STATE OF NEW MEXICO
FIRST JUDICIAL DISTRICT COURT
SANTA FE COUNTY

NICOLE SENA, individually and as
Next friend to A.N., a minor, and
NEW MEXICO TOP ORGANICS – ULTRA HEALTH, INC.,
A New Mexico non-profit corporation,

Plaintiffs,

v. No. D-101-CV-2016-01971

NEW MEXICO DEPARTMENT OF HEALTH, and
LYNN GALLAGHER, in her official capacity as
Secretary-Designate,

Defendants.

ORDER

This matter comes before the Court after a trial on the merits conducted August 14, 2017 through August 17, 2017 with Judge David K. Thomson, and the Court having conducted a trial on the merits, having read closing briefs , and being otherwise duly advised on the premises, FINDS:

DEFINITIONS:

A. "Act" means the Lynn and Erin Compassionate Use Act, NMSA 1978, Sections 26-2B-1 through 26-2B-7.

NMAC 7.34.4

O. "Department" means the New Mexico Department of Health or its agent.

NMAC 7.34.4. (also referred in the Order as "DOH")

JURISDICTION AND PARTIES:

Personal jurisdiction of the Court over the parties is not disputed and is hereby determined to be present. The Defendants have maintained that the Court lacks subject matter jurisdiction 1) insofar as the requested relief is contrary to and prohibited by the separation of

powers identified in the New Mexico Constitution; and 2) insofar as the Plaintiffs have standing to pursue the asserted claims and no legitimate case or controversy exists. As stated,

> The limitations we have placed on the use of the declaratory judgment action respect the role of each branch of government in the constitutional scheme and the administrative processes put in place by the Legislature. Article III, Section 1 of the New Mexico Constitution divides state government into "three distinct departments, the legislative, executive and judicial." Although we have recognized "that the constitutional doctrine of separation of powers permits some overlap of governmental functions," *State ex rel. Taylor v. Johnson,* 1998–NMSC–015, ¶ 23, 125 N.M. 343, 961 P.2d 768, it remains true that "[w]ithin our constitutional system, each branch of government maintains its independent and distinct function." *Id.* ¶ 21 (citing *State v. Fifth Judicial Dist. Court,* 36 N.M. 151, 153, 9 P.2d 691, 692 (1932) for the proposition that "[t]he Legislature makes, the executive executes, and the judiciary construes the laws."). Within this constitutional scheme, we have recognized the Legislature's power to delegate both adjudicative and rule-making power to administrative agencies. *See Bd. of Educ. of Carlsbad Mun. Sch. v. Harrell,* 118 N.M. 470, 483–84, 882 P.2d 511, 524–25 (1994) (citing *Wylie Corp. v. Mowrer,* 104 N.M. 751, 753, 726 P.2d 1381, 1383 (1986), for the proposition that the Legislature may delegate adjudicatory power to agencies); *Duke City Lumber Co. v. N.M. Envtl. Improvement Bd.,* 101 N.M. 291, 292, 681 P.2d 717, 718 (1984) (observing that the Legislature "grants agencies the discretion of promulgating rules and regulations which have the force of law"). Courts should not intervene to halt administrative hearings before rules or regulations are adopted. To do so would thwart the public's opportunity to participate in rule-making. Because of the necessity to respect the separate branches of government, courts should not intervene to halt administrative hearings before rules or regulations are adopted. To do so could deprive the public of the opportunity to propose rules or regulations and otherwise participate in the rule-making process. In addition, the administrative agency should be given the opportunity to correct any errors that have been brought to its attention during the course of such proceedings.
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> *New Energy Econ., Inc. v. Shoobridge*, 2010-NMSC-049, ¶ 14, 149 N.M. 42, 47, 243 P.3d 746, 751

As is more thoroughly discussed in the conclusions of law, this Court has original jurisdiction over the claims at issue due to the Agency's failure to comply with the mandates of the Lynn and Erin Compassionate Use Act by creating a 450 plant limit on producers. This Court is construing the statute at issue, with respect to the Agency's conclusions that a 450 plant count is appropriate.

As stated in *El Castillo*, this Court has original jurisdiction over the dispute,

The Legislature conferred power in the district court to review, as a court of first appeal, a final decision of the Board. *See* NMSA 1978, § 7-38-28(A) (2015); NMSA 1978, § 39-3-1.1 (1999). When acting in its appellate role, the district court may reverse an agency decision if it determines that "(1) the agency acted fraudulently, arbitrarily, or capriciously; (2) the final decision was not supported by substantial evidence; or (3) the agency did not act in accordance with law." Section 39-3-1.1(D). The district court, in its appellate capacity, "is limited in the same manner as any other appellate body ... and must defer to the agency's factual determinations if supported by substantial evidence." *N.M. Bd. of Psychologist Exam'rs v. Land*, 2003-NMCA-034, ¶ 5, 133 N.M. 362, 62 P.3d 1244.

In addition to its appellate jurisdiction, the district court has "original jurisdiction in all matters and causes not excepted in this constitution." N.M. Const. art. VI, § 13. The district court is a court of general jurisdiction and has the authority to consider all matters not exclusive to other courts, including constitutional claims in the first instance. *Maso v. N.M. Tax'n & Revenue Dep't*, 2004-NMCA-025, ¶ 14, 135 N.M. 152, 85 P.3d 276 ("[T]he district court has the authority to consider constitutional claims in the first instance.").

A "district court can simultaneously exercise its appellate and original jurisdiction." *Id.* ¶ 17. On appeal to a district court of claims first considered by an agency, where the appeal also asserts constitutional and other claims in the district court that were beyond the scope of the agency's adjudicative authority, "the district court should consider each claim according to its appropriate standard of review and maintain the distinction between the court's appellate and original jurisdiction in rendering its decision." *Id.*

El Castillo Ret. Residences v. Martinez, 2017-NMSC-026, ¶¶ 21-24, 401 P.3d 751, 757–58

In the *City of Santa Fe* case the Supreme Court stated:

The Declaratory Judgment Act is a special proceeding that grants the district courts the "power to declare rights, status and other legal relations whether or not further relief is or could be claimed." NMSA 1978, § 44–6–2 (1975). "The Declaratory Judgment Act [is] intended to be liberally construed and administered as a remedial measure." *San Juan Water Comm'n v. Taxpayers & Water Users of San Juan County,* 116 N.M. 106, 109, 860 P.2d 748, 751 (1993). "The Act does not enlarge the jurisdiction of the courts over subject matter and parties, but provides an alternative means of presenting controversies to courts having jurisdiction thereof...." *Allstate Ins. Co. v. Firemen's Ins. Co.,* 76 N.M. 430, 432, 415 P.2d 553, 554 (1966).
9 {14} Of particular relevance to this case, the Act grants jurisdiction to the district court to entertain an action for a declaratory judgment to review municipal

ordinances. Such jurisdiction is provided in **305 *791 NMSA 1978, Section 44–6–4 (1975), which provides that "[a]ny person ... whose rights, status or other legal relations are affected by a ... municipal ordinance ... may have determined any question of construction or validity arising under the ... ordinance...." Thus, the Declaratory Judgment Act is specifically designed to bring an action challenging the constitutionality or validity of local laws or ordinances. *See, e.g., Balizer v. Shaver,* 82 N.M. 347, 349, 481 P.2d 709, 711 (Ct.App. 1971) (holding that declaratory proceedings are a proper avenue for testing the constitutionality of municipal ordinances); *see also S. Nat'l Bank of Houston v. City of Austin,* 582 S.W.2d 229, 237 (Tex.Civ.App.1979) (finding declaratory judgment proper where property owners challenged city ordinance); *Ind. Waste Systems, Inc. v. Bd. of Comm'rs of Howard County,* 180 Ind.App. 385, 389 N.E.2d 52, 56 (1979) (holding that a declaratory judgment action was proper to challenge the validity of a county ordinance); *Kmiec v. Town of Spider Lake,* 60 Wis.2d 640, 211 N.W.2d 471, 473 (1973) (holding that a declaratory judgment action was a proper avenue for challenging the validity of an ordinance); *Sorenson v. City of Bellingham,* 80 Wash.2d 547, 496 P.2d 512, 517 (1972) ("The use of declaratory judgment to determine rights in this matter without a course of remedy is entirely appropriate."); *Walker v. Los Angeles County,* 55 Cal.2d 626, 12 Cal.Rptr. 671, 361 P.2d 247, 253 (1961) ("The interpretation of ordinances and statutes are proper matters for declaratory relief."). *See generally* 6 Eugene McQuillin, *The Law of Municipal Corporations,* § 20.23, at 72 (3d ed.); Bernard Schwartz, *Administrative Law* § 9.7, at 537 (2d ed. 1984) ("[T]he declaratory judgment has become the general-utility remedy by which the legality of an administrative act may be determined when there are no statutory review provisions, regardless of the nature of the challenged act.").

Smith v. City of Santa Fe, 2007-NMSC-055, ¶¶ 13-14, 142 N.M. 786, 790–91, 171 P.3d 300, 304–05

Under *El Castillo* and *City of Santa Fe*, the Court has jurisdiction to proceed.

LAWS APPLICABLE TO THE DISPUTE:

The Department's duties are defined as:

A. No later than October 1, 2007, and after consultation with the advisory board, the department shall promulgate rules in accordance with the State Rules Act to implement the purpose of the Lynn and Erin Compassionate Use Act. The rules shall:

(1) govern the manner in which the department will consider applications for registry identification cards and for the renewal of identification cards for qualified patients and primary caregivers;

(2) define the amount of cannabis that is necessary to constitute an adequate supply, including amounts for topical treatments;
(3) identify criteria and set forth procedures for including additional medical conditions, medical treatments or diseases to the list of debilitating medical conditions that qualify for the medical use of cannabis. Procedures shall include a petition process and shall allow for public comment and public hearings before the advisory board;
(4) set forth additional medical conditions, medical treatments or diseases to the list of debilitating medical conditions that qualify for the medical use of cannabis as recommended by the advisory board;
(5) identify requirements for the licensure of producers and cannabis production facilities and set forth procedures to obtain licenses;
(6) develop a distribution system for medical cannabis that provides for:

(a) cannabis production facilities within New Mexico housed on secured grounds and operated by licensed producers; and
(b) distribution of medical cannabis to qualified patients or their primary caregivers to take place at locations that are designated by the department and that are not within three hundred feet of any school, church or daycare center;

(7) determine additional duties and responsibilities of the advisory board; and
(8) be revised and updated as necessary.

NMSA 1978 § 26-2B-7

Adequate supply is defined as,

A. "Adequate supply" means an amount of cannabis, in any form approved by the department, possessed by a qualified patient or collectively possessed by a qualified patient and the qualified patient's primary caregiver that is determined by rule of the department to be no more than reasonably necessary to ensure the uninterrupted availability of cannabis for a period of three months and that is derived solely from an intrastate source;

NMSA 1978 § 26-2B-3

It is defined in regulation as,

B. "Adequate supply" means an amount of cannabis, derived solely from an intrastate source and in a form approved by the department, that is possessed by a qualified patient or collectively possessed by a qualified patient and the qualified patient's primary caregiver, that is determined by the department to be no more than reasonably necessary to ensure the uninterrupted availability of cannabis for a period of three months or 90 consecutive calendar days.

