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No. SC101617

In the Supreme Court of Missouri

HIPPOS, LLC,

Appellant,

v.

MISSOURI DEPARTMENT OF HEALTH AND SENIOR SERVICES,

Respondent.

Appeal from Administrative Hearing Commission
The Honorable Renee Slusher, Commissioner

SUBSTITUTE BRIEF OF RESPONDENT

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INTRODUCTION AND SUMMARY OF THE ARGUMENT

On November 6, 2018, Missouri voters approved an amendment to the Missouri Constitution which legalized the cultivation, manufacture, and distribution of marijuana and marijuana-infused products for medicinal purposes. The constitutional amendment gives the Missouri Department of Health and Senior Services ("Department") authority to administer a licensing program for medical marijuana-related facilities, including the authority to "[g]rant and refuse state licenses and certifications for the cultivation, manufacture, [and] dispensing" of medical marijuana and to "suspend, impose an authorized fine, restrict, or revoke such licenses and certifications." Mo. Const. art. XIV, § 1.3(1)(a). Because the number of medical marijuana facility applicants exceeded the number of available licenses, Article XIV directed the Department to establish a competitive scoring and ranking system based on ten categories of evaluation criteria.

Hippos, LLC ("Hippos") applied for three cultivation, six manufacturing, and five dispensary medical marijuana facility licenses. Its applications were scored under the competitive scoring process. Only one of Hippos' cultivation applications (application number 9067) ranked high enough to receive a license. The Department approved that application and denied Hippos' remaining license applications. Hippos appealed the application denials to the Administrative Hearing Commission ("Commission").

Following a three day contested hearing, the Commission denied all of Hippos' medical marijuana facility applications in three decisions. The Commission rescored all of Hippos' application appeals pursuant to 19 CSR 30-95.025(4)(C)4, but none of the adjusted scores ranked high enough to receive a license for any of the facility types.

When conducting its rescoring of the applications, the Commission noted the importance of the "Evaluation Criteria Scoring Table," and the scores administered by Wise Health, the company the Department contracted with to score the applications. The Commission then opined that expert testimony and other documentary evidence offered by Hippos "pale[d] in comparison" to the weight of the scores Wise Health scorers gave for identical responses to the questions Hippos challenged on appeal.

Hippos raises five points on appeal that can principally be grouped into two types of challenges: (1) the Commission's decisions are arbitrary and capricious; and (2) the Commission's decisions are not supported by competent and substantial evidence. Keeping in mind the standard of review for decisions of administrative agencies, this Court should affirm the decisions of the Commission. The record establishes that the Commission's decisions are supported by competent and substantial evidence and they are not arbitrary or capricious. In three separate decisions, the Commission meticulously reviewed Hippos' scoring challenges, heard expert testimony and evidence, and rescored each of the applications. The Commission's rescoring methodology is logical and reasonable. As the finder of fact the Commission had the authority to reject Hippos' rescoring evidence and rely on the Evaluation Criteria Scoring framework. *Krispy Kreme Doughnut Corp. v. Dir. of Revenue*, 488 S.W.3d 62, 67–68 (Mo. banc 2016). Indeed, Hippos' expert witnesses used different methodologies, did not blind score, and did not review a similar sample size as the Wise Health graders. The Commission as the finder of fact, "is free to believe all, part, or none of the testimony of any witness." *Dorman v. State Bd. of Registration for Healing Arts*, 62 S.W.3d 446, 455 (Mo. App. W.D. 2001). Because all of the Commission's decisions are

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supported by competent and substantial evidence and are not arbitrary or capricious, this Court should deny all of Hippos' points on appeal and affirm the decisions of the Commission.

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STATEMENT OF FACTS AND PROCEDURAL HISTORY

The Department is dissatisfied with Hippos' Statement of Facts. While Hippos' accurately covers some of the procedural history and underlying facts, it omits or otherwise mischaracterizes certain key facts pertinent to this appeal. Mo. Sup. Ct. R. 84.04(f). The Department, therefore, provides its own statement of facts. *See id.*

Background of the Medical Marijuana System in Missouri

On November 6, 2018, Missouri voters approved Amendment 2, legalizing the use of medical marijuana. Amendment 2 became Article XIV of the Missouri Constitution.[1] Article XIV of the Missouri Constitution legalized the use and sale of marijuana for certain medical purposes and granted the Department the authority to carry out the implementation of the program by allowing the Department to grant or refuse state licenses and certifications for the cultivation, manufacture, dispensing, sale, testing, tracking, and transportation of marijuana for medical use as provided by law. *See* Mo. Const.. art. XIV, § 1.3(1)(a).

To implement Article XIV of the Missouri Constitution, the Department enacted the regulations contained in Chapter 95, Division 30, Title 19, of the Missouri Regulations.[2] (D228, p. 1–32*).* Article XIV "gave [the Department] the obligation to make [the] decision" of restricting the number of licenses that could be awarded for

[1] In 2022, Missouri voters again amended the constitution legalizing recreational use of marijuana and amended the medical marijuana provisions. This case does not involve the 2022 amendment or regulations promulgated under that amendment.

[2] All references to the Department regulations governing medical marijuana licensure are to those in effect in 2019. These regulations were repealed following the 2022 constitutional amendment legalizing recreational use of marijuana in addition to amending the medical use provisions.

cultivation, dispensary, and manufacturing. (D51, p. 49). Based on that authority, the Department enacted the following license limitations: 60 for cultivation; 86 for manufacturing; and 192 (24 per congressional district) for dispensaries. (D51, p. 50).

Ultimately, the Department received more applications than licenses available for each facility type. (D51, p. 62). Because the Department received more applications than available licenses, it was required to rank those applicants against each other pursuant to 19 CSR 30-95.025(4). In part, that regulation noted that "where more qualified applicants apply for cultivation, dispensary, manufacturing, or testing licenses or certifications than there are licenses or certificates available in that category, [the Department] will use a system of numerically scoring ten (10) additional evaluation criteria to rank the applicants in each such license or certification against each other." 19 CSR 30-95.025(4).

Scoring of Applications

The Department, through the Office of Administration, contracted with Wise Health to score the applications. (D221). Wise Health provided a scoring team to the Department for the contract. (D259, p. 3). To ensure the scorers had the appropriate expertise that matched up with the questions they were assigned, the Department reviewed every scorer's resume to verify that their professional background qualified the individual to be a scorer for the task they were given. (D51, p. 109). Most scorers were college educated. Some had advanced degrees or demonstrated expertise based on peer-reviewed status. (D259, p. 3). Pursuant to 19 CSR 30-95.025(4)(C)(4), the same grader scored the question that they were assigned for every single application within that particular license type. (D51, p. 72).

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The evaluation criteria questions and initial scoring process were outlined in the "Facility License Application Questions and Scoring Criteria (collectively, the Evaluation Criteria Questions and Points table, the Evaluation Criteria Scoring table and the Evaluation Criteria Topics) (Scoring Criteria), which were promulgated in the rules. (D51, p. 100–102; D250). The Facility License Application Questions and Scoring Criteria set forth 68 questions applicable to all applicants and additional questions applicable to each facility type along with the scoring scale, weight limits, word count limits, and attachment page limits attributable to those questions. (D250). The Evaluation Criteria Scoring Table outlined the scoring criteria and established the framework for how the grader would apply their own expertise and knowledge to the questions they scored. (D51, p. 101). The Facility License Application Questions and Scoring Criteria established four types of questions: 0-10 Point Scale; Satisfactory/Unsatisfactory; Yes/No; and No/Yes. Each question had corresponding raw points which the grader could award. (D250). A depiction of the Evaluation Criteria Scoring Table is as follows:

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Evaluation Criteria Scoring Table	
Answer	**Points**
Question on 0-10 Point Scale	
Unsatisfactory - Response fails to meet minimum expectations; has significant weaknesses and lacks detail and/or clarity; little or no confidence in the proposed approach or ability to fulfill claims.	0
Satisfactory - Response meets minimum expectations; offers no significant benefits beyond the minimum expectations; no significant weaknesses exist; reasonable confidence in the proposed approach or ability to fulfill claims.	4
Superior - Response offers some benefits beyond the minimum expectations; no material weaknesses exist; confidence in the proposed approach or ability to fulfill claims.	7
Distinctive - Response promises significant benefits beyond the minimum expectations; answer presents innovative, and/or best-in-class solutions; high confidence in the proposed approach or ability to fulfill claims.	10
Satisfactory / Unsatisfactory	
Satisfactory - Response meets minimum expectations; no significant weaknesses exist; reasonable confidence in the proposed approach or ability to fulfill claims.	10
Unsatisfactory - Response fails to meet minimum expectations; has significant weaknesses and lacks detail and/or clarity; little or no confidence in the proposed approach or ability to fulfill claims.	0
Yes / No	
Yes (when a preferred response) - Response indicates assent or agreement.	10
No (when an undesirable response) - Response indicates negation, dissent, or denial.	0
No / Yes	

