

## **Written Testimony in Opposition to Senate Bill 399**

### **Cannabis - Advertising - Prohibited Locations *Before the Finance Committee: March 7th, 2024***

Maryland currently restricts outdoor cannabis advertising by prohibiting advertisements on the side of buildings or other publicly visible locations. However, advertisements are permitted on the property of a cannabis business. Senate Bill 399 repeals these restrictions and replaces them with a 500-foot advertising exclusionary zone around substance use treatment facilities, schools, child-care facilities, playgrounds, libraries, and public parks. This change in policy would unnecessarily place Maryland's children at risk. Research shows that children frequently exposed to cannabis billboards are seven times more likely to use cannabis and nearly six times as likely to have symptoms of cannabis use disorder.<sup>1</sup> The system proposed by Senate Bill 399 does little to prevent children from being exposed to cannabis advertising. First, the 500-foot exclusionary zone provides little protection given the inherently transient nature of children. It is difficult to believe students would not be regularly exposed to a cannabis billboard 500 feet from their middle school. Second, the list of protected locations is underinclusive and leaves out many locations frequented by young people. The children of Maryland are best served by maintaining the current advertising restrictions.

### **Restrictions on Commercial Speech**

The testimony submitted by the Public Health Law Clinic at the University of Maryland Carey School of Law provides a thorough discussion of the public health risks that Senate Bill 399 would create. This testimony focuses on the assertions that Maryland's current outdoor cannabis advertising restrictions violate the First Amendment. This is not the case. The First Amendment does not require the harmful change that SB 399 proposes. Maryland's attorney general reached this same conclusion when reviewing the Cannabis Reform Act last year, finding the prohibition constitutional.

Advertising is commercial speech and restrictions on commercial speech are evaluated using the *Central Hudson* analysis created by the United States Supreme Court.<sup>2</sup> This analysis looks at four key elements to determine if the government's restriction is constitutional: (1) does the

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<sup>1</sup> Pamela J. Trangenstein *et al.*, *Cannabis Marketing and Problematic Cannabis Use Among Adolescents*, 82 J. Stud. Alcohol & Drugs 288 (2021).

<sup>2</sup> *Central Hudson Gas & Elec. v. Public Serv. Comm'n*, 447 U.S. 557 (1980).

speech being restricted concern a lawful activity and is not misleading; (2) does the government have a substantial interest to justify the restriction; (3) does the regulation of speech directly advance the government's interest; and (4) is the restriction only as extensive as is necessary to serve the governmental interest. A *Central Hudson* analysis reveals that Maryland's outdoor advertising prohibition is permissible under the First Amendment.

The Central Hudson analysis is not only the framework for analyzing First Amendment commercial speech claims but is applicable to Article 40 of the Maryland Declaration of Rights, which provides state speech protections. This dynamic exists because Maryland courts construe the protections of Article 40 in *pari materia* with the First Amendment, which means they follow federal precedence. Accordingly, a *Central Hudson* analysis reveals that Maryland's outdoor cannabis advertising restrictions are permissible under the First Amendment and Article 40 of Maryland's Declaration of Rights.

### **Cannabis is Illegal Under Federal Law**

The first element of the *Central Hudson* test requires that the commercial speech pertain to a lawful activity to receive First Amendment protections. Cannabis is a Schedule I substance, and it is illegal to produce, distribute, possess, and use cannabis under federal law. Since cannabis is still illegal under federal law, several courts have held that cannabis advertising involves an unlawful activity and does not warrant First Amendment protections. As a result, these courts upheld cannabis advertising restrictions on this element alone.<sup>3</sup> However, even if a court were to deem cannabis sales a lawful activity because of its status under state law, Maryland's outdoor advertising restrictions are still permissible under *Central Hudson*.