NMAC 7.34.4

The disputed provision is outlined in ¶ 2 below:

7.34.4.8 PRODUCER LICENSING; GENERAL PROVISIONS:
A. The department may license two classes of producers:

(1) A qualified patient who holds a valid personal production license. A qualified patient who holds a valid personal production license is authorized to possess no more than four mature female plants and a combined total of 12 seedlings and male plants, and may possess no more than an adequate supply of usable cannabis, as specified in department rule. A personal production license holder may additionally obtain usable cannabis, seeds, or plants from licensed non-profit producers. The primary caregiver of a qualified patient who holds a personal production license may assist the qualified patient to produce medical cannabis at the designated licensed location that is identified on the personal production license; the primary caregiver may not independently produce medical cannabis.

(2) A non-profit producer that operates a facility and, at any one time, is limited to a combined total of no greater than 450 mature female plants, seedlings and male plants, and an inventory of usable cannabis and seeds that reflects current patient needs, and that shall sell cannabis with a consistent unit price, without volume discounts or promotional sales based on the quantity purchased. A non-profit producer shall not possess a quantity of either mature female plants or seedlings and male plants that exceeds the quantities authorized by their licensure and associated licensing fee. A licensed non-profit producer may sell and distribute usable cannabis to a person or entity authorized to possess and receive it. A licensed non-profit producer may obtain plants, seeds and usable cannabis from other licensed non-profit producers.

NMAC 7.34.4

A. "Act" means the Lynn and Erin Compassionate Use Act, NMSA 1978, Sections 26-2B-1 through 26-2B-7.

NMAC 7.34.4

O. "Department" means the Department of Health or its agent.

NMAC 7.34.4

GENERAL NATURE OF THE CLAIMS:

Plaintiffs bring a declaratory judgment seeking to eliminate/invalidate the Department of Health ("DOH") regulation which mandates that licensed non-profit producers of medical cannabis products may possess no more than 450 plants at any given time. *See* Complaint

8/16/2016 at Count 1 ¶88. Plaintiff Sena is the parent of a minor child who is currently a patient enrolled in New Mexico's Medical Cannabis Program. Plaintiff Sena's child has a rare form of epilepsy, the symptoms of which are relieved by medical cannabis products, including CBD oil. The treatment for Plaintiff Sena's child requires a significant amount of cannabis material, and she has difficulty finding licensed non-profit producers who can provide sufficient medicine for her child's treatment.

Plaintiff New Mexico Top Organics-Ultra Health ("Ultra Health") is a licensed non-profit producer of medical cannabis products which seeks to meet the needs of all people in New Mexico who may have medical conditions which can be alleviated or treated with medical cannabis.

Plaintiffs claim that the Department of Health regulation which limits licensed non-profit producers to 450 plants creates barriers to the realization of the purpose of the Lynn and Erin Compassionate Use Act and creates barriers to patients being able to access the medication they need. Plaintiffs also claim that the regulatory limit of 450 plants is not justified by data or by legal considerations and that DOH lacks the capacity or ability to make data-driven decisions regarding plant-count limitations.

Plaintiffs further claim DOH chose the 450 figure arbitrarily—that it was simply a number which was between 100 and 1,000. In coming to the 450 figure, DOH has emphasized its consideration of federal criminal penalties. Those penalties have brackets of 0-99 plants, 99-999 plants, and 1,000-plus plants. Plaintiffs claim the 450 figure is not supported or connected to any relevant data points, such as data on patient consumption, patient need, producer capacity, etc.

Additionally, Plaintiffs claim the plant count limitation creates barriers to the fulfillment of the purpose of the Medical Cannabis Program because it prevents the creation of economies of scale, prevents producers from being responsive to patient needs, creates artificially high prices, and fails to drive down costs despite growing demand.

Finally, Plaintiffs claim that any plant count is outside the scope of authority of DOH. NMSA § 26-2B-4 fails. Defendants deny Plaintiffs' allegations. Defendants argue they have broad statutory authority to create the plant limit under their regulatory authority and that the plant limit meets their obligation to ensure adequate supply.

QUESTION PRESENTED

The question presented by the statute, therefore, is "[d]oes the Act allow DOH to regulate the quantity of cannabis a licensed non-profit producer may produce, possess, distribute, or dispense?", and "may DOH in executing their regulatory authority impose a count limit that impedes the purpose of the Act which is to provide an adequate supply of cannabis?"

SUMMARY OF DECISION

DOH has a duty/obligation to ensure that patients can obtain an "adequate supply" of medical cannabis products, and therefore DOH has a duty to adequately study and evaluate whether patients can obtain such an adequate supply. Plaintiffs claim is substantiated that DOH is not fulfilling its obligations because its data collection is unreliable and because its evaluation of supply is baseless and unreliable. To do this, they must make sure its decision is neither arbitrary nor capricious. Further, they may not rely on their regulatory authority as a pretext for justifying limiting "adequate supply". That is DOH may not use a statutory grant of the power to regulate to impede the fundamental duty under the act which is to ensure an adequate supply.

DOH has been on notice for several years of shortages of medical cannabis supply and that patients cannot obtain necessary amounts of medication. Plaintiffs claim DOH's lack of response to this notice indicates it does not have a valid reason or explanation for its 450 plant count limitation. The Court's decision is further summarized as follows:

1. Plaintiffs' request for relief in the form of Declaratory Judgment invalidating and eliminating the 450 plant count limitation as contrary to the Lynn and Erin Compassionate Use Act is **GRANTED**. The Order invalidating the plant limit is stayed for 120 days to allow DOH to conduct appropriate fact finding procedures to arrive at a plant count limitation that complies with the legislative mandate.

2. That the Lynn and Erin Compassionate Use Act at NMSA 1978, §26-2B-7 confers to the New Mexico Department of Health broad discretion to develop the distribution system for medical cannabis within the New Mexico Medical Cannabis Program ("Program") and to "identify requirements for the licensure of producers and cannabis production facilities and set forth procedures to obtain licenses", but is not a grant to limit the production of medicinal cannabis that has no articulated fact based correlation between the 450 plant limit and what meets the adequate supply needs of patients.

3. The stated purpose of the Lynn and Erin Compassionate Use Act at NMSA 1978, §26-2B-2 is to "to allow the beneficial use of medical cannabis in a regulated system for alleviating symptoms caused by debilitating medical conditions and their medical treatments." The Lynn and Erin Compassionate Use Act does express legislative intent regarding the number of producers to be licensed, and the number of plants to be possessed by individual producers, and that this determination is within the New Mexico Department of Health's statutory authority.

4. Although the Department of Health has endeavored to ensure the general availability of cannabis within the Program, DOH has failed to ensure that there is an adequate supply within the Program as to cannabis in general or as to any given cannabis products.

5. That the plant count limit imposed upon by DOH has prohibited the Plaintiff Nicole Sena from obtaining a given type of cannabis product and limited her ability to provide a medical benefit to her child. Anyone concerned about the benefits of CBD oil to her daughters condition, or her belief that CBD is medically beneficial may reach only one conclusion after hearing her testimony.

6. DOH has not revisited the 450 plant count limitation since 2014, even as the patient enrollment in the Medical Cannabis Program continues to grow. DOH has defended the figure and has claimed that 450 plants-per-producer is currently meeting patient needs. However, data collected and compiled by DOH is irregular, arbitrary, and inaccurate. DOH has simply relied on the theory that based on a 2013 survey producers "have room to grow" through yield improvements. What is not in dispute is that the medical product market has changed since that 2013 survey. While dried flower was the main source of the medical product given to patients, the medical products have change in form and variety and DOH has not accounted for the change in the market.

7. In essence, DOH is using its regulatory authority in a manner and with an end toward impeding the purpose of the Act. Further, its regulatory mandate of 450 plants is not based on fact or reliable data and is not rationally related to its regulatory authority. More importantly, it impedes the ability to assure medical patients have an adequate supply.

UNCONTROVERTED FACTS:

The following facts are established by admissions in the pleadings or by stipulation of counsel at the pretrial conference:

1. The Department of Health commissioned a survey of patients enrolled in the Medical Cannabis Program in 2013.

2. Prior to February 27, 2015, licensed non-profit producers were limited to 150 cannabis plants.

3. A change to NMAC 7.34.4.8 went into effect on February 27, 2015, which limited licensed non-profit producers to 450 cannabis plants.

4. There are currently 35 entities which are licensed by DOH to be non-profit producers.

FINDINGS OF FACT:

1. DOH's choice of 450 plants as the limitation point is not based on reliable data or updated data. DOH's choice of 450 plants is not supported by current and/or reliable data and is not justified by any grant or delegation of authority by the New Mexico Legislature.

2. Evidence at trial showed exactly why "regulated" lacks an "intelligible principal" and presents such a danger of exceeding a statutory mandate. Department Secretary Lynn Gallagher said the "state is tasked with regulating a program in a strict manner" (260:17-19) and DOH operates the "program in a rigid, strict manner" (327:13-15). DOH impermissibly reads into the statute its style of regulation that in fact impedes on its statutory mandate to ensure an adequate supply.

3. Dr. Kelly O'Donnell concluded that a rational, reasoned forecast of demand outstrips a reasonable calculation of supply from non-profit producers by several hundred percent (404:25-405:4, 418:10-15, 421:7-11).

4. Dr. O'Donnell also testified that the shortfall could not be made up by production by personal production licensees or by producers using all of their production capacity (418:10-15). Furthermore, demand will only increase in the future due to rising patient enrollment and demand for diverse products (378:18-21, 386:15-19, 391:5-8, 393:25-394:4). There is also "pent-up" demand from patients who are not enrolled in the program precisely *because* they do not have access to medicine, and this demand is essentially silent (415:3-24).

5. Plaintiff Nicole Sena cannot obtain a beneficial-use product from a regulated, intrastate source. She can only obtain "beneficial use" from an unregulated store and an interstate source: shipment from a producer in Colorado to the CBD Boutique (109:1-25). That store is not on the list of DOH-licensed dispensaries at Exhibit O. She cannot even find a "generic" (versus the branded Hayleigh's Hope) 20:1 ratio CBD oil from a New Mexico producer (129-2-5).

6. Defendants offered no reliable evidence that regulated sources of cannabis provide enough medicine to meet patient needs. Since its 2013 survey, DOH has only gathered data on total yields, self-reported by producers. Further, these reports are not reliable (252:6-8, 252:19-22, 528:9-11, 547:2-7, 551:15-18, 571:20-23, 572:1-3, 688:8-13). DOH admits producers do not all report the same thing (709:1-6).

7. Equally important is what DOH has not done in three-and-a-half years: no more surveys, no studies, no calculations by epidemiologists or economists, no forecast reports, no projections (28:23-25, 32:6-8, 32:14-15, 216:22-25, 224:10-12, 225:22-25, 226:1-4, 229:9-12, 231:18-21, 242:7-11, 248:18-22, 250:3-7, 252:23-253:1, 515:5-19, 524:15-17, 527:15-22).

