarks targeting minors and are riddled with *E. coli*, salmonella, pesticides, heavy metals and other contaminants.<sup>13</sup> At the same time, these illicit shops lack the high-security vaults and rigorous safety protocols that licensed dispensaries typically are required to implement, making them prime targets for theft.<sup>14</sup> These illicit dispensaries are not paying the tax revenues that New York State would otherwise collect from properly licensed operators, which deprive the State of a revenue stream that – as the MRTA clearly states – is intended to benefit, among others, communities that have long borne the disproportionate impact of state and federal drug policies.

10. CCB and OCM are not without tools to stamp out this illicit market. Indeed, the MRTA explicitly authorizes (i) OCM to enjoin illicit cannabis sales, and (ii) CCB to obtain civil penalties or to enlist the State Attorney General’s Office to pursue injunctions.<sup>15</sup> But despite these

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critical keystones in building a durable adult-use infrastructure, and (iii) yielded a continuous stream of taxable revenue. That Defendants-Respondents have not done that here is further evidence of their arbitrary and capricious conduct.

<sup>12</sup> See Carl Campanile and Kyle Schnitzer, *Wild West: 1,400 Illegal Pot Shops Now Open in NYC, Wreaking Havoc*, N.Y. POST (Jan. 18, 2023), <https://nypost.com/2023/01/18/1400-illegal-pot-shops-now-open-in-nyc-already-wreaking-havoc/>; Ashley Southall, *How New York City Became a Free-For-All of Unlicensed Weed*, N.Y. TIMES (Nov. 23, 2022), <https://www.nytimes.com/2022/11/23/nyregion/illegal-weed-dispensaries-shops-nyc.html>. True and correct copies of these articles are attached hereto as Exhibits 3 and 4 respectively.

<sup>13</sup> See N.Y.S. MED. CANNABIS INDUS ASS’N ET AL., *E. COLI, HEAVY METALS, COPYRIGHT INFRINGEMENT AND 100 PERCENT FAILURE RATE: A LOOK AT NEW YORK CITY’S ILLICIT CANNABIS DISPENSARIES* (Nov. 2022), a true and correct copy of which is attached hereto as Exhibit 5 (the “NYMCIA Report”). The NYMCIA Report documents the public health crisis these illicit dispensaries pose. See Ashley Southall, *What’s In New York’s Illicit Cannabis: Germs, Toxins, and Metals*, N.Y. TIMES (Dec. 1, 2022), <https://www.nytimes.com/2022/12/01/nyregion/cannabis-bacteria-pesticides-illegal-dispensary.html>, a true and correct copy of which is attached hereto as Exhibit 6.

<sup>14</sup> See Stephon Johnson, *Shops and Robberies in the Years of Unlicensed Weed Selling*, THE CITY (Jan. 18, 2023), <http://bit.ly/3yGcdR3>, a true and correct copy of which is attached hereto as Exhibit 7.

<sup>15</sup> See MRTA § 138-a (“Injunction for unlawful manufacturing, sale, or distribution of cannabis-OCM has the authority to request an injunction against any person who is unlawfully cultivating, processing, distributing or selling cannabis

clear legislative mandates, neither executive body has taken a meaningful step towards “reduc[ing] the illegal market” as required by the MRTA.<sup>16</sup>

11. Rather, as of this writing, OCM has sent one cease and desist letter to sixty-odd illicit dispensaries operating across the State of New York.<sup>17</sup> The C&D Letters do not threaten injunctive action or cite the authority the MRTA bestows upon OCM and CCB to halt illicit sales. Nor, upon information and belief, has either OCM or CCB followed up with further enforcement action, enjoining and/or penalizing illicit dispensaries or referring these illicit commercial operators to the Attorney General’s Office.

12. As a result, many of these illicit storefronts continue to advertise THC sales, operate elaborate websites, promise delivery, and offer products imported illegally from out-of-state.<sup>18</sup> More than a few of these illicit storefronts have expanded to multiple locations in New York City.<sup>19</sup>

13. The proliferation of the illicit market should come as no surprise to Defendants-Respondents, who despite sending the C&D Letters, seem to be turning a blind eye to illicit, untaxed, yet commercial, cannabis operators. For example, on or about December 2022, NYPD’s Cannabis Enforcement Squad searched a liquor store in Manhattan, claiming that it had reason to believe that the liquor store was illegally selling cannabis. While the liquor store was not selling cannabis, there was an illicit cannabis dispensary across the street, in plain sight. When the liquor store owner suggested that officials search that store, the Cannabis Enforcement Squad refused,

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in this state without appropriate registration, license, or permit”); *see also* MRTA § 16(4) (duty of attorney general to pursue injunction at request of Cannabis Control Board).

<sup>16</sup> MRTA § 2.

<sup>17</sup> True and correct copies of the cease-and-desist letters (the “C&D Letters”) are attached hereto as Exhibit 8. This amounts to about 5% of the number of illicit dispensaries in New York City alone. *See supra* note 11.

<sup>18</sup> *See* Ex. 5 at 5 (naming the twenty illicit dispensaries from which the authors purchased contaminated cannabis flower).

<sup>19</sup> *Id.* at 13.

citing a lack of legal authority, and telling the liquor store owner that “they can’t search that store.”

Upon information and belief, that directive came from Defendants-Respondents.

14. In short, OCM and CCB have failed to fulfill their principal responsibility under the MRTA. Instead, Defendants-Respondents have (i) taken twenty months to propose a set of regulations for the adult-use marketplace and still have not finalized or promulgated them;<sup>20</sup> (ii) routinely violated – and continue to violate – the State Administrative Procedure Act by governing through an ever-changing set of guidance documents to regulate cultivators and processors<sup>21</sup> because final rules still do not exist; (iii) licensed only sixty-odd CAURD dispensaries – only four of which have opened; (iv) promised to provide CAURD licensees state-subsidized real estate and government loans but it has delivered neither;<sup>22</sup> (v) induced New York’s conditional adult-use cannabis cultivators to grow 350,000 pounds of flower in 2022 without creating an adequate retail infrastructure to sell it;<sup>23</sup> and (vi) waged a thinly veiled attack against the registered organizations

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<sup>20</sup> As of this writing the only adult-use regulations that OCM has finalized and promulgated are the rules for the CAURD licensees, which are *ultra vires*. See 9 NYCRR § 116.4 (a) (final rules for CAURD license).

<sup>21</sup> See, e.g., OFF. OF CANNABIS MGMT, GUIDANCE FOR ADULT-USE CONDITIONAL CULTIVATORS (Jan. 12, 2023), [bit.ly/3HsJpiX](http://bit.ly/3HsJpiX) (guidance for adult-use conditional cultivators); see also OFF. OF CANNABIS MGMT, GUIDANCE FOR ADULT-USE CONDITIONAL PROCESSORS (Sept. 9, 2022), [bit.ly/3JxgKMk](http://bit.ly/3JxgKMk). True and copies of which are attached hereto as Exhibits 9 and 10 respectively. See also State Administrative Procedure Act § 102(2)(a).

<sup>22</sup> See Brad Racino and Sean Teehan, *Smoke and Mirrors: Inside the Murky \$200M Effort to Kickstart NY’s Marijuana Industry*, SYRACUSE.COM (Dec. 1, 2022), <http://bit.ly/3j3O3vI>; see also Brad Racino, *\$200M Cannabis Fund Info About Chris Webber, Siebert Williams Comes to Light*, NYUP.COM (Jan. 27, 2023), <http://bit.ly/3HLEH11>. True and correct copies of these articles are attached hereto as Exhibits 11 and 12 respectively; see also Tiffany Kary, *You Can Get Everything Delivered in NYC-Even Legal Weed*, BLOOMBERG (Dec. 9, 2022), <http://bit.ly/3I7lcAq> (OCM recently shifted to a delivery plan “after funding to secure retail locations and to build shops fell through”), a true and correct copy of which is attached hereto as Exhibit 13.

