

BEFORE THE VERMONT BOARD OF PHARMACY

IN RE:

In Re Walgreen Company	2022-98
In Re Walgreen Eastern Co., Inc. #11526	2022-99 & 2022-100
In Re Walgreens Pharmacy #01756	2022-101 & 2022-102
In Re Walgreens Pharmacy #07270	2022-103, 2022-104, 2022-105, 2022-106 & 2022-107
In Re Walgreens Pharmacy #17183	2022-108 & 2022-109
In Re Walgreens #17185	2022-110 , 2022-111, 2022-112 & 2022-113
In Re Walgreen Eastern Co., Inc. d/b/a Walgreens #17379	2022-114, 2022-115, 2022-116, 2022-117, 2022-118 & 2022-119
In Re Walgreens #17471	2022-120, 2022-121, 2022-122, 2022-123, 2022-124, 2022-125 & 2022-126
In Re Walgreen Eastern Co., Inc. d/b/a Walgreens #17518	2022-127 & 2022-128
Walgreen Eastern Co., Inc. d/b/a Walgreens #17596	2022-129
In Re Walgreens #17625	2022-130, 2022-131 & 2022-132
In Re Walgreens #17631	2022-133
In Re Walgreens #17713	2022-134
In Re Walgreens #17749	2022-135 & 2022-136
In Re Walgreen Eastern Co., Inc. d/b/a Walgreens #18020	2022-137, 2022-138, 2022-139, 2022-140, 2022-141, 2022-142 & 2022-143
In Re Walgreen Eastern Co., Inc. d/b/a Walgreens #18090	2022-144, 2022-145, 2022-146 & 2022-147
In Re Walgreen Eastern Co., Inc. d/b/a Walgreens #18265	2022-148
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In Re Walgreens #18418	2022-151, 2022-152, 2022-153, 2022-154, 2022-155, 2022-156, 2022-157 & 2022-158
In Re Walgreens #18977	2022-159 & 2022-160
In Re Walgreen Eastern Co., Inc. d/b/a Walgreens #19233	2022-161, 2022-162, 2022-163 & 2022-164
In Re Walgreens #19795	2022-165, 2022-166 & 2022-167

RESPONDENT WALGREEN CO. MOTION TO DISMISS

Pursuant to Vermont Office of Professional Regulation Administrative Rules of Practice Rule 3.8, Walgreen Co. d/b/a Walgreens (hereinafter, "Respondent") respectfully moves to

dismiss with prejudice the Vermont Board of Pharmacy (hereinafter, “the Board”) matters in the above caption. In support thereof, Respondent states the following:

I. INTRODUCTION AND FACTUAL BACKGROUND

Respondent is a national retail pharmacy chain and a subsidiary of Walgreens Boots Alliance. Respondent is headquartered in Deerfield, Illinois, and operates retail pharmacies in 49 U.S. states, including 32 locations in Vermont. Beginning in 2020, and throughout the COVID-19 pandemic, Respondent, its field leadership team and the staff of its individual stores worked tirelessly to provide critical pharmacy and healthcare services to patients in an uncertain and constantly changing healthcare environment. In fact, not only did Respondent continue to operate and provide valuable services to the residents of Vermont during an uncertain time, but it increased its efforts to serve the community by providing vaccinations and health testing, services that the community desperately needed to decrease the spread and impact of the pandemic. Respondent, like the rest of the nation, could not fully anticipate the impact of the extremely contagious pandemic, and thus, while its operations were admittedly not perfect, they were not in violation of the Vermont statutes. Indeed, Respondent continued to resiliently operate during the pandemic to help, not harm, the community’s health.

A. FILING OF SUBPOENA

On February 14, 2022, the State of Vermont Office of Professional Regulation (the “OPR”) issued to Respondent a subpoena duces tecum, requiring Respondent to produce staffing information for its Vermont pharmacies, policies and procedures related to COVID-19 and pharmacy processes such as vaccine scheduling, workload balancing processing systems, communications related to vaccine scheduling, vaccine administration schedules and doses scheduled and administered, daily prescription data, daily hours worked for all pharmacy

employees, and pharmacy closures. Respondent timely filed responses and objections to the subpoena.

