SUPERIOR COURT OF WASHINGTON
FOR THE COUNTY OF KING

PLAUSIBLE PRODUCTS, LLC d/b/a HASHTAG CANNABIS, *Petitioner*, v. WASHINGTON STATE LIQUOR AND CANNABIS BOARD, *Respondent*.	Case No. 19-2-03293-6 SEA **ORDER GRANTING PETITIONER'S REQUEST FOR RELIEF FROM AGENCY ACTION**

The Court concludes that the Final Order of the Liquor and Cannabis Board was based on unconstitutional provisions in RCW 69.50.369(2) and WAC 314-55-155(2)(a), relating to the content, size, and manner of affixing of on-premises advertising by marijuana retailers. Applying the U.S. Supreme Court's holding in *Central Hudson*, the Court concludes that the commercial speech at issue here is entitled to constitutional protection. First, while the speech does propose a transaction illegal under federal law, the fact that it is legal in the location where it is proposed at least merits the full *Central Hudson* analysis. Second, the State does have a substantial interest in preventing underage marijuana consumption. However, the State's asserted interest in maintaining an orderly marketplace to avoid federal intervention is too vague to qualify as a substantial interest under *Central Hudson*. Third, the advertising restrictions do not directly and materially advance the State's substantial interest in preventing underage consumption, and the restrictions are not sufficiently tailored to advance the State's interest. Given other provisions in the

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1 advertising restrictions which continue to expose potential underage consumers to
2 marijuana advertising, the restrictions are a poor fit with the State's substantial interest in
3 preventing underage consumption. Given that the Board's Final Order was based on
4 unconstitutional provisions, the Court grants Petitioner Plausible Products, LLC (hereafter,
5 "Hashtag") relief from that order.

6 **I. BACKGROUND**

7 Hashtag used what were described as "christmas lights" to spell out the word "POT"
8 in Hashtag's window in or around December 2017 and January 2018. WSLCB
9 Narrative/Evidence Report. Hashtag's landlord complained to the Board, and an
10 investigator arrived at the store on January 8, 2018 to find two signs (hereafter, the "Pot
11 Sign" or "Pot Signs"), including this one, as excerpted from page 142 of the record:

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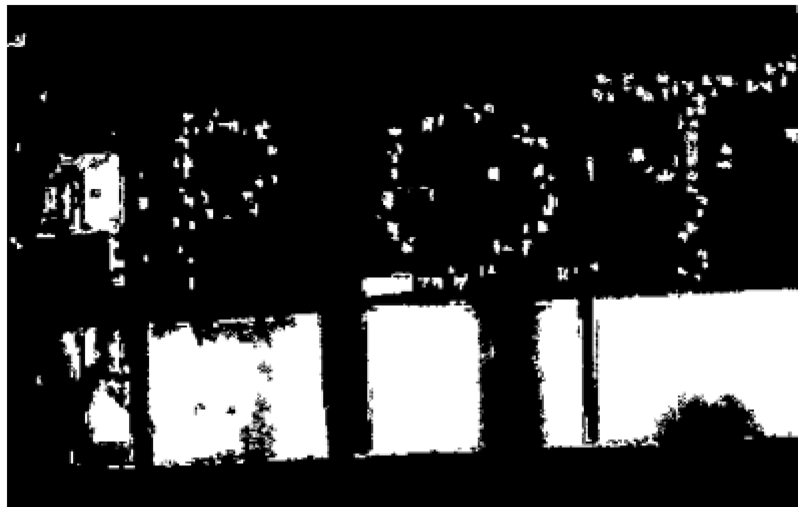

21 The Board issued Hashtag an Administrative Violation Notice ("AVN"), listing the
22 violation as "Advertising violations Signs other than tradename displayed on business,"
23 citing RCW 69.50.369. AVN. Though the AVN appears to only list a violation relating to
24 the allegation that the Pot Signs contained wording other than Hashtag's business or trade
25 name, the Enforcement Report of Complaint reflects that the Board "Issued AVN from 1 8

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2018 complaint too many signs on building," i.e., that the AVN was based on an alleged violation of restrictions on the number of signs Hashtag could display. A later declaration by the Board investigator appears to also take issue with the size of the Pot Signs, allegedly "approximately 3,888 square inches," Declaration of Sergeant Steven Telstad at 2, which would run afoul of restrictions on the size of signage in recreational marijuana stores. In addition, the Board investigator stated in his declaration that Hashtag "had a sign permanently affixed to the building advertising the name of the store," which might be a reference to restrictions on signage that is not permanently affixed. Declaration of Sergeant Steven Telstad at 2. The WSLCB Narrative/Evidence Report simply quotes the whole of RCW 69.50.369(2)). WSLCB Narrative/Evidence Report. In a later Motion for Summary Judgment, the Board alleged that Hashtag violated restrictions on content, size, and affixing. Enforcement's Motion for Summary Judgment at 1-2.

