

Application- Reader Bias: Assessing State Agency Bias in the Context of Cannabis Law

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INTRODUCTION

Harvest of New Jersey, LLC (“Harvest”) was only one of 146 applicants to submit a timely application to operate a medical cannabis alternative treatment center (“ATC”)² in New Jersey in 2018.³ Pursuant to the New Jersey Department of Health (“DOH”) Request for Applications (“RFA”), DOH’s application readers score each application based on the points assigned to the criteria set forth in the RFA, awarding a maximum of 1000 points per application.⁴ Notwithstanding the fact that Harvest received a composite score of 911.1667, DOH denied Harvest’s application to operate a medical cannabis ATC in New Jersey’s southern region.⁵ DOH’s scoring sheets show that for four separate criteria, Harvest received the highest possible score from several application readers and a zero in that same category from other readers.⁶

Surprisingly, the four criteria that yielded inconsistent score ranges were categorical, namely, collective bargaining agreements, certifications or designations establishing the business as woman or minority owned, the provision of certified financial statements, and a record of past business taxes paid to federal state and local governments.⁷ Thus, Harvest appealed DOH’s denial of its application for review from the Appellate Division, requesting that DOH stay the final agency decisions issued to the six applicants selected to proceed with the ATC licensing process under the RFA.⁸ In doing so, Harvest argued that “[t]he fact that Harvest could receive both the highest score and no score at all in those same categories from different evaluators is indicative of a process that is at a minimum capable of abuse and misapplication, arbitrary and capricious in practice and at worst, demonstrative of gross abuse of discretion in its utilization.”⁹ Yet, DOH denied Harvest’s stay application.¹⁰

² *Alternative Treatment Centers*, NJ HEALTH, <https://www.nj.gov/health/medicalmarijuana/alt-treatment-centers/> (last visited Mar. 10, 2021). “Alternative Treatment Center” or “ATC” means a “center authorized to grow and provide registered qualifying patients with medicinal marijuana and related paraphernalia in accordance with the provisions of the Act. This term shall include the organization’s officers, directors, board members, and employees.” *ATC FAQs*, NJ HEALTH, https://www.nj.gov/health/medicalmarijuana/atc_faqs.shtml (last visited Mar. 10, 2021).

³ Letter from Maeve E. Cannon, Esq., Attorney, Stevens & Lee, to Shereef M. Elnahal, M.D., M.B.A., Comm’r, State of N.J. Dep’t of Health (Feb. 4, 2019) (on file with the N.J. Dep’t of Health).

⁴ Letter from Shereef M. Elnahal, M.D., M.B.A., Comm’r, State of N.J. Dep’t of Health, to Steve White, Harvest of N.J. (Dec. 17, 2018) (on file with the N.J. Dep’t of Health).

⁵ *See id.*

⁶ *See* Letter from Maeve E. Cannon to Shereef M. Elnahal, *supra* note 3.

⁷ *See id.*

⁸ Letter from Shereef M. Elnahal, M.D., M.B.A., Comm’r, State of N.J. Dep’t of Health, to Maeve E. Cannon, Esq., Attorney, Stevens & Lee (Feb. 14, 2019) (on file with the N.J. Dep’t of Health).

⁹ *Id.*

¹⁰ *Id.*

Unfortunately, Harvest is not the only ATC applicant in New Jersey to experience scoring disparities. For example, a court put a hold on the review of ATC licenses after denied ATC applicants sued DOH arguing that DOH wrongfully evaluated its application pursuant to the June 2019 RFA.¹¹ However, staying the review of ATC applications delays the ATC licensing process, leaving patients with limited ATC services, medical cannabis shortages, long lines at ATCs, and unreasonably long commutes to dispensaries.¹²

Evidently, New Jersey's ATC licensing process is susceptible to scoring discrepancies. The issue is whether the scoring discrepancies in the ATC license process result from DOH's application reader's bias. This note will demonstrate that DOH — the state agency that reviews ATC license applications — is unlikely to be biased because DOH never acted arbitrarily, capriciously, or unreasonably in awarding ATC licenses. However, New Jersey should adopt an appeal system similar to that of Missouri, which allows applicants to appeal adverse decisions from DOH without resorting to litigation.

New Jersey cannabis law is dynamic. In the weeks leading up to this note's publication, the June 2019 RFA was released from its stay and DOH was permitted to resume scoring applications¹³ and New Jersey legalized the cannabis for adult use.¹⁴ Thus, this note serves as a road map for licensing ATCs under the new adult use legislation in New Jersey, or for other states that have yet to enact a comprehensive medical cannabis program.

Part I of this note will introduce necessary background information that is germane to understanding the legal treatment of cannabis in New Jersey. More specifically, Part I will track New Jersey's Medical Marijuana Program ("MMP") progression, beginning with the January 2010 enactment of the New Jersey Compassionate Use Medical Marijuana Act ("CUMMA") and concluding with the June 2019 RFA. Part II will examine the three ATC licensing processes states employ when the state restricts the amount of available licenses. Part III will analogize and distinguish case law examining the ATC license process in New Jersey, Colorado and Arkansas with caselaw examining college admissions decisions. Part IV will present potential solutions to New Jersey's ATC licensing process, drawing guidance from Missouri.

PART I

A. The word "marijuana" is rooted in racial oppression

¹¹ See Amanda Hoover, *New N.J. Medical Marijuana Dispensaries on Hold as Another Rejected Applicant Sues*, NJ.COM (Jan. 18, 2020), <https://www.nj.com/marijuana/2020/01/new-nj-medical-marijuana-dispensaries-on-hold-as-another-rejected-applicant-sues.html>.

¹² See *id.*

¹³ See *In the Matter of the Application of Medicinal Marijuana Alternative Treatment Center for Tetra Grow (South)*, et. al. No. A-1272-19, 2021 WL 631238 (N.J. Super. Ct. App. Div. Feb. 18, 2021).

¹⁴ N.J. Assembly Bill No. 21, 219th Leg. (2021).

While the word “marijuana” is ubiquitously used as a more common name for cannabis in the United States, its roots may be found in racial oppression and a complicated cultural revolution.¹⁵ The unique history of the word “marijuana” is paramount to the MMP’s legislative history. Therefore, Part I of this note will explore the historical underpinnings of the word “marijuana.” Next, Part I will introduce CUMMA, the legislation that legalized the use of cannabis for medical purposes, and the July 2019 RFA.

Before 1910, the word “marijuana” did not exist in American culture.¹⁶ Instead, “cannabis” was used, generally to reference medicine.¹⁷ Between 1910 and 1920, over 890,000 people legally immigrated from Mexico, some who smoked cannabis recreationally, a form of consumption that was not conceptualized in the U.S. until their arrival.¹⁸ After the Great Depression struck the U.S., Americans looked to place the blame on marginalized groups, such as immigrants.¹⁹ White Americans began to associate cannabis with the Mexican immigrants and Black people that smoked it, treating cannabis as a substance used to corrupt the minds and bodies of “low-class individuals.”²⁰ Before cannabis became federally criminalized through The Marihuana Tax Act of 1937, twenty nine states prohibited cannabis, referring to it as “marijuana” in doing so.²¹ Massachusetts was the first state to require a prescription for the sale of “Indian hemp” in 1911.²² Notably, California, Maine, Wyoming, and Indiana were the first states to ban “marijuana” in 1913.²³

Harry Anslinger, the first director of the Federal Bureau of Narcotics, individually played a large role in stigmatizing cannabis.²⁴ Using film, Anslinger launched a vigilant campaign against cannabis to spread messages that racialized cannabis for white audiences.²⁵ For example, Anslinger stated that “[r]eefers makes darkies think they’re as good as white men...the primary reason to outlaw marijuana is its effect on the degenerate races.”²⁶ Notably, scholars argued that the culmination of Harry Anslinger’s

¹⁵ See Anna Wilcox, *The Origin of the Word ‘Marijuana,’* LEAFLY (Mar. 6, 2014), <https://www.leafly.com/news/cannabis-101/where-did-the-word-marijuana-come-from-anyway-01fb>.

