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CANNABIS REGULATION
FACT SHEET

Cannabis Advertising and the First Amendment

Regulating cannabis advertising is an important public health tool that is subject to First Amendment restrictions. The First Amendment of the United States Constitution prohibits governments at all levels from "abridging the freedom of speech." The Supreme Court has interpreted the First Amendment's protection to extend to commercial speech—any speech or writing that aims to promote commerce—albeit with certain limitations. In *Central Hudson Gas & Electric Corp. v. Public Service Commission*,[1] the Court established a four-part test to determine the constitutionality of regulations on commercial speech. This test requires that: (1) the speech must concern lawful activity and not be misleading, (2) the government's interest in regulating the speech must be substantial, (3) the regulation must directly advance the government's interest, and (4) it must not be more extensive than necessary. As applied to cannabis advertising, courts are divided on whether state-imposed restrictions violate a business's First Amendment rights to engage in commercial speech.

Lawful Activity and Misleading Claims

A critical aspect of the Court's jurisprudence is that First Amendment protection for an advertisement applies only if it promotes a "lawful" product or service. The use, possession, production, and distribution of cannabis remains illegal under federal criminal law. One court[2] and some commentators have concluded that this means that the federal Constitution's free speech guarantee does not protect cannabis advertising, even in states where cannabis is legal. Their central argument is that something which remains unlawful under federal law, the supreme law of the land, cannot constitute a "lawful activity."[3]

However, it is clear that not all courts agree. Some courts have made the distinction based on whether plaintiffs made a Federal or State constitutional claim.[4] In *Clarence Cocroft & Tru Source Medical Cannabis v. State*, the Court reasoned that if a First Amendment case is brought solely under federal law and the U.S. Constitution, then federal law is used to determine whether the activity is lawful. In contrast, if the First Amendment claim is brought under state law or the state constitution, and that state's Constitution protects commercial speech to a greater degree than the Federal Constitution, it is possible that cannabis activities may be considered "lawful" if cannabis is legal under that state's laws. The Court's reasoning relies on a case involving abortion advertisements: *Bigelow v. Virginia.*

In *Bigelow v. Virginia*,[5] the Supreme Court held that a Virginia statute that made it a misdemeanor to encourage the procurement of an abortion violated the First Amendment when the statute was applied to a Virginia newspaper editor who published an advertisement for an abortion service provider in New York City. Later decisions have read Bigelow as adopting "a strong position against the constitutionality of a prohibition by one locality . . . on advertising regarding activities lawful in another locality."[6] These courts have "interpreted Bigelow to mean that an activity is 'lawful' under the Central Hudson test so long as it is lawful where it will occur." Yet, Bigelow deals with a difference in the lawfulness of an activity between coequal states but does not comment on an activity that is simultaneously lawful under state law but unlawful under federal law in the place "where it will occur."[7]

Regarding misleading advertising, the Supreme Court has always been clear that false or misleading advertising is not entitled to First Amendment protection because it serves no informational function.[8] However, the Court has been less clear about what, precisely, constitutes "misleading" advertising. While determining the accuracy or falsehood of a statement can be verified, discerning whether a specific claim is misleading presents a greater challenge.[9] The handful of cases that address misleading advertising suggest that advertisements are not protected if they have no intrinsic meaning, convey no information, are inherently likely to deceive, or have proven to be misleading in practice.[10] It remains to be seen whether certain cannabis advertisements will qualify as misleading.

Substantial Government Interest

The second step of the *Central Hudson* test asks whether the asserted governmental interest is substantial. Courts agree that states have a substantial interest in protecting the physical, mental and emotional health of children.[11] For instance, the Court in *Plausible Products, LLC d/b/a Hashtag Cannabis v. Washington State Liquor and Cannabis Board* noted that states have "the goal of curtailing minor children's interest in and exposure to the marijuana trade" and "a substantial interest in discouraging and preventing the consumption of marijuana by minors." [12] Similarly, the Court in *Seattle Events* determined that a "[s]tate has a substantial interest in preventing underage marijuana use and thereby protecting children's health." Because of this interest, Courts have found that states possess the authority to limit advertising in order to prevent underage individuals, who are not legally permitted to purchase the product, from being influenced to do so. This prong is rarely disputed in *Central Hudson* cases.