B. FILING OF FORMAL CHARGES

On June 23, 2022, the OPR filed 23 identical Specifications of Charges, with one directed to Respondent's Deerfield, IL headquarters, and the other 22 directed to individual Respondent pharmacies in the following Vermont towns: Burlington, Rutland, Brattleboro, Colchester, Hardwick, Wilmington, Essex Junction, Barre, Montpelier, Lyndonville, Bennington, Newport, Manchester Center, St. Johnsbury, Brandon, West Rutland, Shelburne, Morrisville, Bellows Falls, and Saint Albans, which contained the following allegations:

- a. Respondent violated 26 V.S.A. § 2053(a)(1) in that Respondent introduced or enforced policies and procedures related to the provision of pharmacy services in a manner that resulted in deviation from safe practice.
- b. Respondent violated 26 V.S.A. § 2053(a)(2) in that Respondent unreasonably prevented or restricted a patient's timely access to patient records or essential pharmacy services.
- c. Respondent violated 26 V.S.A. § 2053(a)(3) in that Respondent failed to identify and resolve conditions that interfered with a pharmacist's ability to practice with competency and safety or created an environment that jeopardizes patient care, including by failing to provide mandated rest periods.
- d. Respondent violated 26 V.S.A. § 2053(a)(4) in that Respondent repeatedly, habitually, or knowingly failed to provide resources appropriate for a pharmacist of reasonable diligence to safely complete professional duties and responsibilities, including: (A) drug utilization review; (B) immunization; (C) counseling; (D) verification of the accuracy of

a prescription; (E) all other duties and responsibilities of a pharmacist under State and federal laws and regulations.

- e. Respondent violated 3 V.S.A. § 129a(a)(3) in that Respondent failed to comply with provisions of federal or State statutes or rules governing the practice of the profession (incorporating Chapter 36 of Title 26 of Vermont Statutes Annotated and the Administrative Rules of the Vermont Board of Pharmacy).
- f. Respondent violated 3 V.S.A. § 129a(a)(28) in that Respondent engaged in conduct of a character likely to deceive, defraud, or harm the Public.
- g. Respondent violated 3 V.S.A. § 129a(b)(1) in that Respondent failed to practice competently by reason of any cause on a single occasion or on multiple occasions may constitute unprofessional conduct, whether actual injury to a client, patient, or customer has occurred. Failure to practice competently includes: (1) performance of unsafe or unacceptable patient or client care.

II. LEGAL FRAMEWORK

The Board, as the proponent in these matters, bears the burden of proof by a preponderance of the evidence as to each allegation. 3 V.S.A. § 129(c).

A. 3 V.S.A. § 129a

Pursuant to 3 V.S.A. § 129a, the Board may take disciplinary action against a licensee or applicant, including imposing an administrative penalty not to exceed \$5,000.00, for each instance of unprofessional conduct.

B. 26 V.S.A. § 2053

Pursuant to 26 V.S.A. § 2053(b), the Board may seek to discipline all pharmacies in a retail drug chain. Discipline against any one drug outlet in a chain may be imposed against all

drug outlets in a chain, provided the State alleges in a specification of charges and the Board subsequently finds: (1) unprofessional conduct has occurred at one or more drug outlets; (2) the unprofessional conduct is attributable to pharmacy or pharmacy business-related policies, procedures, systems, or practices of the chain whether or not those practices manifested in unprofessional conduct at each individual location; and (3) imposition of disciplinary sanctions or conditions against all drug outlets in the chain is appropriate to protect the public.

C. The Standard of Review

Vermont determines the appropriate standard of care owed by a healthcare provider by applying the facts to a standard of reasonableness. *Lynch v. Off. of Pro. Regul.*, No. 1999-389, 2000 WL 35640801, 173 Vt. 644 (2001), citing *Braun v. Bd. of Dental Examiners*, 167 Vt. 110, 702 A.2d 124 (1997). Vermont courts will only support the conclusions of OPR and its professional licensing boards if those conclusions are rationally derived from the findings and are based on a correct interpretation of law. *Lynch*, 2000 WL 3540801, at * 3.