<sup>23</sup> See Edward Helmore, *New York Has \$750M Worth of Cannabis Stockpiled that Growers Can’t Sell*, THE GUARDIAN (Nov. 19, 2022), <http://bit.ly/3HOsQzo>, a true and correct copy of which is attached hereto as Exhibit 14.

(“R.O.s”) that has harmed – and continues to harm – the existing medical market<sup>24</sup> and threatens to impede their expansion into the adult-use market.<sup>25</sup>

15. For all of these reasons, and for the reasons set forth below, Plaintiff-Petitioner initiates this hybrid Article 78 and declaratory judgment action and seeks an order (1) declaring OCM’s CAURD license an *ultra vires* and unconstitutional licensing category that violates the MRTA and contravenes New York’s separation of powers doctrine; (2) declaring the qualifying criteria for the CAURD license category arbitrary and capricious;<sup>26</sup> (3) compelling OCM and/or CCB to (i) pursue civil injunctions against all illicit cannabis stores,<sup>27</sup> (ii) refer to the Attorney General’s Office the names of all illicit cannabis stores advertising THC products cited in the NYMCIA Report for further legal action,<sup>28</sup> and (iii) open the adult-use retail dispensary licensing window for all applicants immediately,<sup>29</sup> including for all the social and economic equity applicants specified in the MRTA<sup>30</sup> and for R.O.s,<sup>31</sup> in order to supplant the illicit market and to promote a safe and regulated cannabis industry capable of generating the tax revenue necessary to

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<sup>24</sup> New York Majority Leader Crystal Peoples-Stokes expressed intention to keep “large cannabis companies, and/or existing registered organizations who, again, are large companies that are not from New York” out of the New York Cannabis Market. See WIVBTB, *Crystal Peoples-Stokes discusses bill allowing temporary marijuana growing licenses*, YOUTUBE (Feb. 17, 2022), <https://bit.ly/3REqcQp>; see also 9 NYCRR § 120.4(b)(12) (charging R.O.s \$6M to \$20M dollars to sell adult-use cannabis and barring their entry into the adult-use market for three years); see also 9 NYCRR § 123.17 (requiring R.O.s to divest extraterritorial cannabis assets to operate in New York).

<sup>25</sup> See MRTA § 35(8) (R.O.s can open an additional four dispensing sites).

<sup>26</sup> The CAURD program’s qualifying criteria disregards the MRTA’s priority preference for (i) minority and women-owned businesses, (ii) distressed farmers, and (iii) service-disabled veterans, by limiting CAURD eligibility only applicants who are “justice involved” and own a profitable business. See MRTA § 87.

<sup>27</sup> See MRTA § 138-a.

<sup>28</sup> See MRTA §§ 16(3)-(4) (duty of attorney general upon CCB’s request to bring injunction against any person who violates MRTA or disobeys lawful notice).

<sup>29</sup> See MRTA §§ 10(19), 68-a, 72.

<sup>30</sup> See MRTA § 87.

<sup>31</sup> See MRTA § 39, 68-a.

endow the New York State Community Grants Reinvestment Fund and “to re-invest in communities disproportionately affected by past federal and state drug policies.”<sup>32</sup>

### **PARTIES**

16. Plaintiff-Petitioner Coalition For Access to Regulated & Safe Cannabis is an unincorporated trade association comprised of (i) licensed Registered Organizations, (ii) parties that planned to pursue an adult-use dispensary license when the application window first opened up (including social equity applicants who would qualify as priority or extra priority applicants under Section 87 of the MRTA), and (iii) physicians whose practices have suffered because of Defendants-Respondents’ neglect of the medical program.

17. Plaintiff-Petitioner’s goal is to create a robust, regulated and safe, cannabis market in the State of New York that is able to serve both patients in need of medicine and adults that are interested in using cannabis recreationally.

18. Defendant-Respondent New York State Office of Cannabis Management (“OCM”) is an independent office that the MRTA established within the Division of Alcoholic Beverage Control.

19. Defendant-Respondent Chris Alexander is, and was, at all times relevant to this action the Executive Director of OCM, having the powers and duties granted to him in his official capacity, and he is named in his official capacity.

20. Defendant-Respondent New York State Cannabis Control Board (“CCB”) is a government-appointed board that the MRTA established to promulgate rules and regulations for

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<sup>32</sup> See MRTA §§ 99-ii, 99-kk(4); see also MRTA § 99-ii(3)(d)(iii) (40% of cannabis excise tax revenues allocated for communities disproportionately impacted by cannabis prohibition).

New York's cannabis industry and vested with the powers and duties stipulated in MRTA § 10. It consists of a chairperson and four other voting members.

21. Defendant-Respondent Tremaine Wright is, and was, at all times relevant to this action the Chairwoman of CCB, having the powers and duties granted to her, and she is named in her official capacity.

### **JURISDICTION AND VENUE**

22. This Court has subject matter jurisdiction to decide this Verified Petition pursuant to CPLR § 7803 because (i) CCB and/or OCM have failed to perform a duty the law requires of them and/or is proceeding in excess of jurisdiction, and (ii) OCM's rules and regulations governing the CAURD program are final determinations which are arbitrary and capricious, violations of lawful procedure, and/or affected by errors of law. This Court also has jurisdiction to render a declaratory judgment pursuant to CPLR § 3001. Finally, MRTA § 135(a) bestows on this Court the authority to adjudicate CCB's refusal to license the R.O.s for adult-use cannabis via an Article 78 proceeding.

23. Venue lies in Albany County pursuant to CPLR §§ 506(b) and 7804(b) because upon information and belief, OCM's and CCB's principal offices are located in Albany, New York and it is where Defendants-Respondents failed to perform their legal duties and/or where the material events giving rise to Plaintiff-Petitioner's suit took place.

### **BACKGROUND**

#### **THE MRTA'S STRUCTURE AND GOALS**

24. On March 31, 2021, New York State enacted the MRTA, *inter alia*, to regulate and tax medical and adult-use cannabis and to craft a licensing regime to authorize its cultivation, processing, distribution and sale.

25. The statute delineated eleven adult-use license types and divided the market into essentially two tiers – production and retail.<sup>33</sup>

26. In addition, the MRTA created OCM as a separate and independent division of New York’s Division of Alcoholic Beverage Control, entrusted OCM with regulatory oversight of the adult-use and medical market, and charged OCM with executing the powers and duties specified in the MRTA.<sup>34</sup>

27. The statute also established CCB, which was to be appointed jointly by the Governor, the Assembly and the Senate, to oversee OCM, and obligated CCB to perform specified tasks, including the promulgation of rules and regulations.<sup>35</sup>

28. Among other things, MRTA § 10(19) obligated CCB to “[a]pprove the opening of new license application periods, and when new or additional licenses are made available pursuant to this chapter, provided however, that *the initial adult-use cannabis retail dispensary license application period shall be opened for all applicants at the same time.*”<sup>36</sup>

29. The MRTA’s preface makes clear that the objectives the Legislature aimed to accomplish by enacting the MRTA were to, *inter alia*: (i) “reduce the illegal drug market,” (ii) “reduce the participation of otherwise law-abiding citizens in the illicit market,” (iii) “protect the public health, safety and welfare” of New Yorkers,” (iv) “prevent access to cannabis by those under the age of twenty-one years,” and (v) launch a regulated cannabis marketplace that will

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<sup>33</sup> MRTA §§ 68-75, 77 (The different license types consist of: (i) an adult-use cultivator license; (ii) an adult-use processor license; (iii) adult-use cooperative license; (iv) an adult-use distributor license; (v) an adult-use dispensary license; (vi) microbusiness license; (vii) delivery license; (viii) nursery license; (ix) an adult-use consumption license; (x) Registered Organization adult-use cultivator processor distributor retail dispensary license; and (xi) Registered Organization adult-use cultivator, processor and distributor license).