Directly Advances the Substantial Government Interest

Central Hudson's third step requires courts to ask if the challenged restrictions directly advance the governmental interest. To satisfy this step, the state "must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree."[13] A restriction can be justified at this step "by reference to studies and anecdotes pertaining to different locales altogether" or by "history, consensus, and 'simple common sense.'"[14] So, when a government asserts a purpose to prevent underage cannabis use, prong three requires that concrete evidence, rather than "speculation and conjecture," is produced to demonstrate that there is a danger to minors consuming cannabis.[15]

The government must also show that the means chosen by the state—restricting speech through advertising—will be effective in reducing the harm that it has shown to exist.[16] To satisfy this requirement, governments most often rely on past evidence and parallels with similar products to demonstrate the relationship between advertising and youth demand. The Supreme Court has acknowledged the general notion that advertising promotes product demand, while restricted advertising has the opposite effect.[17]

Studies regarding tobacco and alcohol have established links between advertising and increased underage usage, and similar studies have emerged since the legalization of medical marijuana in certain states, indicating a connection between cannabis advertising and heightened underage consumption. For instance, both Congress and the United States Supreme Court have connected tobacco advertising to underage tobacco use.[18] And the United States Court of Appeals for the Fourth Circuit found it reasonable for a city to conclude "that there is a 'definite correlation between alcoholic beverage advertising and underage drinking.'"[19] Studies have also identified that exposure to outdoor cannabis advertising is significantly associated with a higher probability of cannabis use, cannabis use disorder, and stronger intentions to use cannabis products one year later.[20]

In *Seattle Events*, the Court held that common sense allows a state "to conclude that less exposure to marijuana advertising would make minors less likely to use marijuana, especially since the same is true about other regulated products like alcohol and tobacco."[21] In this case, the challenged restrictions were limited to a 1,000-foot provision, a sign size limitation, and restrictions on signs at events that were not limited to individuals 21 and older. These restrictions minimize cannabis advertising near locations where one can reasonably assume children congregate, like schools, playgrounds, recreation centers, childcare centers, parks, libraries, game arcades, arenas, stadiums, malls, fairs, and farmers markets. The Court reasoned "that minimizing marijuana advertising in areas where children congregate regularly would decrease their exposure to that advertising." As such, restrictions that minimize youth exposure and proximity to cannabis advertising are likely to directly advance a state's substantial interest in preventing underage cannabis use.

Narrowly Tailored

The fourth and final step of the *Central Hudson* analysis determines whether the challenged restrictions are not more extensive than necessary. At this step, the state must show "a 'fit between the legislature's ends and the means chosen to accomplish those ends.'"[22] That fit can be "not necessarily perfect, but reasonable," and must be "'in proportion to the interest served.'"[23] This analysis does not require the State to employ the least restrictive means, but instead "a means narrowly tailored to achieve the desired objective."[24] In other words, the state must show that they are not restricting more commercial speech than necessary to achieve their objective.

In *Lorillard Tobacco Co. v. Reilly*, the Court struck down outdoor advertising regulations prohibiting smokeless tobacco or cigar advertising within 1,000 feet of a school or playground for failure to satisfy prong four.[25] In its holding, the Court found a lack of tailoring for two reasons: (1) the state failed to demonstrate how much speech would be restricted in major metropolitan areas, and (2) with respect to the restricted media, the state should have tailored the restrictions more carefully to target "particular advertising and promotion practices that appeal to youth." For instance, it is not clear why a ban on oral communications is necessary to further the state's interest. That restriction prevents a retailer from answering inquiries about its tobacco products if that communication occurs outdoors. Similarly, a ban on all signs of any size is ill suited to target the problem of highly visible billboards. To the extent that studies have identified particular advertising and promotion practices that appeal to youth, tailoring should involve targeting those practices while permitting others.

The *Lorillard* Court also noted that the regulation was not narrowly tailored because a tobacco retailer may have no means of communicating to passersby on the street that it sells tobacco products. Alternative forms of advertisement, like newspapers, do not allow a retailer to propose an instant transaction in the way that onsite advertising does. The ban on any indoor advertising that is visible from the outside also presents problems in establishments like convenience stores that are not specialty stores and require a method of advertising to inform

customers that the product is inside the store. This issue, however, does not apply to cannabis regulation because cannabis products can only be sold in specialty stores that are designated as dispensaries.