No (when a preferred response) - Response indicates negation, dissent, or denial.	10
Yes (when an undesirable response) - Response indicates assent or agreement.	0

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As depicted in the Evaluation Criteria Scoring Table above, for a "0-10 Point Scale Question" graders could award a score based on four categories (Unsatisfactory; Satisfactory; Superior; and Distinctive) with corresponding raw points being either a 0, 4, 7, or 10. (D51, p. 100; D250, p. 10). Each category then provided "parameters" as to why a scorer could give a response a particular score: "unsatisfactory, satisfactory, superior, and distinctive." (D51, p. 100–101; D250, p. 10). Within the parameters provided for a given score, the Evaluation Criteria Scoring Table included terms, such as "minimum expectations," "significant weakness," and "best in class," that were not defined by regulations or rules. (D51, p. 101). The parameters had a level of discretion and subjectivity built in as the graders would have to apply their own experience and knowledge to the scores they awarded. (D51, p. 102).

Each grader was to use their professional expertise to define the terms as they applied to the question at hand. (D51, p. 101). As such, two different graders could apply different subjective criteria to those parameters. (D53, p. 46). The primary tools for consistency was that only one grader scored each question in a license type and that the graders were highly experienced and trained on the rubric and the process, as well as the expectations. (D51, p. 21).

Wise Health applied the Scoring Criteria to all of the questions for each facility type, and it did not cross-compare applications to other facility types when scoring. (D51, p. 134–35). Wise Health scored 2,219 total applications and sent those scores to the Department. (D51, p. 113; D52, p. 71). The Department accepted all scores received from Wise Health as valid, and did not change any of the scores that they

received. (D51, p. 141, 116).

To further implement an impartial scoring process, the Department and Wise Health used an anonymous scoring process so all applications, including Hippos' applications, were scored blindly. (D51, p. 71–76.). So when graders gave a score, they did not know to which applicant the response belonged. (D51, p. 116). The Department and Wise Health implemented this anonymous system to avoid any type of bias in the scoring process. (D51, p. 75–77).

Ranking of Applications

Once Wise Health completed the application scoring and sent the scores to the Department, the Department applied the scoring adjustments, per rule. (D52, p. 76). After adjustments were applied, the Department ranked the applications. (D51, p. 68). The Department ranked the applications within each facility type and not across facility types. (D51, p. 135).

Hippos' Applications (Cultivation, Dispensary, and Manufacturing)

Hippos applied for three cultivation, six manufacturing, and five dispensary medical marijuana facility licenses. (D240–D245; D251–D253). Only one of Hippos cultivation applications ranked in the top 60 of all cultivation applications. (D251, p. 2). Hippos' remaining cultivation applications (8997 and 9072) were denied "due to the results of scoring and ranking." (D51, p. 125).

None of Hippos' five dispensary applications ranked in the top 24 applicants within their respective congressional districts to receive a license. (D252). Thus, all five of its dispensary applications were denied "due to the results of scoring and

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ranking." (D51, p. 125–26).

Similarly, none of Hippos' six manufacturing applications ranked in the top 86 applicants to receive a manufacturing license. (D253). Like the dispensary applications, all six of these applications therefore were denied "due to the results of scoring and ranking." (D51, p. 126.).

Hippos appeals the Department's license denial decisions

Hippos appealed the Department's denial of its two cultivation applications (application nos. 8997 and 9072), five dispensary applications (applications nos. 9076, 9080, 9083, 9088, and 9093) and six manufacturing applications (applications nos. 8901, 9058, 9064, 10327, 10329 and 10333) to the Commission. (D50, p. 99). In each of its administrative appeals, Hippos contended that the scoring of its license applications was "arbitrary, subjective, unfair, erroneous, capricious, negligent, unsupported by competent and substantial evidence, and/or contrary to law." *See, e.g.*, (D396). Hippos' appeals challenged the scoring of specific application questions, challenged aspects of the entire scoring system, and challenged the constitutionality of some of the Department's actions during the medical marijuana application process. *See, e.g.*, (D396). The Commission consolidated the cases (case nos. 20-0551, 20-1634, and 20-1181) for purposes of hearing. (D51, p. 11).

Hearing Testimony of Joe Patterson and Ashley Picillo

Hippos retained Joe Patterson to opine on the rescoring of its medical marijuana application answers. (D54, p. 52–53, 131). Mr. Patterson has experience in law enforcement and operates a security firm. (D50, p. 127). He wrote application

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responses concerning security questions for other medical marijuana facility applicants. (D50, p. 128). About half of those applicants received licenses. (D50, p. 128). For the cultivation application, he testified to question 59. (D63). For Hippos' dispensary applications, Mr. Patterson testified to questions 55, 56, 57, 58, 59, 60. (D54, p. 52–155). Mr. Patterson conceded on cross-examination at the hearing that when he reviewed Hippos' applications, he did not complete review by a blind scoring process. (D54, p. 130–31, 156). Instead, Mr. Patterson developed his subjective definitions for the terms used in the Evaluation Scoring Table only after hired to give opinions for Hippos. He did not know the graders' expertise, training, and background and agreed terms like "minimum expectations" and "significant weaknesses" were not defined. (D54, p. 118–146). He also agreed that when a grader rewards a score, it should be based on the Evaluation Criteria Scoring Table. (D54, p. 142).

Hippos also retained Ashley Picillo to opine on the rescoring of their answers. Ms. Picillo operates a management consulting firm specializing in cannabis compliance. (D50, p. 127). She testified to questions 3, 27, 30, 41, 44, 50, 51, 52, 66, and 67 for Hippos' cultivation applications. (D61). For the dispensary applications, Ms. Picillo testified to questions 26, 41, 43, 44, 51, 52, 66, 67, and dispensary specific questions 4 and 6. (D55, p. 8–153; D56, p. 4–81).

Ms. Picillo had not spoken with anyone from Wise Health regarding Hippos' applications. (D56, p. 5). Though her evaluation of Hippos' applications was not blind, she believed the risk of scoring bias was mitigated and lessened by the required anonymous application submissions. (D56, p. 58–59). Ms. Picillo applied a different

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standard than Wise Health during her evaluation of Hippos' application scores. (D55, p. 47–153; D56, p. 4–31). On cross-examination, Ms. Picillo agreed that her scoring criteria was different than some of the scoring criteria used by Wise Health. (D56, p. 27). She agreed that having applicants of the same facility type answer the same questions lent to the consistency of the program, and so did having the same grader score a specific question. (D56, p. 8). She also conceded that all applicants should be treated the same and have the same standards applied to them. (D56, p. 59–60).

Ms. Picillo further agreed during cross-examination that blind scoring ensured consistency to the process, that no applicant should get specialized treatment, and that all applicants should be treated the same. (D56, p. 59–60). The witnesses agreed that blind scoring ensured consistency to the process, that no applicant should get specialized treatment, and that all applicants should be treated the same. (D51, p. 141; D56, p. 58–60).

Cultivation Decision

The Commission's decision in case no. 20-0511 (cultivation decision D49, p. 49–118) denied Hippos' cultivation application numbers 8997 and 9072 finding that Hippos failed to establish "that its scores . . . were high enough to merit licensure because its corrected scores would still have fallen outside the top 60." (D49, p. 118). Hippos moved for reconsideration after the Commission issued its cultivation decision. Hippos' motion pointed out technological errors related to the upload of some of its hearing exhibits. (D49, p. 120). Hippos requested that the Commission correct references to exhibits in the

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cultivation decision and asked it to reconsider its decision on the merits. (D49, p. 121–125)

The Commission granted Hippos' reconsideration motion and issued an amended decision on March 15, 2022. (D50, p. 166). Despite noting that Hippos' post-hearing brief significantly departed "from its amended complaint in both structure and substance," the Commission nevertheless agreed to amend its "decision to address Hippos' current legal positions as reflected in its brief." (D50, p. 144–45). In reaching its decision, the Commission first noted that it was undisputed that Hippos' applications met the minimum standards for a cultivation facility license as provided by 19 CSR 30-95.025(4)(A). (D50, p. 149). As a result, the Commission noted it had the authority to rescore Hippos' cultivation applications and direct the Department to grant one or two additional licenses if Hippos demonstrated by a preponderance of the evidence that one or both of its denied applications should have scored in the highest 60. (D50, p. 149).