8. DOH has not done enough to gather and learn from data about patient use.

9. DOH's own data clearly show there is insufficient supply based on "beneficial use" or "adequate supply" figures. For example, DOH's Exhibit R says that in the first quarter of

2017, licensed producers yielded 2,353,858 units, for an average of 196,155 units per week. Even in the best possible scenario, 196,155 divided by 45,000 patients equals 4.36 units per patient per week. 4.36 units is less than half of the 9-10 gram average weekly consumption reported by patients in DOH's 2013 survey [Exhibit 6] and found in Dr. O'Donnell's research (79:10-11, 363:14-364:4).

10. There is no connection between 450 plants and risk of diversion/Federal interference. The DOH provided no evidence that the risk of federal interference with the medical cannabis program is related in any way to its 450-plant limitation.

11. Furthermore, Defendants presented no evidence or explanation as to why 450 is the magic number at which the risk of diversion is eliminated or significantly decreased.

12. Defendants presented no evidence or explanation that the risk of diversion becomes imminent when producers have 451 plants, but is not imminent when producers have 449 plants. Likewise, Defendants presented no evidence or explanation that the risk of federal intervention becomes a clear and present danger at 451 plants, but not at 449 (see 800:23-801:1).

13. Defendants' basis for the 450-plant limitation is reduced to the position "the 2013 survey said producer supply was only one-fifth of patient consumption, so we multiplied the number of plants by five" (223:1-6, 290:15-19, 534:22-25). The problem is DOH's calculation did not account for future patient growth, which was known to DOH at the time.

14. DOH failed to implement a proactive system of medical cannabis regulation. DOH reactively responded to a shortage crisis in 2013, but it reacted only to the needs of the existing 9,760 patients. A regulation designed to serve 9,760 patients cannot reasonably be expected to serve 45,000 patients, and the data used to serve 9,760 patients may not be used by hope of higher yield to serve 45,000.

15. Plaintiffs have met their burden.

16. The Plant-Count Limitation Effectively Overrules the Statute. The trial evidence established that DOH's 450-plant limitation overrules the statute because it prevents patients from obtaining sufficient amounts of cannabis from *regulated sources*. The Court itself asked several times how the 450-plant cap accomplishes the purpose of the statute (281:16-22, 561:1-4, 570:22-517:1, 784:15-17). Defense witnesses failed to offer satisfactory answers to the Court's pertinent question and thus failed to justify the existence of the 450-plant limitation.

17. While DOH commissioned a patient survey in 2013, the survey results reported numbers representing projected per-patient "need" and the total global projected amount of cannabis which would be required to meet this need. This survey has not been updated since its creation and its undisputed findings do not correlate to the current patient population.

18. DOH has not revisited the 450 plant count limitation since 2014, even as the patient enrollment in the Medical Cannabis Program continues to grow. DOH has defended the figure and has claimed that 450 plants-per-producer is currently meeting patient needs. The data collected and compiled by DOH is irregular, arbitrary and inaccurate. Plaintiffs claim that DOH is incapable of data-driven decisions is not substantiated. Deference is due to DOH to develop a data-drawn decision. However, DOH's defense of the 450 plant count is not justified based on any data source it currently employs or the plant count it has promulgated by rule.

19. DOH has not conducted another survey since 2013. Exhibit 6

A. It has not surveyed patients.

B. It has not surveyed physicians.

20. It did not take into account how patient enrollment would increase over the years.

21. Exhibit 12 shows patient growth has expanded from the date of the last data assessment (2013) indicating patient numbers have increased from 10,708 to 29,165 as calculated in 2016.

22. Exhibit 18 indicates the Department of Health promised to "have a plan to meet current and future patient needs. Despite this 2014 promise, the Department of Health has not conducted a survey or otherwise assessed patient needs on updated data.

FINDINGS OF FACT BY WITNESS TESTIMONY

The Court here outlines additional findings by witness testimony, followed by the witnesses trial testimony.

NICOLE SENA

1. Testified as a caring and thoughtful mother whose daughter has a rare form of epilepsy requiring medication for the treatment of severe seizures.

2. Traveled to and remained in Denver for 6 months to treat her daughter for the life threatening ailments involving the seizure disorder.

3. Indicated that she used CBD oil. She found that CBD oil assisted in the treatment of her daughter's seizure disorder. After use of CBD oil, her daughter is free from seizures and is able to reach milestones. CBD oil requires a lot of plant material and, relevant to the Court's decision, was not contemplated when DOH conducted its survey and tied the 450 plant limit to the adequate supply.

4. Obtained CBD oil or Haley's Hope. She went to Ultra Health to obtain Haley's Hope. Ultra Health indicated it did not produce enough plants to create CBD oil or Haley's Hope. It is clear that if Ultra Health has the plant product available to it, it would produce a CBD oil similar to Haley's Hope.

5. Established standing that the absence of medical marijuana production may injure her child. She testified she wished to work with Ultra Health to develop this oil.

6. The Court finds Plaintiff Nicole Sena has standing to bring this claim, as she does not have access to Haley's Hope.

7. She can order the product on-line, however she is concerned about the quality.

8. It is not disputed that a product like Haley's Hope, because it is complex, takes more plants to produce. A producer is not going to use 50 of the 450 plant limit to produce 2 ounces of CBD oil.

Q. Good afternoon. Can you please, just once more, state your name for the record.

A. Nicole Sena.

Q. Where do you currently live?

A. In Los Lunas.

Q. And do you have any children?

A. Yes.

Q. How many?

A. I have two.

Q. Okay. And boys, girls?

A. Both girls.

Q. And what ages are they?

A. 3 and 20 months.

Q. And so your younger daughter is 20 months?

A. Yes.

Q. Do you feel comfortable sharing her name here today?

A. Yes. Her name is Amylea Munoz.

Q. Does Amylea face any health challenges?

A. Many.

Q. And what kind of health challenges?

A. Amelia has a rare form type of epilepsy.

Q. And did you discover treatment that changed that prognosis?

A. Yes. Yes, I did.

Q. What was that?

A. CBD oil.

Q. Okay. How did you discover that?

A. By research online. I had brought it up to the medical team a few times. They had told me that they had used it for other patients, but the only reason why they used it was that they used it in an outpatient setting.

Q. And so how old was -- did you eventually try treating Amylea with CBD oil?

A. Yes. Go ahead.

Q. I just wanted to clarify. What is your understanding of what CBD oil is?

A. It's a cannabidiol oil.

Q. And which one did you talk to?

A. With Ultra Health.

Q. Okay. And when was that?

A. A long time ago. I think it was not too long after I had come back from Colorado.

Q. And was Ultra Health able to provide you with the Haleigh's Hope oil?

A. No.

Q. So when you go to the CBD Boutique, is there always a guarantee that Haleigh's Hope is going to be there on the shelf?

A. No.

Q. And do you have to make any special arrangements with CBD Boutique to get it?

A. I usually go about two weeks ahead of time before she runs out of her oil, just to make sure that I have a bottle on hand. There has been times that I have gone to CBD Boutique where they just don't have it, and they won't be getting it in until the following week.

Q. And what's the impact on your life when CBD Boutique doesn't have any on the shelf?

A. It's scary.

Q. And does it add to the stress -- does it create stress in your life?

A. Yes. If Amylea doesn't have her medicine, you know, she will be seizing. We'll end up in the hospital. We'll be Life Flighted to Denver again. We'll have to start all over getting her back in control. It's very hard to get her under control when she has a breakthrough of strong tonic-clonic seizures.

Q. And where is CBD Boutique?

A. They have one in Nob Hill and then one on the west side.

LEIGH JENKE

1. Leigh Jenke testified she is employed by Ultra Health.

2. She is the Director of Operations for Ultra Health.

3. Because of plant limit, she is not able to provide the type of medication requested by the patient.

4. She testified that 50 plants would be required to produce the needed amount of Haley's Hope.

5. She testified that she would need 50 plants (4 strains by 12 months). They would not be able to serve other clients or other patients.

6. Jenke established that the patient demand and medical needs have changed since the 2013 survey upon which Defendant relies for its 450 plant count limit. As such, the additional plant count limit does not correlate to the ongoing requests of the statute.

Q. Would you please state your name for the record.

A. My name is Leigh Jenke.

Q. And what is your current employer?

A. Ultra Health. NMTO - Ultra Health.

Q. Okay. That's -- what does "NMTO" stand for?

A. That's New Mexico Top Organics, and the LNPP under management of Ultra Health.

Q. Okay. And is there any kind of a trend that you're seeing in the types of products that patients are asking for? Are they, for example, mostly satisfied to stay with dried flower or are they starting to ask for other types of products?

A. Well, with our -- I guess with the more sophisticated methods of making product, you see a wider variety of product that patients want. So we started out with the smokeable cannabis, the smokeable flower, and then, you know, it's kind of morphed into medibles, and then oils, and you know, we're starting to see a really really big trend in HNB products which are -- they're heat-not-burn. And so these are concentrates and different things that unfortunately they're probably a little bit better for patients not to have to smoke just the dried flower. But to make these products, it takes higher plant material.

Q. So is it correct, sounds like the lowest amount of plant material for a given product would be dried flower?

A. Yes.

9. Distributors are limited in supply by the plant count.

Q. Okay. Are there any types of products that Ultra Health has had to limit in terms of what it's able to sell to patients?

A. We don't actually limit ourselves. We don't limit our products. But we are limited by our plant count. We can only -- we can only harvest -- we only have 450 plants. And that includes the really tiny baby seedlings to the flowering plants, plus the male plants. So we can only harvest about 60 plants every harvest. So that limits us in the amount of products that we can put on the shelves.

10. Jenke established that the only option they have to meet the supply demanded is to purchase it on the wholesale market and that is not reliable. Jenke also established that the outdated plant limit does not take into account the medical delivery system for the medicine, for example dry flowers versus oil.

Q. So you have to decide what percentage of that harvest is going to go to dried flower, that percentage is going to go to oils, what percentage is going to go to some other form?

A. Yes.

THE COURT:

Let me ask you. With regard to the testimony I just heard, could you buy the -- in order to create Haleigh's Hope, could you buy the product wholesale and then produce the oil?

A. THE WITNESS: We wouldn't be able to produce the oil ourselves. The Haleigh's Hope, if -- I suppose, if we found another LNPP who was willing to grow those four plants, we technically could. But I think one, you know, some of the LNPPs, they don't all grow 450 plants. And unfortunately, using those four plants, it would be roughly 50 plants a year out of the 450 plant

count. So if they were willing to donate that many plants for just -- for just Ms. Sena, then yes, we could do that.

THE COURT: So the wholesale has to come from someone else in New Mexico?

A. THE WITNESS: Yes.

Q. So you're not able to provide Haleigh's Hope to Ms. Sena or to Amylea. And I think you just said it would be 50 plants have to be dedicated all year in order to be able to produce that one product?

A. Right. 50 out of our 450, and I'm sorry, but just for Amylea.

DUKE RODRIGUEZ

1. Authorized to grow 450 plants from seeding to flowing plant.

2. Of the 35 producers, 26 of them have renewed at 450 plants. The remaining have not paid a license to produce the full 450 plants.