OPR must consider the impact and effects of the COVID-19 pandemic on Respondent's ability to provide a reasonable level of care during an unprecedented global pandemic. Notably, Vermont Governor Phil Scott declared a statewide State of Emergency on March 13, 2020 in response to the COVID-19 pandemic¹, which was renewed multiple times until all COVID-19 related restrictions were lifted on June 15, 2021.² Since the declaration of the initial State of

¹ State of Vermont, Executive Department, Executive Order No. 01-20, available at <https://governor.vermont.gov/sites/scott/files/documents/EO%2001-20%20Declaration%20of%20State%20of%20Emergency%20in%20Response%20to%20COVID-19%20and%20National%20Guard%20Call-Out.pdf> (last accessed August 10, 2022),

² State of Vermont, Governor's Directive to the Secretary of Commerce and Community Development, available at <https://governor.vermont.gov/sites/scott/files/CovidRestrictionsLiftedDirective.PNG> (last accessed August 10, 2022).

Emergency in March 2020, 1 in 5 Vermont residents has been infected with COVID-19, with 138,145 total reported cases and over 690 deaths.³ Moreover, the government encouraged COVID-19 vaccinations at Respondent's locations.⁴ In the context of the uncertainty and instability caused by the pandemic, Respondent provided reasonable care to its patients while grappling with contingencies that impacted pharmacists nationwide. Despite this, OPR is attempting to unfairly hold Respondent to a nearly impossible standard of care under the circumstances and seeks to discipline Respondent for unprecedented circumstances.

III. ARGUMENT

A. The OPR's Interpretation of 26 V.S.A. § 2053(a)(1) Constitutes an Impermissible Ultra Vires Act

OPR must presume that a legislature “meant what [it] said and said what [it] meant” in a statute. *Burlington Elec. Dept. v. Vt. Dept. of Taxes*, 154 Vt. 332, 336, 576 A.2d 450, 452 (1990). The power to enact laws is inherently legislative and nontransferable. *Vermont Educ. Bldgs. Fin. Agency v. Mann*, 127 Vt. 262, 267, 247 A.2d 68, 72 (1968). An activity is ultra vires if it is “beyond the scope of power allowed or granted by a corporate charter or by law.” Black's Law Dictionary (10th ed. 2014). The inherent power to enact a statute is the state legislature; OPR has no inherent power to enact statutes. OPR exercises such authority solely by legislative grant and in the absence of legislative delegation of power, their actions are ultra vires and void.

³ *Tracking Coronavirus in Vermont: Latest Map and Case Count*, The New York Times, available at <https://www.nytimes.com/interactive/2021/us/vermont-covid-cases.html> (last visited August 11, 2022).

⁴ See <https://www.burlingtonvt.gov/covid-19/vaccine> (last visited August 10, 2022); <https://www.omnireporter.com/reportersnotebook/walgreens> (last visited August 10, 2022); <https://www.healthvermont.gov/covid-19/vaccine> (last visited August 10, 2022).

Perry v. Vermont Med. Prac. Bd., 169 Vt. 399, 737 A.2d 900 (1999) (agency's interpretations of regulations must be reasonably related to the legislation to withstand judicial scrutiny).

Here, OPR has arbitrarily interpreted 26 V.S.A. § 2053(a)(1) to include the term "practices," thereby creating new meaning to the statute. Specifically, in ¶ 313 of each of the 23 Charges, the Board alleges that Respondent "introduced and enforced policies, *practices*, and procedures related to the provision of pharmacy services that resulted in deviation from safe practice," and cites 26 V.S.A. § 2053(a)(1) in order to support the conclusion that Respondent engaged in unprofessional conduct. (Emphasis added). However, the text of the statute reads:

(a) It shall be unprofessional conduct for a licensee to:

(1) introduce or enforce policies and procedures related to the provision of pharmacy services in a manner that results in deviation from safe practice.

Vt. Stat. Ann. tit. 26, § 2053(a)(1).

The plain text of the statute only refers to "policies and procedures" that deviate from safe practice, not "policies, *practices*, and procedures" as the conduct is alleged by the State in each Specification of Charges.