<sup>34</sup> See MRTA §§ 8, 9, 11.

<sup>35</sup> MRTA § 10; see also MRTA § 10(23) (CCB also has the authority to delegate any of its functions, powers and duties, with the exception of promulgating rules and regulations, to the executive director of OCM).

<sup>36</sup> MRTA § 10(19) (emphasis added).

generate significant tax revenue specifically allocated for “investment in communities and people most impacted by cannabis criminalization.”<sup>37</sup>

30. To date, CCB and OCM have failed to realize any of these goals, putting New Yorkers’ health and safety at risk, while also undermining the legislative intent of the MRTA to establish a well-regulated and flourishing cannabis program that benefits all state residents.

31. As set forth more fully below, Defendants-Respondents have exceeded their authority by devising a new licensing category, the CAURD license, based on their own idiosyncratic conception of public policy.

32. At the same time, Defendants-Respondents have abdicated their duties under the MRTA (excerpted below) to curtail the illicit cannabis marketplace to the detriment of the communities the MRTA was designed to benefit.

#### **CCB’s and OCM’s Enforcement Powers and Their Abdication**

33. To curtail the illicit cannabis market, the MRTA vested CCB and OCM with separate, albeit overlapping, powers to penalize and enjoin the unlawful cultivation, processing, distribution or sale of unregulated cannabis in New York State.

34. With respect to CCB, MRTA § 16, titled “Violations of cannabis laws or regulations; penalties and injunctions,” provides, as follows:

1. Any Person who violates, disobeys or disregards any term or provision of this chapter or of any lawful notice, order, or regulation pursuant thereto for which a civil or criminal penalty is not otherwise prescribed by law, shall be liable to people of the state for a civil penalty of not to exceed five thousand dollars for every such violation.
2. The penalty provided for in subdivision one of this section may be recovered by an action brought by the board in any court of competent jurisdiction.

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<sup>37</sup> MRTA § 2.

3. Such civil penalty may be released or compromised by the board before the matter has been referred to the attorney general, and where such matter has been referred to the attorney general, any such penalty may be released or compromised and any action commenced to recover the same may be settled and discontinued by the attorney general with the consent of the board.
4. It shall be the duty of the attorney general upon request of the board to bring an action for an injunction against any person who violates, disobeys or disregards any term or provision of this chapter or any lawful notice, order, or regulation pursuant thereto; provided however that the executive director [of OCM] shall furnish the attorney general with such material, evidentiary matter or proof as may be requested by the attorney general for prosecution of such an action.
5. It is the purpose of this section to provide additional and cumulative remedies, and nothing herein contained shall abridge or alter rights of action or remedies now or hereafter existing, nor shall any provision of this section, nor any action done by virtue of this section, be construed as estopping the state, persons or municipalities in the exercising of their respective rights.

MRTA § 16.

35. With the respect to OCM, MRTA § 138-a, titled “Injunction for unlawful manufacturing, sale or distribution of cannabis,” provides as follows:

“The office of cannabis management shall have the authority to request an injunction against any person who is unlawfully cultivating, processing, distributing or selling cannabis in this state without obtaining the appropriate registration, license, or permit therefor, in accordance with this chapter and any applicable state law.”

MRTA § 138-a.

36. OCM and CCB have not exercised any of the authorized remedies delineated above – not the financial penalties, not referrals to the Attorney General’s office, and not the civil injunctions – in order to close the illicit storefronts trafficking in untested and potentially dangerous cannabis products that have spread throughout New York State since September 2021.<sup>38</sup>

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<sup>38</sup> See generally Ex. 5.

37. Recent reports estimate that approximately 1,400 shops in New York City are currently selling cannabis products illegally.<sup>39</sup> Many of these stores masquerade as licensed dispensaries and have opened multiple locations.<sup>40</sup>

38. These illicit stores teem with potentially contaminated and counterfeit cannabis products from people/groups that are taking advantage of Defendants-Respondents' laissez-faire approach to enforcement.<sup>41</sup> The proliferation of illicit cannabis retailers has also spurred a spate of robberies, shootings and stabbings.<sup>42</sup>

39. OCM's nonfeasance has emboldened the owners of some illicit stores to flaunt the sale of cannabis products from out-of-state producers — in violation of both New York and federal law.<sup>43</sup>

40. In short, OCM and CCB have forsaken their legal duties (i) “to reduce the illegal drug market,” (ii) “to reduce the participation of otherwise law-abiding citizens in the illicit market,” and (iii) “to protect the public health, safety and welfare” of New Yorkers.<sup>44</sup>

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<sup>39</sup> See Ex. 3.

<sup>40</sup> See Ex. 5 at 13.

<sup>41</sup> See Cailley LaPara, *Influx of Counterfeit Cannabis Threatens New York's Nascent Legal Weed Market*, BLOOMBERG (Feb. 6, 2023), <https://www.bloomberg.com/news/newsletters/2023-02-06/fake-vapes-counterfeit-cannabis-products-threaten-new-york-legal-weed>, a true and correct copy of which is attached hereto as Exhibit 15.

<sup>42</sup> See Ex. 7.

<sup>43</sup> See Will Yakowicz, *Why the Legal Cannabis Industry Needs the Black Market*, FORBES (Aug. 19, 2022), <http://bit.ly/3YfhnyC> (when one illicit storefront owner was asked how legally made and lab-tested products from out-of-state wind up in his unlicensed New York dispensary, he said “Hey, magic happens”), a true and correct copy of which is attached hereto as Exhibit 16.

<sup>44</sup> MRTA § 2.

### **OCM's Half-Hearted and Futile Enforcement Campaign**

41. As New York's illicit cannabis market has boomed, OCM has resorted to half-measures, cosmetic gestures, and sporadic and indiscriminate raids of a few select culprits with the collaboration of local law enforcement.

42. For example, in July 2022, OCM announced in a press release<sup>45</sup> that it had sent sixty-six (66) cease and desist letters to stores purveying illicit cannabis and posted a link to the letters online.<sup>46</sup>

43. The C&D Letters do not invoke (or even cite to) CCB's or OCM's statutory authority to pursue civil injunctions, or to enlist the Attorney General's office to do so.<sup>47</sup>

44. Instead, the C&D Letters make idle mention of "substantial fines" and "criminal penalties" that, upon information and belief, Defendants-Respondents do not intend to pursue.<sup>48</sup>

45. The C&D Letters also threaten to disqualify the addressees from obtaining a legitimate retail cannabis dispensary license in the future.<sup>49</sup>

46. More risible still, many of the C&D Letters targeted innocent proprietors or addressed stores that had closed long ago.<sup>50</sup>

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<sup>45</sup> See Press Release, Trivette Knowles and Aaron Ghitelman, Office of Cannabis Management Publicly Identifies Illicit Retail Operations (July 7, 2022), [bit.ly/3HKY9do](https://bit.ly/3HKY9do), a true and correct copy of which is attached hereto as Exhibit 17.

<sup>46</sup> See Ex. 8.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> See Brad Racino, *Why We Didn't Write About NY's Cease and Desist Letters*, SYRACUSE.COM (July 8, 2022), [http://bit.ly/3lacPuP](https://bit.ly/3lacPuP), a true and correct copy of which is attached hereto as Exhibit 18.