Pursuant to 19 CSR 30-95.025(4)(C)(4), the Commission rescored nine of Hippos' cultivation application questions because those nine responses received different scores for identical answers. (D50, p. 149). Having chosen to rescore those questions, the Commission noted the importance of the Evaluation Criteria Scoring Table. (D50, p. 150). The Commission noted that the scoring table had been incorporated by reference into the Department regulations and therefore had the force and effect of law. (D50, p. 150). Focusing on the structure of the scoring table, the Commission explained that each of the questions challenged in "Category I" of Hippos' brief were scored using the 0-10 point scale. (D50, p. 150). And none of the Department's regulations defined the terms

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within the broad qualitative descriptions of awardable scores. (D50, p. 150–51). As a result, the Commission opined that the scoring determinations hinged on the subjective valuations of the scorers, and reasonable minds may disagree on the appropriate score for a question. (D50, p. 151).

But even though the Commission believed that the Evaluation Scoring Criteria allowed reasonable minds to disagree on the appropriate scores for an applications' answers, it did not believe that this inherent subjectivity permitted inconsistency. (D50, p. 151). Rather, the Commission "look[ed] for evidence reflecting the scorer of that question's subjective valuation." It believed that the "actual scores assigned to identical answers by these scorers represents the most concrete indication of these subjective preferences in the record." (D50, p. 151–52). Indeed, the Commission opined that "[e]xpert testimony and other documentary evidence pale in comparison to the weight these scores carry for identical responses to the same question. Even 'similar' answers scored by the same person cannot approach the same weight of scores for identical answers because even slight differences may affect a person's subjective judgment." (D50, p. 152).

Keeping the importance of the Evaluation Scoring Criteria framework in mind, the Commission evaluated and assessed each of the 9 questions Hippos challenged. When making its assessment, the Commission noted that the scores for each of the nine questions contained a "wobbler" or outlier: *i.e.*, one score that differed from the remaining two scores. The cultivation decision contained the following table which includes the

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challenged questions and the response scores for each of Hippos' three cultivation licenses. (D50, p. 152).

Question	8997/HIPP9706	9072/HIPP9707	9067/HIPP9708
26	4	7	4
27	10	4	4
41	7	0	7
48	4	4	7
49	7	7	10
50	4	7	7
51	10	7	10
52	7	10	10
66	7	7	10

The Commission's assessment included a detailed explanation for its rationale regarding each individual question that it rescored. When analyzing each question, the Commission noted that "Hippos' response contained information that could be reasonably construed as strengths or weaknesses depending on the subjective valuation of the scorer." *(see, e.g.,* D50, p. 152). For some of the questions, the Commission found that Hippos score should be increased to the higher score that Hippos advocated for. For other questions, the Commission determined that Hippos did not meet its burden to show that its response merited the higher score it advocated for. When conducting its scoring reassessment, the Commission ultimately determined that the most frequent

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assessed score was the most credible and appropriate score for the question. (D50, p. 152–58).

After the Commission rescored the 9 questions described above, it addressed Hippos' remaining arguments, which included: challenges to scores for similar answers submitted in non-Hippos' applications; challenges to scores received for questions 3, 27, 30, 41, 44, 50, 51, 52, 59, 66, and 67 based on the testimony of Ms. Picillo and Mr. Paterson; challenges to questions based on a comparison of Hippos' cultivation application answers to other facility types; a challenge to question 19; challenges to the rule making process and the constitutionality of the Department's actions; and "[a]rguments for [r]econsideration." (D50, p. 159–166). Except for rescoring Hippos question 19 for applications 8997 and 9072 which resulted in a 4.00 increase for both applications, the Commission rejected Hippos' remaining challenges and arguments because Hippos did not meet its burden to show that its responses merited the higher score it advocated for.

The Commission ultimately found that Hippos' cultivation application "8997 earned an additional 7.8 points based on inconsistent scores for identical answers on other cultivation applications and 4 points for the incorrectly scored Question 19, for a total of 11.8 points." (D50, p. 156). Similarly, the Commission found that Hippos' cultivation "application 9072 earned an additional 18.8 points based on inconsistent scores for identical answers on other cultivation applications and 4 points for the incorrectly scored Question 19 for a total of 22.8." (D50, p. 156).

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Because the lowest two scores to receive a cultivation license were higher that Hippos' corrected scores, the Commission found that Hippos failed to establish that its corrected scores were high enough to merit licensure. (D50, p. 156). The Commission therefore denied Hippos' cultivation licenses. (D50, p. 156).

Manufacturing Decision

The Commission issued its decision in case no. 20-1634 (manufacturing decision) on March 15, 2022. (D436, p. 73). Like its cultivation decision, the Commission first noted that it was undisputed that Hippos' applications met the minimum standards for a manufacturing license as provided by 19 CSR 30-95.025(4)(A). (D436, p. 63). As a result, the Commission noted it had the authority to rescore Hippos' manufacturing applications and direct the Department to issue up to three licenses if Hippos demonstrated by a preponderance of the evidence that one, two, or three of its denied applications should have scored in the highest 86 applicants. (D436, p. 63). Pursuant to 19 CSR 30-95.025(4)(C)(4), the Commission rescored two of Hippos' manufacturing application questions because those responses received different scores for identical answers. (D436, p. 63).

Having chosen to rescore those questions, the Commission again noted the importance of the Evaluation Criteria Scoring Table. (D436, p. 64). Focusing on the structure of the scoring table, the Commission explained that both of the questions Hippos challenged were scored using the 0-10 point scale. And none of the Department's regulations defined the terms within the broad qualitative descriptions of awardable scores. (D436, p. 65). As a result, the Commission opined that the scoring determinations

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hinged on the subjective valuations of scorers, and reasonable minds may disagree on the appropriate score for a question. (D436, p. 65).

Just as it did in its cultivation decision, the Commission opined that "[e]xpert testimony and other documentary evidence pale in comparison to the weight these scores carry for identical responses to the same question. Even 'similar' answers scored by the same person cannot approach the same weight of scores for identical answers because even slight differences may affect a person's subjective judgment." (D436, p. 65). Thus, the Commission again "look[ed] for evidence reflecting the scorer of that question's subjective valuation." It believed that the "actual scores assigned to identical answers by these scorers represents the most concrete indication of these subjective preferences in the record." (D436, p. 65).

Keeping the importance of the Evaluation Scoring Criteria framework in mind, the Commission assessed both of the questions Hippos challenged. The Commission's assessment included a detailed explanation for its rationale regarding each individual question that it rescored. When analyzing each question, the Commission noted that "Hippos' response contained information that could be reasonably construed as strengths or weaknesses depending on the subjective valuation of the scorer."

Just as in its cultivation decision, the Commission ultimately determined that the most frequent assessed score was the most credible and appropriate score for the question. As a result, the Commission increased Hippos' scores for both question 3 and 34, which resulted in an increased final score for each of Hippos' applications. (D436, p.

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66-67). The rescoring of application 9064 resulted in an increase of .6 points to its final score. (D436, p. 67).

After the Commission rescored the two questions described above, it addressed Hippos' remaining arguments, which included: challenges to scores for similar answers submitted in non-Hippos' applications; challenges to questions based on a comparison of Hippos' manufacturing application answers to other facility types; challenges to questions 64 and 68; challenges to the rule making process and the constitutionality of the Department's actions. The Commission rescored question 68 but rejected the remainder of Hippos' arguments. Ultimately, the Commission found that none of Hippos' rescored manufacturing license applications were high enough to merit licensure because its corrected scores still fell outside the top 86 applications. (D436, p. 69–70). Therefore, the Commission denied all of Hippos' manufacturing license applications. (D436, p. 73).