The addition of the word "practices" to the OPR's charge in Violation One is an impermissible expansion of OPR's powers as granted by the statute, and it failed to give Respondent sufficient notice. It was the Vermont legislature's prerogative, in drafting the legislation that amended 26 V.S.A. § 2053(a)(1) to give OPR the power to discipline licensees for the introduction of policies and procedures that result in a deviation from safe practice. If OPR wishes to interpret the legislature's intent in drafting the statute, it must do so using the Vermont Administrative Procedure Act's rulemaking process at 3 V.S.A. Chapter 25, which includes publication, notice and comment, and public hearing opportunities. While a state agency does not need to engage in rulemaking to carry out what its authorizing statute

specifically directs it to do, rulemaking must occur in order to alter or affect substantive legal rights. *King v. Gorczyk*, 175 Vt. 220, 825 A.2d 16 (2003), citing *Parker v. Gorczyk*, 173 Vt. 477, 787 A.2d 494 (2001). Accordingly, if OPR wishes to interpret Vt. Stat. Ann. tit. 26, § 2053(a)(1) to consider the informal practices of licensed entities, it must engage in the formal rulemaking process.

B. 26 V.S.A. 2053(a)(2) Is Impermissibly Vague

A foundation of the law is that people of ordinary intelligence must be afforded a reasonable opportunity to know what is prohibited so that they may act accordingly. *See FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012). Additionally, laws must provide standards that are sufficiently explicit to prevent arbitrary and discriminatory enforcement. *See Kolender v. Lawson*, 461 U.S. 352, 357 (1983); *Smith v. Goguen*, 415 U.S. 566, 572-73 (1974). The relevant inquiry is “whether the language conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices.” *Rubin v. Garvin*, 544 F.3d 461, 467 (2d Cir. 2008) (internal quotation marks and citations omitted). Here, 26 V.S.A. 2053(a)(2) states:

(a) It shall be unprofessional conduct for a licensee to:

(1) unreasonably prevent or restrict a patient’s timely access to patient records or essential pharmacy services.

There is no promulgated definition of the terms “unreasonably,” “prevent or restrict” or “timely”. Additionally, there are no promulgated standards of review for these vague terms which means that they can be arbitrarily enforced. In other words, the language of the statute did not provide Respondent sufficient notice as to what practices are unacceptable during a temporary closure.

OPR has unilaterally -- and without notice -- determined that Respondent's pharmacy closures are in violation of law because they "unreasonably prevented or restricted patients' timely access to essential pharmacy services" by failing to provide (1) "notice" (2) functioning phone systems, (3) current information regarding the store closures; and (4) reversal of billings. *See Charges ¶¶ 317-319.* In addition to the OPR arbitrarily interpreting 26 V.S.A. 2053(a)(2), OPR's interpretation fails for a number of reasons.

First, OPR acknowledges that these were unexpected and temporary closures, *i.e.*, closures that Respondent did not intend and could not plan for accordingly due to the length and severity of the pandemic. Thus, even though Respondent's pharmacies were mostly open and serving the public during a pandemic, OPR unreasonably seeks to penalize Respondent for unexpected closures.⁵ Moreover, OPR seeks to penalize Respondent for issues outside of its control such as a computer system malfunction, *see Charges ¶¶ 30*, and a fire and resulting clean up, *see Charges ¶¶ 31-43*. Indeed, OPR essentially seeks disciplinary action for any closure without considering the underlying circumstances.

Second, failure to provide notice of an unexpected, temporary closure by posting a sign on the pharmacy may not be optimal customer service; however, it is not in violation of any statute or rule. Further, OPR's conclusion that the failure to post notice of a closing itself prevents or restrict patients' timely access to essential pharmacy services is flawed. The notice is simply a manner by which the closure could have been communicated but it does not carry any additional powers. Moreover, OPR admits that Respondent provided notice on multiple

⁵ *See* <https://www.drugstorenews.com/pharmacist-shortages-are-affecting-pharmacy-industry> (last visited August 9, 2022).

occasions, but in those cases, does not give them any effect. *See* Charges at ¶¶ 28, 43, 44, 45, 104, 119. For example, Respondent followed internal procedures to close the pharmacy and notify customers of where to pick up their prescriptions during the temporary closure. While not required by law, Respondent posted a conspicuous sign on the front entrance of the store, listing the location, phone number, and hours of operation of the Rutland or Bennington pharmacies so that patients could arrange for pickup at that location. Charges at ¶ 44-45.