3. The least expensive product is the dried flower. As the product gets more complex, the more plant material is required.

4. Testified that the concentrations are getting higher, and the flower is taking less of a share. That said, the total demand is increasing.

5. Duke Rodriguez established even in the rotating manufacturing process 450 plants do not correlate to adequate supply.

Q. Good afternoon.

A. Good afternoon.

Q. Would you please tell the court your name.

A. I am Duke Rodriguez.

Q. Okay. And what is your current employment?

A. I am the CEO/President of Ultra Health, LLC, based in Arizona.

Q. Okay. And you're, of course, aware of an entity in New Mexico, a nonprofit corporation, New Mexico Top Organics - Ultra Health, Inc.?

A. Yes, sir.

Q. What is the relationship between Ultra Health, LLC, and the nonprofit corporation in New Mexico?

A. We are the management company

Q. How many plants is Ultra Health able to harvest each year, if you know?

A. We have 450 licensed plants, and we do them in a perpetual cycle so we can have as much of a stable inventory as you can have with 450 plants. So we take down about 60 to 70 plants every two weeks. So 450 plants, that's your maximum you can ever have on the ground. But because of the perpetual system, you harvest somewhere between 13- and 1,400 plants a year.

Q. Okay. And do you know whether or not the ability to harvest 13- to 1,400 plants a year, based on 450 licenses, is that typical in New Mexico?

A. We certainly talk to all producers to see what the growth style was here. You can harvest plants on three-week cycles, five-week cycles. But it seemed to be the industry standard that eight weeks of flower and eight weeks of veg is about the right standard. From our own experience, we use normally a lower cycle in other states, five weeks and five weeks. We found that eight weeks on flower and eight weeks of veg seemed to be the right cycle.

6. Duke Rodriguez established the large increase in patient enrollment.

Q. Okay. And we'll come to it in a minute, but currently, right now, do you know roughly how many plants there are per patient today in New Mexico?

A. Currently, with the reenrollment effect of August 1, I believe that reenrollment was around 15,350 plants were relicensed since August 1, plus or minus 700, August 1, 2017, which will carry through July 31, 2018, which is up from the previous year of 13,800. So you have 14,350 plants licensed for currently, as the Secretary has testified, Secretary testified, 45,441 cardholders.

Q. Does that come up to about .35 plants, give or take?

A. Comes to about one-third of a single plant per patient.

7. Compared to other States, the count limit is an outdated concept.

Q. In Colorado, are you familiar with its Medical Cannabis Program?

A. I am.

Q. Can you tell the Court their ratio in Colorado for plants per patient?

A. The Colorado Medical Cannabis Program, not counting the adult use program, has it in statute at about -- it's exactly at -- it's allowed up to six plants per enrollee. So they have got just about 100,000 cardholders, so they are currently allowing about 600,000 plants with their medical plan.

THE COURT: Okay. But the Colorado amount that's set by statute, is that what is defined as reasonable access by statute, or is it the same math you just went through with me? That those are the plants in production available to patients in Colorado? Do you see the difference?

THE WITNESS: That's a good question. The six plants is defined in statute. Then they have to allow the growers to subscribe how many plants they want to grow. The program is capped at six plants per enrollee. So they can always move up and down as enrollee goes up. In fact, the number of plants that are actually in production, they report the number of plants that are in production by month. And their number of plants in production for the last 12 months has been balancing between about 300,000 and some change and 312,000, in that range. So we've watched

their utilization rate and their utilization rate on a per patient, per plant, is right at three plants per enrollee.

THE COURT: So compared to ours, you would describe the one-third as a utilization rate?

THE WITNESS: So I would say it was about a ten-fold difference, that's correct.

8. Secretary Gallagher has in good faith attempted to continue production diversion of the medical product and protect the State from federal intervention given the limited resources provided to her agency.

SECRETARY LYNN GALLAGHER

1. Joined Department of Health in 2012.

2. Appointed in 2016; confirmed by the NM Senate.

3. Testified as to Exhibit 6:

4. The direct of this witness was informative because it inquired as to whether DOH could change to license for more than 450 plants and could use that money to regulate the production.

Q. Good morning, Secretary. Can you just state your name one more time for the record.

A. Lynn Gallagher.

Q. And you joined the Department of Health in August 2013; is that right?

A. Correct.

Q. And at that time, you joined as a Deputy Cabinet Secretary?

A. Yes.

Q. And what were your duties as Deputy Cabinet Secretary?

A. I had oversight authority over a number of programs within the Department. I also worked directly with the Cabinet Secretary on various strategic plan initiatives and overall running of the agency.

Q. Now could you look at Exhibit 18. And Exhibit 18, is that a release or a letter from the Department of Health?

A. It's a press release from the Department of Health, yes.

Q. Okay. From February 2014?

A. Correct.

Q. Okay. And it states, "The New Mexico Department of Health announced proposed adjustments to the Medical Cannabis Program regulations." And it goes on, "The Department is proposing to increase plant limit from 150 total plants and seedlings up to 150 mature plants and up to 300 seedlings. This will require a rule change and public comment before implementation.

The Department plans to open the applications period to add up to 12 licensed nonprofit producers. There are currently 23 licensed nonprofit producers"; is that right?

A. Yes.

Q. And at some point during the rule making, the proposed rule was amended to 450 plants, regardless of maturity; is that right?

A. Yes.

Q. And then the rule was finally published and finalized in February 2015; is that right?

A. Yes.

5. DOH's argument regarding resources is credible; however, the Secretary acknowledges that diversion can be mitigated even if a higher plant count is permitted.

Q. Now, the Department charges different licensing fees according to how many plants a producer wishes to possess; is that right?

A. Correct.

6. That is, DOH showed no nexus between plant count, enforcement or diversion.

Q. So it's, I believe, 30,000, which is for 300 plants, and then the total for 450 plants would be a 90,000 licensing fee; is that right?

A. Correct.

Q. Are you aware of any reasons why the Department could not charge an even greater licensing fee for more than 450 plants?

A. A number of factors would go into that consideration

Q. I'm sorry. Let me begin again, then. Interrogatory 2 asked, "State the complete basis for your determination that each New Mexico licensed nonprofit producer should be allowed to grow no more than 450 plants." Is that what Interrogatory 2 asked?

A. Yes.

Q. Now, there's -- I just want to point your attention to there's a lengthy objection there, and going to exhibit -- sorry, page 4, the third line down, the answer is, "Cannabis is identified as a Schedule 1 drug in the U.S. Controlled Substances Act, and as such a conflict exists between state and federal laws concerning the use and possession of cannabis within a Medical Cannabis Program." Do you agree that the federal status of cannabis was a factor in the Department's decision to implement a 450-plant count limitation?

A. Yes.

Q. If you could look at Plaintiffs' Exhibit 23. Just one moment. Sorry. Plaintiffs' Exhibit 22. I just want to make sure I have -- can you describe what Plaintiffs' Exhibit 22 is?

A. It's an interrogatory.

7. The 450 plant count is based on regulatory needs and not based on the medical or data assessment of patient needs.

Q. When DOH implemented the 450-plant count rule, did it consult the medical advisory board for the board's opinion on the appropriate level of supply that was needed?

A. It did.

Q. And what did the board say?

A. I don't recall, at this time.

Q. Could you turn to Plaintiffs' Exhibit 24. And this is titled "Report and Recommendations to the New Mexico Department of Health from a Public Hearing on Monday, August 25, 2014 at the Harold Runnels Building;" is that right?

A. Yes.

Q. And did you attend that meeting?

A. No.

Q. Did you receive this report that was directed to the New Mexico Secretary of Health? Or did you look at it? Ever?

A. I've looked at it, yes.

Q. And if you could look at exhibit -- I mean sorry, page 4 of Exhibit 24. No. 2, "Changes in the Definition of Adequate Supply. Dr. Jenison recommends NMDOH withdraw a proposed rule change mandate that medical cannabis be obtained only from intrastate and licensed sources, especially given NMDOH's failure to keep up with demand for medical cannabis." Were you aware that the medical advisory board identified a failure to keep up with demand in August 16 2014?

A. I was aware that Dr. Jenison held that opinion.

Q. And after this meeting, what did you do to follow up with Dr. Jenison to find out the basis for his opinion?

A. He had a meeting with Secretary Ward, myself and Brad McGrath.

Q. And at that time, did DOH make any changes to its proposal to move the limitation to 450 plants?

A. It was among the factors we considered.

Q. So DOH originally proposed the 450 number in February 2014; is that right?

A. Actually, we originally proposed a bifurcated system with the 150 and then 300 seedlings. In my mind, they're distinct and different.

Q. Did you request any number from Dr. Jenison as to what he believed should be the supply figure?

A. We had a lengthy discussion with him about what he considered to be sufficient to meet the needs in 2013.

Q. And after meeting with --

A. '14, sorry.

8. After the 2013 study the plant count limit was amended from 150 to 450 plants without distinction as to their maturity.

Q. After meeting with Dr. Jenison, did DOH make any further changes to its proposal for 450 plants?

A. I don't recall.

THE COURT: Can you remind me again when it was moved from 150 to 450?

MS. CAFFREY: The original proposal was February 2014. That's Exhibit 18. And during July 2014, it was slightly amended so that it was 450 without distinction to the maturity of the plant.

THE COURT: Okay. So it would have been after this 2013 study?

MS. CAFFREY: Correct.

THE COURT: Okay.

9. Simple extrapolation of increase of potential numbers multiplied by DOH's current accepted grams per patient need shows the current plant limit is inadequate.

Q. The survey says with 9,760 patients, to satisfy patient need, supply would need to be approximately 5 million grams per year. So using the logic of the survey report, wouldn't it make sense that if approximately 10,000 patients needed 5 million grams per year, according to the survey report, wouldn't it make sense that 40,000 patients would need approximately 20 million grams per year?

A. Not necessarily, no.

10. Further, DOH never went back and duplicated the survey.

Q. And DOH never went back and did any other surveys of any patients, did it?

A. Not yet, no.

Q. And DOH did not in 2013 say, "We haven't surveyed enough patients, let's go survey more"?

A. It was a consideration.

Q. But there have been no other surveys so far?

A. Correct.

Q. And DOH has made no other studies or projections of how much cannabis all the patients in New Mexico would need, has it?

A. We did a different study through our Epidemiology and Response Division.

Q. And do we have that here today?

A. I don't, no.

Q. But the 2013 study is the only patient survey DOH has done?

A. Correct.

11. Such data inadequacies include the lack of an epidemiologist's study.

Q. And in 2014 -- sorry, 2014, none of DOH's epidemiologists produced a formal opinion about what the level of plants should be, did they?

A. Not that I know of. I don't understand the question, but not that I know of.

Q. Let me ask it in a forward way. Did any of DOH's epidemiologists make a formal recommendation about the number of plants which should be allowed?