¹⁶ *Id.*

¹⁷ *See id.*

¹⁸ *See id.*

¹⁹ *See id.*

²⁰ *See id.*

²¹ *See id.*

²² THE SAGE ENCYCLOPEDIA OF PHARMACOLOGY AND SOCIETY 1758 (Sarah E. Boslaugh ed., SAGE Publications, Inc. 2016).

²³ *Id.*

²⁴ Wilcox, *supra* note 15.

²⁵ *Id.*

²⁶ *Id.* (citing MIKE GRAY, DRUG CRAZY (Random House 1998)).

efforts catalyzed the 1937 federal prohibition on the use of cannabis and individual state prohibitions.²⁷

B. The Trend toward Legalization of Cannabis for Medical Purposes

Notwithstanding federal resistance, a few patients obtained cannabis legally for therapeutic purposes.²⁸ In the 1970s, state governments responded to the pressure of legalizing cannabis for medical purposes from patients and physicians.²⁹ New Mexico was the first state to pass legislation recognizing the medical value of cannabis in 1978.³⁰ The New Mexico Controlled Substances Therapeutic Research Act allowed physicians to prescribe cannabis to patients suffering from nausea and vomiting induced by cancer chemotherapy.³¹ The law was later modified to comply with federal regulations requiring a research program.³² Notably, from 1978 to 1986, “about 250 cancer patients in New Mexico received either marihuana or THC after conventional medications failed to control their nausea and vomiting.”³³ In 1996, California voters passed Proposition 215, making California the first state to wholly allow for the medical use of cannabis.³⁴

New Jersey took its first steps to becoming a medical cannabis state in January 2005, when CUMMA was introduced in the New Jersey State Senate by Senator Nicholas Scutari (D-Linden) as S2200.³⁵ A companion bill was introduced in the Assembly on December 8, 2005 as A4501 and was sponsored by Assemblyman Reed Gusciora (D-Trenton) and Assemblyman Michael Carroll (R-Morris Township).³⁶ “[T]he purpose of [CUMMA] is to protect from arrest, prosecution, property forfeiture, and criminal and other penalties, those patients suffering from debilitating medical conditions, and their physicians and primary caregivers, if such patients engage in the medical use of marijuana.”³⁷ Thus, in enacting CUMMA, the Legislature explained that “[c]ompassion dictates that a distinction be made between medical and non-medical uses of marijuana.”³⁸ Almost four years later, CUMMA was passed by both houses of the Legislature in December 2009 and was signed in January 2010.³⁹

²⁷ *Id.*

²⁸ LESTER GRINSPOON & JAMES B. BAKALAR, *MARIHUANA, THE FORBIDDEN MEDICINE* 18 (1997).

²⁹ *Id.*

³⁰ Alice O’Leary-Randall, *Today Is the 40th Anniversary of America’s First Medical Marijuana Law*, CANNABISNOW (Feb. 21, 2018), <https://cannabisnow.com/lynn-pierson-first-medical-marijuana-law/>.

³¹ GRINSPOON & BAKALAR, *supra* note 28.

³² *Id.*

³³ *Id.* at 19.

³⁴ *Ross v. RagingWire Telecomm., Inc.*, 174 P.3d 200, 211 n.1 (Cal. 2008) (Kennard, J., concurring in part) (noting that California’s “Compassionate Use Act” was the “first law of its kind in the nation”).

³⁵ N.J. Senate Bill No. 2200, 211th Leg. (2005).

³⁶ N.J. Assembly Bill No. 4501, 211th Leg. (2005).

³⁷ *Id.*

³⁸ *Id.*

³⁹ N.J. STAT. ANN. § 24:6I-1 (West 2010) (amended 2019).

C. New Jersey's MMP: The Compassionate Use Medical Marijuana Act

Then-Governor Jon Corzine signed CUMMA⁴⁰ into law on January 18, 2010,⁴¹ making New Jersey the fourteenth State to legalize cannabis for medical purposes.⁴² CUMMA is the enabling authority for the MMP.

Most significantly, CUMMA sets forth the process for obtaining a license to operate a medical cannabis dispensary.⁴³ CUMMA provides that the “[DOH] shall accept applications from entities for permits to operate as alternative treatment centers, and may charge a reasonable fee for the issuance of a permit.”⁴⁴ It is, therefore, DOH’s statutory duty to ensure the availability of a sufficient number of ATCs throughout New Jersey, based on patient need, including at least two each in the northern, central, and southern regions of the State.⁴⁵ However, DOH has “broad authority” to issue a permit to operate an ATC consistent with the purposes of CUMMA.⁴⁶

Additionally, CUMMA required DOH to establish a registry of qualifying patients and their caregivers.⁴⁷ CUMMA accordingly required DOH to issue a registry identification card to a qualifying patient and primary caregiver.⁴⁸

It bears mentioning that CUMMA’s implementation was hindered when Governor Christie took office on January 19, 2010, which reflected Governor Christie’s fierce opposition to legalize the use of cannabis for medicinal purposes.⁴⁹ Consequently, the patient registry did not become available until 2012.⁵⁰ By the end of 2016, approximately 12,500 medical cannabis patients were registered, which is considerably less than the number of patients registered in other medical cannabis states.⁵¹ Comparatively, Michigan had 182,091 medical cannabis patients registered in March 2016.⁵² Currently,

⁴⁰ *Id.*

⁴¹ *Id.* (effective September 10, 2013).

⁴² *Id.*

⁴³ See N.J. STAT. ANN. § 24:6I-7(a) (West 2020).

⁴⁴ *Id.*

⁴⁵ *Id.* (noting additionally that the first two centers issued a permit in each region must be nonprofit entities).

⁴⁶ See N.J. STAT. ANN. § 24:6I-7(e) (West 2020) (under CUMMA, DOH may suspend or revoke a permit to operate as an ATC for cause).

⁴⁷ N.J. STAT. ANN. § 24:6I-4 (West 2020).

⁴⁸ *Id.*

⁴⁹ Morgan Roger, *The History of Marijuana in New Jersey*, CIVILIZED, <https://www.civilized.life/articles/history-of-marijuana-in-new-jersey/> (last visited Mar. 11, 2021).

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Medical Marijuana Patient Numbers*, MPP.ORG (DEC. 2, 2020), <https://www.mpp.org/issues/medical-marijuana/state-by-state-medical-marijuana-laws/medical-marijuana-patient-numbers/>.

in 2021, more than 100,000 patients are in the program.⁵³ New Jersey’s then-low participation rate seemingly reflected CUMMA’s unusually strict rules and regulations.⁵⁴

1. Regulations Governing the MMP

By design, CUMMA is one of the most restrictive state medical cannabis laws across the nation.⁵⁵ The reasoning is that CUMMA was created to provide medical cannabis “to individuals with specific enumerated medical conditions via a reasonable system that is highly regulated and extensively overseen.”⁵⁶ CUMMA requires the Commissioner of the DOH to promulgate rules to implement the MMP.⁵⁷ In pertinent part, the Rules set forth procedures for the “permitting, establishment, and operation” of ATCs to cultivate and dispense cannabis for medical purposes.⁵⁸

On October 6, 2010, DOH posted draft proposed rules on its website.⁵⁹ Shortly thereafter, the Legislature passed Assembly Concurrent Resolution No. 151 (“ACR151”) and its senate companion⁶⁰ Senate Concurrent Resolution No. 130 (“SCR130”)⁶¹ (hereinafter collectively referred to as the “concurrent resolution”), which stated that DOH’s draft proposed rules are “not consistent with the intent of the Legislature as expressed in the language of [CUMMA].”⁶² The concurrent resolution stipulated that the Commissioner of the DOH will have thirty days from the transmittal date of the concurrent resolution to amend or withdraw portions of the draft rules that the Legislature identified as non-conforming.⁶³ Specifically, the concurrent resolution expressed concern about the proposed rules’ restrictions on patient access since the proposed rules “would prohibit an entity designated as an ‘alternative treatment center—dispensary’ from cultivating marijuana, and an entity designated as an ‘alternative treatment center—plant cultivation’ from dispensing directly to patients.”⁶⁴ The concurrent resolution concluded

⁵³ See *Spotlight*, N.J. DEP’T OF HEALTH, <https://www.nj.gov/health/medicalmarijuana/> (last visited Mar. 10, 2021).