47. In late August, the New York City Police Department publicized that it had seized nineteen (19) mobile vehicles selling illicit cannabis.<sup>51</sup>

48. Despite these efforts, there are still more than 1,400 illicit cannabis storefronts in New York City operating with impunity.<sup>52</sup>

49. In late December, New York City Mayor Eric Adams announced with great fanfare that an intergovernmental task force comprised of OCM, the New York City Sheriff's Office, the New York City Police Department (NYPD), and the New York City Department of Consumer and Worker Protection (DCWP) had "inspected" fifty-three (53) locations across the five boroughs, had seized 100,000 cannabis products, and had issued 500 civil violations and sixty-six (66) criminal summonses.<sup>53</sup>

50. Assorted articles also reported an indiscriminate and isolated police raid in Bay Ridge Brooklyn at the behest of local residents.<sup>54</sup>

51. But "inspecting" fifty-three (53) locations when there are more than 1,000 storefronts retailing illicit cannabis falls woefully short of curing (or even remotely addressing) the problem.

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<sup>51</sup> See NYPD Chief of Patrol John Chell (@NYPDChiefPatrol), TWITTER (Aug. 16, 2022, 8:07 PM), [https://twitter.com/NYPDChiefPatrol/status/1559693359538634752?ref\\_src=twsrc^tfw|twcamp^tweetembed|twterm^1559693359538634752|twgr^1c17723ccf731f9ed82e53c3955e4ce83a758e12|twcon^s1\\_c10&ref\\_url=https://www.ny1.com/nyc/all-boroughs/news/2022/08/18/nypd-seizes-19--illegal-cannabis-trucks](https://twitter.com/NYPDChiefPatrol/status/1559693359538634752?ref_src=twsrc^tfw|twcamp^tweetembed|twterm^1559693359538634752|twgr^1c17723ccf731f9ed82e53c3955e4ce83a758e12|twcon^s1_c10&ref_url=https://www.ny1.com/nyc/all-boroughs/news/2022/08/18/nypd-seizes-19--illegal-cannabis-trucks), a true and correct copy of which is attached hereto as Exhibit 19.

<sup>52</sup> See generally Exs. 2, 3 and 4.

<sup>53</sup> See *Mayor Adams Takes Action to Promote Equitable and Legal Cannabis Market*, OFFICIAL WEBSITE OF NYC, (Dec. 15, 2022), <https://www.nyc.gov/office-of-the-mayor/news/918-22/mayor-adams-takes-action-promote-equitable-legal-cannabis-market-seizure-4#/0>, a true and correct copy of which is attached hereto as Exhibit 20.

<sup>54</sup> See Calvin Stovall, *New York's Gray Market Crackdown Begins in Brooklyn*, LEAFLY (Nov. 19, 2022), <http://bit.ly/3jMqZlB>, a true and correct copy of which is attached hereto as Exhibit 21.

52. More recently, the Manhattan District Attorney's Office issued a public letter notifying New York City residents that "smoke shops" trafficking in the "unlicensed sale of cannabis, the sale of untaxed cigarettes, and the sale of adulterated products" would result in eviction proceedings.<sup>55</sup>

53. But the letter then concluded by minimizing the threat: "This letter is not a formal notice of eviction proceedings, and the legal sale of products otherwise authorized by the City and State of New York will not result in any legal action by the Manhattan District Attorney's Office."<sup>56</sup>

54. In each instance, headlines ensued heralding an imminent crackdown on New York's illicit cannabis sellers. But in reality, the number of stores selling untested, unregulated and potentially dangerous cannabis products persists unabated.

55. Defendants-Respondents' arbitrary and capricious failure to prosecute these illicit actors has prompted rumors that certain illicit storefronts have purchased their immunity from enforcement action and have earned their place on a "Do Not Touch" list.

56. Moreover, it is curious that in none of these pronouncements has (i) CCB threatened to enlist the Attorney General's Office to prosecute civil injunctions against the illicit stores (*see* MRTA § 16(4)), or (ii) OCM cited its independent authority and/or willingness to pursue civil injunctions in accordance with MRTA § 138.

57. Once obtained, a civil injunction would enable either the Attorney General or OCM to pursue severe fines or imprisonment against any store owner daring to defy it.

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<sup>55</sup> See Letter from Alvin L. Bragg, Jr., District Attorney of N.Y. County, (Feb. 7, 2023), <https://www.manhattanda.org/wp-content/uploads/2023/02/Smoke.Shops-2.7.23.pdf>, a true and correct copy of which is attached hereto as Exhibit 22.

<sup>56</sup> *Id.*

58. CCB and OCM's disregard for their authority, in the face of a public health crisis, suggests one possible explanation. Defendants-Respondents are, upon information and belief, sympathetic to owners of illicit dispensaries and concerned about the negative optics of taking action against them, especially as they seek to encourage legacy operators to enter the legal adult-use market.

59. For example, Johnny's Wine & Liquor is a family-owned business located in New York City's East Village ("Johnny's").<sup>57</sup>

60. The store has been open and operating from its current location for approximately 10 years (or more), and during that time it has only ever sold wine and liquor, and related products.

61. Just two doors down from Johnny's is an illicit dispensary that is named for a popular California based cannabis brand.

62. In addition, there are a handful of other cannabis related businesses, both illicit and not, located in the immediate surrounding area.

63. In or around early December 2022, Johnny's was raided by NYPD's Cannabis Enforcement Squad in search for unregulated, illegal cannabis products for sale.

64. The officers inspected the entire store, looking in the back storage room and behind the sales counter, but they were only able to find wine and liquor, as Johnny's has never sold any cannabis products.

65. When Johnny's owner questioned officers about why they were searching his liquor store for illicit cannabis products when there was an open and obvious illicit dispensary just a

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<sup>57</sup> The real name of this liquor store is being withheld for confidentiality reasons. At the appropriate time, Plaintiff-Petitioner will release the true identity of Johnny's.

couple of doors down, he was told, without explanation, that the enforcement officers could not raid that dispensary.

66. Upon information and belief, NYPD's Cannabis Enforcement Squad was provided with explicit instructions by one or more Defendants-Respondents not to investigate illicit market operators.

67. Such arbitrary and capricious enforcement policies further embolden the illicit market and makes it nearly impossible for a regulated (and safe) market to develop. This undermines all legal operators, and particularly harms those select individuals the State has sought to provide early entry into the legal adult-use program.

#### **THE ULTRA VIRES CAURD PROGRAM**

68. Instead of policing the cannabis marketplace and/or opening the adult-use retail dispensary application window for a sufficient number of licensees to meet New York's demand for safe and regulated cannabis products, Defendants-Respondents have embarked on an *ultra vires* law-making project to craft a new "social equity" policy that is inconsistent with the priorities of the Legislature.

69. Only New York State's Legislature has the constitutional authority to develop a policy to address a social problem that is so systemic, or to undertake a compensatory project so ambitious.<sup>58</sup>

70. By proceeding regardless, Defendants-Respondents have transgressed the constitutional boundary that exists between New York's executive and legislative branches.

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<sup>58</sup> See generally Ta-Nehisi Coates, *The Case for Reparations*, THE ATLANTIC (June 2014), <https://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631/> (reparations to the heirs of slavery is necessary to overcome America's racial wealth gap), a true and correct copy of which is attached hereto as Exhibit 23.