A. No.

Q. So you cannot say today, between 2014 and the present, what the growth rate of patient enrollment is?

A. I could if I had a calculator and the actual numbers in front of me. I mean, I could add it up and divide it by --

Q. Oh. But you have not done that?

A. It's not something I would do.

Q. And you have not charged any other employee at DOH with calculating that growth rate?

A. So I don't charge people with doing anything, but I have not asked anyone to do that, specifically.

12. It is not disputed patient enrollment has increased significantly.

Q. And prior to the Kieve case, which sped up the enrollment for patients with PTSD or chronic pain, was the patient enrollment rate constant or accelerating?

A. It was -- it was growing, but it was growing at a consistent level.

Q. And who made that calculation of whether it was growing at a consistent level?

A. I think you could look at the numbers and say it was growing at a consistent level.

Q. And did you actually do that?

A. I personally did not do those additions.

Q. Did you instruct any other employee of DOH to do that?

A. No, I did not.

Q. And after the Kieve case, was the patient enrollment rate constant, or accelerating, or decelerated?

A. Can you repeat that?

Q. Sure. After the Kieve case, which again, made it easier for patients with PTSD and chronic pain to enroll, did the patient enrollment rate decrease, increase, stay the same?

A. So immediately after the change in the rule, which happened as a result of the Kieve decision, enrollment, patient enrollment spiked dramatically, and at that spike, has continued a steady growth upward.

Q. And so even after the Kieve case, in the months afterward, patient enrollment continued to increase?

A. At a steady level, yes.

Q. And in fact, in the, let's say, first two quarters of 2017, patient enrollment has continued to increase?

A. I'm not familiar with the exact numbers, but I would venture a guess at saying probably they increased. We've had some decreases in patients. We've had some patients opt out of the program for various reasons.

Q. Whose responsibility is it at DOH to calculate patient growth rates?

A. So the Medical Cannabis Program itself is tasked with managing the program. Part of those duties include enhancing the program and looking at trends of information. We don't have a named person who right now is tasked with doing anything. Everybody's tasked with managing and regulating the program.

Q. And how many times in the last year has any employee of the Department of Health come to you and said, "This is the patient enrollment rate," how it's moving?

A. So on occasion I've met with the director, Kenny Vigil, and we've talked about what the numbers in the program are, based on the quarterly reports.

Q. How many times do you have that discussion per month?

A. We probably meet once a month. Sometimes there are reasons to meet in between. So I would say in 2017, we've probably met ten times, and five of them talked about trends in the program and what the producers were reporting to the Department.

Q. How many times has Mr. Vigil given you a percentage as to the patient enrollment growth rate?

A. He has not.

Q. And how often have you requested that the patient enrollment rate be given to you in a percentage?

A. It's not something I would request specifically.

Q. How many hours have you spent consulting or just talking with agencies in other states regarding how they manage medical cannabis?

A. Oh, boy. In hours?

Q. Yes.

A. 30, over the course of my four and a half, four years at the Department.

Q. So 30 hours over four and a half years. So that's what, seven and a half hours per year?

A. I guess.

Q. Have you asked any employee of the Department of Health to calculate a rate of increased productivity?

A. I have not.

Q. Have you tasked any employee of DOH with calculating how patient growth percentages would affect demand?

A. No.

13. The 450 plant limit is based solely on the regulatory authority of the Secretary. Even then, there is no shown nexus between that number and DOH's ability to regulate distributors. Most significantly, the limit restricts adequate supply. The Court inquired directly into this subject matter.

THE COURT: Where, as a Secretary, do you believe you derive your authority to institute a cap?

THE WITNESS: A number of places. I would say the over- -- in an overall general term, in a regulated system means just that, regulation -- regulatory system means establishing guidelines and protocols to ensure for the beneficial use of cannabis. But I also think, from my personal perspective, that also when the legislature decided to place a possession limit --

THE COURT: Okay.

THE WITNESS: -- that has to create a requirement on the Department to set forth certain guidelines of how that possession limit is satisfied.

THE COURT: Okay. So let's start with that. Tell me how you view the cap, a 450-plant cap. How does that correlate to the possession unit for the individual users, as part of your duties to regulate?

THE WITNESS: So we know -- we knew at the time, or when I was involved at the time with the current ten-plus thousand people in the program, and they had, at that time, a possession limit which was different. It was lower. It was a different possession limit that -- it described a certain amount that patients could, up to could, possess.

THE COURT: Right.

THE WITNESS: But we also know that the information that's given to us not only from producers, but from patients, is not always a hundred percent spot on. So we know that there are deviations in those possession actuals, for lack of a better word.

THE COURT: Okay.

THE WITNESS: So a patient can possess in a 90-day time period up to 230 units, currently. But many patients use -- need a very, very small amount of a tincture or an oil to satisfy their chronic pain, or their Parkinson's disease, or whatever it is. I'm not a provider, so I don't want to speak about the mechanics of the medicinal part. But we know that in regulating the program, we have to establish those criteria, and understanding that it's an ebb and flow. There are also times when patients, through their provider, hopefully with the consultation of their provider, become almost – not immune, but their tolerance level increases. And sometimes it's important for them to take a time out from utilizing cannabis to give their body time to sort of reset, and then they go back and they have a different -- I don't want to call it a possession. A need, a need for the patient. The

possession limit is a term of art, right? The statute has to say you're protected if you are within these limits. But for a patient, and with the exception in place, sometimes they need more, but sometimes they need very little. And in order for us to determine that, it's not an easy thing to do, based on a number of different factors. And so we do what we always do as a regulatory body, is we establish parameters and then we make sure that they're working. And then if we need to adjust, we 11 embark on a discussion and make a determination to adjust. In 2013, the agency was receiving a lot of correspondence and calls about patients not being able to access product and their medicine. We're not receiving those calls and concerns today. In 2013, people were accessing the black market. It didn't just start -- black market product didn't just start in New Mexico when we raised the plant count. Or maybe it did. But people were accessing the black market then and they were still in droves contacting the agency saying, "We need medicine and we're not able to get it, and our producer is closed. We can't go in and get it at a distribution site." Someone said there needs to be a survey, so they did the survey. We're not having calls, we're not seeing people, and the self-reporting producers are showing that they have supply in stock, as a carryover, based on the sales of what people are buying from them.

THE COURT: And that I understand completely, because that part -- what is clear about the statute is it really comes in at the, let's say the user level, right? Although patient level. Although, what is the term? Reasonable supply.

THE WITNESS: Adequate supply.

THE COURT: Adequate supply is mushy. But at least there's a definition there. There's nothing in the act about the distributor, the manufacturer level, other than sort of safe and secure facilities, that kind of stuff. So I guess my question is, how, given what you've just said, how does that tie -- if I were to say what is the reasonable purpose for DOH to have a cap, to do

exactly what you just said, which is entirely reasonable, but what is it about the cap that makes -- is a reasonable regulation to affect what you just described? Because what it sounds like is the 150 cap triggered these responses you got in 2013. We have this 150 cap, the patients are saying because of the cap, I can't get an adequate supply. So you bump the cap up. But I need to know from you what is the reasonable, justifiable purpose of that regulation to affect what your job is with regard to adequate supply?

THE WITNESS: Because I think that the two have to -- the two have to operate together. Producers, manufacturers, couriers, have to abide by the Lynn and Erin Compassionate Use Act, circularly. So that's a broad statement. But in and of itself, the fact of establishing an adequate supply level mandates that we establish the guidelines for product being available to patients. It's not like patients have access to the medical -- through the Medical Cannabis Program, and can get it from anywhere, at any CBD Boutique anywhere, wherever they want to get.

THE COURT: Right.

THE WITNESS: They get it. It has to be regulated, because in my opinion, the legislature understands that it is medicine and it's not recreational, and that there's a distinction. And in order to regulate it, the regulator, which was granted in the statute to the Secretary of Health --

THE COURT: Right.

THE WITNESS: -- is to make sure that that is held in a high regard. And I don't think that having absence of language dictates the requirement to ensure that producers have an amount that can be regulated.

THE COURT: Okay. Looking back at the way the new cap was created back before with the hearing officer, seems to me it was sent to the hearing officer, the hearing officer had questions for the Department, and I guess e-mailed -- kind of unusual, quite frankly, okay, having done

this. But it is what it is and it is what the record is. In the record that you've reviewed, is there that conversation or is that a deliberation by the hearing officer as to when we go to 150 to 450, here's going to be the impact on our regulatory concern that the feds are going to come in, shut down a major producer and cause a huge supply challenge? Do you know if that was considered?

14. The 450 plant count does not meet a fundamental purpose of the Act, because it impedes DOH's obligation to ensure adequate supply.

THE COURT: Give me an understanding of the data, of the hard data that the Department has. So if the part of the analysis in this case is whether or not the Department's determination that a 450-plant count, for the reasons we described, also meets a fundamental purpose of the act, which is to provide an adequate supply for patients; right? That's really what the proponent in the act is. I don't think you can dispute that. The hard data that the Department has is, is they will know how many patients are enrolled on a quarterly basis?

THE WITNESS: We know how many patients are enrolled, and I do believe we present that quarterly, yes.

THE COURT: Okay. And you know how many – you know the total plant count in the state, based on those 35 producers?

THE WITNESS: Yes. That are barcode – that are tagged, yes.

THE COURT: You don't know what stage those plants are in, necessarily, or do you?

THE WITNESS: Correct, we do not know what stage they are in.

THE COURT: And you do not know, outside of what they self-report, what the yield of those plants are?

THE WITNESS: Correct.

THE COURT: Would you know whether there is a huge variance in yield between a manufacturer?

THE WITNESS: I don't really know how to answer that because the yield is really hard to determine. It's what each producer considers in its yield. There's trim. You know, do they consider trim as part of the yield? Do they not? Do they use some of the leaves and things for juicing and other things? I mean, there's -- it's not -- yield is a very hard calculation to determine --

THE COURT: Okay.

THE WITNESS: -- with any efficacy.

THE COURT: It would be a hard data point to be fixed with a little variable. So it depends on what the manufacturer does with the plant.

THE WITNESS: Kind of. You know, they have to -- hopefully, they're all measuring yield before -- you know, before they test or when they test, they're doing all of that. And then they're sending things off for various purposes.

THE COURT: Hold on. (Discussion off the record.)

THE COURT: Did you have anything to add?

THE WITNESS: Just that I think there are probably better ways, and we're moving toward those better ways, but based on the program that we have today, pinpointing exactly how much a producer yields –

15. DOH's answer to adequate supply is to hope yields increase on a static plant number that is based on 2013 data. That is not sufficient.

THE COURT: The reason I asked these questions is because I'm wondering why the Department since that -- whatever flaws may exist in this 2013 survey, there are some data points in there

that are -- seem to be more objective. Tell me if I'm misunderstanding, because I need to understand this. It seems to me the Department is saying we don't know if there is an adequate supply unless patients come to us and say there is a shortage. Then we'll trigger the process. Rather than going back to another 2013 survey and saying let's see how many patients are out there, plants. Let's make this data driven rather than communications from patients that are just reporting we don't have an adequate supply.