### **Maryland has a Substantial Interest in the Health of its Children.**

Under the second element of the *Central Hudson* test, the government must have a substantial interest for restricting commercial speech. Courts have repeatedly held that a state has a substantial interest in protecting the physical, mental, and emotional health of children. More specifically, courts have recognized the government interest in preventing underaged substance use.<sup>4</sup> Unsurprisingly, when evaluating restrictions on cannabis advertising, courts have acknowledged the state's substantial interest in preventing underaged cannabis use.<sup>5</sup> As a

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<sup>3</sup> Mont. Cannabis Indus. Ass'n v. State, 368 P.3d 1131 (Mont. 2016); Cocroft v. Graham, No. 23-cv-00431 (N.D. Miss. Jan. 22, 2024)

<sup>4</sup> See Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 564 (2001) (recognizing the government's interest in preventing underaged substance use); Anheuser-Busch, Inc. v. Schmoke, 101 F.3d 325, 329-30 (4<sup>th</sup> Cir. 1996) (upholding alcohol advertising restrictions based on the substantial government interest of preventing underaged alcohol consumption).

<sup>5</sup> Seattle Events v. State, 512 P.3d 926,935 (Wash. App. 2022) (holding that "the state has asserted a substantial government interest in preventing underage marijuana use and satisfies the second step of the *Central Hudson* test"); Plausible Products, LLC d/b/a Hashtag Cannabis v. Washington State Liquor and Cannabis Board, Case No.19-

result, Maryland has an uncontestable interest in protecting its children from the harms of cannabis advertising.

### **Maryland's Advertising Restrictions Directly Advance the Health of Children**

The third element of the *Central Hudson* test requires that the challenged restriction directly advance the government's interest. This factor requires the state to "demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree."<sup>6</sup> To establish the validity of the risk involved governments can rely on references to studies, anecdotes, history, consensus, and simple common sense.<sup>7</sup> Research shows that exposure to cannabis advertising increases the likelihood that a child will use cannabis and increases positive perceptions of cannabis in children.<sup>8</sup> Research is especially troubling with regards to outdoor cannabis advertising. A study found that children frequently exposed to cannabis billboard advertising were seven times more likely to use cannabis and nearly six times as likely to have symptoms of cannabis use disorder.<sup>9</sup> Cannabis use in children is associated with a plethora of negative outcomes including impaired cognitive development.<sup>10</sup>

With regards to effectiveness of Maryland's outdoor cannabis advertising restrictions, the Supreme Court has already acknowledged that advertising promotes product demand and restrictions on advertising reduce demand.<sup>11</sup> This dynamic combined with the risk created by outdoor advertising proves that Maryland's restrictions materially advance the state's interest in protecting the health of its children.

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2-03293-6 SEA (2019) (holding that the state had a substantial interest in preventing underage cannabis consumption).

<sup>6</sup> *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 555 (2001) (quoting *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 188, 119 S. Ct. 1923, 144 L. Ed. 2d 161 (1999)).

<sup>7</sup> *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 628 (1995).

<sup>8</sup> Elizabeth J. D'Amico et al., *Gateway to Curiosity: Medical Marijuana Ads and Intention to Use During Middle School*, 29 PSYCH. ADD. BEHAV. 613 (2015); Elizabeth J. D'Amico et al., *Planting the Seed for Marijuana Use: Changes in Exposure to Medical Marijuana Advertising and Subsequent Adolescent Marijuana Use, Cognitions, and Consequences Over Seven Years*, 188 DRUG & ALCOHOL DEPEND. 385 (2018).

<sup>9</sup> Pamela J. Trangenstein et al., *Cannabis Marketing and Problematic Cannabis Use Among Adolescents*, 82 J. Stud. Alcohol & Drugs 288 (2021).