⁵⁴ Roger, *supra* note 49.

⁵⁵ Nicole DiMaria, *The New Jersey Compassionate Use Medical Marijuana Act—Questions Abound*, GARDEN STATE FOCUS, May-June 2010, at 17, https://hfmanj.org/images/downloads/Focus_Magazine/22739_may.pdf.

⁵⁶ Melissa Brown, *The Garden State Just Got Greener: New Jersey Is the Fourteenth State in the Nation to Legalize Medical Marijuana*, 41 SETON HALL L. REV. 1519, 1521 (2011).

⁵⁷ DOH’s rules governing the MMP are set forth at N.J.A.C. 8:64-1 *et seq.*

⁵⁸ *Executive Order 6 Report*, N.J. DEP’T OF HEALTH (Mar. 28, 2018), https://www.state.nj.us/health/medicalmarijuana/documents/EO6Report_Final.pdf

⁵⁹ 42 N.J. Reg. 2668(a) (Nov. 15, 2010).

⁶⁰ Meaning an identical Senate bill.

⁶¹ Assembly Regulatory Oversight and Gaming Committee, *Statement to Assembly Concurrent Resolution No. 151* (Nov. 8, 2010), https://www.njleg.state.nj.us/2010/Bills/ACR/151_S1.PDF.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

that the proposed rules' prohibitions will significantly limit patient access to ATCs that dispense cannabis, which was not the Legislature's intent when it enacted CUMMA.⁶⁵

DOH proposed modified rules on February 22, 2011.⁶⁶ The modified rules provided for six ATCs that cultivate and dispense cannabis, combining the separate application processes for cultivating and dispensing permits into one application for an ATC permit.⁶⁷ Additionally, the modified rules prohibited ATC satellite dispensing locations and home delivery.⁶⁸

After the Legislature failed to adopt the Senate's second concurrent resolution⁶⁹ which reaffirmed the finding that DOH's proposed rules contravened the Legislature's intent, the MMP rules were finalized and adopted on November 23, 2011.⁷⁰

Pursuant to N.J.A.C. 8:64-6.1, "[DOH] may periodically announce a request for applications for the award of an ATC" and DOH must announce a RFA by publication in the New Jersey Register.⁷¹ The rule further provides for the contents of the Notice, such as eligibility criteria, evaluation criteria, weights for the criteria, applications materials, deadlines, etc.⁷²

D. Executive Order No. 6

In January 2018, Governor Murphy issued Executive Order No. 6 ("EO 6"), which directed DOH to conduct a comprehensive review of the MMP specifically focused on potential ways to expand access to cannabis for medical purposes.⁷³ In March 2018, DOH submitted its corresponding report pursuant to EO 6.⁷⁴ In doing so, DOH attempted to answer the questions CUMMA left unanswered.⁷⁵ There, DOH submitted regulatory action items and statutory recommendations that permit satellite ATC locations⁷⁶ and create separate endorsements for ATC permits.⁷⁷

⁶⁵ *Id.*

⁶⁶ 43 N.J. Reg. 340(a) (Feb. 22, 2011).

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ On April 11, 2011, the Senate introduced a second concurrent resolution, Senate Concurrent Resolution No. 151 but the Legislature never adopted it. *See* S. Res. 151, 214th Leg. (N.J. 2011).

⁷⁰ N.J. ADMIN. CODE § 8:64 (2021).

⁷¹ N.J. ADMIN. CODE § 8:64-6.1(a)-(c) (2021).

⁷² *Id.*

⁷³ N.J. DEPT. OF HEALTH, *supra* note 58.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

DOH first evaluated CUMMA's rules regulating the operations and siting of dispensaries and cultivation facilities, focusing on whether the rules should be revised to remove obstructions to expansion.⁷⁸ CUMMA addresses the operations and siting of ATCs, stating in pertinent part:

The department shall accept applications from entities for permits to operate as [ATCs], and may charge a reasonable fee for the issuance of a permit . . . The department shall seek to ensure the availability of a sufficient number of [ATCs] throughout the State, pursuant to need, including at least two each in the northern, central, and southern regions of the State. The first two centers issued a permit in each region shall be nonprofit entities, and centers subsequently issued permits may be nonprofit or for-profit entities.⁷⁹

DOH concluded that "siting of ATCs is impacted by a regulatory prohibition on satellite locations."⁸⁰ N.J.A.C. 8:64-7.9(a) provides that "[t]he Department shall not authorize or permit dispensing operations at any satellite locations. However, an ATC, as approved by the Department, may cultivate marijuana at a location separate from the location where the ATC shall dispense the marijuana, but both locations shall be within the same region."⁸¹

To address CUMMA's regulatory limits to ATC expansion, DOH submitted a regulatory action item to amend N.J.A.C. 8:64-7.9 to permit current ATCs to dispense medical cannabis at satellite locations and permit more than one cultivation site per ATC with DOH approval.⁸² In eliminating the bar on satellite sites, DOH seeks to "increase the supply of, and access to, product for qualifying patients."⁸³

E. The "Jake Honig Compassionate Use Act"

On July 2, 2019, Governor Phil Murphy signed the "Jake Honig Compassionate Use Medical Cannabis Act"⁸⁴ ("the Act") into law, significantly expanding New Jersey's MMP to include, *inter alia*, the creation of separate medical cannabis cultivator, dispensary, and manufacturer permits and the Cannabis Regulatory Commission ("CRC") to oversee, administer, and enforce the medical cannabis program.⁸⁵ Medical

⁷⁸ *Id.*

⁷⁹ N.J. STAT. ANN. § 24:6I-7 (West 2021).

⁸⁰ N.J. DEPT. OF HEALTH, *supra* note 58.

⁸¹ N.J. ADMIN. CODE § 8:64-7.9(a) (2021).

⁸² N.J. DEPT. OF HEALTH, *supra* note 58.

⁸³ *Id.*

⁸⁴ See Joe Torres, *New Jersey Gov. Phil Murphy Signs 'Jake's Law' Expanding Medical Marijuana Program*, ABC7 NY (July 2, 2019), <https://abc7ny.com/politics/nj-governor-signs-jakes-law-expanding-medical-pot-program/5374834/> (The Bill is named after Jake Honig, a 7-year-old from Howell, who lost his battle to brain cancer on January 21, 2018. In Honig's final months, medical cannabis was "the one thing" that eased his symptoms.).

⁸⁵ N.J. STAT. ANN. § 24:6I-24 (West 2019).

cannabis cultivation⁸⁶ is a term that refers to growing cannabis; a medical cannabis dispensary⁸⁷ is a location at which cannabis is legally sold for medical use. The term medical cannabis manufacturer⁸⁸ refers to organizations that legally purchase medical cannabis from cultivators and sell the cannabis to dispensaries. Vertical integration is a term that is used to describe organizations that facilitate more than one point in the medical cannabis supply chain, such as cannabis cultivation and dispensing.⁸⁹ Interestingly, the Act nor its predecessor define “vertical integration.”⁹⁰

Next, the Act creates the CRC, which is a commission within the Department of the Treasury and consists of five members appointed by the Governor, two of which are from recommendations from the Senate President and Assembly Speaker, respectively.⁹¹ The Governor directly appoints three individuals to serve on the CRC, those members serve terms of three, four, and five years, and are subject to advice and consent.⁹² The Act requires the CRC to issue a request for new permit applications within the first year of its effective date.⁹³ Under the Act, the CRC is restricted as to the amount and type of permits that it may award within the first 18 months of the Act’s effective date.⁹⁴ Entities may be awarded only one type of permit (cultivator, dispensary, or manufacturer), and the amount of cultivation permits must be capped at 28.⁹⁵ After the initial 18-month period, an ATC license applicant can concurrently hold more than one type of permit and the CRC can issue more than 28 cultivation permits.⁹⁶ The Act authorizes the CRC to periodically evaluate whether additional permits should be issued and administer further requests for applications.⁹⁷

F. The Request for Applications

⁸⁶ See N.J. STAT. ANN. § 24:6I-3 (West 2019).