THE WITNESS: And that's something that we're working on. That's part of why we, a little bit more than a year ago, brought on a seed to sale software program. I mean, these are some of the things that we're engaged in right now, because we know that when the program started in 2008, it was very rudimentary and it was very malleable. But in 2013, we did see a spike in communication. That in and of itself is not the only thing that I would consider as my baseline for when I would embark on another decision. But I do want to say that I get just as many people telling me that there is not a shortage, and that patients are accessing medicine, and this is just about profits. And I weigh them anecdotally like I weigh everything else. So how do I appease -- I'll say the same thing that I've said over and over again. I said it in settlement negotiations, that this is a balance. And --

DR. KELLY O'DONNELL

1. Dr. O'Donnell is a reliable expert who established that by basic economic principles DOH's adequate supply analysis is flawed.

Q. Dr. O'Donnell, will you please state your name for the record.

A. Kelly O'Donnell.

Q. Okay. And how are you employed, currently?

A. I am an assistant research professor at the School of Public Administration at the University of New Mexico, and I'm a private economic consultant.

Q. Okay. You've been offered as an expert in economics. Do you claim to have any expertise with respect to agriculture or any expertise specific to the Medical Cannabis Program outside of an economic background?

A. The expertise I've gained through research in the last year on the cannabis program, I would consider myself to have a fair degree of expertise. I'm also an expert in the New Mexico's economy and in healthcare in New Mexico.

Q. Are you able to forecast -- are you able to use your knowledge, skills and expertise as a Ph.D. economist to evaluate the supply and demand of a product in New Mexico?

A. Yes.

Q. Would you be able to evaluate the supply and demand, if you were to be asked to do so, could you create a model for the supply and demand of Coca-Cola within the State of New Mexico?

A. Sure

Q. Okay. One last thing I want to ask you about. In preparing your report and looking at supply and demand in the state, did you review the 2013 survey that the Health Department conducted?

A. I did.

2. Dr. O'Donnell used the data available to her by DOH.

Q. Okay. And would you tell the Court about your review of that study.

A. Well, I mean, it was useful information, 13 certainly. I mean, there were a number of pieces of data developed from that survey that were of interest. One of the major -- the questions in that survey, some of them weren't phrased optimally --

Q. These are surveys that the Health Department sent to licensed patients?

A. Yes.

Q. Okay.

A. I think the most valuable piece of information was how much these licensed patients were reported consuming on a weekly basis and how much product they reported consuming on a weekly basis. The ultimate, you know, the analysis that the Department of Health did of the data that derived from the report wasn't as compelling because it was somewhat dated. But those data points about how much was being consumed by patients were very valuable.

3. Dr. O'Donnell provided reliable testimony that assisted the trier of fact.

THE COURT:

All right. Before the Court is the Department of Health's objection to the proffer of Dr. Donnell as an expert economist and in particular an expert with regard to medical supply and demand, or medical cannabis supply and demand. And in addition, the Department's objection to the introduction of what has been marked as Exhibit 7, which is the medical cannabis market in New Mexico, Kelly O'Donnell, Ph.D. It's dated August 16. Within that is layers, two layers. Namely one is the qualifications as Dr. O'Donnell as an expert.

But on that particular issue, if you can point to the portions of the report which either those are disclosed or she's qualified to testify, I'll reconsider that. But I imagine at this point, the scope of the testimony is as an economist. And if the underlying data is reliable, those opinions will be accepted for whatever weight I ultimately give them.

4. Dr. O'Donnell confirmed what is known: the patient population is increasing and a static 450 plant limit is not fundamentally tied to an adequate supply.

Q. Okay. We'll have some more questions here about the report, but in general, did you create – you said earlier you created a model to project patient demand in New Mexico. Will you please describe for the court what that model does and how you created it?

A. Well, the model is based on essentially the number of cardholders or people who are authorized to purchase medical cannabis and their likely consumption, or demand for cannabis relative to the supply that could be provided by a licensed producer, licensed nonprofit producers. And then, you know, obviously the deficit or the surplus is going to be the difference between those two numbers. Obviously, you take into consideration a number of factors in making that estimate. But those are the overarching, you know, those are the most essential components of the model.

Q. And so is it your expert opinion that as patients continue to participate in the program over time, the amount used per patient will increase? For each individual patient, not necessarily the average.

A. I can't speak to whether an individual patient's dosage will increase over the duration of their illness or whether new entrants to the program are more or less likely to consume more or less than the average. What I can tell you is that as the product mix evolves and diversifies, a shifting away from smoking flower cannabis towards products that are actually manufactured from cannabis will tend to increase the volume of cannabis used because those products per unit of potency take -- utilize more cannabis.

Q. Okay. So could you explain to me and to the court how you reached the conclusion that only 1.2 percent of the roughly 630,000 potentially eligible New Mexicans are participating in the program? Is it just simple math that about 30,000 -- how do you reach that number?

A. Well, you simply take the ratio of the number of participants in the Medical Cannabis Program, divided by the total population.

Why do you conclude that over time the rate of market penetration in New Mexico will increase over time?

A. There are -- the number one reason is that there has been, and continues to be, an increase in the number of cardholders, a marked increase. And so, I mean -- and the population of New Mexico is not growing that much and certainly not growing at the rate that the number of cardholders is growing.

Q. What did you conclude with regard to enrollment trends, taking into account the data change which you briefly touched on yesterday?

A. That the -- well, the number of folks enrolling in the Medical Cannabis Program was continuing to increase rapidly. That is one conclusion. The other -- the other data change was that the data reported by the Department of Health had changed. They had removed a number of cardholders from their count of cardholders. So at the same time that the population – that more people were coming into the program, the Department of Health had made some database changes that dropped several thousand cards essentially out of the count of cards.

Q. And is that what we see in Figure 1 on Page 2, Dr. O'Donnell?

A. Yes.

Q. On Page 1 you have a subtitle, "Updated Cannabis Consumption Data." Would you -- from the Substance Abuse and Mental Health Services Administration. Would you please tell the court what conclusions or what information you present there?

A. That really simply speaks to the premise that there is greater cultural acceptance of cannabis in general. The National Survey of Drug Use and Health basically talks about the percentage of New Mexicans, or the percentage of people, who report having used cannabis recently. It also discusses their perception of cannabis as being risky. And essentially what the survey shows, not surprisingly, is a continued upward trend in the number of or the percentage of adults who consumed cannabis fairly regularly. And it also conveyed or showed that there was a decline in the percentage of adults who perceived cannabis use as highly risky.

Q. Okay. If you go back to Page 25 of your report, Figure 15, drawing your attention to the series of bar graphs with excess demand, given the 450-plant count limit imposed on licensed nonprofit producers by regulation, is there any way -- I'm asking you as an expert economist, expert in the medical cannabis market in New Mexico, is there any way for licensed nonprofit producers in New Mexico to meet patient demand while operating under the 450-plant count limit?

A. No.

Q. No way at all?

A. No.

Q. Even if all of the licensed nonprofit producers produced 450 plants?

A. Right.

KENNY VIGIL

1. Kenny Vigil operates the Medical Cannabis Program diligently and makes good faith efforts given the resources. He is a credible witness.

Q. Would you state your name and job title for the record, please.

A. Kenny Vigil, Medical Cannabis Program director.

Q. How long have you been the program director for the Medical Cannabis Program?

A. About a year.

Q. What did you do before becoming program director?

A. I worked for the Department of Health for four years as the public information officer.

Q. And what does your job as program director entail?

A. So I have oversight responsibilities of two divisions within the Medical Cannabis Program. One is patient services, where we administratively approve of patient applications and then there's licensing and compliance where we deal with the licensure and compliance issues of producers.

Q. How long has the Licensing and Compliance Division existed?

A. That's a fairly new division. I believe that it was staffed in April of 2016.

Q. Okay. The question on Exhibit U, you said to Mr. Woodward that you can't -- I think you said tally up how much is in stock. Is that with reference to the use of BioTrack?

A. Correct. So there's not a function that we can -- can't push a button and say calculate, just give me a total number.

2. Simply put, based on DOH's own numbers the 450 plant limit has no correlation to adequate supply and is an unsubstantiated number.

Q. Okay. I want to look at the -- let's take the -- let's take a number of a million. Let's see. Let's look at V-2, May 25 quarter. That's the first quarter of 2017 as reflected in V-2; correct?

A. Yes, sir.

Q. Okay. So if we were to take an even million -- I understand this is 1,159,000 in stock. But if we were to make it an even million, I calculate that that results in about 3/4 of an ounce per patient in the system, or about 17 grams. If you have a million grams, that's equal to 35,274 ounces, divided by 45,000 patients, you get .78 ounces. Does that sound -- I know we don't have a calculator, but does that seem like roughly reasonable to you?

A. I'll take your word for it.

Q. Okay. So a million grams is equal to about 17.16 grams per patient. That would also be 17.16 units; is that right?

A. Correct.

Q. Okay. And this, the Department has identified adequate supply for individual patients at 230 units.

A. Correct.

Q. Okay. So a million units in stock gets you a little bit less than 10 percent of adequate supply for each of the patients in the program.

A. That's assuming all of them are purchasing the max.

Q. No, that's assuming that each of them were to purchase an equal share of the stock.

MR. WOODWARD: Objection. Is there a question or is counsel just debating with the witness?

THE COURT: I think he asked whether it's 10 percent.

Q. So 17.16 units per patient is less than 10 percent of what the Medical Cannabis Program would consider to be adequate supply?

A. Yes.

Q. Okay. And on that basis of a million grams in stock, resulting in a little bit less than 10 percent adequate supply for each of the enrolled patients, that meets the Department or the Program's definition that supply is meeting demand?

A. Again, I think that we're assuming that patients purchase 230 units each quarter, or every 90 days, and we don't believe that to be true.

Q. But that wasn't my question. That amount would equal something less than 10 percent of adequate supply for --

A. Correct.

Q. And you think that that amount is sufficient to say that supply is meeting demand?

A. I do at this point.

3. Again the plant count is for regulatory purposes only and actually defeats the purpose of the Act by restricting adequate supply.

THE COURT: Okay. And the reason I ask these questions is because I'm still on this -- I'm going to ask you, as I asked the Secretary. Part of the litigation is over the 450-plant count limit. And if I were to ask you as the operator of the program -- because we've gone through this tracking database you have, and these quarterly reports, and complaints by patients -- what is it about the 450-count limit that, in your view, effectuates the purpose of the Compassionate Care Act.

THE WITNESS: Can you repeat that a little bit, maybe?

THE COURT: I basically asked the Secretary the same question. So if I understand, there was this 150-cap limit, and it went to 450.

THE WITNESS: Correct.

THE COURT: And I understand that that is a regulation on producers. And what I'm trying to get a clear -- from your perspective, as the operator, if you were to say, "I need this cap limit in order for me to operate this program. The reason I need this cap limit is," what?