Finally, OPR conflates access to patient records and pharmacy services with insurance coverage. Specifically, OPR relies on 26 V.S.A. ¶ 2053(a)(2) to allege that some of Respondent's staff did not know how to perform reverse billing for prescriptions. Charges ¶ 121. However, OPR acknowledges that the patient was able to obtain his or her prescription at a different pharmacy if the "patient pays out of pocket." Charges ¶ 122; 87. Thus, OPR's interpretation of 26 V.S.A. ¶ 2053(a)(2) to essentially equate access to medication with an insurance issue is arbitrary. Moreover, simply because patients were unable to obtain their medications at a specific Respondent pharmacy due to a temporary closure does not automatically mean that a different pharmacy could not dispense that medication.

C. OPR's Reliance on Rule 8.3 to Allege a Violation of 3 V.S.A. § 129(a)(3) Is Misplaced

OPR has improperly applied Board Rule 8.3, the only rule relating to store closures. Rule 8.3⁶ refers to the *permanent* closure of a drug outlet, as evidenced by the other Rules in Part 8 -

⁶ Rule 8.3 reads as follows:

If the closing of a drug outlet is not planned, the licensee shall notify the Board of the closing within 48 hours. The licensee shall notify the general public of the intent of the licensee and the future location of prescription files by advertising in a newspaper with a general circulation in the area served, and by posting signs in a conspicuous place at or near the drug outlet. (a) The licensee shall arrange for a responsible agent to maintain all prescription drug outlet records for three years from the date the outlet is closed. (b) If the closing of a drug outlet is planned, the licensee shall, at least 15 days prior to the closing, send the Board written notification of the following: (1) The date the outlet will close for public business; (2) The name(s) and address(es) of the person(s) with custody of prescription, bulk compounding, repackaging, and controlled drug inventory records; (3) The names and addresses of all persons who will acquire legend drugs when the drug outlet closes. Page 35 of 89 (c) The licensee shall, within

the surrender of the facility's license and the future location of the files. The Rule does not contemplate temporary closures due to an emergency or the inability to staff a pharmacy, and OPR's application of the rule to these situations is misplaced.⁷ Additionally, nowhere in the Rules does reopening of a pharmacy after a temporary closure require notice to the Board.

D. 26 V.S.A. § 2053 Violates Due Process

1. 26 V.S.A. § 2053 Violates Due Process Because It Fails to Provide Respondent Notice of Possible Discipline

Due process of law requires notice sufficient to “give the person of ordinary intelligence a reasonable opportunity to know what is prohibited” and to “provide explicit standards for those who apply them.” *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972); *see also State v. Galusha*, 164 Vt. 91, 94, 665 A.2d 595, 597 (1995). Further, Vermont requires an agency to

30 days of closing the drug outlet, send the Board a written report, indicating: (1) The licensee voluntarily surrendered the license to operate a drug outlet; (2) All legend drugs were transferred to another authorized drug outlet, or returned to wholesalers or manufacturers, or destroyed, and the name(s) and address(es) of the drug outlet(s) receiving the legend drugs; (3) All labels and blank prescription pads were destroyed; (4) All signs indicating the presence of a drug outlet were removed; and (5) Confirmation that the DEA registration and all unused DEA 222 forms were returned to the DEA. (d) The licensee shall, at least 30 business days in advance, notify the general public of the date of closing and the future location of prescription files, in the following manner: (1) Advertise in a newspaper with a general circulation in the area served; and (2) Post signs in a conspicuous place in the drug outlet.