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ Sara Brittany Somerset, *Florida Court Rules Vertical Integration Is Unconstitutional – Are Big Changes Coming To The Sunshine State's Cannabis Industry Or Will Big Marijuana Prevail?*, FORBES (Jul. 26, 2019, 5:06 AM), <https://www.forbes.com/sites/sarabrittany Somerset/2019/07/26/florida-court-rules-vertical-integration-is-unconstitutional--are-big-changes-coming-to-the-sunshine-states-cannabis-industry-or-will-big-marijuana-prevail/> - 41a73cb44fb2

⁹⁰ See N.J. STAT. ANN. § 24:6I-3 (West 2019).

⁹¹ Press Release, Phil Murphy, Governor of New Jersey, *Governor Murphy Signs Legislation to Dramatically Reform New Jersey’s Medical Marijuana Program, Expand Patient Access* (July 2, 2019).

⁹² *Id.*

⁹³ N.J. STAT. ANN. § 24:6I (West 2019).

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

On June 3, 2019, merely days after the New Jersey Senate passed the Act, DOH issued a Notice of RFA.⁹⁸ The DOH thereafter issued the new RFA for ATC permits and endorsements on July 1, 2019.⁹⁹ Notably, the RFA falls under the purview of CUMMA, notwithstanding Governor Murphy signing the Act into law on July 2, 2019, which effectively amends CUMMA by expanding the program.¹⁰⁰

Pursuant to the RFA, the DOH will award up to 24 additional ATC permits and endorsements throughout the state.¹⁰¹ In total, the DOH will award up to 4 vertically integrated permits¹⁰², up to 5 cultivation endorsements, and up to 15 dispensary endorsements.¹⁰³

The ATC permits and endorsements awarded under the RFA are to be distributed regionally and in the following manner:

<u>Region</u>	<u>Number and Type</u>
Northern	Cultivation endorsements: 2 Dispensary endorsements: 5 Vertically integrated permits: 1*
Central	Cultivation endorsements: 2 Dispensary endorsements: 5 Vertically integrated permits: 1*
Southern	Cultivation endorsements: 1 Dispensary endorsements: 5 Vertically integrated permits: 1*

*The fourth vertically integrated permits' region will be determined at the time of the award, based on the applicant's overall score and patient need.¹⁰⁴

The RFA sets forth the criteria that the selection committee must use in order to evaluate and score ATC applicants.¹⁰⁵ Provided that an application is full and complete, the application will be reviewed and scored by the selection committee.¹⁰⁶ Selection

⁹⁸ Rosemarie Moyeno Matos, *New Jersey Requesting Applications For 24 Endorsements- What Applicants Need To Know*, MJ NEWS NETWORK (July 29, 2019), <https://mjnewsnetwork.com/legal/new-jersey-requesting-applications-for-24-atc-endorsements-what-applicants-need-to-know/>.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Request for Applications*, N.J. DEPT OF HEALTH: DIV. OF MED. MARIJUANA (Aug. 2, 2019), https://www.nj.gov/health/medicalmarijuana/documents/MMP_RFA_07012019.pdf.

¹⁰² *Id.* (defining vertically integrated permits as a permit issued by the NJDOH that includes a cultivation endorsement, a manufacturing endorsement, and a dispensary endorsement).

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* (stating that once received, the NJDOH reviews applications for completeness. In doing so, the NJDOH must ensure that the applicant disclosed all mandatory information and that all information provided is truthful).

committee members will be “chosen for their expertise” and must “be free from conflicts of interest.”¹⁰⁷ Section VI of the RFA, “Criteria and Weighting,” lays out the criteria that the selection committee will use to score the applications.¹⁰⁸ The RFA includes 7 scored criteria, worth a total of 300 points.¹⁰⁹ Each criterion is accorded a different weight and additionally includes “measure(s)” to guide the selection committees’ scoring.¹¹⁰

RFA Scoring Guidelines

Criterion	Measure
<u>Criterion 1</u> : “Ability to meet the overall health needs of qualified patients and safety of the public.” 30 points	<u>Measure 1</u> , Security Plan 10 points <u>Measure 2</u> , Environmental impact plan 10 points <u>Measure 3</u> , Quality control and assurance plan 10 points
<u>Criterion 2</u> : “History of compliance with regulation and policies governing government-regulated marijuana programs.” 20 points	<u>Measure 1</u> , Background of principals, board members and owners 20 points
<u>Criterion 3</u> : “Ability and experience of applicant in ensuring an adequate supply of marijuana.” 20 points	<u>Measure 1</u> , Financing plan 20 points
<u>Criterion 4</u> : “Community support and participation.” 20 points	<u>Measure 1</u> , Ties to the local community 20 points
<u>Criterion 5</u> : “Ability to provide appropriate research data.” 10 points	<u>Measure 1</u> , Research contributions 10 points
<u>Criterion 6</u> : “Experience in cultivating, manufacturing, or dispensing marijuana in compliance with government-regulated marijuana programs.” 100 points	<u>Measure 1</u> , cultivation plan <u>Measure 2</u> , manufacturing plan <u>Measure 3</u> , dispensary plan
<u>Criterion 7</u> : “Workforce and job creation plan, including plans to involve women, minorities and military veterans in ATC ownership, management and experience with	<u>Measure 1</u> , Labor Peace Agreement 30 points <u>Measure 2</u> , Labor compliance plan 20 points

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

collective bargaining in cannabis industries.” 100 points	<u>Measure 3</u> , Minority-owned, women-owned or veteran owned business certification 30 points <u>Measure 4</u> , workforce and job-creation plan 20 points
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Thereafter, DOH will compile the scores and issue its Final Agency Decision (“FAD”). FADs are predicated on scoring, location, the limitations outlined under the eligibility criteria of the RFA, and any other criteria the DOH determines is consistent with the New Jersey Compassionate Use Medical Marijuana Act’s underlying legislative objective.¹¹¹

PART II

Thirty-three states, the District of Columbia, Puerto Rico, Guam, and the U.S. Virgin Islands have legalized cannabis for medical purposes.¹¹² Yet, medical cannabis states vary considerably in how they choose to award medical cannabis licenses.¹¹³ Therefore, Part II of this note will examine the medical cannabis licensing process when the amount of cannabis licenses is restricted. Generally, states employ one of three different processes to grant cannabis licenses, namely, competitive (also known as merit-based), lottery or qualified lottery.¹¹⁴

A. Competitive License Process

Most medical cannabis states, including New Jersey, use the competitive licensing process.¹¹⁵ Under a competitive licensing process, medical cannabis license applicants are scored using the same criteria.¹¹⁶ Therefore, it follows that the applicants with the highest composite scores are granted the medical cannabis license.¹¹⁷

Unfortunately, New Jersey is not the only state to experience issues concerning the medical cannabis applications scoring process.¹¹⁸ For example, in Pennsylvania, approximately one out of every three medical cannabis license applicants filed an appeal with the Pennsylvania DOH after an investigation revealed that Pennsylvania’s

¹¹¹ *Id.*

¹¹² *State Medical Marijuana Laws*, NCSL (Feb. 23, 2021), <https://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx>