THE WITNESS: So I think it's protection. It's the control part. So one of the things that we've seen -- and I'm not opposed to going from 150 to 450. My perspective is that we were one of the first states to implement a Medical Cannabis Program, so there wasn't a lot of information out there. And that's my opinion, so. So I think there's been a lot of development of the program, or of programs in general. And so I think that having the plant count, from a regulatory standpoint, is important so that we can say -- if I get a law enforcement call, for instance -- and I did last year from State Police for an outdoor grow -- that I can explain to them, "Okay, Producer X is licensed for this number of plants, and Producer Y is licensed for this number of plants." We can tell them what they're licensed for. I think that's some protection for producers. I think that having the plant count is also, from a regulatory standpoint, is important for the number of production locations. I think that's absolutely important. Because if we lose, I'm going to say control, or the ability to know where producers are growing, that's going to be problematic. I also think that as you get into – numbers are numbers. 450 is 450. If you -- if there's gray in that, it's going to be difficult. So we have a tracking system, right? So if everyone does what they're supposed to do, all plants will be -- will have a label. But is it easier for plants to be into -- I'm just going to say plants -- to, "Hey, there's 2,000 plants in here. Let's just take a couple and n and no one's going to notice." So I hope those points help.

THE COURT: Okay. In your view as the operator of the program -- try and phrase this the right way. I'll use it by analogy. So when I was growing up, my parents bought me really big jeans

and then rolled them up, and then you'd grow into them. It seems the Department of Health has, in promulgating the rule, in essence said I did this survey, and based on the amount, new distributors and new -- and additional plant count, it's our view that the patient need is -- we have exceeded what the adequate supply for those patients are going to need, and they'll grow into it, rather than what, at least in part this 2013 survey does, which is look into the particular points of patient demand. Is there any reason that you know of, as an operator, why, since 2013, there hasn't been this sort of study done to make a reasonable -- to make a determination about whether or not the plant count is at all affecting a patient's adequate supply?

THE WITNESS: So I can speak about that from my time in the program.

THE COURT: Mm-hmm.

THE WITNESS: So it has been about a year that I was named director. I didn't fully transition into the position until probably late September, early October. There have been some changes. My understanding was that in speaking with the Licensing/Compliance program manager that we were going to have some data from BioTrack. And we do. It's not necessarily the data and the format that we needed. And we've been trying to get there. It just -- it hasn't been as quickly as we hoped for, for some of the reasons that I mentioned. You know, I think there's a -- we should also be looking -- I think that from our conversations with them, and we've had several, that maybe there is a way to get what we need. It just -- it might take some time.

CONCLUSIONS OF LAW:

1. A per se plant limitation per se under NMAC 7.34.4.8 for non-profit producers is not outside the scope of authority granted to the Department of Health by the Lynn and Erin Compassionate Use Act, NMSA 1978 § 26-2B-1 et seq. However, the established 450 count plant limit is contrary to the Department's obligation to ensure an adequate supply, and thus is

contrary to law. Further any plant count, and certainly the 450 plant count, it may not be simply based on outdated and unrelated data in such a manner and means as to violate the Legislature's directive to provide an adequate supply.

2. The 450-plant limitation under NMAC 7.34.4.8's for non-profit producers is arbitrary based on the outdated data, including but not limited to reliance on the original survey. Such a limit is contrary to DOH's statutory obligation under the Act.

3. NMAC 7.34.4.8's 450-plant limitation for non-profit producers prevents and impeding the purpose of the Lynn and Erin Compassionate Use Act, NMSA 1978 § 26-2B-1 et seq., from being accomplished, as the limit is arbitrary and capricious as applied to current conditions based on outdated information.

4. DOH has a duty/obligation to ensure patients enrolled in the Medical Cannabis Program can access an adequate supply of medical cannabis in New Mexico.

5. Achieving the purpose of the Lynn and Erin Compassionate Use Act, NMSA 1978 § 26-2B-1 et seq. does not require eliminating the plant count limitation altogether.

6. The phrase 'regulated system does grant authority to DOH to limit the number of plants a licensed producer may cultivate in production.

7. However, given conclusions of law in #6 above, the inclusion of the adjective "regulated" in the statute does not bestow on DOH wide-ranging power to issue whatever regulations it wants. Similarly, references in other statutes to "safety" or "welfare" do not operate as broad grants of authority; rather, the inclusion of such phrases and words are understood as general statements of purpose, not as delegations of power. "The purposes of the enabling acts, which include the goal of protecting the 'public health, safety and welfare,' are designed to invoke the general police power of the state...This general expression of legislative police

power, without more, does not create a standard for protecting 'public health, safety and welfare.'" *In re Application of Rhino Environmental Servi*ces, 2000-NMSC-024, ¶ 29, 117 P.3d 939. "Thus, the Court of Appeals [in the intermediate appeal] was correct to reject CDC's reliance on the purposes of the acts as a statutory mandate to respond to issues that fit ever so loosely under the umbrella of 'sociological concerns.' Such a broad mandate would offer no guidance to the Department, and violate the well-settled principle that a legislative body may not vest unbridled or arbitrary power in an administrative agency." *Id.*

8. The statute provides for "beneficial use," and if patients cannot obtain cannabis from regulated sources in an amount which is actually beneficial, then the statute is an illusion. The specific mention of "beneficial use" in the statute signals the statute intends to build a system where cannabis is not just available in a theoretical sense—as in, each patient gets access to one gram per month at $100 per gram—but is available in an amount which can benefit patients.

9. The relevant statute here is the Lynn and Erin Compassionate Use Act, NMSA § 26-2B-1 et seq. NMSA § 26-2B-4 states, "A qualified patient shall not be subject to arrest, prosecution or penalty in any manner for the possession of or the medical use of cannabis if the quantity of cannabis does not exceed an adequate supply". NMSA § 26-2B-3 defines "adequate supply" as "an amount of cannabis... that is determined by rule of the department to be no more than reasonably necessary to ensure the uninterrupted availability of cannabis for a period of three months and that is derived solely from an intrastate source."

10. Thus, the statue specifically indicates that patients may only lawfully possess an "adequate supply" and specifically directs DOH to figure out what that "adequate supply" is.

11. NMSA § 26-2B-3 does not define an "adequate supply" applicable to producers. And NMSA § 26-2B-7 does not direct the Department to promulgate any regulations regarding how much producers can produce. In fact, NMSA § 26-2B-7 instructs DOH to formulate regulations on only a few specific topics: "No later than October 1, 2007, and after consultation with the advisory board, the department shall promulgate rules in accordance with the State Rules Act to implement the purpose of the Lynn and Erin Compassionate Use Act. The rules shall: (1) govern the manner in which the department will consider applications for registry identification cards," "(2) define the amount of cannabis that is necessary to constitute an adequate supply, including amounts for topical treatments;" 3) identify criteria and set forth procedures for including additional medical conditions...;" 4) set forth additional medical conditions, medical treatments or diseases to the list of debilitating medical conditions that qualify for the medical use of cannabis as recommended by the advisory board;" 5) identify requirements for the licensure of producers and cannabis production facilities and set forth procedures to obtain licenses;" "(6) develop a distribution system for medical cannabis that provides for: (a) cannabis production facilities within New Mexico housed on secured grounds and operated by licensed producers; and (b) distribution of medical cannabis to qualified patients or their primary caregivers to take place at locations that are designated by the department and that are not within three hundred feet of any school, church or daycare center;" "(7) determine additional duties and responsibilities of the advisory board;" and "(8) be revised and updated as necessary."

12. The Department of Health has remained static in its production supply limit when it is delegated to adjust to the changing circumstances of its medical product. In *Rutherford v. Chaves County*, 2002-NMCA-059, ¶ 17, the Court of Appeals stated, "our case law has not

limited the concept of maintenance to 'fixed remedies' for static dangerous conditions...For example, the location of the school bus stop in *Gallegos* and the placement of elk warning signs in *Ryan* were remedies that may need to be changed as governmental entities learn or should learn about changes in the needs of school children or in the movement of elk." *Id.* at ¶ 20.

13. The Court declares that the 450 plant limitation is not within the power of the Department and since it frustrates the purpose of the statute, alters the reach of the statute, and contradicts the statute, the remedy is to strike the 450 figure and remand to the Department for further proceedings to find a number which can ensure patient needs are met. The Court declares that any quantity limitation against producers which is expressed as a fixed number of plants of 450 is not within the power of the Department since it frustrates the purpose of the statute, alters the reach of the statute, and contradicts the statute, the remedy would be to strike the 450 figure and remand to the Department for further proceedings to construct a quantity limitation which ensures producers can respond to patient demand.

14. "The court 'will not read into a statute or ordinance language which is not there.'" *Public Service Co. of New Mexico v. New Mexico Public Utility Com'n*, 1999-NMSC-040, ¶ 18. It is the *Legislature*'s role to decide if the regulation should be "strict" or not, and the Legislature's silence on any production limit (in contrast to the explicit possession limit for patients), plus its seven specific enumerated items in § 26-2B-7, suggests the Legislature wanted a flexible, relatively hands-off, patient-centric regulatory system.

15. The Agency limit of 450 plants is arbitrary and capricious "[A]n agency rule would be arbitrary or capricious if the agency ... failed to consider an important aspect of the problem." *Rio Grande Chapter of Sierra Club v. New Mexico Mining Com'n*, 2003-NMSC-005, ¶ 12 (internal citation omitted) (ellipsis in original).

16. The remedy for an arbitrary regulation is to remand the issue to the agency. *See New Mexico Exchange Carrier Group v. New Mexico Public Regulation Commission,* 2016-NMSC-015,32, 369 P.3d 1058 (PRC rule held arbitrary and not supported by substantial evidence was "remand[ed] this matter to the PRC for further proceedings. The record must have substantial evidence to support a finding that the newly adopted funding formula is adequate to satisfy the requirements of Section 63-9H-6(C) and (K) and Rule 17.11.10.19(C), and that the surcharge cap has not been arbitrarily established"); and *Attorney General v. New Mexico Public Regulation Commission,* 2011-NMSC-034,18-19, 150 N.M. 174, 258 P.3d 453 ("The PRC's adoption of the adder rates was arbitrary and unlawful in that they were not evidence-based, cost- based, nor utility specific. We conclude, therefore, that the PRC's Final Order is inconsistent with the law because the PRC had no basis in the record for determining that the adder rates contained in Alternative A were 'just and reasonable.' We therefore annul and vacate the PRC's Final Order due to the lack of a lawful basis in the record to support its decision. We remand this case to the PRC for further proceedings in accordance with this Opinion").

17. The Department of Health exceeded their statutory authority by, without justification, altering, modifying and limiting the reach of the Act created by the Legislature by their unsupported limit of 450 plants per producer.

18. DOH's altering of the Act is not permitted. The New Mexico Supreme Court has stated,

> A governor's proper role is the execution of the laws. NM Const. Art. V, § 4. Public assistance programs must be administered, and we recognize that such administration involves discretion by executive agencies. Yet, such discretion is not boundless. Generally, the Legislature, not the administrative agency, declares the policy and establishes primary standards to which the agency must

conform. *See State ex rel. State Park & Recreation Comm'n v. New Mexico State Authority,* 76 N.M. 1, 13, 411 P.2d 984, 993 (1966).