⁷ We note that there were occasions that Respondent provided notice of its closures. For instance, during the period that the Manchester store was closed for repairs, a sign was posted on the front entrance of the building reading "[u]nfortunately Manchester Walgreens will be CLOSED until further notice. *for Rx needs please call Bennington/Rutland", providing voluntary notice to patients beyond what Board rules require. Further, ¶¶ 43 of the Charges alleges that Respondent did not notify the Board that the pharmacy had reopened on December 11, 2021. Thus, at all times during the temporary closure of the Manchester Center store due to fire, Respondent was in compliance with Board rules, and even went beyond Board requirements by notifying patients of the next closest Respondent store. Further, OPR alleges store closures where, in certain circumstances, none exist. In each Specification of Charges, the Board alleges the following closures for Respondent's stores, but Respondent's data does not indicate the stores were closed on these dates: (1) Paragraph 26 lists dates of unexpected closure of the Brandon, Hardwick, and Morrisville stores on July 19, 2020. Respondent's data does not reflect that any of these stores were closed on that date; (2) Paragraph 74 lists dates of closures of St. Albans store. Respondent's data does not reflect store closures on October 13, 2021; (3) Paragraph 80 lists dates of closure of the Morrisville store. Respondent's data does not reflect a store closure on February 2, 2022. Records indicate that prescriptions were sold to patients that day; (4) Paragraph 82 lists dates of the closure of the Colchester store. Respondent's data does not reflect a store closure on May 18, 2021. Records indicate that prescriptions were sold to patients that day; (5) Paragraph 83 lists dates of the closure of the Bellows Falls store. Respondent's data does not reflect store closures on May 30, 2021, May 19, 2022, May 26, 2022, and June 9, 2022; and (6) Paragraph 107 lists dates of the closure of the Middlebury store. Respondent's data does not reflect a store closure on October 21, 2021. Records indicate prescriptions were sold to patients that day. Thus, OPR's assertions of the facts is simply incorrect.

provide notice to a person of ordinary intelligence of the possibility that conduct may trigger disciplinary action by an agency. *Sec'y, Vermont Agency of Nat. Res. v. Irish*, 169 Vt. 407, 738 A.2d 571 (1999). The current disciplinary statutes provide no such notice of the discipline that may be imposed and under what circumstances. Respondents are left at the mercy of the Board to decide what conduct may be subject to discipline. The Board has in effect created a moving target of discipline that prevents Respondent from being able to draft policies and procedures that comply with Board guidance.

Notably, until July 1, 2018, the language of the Board's disciplinary statutes included a list of potential penalties and procedures for reinstatement of a disciplined license. Specifically, Vt. Stat. Ann. tit. 26, § 2051 included a list of practices that constituted unprofessional conduct by a pharmacy and listed the potential penalties that could be levied against a licensee if the unprofessional conduct was proven. That list included the Board's ability to refuse to issue or renew, or may suspend, revoke, or restrict the licenses of any person who engaged in unprofessional conduct. Additionally, Vt. Stat. Ann. tit. 26, § 2052 clearly stated the consequences of unprofessional conduct, and the reinstatement provisions that a licensee could take to be restored to full practice authority at the conclusion of the disciplinary period.⁸ Read

⁸Prior to its repeal, the text of Vt. Stat. Ann. tit. 26, § 2052 read as follows:

Upon the finding, after notice and opportunity for hearing, of the existence of grounds for discipline of any person or any drug outlet holding a license, under the provisions of this chapter, the board of pharmacy may impose one or more of the following penalties:

- (A) Suspension of the offender's license for a term to be determined by the board;
 - (B) Revocation of the offender's license;
 - (C) Restriction of the offender's license to prohibit the offender from performing certain acts or from engaging in the practice of pharmacy in a particular manner for a term to be determined by the board;
 - (D) Placement of the offender under the supervision of the board for a period to be determined and under conditions set by the board;
 - (E) A requirement to perform up to 100 hours of public service, in a manner and at a time and place to be determined by the board;
 - (F) A requirement of a course of education or training;
 - (G) An administrative penalty as provided in 3 V.S.A. § 129a(d).
- (2) Deleted.

together, 26 Vt. Stat. Ann. § 2051 and 26 Vt. Stat. Ann. § 2052 gave licensees clear notice of the Board's disciplinary procedures and potential penalties they could face. In contrast, the new pharmacy disciplinary statute, 26 Vt. Stat. Ann. § 2053, which became effective July 1, 2021, provides no notice to licensees about potential penalties faced or any of the procedures relevant to a license that has been disciplined. The language of the statute is extremely vague and does not provide Respondent reasonable notice of consequences of a disciplinary action.