¹¹³ *Id.*

¹¹⁴ Susan Gunelius, *Lottery or Competition - What’s the Best Way to Grant Marijuana Licenses?*, CANABIZ MEDIA (Nov. 16, 2018), <https://cannabiz.media/lottery-or-competition-whats-the-best-way-to-grant-marijuana-licenses/>

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ Susan Gunelius, *Controversy Surrounds Marijuana Licensing in Pennsylvania and Florida*, CANABIZ MEDIA (Sep. 28, 2017) <https://cannabiz.media/controversy-surrounds-marijuana-licensing-in-pennsylvania-and-florida/>.

application review and licensing process was severely flawed.¹¹⁹ Specifically, the investigation concluded that, *inter alia*, identical answers to the same question on different applications were awarded different scores, DOH evaluated parts of the application using a scoring scale where one should not have been used, DOH often added scores inconsistently, and DOH's scoring criteria was not made widely available.¹²⁰

B. Lottery License Process

Few states, including Arizona, use the lottery licensing process.¹²¹ Notably, the number of potential patients served by a medical cannabis business location was not a factor when Arizona began its medical marijuana program in 2012.¹²² In a lottery licensing process, the medical cannabis applicants that meet minimal requirements are entered into a lottery and "winners" are chosen at random without consideration of the applicant's qualifications.¹²³ The lottery "winners" are thereafter granted the medical cannabis license.¹²⁴

Arizona decided to use the lottery licensing process as a strategy to avoid lawsuits pertaining to its medical cannabis licensing process.¹²⁵ However, the benefits of the lottery licensing process exceed risk allocation. For example, the lottery licensing process is considered a less subjective licensing award process and assuages concerns of political influence.¹²⁶ Taylor West from the National Cannabis Industry Association stated, however, "[t]he problem with the lottery is it doesn't always get you your best results A lottery doesn't reward the really diligent actors who give a lot of thought to the application and have done a lot of planning ahead of time and focused on building the best business possible."¹²⁷

C. Qualified Lottery License Process

Few states, including Washington, use the qualified lottery licensing process.¹²⁸ In simplicity, a qualified lottery process is a "hybrid between the competitive and lottery processes."¹²⁹ Similar to the competitive system, the State DOH is permitted to review

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ Gunelius, *supra* note 114.

¹²² Rebecca Beitsch, *Licensing Medical Marijuana Stirs Up Trouble for States*, PBS (Dec. 22, 2016) <https://www.pbs.org/newshour/health/medical-marijuana-licensing-states>.

¹²³ Gunelius, *supra* note 114.

¹²⁴ *Id.*

¹²⁵ *See* Beitsch, *supra* note 122.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *See* Beitsch, *supra* note 122.

¹²⁹ Gunelius, *supra* note 114.

the applicant's qualifications according to set criteria.¹³⁰ However, unlike the lottery licensing process, medical cannabis applicants participating in a qualified lottery licensing process must meet higher standards in order to qualify for entry into the lottery.¹³¹ Qualified applicants are entered into the lottery and chosen at random, just like the lottery licensing process.¹³²

Unfortunately, the qualified lottery licensing process does not solve the issues that states, using the lottery or competitive licensing process, experienced.¹³³ For example, in Washington, the state DOH inadvertently disqualified some applicants from entering the lottery.¹³⁴ Therefore, Washington needed to add the "disqualified" applicants back into the lottery, without affecting the ranking of existing applicants.¹³⁵ Mistakenly disqualifying the applicants required the state DOH to somehow remain blind to the "disqualified" applicants' identities, notwithstanding the fact that the applicants' identities were released to the public.¹³⁶

PART III

CUMMA expressly states that a denied ATC license application is considered a FAD, subject to review by the New Jersey Appellate Division.¹³⁷ However, the judiciary's role in reviewing administrative decisions is limited¹³⁸ as courts are "ill-equipped to micromanage an agency's activities."¹³⁹ Therefore, the agency's final decision will be sustained absent a "clear showing" that the agency's decision is "arbitrary, capricious, or unreasonable, or ... lacks fair support in the record."¹⁴⁰ In determining whether agency action is arbitrary and capricious, a court may consider whether the action contravenes its enabling act's express policy.¹⁴¹ Court intervention is justified when the agency's action is not supported or accompanied by any reasonable explanation.¹⁴²

¹³⁰ LEGAL MARIJUANA: PERSPECTIVES ON PUBLIC BENEFITS, RISKS AND POLICY APPROACHES 146 (Joaquin Jay Gonzalez III & Mickey P. McGee eds., 2019).

¹³¹ *Id.*

¹³² Gunelius, *supra* note 114.

¹³³ See Roberta Kwok, *How to Design A Marijuana-License Lottery*, NEW YORKER (Mar. 22, 2016), <https://www.newyorker.com/tech/elements/how-to-design-a-marijuana-license-lottery>

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ N.J.S.A. § 24:6I-7(e). See also N.J. Ct. R. 2:2-3(a)(2) (Please note that this language was not amended in the Act).

¹³⁸ Caporusso v. N.J. Dep't of Health & Senior Servs., 434 N.J. Super. 88, 101 (Super Ct. App. Div. 2014).

¹³⁹ *Id.*

¹⁴⁰ Nat. Med., Inc. v. N.J. Dep't of Health & Sr. Servs., 428 N.J. Super. 259, 269 (Super. Ct. App. Div. 2012) (citing *In re Herrmann*, 192 N.J. 19, 27-28 (2007)).

¹⁴¹ *Caporusso*, 434 N.J. at 103 (citing *Pub. Serv. Elec. & Gas Co. v. N.J. Dep't of Env'tl. Prot.*, 101 N.J. 95, 103 (1985)).

¹⁴² *Id.*

Furthermore, it is well-settled that agency rule-making is a “highly discretionary undertaking[.]” and not a ministerial function.¹⁴³ The judiciary accords deference to the “agency’s expertise and superior knowledge of a particular field.”¹⁴⁴ Judicial deference “is *even stronger* when the agency has delegated discretion to determine the technical and special procedures to accomplish its task.”¹⁴⁵

Since the court’s role in reviewing ATC applications is limited, Part III of this note will discuss the caselaw pertinent to the ATC application process.

A. Case Law

Not surprisingly, few New Jersey cases consider bias in the context of the ATC licensing process because CUMMA was only recently enacted. Therefore, it is necessary to look to case law in other jurisdictions for guidance, namely, Arkansas and Colorado.

Furthermore, Arkansas’ and Colorado’s medical cannabis laws vary considerably from New Jersey’s CUMMA. As such, examining case law in different applicant-centered industries is instructive. The 2019 college admissions bribery scandal, for example, calls the college admissions process’ integrity into question.¹⁴⁶ Therefore, this note will analogize and distinguish caselaw concerning ATC licensing bias from cases examining the bias in the college admissions process. College admissions decisions are akin to DOH’s discretionary undertaking in ATC licensing because public universities employ similar scoring criteria that DOH uses to determine which ATCs to license, specifically, location, diversity, and contribution to the community.

In drawing comparisons between the ATC license process and the college admissions process, it is important to mention that this note analyzes a narrow issue in college admissions decisions. The college admissions decisions have important consequences pertaining to how higher education institutions enroll a diverse student body. Notwithstanding, the college admissions decisions serve as an available tool in analyzing the new law.

1. New Jersey Case Law

The New Jersey Appellate Division’s recent opinions in *In re Inst. For Health Research and Caporusso v. N.J. Department of Health & Senior Services* stand for the proposition

¹⁴³ *Equitable Life Mortg. & Realty Inv’rs v. N.J. Div. of Taxation*, 151 N.J. Super. 232, 238 (Super. Ct. App. Div. 1977).

¹⁴⁴ *Nat. Med., Inc.*, 428 N.J. Super. at 270. (citing *In re Herrmann*, 192 N.J. 19, 28 (2007)).

¹⁴⁵ *In re Application of Holy Name Hosp. for a Certificate of Need*, 301 N.J. Super. 282, 295 (Super. Ct. App. Div. 1997) (emphasis added).