Dispensary Decision

The Commission issued its decision in case no. 20-1181 (dispensary decision) on March 15, 2022. (D431, p. 58). As with its cultivation and manufacturing decisions, the Commission first noted that it was undisputed that Hippos' applications met the minimum standards for a manufacturing license as provided by 19 CSR 30-95.025(4)(A). (D431, p. 44). As a result, the Commission noted it had the authority to rescore Hippos' dispensary applications and direct the Department to issue one or more dispensary licenses if Hippos demonstrated by a preponderance of the evidence that one or more of its denied applications should have scored within the highest 24 applicants in each

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applicable congressional district (1st, 2nd, and 5th). (D431 p. 45). Pursuant to 19 CSR 30-95.025(4)(C)(4), the Commission rescored seven of Hippos' dispensary application questions because those responses received different scores for identical answers. (D431, p. 46).

Having chosen to rescore those questions, the Commission again noted the importance of the Evaluation Criteria Scoring Table incorporating the same analysis and rationale that it used in its other decisions. (D431, p. 46). Keeping the importance of the Evaluation Scoring Criteria framework in mind just as it did in its other decisions, the Commission assessed each of the seven questions Hippos challenged. The dispensary decision contained the following table which includes the challenged questions and the response scores for each of Hippos' five dispensary license applications. (D431, p. 48).

Question	9093/HIPP9701 9088/HIPP9702	9083/HIP9703 9080/HIPP9704 9076/HIPP9705
31	4	7
35	10	7
36	10	7
39	4	7
43	4	7
44	4	7
52	10	7

The Commission's assessment included a detailed explanation for its rationale regarding each individual question that it rescored. When analyzing each question, the

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Commission once again noted that "Hippos' response contained information that could be reasonably construed as strengths or weaknesses depending on the subjective valuation of the scorer." *See, e.g.*, (D431, p. 48). For some of the questions, the Commission found that Hippos score should be increased to the higher score that Hippos advocated for. For other questions, the Commission determined that Hippos did not meet its burden to show that its response merited the higher score it advocated for. When conducting its scoring reassessment, the Commission ultimately determined that the most frequent assessed score was the most credible and appropriate score for the question. After the Commission rescored the seven questions described above, it addressed Hippos' remaining arguments, which included: challenges to scores for similar answers submitted in non-Hippos' applications; challenges to scores received for questions 26, 41, 43, 44, 51, 52, 55, 56, 57, 58, 59, 60, 66, 67, D4, and D6 based on the testimony of Ms. Picillo and Mr. Paterson; challenges to questions based on a comparison of Hippos' dispensary application answers to other facility types; and challenges to the rule making process and the constitutionality of the Department's actions. Ultimately, the Commission found that none of Hippos' rescored dispensary license applications were high enough to merit licensure because its corrected scores still fell outside the top 24 scores in each Congressional district within which it applied. (D431, p. 57). Therefore, the Commission denied all of Hippos' dispensary license applications. (D431, p. 57).

Hippos petitioned for judicial review of each Commission decision. (D432; D392; D2). The circuit court consolidated the petitions for purposes of judicial review. (D358).

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After the parties briefed and argued the issues raised in Hippos' petitions, the circuit court affirmed, entering judgment for the Department. (D389).

Hippos timely appealed to the Missouri Court of Appeals, Southern District ("Southern District"). (D390). The Southern District issued a signed majority opinion reversing the Commission's decision and remanding the case to the circuit court with instructions to award Hippos licenses for all of its denied applications. *Hippos, LLC v. Missouri Dep't of Health and Senior Serv.*, No. SD38218 (Mo. App. S.D. Mar. 10, 2026). The Department moved for rehearing and transfer to this Court. *Id.* (Mar. 25, 2026). The Southern District denied the Department's motion. *Id.* (Apr. 10, 2026). The Department then moved for transfer in this Court. *Hippos, LLC v. Missouri Dep't of Health and Senior Serv.*, No. SC101617 (Mo. banc Apr. 22, 2026). This Court sustained the Department's motion. *Id.* (June 22, 2026).

This appeal on transfer follows.

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STANDARD OF REVIEW

"Article V, section 18 of the Missouri Constitution articulates the standard of judicial review of administrative actions." *Albanna v. State Bd.. of Registration for Healing Arts*, 293 S.W.3d 423, 428 (Mo. 2009). "On appeal, this Court is charged with determining whether the agency actions 'are authorized by law, and in cases in which a hearing is required by law, whether the same are supported by competent and substantial evidence upon the whole record.'" *Id.* (quoting MO. CONST. art. V, § 18). This Court reviews the Commission's conclusions of law *de novo* but defers to the Commission's findings of fact. *Michael Jaudes Fitness Edge, Inc. v. Dir. of Revenue*, 248 S.W.3d 606, 608 (Mo. banc 2008).

"Moreover, 'all final decisions of the administrative hearing commission shall be subject to judicial review as provided in and subject to the provisions of sections 536.100 to 536.140[.]'" *MO CANN Do, Inc. v. Missouri Dep't of Health & Senior Servs.*, 686 S.W.3d 642, 645 (Mo. banc 2024) (quoting § 621.145, RSMo[3]).

The standard of review for an agency decision in a contested case is set forth in section 536.140. *Stone v. Missouri Dep't of Health & Senior Servs.*, 350 S.W.3d 14, 19 (Mo. banc 2011). Under this standard, an agency's decision will be upheld unless it: "(1) is in violation of constitutional provisions; (2) is in excess of the statutory authority or jurisdiction of the agency; (3) is unsupported by competent and substantial evidence upon the whole record; (4) is, for any other reason, unauthorized

[3] All statutory citations are to the current Revised Statutes of Missouri, unless otherwise indicated.

by law; (5) is made upon unlawful procedure or without a fair trial; (6) is arbitrary, capricious, or unreasonable; or (7) involves an abuse of discretion." § 536.140.2; *see also* MO. CONST. art. V, § 18. "Consistent with the constitutional standard, section 536.140.2 provides for appellate review of the administrative ruling, not that of the circuit court[.]" *Lagud v. Kan. City Bd. of Police Comm'rs*, 136 S.W.3d 786, 791 (Mo. banc 2004); *see also Stone*, 350 S.W.3d at 19 (citing section 536.140.2) ("[a]n appellate court reviews the decision of the agency rather than the decision of the circuit court.").

The Commission, as the finder of fact, "is free to believe all, part, or none of the testimony of any witness." *Dorman v. State Bd. of Registration for Healing Arts*, 62 S.W.3d 446, 455 (Mo. App. W.D. 2001). "This court must defer to the Commission's choice, as it is not permitted to substitute its judgment on the credibility of witnesses, or on factual matters for that of the Commission." *Id.* (internal citations omitted). Indeed, Missouri appellate courts have made clear that "even if the evidence before the Commission 'warrants either of two opposed findings,' [the reviewing court] is bound by the Commission's findings." *Id.* (citing *Larocca v. State Bd. of Registration for Healing Arts*, 897 S.W.2d 37, 45 (Mo. App. E.D. 1995)). *See also*, *Lagud v. Kansas City Bd. of Police Com'rs*, 136 S.W.3d 786, 791 n5 (Mo. banc 2004) ("This does not mean that this Court will redetermine the issues on appeal. It merely means that, as the constitution requires, this Court will look at the entire record, not just those parts of it supporting the ruling, to determine whether it is supported by competent and substantial evidence upon the whole record. If so, the ruling will be affirmed, even though the evidence would also have supported a contrary determination.")

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ARGUMENT

I. Competent and substantial evidence supports the Commission's rescoring of the cultivation applications. (Responding to Points I and IV).

Contrary to the assertions made in Hippos first and fourth points relied on (App. Br., p. 48–56; 65–69), the Commission's cultivation decision is supported by competent and substantial evidence. Hippos' argument is meritless for three reasons: (1) the Department contradicted Hippos' expert testimony through cross-examination; (2) the Commission did not disregard Hippos' expert testimony; and (3) the Commission considered evidence of the subjective preferences of the scorers.

A. The Department contradicted the expert testimony of Ashley Picillo and Joe Patterson through cross-examination.

Ms. Picillo and Mr. Patterson's own testimony under cross-examination demonstrated contradictions and impeached testimony through their own admissions.