2. 26 V.S.A. § 2053 Violates Due Process Because It Fails to Provide Respondent's Individual Pharmacies Notice

It is axiomatic that a governmental entity must give a person adequate notice prior to deprivation of a significant property interest. *See, e.g., Board of Regents v. Roth*, 408 U.S. 564 (1972); *Mathews v. Eldridge*, 424 U.S. 319 (1976). A notice is adequate if it apprises the affected individual of, and permits adequate preparation for, an impending hearing. *Memphis Light, Gas and Water Division v. Craft*, 436 U.S. 1, 13 (1978). Here, Respondent has 32 different locations in Vermont, which is approximately 9,600 square miles in size. The statutes and rules do not have separate provisions for pharmacies that are a part of a chain. Instead, each location is required to independently comply with the rules, and the rules do not permit individual pharmacies to share pharmacists in charge. Because each pharmacy operates independently, each location may be experiencing different issues depending on its pharmacist-in-charge, staff or lack thereof, local patient population and its proximity to other pharmacies. Thus, 26 V.S.A. § 2053 violates due process because individual Respondent pharmacies may not

(b) Any person or drug outlet whose license to practice pharmacy in this state has been suspended, revoked, or restricted pursuant to this chapter, whether voluntarily or by action of the board, shall have the right, at reasonable intervals, to petition the board for reinstatement of such license. Such petition shall be made in writing and in the form prescribed by the board. Upon hearing, the board may in its discretion grant or deny such petition or it may modify its original finding to reflect any circumstances which have changed sufficiently to warrant such modifications.

have violated any rules or statutes and may be unaware of the issues another pharmacy across the state is experiencing, and the statute disciplines all of Respondent's locations without notice of individualized wrongdoing.

E. 26 V.S.A. § 2053 Discriminates Against Chain Pharmacies

The Equal Protection Clause of the Fourteenth Amendment provides that a state may not “deny to any person within its jurisdiction the equal protection of the laws.” United States Constitution Amend. XIV, Sec. 1; *see Santa Clara Co. v. Railroad Co.*, 118 U.S. 396 (1886) (corporations are “persons” within the meaning of the Fourteen Amendment). It is essentially a guarantee that those similarly situated will be afforded equal treatment. Thus, distinctions will be found unconstitutional only if similar persons are treated differently on “wholly arbitrary and capricious grounds.” *See Colchester Fire Dist. No. 2 v. Sharrow*, 145 Vt. 195, 198, 485 A.2d 134, 136 (1984).

Application of 26 V.S.A. § 2053(b), which states that “discipline against any one drug outlet in a chain may be imposed against all drug outlets in a chain,” violates the Equal Protection Clause of the Constitution. As previously discussed, Vt. Stat. Ann. tit. 26, § 2053(b) authorizes the Board to impose discipline on all pharmacies in a chain if the Board finds: (1) unprofessional conduct has occurred at one or more drug outlets; (2) the unprofessional conduct is attributable to pharmacy or pharmacy business-related policies, procedures, systems, or practices of the chain whether or not those practices manifested in unprofessional conduct at each individual location; and (3) imposition of disciplinary sanctions or conditions against all drug outlets in the chain is appropriate to protect the public. This statute is discriminatory against chain pharmacies, giving OPR latitude to disproportionately impose discipline against individual

locations in a chain whose conduct does not meet the thresholds set in V.S.A. § 2053(a).⁹ Such action would violate the Equal Protection clause as there is no rational basis for distinguishing a pharmacy that is part of a chain from an independent pharmacy and penalizing the chain pharmacy for actions that did not occur on its premises.

IV. CONCLUSION

For the aforementioned reasons, Respondent respectfully moves to dismiss with prejudice the Board's charges in Violations One, Two, Three, Four, Six, and Seven of each individual Specification of Charges.

⁹ For example, the following pharmacies in the complaint are only alleged to have 1 to 3 unexpected closures over the more than two-year period covered by the Charges:

- a. Walgreens Eastern Co, Inc. dba Walgreens #18278, License No. 038.013403[5], West Rutland;
- b. Walgreens #17631, License No. 038.01340[35], Bennington;
- c. Walgreens Eastern Co, Inc. dba Walgreens #17596, License No. 038.0134041, Montpelier; and
- d. Walgreens Eastern Co, Inc. dba Walgreens #17475, License No. 038.0134027, Williston.

Despite these four pharmacies having less than three closures over a more than two-year period, each store faces the same discipline as stores that have allegedly operated without Pharmacist-Managers and/or more frequent store closures. Sweeping the above stores into the complaints serves only to impermissibly expand the Board's already broad powers, and issue discipline to Respondent's stores who, on their own, would likely not face discipline.

Dated August 18, 2022.

Respectfully submitted,

Walgreen Co. d/b/a Walgreens, Respondent

/s/P. Scott McGee

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