II. POSTURE

The ALJ granted the State's Motion for Summary Judgment, concluding that Hashtag "violated RCW 69 50 369 and WAC 314-55-155 by putting up holiday lights in the windows which spelled the word 'POT.'" Initial Order On Summary Judgment at 7. In so ruling, the ALJ did not reach Hashtag's arguments that the statute on which the AVN was based was unconstitutional; rather, the ALJ determined that it had "no authority to determine a policy or regulation unconstitutional." *Id.* at 6. The Board adopted the ALJ's Findings of Fact and Conclusions of Law as its own and affirmed the ALJ, still not reaching Hashtag's argument that the statute is unconstitutional. Final Order of the Board at 2.

Hashtag now appeals the Board's Final Order in this Court. Hashtag invokes what it asserts is this Court's authority under RCW 34.05.570(3)(a), which provides in relevant part:

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> Review of agency orders in adjudicative proceedings. The court shall grant relief from an agency order in an adjudicative proceeding only if it determines that . . . [t]he order, or the statute or rule on which the order is based, is in violation of constitutional provisions on its face or as applied.

RCW 34.05.570(3)(a).

On appeal, Hashtag asks the Court to determine if "the AVN is unenforceable because RCW 69.50.369(2) and WAC 314-55-155(2)(a) unconstitutionally burden commercial speech." Petitioner's Opening Br. at 4.

III. THE RECORD ON REVIEW

On review, the State moved to supplement the record with: (1) a memorandum from United States Deputy Attorney General James M. Cole dated August 29, 2013, titled "Guidance Regarding Marijuana Enforcement," Respondent's Motion to Supplement the Record, Ex. A (hereafter, the "Cole Memo"); a memorandum from United States Attorney General Jefferson B. Sessions dated January 4, 2018, titled "Marijuana Enforcement," *id.*, Ex. B (hereafter, the "Sessions Memo"); (3) an article from the journal Psychology of Addictive Behaviors dated June 1, 2015, titled "Gateway to Curiosity: Medical Marijuana Ads and Intention and Use During Middle School," *id.*, Ex. C; and (4) an article from the journal Drug and Alcohol Dependence dated May 10, 2018, titled "Planting the seed for marijuana use: Changes in exposure to medical marijuana advertising and subsequent adolescent marijuana use, cognitions, and consequences over seven years," *id.*, Ex. D. Hashtag did not oppose the State's Motion to Supplement the Record, given that neither the ALJ nor the Board reached the constitutionality of the statute. Petitioner's Response to Respondent's Motion to Supplement the Record at 2.

Under RCW 34.05.562, the Court may receive evidence in addition to that contained in the agency record for judicial review, in relevant part, only if it relates to the validity of the agency action at the time it was taken and is needed to decide disputed issues regarding "[m]aterial facts in . . . brief adjudications, or other proceedings not required to

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be determined on the agency record." RCW 34.05.562(1)(c). Here, neither the ALJ nor the Board could reach the constitutionality of the statute forming the basis for enforcement, and thus this Court granted the State's Motion to Supplement the Record with documents addressing the State's argument that the statute is constitutional. The Court asked Hashtag if it, too, wished to supplement the record; Hashtag declined.

The Court heard argument on Hashtag's appeal on October 4, 2019.

IV. DISCUSSION

A. *Central Hudson* Applies Under Both the U.S. and Washington Constitutions

The Court analyzes the constitutionality of the advertising restrictions using the rules concerning restrictions on commercial speech set out in *Central Hudson Gas & Electric Corporation v. Public Service Commission of New York*, 447 U.S. 557 (1980). "The Constitution . . . accords a lesser protection to commercial speech than to other constitutionally guaranteed expression." *Id.* at 563. The Pot Sign here is commercial speech, and neither Hashtag nor the State contend otherwise. Nor does either side disagree on the applicability of *Central Hudson*; the parties do not agree, however, on how far down the *Central Hudson* road the Court should travel.

The first questions under *Central Hudson* are whether the commercial speech is "more likely to deceive the public than to inform it," and whether the commercial speech is "related to illegal activity." *Id.* at 563-64 (citations omitted). If the commercial speech is deceptive or relates to illegal activity, "[t]he government may ban" the speech, and thus the speech gets no First Amendment protection. *Id.* (citations omitted). If the commercial speech is neither misleading nor related to illegal activity, courts apply a three-part test to determine whether the restriction is constitutional.

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Under the first part of the *Central Hudson* test, courts ask whether "[t]he State . . . [has] assert[ed] a substantial interest." *Id.* at 564.