"In reviewing the [C]ommission's decision, the Court may not determine the weight of the evidence or substitute its discretion for that of the administrative body." *Psychare Mgmt., Inc. v. Dep't of Soc. Servs. Div. of Med. Servs.*, 980 S.W.2d 311, 312 (Mo. banc 1998). This includes witness testimony and other factual matters. *Dorman*, 62 S.W.3d at 455. "Cross-examination of a witness on the stand for the purpose of impeaching that witness . . . has been permitted in Missouri." *Mitchell v. Kardesch*, 313 S.W.3d 667, 676 (Mo. banc 2010). To be sure, impeaching a witness through cross-examination can show "the bias or interest of the witness because a witness's bias or interest could affect the reliability of the witness's testimony on any issue." *Id.*

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The Department challenged and contradicted the testimony of Ms. Picillo and Mr. Patterson through cross-examination. More specifically, the Department's cross-examination of Ms. Picillo spanned sixty-six (66) pages of the Commission transcript. (D56, p. 4–62; 70–78). And the Department's cross-examination of Mr. Patterson spanned thirty-four (34) pages of the Commission transcript. (D54, p. 114–146; 155–156).

Mr. Patterson and Ms. Picillo both agreed on cross-examination that they applied different methodology and criteria than the criteria used by the Wise Health graders in 2019 to obtain new Hippos scores. (D54, p. 121; D56, p. 27–28). This subsequent methodology did not follow the same process developed by the Department and Wise Health. (D54, pp. 120–22; D56, p. 4).

Hippos' expert witnesses reviewed only a nominal fraction of the more than 168,000 total application answers scored by Wise Health. (D52, p. 71; D55, p. 32). For example, on cross-examination, when Mr. Patterson compared Hippos' applications to non-Hippos applications, he used only three non-Hippos applications for comparison. (D54, p. 118). These third-party applications were written by Mr. Patterson and his team. (D54, p. 118). Thus, not only was his review volume minuscule, but Mr. Patterson also compared these applications to the third-party applications he himself drafted. Similarly, Ms. Picillo admitted on cross-examination that she did not compare more than five applications to Hippos. (D56, p. 37). And the applications she compared to Hippos' were applications that she had written.

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Despite these subsequent acknowledgments on cross-examination, however, Hippos' witnesses suggested new scores based on criteria made just for Hippos. For example, Mr. Patterson developed his subjective definitions for the terms used in the Evaluation Scoring Table only after he was hired to give opinions for Hippos. He did not know the graders' expertise, training, or background, and agreed terms like "minimum expectations" and "significant weaknesses" were not defined. (D54, pp. 118–146.) Ms. Picillo also applied a different standard than Wise Health. (D55, pp. 47–153; D56, pp. 4–31). She agreed that her scoring criteria was different than some of the scoring criteria used by Wise Health. (D56, p. 27).

The Hippos witnesses also testified to different applications receiving different scores. They suggested Hippos should receive a higher score because the highest score awarded was the correct score and the lowest score was the incorrect score. This is a faulty premise because "their determinations regarding what constitutes 'minimum expectations,' 'material weaknesses,' and other subjective considerations represent *only their individual opinions*; they do not *disprove the validity of the original scorers' determinations* who evaluated *all* responses to a single question within a specific facility type." (D50, p. 160) (emphasis added).

Contrary to Hippos' contention, the record does not show that Mr. Patterson and Ms. Picillo's testimony was uncontradicted and unimpeached. Rather, the overwhelming weight of the evidence shows that their testimony lacked credibility and failed to persuade the Commission. To be sure, after noting the significance of the scoring framework, the Commission opined that the "[e]xpert testimony and other

documentary evidence pale in comparison to the weight these scores carry for identical responses to the same question." (D50, p. 152). Additionally, the Commission concluded that the responses Ms. Picillo reviewed from other applications "differed *substantially* from Hippos' responses." (D50, p. 160) (emphasis added). While the Commission did not make an express credibility finding, the only inference to be drawn from the Commission's decision is that it did not find the expert witness testimony offered by Hippos persuasive. That was the Commission's choice to make, and it is worth repeating that a reviewing court "may not determine the weight of the evidence or substitute its discretion for that of the administrative body." *Psychare Mgmt.*, 980 S.W.2d at 312. This includes witness testimony and other factual matters. *Dorman*, 62 S.W.3d at 455.

Finally, the Department notes that the passage of Article XIV placed the Department in a unique situation where medical marijuana licenses were awarded based on a competitive writing system. In that system, each potential licensee competed against all other potential licensees for a limited number of licenses for each facility type. The Department created an unbiased grading system with blind grading. After that blind grading system closed, Hippos appealed and hired experts who unsurprisingly determined that all of their disputed scores should go up. If all it takes to receive a higher score is to appeal to the Commission and hire experts to advocate for a higher score, then the whole grading system becomes meaningless. Instead of a competitive scoring system, the system becomes one where the applicants with the deepest pockets ultimately succeed. The Commission presumably was aware

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of this and decided not to give significant weight to Hippos' hired advocates. That choice, again, was the Commission's to make, and courts cannot substitute their own discretion for that of the finder of fact. *Psychare Mgmt.*, 980 S.W.2d at 312; *Dorman*, 62 S.W.3d at 455.

The Department challenged and contradicted the expert testimony of Hippos through cross-examination. Likewise, the Department's own evidence contradicted the expert testimony because the Department introduced its own evidence demonstrating the graders' scores, *i.e.*, scoring sheets, rubrics, etc. (*See, e.g.,* D233; D261; D299). Hippos' assertion that its expert witness testimony was uncontradicted and unimpeached carries no weight and is directly contradicted by the administrative record.

B. The Commission did not disregard Hippos' expert testimony.

Hippos' reliance on this Court's decision in *State ex rel. Kahler v. State Tax Comm'n*, 393 S.W.2d 460 (Mo. Div. 1 1965) is a red herring. *Kahler* concluded that an administrative agency may not disregard testimony absent a lack of credibility finding. *Id.* at 465. Likewise, the agency may not "arbitrarily disregard the substantial and undisputed testimony [of witnesses] who were not impeached or shown by the record to have been disbelieved." *Id.* But the expert testimony of Ms. Picillo and Mr. Patterson was disputed and impeached. This fact alone makes *Kahler* inapplicable.

Nor did the Commission disregard the expert testimony of Ms. Picillo and Mr. Patterson. Rather, the Commission concluded that "[t]he actual scores assigned to

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identical answers by [the Wise Health scorers] represents the *most concrete indication* of [the] subjective preferences in the record." (D50, p. 151–152). By contrast, "[e]xpert testimony and other documentary evidence pale in comparison to the weight [the Wise Health scorers] carry for identical responses to the same question. Even 'similar' answers scored by the same person cannot approach the same weight of scores for identical answers because even slight differences may affect a person's subjective judgment." (D50, p. 152).

As to the testimony of Ms. Picillo and Mr. Patterson specifically, Hippos claims that the Commission's reasonable minds may differ standard is logical only if the scoring determinations are consistent. App. Br., p. 58. But Hippos disregards the *very next line* of the cultivation decision: "[a]lthough Picillo and Patterson possess expertise related to their respective fields, their determinations regarding what constitutes 'minimum expectations,' 'material weaknesses,' and other subjective considerations represent *only their individual opinions*; they do not *disprove the validity of the original scorers' determinations* who evaluated *all* responses to a single question within a specific facility type." (D50, p. 160) (emphasis added). Additionally, the Commission concluded that the responses Ms. Picillo reviewed from other applications "differed *substantially* from Hippos' responses." (D50, p. 160) (emphasis added). Nothing in *Kahler* requires the Commission to give dispositive weight to testimony that the Commission did not make an express lack of credibility finding. Rather, *Kahler* merely concludes the testimony may not be disregarded. 393 S.W.2d

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at 465. The Commission's decision shows that it did not disregard the Hippos' expert testimony.

Hippos essentially argues that the Commission did not give the expert testimony the weight that Hippos desired. But Hippos, as the petitioner challenging the denial of its medical marijuana license applications, carried the burden of production and burden of persuasion in its contested case before the Commission. *See* § 621.120. This Court has explained this principle well:

> The burden of persuasion means [Petitioner] had to convince the fact-finder to view the facts in a way that favors [it]. [Petitioner] did not carry its burden simply by the fact that it offered evidence to support its position and the director offered no evidence. The Commission may disregard evidence which in its judgment is not credible, even though there is no countervailing evidence to dispute or contradict it. The rule is established in this State that the triers of fact under their duty to weigh the evidence may disbelieve evidence although it is uncontradicted and unimpeached. The director needed only to contest [Petitioner's] evidence, which may be done through cross-examination or pointing out internal inconsistencies or credibility issues. Because the director contested [Petitioner]'s evidence, this Court defers to the Commission's determinations about persuasiveness of the evidence.