¹⁴⁶ Jennifer Medina, Katie Benner, & Kate Taylor, *Actresses, Business Leaders and Other Wealthy Parents Charged in U.S. College Entry Fraud*, *NY TIMES* (Mar. 12, 2019), <https://www.nytimes.com/2019/03/12/us/college-admissions-cheating-scandal.html>.

that DOH is given considerable discretion in achieving CUMMA’s underlying purpose—to increase patient access.¹⁴⁷

The court in *In re Institute For Health Research* did not find DOH’s ATC selection decisions to be arbitrary, capricious, or unreasonable, notwithstanding the fact that appellant Garden State’s ATC application for the northern region was denied in favor of the next highest-scoring applicant, Greenleaf.¹⁴⁸ DOH’s decision to award the ATC license to Greenleaf was based on Greenleaf and Garden State’s proposed locations the northern region’s highest scoring applicants intended to locate in Secaucus.¹⁴⁹ The Secaucus location was awarded to the second-highest scoring applicant in the State and the highest-scoring applicant in the region.¹⁵⁰ Consequently, DOH was left to decide between Garden State and Greenleaf in awarding the second ATC license in the northern region.¹⁵¹ In doing so, DOH noted that although Garden State was the second-highest scoring applicant in the northern region, it also proposed to locate in Secaucus, but Greenleaf, the next highest-scoring applicant, proposed to locate in Montclair.¹⁵² In deciding to award the ATC license to Greenleaf, DOH reasoned that locating two ATCs in Secaucus¹⁵³ contravenes the best interest of the public, which is to improve patient access to medical cannabis.¹⁵⁴

The court also rejected Greenleaf’s argument that the ATC selection process is akin to the public contract award process.¹⁵⁵ In Local Public Contracts Law cases, the awarding entity’s discretion is strictly limited and accordingly requires awarding the “lowest possible bidder.”¹⁵⁶ However, the Legislature does not set forth a rigid process for selecting ATCs.¹⁵⁷ Instead, the Department is given “considerable” discretion to further the legislative directive.¹⁵⁸

Next, *Caporusso v. N.J. Department of Health & Senior Services* stands for the proposition that courts cannot compel DOH to exercise its discretion in a specific manner but may, instead, order a “remedy for arbitrary inaction.”¹⁵⁹ In *Caporusso*, the

¹⁴⁷ See Kwok, *supra* note 124.

¹⁴⁸ *In re Inst. For Health Rsch.*, Nos. A-0069-11T3, A-0102-11T3, A-0103-11T3, 2013 N.J. Super. Unpub. LEXIS 2085, at *12 (Super. Ct. App. Div. Aug. 22, 2013).

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at *11.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.* (noting that the Secaucus location serves the seven-county northern region).

¹⁵⁴ *Id.* at *12.

¹⁵⁵ *Id.* at *22.

¹⁵⁶ *Id.* at *22-23.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Caporusso v. N.J. Dep’t of Health & Senior Servs.*, 434 N.J. Super. 88, 108 (Super. Ct. App. Div. 2014) (citing *In re Petition of Howell Twp., Monmouth Cnty.*, 371 N.J. Super. 167, 188 (Super. Ct. App. Div. 2004)).

plaintiffs¹⁶⁰ brought suit for “injunctive and/or declaratory relief” to effectuate CUMMA.¹⁶¹ Plaintiffs, qualified patients under CUMMA, claimed that DOH’s failure to implement the MMP as mandated amounted to denial of their access to medical cannabis.¹⁶² Specifically, the plaintiffs challenged the number of currently operating ATCs, expressing dissatisfaction with the rate at which ATCs are opening in the State.¹⁶³ The plaintiffs, *inter alia*, claimed that DOH did not comply with CUMMA’s requirement to submit reports to the Governor and Legislature within a fixed time period.¹⁶⁴

The court denied the plaintiffs the requested relief, holding that DOH did not act arbitrarily or capriciously in approving ATC licensure at its current rate.¹⁶⁵ In so holding, the court reasoned that the ATC licensing process is arduous and therefore the requested relief is inappropriate because licensing ATCs is “highly” *discretionary*¹⁶⁶ and not ministerial.¹⁶⁷ However, the court agreed with the plaintiffs’ claim that DOH did not comply with CUMMA’s reporting requirements and no apparent basis justified DOH’s continued delay.¹⁶⁸ Reasoning that DOH’s reporting requirement involves a ministerial function, the court compelled DOH to file the required reports¹⁶⁹ mandated by CUMMA within forty-five days of the date of its opinion.¹⁷⁰

2. Case Law from Different States

Although each state’s MMP law and regulations are unique, “marijuana appeals in states that used competitive scoring can be significantly valuable to review if the scoring and issues are similar.”¹⁷¹ The consequences of bias in the ATC licensing process is borne out in a recent lawsuit filed in Pulaski County, Arkansas.¹⁷² In *Naturalis Health, LLC v. Ark. Department of Finances & Administration*, the court took issue with the

¹⁶⁰ The Plaintiffs are Richard and Jill Caporusso, Caroline Glock, and Dr. Jeffrey S. Pollack. *See id.* at 92.

¹⁶¹ *Id.*

¹⁶² *Id.* at 96.

¹⁶³ *Id.* at 108 (ruling that DOH did not act arbitrarily or capriciously).

¹⁶⁴ *Id.* at 109.

¹⁶⁵ *Id.* at 105.

¹⁶⁶ To determine whether the requested agency action is ministerial or discretionary, courts will look to the language of the statute to ascertain the legislative intent. *See id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 109.

¹⁶⁹ The required reports address the status of the MMP, the likely success of ATCs which have yet to open, and whether the number of existing licensed and operating ATCs fully serve statewide patient need. *See id.* at 110.

¹⁷⁰ *Id.*

¹⁷¹ Rachel Herndon, *Missouri Attorneys Break Down Appellate Process for Medical Marijuana Facility Applicants*, MO GREENWAY (Jan. 2, 2020), <https://mogreenway.com/2020/01/02/missouri-attorneys-break-down-appellate-process-for-medical-marijuana-facility-applicants/>.

¹⁷² *See generally* Memorandum Order Entering Preliminary Injunction & Declaratory Judgment, *Naturalis Health, LLC v. Ark. Dep't of Fin. & Admin.* (2018), No. 60CV-18-1559.

Arkansas Medical Marijuana Commission (“MMC”) process that resulted in a decision awarding the top-five scoring applicants ATC licenses.¹⁷³ After several reports indicated bias in the review process, Naturalis, an applicant that did not receive a score sufficient to obtain one of the initial five licenses, filed suit alleging that the process was tainted by all “matters of inconsistencies, failure to follow their own rules, and ... a process that wasn't fair for the applicants themselves and ultimately the patients.”¹⁷⁴ Consequently, Judge Griffen issued a temporary restraining order (“TRO”), preventing the MMC from formally issuing cultivation licenses.¹⁷⁵ The court agreed with a number of Naturalis’ specific challenges to the procedures employed by the MMC,¹⁷⁶ including Naturalis’ allegation that two members of the MMC presented conflicts of interest and bias.¹⁷⁷ Consequently, the court concluded that the MMC’s decisions were “arbitrary and capricious,” and the MMC was enjoined from issuing licenses based on its original findings.¹⁷⁸ Thus, the temporary restraining order was replaced with an injunction preventing the MMC from issuing the cultivation facility licenses.¹⁷⁹

Thereafter, the Arkansas Supreme Court reversed Judge Griffen’s injunction on jurisdictional grounds.¹⁸⁰ In doing so, the court reasoned that the MMC never conducted “an adjudication” to determine which applicants are the top-five scoring and there was therefore “no reviewable agency action” by the MMC.¹⁸¹ However, Chief Justice Kemp’s concurrence urged the MMC “to review its rules and procedures and to cure any deficiencies.”¹⁸²

The Colorado Supreme Court in *Rocky Mountain Retail Management, LLC v. City of Northglenn* found that the City’s decision to deny defendant Rocky Mountain’s ATC license application was not arbitrary and capricious, notwithstanding the City’s reliance on testimony from existing ATCs to support its conclusion.¹⁸³ There, Rocky Mountain submitted an ATC license application to operate an ATC in the City of Northglenn.¹⁸⁴ Pursuant to the Northglenn Code, the City issued a preliminary report, finding that Rocky

¹⁷³ *Id.*

¹⁷⁴ Carol Goforth & Robyn Goforth, *Medical Marijuana in Arkansas: The Risks of Rushed Drafting*, 71 ARK. L. REV. 647, 698 (2019).