<sup>10</sup> *Marijuana and Youth: The Impact of Marijuana Use on Teen Health and Wellbeing*, CTR. FOR DISEASE CONTROL & PREVENTION (Apr. 28, 2023) <https://www.cdc.gov/marijuana/featured-topics/marijuana-youth.html>; Sanjay B. Maggirwar et al., *The Link Between Cannabis Use, Immune System, and Viral Infections*, 13 VIRUSES 1099 (2021); Venkat N. Subramaniam, *The Cardiovascular Effects of Marijuana: Are the Potential Adverse Effects Worth the High?*, 116 MO. MED 146 (2019); Ryan S. Sultan et al., *Nondisordered Cannabis Use Among US Adolescents*, 6 JAMA NETWORK OPEN 1 (2023); Will Lawn, *The CannTeen Study: Cannabis Use Disorder, Depression, Anxiety, and Psychotic-like Symptoms in Adolescent and Adult Cannabis Users and Age-matched Controls*, 36 J. PSYCHOPHARMACOL 1350 (2022).

<sup>11</sup> *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 557 (2001); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 487 (1995); *United States v. Edge Broad. Co.*, 509 U.S. 418, 434 (1993); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 568–69 (1980).

## **Maryland's Outdoor Cannabis Advertising Restrictions are Narrowly Tailored**

The final element of the *Central Hudson* test requires that the challenged restriction on speech be no more extensive than necessary. To satisfy this requirement, the state must show “a ‘fit between the legislature's ends and the means chosen to accomplish those ends.’”<sup>12</sup> *Central Hudson* does not require a perfect fit between the commercial speech restriction and the government’s interest, it must be reasonable and proportionate to the interest served.<sup>13</sup> Also, *Central Hudson* does not require the state to use the least restrictive means. Instead, the state must employ “a means narrowly tailored to achieve the desired objective.”<sup>14</sup>

The seminal case pertaining to advertising restrictions that seek to prevent underage substance use is *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001). In this case, the Supreme Court evaluated a series of regulations from Massachusetts that restricted the outdoor advertising of smokeless tobacco and cigars. These regulations prohibited every form of outdoor advertising at any location within a 1,000-foot radius of schools. However, the court found that these regulations served as a *de facto* ban in metropolitan areas because of the population density. The Court struck down these regulations as unconstitutional because they were not narrowly tailored. Maryland’s outdoor cannabis advertising restrictions do not invoke the constitutional issues at the center of *Lorillard* for two reasons.

First, Maryland’s outdoor advertising restrictions are less stringent than the contested regulations in *Lorillard* in critical ways. Maryland’s system prohibits advertising on “the side of a building or another publicly visible location of any form, including a sign, poster, placard, a device, a graphic display, an outdoor billboard, or a freestanding signboard.”<sup>15</sup> However, this restriction does not apply to advertisements placed on the property of the cannabis business. Contrastingly, the regulations in *Lorillard* prohibited advertisements on the property of the tobacco retailers. In addition, the regulations in *Lorillard* prohibited oral communications regarding the sale of tobacco within the exclusionary zone, a factor the Court highlighted in determining that the regulations were not narrowly tailored. Maryland does not restrict oral communications in this way. As a result of these differences, the Maryland’s restrictions prohibit less speech than the regulations in *Lorillard* and are a better fit to the government’s interest in preventing underaged cannabis use.

Second, the specific commercial speech interest the Court sought to protect in *Lorillard* is not infringed upon by Maryland advertising restrictions. In *Lorillard*, the Court focused on a business’s ability to propose a commercial transaction to an adult passing their location. The

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<sup>12</sup> Bd. of Trustees of State Univ. of N.Y. v. Fox, 492 U.S. 469, 480 (1989) (internal quotation marks omitted) (quoting *Posadas de P.R. Assocs. v. Tourism Co. of P.R.*, 478 U.S. 328 (1986)).

<sup>13</sup> Bd. of Trustees of State Univ. of N.Y. v. Fox, 492 U.S. 469, 480 (1989).