Krispy Kreme Doughnut Corp. v. Dir. of Revenue, 488 S.W.3d 62, 67–68 (Mo. banc 2016); *see also Annayeva v. SAB of TSD of City of St. Louis*, 597 S.W.3d 196, 200 n.8 (Mo. banc 2020) (noting "Annayeva failed to meet her burden of persuasion. In its findings, the Commission analyzed why it was not persuaded by Annayeva's description of the floor.").

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Hippos disregards this fundamental principle of Missouri administrative law. Instead, Hippos asks this Court to reweigh the evidence in its favor and to effectively shift the burden to the Department by claiming the Department did not contradict or impeach its expert testimony. As noted in great detail above, the Department contradicted and impeached Hippos' experts through cross-examination. To the extent it could be argued that the Department's cross-examination of Hippos' expert witnesses was somehow insufficient to contradict or impeach Hippos' experts, the Department's cross-examination was sufficient to contest Hippos' evidence which is what this Court's jurisprudence requires. *Krispy Kreme*, 488 S.W.3d at 67-68 ("The director needed only to contest [Petitioner's] evidence, which may be done through cross-examination or pointing out internal inconsistencies or credibility issues.") And because the Department did not have the burden of proof, this Court's jurisprudence did not require the Department to offer rebuttal to Hippos' expert testimony. *Id.*; *Annayeva*, 597 S.W.3d at 200 n.8.

The Commission's well-reasoned decisions acknowledge the expert witness evidence and other evidence offered by Hippos, but ultimately found that Hippos did not meet its burden. (D50, p. 151–152; 160). In other words, just as in *Annayeva*, the Commission analyzed why it was not persuaded by Hippos' testimony that advocated for an increase its disputed application questions. The Commission concluded that even though Hippos' experts possessed expertise related to their respective fields, their individual opinions did not disprove the validity of the original scorers' determinations who evaluated all responses to a single question within a specific

facility type. (D50, p. 160). Additionally, the Commission concluded that the responses Ms. Picillo reviewed from other applications "differed *substantially* from Hippos' responses." (D50, p. 160) (emphasis added). The Commission was the factfinder to make that choice, and it is not for Hippos or the courts on appellate judicial review to re-weigh the evidence as they see fit. *Psychare Mgmt.*, 980 S.W.2d at 312 ("[i]n reviewing the [Commission]'s decision, the Court may not determine the weight of the evidence or substitute its discretion for that of the administrative body."); *see also Healey v. State*, 732 S.W.3d 827, 849 (Mo. banc 2026) (declining to conclude that the circuit court disregarded certain evidence because the circuit court "just did not give this evidence the weight Appellants desire.").

Indeed, Hippos cites the standard for substantial evidence six times in its substitute brief: "Substantial evidence is competent evidence that, if belief, has probative force upon the issues." *See* App. Br., pp. 38, 49, 55, 57, 60, and 72. Hippos, however, downplays the key phrase of the substantial evidence standard, which is the phrase *if believed*. The Department acknowledges that Hippos provided evidence to support its contention that its applications should have received higher scores. The Commission simply *did not believe* it, which it has the authority to do.

Therefore, because the Commission did not disregard the expert testimony presented by Hippos, this Court should deny Hippos' first point relied on.

C. The Commission considered evidence of the subjective preferences of the scorers.

Hippos, as the Petitioner challenging the denial of its medical marijuana license applications, carried the burden of production and burden of persuasion in its

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contested case before the Commission. *See* § 621.120. This means Hippos "had to convince the fact-finder to view the facts in a way that favors [it]." *Krispy Kreme*, 488 S.W.3d at 67–68. Nonetheless, the Department introduced its own evidence demonstrating the graders' scores, *i.e.*, scoring sheets, rubrics, etc. (*See, e.g.,* D233; D261; D299).

Moreover, the decision of the Commission, not the Department, is what this Court reviews. The Missouri Administrative Procedure Act provides for judicial review of only *final* decisions in a contested case. *See* § 536.100. "[I]n a contested case the private litigant must try his or her case before the agency, and judicial review is on the record of that administrative trial[.]"*City of Valley Park v. Armstrong*, 273 S.W.2d 504, 507 (Mo. banc 2009). After the Department denied Hippos' applications, Hippos exercised its administrative remedy to appeal to the Commission. MO. CONST. art. XIV, § 1.3(23). Hippos did not try its case to the Department before the Department's initial denial nor before the Department executed the scoring plan with Wise Health. Thus, Hippos' significant focus on Department procedures outside the Commission's final decision distracts from the main issues on appeal: whether the Commission's decisions are supported by competent evidence and whether those decisions are arbitrary and capricious.[4]

[4] The Commission decision briefly discusses the constitutional and rulemaking authority challenges Hippos made to the Department's denial of its cultivation applications. (D50, p. 163). But Hippos did not raise those issues anywhere in its substitute brief. "Issues not raised in the point relied on, as well as those that are unsupported by argument, are deemed abandoned." *Jones v. Jones*, 296 S.W.3d 526, 528 n.1 (Mo. Ap. W.D. 2009).

Turning to the merits of Hippos' fourth point relied on, the record is replete with evidence of the scorers' subjective preferences. A grader determined whether a response was unsatisfactory, satisfactory, superior, or distinctive by using the criteria from each category, as well as their own expertise and discretion. Both parties recognized that the scoring criteria table is "applied to each individual question [and] rests heavily on the grader's expertise..." (D56, p. 10). As such, two graders could apply different subjective criteria to those parameters. (D53, p. 46). To maintain consistency and fairness across all applicants, Wise Health assigned the same individual grader to specific questions. (D51, p. 72; D266–D268). All scores awarded to Hippos were given by the same Wise Health grader contemporaneously with other cultivation applications during the 2019 process and accepted by the Department. And to implement an impartial scoring process, the Department and Wise Health executed an anonymous scoring process by which all applications, including Hippos' applications, were scored blindly. (D51, pp. 71–74).

Focusing on the structure of the scoring table, the Commission explained that each of the inconsistently scored questions that Hippos challenged in its cultivation license denial appeals were scored using the 0-10 point scale. (D50, p. 151). Because none of the Department's regulations defined the terms within the broad qualitative descriptions of awardable scores, the Commission opined that the scoring determinations hinged on the subjective valuations of scorers, and reasonable minds may disagree on the appropriate score for a question. (D50, p. 151). But even though the Commission believed that the Evaluation Scoring Criteria allows reasonable

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minds to disagree on the appropriate scores for application answers, it did not believe that this inherent subjectivity permitted inconsistency. (D50, p. 151).

Rather, the Commission "look[ed] for evidence reflecting the scorer of that question's subjective valuation." (D50, p. 151). It believed that the "actual scores assigned to identical answers by these scorers represents the most concrete indication of these subjective preferences in the record." (D50, p. 151–152). Indeed, the Commission opined that "[e]xpert testimony and other documentary evidence pale in comparison to the weight these scores carry for identical responses to the same question. Even 'similar' answers scored by the same person cannot approach the same weight of scores for identical answers because even slight differences may affect a person's subjective judgment." (D50, p. 152).

Keeping the importance of the Evaluation Scoring Criteria framework in mind, the Commission properly rescored questions for which Hippos received inconsistent scores, and ultimately found that Hippos failed to establish that its corrected final scores were high enough to merit licensure. As explored above and in even greater detail in the Commission's 68-page amended decision, the Commission adequately explained its rationale behind its rescoring of Hippos' cultivation applications. The Commission pointed to the evidence, or lack thereof, of each disputed question and then assessed a score looking "for evidence reflecting the scorer of that question's subjective valuation." (D50, p. 151).

When analyzing each question, the Commission noted that "Hippos' response contained information that could be reasonably construed as strengths or weaknesses

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depending on the subjective valuation of the scorer." (D50, p. 152). For some of the questions, the Commission found that Hippos score should be increased to the higher score that Hippos advocated for. For other questions, the Commission determined that Hippos did not meet its burden to show that its response merited the higher score it advocated for. When conducting its scoring reassessment, the Commission ultimately determined that the most frequent assessed score was the most credible and appropriate score for the question. (D50, pp. 152–58). That was the Commission's choice to make, and this Court may not substitute its discretion for that of the Commission. *Psychare Mgmt.*, 980 S.W.2d at 312. This is especially true here because the Commission concluded that Hippos failed to meet its burden, and Hippos improperly attempts to shift the burden to the Department on appeal. *Krispy Kreme*, 488 S.W.3d at 67–68.