"The last two steps of the *Central Hudson* analysis basically involve a consideration of the 'fit' between the legislature's ends and the means chosen to accomplish those ends." *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 486 (1995) (citation omitted). Under the second part of the *Central Hudson* test, courts ask whether "the restriction . . . directly advance[s] the state interest involved." *Id.* In analyzing this question, "the regulation may not be sustained if it only provides ineffective or remote support for the government's purpose." *Id.* Finally, under the third part of the *Central Hudson* test, courts ask whether "the governmental interest could be served as well by a more limited restriction on commercial speech." *Id.* In analyzing this question, "excessive restrictions cannot survive." *Id.*

1. *Central Hudson* applies to the question under the U.S. Constitution's First Amendment.

The First Amendment restricts in relevant part, laws abridging the freedom of speech. U.S. Const. amend. I. As applied to the States through the Fourteenth Amendment, the First Amendment protects commercial speech from unwarranted governmental regulation. *Central Hudson*, 447 U.S. at 561.

2. *Central Hudson* applies to the question under the Washington Constitution, Article I, Section 5.

Article I, Section 5 of the Washington Constitution provides that "[e]very person may freely speak, [and]write and publish on all subjects." Wash. Const. art. I, § 5. In analyzing whether restrictions on commercial speech violate Article I, Section 5 of the Washington Constitution, Washington courts apply *Central Hudson*. *See Nat'l Fed'n of Retired Persons v. Ins. Comm'r*, 120 Wn.2d 101, 119, 838 P.2d 680 (1992) (applying *Central Hudson* to a state constitutional question, concluding that the Washington Constitution did not provide greater protection than the U.S. Constitution in this context,

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and explaining, "[w]e therefore follow the interpretive guidelines under the federal constitution.").

B. The Commercial Speech Survives *Central Hudson's* Illegality Test

The commercial speech here clears the illegality threshold under *Central Hudson* to at least allow the Court to analyze the constitutionality of the advertising restrictions under *Central Hudson's* three-part test. The State argues that, "[f]or purposes of the first *Central Hudson* test, marijuana activity cannot be considered to be 'lawful activity" where its use, possession, manufacture, and distribution remains illegal under federal criminal law." Respondent's Answer at 5. The issue is novel, and neither the Parties nor the Court have identified any cases addressing the threshold question posed here: What it means for commercial speech to be "related to illegal activity" under *Central Hudson*, such that the speech gets no First Amendment protection, where the commercial speech relates to activity that is illegal under federal law, but legal under state law. As explained below, the Court concludes that the commercial speech here at least gets past this first gate and into the three-part *Central Hudson* analysis.

Courts have frequently analyzed commercial speech in answering a question related to that here: whether one state can restrict advertising of an activity that is legal in the state listed in the advertisement, but illegal in the state restricting the advertising. Often, these cases concerned sales of drug paraphernalia. Such was the case in *Washington Mercantile Association v. Williams*, 733 F.2d 687 (9th Cir. 1984). In *Washington Mercantile*, the question was whether Washington could ban advertisements for the sale of drug paraphernalia from places outside of Washington, where such sale was illegal in Washington, but legal in the places originating the advertising. *Id.* at 688. The court concluded that such speech was entitled to protection, holding that "the advertiser who proposes a transaction in a state where the transaction is legal is promoting a legal activity,"

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and such "speech deserves First Amendment protection." *Id.* at 691 (citation omitted). However, *Washington Mercantile* and cases like it are distinguishable from the situation here, where the sale of marijuana is illegal everywhere in the United States under federal law.

In another drug paraphernalia case in 1982, the Court of Appeals for the First Circuit, in dicta, imagined something like the question presented here. *New England Accessories Trade Ass'n v. City of Nashua*, 679 F.2d 1, 4 (1st Cir. 1982). In discussing its conclusion that drug paraphernalia advertising was actually proposing illegal possession of drugs, the *New England Accessories* court reasoned that the advertisement in question "promotes activity which has been determined to be criminal in all jurisdictions." *Id.* at 3. Yet, the court envisioned a scenario close to that the presented here: "If New York, or some other state, decided to legalize the sale and use of marijuana, New Hampshire would have greater difficulty . . . prohibiting an advertisement suggesting that the Big Apple was the place to get high on marijuana." *Id.* at 4 In the scenario imagined by the First Circuit, commercial speech advertising recreational marijuana for sale in Washington would at least be entitled to *Central Hudson* analysis if another state where recreational marijuana was illegal tried to restrict advertisements in that state for Washington recreational marijuana stores. It follows that, where one state could not avoid *Central Hudson* scrutiny for banning advertisement of Washington recreational marijuana, neither can the State here avoid *Central Hudson* scrutiny on the basis that recreational marijuana is still illegal under federal law.

C. The State Has a Substantial Interest Under *Central Hudson*

Hashtag does not dispute that the State has asserted a sufficient substantial interest under *Central Hudson*. Petitioner's Opening Br. at 9. However, the substantial interests asserted and their contours are not so clear.