<sup>14</sup> *Id.*

<sup>15</sup> MD CODE ANN., ALCOHOLIC BEVERAGES AND CANNABIS, §36-903.

court reasoned that without outdoor advertising many businesses could not communicate that they had tobacco available for sale. This is a reasonable assertion since many tobacco retailers sell a broad range of products and are not specialty stores (e.g., convenience stores). In its analysis, the court held that alternative forms of advertising, like newspaper advertisements, could not provide the same immediate communication.

This ability to propose an immediate transaction is not infringed upon by Maryland's outdoor advertising restrictions. First, cannabis dispensaries are specialty stores and by definition sell cannabis. Any adult walking past a dispensary knows that they can purchase cannabis at the business. Second, Maryland allows cannabis businesses to place advertisements on their property to help facilitate the immediate commercial transaction contemplated in *Lorillard*. Third, the *Lorillard* case was decided in 2001 and advertising technology has advanced considerably, allowing more cost effective and targeted advertising methods than billboards. Cannabis businesses can utilize age-gated social media and mobile applications to engage adult-customers. These methods present a smaller risk of youth exposure than the outdoor advertising methods subject to Maryland's restrictions.

Maryland's outdoor cannabis advertising restrictions do not create the same constitutional issues experienced in *Lorillard*. Maryland's policy is narrowly tailored to protect children from the unique risk presented by outdoor cannabis advertising, while permitting the cannabis industry ample opportunities to advertise their products through other more targeted means. Under Maryland's current advertising laws, the licensed cannabis industry generated \$800 million sales in 2023.<sup>16</sup> The success of Maryland's cannabis industry has been repeatedly highlighted by the media and the industry is expected to reach \$1.1 billion in sales in 2024.<sup>17</sup> This level of success indicates that Maryland has restricted no more speech than necessary in crafting its outdoor advertising restrictions.

### **Conclusion**

Maryland's current outdoor advertising restrictions are a critical policy tool that directly advances its interest in preventing underage cannabis use. These restrictions are narrowly tailored to address the unique risks presented by cannabis billboards and other untargeted

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<sup>16</sup> Maryland Cannabis Administration Releases 2023 Sales data and Launches Medical and Adult-use Cannabis Data Dashboard, available at [https://mmcc.maryland.gov/Documents/2024\\_Laws\\_and\\_Regulations/NOTICE%20-%20Maryland%20Cannabis%20Administration%20Releases%202023%20Sales%20Data%20and%20Launches%20Medical%20and%20Adult-use%20Cannabis%20Data%20Dashboard.pdf](https://mmcc.maryland.gov/Documents/2024_Laws_and_Regulations/NOTICE%20-%20Maryland%20Cannabis%20Administration%20Releases%202023%20Sales%20Data%20and%20Launches%20Medical%20and%20Adult-use%20Cannabis%20Data%20Dashboard.pdf)

<sup>17</sup> Over \$87 million spent on cannabis in Maryland's first month of adult sales, Katie Shepard, The Washington Post, Aug 2, 2023, available at <https://www.washingtonpost.com/dc-md-va/2023/08/02/maryland-july-cannabis-sales/>; Maryland Breaks Monthly Adult-Use Sales Record; On Pace for \$1.1 Billion in 2024, Tony Lange, Cannabis Business Times, December 13, 2023, available at <https://www.cannabisbusinesstimes.com/news/maryland-cannabis-dispensary-sales-november-2023/>.

outdoor advertising methods, while still providing ample opportunities for commercial speech. The effectiveness of these other advertising opportunities has resulted in Maryland having one of the most successful cannabis markets in the country. A reasoned analysis of relevant First Amendment jurisprudence reveals that Maryland's current restrictions are permissible under the Constitution. Senate Bill 399 is not necessary to protect commercial speech. It simply and unnecessarily endangers the health of Maryland's children. For these reasons, I request an unfavorable report on Senate Bill 399.

*This testimony is submitted by Mathew Swinburne, Managing Director of the Legal Resource Center for Public Policy-Cannabis at the University of Maryland Carey School of Law and not by the School of Law; the University of Maryland, Baltimore; or the University of Maryland System.*