The Commission's decision to rely on the most frequent score as the most credible and appropriate score for the challenged questions makes sense. Hippos spends a significant portion of its argument focusing on the importance of consistency in the application scoring process and the fact that some of its application questions received inconsistent scores. Accepting Hippos' assertions about the importance of

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consistency, the most frequent assesses score is substantial evidence of the scorers' effort to score each application consistently.[5]

Therefore, because Commission considered evidence of the subjective preferences of the scorers, this Court should deny Hippos' fourth point relied on.

II. Competent and substantial evidence supports the Commission's scoring of Hippos' dispensary license application denials (Responding to Point II).

In its second point relied on, Hippos raises the same challenge to the dispensary decision that it did for the cultivation decision. App. Br., p. 56–61. But as detailed in Section I-A above, Ms. Picillo and Mr. Patter's testimony was not uncontradicted or unimpeached, and the Commission properly found that Ms. Picillo and Mr. Patterson's testimony should be given less weight than the actual scores assigned by the Wise Health scorers. Indeed, the Department contradicted Hippos' expert witness testimony and impeached them.

Review of the record shows that the Department challenged Ms. Picillo and Mr. Patterson's credibility through cross-examination during the administrative hearing. Based on that cross-examination, the Commission was able to judge those witnesses' credibility and weigh the value of their opinions. In contrast to Wise

[5] Although not binding on this Court, the Department notes that the Commission's rationale has been supported by expert analysis in subsequent administrative actions. Since Hippos, the Department has used an expert in classical measurement theory who agrees with the Commission's conclusions in Hippos. *See e.g.*, *13013 State Line KC, LLC v. Department of Health & Senior Services*, AHC No. 20-1007, p. 23 decided May 12, 2023 (Expert Wes Bonifay for the Department, applying "a neutral analysis based on psychological measurement theory to ascribe significance to inconsistencies in scores for identical answers from the same scorer" agreed with the Commission's analysis of using most common answer.

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Health, Hippos' expert witnesses reviewed only a nominal fraction of the more than 168,000 total application answers scored by Wise Health. The Hippos witnesses also testified to different applications receiving different scores. They suggested Hippos, the party paying them for their testimony at hearing, should receive a higher score based on the incorrect premise that the highest score awarded is the correct score and the lowest score is the incorrect score. This evidence of bias along with the other examples outlined above, supports the inference that the Commission did not find the expert witness testimony offered by Hippos persuasive or deserving of as much weight as the actual scores assigned by the Wise Health scorers. That was the Commission's choice to make and this Court "may not determine the weight of the evidence or substitute its discretion for that of the administrative body." *Psychare Mgmt.*, 980 S.W.2d at 312. This includes witness testimony and other factual matters. *Dorman*, 62 S.W.3d at 455.

Because the Commission did not disregard the expert testimony presented by Hippos but instead determined that it was not persuaded by it, this Court should deny Hippos' second point relied on.

III. The Commission's rescoring of Hippos' cultivation applications was not arbitrary or capricious. (Responding to Point III).

In its third point relied on, Hippos argues that the Commission's cultivation decision was arbitrary and capricious on its face because it violates the prohibition on arbitrary and capricious actions by an administrative agency. App. Br., p. 62–65. Hippos' third point is meritless for two reasons: (1) the Commission's rescoring

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methodology was logical and reasonable; and (2) the Commission's authority is limited to denials of facility applications for licensure.

A. The Commission's scoring methodology was logical and reasonable.

This Court has articulated the standard for determining whether an agency decision is arbitrary or capricious:

> An administrative agency acts unreasonably and arbitrarily if its decision is not based on substantial evidence. Whether an action is arbitrary focuses on whether an agency had a rational basis for its decision. Capriciousness concerns whether the agency's action was whimsical, impulsive, or unpredictable. To meet basic standards of due process and to avoid being arbitrary, unreasonable, or capricious, an agency's decision must be made using some kind of objective data rather than mere surmise, guesswork, or "gut feeling." An agency must not act in a totally subjective manner without any guidelines or criteria.

Bd. of Educ. of City of St. Louis v. Missouri State Bd. of Educ., 271 S.W.3d 1, 11 (Mo. banc 2008) (quoting *Missouri Nat. Educ. Ass'n v. Missouri State Bd. of Educ.*, 34 S.W.3d 266, 281 (Mo. App. W.D. 2000).

No part of the Commission's decisions satisfies that standard. As analyzed in Part I above, the Commission meticulously addressed Hippos' arguments for both of its denied cultivation license applications and rescored application questions with inconsistent scores. The Commission's decision was 68 pages long, and the Commission considered all testimony and evidence presented. The Commission made 77 factual findings, and its conclusions of law analyzed the evidence, applicable constitutional provisions, case law, and regulations.

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Moreover, the Commission's rescoring methodology was logical and reasonable. The evidence regarding the Evaluation Scoring Criteria was probative upon the issue of rescoring Hippos' medical marijuana cultivation license applications. The people of Missouri, through adoption of Article XIV of the Missouri Constitution, entrusted the Commission with resolving medical marijuana facility licensing appeals. As the finder of fact, the Commission had the authority to reject Hippos' rescoring evidence and rely on the Evaluation Criteria Scoring framework. While the Commission could have reached a different result if it chose to believe the evidence submitted by Hippos, its choice to rely on the framework of the Evaluation Scoring Criteria and the actual scores assigned to identical answers by the scorers meets the competent and substantial evidence requirement. Nothing about how the Commission addressed Hippos' cultivation license denials was arbitrary or capricious. *Bd. of Educ. of City of St. Louis*, 271 S.W.3d at 11.

The Commission's decision was logical and reasonable and this Court should deny Hippos' third point relied on.

B. The Commission's authority is limited to denials of facility applications for licensure.

Because Hippos received a license for application 9067, the Commission had no authority to take any action regarding that application. Indeed, the "Commission is purely a creature of statute which has no more and no less authority than that granted it." *Gan v. Schrock*, 640 S.W.3d 451, 460 (Mo. App. W.D. 2022) (internal citation and quotations omitted). Relevant here, Article XIV, § 1.3(23) limits the Commission's authority to hear medical marijuana facility application appeals

involving "[t]he denial of a license." Thus, the Commission's decision not to simply opine that Hippos must receive cultivation facility licenses for its denied applications simply because Hippos had been granted a facility license for another application followed the Missouri Constitution; it was not arbitrary or capricious. Hippos may not use a granted license to artificially manufacture disparate treatment for a denied license.

Hippos' characterization of the Commission's analysis of the *Wolfner* case does not tell the full story. Hippos relies on *Wolfner* for the proposition that an agency cannot "pick and choose between similarly situated applicants of whom they will or will not require strict compliance[.]" *Wolfner v. Bd. of Adjustment of City of Frontenac*, 672 S.W.2d 147, 151 (Mo. App. E.D. 1984). True, the Commission distinguished *Wolfner*, in part, because there was no granting of a variance for Hippos' successful cultivation application. (D50, p. 165). But once again, Hippos ignores a critical part of the Commission's decision that immediately followed. Specifically, the Commission also distinguished the facts of Hippos' case to the facts of *Wolfner*:

> The record reflects that the Department mistakenly assigned different scores to identical answers for applicants of the same facility type. *There is no evidence the Department has consciously chosen to exercise its discretion to rescore some of Hippos' application questions and not others*. This mistake is simply an error that we consider on appeal, and we must work within our standards of review to ascertain whether the denied applicants qualify for licensure. (Emphasis added).