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1. The State has a substantial interest under *Central Hudson* in preventing underage consumption of marijuana.

In its briefing, the State cites "the goal of curtailing minor children's interest in and exposure to the marijuana trade" as a substantial interest under *Central Hudson*, Answer at 7, and Hashtag agrees "that the State has a substantial interest in discouraging and preventing the consumption of marijuana by minors, and does not dispute that the second *Central Hudson* factor is therefore met," Petitioner's Opening Brief. at 9. In enacting laws to regulate the recreational marijuana industry, the Legislature took care to express the interest it was seeking to advance, while declaring that the restrictions did not infringe upon retailers' free-speech rights:

> The legislature finds that *protecting the state's children, youth, and young adults under the legal age to purchase and consume marijuana, by establishing limited restrictions on the advertising of marijuana and marijuana products, is necessary to assist the state's efforts to discourage and prevent underage consumption and the potential risks associated with underage consumption*. The legislature finds that these restrictions assist the state in maintaining a strong and effective regulatory and enforcement system as specified by the federal government. The legislature finds this act leaves ample opportunities for licensed marijuana businesses to market their products to those who are of legal age to purchase them, without infringing on the free speech rights of business owners. Finally, the legislature finds that *the state has a substantial and compelling interest in enacting this act aimed at protecting Washington's children, youth, and young adults*.

Session Laws, 65th Leg., Regular Sess. ch. 317, sec. 12 (Wash. 2017) (emphasis added). The Legislature asserted a substantial interest in preventing underage consumption, the State argues it here, and Hashtag does not dispute it. Thus, the State has a sufficient substantial interest in preventing underage consumption under *Central Hudson*. The State's other asserted substantial interest is more elusive.

2. The State's interest in avoiding federal enforcement is too vague to qualify as a substantial interest under *Central Hudson*.

In addition to discouraging underage consumption, the State asserts a substantial interest in "maintain[ing] an orderly marketplace . . . to comply with the federal

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government's expectation of a strong and effective marijuana regulatory system." Respondent's Answer at 7. In fact, the Legislature also cited this interest in its findings, explaining that it "finds that these restrictions assist the state in maintaining strong and effective regulatory and enforcement systems as specified by the federal government." Sessions Laws, 65th Leg., Regular Sess. ch. 317, sec. 12. Essentially, the State argues that it has a substantial interest in strict regulation of the recreational marijuana industry in order to avoid attracting the attention of federal law enforcement officials. Respondent's Answer at 6 ("[F]ederal prosecution for any marijuana activity is always a very real possibility.").

In support of its argument that it has a substantial interest in maintaining an orderly marketplace, the State points to memoranda from the U.S. Department of Justice: the 2013 Cole Memo, which seems to giveth, and the 2018 Sessions Memo, which seems to taketh away.

Among the federal government's interests asserted in the Cole Memo is "[p]reventing the distribution of marijuana to minors." Cole Memo at 1. The Department of Justice guidance in the Cole Memo "rest[ed] on its expectation that states . . . will implement strong and effective regulatory and enforcement systems," which will be "effective in practice." *Id.* at 2. Deputy Attorney General Cole went on to explain that, "[i]f state enforcement efforts are not sufficiently robust to protect against the harms set forth above, the federal government make seek to challenge the regulatory structure itself in addition to continuing to bring individual enforcement actions." *Id.* at 3. "The primary question in all cases . . . should be whether the conduct at issue implicates one or more of the enforcement priorities." *Id.* In other words, the Department of Justice was telling the States in the Cole Memo to tightly regulate the marijuana industry or risk federal intervention.

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While the Cole Memo provided some guidance to states like Washington, the memorandum ends by advising the States that nothing in the memorandum may "be relied upon to create any rights." *Id.* at 4. Attorney General Sessions made the inability to rely on federal guidance even more clear in 2018 when he declared that "previous nationwide guidance specific to marijuana is unnecessary and is rescinded, effective immediately," Sessions Memo at 1, including the Cole Memo, *id.* n.1. Having rescinded the Cole Memo, whatever small comfort states like Washington could draw from pointing to a strict regulatory regime seemed to have vanished.

The Court concludes that the State's asserted interest in avoiding federal intervention is too elusive to amount to a substantial interest under *Central Hudson*. Under the now-rescinded Cole Memo, perhaps Washington had slightly greater hope of being able to point to the advertising restrictions as evidence of Washington's strong regulatory systems. Yet, even the Cole Memo advised that the regulatory systems had to be "effective in practice." As further explained below, the advertising restrictions here have too many exceptions to be effective with respect to preventing underage consumption of marijuana. Regardless, the Cole Memo is history, the Sessions Memo now governs, and there is no telling what the next memorandum or memoranda, if any, might say. Given that Department of Justice guidance (1) creates no rights that Washington can rely upon, and (2) can be changed at any time, and given that the sale of marijuana remains illegal under federal law, the State's asserted substantial interest in avoiding federal intervention is too much of a moving target to qualify under *Central Hudson*.