71. Defendants-Respondents' creation of the CAURD license epitomizes the kind of executive overreach that *Boreali* and its progeny prohibit.<sup>59</sup>

72. The CAURD program's rules and regulations<sup>60</sup> trigger all four of the "coalescing circumstances" set forth in *Boreali* that establish when an executive agency has acted beyond the legitimate "interstitial rulemaking" in which it is permitted to engage.

73. In fact, OCM's Executive Director, Chris Alexander acknowledged that his policymaking agenda violated *Boreali* in an interview with *The New York Times*:

Mr. Alexander said he expects between 100 and 200 [of the first retail dispensary licenses] to go to people who were convicted of marijuana-related offenses before the drug was legalized...Mr. Alexander also said his office would evaluate applicants on their business plans and experience in retail.... Mr. Alexander said that he thought giving so-called 'equity entrepreneurs' a chance to woo customers before more established cannabis companies—including currently running medical marijuana facilities—begin to compete with them would help them succeed. 'I could press the green button right now and have 40 dispensaries online.... But instead we've decided that folks who have been most impacted [by the War on Drugs] actually have the space and the real runway to participate in a meaningful way.'<sup>61</sup>

74. But the New York State Constitution does not authorize appointed administrators to craft their own social equity policy particularly where such policy is statutorily mandated, as is the case in the MRTA. That power is reserved exclusively for New Yorkers' elected representatives.

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<sup>59</sup> See *Boreali v. Axelrod*, 71 N.Y.2d 1 (1987); see also *N. Y. Statewide Coal. of Hisp. Chambers of Com. v. N.Y.C. Dep't of Health*, 23 N.Y.3d 681 (2014).

<sup>60</sup> See generally 9 NYCRR § 116.

<sup>61</sup> See Jesse McKinley and Grace Ashford, *New Yorkers with Marijuana Convictions Will Get First Retail Licenses*, N.Y. TIMES (Mar. 9, 2022), <https://www.nytimes.com/2022/03/09/nyregion/marijuana-sellers-licenses-hochul.html>, a true and correct copy of which is attached hereto as Exhibit 24.

**Factors 1 & 2: CCB Has Enacted Its Own Idea of Sound Public Policy and Regulated on a Clean Slate**

75. “Social equity” is a term that is commonly used in the cannabis industry, but it carries multiple meanings. Broadly speaking, it connotes the aspiration of state and local governments to redress the multi-generational trauma that draconian and outdated drug enforcement policies have inflicted on individuals and communities by prioritizing those adversely impacted communities in the award of adult-use cannabis licenses.

76. To date, these programs largely have failed because the federal prohibition on cannabis handicaps even the most nimble and well-financed cannabis company;<sup>62</sup> small independent, and minority-owned cannabis businesses suffer these impediments even more acutely.<sup>63</sup>

77. CCB has endeavored to remedy this through a set of arbitrary and capricious eligibility criteria that favor “equity entrepreneurs” that run profitable businesses but bypass the “social equity plan” prescribed in the MRTA.<sup>64</sup>

78. As set forth in Section 87 of the MRTA, CCB should aspire to award “*fifty percent* of adult-use cannabis licenses” to social and economic equity applicants and to prioritize the consideration of applicants who (i) qualify as minority-owned businesses, women-owned

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<sup>62</sup> See Chris Roberts, *Why Isn't Marijuana Legalization Doing Any Good for People of Color*, THE OBSERVER (Feb. 10, 2020), <http://bit.ly/3HLTE25> (“equity programs have been vastly oversold—and rest on the premise that being handed a license to sell weed, in an era when almost every legal weed merchant is struggling and laying off staff, can be seen as a make-good for generations of impoverishment, imprisonment and disenfranchisement”); see also Jon Walker, *The Cannabis Equity Con*, THE AMERICAN PROSPECT (July 1, 2019), <https://bit.ly/3lnZlfc> (capping licenses diverts government tax revenue in the interest of a small set of beneficiaries like the taxi medallion system). True and correct copies of these articles are attached hereto as Exhibits 25 and 26 respectively.

<sup>63</sup> See Yvette McDowell Et. Al., CALIFORNIA CANNABIS EQUITY ACCOUNTABILITY REPORT: AN ANALYSIS OF THE HEALTH AND SUCCESS OF CALIFORNIA’S SOCIAL EQUITY PROGRAM, CALIFORNIA CANNABIS INDUS. ASS’N (2021), <https://bit.ly/40UboRU>, a true and correct copy of which is attached hereto as Exhibit 27.

<sup>64</sup> See Ex. 24.

businesses, distressed farmers, and service-disabled veterans, or (ii) are from communities disproportionately impacted by cannabis prohibition.<sup>65</sup>

79. But before undertaking even this much, the MRTA obligates CCB, in pertinent part, as follows:

in consultation with the chief equity officer and executive director, and *after receiving public input*, [CCB] *shall create and implement a social and economic equity plan* and actively promote applicants from communities disproportionately impacted by cannabis prohibition AND promote racial, ethnic, and gender diversity when issuing licenses for adult-use cannabis related activities,<sup>66</sup>

[CCB's] social and economic equity plan shall also promote diversity in commerce, ownership and employment, and opportunities for social and economic equity in the adult-use cannabis industry. A goal shall be established *to award fifty percent of adult-use cannabis licenses to social and economic equity applicants* and ensure inclusion of: (a) *individuals from communities disproportionately impacted by the enforcement of cannabis prohibition*; (b) minority-owned businesses; (c) women-owned businesses; (d) minority and women-owned businesses []; (e) distressed farmers [] and (f) service-disabled veterans.<sup>67</sup>

The Board, shall, with recommendations from the state cannabis advisory board, the chief equity officer and executive director, issue guidelines to determine how to assess which communities have been disproportionately impacted and how to assess if someone is a member of a community disproportionately impacted.<sup>68</sup>

The Chief Equity Officer shall provide a report to the Board, no later than January 1, 2023, and annually thereafter, of their activities in ensuring compliance with the social and economic equity plan.<sup>69</sup>

80. In other words, CCB was required to create a “social and economic equity plan,” that would strive to achieve a goal of awarding 50% of adult-use cannabis licenses to “(a) individuals from communities disproportionately impacted by the enforcement of cannabis

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<sup>65</sup> MRTA §§ 87(1)-(2) (emphasis added).

<sup>66</sup> MRTA § 87(1) (emphasis added).

<sup>67</sup> MRTA § 87(2) (emphasis added).

<sup>68</sup> MRTA § 87(5)(g).

<sup>69</sup> MRTA § 12(3).

prohibition; (b) minority-owned businesses; (c) women-owned businesses; (d) minority and women-owned businesses []; (e) distressed farmers [] and (f) service-disabled veterans.”<sup>70</sup>

81. Defendants-Respondents, however, have not published any social and economic equity plan (which, according to the MRTA, was due on January 1, 2023).<sup>71</sup>

82. Even worse, in crafting the CAURD rules and regulations, CCB has disregarded, if not actually contravened, these provisions by pursuing its own policy agenda.

83. For example, the CAURD rules and regulations do not account for social equity applicants who otherwise qualify as a “minority or women-owned business, distressed farmers, or service-disabled veterans.”<sup>72</sup>

84. Instead, CCB’s rules and regulations limit CAURD applicants to “justice-involved individuals” who also operate “qualifying businesses”.<sup>73</sup>

85. In truth, none of the MRTA’s eleven licensing types includes a CAURD license.<sup>74</sup> Nor does any provision in the MRTA authorize CCB to narrow the “social equity” beneficiary to “justice-involved individuals” with “qualifying businesses”.