¹⁷⁵ Naturalis Memorandum Order, *supra* note 172, at 27.

¹⁷⁶ *Id.* at 15-18.

¹⁷⁷ *Id.* at 20, 21.

¹⁷⁸ *Id.* at 27.

¹⁷⁹ *Id.*

¹⁸⁰ Ark. Dep’t of Fin. & Admin. v. Naturalis Health, LLC, 549 S.W.3d 901, 904 (Ark. 2018).

¹⁸¹ *Id.* at 906.

¹⁸² *Id.* at 908 (cautioning the MMC that it has “a constitutional duty to adopt rules necessary for its fair, impartial, stringent, and comprehensive administration’ of the Arkansas Medical Marijuana Amendment.”).

¹⁸³ Rocky Mt. Retail Mgmt., LLC v. City of Northglenn, 393 P.3d 533, 543 (Colo. 2017).

¹⁸⁴ *Id.* at 535.

Mountain’s application met preliminary requirements and Rocky Mountain was thus eligible to operate as an ATC subject to a public hearing before the City Council.¹⁸⁵

Despite the findings set forth in the City’s preliminary report, the City denied Rocky Mountain's application after receiving evidence at two public hearings, which indicated the number of existing ATCs in Northglenn was sufficient.¹⁸⁶ In doing so, the City considered that there were three other ATCs operating in Northglenn, and two witnesses testified that wait times at the existing ATCs were short.¹⁸⁷ Significantly, the City found that Rocky Mountain’s investigator’s testimony suggesting that wait times at the existing ATCs was longer "indicated an apparent bias which affected his credibility."¹⁸⁸ Reasoning that “[the] court will not substitute its judgment for the City Council's where the City Council received substantial evidence and adequately explained its consideration of that evidence in written findings[,]” the court held that the City’s decision was not arbitrary or capricious.¹⁸⁹

3. College Admissions Case Law

Since many public universities utilize criteria similar to the DOH’s RFA criteria, including the applicants’ location, diversity, and likely contribution to the community, this note will analogize cases discussing college admissions decisions.

In 2003, the United States Supreme Court decided two cases challenging admissions practices at University of Michigan. In *Grutter v. Bollinger*, the United States Supreme Court rejected the challenge to the University of Michigan Law School admission procedures, holding that the school’s affirmative action policy was narrowly tailored to serve the compelling interest of educational diversity.¹⁹⁰ In so holding, the Court additionally found that the law school utilized an admission procedure that holistically assessed talent, experience, and potential contributions in conjunction with academic criteria.¹⁹¹ The Court endorsed Justice Powell’s opinion in *Regents of University of California v. Bakke*, finding that "nation's future depends upon leaders trained through wide exposure' to the ideas and mores of students as diverse as this Nation."¹⁹² However, Justice Ginsburg in concurrence emphasized “conscious and unconscious race bias . . . remain alive in our land, impeding realization of our highest values and ideals.”¹⁹³

¹⁸⁵ *Id.* at 537 (noting that the City Council acts as the City’s “medical marijuana local licensing authority.”).

¹⁸⁶ *Id.* at 535, 542-43 (noting that the City also issued a written decision, which explained why it found certain testimony to be helpful).

¹⁸⁷ *Id.* at 543.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Grutter v. Bollinger*, 539 U.S. 306, 335-36 (2003).

¹⁹¹ *Id.* at 315-16.

¹⁹² *Id.* at 324 (quoting *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 315 (1978)).

¹⁹³ *Id.* at 345. (Ginsburg, J., concurring).

In the same term, the Court invalidated the admissions program at the University of Michigan College of Literature, Science and the Arts in *Gratz v. Bollinger*.¹⁹⁴ Unlike *Grutter*, the Court found that the University of Michigan's admissions practices were neither individualized nor holistic.¹⁹⁵ Specifically, the Court took issue with the University's process of automatically awarding an additional 20 points to every minority applicant, which the Court found made race decisive for many minority applicants.¹⁹⁶

Similar to the Supreme Court's holding in *Grutter*, the New Jersey Appellate Division's opinions in *In re Institute For Health Research* and *Caporusso* establish that CUMMA's policy concerning the number of ATCs in each region is narrowly tailored to serve CUMMA's goal of improving patient access to medical cannabis.¹⁹⁷ Notwithstanding the fact that both the *Grutter* admissions process and New Jersey's ATC licensing process utilize "holistic" assessments of applicants, the New Jersey ATC licensing process is distinguishable from the college admissions process because the DOH makes its RFA criteria available to ATC applicants before applications are due.¹⁹⁸ In doing so, ATC applicants have the opportunity to tailor applications to best fit the criteria set forth in the RFA rather than guess how application readers will score applications.¹⁹⁹

Furthermore, unlike *Gratz*, DOH did not automatically award an additional 20 points to desirable applicants.²⁰⁰ An argument that the New Jersey ATC licensing process is akin to *Gratz* is inapposite, despite there being several instances where ATC applicants received the highest score possible from several application readers and no score at all from different application readers in the same category.²⁰¹ The reasoning follows that DOH's scoring disparities, while requiring remediation, is not automatic. DOH's scoring disparities in those cases are likely the result of natural human error, not an automatic computer formula programmed to be biased.

In 2016, the Court considered the two-part undergraduate admissions practice employed by the University of Texas at Austin when it heard *Fisher v. University of*

¹⁹⁴ *Gratz v. Bollinger*, 539 U.S. 244, 251 (2003).

¹⁹⁵ *Id.* at 271.

¹⁹⁶ *Id.* at 271-72.

¹⁹⁷ See *In re Inst. For Health Rsch.*, Nos. A-0069-11T3, A-0102-11T3, A-0103-11T3, 2013 N.J. Super. Unpub. LEXIS 2085, at *12 (Super. Ct. App. Div. Aug. 22, 2013); *Caporusso v. N.J. Dep't of Health & Senior Servs.*, 434 N.J. Super. 88, 108 (Super. Ct. App. Div. 2014).

¹⁹⁸ See *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Updates on Expansion of Medicinal Marijuana Program*, N.J. HEALTH, <https://www.nj.gov/health/medicalmarijuana/alt-treatment-centers/applications.shtml> (last visited Mar. 10, 2021); Phoebe Maltz Bovy, *The False Promise of 'Holistic' College Admissions*, THE ATLANTIC (Dec. 17, 2013), <https://www.theatlantic.com/education/archive/2013/12/the-false-promise-of-holistic-college-admissions/282432/>.

¹⁹⁹ See N.J. HEALTH, *supra* note 198; Maltz Bovy, *surpa* note 198.

²⁰⁰ Maltz Bovy, *surpa* note 198.