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D. The Content, Size, and Affixing Restrictions in RCW 69.50.369(2) and WAC 314-55-155(2)(a) Relating to On-Premises Advertising Do Not Directly and Materially Advance the State's Interest in Preventing Underage Consumption of Marijuana

Under the second part of the *Central Hudson* test, courts ask "whether the speech restriction directly and materially advances the asserted governmental interest." *Greater New Orleans Broadcasting Ass'n, Inc. v. U.S.*, 527 U.S. 173, 188 (1999). "This burden is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Id.* (citation omitted).

In support of its argument that the advertising restrictions advance its substantial interest in preventing underage consumption of marijuana, the State supplemented the record with two articles: Elizbeth J. D'Amico, et al., *Medical Marijuana Ads and Intention and Use during Middle School*, 29 Psychology of Addictive Behaviors 613 (2015) (hereafter, "Medical Marijuana Ads"); and 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 Dependence 385 (2018) (hereafter, "Planting the Seed").

Relevant here, in the research discussed in the 2015 Medical Marijuana Ads article:

- Students in grades 6 through 8 were recruited into a study in 2008, and as part of the study were asked: "In the past three months, how often have you seen advertisements for medical marijuana on billboards, in magazines, or somewhere else?"
- "[Y]outh who reported seeing any ads for medical marijuana were twice as likely as youth who reported never seeing an ad to use marijuana as youth

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who reported never seeing an ad to use marijuana and to report higher intentions to use marijuana one year later."

Also relevant here, in the research discussed in the 2018 Planting the Seed article:

- Students in grades 6 and 7, ages 11 to 12, were recruited into a study in 2008 and followed to 2017. As part of the study, the students were asked: "In the past three months, how often have you seen advertisements for medical marijuana on billboards, in magazines, or somewhere else?"
- "Adolescents that reported higher than average exposure to [medical marijuana] ads also tended to report greater marijuana use."
- Researchers concluded that, "[o]verall results suggest that exposure to [medical marijuana] advertising may not only play a significant role in shaping attitudes about marijuana, but may also contribute to increased marijuana use."

What the Court distills from the State's arguments and the two articles the State provided is that: (1) the State has a substantial interest in preventing underage consumption of marijuana; and (2) youth ages 11 to 17 who are exposed to advertising for medical marijuana in billboards, magazines, or somewhere else are more likely to use marijuana.

The State's argument that the statutory scheme advances its substantial interest in preventing underage consumption of marijuana is more than speculation. In analyzing whether a commercial speech restriction directly and materially advances the asserted governmental interest, the "burden is not satisfied by mere speculation or conjecture." *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 555 (2001) (citation omitted). Instead, "a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restrictions will in fact alleviate them to a material degree." *Id.* (citation omitted). In answering the question, the U.S. Supreme Court

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1 has "permitted litigants to justify speech restrictions by reference to studies and anecdotes
2 pertaining to different locales altogether, or even, in a case applying strict scrutiny, to justify
3 restrictions based solely on history, consensus, and simple common sense." *Id.* (citation
4 omitted). Thus in *Lorillard*, the U.S. Supreme Court concluded that the restricting authority
5 had provided "ample documentation of the problem with underage use of smokeless tobacco
6 and cigars," and thus on the record there, the court was "unable to conclude that the Attorney
7 General's decision to regulate advertising of smokeless tobacco and cigars in an effort to
8 combat the use of tobacco products by minors was based on mere speculation and
9 conjecture." *Id.* at 561 (quotation marks and alterations omitted). There are just two articles
10 in the record here, yet, as the authors of those articles themselves acknowledge, widespread
11 legal marijuana sales are a relatively recent development. Though the record in *Lorillard*
12 contained much more research supporting the restriction than the two articles in the record
13 here, as in *Lorillard*, this Court cannot say that State's arguments concerning the connection
14 between advertising and underage consumption of marijuana are mere speculation and
15 conjecture.

16 Though the State's position rises above speculation and conjecture, the advertising
17 restrictions have too many conflicting provisions to directly and materially advance the
18 State's substantial interest in preventing underage consumption of marijuana. *Rubin*, 514
19 U.S. at 488. In *Rubin*, a beer brewer brought a *Central Hudson* First Amendment challenge
20 against a federal law prohibiting disclosure of the alcohol content of beer on labels or in
21 advertising. *Id.* at 478. In resisting the challenge in *Rubin*, the government argued that the
22 statutory scheme advanced its substantial interest in "curbing 'strength wars' by beer
23 brewers who might seek to compete for customers on the basis of alcohol content." *Id.* at
24 483. In rejecting the government's argument, the court in *Rubin* noted that, "[w]hile the
25 laws governing labeling prohibit disclosure of alcohol content unless required by state law,

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federal regulations apply a contrary policy to beer advertising," prohibiting statements of alcohol content, but "only in States that affirmatively prohibit such advertisements." *Id.* at 488. The court then observed that only eighteen states at the time prohibited such advertisements, meaning that, under the statutory scheme, "brewers remain free to disclose alcohol content in advertisements, but not on labels, in much of the country." *Id.* Given the conflicting provisions in the statutory scheme in *Rubin*, the court observed:

> The failure to prohibit the disclosure of alcohol content in advertising, which would seem to constitute a more influential weapon in any strength war than labels, makes no rational sense if the Government's true aim is to suppress strength wars.