86. Critical comments published prior to the rule’s promulgation reflect this very objection.<sup>75</sup>

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<sup>70</sup> *Id.*

<sup>71</sup> See MRTA § 12(3); see also Brad Racino, *OCM Misses Key Deadline To Develop Social Equity Plan*, SYRACUSE.COM (January 4, 2023), <https://bit.ly/3YEI6V7>, a true and correct copy of which is attached hereto as Exhibit 28.

<sup>72</sup> See MRTA § 87(2).

<sup>73</sup> See 9 NYCCR 116.4(a)(2).

<sup>74</sup> See *supra* note 31.

<sup>75</sup> See Office of Cannabis Mgmt. Comments on Proposed Rule Part 116 – Conditional Adult-Use Retail Dispensary Regulations, <https://bit.ly/3YL7E3b> (commenters stated that this requirement favors the wealthy and not those who have been financially harmed by their conviction), a true and correct copy of which is attached hereto as Exhibit 29.

87. Having invented a new licensing category at odds with the statutory requirements, Defendants-Respondents then went one step further by opening the application window for adult-use retail dispensaries for CAURD applicants only, and not social equity candidates that may be from communities disproportionately impacted by the enforcement of cannabis prohibition; minority-owned businesses; women-owned businesses; distressed farmers; or service-disabled veterans.

88. In addition, Defendants-Respondents initially limited the number of CAURD licenses to one hundred and seventy-five (175).<sup>76</sup>

89. After receiving the CAURD applications for the 175 licenses, Defendants-Respondents closed the application window<sup>77</sup> indefinitely for all other adult-use cannabis retail dispensary licenses.

90. Defendants-Respondents have readily admitted that they have staggered the application process in this manner so as to insulate the CAURD license winners from the challenges of a competitive marketplace.<sup>78</sup>

91. But Defendants-Respondents' conduct directly contravenes the Legislature's expressed mandate in MRTA § 10(19) to open "the initial adult-use cannabis retail dispensary license application period... for *all applicants at the same time*." (Emphasis added.)

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<sup>76</sup> OCM intended to award 150 licenses to "justice-involved individuals" with "qualifying businesses" and another twenty-five to nonprofits with a history of serving formerly incarcerated individuals. See NYS OFFICE OF CANNABIS MANAGEMENT, CAURD INFORMATION, <https://cannabis.ny.gov/caurd-info> (last visited Mar. 10, 2023). To date, OCM only has issued about sixty-six of them because a federal court concluded the CAURD program's tacit residency preference for those convicted under New York State law violated the federal Constitution and enjoined OCM from issuing any in five regions. See *Variscite NY One*, 2022 WL 17257900, at \*19.

<sup>77</sup> Press Release, OFF. CANNABIS MGMT., Office of Cannabis Management Announces Application Portal Opening Date for New York's First Retail Cannabis Dispensaries, (Aug. 2022), <https://bit.ly/3JWlv1i>, a true and correct copy of which is attached hereto as Exhibit 30.

<sup>78</sup> See *supra* ¶ 72.

92. By arbitrarily and capriciously limiting the number of dispensaries, Defendants-Respondents have emboldened (rather than curtailed) the illicit market, putting all consumers at risk and undermining the ability of the legal market to generate much-needed tax revenue intended to benefit those disproportionately impacted by the War on Drugs.

93. Given the lack of licensed adult-use retail dispensaries in New York, OCM announced on March 2, 2023, that it intends to double the number of “justice-involved” licenses from 150 to 300.<sup>79</sup>

94. OCM’s announcement is an acknowledgement that its artificial limit on dispensaries has inhibited the industry’s growth. As OCM stated: “Doubling the amount of available conditional adult-use dispensary licenses will help kickstart the growth of the [legal] cannabis industry.”<sup>80</sup>

95. Nevertheless, OCM is effectively compounding its violation of the separation of powers doctrine by selecting its own category of potential applicants (the CAURD candidates) in defiance of MRTA § 10(19)’s mandate to open the initial licensing window for all adult-use dispensary applicants “at the same time.”

### **Factor 3: The Legislature Declined to Act**

96. New York’s Legislature has had ample opportunity to amend the MRTA, after its passage on March 31, 2021, to add a conditional adult-use retail dispensary license, to confine the first wave of retail licenses to “justice-involved individuals” with “qualifying businesses,” or even authorize a first wave of retail licenses preempting § 10(19) in order to insulate the first 175 licensees from marketplace competition.

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<sup>79</sup> See Sam Reisman, *NY Pot Regulators to Double Number of Retail Licenses*, LAW360 (Mar. 2, 2023), <https://bit.ly/3EZsMLp>, a true and correct copy of which is attached hereto as Exhibit 31.

<sup>80</sup> *Id.*

97. But the Legislature has never done so.

98. The Legislature's decision not to act is telling, given that it has amended the MRTA in other respects.

99. For example, the Legislature amended the MRTA to benefit hemp farmers and hemp processors.<sup>81</sup>

100. S.8084-A creates "a conditional adult-use cannabis cultivation license" for hemp cultivators and a "conditional adult-use cannabis processing license" for hemp processors.<sup>82</sup>

101. But the Legislature did not add a new retail cannabis dispensary license class—conditional or otherwise.

**Factor 4: The Agency Did Not Exercise Any Special Expertise or Technical Competence.**

102. Finally, there is no evidence that Defendants-Respondents drew upon any special expertise or technical competence in cannabis or in social equity policy.

103. CCB is an executive body appointed by the Governor and the Legislature. The Governor appoints the Chairperson along with two other board members, and the President of the Senate and the Speaker of the Assembly may exercise one appointment each.<sup>83</sup>

104. The Governor also selects the Executive Director of OCM with the advice and consent of the Senate.<sup>84</sup>

105. The MRTA does not require CCB or OCM to possess any special competence.

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<sup>81</sup> See NY S.B. 8084-A, 244th Leg. Sess. (N.Y. 2022) ("S.8084-A").

<sup>82</sup> See S.8084-A (adding MRTA § 68-c "conditional adult-use cultivation license" and MRTA § 69-a "conditional adult-use processor license").

<sup>83</sup> See MRTA §§ 7 (1)-(2).

<sup>84</sup> See MRTA § 9.

106. And by all accounts, the Board did not invoke any technical competence or special expertise in determining to create the CAURD program.

107. Following the appointment of CCB's Chairperson, Tremaine Wright, then Senator Diane Savino commented as follows: "You [Tremaine Wright] have experience in a lot of things but I'm concerned you don't have direct experience with cannabis or the cannabis industry itself."<sup>85</sup>

108. For all of the reasons set forth above, it is clear that no real expertise was applied at all.

109. Indeed, Defendants-Respondents have created a licensing category out of whole cloth, ignored the statutory mandates with respect to the social and economic equity plan, and have otherwise failed to follow the letter and spirit of the MRTA.

**DEFENDANTS-RESPONDENTS' ARBITRARY AND CAPRICIOUS CONDUCT  
LEADS TO AN UNREGULATED AND UNSAFE MARKETPLACE**

110. In 2018, then-Governor Cuomo called for an assessment of the potential impact of regulated cannabis in New York State.

111. The Governor directed New York State agencies to evaluate the health, public safety, and economic impact of legalizing cannabis for adult-use.

112. One of the conclusions that was reached was that it would be "essential to ensure public safety and the integrity of the program by, among other things, [i] reducing the illegal market and preventing diversion, [ii] ensuring adequate security at cultivation and dispensing

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<sup>85</sup> See James Nani, *NY Senate Confirms Two Key Cannabis Officials*, LAW360 (Sept. 2, 2021), <http://bitly.ws/Bup4>. A true and correct copy of which is attached hereto as Exhibit 32.

facilities, and [iii] employing a robust monitoring and oversight system with the ability to issue fines for violations and revoke licenses as needed.”<sup>86</sup>

113. For the last two years, Defendants-Respondents have done none of the above. Instead, they have ventured into the role of the Legislature to create the CAURD work-around to the legally mandated “social equity plan” that is inconsistent with the statute.