(D50, p. 165). The Commission applied *Wolfner* to the facts of the cultivation decision and found those facts distinguishable from *Wolfner*. Indeed, the Commission

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concluded that the Department did not consciously pick and choose to arbitrarily rescore some of Hippos applications and not others, which was the precise issue in *Wolfner*. 672 S.W.2d at 151. Likewise, the Commission had authority to rescore questions. *See* 19 CSR 30-95.025(4)(C)4. And the Commission gave concrete reasons for choosing to rescore some questions and not others. For example, the Commission chose to rescore some questions because Hippos demonstrated inconsistencies in some of the scores. (D50, p. 150). Contrastingly, the Commission chose not to rescore other questions because the testimony of Mr. Sean Maddock, Ms. Picillo, and Mr. Patterson was not sufficient to justify rescoring the questions pertaining to the testimony of those witnesses. (D50, p. 159–61). In sum, the Commission did not arbitrarily pick and choose which questions or which applications to rescore. Rather, the Commission rescored questions where Hippos had met its burden, *i.e.*, where sufficient evidence justified rescoring. This is consistent with the burden of proof and persuasion in a licensure denial appeal. *See* § 621.120.

Finally, Hippos contends that:

> "[t]he Commission's role in this appeal was not to discern whether Hippos met the qualifications for a license. As noted in the Amended Decision, and evidenced by the fact that Hippos was awarded one license for a facility in Vienna, Missouri, Hippos met the qualifications for a license. The role of the Commission with respect to this particular issue, was to determine if the Department's actions were arbitrary and capricious."

App. Br. p. 65.

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But the first finding the Commission must make to award a license is that the applicant is qualified for a license. § 621.120 ("[*i*]*f at the hearing the applicant shall show that under the law he is entitled to examination for licensure or licensure or renewal*, the administrative hearing commission shall issue an appropriate order to accomplish such examination or licensure or renewal, as the case may be.") (Emphasis added). And applications 8997 and 9072 were not qualified for a license because the ranked scores of applications 8997 and 9072 were not in the Top 60 cultivation applications. (D50, p. 9–10, ¶¶ 20–22). An applicant had to meet all minimum standards for licensure and have a numerical score ranking in the top 60 cultivation applications. (D50, p. 102). The Commission properly exercised its role under Missouri law.

Because there was a rational basis for the Commission's rescoring and because the Commission properly exercised its role, Hippos' third point relied on must fail.

IV. Competent and substantial evidence supports the Commission's scoring decision for Question 64 in Hippos' manufacturing facility license application denials (Response to Point V).

In its fifth point relied on, Hippos argues that the Commission's manufacturing decision was not supported by competent and substantial evidence because the assigned scorer for Question 64 lacked appropriate background and expertise to score the answer. App. Br., p. 70–73. Hippos' argument is lacks merit because competent and substantial evidence shows Ms. Szopinski possessed the necessary background and expertise to score this question.

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Hippos' argument is built on the faulty logic that simply because Mr. Cohen was qualified to score Question 64 of its cultivation and dispensary applications, Ms. Szopinski was not qualified to do so for its manufacturing applications. Not so. The record shows that Ms. Szopinski also scored Questions 2, 27, and 28 for dispensary and Question 41 for manufacturing. (D267; D268). Yet Hippos does not criticize her scoring of those questions. That is because she awarded scores of ten for each of them. (D241; D242).

Further, the record shows that Ms. Szopinski is a qualified educator with extensive experience in teaching and counseling. (D271). She has a keen interest in research, aptitude to work effectively, an ability to excel in a demanding outcome-oriented work environment, and ability to take difficult concepts and present them in a simplistic manor. (D271). Those are exactly the skills required to analyze a response describing relevant experiences. Ms. Szopinski has taught in a large range of classroom topics on a highly regulated and sophisticated industry, demonstrating her ability to not only comprehend complex or highly regulated information but to teach others about it. (D271). An example includes her experience teaching an epidemiological research class where students learned to develop a research plan, collect, analyze, and interpret data and apply findings. (D217). Additionally, she grades tests and homework as a normal and consistent part of her work. (D271). Ms. Szopinski's high level of experience and skills are certainly transferable to the grading of Missouri medical marijuana application responses, particularly responses describing relevant experiences in a regulated industry. Competent and substantial

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evidence supports a finding that Ms. Szopinski possessed the requisite expertise to score Question 64.

What is more, Hippos improperly asked the Commission to compare scores across facility types, which is not permitted by the applicable rules or the Missouri Constitution. As noted by the Commission:

> 19 CSR 30-95.025(4)(C)4 does not authorize rescoring of inconsistently scored answers across facility applications of different types. In addition, 19 CSR 30-95.025(4)(C) sets forth the procedure the Department shall employ when numerical scoring is applicable. This refers to a circumstance where the number of applicants for a particular facility type exceeds the number of licenses allotted, as Article XIV, calls for separate caps for each facility type. Mo. Const. art. XIV § 1.3(15)-(17). Correspondingly, the Department's regulations make clear that '[e]ach type of facility or certification application will be scored and ranked against the other applications of the same type.' 19 CSR 30-95.025(4)(C)2.A.

(D436, p. 70). Hippos takes the same approach on appeal and asks this Court to do what 19 CSR 30-95.025(4)(C)4 expressly prohibits: rescore inconsistently scored Hippos' facility applications of different types. Any reliance on scores Hippos received for applications submitted for other facility types carries no weight.

Therefore, because competent and substantial evidence supports a finding that Ms. Szopinski possessed the requisite expertise to score Question 64 and because Hippos improperly asked this Court to compare scores across facility types, this Court should deny Hippos' fifth point relied on.

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V. Awarding Hippos six (6) manufacturing licenses violates the Missouri Constitution. (Responding to Point V).

In its fifth point relied on, Hippos asks this Court to award it six (6) manufacturing licenses App. Br., p. 73. The Missouri Constitution expressly prohibits the remedy Hippos seeks.

In addition to limiting the number of total licenses allowed in Missouri, Article XIV places strict limits on the number of licenses that can be held by entities under substantially common control, ownership, or management. As it related to manufacturing facilities specifically, "[n]o more than three medical marijuana infused products manufacturing facility licenses shall be issued to any entity under substantially common control, ownership, or management. MO. CONST. art. XIV, § 1.3(10) (2018)[6]. Here, Hippos seeks an award of six (6) manufacturing licenses. Such a request violates the Missouri Constitution, and this Court should summarily reject this request.

Hippos has previously argued, and the Department expects it to argue again, that the Department somehow waived this argument. Hippos' argument misses the mark. Constitutional issues "must be raised in the trial court at the earliest opportunity, consistent with good pleading and orderly procedure." *Carpenter v. Countrywide Home Loans, Inc.*, 250 S.W.3d 697, 701 (Mo. banc 2008) (citing *Call v. Heard,* 925 S.W.2d 840, 847 (Mo. banc 1996)). Because the Commission and the

[6] The people of Missouri amended Article XIV as a result of the general election on November 8, 2022. The events of this appeal predate the adoption of this amendment, and the constitutional license caps in the 2018 version of Article XIV control here.

circuit court affirmed the denial of Hippos' manufacturing applications, the Department had no other opportunity to raise the constitutional cap preventing Hippos from obtaining more than three manufacture facility licenses. In other words, no constitutional issue existed because Hippos had not been awarded any manufacturing licenses. Thus, the Department has not waived this argument. And even if this Court decides to award Hippos' manufacturing licenses (it should not), Hippos cannot receive more than three manufacturing licenses. *See* MO. CONST. art. XIV, § 1.3(10).

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CONCLUSION

In every licensure denial appeal it filed, Hippos had the burden to show it was qualified for a license. § 621.120; *Krispy Kreme*, 488 S.W.3d at 67–68. This Court must not re-weigh the evidence or substitute its discretion for that of the Commission. § 536.140.5; *Psychare Mgmt.*, 980 S.W.2d at 312. This includes deference to the Commission's findings pertaining to witness testimony and other factual matters. *Dorman*, 62 S.W.3d at 455. All five of Hippos' points on appeal ask this Court to set aside these bedrock principles of Missouri administrative law and give Hippos' evidence the weight Hippos believes it deserved. In each decision, the Commission handed down carefully reasoned decisions that are supported by competent and substantial evidence and are not arbitrary or capricious. Accordingly, this Court should affirm.

Respectfully Submitted,

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CERTIFICATION OF COMPLIANCE

I hereby certify that this brief contains 11,783 words, complies with Missouri Supreme Court Rule 84.06(b), includes the information required by Rule 55.03, and includes information on how the brief was served on the opposing party.

/s/ David L. McCain, Jr.
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document was filed and served electronically on all counsel of record via the Court's e-filing system on August 31, 2026.

/s/ David L. McCain, Jr.
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