Id. Thus, the *Rubin* court concluded that the challenged law "cannot directly and materially advance its asserted interest because of the overall irrationality of the Government's regulatory scheme." *Id.*

The statutory scheme here does not directly and materially advance the State's substantial interest in preventing underage consumption of marijuana because the challenged provisions are undermined by other parts of the scheme.

Hashtag was cited in part for "Advertising violations Signs other than tradename displayed on business." AVN. Relatedly, the Board's Enforcement Report referred to "too many signs on building." The Board also noted that the Pot Sign was "approximately 3,888 square inches." The WSLCB Narrative/Evidence Report quoted the whole of RCW 69.50.369(2), WSLCB Narrative/Evidence Report, and the Board later alleged that Hashtag violated restrictions on content, size, and affixing. Enforcement's Motion for Summary Judgment at 1-2.

The advertising restrictions provide in relevant part that:

> Except for the use of billboards, as authorized under this section, licensed marijuana retailers may not display any signage outside of the licensed premises, other than two signs identifying the retail outlet by the licensee's business or trade name, stating the location of the business, and identifying

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1 the nature of the business. Each sign must be no larger than one thousand
six hundred square inches and be permanently affixed to a building or other
2 structure.

3 RCW 69.50.369(2); WAC 314-55-155(2)(a). When it displayed the Pot Sign, Hashtag
4 violated these restrictions because: (1) Pot was not Hashtag's business or trade name; (2)
5 the Pot Sign put Hashtag over the two-sign limit; (3) the Pot Sign was large than 1,600
6 square inches; and (4) the Pot Sign was not permanently affixed.

7 As to content, at argument, counsel for the State agreed that Hashtag could register
8 the word Pot as a business or trade name and then display the word Pot on an otherwise-
9 compliant sign in the store. It follows that, so long as the sign was permanently affixed,
10 no larger than 1,600 square inches, and did not exceed the two-sign limit, it would be
11 permissible.

12 At argument, counsel for the State also agreed that Hashtag could have a billboard
13 right next door to the store. In contrast to the restriction on signs in stores to no more than
14 1,600 square inches under RCW 69.50.369(2), a billboard must be a "*minimum* size of five
15 feet in height by eleven feet in width." WAC 314-55-155(7)(b) (emphasis added). It
16 follows that, so long as Pot is the business or trade name, a marijuana retailer could have a
17 billboard *no smaller* than 55 square feet next door, so long as it was "off-premises" and
18 otherwise compliant. *Id.*

19 While the State argues that the restrictions in RCW 69.50.369(2) advance the
20 State's interest because they "minimize the risk of inordinately capturing the attention of
21 children, youth, and young adults," Respondent's Answer at 11, other provisions in the
22 regulatory scheme undermine the advancement of that goal. Hashtag could have a sign
23 using the word Pot if it just registers that business or trade name, and it could conceivably
24 have an entire billboard next door to its store with the word Pot. If the State wishes to
25 minimize the risk of capturing the attention of children, restricting retailers to two

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permanently-affixed signs displaying the business or trade name of no more than 1,600 square inches on premises, but allowing billboards off premises, and allowing retailers to register business or trade names such as Pot, does not directly advance that goal. In summary:

- Hashtag could have two 1,600 square inch pot signs, so long as it registers that business or trade name, but Hashtag could not have not have a 1,600 square inch pot sign and a 1,600 square inch Hashtag sign, because, as the State argues, that risks encouraging underage consumption of marijuana.
- Hashtag could have two 1,600 square inch pot signs, so long as it registers that business or trade name and permanently affixes the signs, but Hashtag could not have not have two 1,600 square inch pot signs that were not permanently affixed, because, as the State argues, that risks encouraging underage consumption of marijuana.
- Hashtag could have billboards off-premises, of no less than 55 square feet (and could even use the word pot if it registered that word as the business or trade name), but can only have two signs of no more than 1,600 square inches, permanently affixed, on-premises, because, as the State argues, larger on-premises signs risk encouraging underage consumption.