114. By arbitrarily ignoring their statutory obligations, Defendants-Respondents have failed to limit the illicit market in two ways. First, they have failed to actively prosecute the illegal operators. Second, they have failed to issue enough regulated and legal dispensary licenses to allow (i) licensed cultivators and processors to sell their goods into the legal market, and (ii) customers to buy safe, regulated and tested products from licensed retail outlets.

115. As set forth above, there are approximately 1,400 illicit dispensaries operating in New York City alone as of this writing. By contrast, there are four legal dispensaries currently operating in all of New York State.

116. These 1,400 illicit dispensaries have to obtain the cannabis products they sell from somewhere. Upon information and belief, most of these 1,400 illicit dispensaries receive cannabis from licensed and illicit out-of-state operators (in violation of the MRTA and a host of other state and federal laws).

117. Cannabis products cultivated and manufactured outside of New York State do not undergo the rigorous testing that New York requires of its licensed operators. As a result, the products sold by illicit dispensaries – often to individuals who are not required to show ID to

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<sup>86</sup> See N.Y. DEP’T OF HEALTH, EXECUTIVE SUMMARY: ASSESSMENT OF THE POTENTIAL IMPACT OF REGULATED MARIJUANA IN NEW YORK STATE (2018), at 7-8. <https://bit.ly/3yAYxqI>, a true and correct copy of which is attached hereto as Exhibit 33.

ensure they are of legal age to purchase cannabis – contain contaminants such as *E. coli*, salmonella, pesticides, heavy metals and other harmful products.<sup>87</sup>

118. At the same time, (i) hemp growers who received licenses to grow cannabis with THC have spent millions of dollars preparing for the adult-use market, (ii) the R.O.s that have been cultivating cannabis pursuant to New York’s standards have the ability to service a portion of the adult use market, (iii) the R.O.s have dispensaries that can expand to serve adult-use customers, and (iv) numerous operators [including some that are members of Plaintiff-Petitioner] stand at the ready to submit their adult-use retail application as soon as Defendants-Respondents permit them to do so.

119. But so long as Defendants-Respondents continue to arbitrarily and capriciously manipulate the market – in violation of their statutory obligations – none of these legal actors are able to be meaningfully engage in New York’s adult-use marketplace, to the significant detriment of consumers and those communities most impacted by the War on Drugs.

120. In addition, the illicit market will continue to flourish to the detriment of all New Yorkers.

### **INJURIES TO PLAINTIFF-PETITIONER**

121. OCM’s failure to enjoin the lawful sale of cannabis dispensaries as MRTA § 138-a contemplates has caused immediate, tangible, and irreparable harm to (i) Coalition members’ licensed medical cannabis businesses and professional practices, and (ii) those Coalition members that sought to apply for adult use retail dispensary licenses in New York when the application window first opened.

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<sup>87</sup> See generally Exs. 5 and 6.

122. New York’s medical cannabis program originated in July 2014 with the enactment of New York’s Compassionate Care Act (the “CCA”)<sup>88</sup> and the promulgation in April 2015 of complementary regulations, the Medical Marihuana Program Regulations (“MMPR”).<sup>89</sup> Taken together, these rules inaugurated a highly regulated medical cannabis regime in New York authorizing the use of cannabis for medical patients suffering from a narrow set of debilitating illnesses and confining its provision to specially certified personnel.

123. In addition, the CCA and MMPR established a vertically integrated regime for medical cannabis’ production, distribution, and sale. This required certain Coalition members to build indoor cultivation facilities, to purchase and to operate expensive extraction machinery, to manufacture medicine in accordance with stringent pharmaceutical standards and protocols, to subject their products to exhaustive testing, precise labeling, and to deliver to and support four dispensaries widely dispersed throughout the State.

124. The illicit storefronts that now have proliferated throughout New York City since the MRTA’s passage now masquerade as licensed cannabis dispensaries and confuse New Yorkers about their legal status.<sup>90</sup>

125. In part due to this confusion – and Defendants-Respondents’ refusal to expand the medical program as contemplated by the MRTA – patients increasingly lack access to safe and

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<sup>88</sup> See NYPHL §§ 3360-3369-e.

<sup>89</sup> See 10 NYCRR § 1004.

<sup>90</sup> According to a recent survey, 71% of New York cannabis users thought they purchased recreational cannabis in 2022 even though the first licensed adult-use retail cannabis dispensary did not open until December 29, 2022. See Ex. 15.

regulated medical cannabis and these illicit dispensaries draw medical patients from Coalition members' businesses and erode their bottom line.<sup>91</sup>

126. They also diminish the value of Coalition members' pharmaceutical-grade medicine by blurring the distinction between the Coalition-members' products from the illicit operators' mislabeled and potentially tainted products.<sup>92</sup>

127. Finally, the illicit dispensaries incite indiscriminate animus toward cannabis storefronts as breeding grounds for crime and contraband, threatening the goodwill of R.O.s' businesses and the support earned over nearly a decade from their surrounding communities.

128. The R.O.s have anchored New York's medical cannabis program for the better part of a decade. They have invested tens of millions of dollars over the past eight years in order to produce a sufficient supply of pharmaceutical-grade cannabis to serve New Yorkers who need cannabis to treat debilitating diseases, conditions and illnesses. The MRTA specifically authorizes R.O.s to obtain adult-use cannabis licenses<sup>93</sup> and to sell adult-use cannabis from up to three of their current medical cannabis dispensing locations.<sup>94</sup> Arresting their entry into the adult-use market inflicts ongoing injury to their business and imperils their bottom line.

129. At the same time, Defendants-Respondents' *ultra vires* CAURD program contravenes MRTA § 10(19) and constitutes an unconstitutional exercise in legislative policymaking.

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<sup>91</sup> See Stefan Sykes, *Marijuana's Black Market is Undercutting Legal Businesses*, CNBC (Dec. 23, 2022), <http://bit.ly/3Hp22V8>; see also Will Yackowicz, *New York's Massive Cannabis Gray Market Could Cost The State \$2.6 Billion In Lost Taxes By The End Of The Decade*, FORBES (Mar. 14, 2023), <http://bitly.ws/BCdw>. True and correct copies of these articles are attached hereto as Exhibit 34 and Exhibit 35 respectively.

<sup>92</sup> See Exhibit 5 at 5-8.

<sup>93</sup> See MRTA §§ 39, 68-a, 68-b.

<sup>94</sup> See MRTA § 63(1-a).

130. As such, certain Coalition members could not apply in the first round for adult-use dispensary licenses.

131. By being precluded from the marketplace, these Coalition members are losing critical time to develop the good will that first movers typically enjoy.

132. All of this has inflicted immediate, tangible, and irreparable harm on Coalition members' businesses.

133. By confining adult-use dispensaries to CAURD applicants, insulating them from market competition, delaying indefinitely the full rollout of New York's adult-use cannabis program, and withholding adult-use licenses from Plaintiff-Petitioner members,<sup>95</sup> Defendants-Respondents have evidenced an arbitrary animus towards Plaintiff-Petitioner members and have harmed their businesses.

### **FIRST CAUSE OF ACTION**

#### **Request for Declaratory Relief against Defendants-Respondents Pursuant to Article 30 of the CPLR**

134. Plaintiff-Petitioner repeats and realleges the allegations set forth in Paragraphs 1 to 133 as if fully set forth herein.