The administrative agency's discretion may not justify altering, modifying or extending the reach of a law created by the Legislature. *See, e.g., Chalamidas v. Environmental Improvement Div. (In re Proposed Revocation of Food and Drink Purveyor's Permit),* 102 N.M. 63, 66, 691 P.2d 64, 67 (Ct.App.1984) (stating that an " agency cannot amend or enlarge its authority through rules and regulations"); *Rainbo Baking Co. v. Commissioner of Revenue,* 84 N.M. 303, 306, 502 P.2d 406, 409 (Ct.App.1972).

While recognizing the specific roles of each branch of government, we also note that absolute separation of powers is "neither desirable nor realistic," *State ex rel. Clark,* 1995–NMSC–051, 120 N.M. at 573, 904 P.2d at 22, and that the constitutional doctrine of separation of powers permits some overlap of governmental functions, *Mowrer v. Rusk,* 95 N.M. 48, 53, 618 P.2d 886, 891 (1980). Nonetheless, this Court must give effect to Article III, Section 1, and will not be reluctant to intervene where one branch of government unduly encroaches or interferes with the authority of another branch. *State ex rel. Clark,* 1995–NMSC–051, 120 N.M. at 573, 904 P.2d at 22; *Rusk,* 95 N.M. at 54, 618 P.2d at 892. Such an infringement occurs when the action by one branch prevents another branch from accomplishing its constitutionally assigned functions. *State ex rel. Clark,* 1995–NMSC–051, 120 N.M. at 574, 904 P.2d at 23 (citing *Nixon v. Administrator of Gen. Servs.,* 433 U.S. 425, 433, 97 S.Ct. 2777, 53 L.Ed.2d 867 (1977)).

"The test is whether the Governor's action disrupts the proper balance between the executive and legislative branches." *State ex rel. Clark,* 1995–NMSC–051, 120 N.M. at 574, 904 P.2d at 23. If a governor's actions infringe upon "the essence of legislative authority—the making of laws—then the [g]overnor has exceeded his authority." *State ex rel. Clark,* 1995–NMSC–051, 120 N.M. at 573, 904 P.2d at 22.

A violation occurs when the Executive, rather than the Legislature, determines "how, when, and for what purpose the public funds shall be applied in carrying on the government," *State ex rel. Schwartz v. Johnson,* 1995–NMSC–083, ¶ 14, 120 N.M. 820, 907 P.2d 1001 (quoting *State ex rel. Holmes v. State Bd. of Fin.,* 69 N.M. 430, 441, 367 P.2d 925, 933 (1961)). In addition, infringement upon legislative power may also occur where the executive does not "execute existing New Mexico statutory or case law [and rather attempts] to create new law." *State ex rel. Clark,* 1995–NMSC–051, 120 N.M. at 573, 904 P.2d at 22.

State ex rel. Taylor v. Johnson, 1998-NMSC-015, ¶¶ 22-24, 125 N.M. 343, 349–50, 961 P.2d 768, 774–75

19. While it may be true that DOH was delegated the authority to regulate the system of distribution of medical marijuana in this State, it may not create its own arbitrary production number that does not have reasonable nexus in law or fact to adequate supply for patients in the program.

> "An administrative agency has no power to create a rule or regulation that is not in harmony with its statutory authority." *Rivas v. Bd. of Cosmetologists,* 101 N.M. 592, 593, 686 P.2d 934, 935 (1984). The Legislature may delegate legislative duties to a board, "but in so doing, boundaries of authority must be defined and followed." *Id.*

Wilcox v. New Mexico Bd. of Acupuncture & Oriental Med., 2012-NMCA-106, ¶ 7, 288 P.3d 902, 905

20. DOH's reliance on the fear of Federal government intervention in the State run program may not be the sole basis for its plant count limit.

21. The DOH in implementing this goal may not simply ignore the statutory requirement of ensuring an adequate supply for the growing and diverse needs of the patients. As such, DOH's actions fail as a matter of law and they are not reserved simply for administrative discretion.

22. While the Court is reluctant to intervene in such a dispute, the issue of whether an agency has exceeded its statutory mandate by the legislature is one that must be decided by the Court's original jurisdiction.

> It is axiomatic that an administrative agency's power to promulgate regulations may extend only as far as its legislative grant of authority. *Bowen v. Georgetown Univ. Hosp.,* 488 U.S. 204, 208, 109 S.Ct. 468, 102 L.Ed.2d 493 (1988); see *In re Vt. Gas Sys., Inc.,* 150 Vt. 34, 39, 549 A.2d 627, 630 (1988) ("An administrative agency's rule-making authority cannot support an expansive interpretation of its own powers.").
>
> Thus, while we generally presume the validity of regulations within the agency's authority, we will uphold an administratively adopted regulation only "where we can do so without compromising the intent of the statute which authorized it." *In re Agency of Admin.,* 141 Vt. 68, 74, 444 A.2d 1349, 1351–52 (1982); see *Vt.*

> *Ass'n of Realtors, Inc. v. State,* 156 Vt. 525, 530, 593 A.2d 462, 465 (1991) ("[W]e will not countenance any agency rule that exceeds the authority delegated to the agency under its enabling act."). If an agency operates outside the bounds, or for purposes other than those, authorized by the enabling legislation, "this Court will intervene." *In re Agency of Admin.,* 141 Vt. at 75, 444 A.2d at 1352.

Martin v. State, Agency of Transp. Dept. of Motor Vehicles, 2003 VT 14, ¶ 15, 175 Vt. 80, 87, 819 A.2d 742, 749 (2003)

and

> The fundamental principle served by these tenets is the doctrine of separation of powers. See 1A N. Singer, Statutes and Statutory Construction § 31.06, at 544 (5th ed.1993). Courts have generally upheld broad delegations of authority to administrative agencies, but agency action that "transcends the delegation will not be sustained." 1 J. Stein, G. Mitchell & B. Mezines, Administrative Law § 3.03[5], at 3–110 (2002). Confining delegated lawmaking authority within its intended bounds helps to assure that ultimate control over policymaking rests with the legislative branch of government rather than unelected administrative officials. 1 N. Singer, Statutes and Statutory Construction § 4.15, at 166 (5th ed.1994); see *Chambers v. St. Mary's Sch.,* 82 Ohio St.3d 563, 697 N.E.2d 198, 202 (1998) (legislative accountability is cornerstone of democratic process that justifies general assembly's role as lawmaker and restricts administrative rule-making to placing general assembly's policy into effect).

Martin v. State, Agency of Transp. Dept. of Motor Vehicles, 2003 VT 14, ¶ 16, 175 Vt. 80, 87, 819 A.2d 742, 749–50 (2003)

23. Finally, the Court has the greatest sympathy for the Department of Health and its Cabinet Secretary in implementing a program that is new and evolving and uniquely a program that might run afoul of federal criminal statutes that govern the subject matter. That said, New Mexico Courts have not accepted an "Administrative Necessity" defense to an Agency's regulatory overreach because what they are tasked to do is difficult.

> Finally, the State argues that the challenged regulation is a valid exercise of DMV's authority because it is administratively necessary. Again, we find this argument unpersuasive. Agencies generally may not choose to ignore "their statutory mandate because they believe it is administratively inefficient or infeasible." *Campbell v. United States Dep't of Agric.,* 515 F.Supp. 1239, 1249 (D.D.C.1981) (agency cannot decide not to allow food stamp recertifications at Social Security offices because of practical problems they perceive in doing so).
> 1314 ¶ 29. In very limited circumstances, "administrative necessity may be a basis for finding implied authority for an administrative approach not explicitly

> provided in the statute." *Ala. Power Co. v. Costle,* 636 F.2d 323, 358 (D.C.Cir.1979). A court may uphold streamlined agency approaches or procedures involving categorical exemptions not explicitly provided by statute when a case-by-case approach would, as a practical matter, prevent the agency from carrying out its legislatively authorized mission. *Id.* But the agency's burden to justify its actions "in such a case is especially heavy." *Id.* at 359.
>
> ¶ 30. The State has not met that heavy burden here. Cf. *Pub. Citizen, Inc. v. Shalala,* 932 F.Supp. 13, 17 (D.D.C.1996) (FDA failed to demonstrate administrative impossibility of applying statute's nutrition content and health claim provisions to restaurant menus). There is no evidence that DMV could not carry out its statutory mandate without imposing overbroad categorical exclusions that sever the statutory nexus between the denial and the offensiveness of the requested plate.
>
> ¶ 31. In support of its administrative necessity argument, the State states simply that the Commissioner would be unable to handle the growing number of special plate applications without regulatory standards to implement the program. We do not suggest otherwise. DMV may promulgate regulations consistent with the statute, and, in doing so, may establish lists of combinations of numbers and letters that might be offensive. DMV may also, consistent with § 304(d), exclude entire categories comprised exclusively of words that might offend the general public. Cf. *McMahon v. Iowa Dep't of Transp.,* 522 N.W.2d 51, 55–57 (Iowa 1994) (upholding regulation disallowing combinations of numbers and letters that have sexual connotations or that are defined in dictionaries as terms of vulgarity, contempt, prejudice, hostility, insult, or racial or ethnic degradation); *Higgins v. DMV,* 170 Or.App. 542, 13 P.3d 531, 533 n. 3–4 (2000) (en banc) (construing regulation defining "ethnic words" as words that refer to definable class of persons, and that ridicule or support superiority of that class). The agency may not, however, claim the authority to establish policy unauthorized by statute solely because the task is fraught with difficulty. If the Legislature has set DMV "with an impossible task, their remedy is with [the Legislature] and not this Court." *Campbell,* 515 F.Supp. at 1249.

Martin v. State, Agency of Transp. Dept. of Motor Vehicles, 2003 VT 14, ¶¶ 28-31, 175 Vt. 80, 91–92, 819 A.2d 742, 752–53 (2003)

24. The language of the Statute must prevail over the agency regulation, and the DOH may not overrule the portion of the Act that provides for adequate supply by such a restrictive and unsupported plant count regulation.

> If there is a conflict or inconsistency between statutes and regulations promulgated by an agency, the language of the statutes shall prevail. An agency by regulation cannot overrule a specific statute.

Jones v. Employment Services Div. of Human Services Dept., 1980-NMSC-120, ¶ 3, 95 N.M. 97, 99, 619 P.2d 542, 544

IT IS THEREFORE ORDERED:

DOH is enjoined from enforcing the 450 quantity limitation against producers described in its rule. The injunction is stayed for 120 days to provide DOH an opportunity to amend NMAC 7.34.48 to comply with the §26-2B-1 et. seq. and NMAC 7.34.4.7B.

The Court enters judgment in favor of Plaintiffs, against Defendants, and invalidates NMAC 7.34.4.8(A)(2), consistent with this ruling.

The Court DENIES Plaintiff request to declare that DOH has no authority to regulate the medical cannabis industry by means of a plant count as long as such count is based in fact and does not impede the purpose of the act.

Any Finding of Fact or Conclusion of Law not incorporated are rejected. The prevailing party shall prepare a form of Order.

HONORABLE DAVID K. THOMSON
District Court Judge, Division VI

CERTIFICATE OF MAILING

I hereby certify that a true copy of the foregoing Order was served electronically to the following parties/counsel of record at the following addresses this date of filing.

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