As the court put it in *Rubins*, where the government's asserted interest was to "suppress strength wars," it made "no rational sense" to prohibit alcohol content advertising on labels, but allow it in advertising, where advertising "would seem to constitute a more influential weapon in any strength war than labels." *Rubins*, 514 U.S. at 488. As in *Rubins*, where the State's asserted interest is to prevent underage consumption of marijuana, it makes no rational sense to restrict advertising in marijuana retailers where underage consumers are not allowed to enter or make purchases, but not so restrict billboards, where

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billboards would seem more effective at capturing the attention of potential underage consumers. While the advertising restrictions do prohibit advertising within one thousand feet of, e.g., schools, RCW 69.50.369(1), the law similarly prohibits marijuana retailers from locating within one thousand feet of, e.g., of schools, RCW 69.50.331(8)(a). Nothing would prevent the potential underage consumer from standing outside of a marijuana retailer and seeing the hypothetical billboard next door.

Here, the State's supplemental materials actually prove too much, because the research referenced in both the 2015 Medical Marijuana Ads article and the 2018 Planting the Seed article asked youth about their exposure to medical marijuana advertisements in "billboards, in magazines, or somewhere else." Yet, under the advertising restrictions, there are seemingly fewer restrictions on, e.g., billboards, than on on-site advertising. As the *Rubin* court put it: "There is little chance that § 205(e)(2) can directly and materially advance its aim, while other provisions of the same Act directly undermine and counteract its effects." *Rubin*, 514 U.S. at 489.

As in *Rubin*, there is little chance here that RCW 69.50.369(2)'s on-premises advertising restrictions relating to business or trade name can directly and materially advance the State's asserted interest in preventing underage consumption when a marijuana retailer can register a business or trade name such as pot and then use that word on signage. Similarly, there is little chance here that RCW 69.50.369(2)'s on-site advertising restrictions relating to affixing and size can directly and materially advance the State's asserted interest in preventing underage consumption when the very first words in that section of the statute are: "*Except* for the use of billboards." RCW 69.50.369(2) (emphasis added). As in *Rubin*, this Court agrees that the State's interest in preventing underage consumption "remains a valid goal." *Rubin*, 514 U.S. at 489. Yet, also as in *Rubin*, this Court concludes that "the irrationality of this unique and puzzling regulatory framework

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1 ensures that the [restrictions] will fail to achieve that end." *Id.* Ultimately, a regulation
2 cannot withstand *Central Hudson* scrutiny where it "provides only ineffective or remote
3 support for the government's purpose." *Lorillard*, 533 U.S. at 566 (citation omitted). Here,
4 given that, based on the State's own evidence, parts of the advertising restrictions actually
5 undermine rather than advance the State's interest in preventing underage consumption, the
6 Court concludes that RCW 69.50.369(2)'s restrictions on the content, size, and manner of
7 affixing on-premises advertising do not directly and materially advance the asserted interest.

8 **E. The Content, Size, and Affixing Restrictions in RCW 69.50.369(2) and**
9 **WAC 314-55-155(2)(a) Relating to On-Premises Advertising Are Not Sufficiently Tailored to Advance the State's Substantial Interest**

10 "The last step of the *Central Hudson* analysis completements the third step, asking
11 whether the speech restriction is not more extensive than necessary to serve the interests
12 that support it. *Lorillard*, 533 U.S. at 556 (citation omitted). "[T]he case law requires a
13 reasonable fit between the legislature's ends and the means chosen to accomplish ends"; "a
14 means narrowly tailored to achieve the desired objective." *Id.* (citation omitted).

15 The advertising restrictions are more extensive than necessary, because minors are
16 already prevented from entering marijuana retailers and buying marijuana. As an initial
17 matter, no person under age 21 may possess marijuana. RCW 69.50.4013(5). More
18 relevant here, marijuana retailers may not employ persons under age 21 or allow persons
19 under age 21 to enter or remain on premises of a retail outlet, RCW 69.50.357(2), and
20 marijuana retailers must train employees in the identification of persons under age 21, RCW
21 69.50.357(3)(a). Thus, however enticing a non-permanently affixed pot sign exceeding
22 1,600 square inches inside of a marijuana retailer might be to a person under age 21,
23 Washington law prevents that person from entering the marijuana retailer and purchasing
24 marijuana. Given that Washington law already prohibits underage consumers from entering
25 marijuana retailers, let alone purchasing recreational marijuana, the restrictions in RCW

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69.50.369(2) and WAC 314-55-155(2)(a) are more extensive than necessary to advance the State's interest in preventing underage consumption.