135. The separation of powers is a core tenet of the New York State Constitution.

136. The separation of powers doctrine precludes administrative agencies from engaging in unauthorized policy making based on complex value judgments, which should otherwise fall under the purview of the Legislature.

137. As officers and agencies of the executive branch, Defendants-Respondents have impermissibly exceeded their statutory authority under the MRTA (and improperly frustrated its

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<sup>95</sup> See 9 NYCRR 123.18(b)(9) (proposing to withhold R.O.s from applying for adult-use retail before three years after first date of retail adult-use sales).

policy goals) by, among other things, creating a staggered, two-tiered application process that permits “justice-involved” applicants with “qualifying businesses” to apply for and obtain retail dispensary licenses while preventing all other would-be applicants from even applying for a retail dispensary licenses for an indeterminate period of time.

138. Through their *ultra vires* policymaking, Defendants-Respondents have usurped the Legislature’s authority by elevating their own chosen class of CAURD applicants at the expense of all other prospective applicants, and the creation of a robust, competitive, safe and regulated adult-use cannabis market in accordance with the goals of the MRTA.

139. Accordingly, Plaintiff-Petitioner respectfully requests that this Court issue a declaratory judgment pursuant to CPLR § 3001 finding Defendants-Respondents’ *ultra vires* policymaking unconstitutional under the separation of powers doctrine.

**SECOND CAUSE OF ACTION**  
**Request for *Mandamus* Relief against Defendants-Respondents**  
**Pursuant to CPLR § 7803(1)**

140. Plaintiff-Petitioner repeats and realleges the allegations set forth in Paragraphs 1 to 139 as if fully set forth herein.

141. Section 10(19) of the MRTA directs CCB and OCM to:

Approve the opening of new license application period, and when new or additional licenses are made available pursuant to this chapter, provided, however, that ***the initial adult-use cannabis retail dispensary license application period shall be opened for all applicants at the same time.*** (emphasis added)

142. The MRTA also states that (i) “any person may apply to the board for a license to . . . dispense cannabis within this state for sale”<sup>96</sup> and (ii) its goal of ensuring “a competitive market where no licensee is dominant in . . . any individual category of licensing”<sup>97</sup>

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<sup>96</sup> MRTA § 61.

<sup>97</sup> MRTA § 65(3).

143. Rather than adhere to these (and other) statutory mandates, CCB and OCM have engaged in unconstitutional policymaking that (i) violates the separation of powers by exceeding the scope of their authority under the MRTA, (ii) enacts *quasi*-legislative policy programs that contravene the expressly stated goals of the MRTA, and (iii) improperly prejudices all but a small class of potential applicants by denying them the right to apply for adult-use cannabis retail dispensary licenses “at the same time.”

144. More specifically, Defendants-Respondents have (i) created a licensing category of “justice-involved individuals” with a “qualifying business” even though this category does not appear anywhere in the MRTA, (ii) permitted these so-called “CAURD applicants” to apply for retail dispensary licenses before opening the application period to any other non-CAURD applicant, and (iii) forced non-CAURD applicants to wait indefinitely until Defendants-Respondents decide to “press the green button” (in the words of OCM’s Executive Director, Chris Alexander) and permit them to apply for a retail dispensary license.

145. Such unconstitutional conduct is not authorized by the MRTA. In fact, it actively *undermines* the policy goals stated in MRTA § 2 by, *inter alia*, hampering (i) the creation of a robust adult-use market, (ii) the generation of new tax revenue, (iii) the creation of more jobs, and (iv) the strengthening of New York’s agricultural sector.

146. By preventing prospective applicants from even applying for retail dispensary licenses, CCB and OCM are helping to sustain the illicit, unregulated cannabis market, in further violation of the MRTA’s stated goals, putting New Yorkers unnecessarily at risk.

147. For all these reasons, Plaintiff-Petitioner requests that the Court issue an order of *mandamus* directing Defendants-Respondents to perform their statutory mandate by opening the

new license application period for adult-use retail dispensary licenses to all applicants immediately.

**THIRD CAUSE OF ACTION**  
**Request for *Mandamus* Relief against Defendants-Respondents**  
**Pursuant to CPLR § 7803(1)**

148. Plaintiff-Petitioner repeats and realleges the allegations set forth in Paragraphs 1 to 147 as if fully set forth herein.

149. The MRTA is intended to, *inter alia*, (i) “reduce the illegal drug market;” (ii) reduce the “participation of otherwise law-abiding citizens in the illicit market;” (iii) protect the public health, safety and welfare” of New Yorkers; (iv) “prevent access to cannabis by those under the age of twenty-one years;” and (v) enjoin the illicit and unlawful cultivation, processing, distribution and sale of cannabis.<sup>98</sup>

150. In order to accomplish these goals, Section 16 of the MRTA provides OCM and CCB with explicit enforcement mechanisms of both civil penalties and injunctions to effectuate these purposes.

151. In addition, Section 138-a of the MRTA provides that OCM “shall have authority” to pursue injunctive relief “against any person who is unlawfully cultivating, processing, distributing or selling cannabis” without appropriate licensing.

152. Since the passage of the MRTA, an epidemic of illicit dispensaries purveying unregulated, untested and often contaminated cannabis have burgeoned across the state.

153. These illicit dispensaries often sell cannabis that may be riddled with *E. coli*, salmonella, pesticides, heavy metals and numerous other harmful contaminants. Even worse, some of them target their sales to minors.

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<sup>98</sup> MRTA § 2.

154. Moreover, the lack of high security vaults and adequate safety protocols that licensed dispensaries typically adopt have precipitated a wave of violent crimes.

155. The MRTA requires CCB and OCM to reduce the scope and deleterious impact of the illicit cannabis market. But Defendants-Respondents have eschewed the enforcement mechanisms provided thereunder and have refrained from taking any meaningful steps to reduce the size of (or otherwise hamper) the illicit cannabis market.

156. For example, after months of public outcry and numerous reports of the growth of the illicit market through the operation of illicit cannabis dispensaries, OCM sent the boilerplate C&D Letters to just a handful of known illicit cannabis dispensaries that continue to sell unregulated and illicit cannabis products to this day.

157. These C&D Letters conspicuously bear no mention of the authority that CCB and OCM wield under the MRTA to enjoin illicit sales or to refer culprits to the Attorney General's Office.

158. Defendants-Respondents' abdication of their duties has been so egregious that other law enforcement agencies – such as the Manhattan District Attorney's Office – have been forced to fill the void left by their abject failure to take any meaningful enforcement action.

159. Plaintiff-Petitioner, accordingly, requests a judgment directing Defendants-Respondents to perform its express duties imposed by the MRTA to “reduce the illegal drug market” in New York.

**WHEREFORE**, Plaintiff-Petitioner respectfully requests the Court enter an order and judgment against the Defendants pursuant to CPLR §§ 7803 and 3001 and grant Plaintiff-Petitioners the following relief:

(a) On their First Cause of Action, declaring that Defendants-Respondents CAURD licensing regime constitutes an unconstitutional violation of the separation of powers doctrine;

(b) On their Second Cause of Action, ordering Defendants-Respondents to act pursuant to its statutory mandate and open the adult-use retail dispensary license window for all applicants immediately;

(c) On their Third Cause of Action, ordering Defendants-Respondents to act pursuant to its statutory mandate and employ its enforcement mechanisms to reduce the illicit cannabis market;

(d) Awarding Plaintiff-Petitioner costs and disbursements, including Plaintiff-Petitioner's attorneys' fees; and/or

(e) Granting such other and further relief as the Court deems just and proper.

Dated: New York, New York  
March 16, 2023

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