²⁰¹ *Id.*

Texas.²⁰² Texas state law automatically granted admission to public state universities to students graduating in the top 10% of their class from a Texas high school.²⁰³ The University then fills the remainder of its incoming freshman class by utilizing a formula that considers race, among other factors, for diversity purposes.²⁰⁴ In doing so, the University admissions officer first combines an applicant's Academic Index ("AI")²⁰⁵ with the applicant's Personal Achievement Index ("PAI").²⁰⁶ The second component is a full-file review, completed by a separate reader, that results in the Personal Achievement Score ("PAS"), which is a score ranging from 1 to 6.²⁰⁷

Fisher held that the University's admissions practice did not violate the Equal Protection Clause.²⁰⁸ In so holding, the Court, *inter alia*, identified the process the University used in order to ensure consistent scoring among applicants.²⁰⁹ First, the Court noted that both the essay readers and the full-file readers must undergo extensive training to ensure consistent scoring among applicants.²¹⁰ Notably, while applications are being evaluated, the Admissions Office undertakes "regular 'reliability analyses' to 'measure the frequency of readers scoring within one point of each other.'"²¹¹ The Court concluded that "[b]oth the intensive training and the reliability analyses aim to ensure that similarly situated applicants are being treated identically regardless of which admissions officer reads the file."²¹²

Just like *Fisher*, the New Jersey ATC licensing process requires its application readers to be unbiased. However, the ATC licensing process and college admissions process utilize different mechanisms to ensure unbiased decisions. Absent from the ATC licensing process in New Jersey is a regular "reliability" analysis akin to that set forth in *Fisher*, which seeks to ensure unbiased results among application readers. Instead, DOH seemingly relies on the application reader's integrity to ensure unbiased results, such that

²⁰² The State law is referred to as the "Top Ten Percent Law," Tex. Educ. Code Ann. §51.803 (West 2015). See *Fisher v. Univ. of Tex.*, 136 S. Ct. 2198, 2205 (2016).

²⁰³ See *Fisher v. Univ. of Tex.*, 136 S. Ct. 2198, 2205 (2016).

²⁰⁴ *Id.* at 2202. The PAI is a number from 1 to 6 (6 is the best) that is predicated upon two primary components.

²⁰⁵ AI combines the applicant's SAT score and high school academic performance. *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.* A separate reader determines the PAS by rereading the applicant's required essays, reviewing supplemental information, and using the applicant's leadership experience, extracurricular activities, awards/honors, community service, and other "special circumstances" to predict the applicant's likely contribution to the University's student body. *Id.*

²⁰⁸ *Id.* at 2213.

²⁰⁹ *Id.*

²¹⁰ *Id.* at 2206.

²¹¹ *Id.*

²¹² *Id.*

application readers are “chosen for their expertise” and must “be free from conflicts of interest.”²¹³

PART IV: Solutions and Conclusion

The harsh reality is that medical cannabis patient’s options are limited: only seven medical cannabis dispensaries serve the qualified patient population of over 100,000 in New Jersey.²¹⁴ New Jersey’s experience with the ATC license decision appeals process suggests that “[c]omplaints to the [DOH] may be cathartic, but are unlikely to produce real change.”²¹⁵ For example, in December 2019, the Appellate Division ordered DOH to halt its review of almost 150 ATC applications after denying nine applicants due to a technical error.²¹⁶ Consequently, the remaining 150 applicants had no choice but to wait- out²¹⁷ the appeals process, losing properties held under conditional leases or purchase agreements.²¹⁸ It is clear that DOH cannot retroactively change how it handled the denied applications. Therefore, the overarching issue is how to best move forward.

The first question is whether New Jersey- and other states- should switch from a competitive licensing system to a different licensing system. More specifically, should New Jersey switch from limiting the number of ATC licenses it may award to granting an unlimited number of ATC licenses? Massachusetts, for example, switched from granting a limited amount of ATC licenses to granting an unlimited amount of ATC licenses.²¹⁹ In doing so, it required that applicants get support from local leaders.²²⁰ However, Massachusetts found that requiring applicants to get support from local leaders led to pricy contracts between businesses and the towns.²²¹ It is uncertain whether New Jersey could withstand an influx of ATC licenses. States that do not cap ATC licenses may give out “hundreds” to applicants it views as qualified.²²² Although the number of qualified medical cannabis patients is exponentially growing in New Jersey, “[i]ndustry advocates say the most important thing is just having enough licenses that patients don’t have to travel far to get the medicine they need.”²²³

²¹³ *Id.*

²¹⁴ Amanda Hoover, *Court Blocks N.J. from Receiving New Medical Marijuana Business Licenses*, NJ.COM (Jan. 16, 2020), <https://www.nj.com/marijuana/2020/01/court-blocks-nj-from-reviewing-new-medical-marijuana-business-licenses.html>.

²¹⁵ Goforth & Goforth, *supra* note 174, at 715-16.

²¹⁶ Hoover, *supra* note 214.

²¹⁷ This matter was finally released from litigation on February 18, 2021. *See* In the Matter of the Application of Medicinal Marijuana Alternative Treatment Center for Tetra Grow (South), et. al. No. A-1272-19, 2021 WL 631238 (N.J. Super. Ct. App. Div. Feb. 18, 2021).

²¹⁸ *Id.*

²¹⁹ Beitsch, *supra* note 122.

²²⁰ *Id.*

²²¹ *Id.*

²²² *Id.*

²²³ *Id.*

Another potential change to New Jersey’s ATC licensing process could be to allow an independent third party to blindly review ATC license applications.²²⁴ For example, Missouri hired a third-party company to blindly score the ATC applications.²²⁵ Missouri’s third-party scoring process is analogous to the “reliability analyses” employed in *Fisher*, to the extent that “identical, or substantively similar answers, needed to be scored the same and that inconsistencies need to be rescored.”²²⁶ Surprisingly, at least seventeen groups appealed their ATC license decisions under Missouri’s third-party review process.²²⁷ However, the appeals stem from the scoring of one question, where 384 out of about 577 applicants received no points at all for their response.²²⁸ Significantly, the 384 applicants that received no score for the question at issue included applicants that were denied and applicants that were awarded licenses. Unlike *Gratz*, where applicants were automatically awarded extra points for diversity, the Director of the Missouri MMP denied that the question was scored unfairly and, instead, applicants who received no credit for their response “failed to address” the question.²²⁹

Lastly, and perhaps most significantly, the New Jersey DOH should change the appeals process to limit litigation. In New Jersey, appeals of ATC license decisions are filed directly with the Appellate Division, notwithstanding the fact that courts are limited in their review of agency decisions. In Missouri, appeals of DOH decisions are more efficient, such that they are filed with “an independent hearing officer for state agencies,” the Administrative Hearing Commission (“AHC”).²³⁰ The AHC is a statutorily created body that hears regulatory and administrative disputes and is made up of three administrative law judges, each appointed by the Governor.²³¹ Appeals before the AHC are less formal than court, but are “official and have the force of law.”²³² With the AHC appeal process in place, Missouri noted that “few” appeals were filed.²³³

²²⁴ Jeff Smith, *Licensing Appeals Overwhelm Missouri’s Medical Marijuana Program, Point to Widespread MJ Industry Concern About Scoring Fairness*, MARIJUANA BUS. DAILY (Feb. 21, 2020), <https://mjbizdaily.com/missouri-medical-cannabis-overwhelmed-by-licensing-appeals/>.

²²⁵ *Id.*

²²⁶ Nassim Benchaabane, *Fumbled Numbers? Rejected Pot Applicants in Missouri Point to Scoring Flaws*, ST. LOUIS TODAY (Jan. 20, 2020), https://www.stltoday.com/news/local/marijuana/fumbled-numbers-rejected-pot-applicants-in-missouri-point-to-scoring/article_e974e7c4-8654-5f15-a66e-e594262c5b32.html.

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ Herndon, *supra* note 171.

²³¹ *Id.*

²³² *Id.*

²³³ *Id.*

The ultimate conclusion is that DOH is not biased. Any scoring errors were likely a result of human error, and not the application reader's bias. However, to avoid litigation in respect to ATC license scoring bias, DOH should hire an independent third-party to score the applications. Thereafter, DOH should compare its scores to the independent third-parties to ensure that the scores were reasonably close. New Jersey- and other states- should adopt an appeal process similar to Missouri's, where denied applicants appeal to an independent agency rather than directly to the Appellate Division. By making the aforesaid changes, states can ensure that cannabis is widely available to those who want and need it.