The advertising restrictions are also underinclusive, because they do not restrict the number and maximum size of billboards. Again, the State cites two studies, both of which apparently concluded that youth exposed to, among other advertisements, billboards, reported more marijuana use and increased intention to use marijuana. As the court in *Lorillard* explained: "To the extent that studies have identified particular advertising and promotion practices that appeal to youth, tailoring would involve targeting those practices while permitting others"; "[a]s crafted, the regulations make no distinction among practices on this basis." *Lorillard*, 533 U.S. at 563. Similarly, here, if the State is concerned with "minimiz[ing] the risk of inordinately capturing the attention" of underage consumers, Respondent's Answer at 11, a tailored approach sufficient to withstand *Central Hudson* scrutiny might involve targeting the advertising means called out in the research the State cites. For now, while the law prohibits underage consumers from entering a marijuana retailer and purchasing marijuana, and restricts on-premises signage, the aspiring underage customer is left to stand outside of the marijuana retailer and stare at the minimum 55 square foot billboard next door, directing of-age consumers to the marijuana retailer.

The Court concludes that the content, size, and affixing restrictions in RCW 69.50.369(2) and WAC 314-55-155(2)(a) are more extensive than necessary to advance the State's interest in preventing underage consumption. Given that the restrictions are both more extensive than necessary and yet also underinclusive, there is a poor fit between the restrictions and the State's interest; too poor to withstand *Central Hudson*'s last step.

F. The Court's Holding is Limited

The Court is not holding that all of the State's advertising restrictions violate the U.S. and Washington Constitutions. The State warns that "the elimination of all advertising

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restrictions could easily result in widespread proliferation of unrestrained advertising, including flashing neon-lighted signs, numerous signs of unlimited size, sign spinners, cartoon characters, and depictions of marijuana plants and paraphernalia." State's Answer at 11. "Such a free-for-all atmosphere," the State worries, "would dramatically undermine the state's substantial interests in protecting children." *Id.*[1] As the Court has explained, it is the State's own laws that undermine its interests. Indeed, that is the problem. "There is no *de minimis* exception for a speech restriction that lacks sufficient tailoring or justification." *Lorillard*, 533 U.S. at 567. Thus, whatever the impact of the unconstitutional restrictions here, they cannot survive scrutiny.

The Court's ruling is limited to the on-premises content, size, and affixing restrictions applicable to marijuana retailers, set out in RCW 69.50.369(2) and WAC 314-55-155(2)(a). The lawful sale of recreational marijuana is relatively new, and it is perhaps not surprising if there is not much research into the effect of advertising on potential underage consumers. The Board could not address the constitutionality of the advertising restrictions. This Court can only say that, on this record, as supplemented, the advertising restrictions violate the U.S. and Washington constitutions. The Court's ruling does not eliminate all advertising restrictions or suggest a free-for-all. If anything, the research cited by the State and the case law cited herein might suggest other targeted, rational restrictions

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[1] The State also notes that "[t]he signs were created using bright, multi-colored electric lights, which are more likely to be particularly appealing to children," citing WAC 314-55-105(5)(b). Respondent's Answer at 11. Advertising by marijuana retailers cannot include advertising "Especially appealing to children," which includes, among other things, an "advertisement that includes . . . [t]he use of bright colors similar to those used on commercially available products intended for or that target youth or children." WAC 314-55-105(5)(b)(iii). The Board's enforcement action against Hashtag does not appear to have been based on Hashtag's use of multi-colored lights, and the Court expresses no opinion on the constitutionality of restrictions relating to advertising especially appealing to children.

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on advertising in connection with marijuana retailers—that is beyond the scope of this Court's decision.

V. CONCLUSION

For the reasons set forth above, the Court concludes that the following provisions in the Revised Code of Washington and Washington Administrative Code violate the First Amendment to the United States Constitution and Article I, Section 5 of the Washington Constitution:

- The restriction to "signs identifying the retail outlet by the licensee's business or trade name," RCW 69.50.369(2), and "signs identifying the retail outlet by the licensee's business name or trade name," WAC 314-55-155(2)(a).
- The restriction to signs "no larger than one thousand six hundred square inches," RCW 69.50.369(2), and signs no larger than "sixteen hundred square inches," WAC 314-55-155(2)(a).
- The requirement that signs be "permanently affixed." RCW 69.50.369(2). (In contrast to RCW 69.50.369(2)'s requirement that each sign be "permanently affixed to a building or other structure," WAC 314-55-155(2)(a) requires that signs simply be "affixed to a building or permanent structured.")

Given that the Board based its Final Order on the unconstitutional provisions cited above, the Court grants Hashtag relief from that order. RCW 34.05.570(3)(a).

It is so ordered.

DATED this 17th day of November, 2019.

David S. Keenan
Judge

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Document Title: ORDER GRANTING PETITION FOR RELIEF

Signed by: David Keenan
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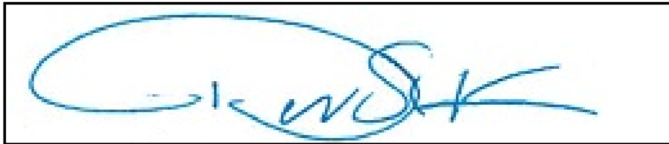

Judge/Commissioner: David Keenan

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