Specifically related to cannabis, the Court in *Seattle Events* found that a restriction prohibiting cannabis advertising within 1,000 feet of many places where minors are likely to congregate was narrowly tailored to achieve the desired objective, preventing underage cannabis consumption.[26] Unlike in *Lorillard Tobacco Co. v. Reilly,* the challenged restrictions were not an outright ban on outdoor advertising. The restrictions instead listed specific public areas that marijuana advertising cannot generally be placed near, and importantly, the restrictions allowed cannabis advertising, even at restricted locations, as long as the location was being used for an adults-only event. The challenged restrictions also allowed physical storefronts to have two signs advertising their business by using their name, location, and the nature of their business. The Court reasoned that each of these features shows that the challenged restrictions are carefully crafted to minimize exposure of children to marijuana advertising while still allowing adults to see those advertisements, satisfying the fourth step of *Central Hudson*.

However, in *Plausible Products, LLC d/b/a Hashtag Cannabis v. Washington State Liquor and Cannabis Board*, the Court concluded that the content, size, and affixing advertising restrictions were more extensive than necessary to advance the State's interest in preventing underage consumption.[27] The Court reasoned that because minors are already prevented from entering cannabis retailers and buying cannabis, no matter how enticing a non-permanently affixed pot sign exceeding 1,600 square inches inside of a marijuana retailer might be to a person under age 21, kids cannot obtain cannabis for licensed businesses. The Court believed the advertising restrictions were also underinclusive because they did not restrict the number and maximum size of billboards. If the State is concerned with minimizing the risk towards underage consumers, the Court noted that a tailored approach sufficient to withstand *Central Hudson* scrutiny might involve targeting the advertising that has proven to impact youths, such as billboard signs. As a result, Washington's cannabis advertising restrictions failed *Central Hudson's* last step.

Depending on the scope and characteristics of a state's advertising policy, cannabis advertising can be constitutionally restricted in order to protect children's health. However, regulators must be certain that their scheme of regulations consistently seeks to minimize the harm of youth cannabis use and restricts no more speech than needed to achieve this goal.

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[1] 447 U.S. 557 (1980).
[2] Mont. Cannabis Indus. Ass'n v. Montana, 368 P.3d 1131, 1150 (Mont. 2016) ("[A]n activity that is not permitted by federal law—even if permitted by state law—is not a 'lawful activity' within the meaning of Central Hudson's first factor.").
[3] Clarence Cocroft & Tru Source Medical Cannabis v. State, 23-cv-00431, 10 (N.D. Miss. Jan. 22, 2024).
[4] Seattle Events, 22 Wash.App. 2d at 656, this distinction was addressed: "In Montana Cannabis, the plaintiffs "rel[ied] exclusively on federal law in their argument on this issue" and did not bring a claim under the free speech provision of the Montana Constitution. The sale of marijuana remains illegal under federal law. 21 U.S.C. §§ 812(c) sched. I(c)(10), 841. In addition to a challenge under the federal constitution, Seattle Events brought claims under the state constitution, which invokes state law. Therefore, this case is distinguishable from Montana Cannabis, where the appellants relied solely on the protections of the United States Constitution and invoked only federal law."
[5] 421 U.S. 809 (1975).
[6] Nat'l Ass'n of Tobacco Outlets, Inc. v. City of Worcester, 851 F. Supp. 2d 311, 315 (D. Mass. 2012); see also Washington Mercantile Ass'n v. Williams, 733 F.2d 687, 691 (9th Cir. 1984) (finding that an advertiser who proposes a transaction in a state where the transaction is legal is promoting a legal activity); Leslie Gielow Jacobs, Regulating Marijuana Advertising and Marketing to Promote Public Health: Navigating the Constitutional Minefield, 21 LEWIS & CLARK L. REV. 1081, 1096 (2018).
[7] *Id*.
[8] Jennifer Harris & Samantha Graff, Protecting Young People from Junk Food Advertising: Implications of Psychological Research for First Amendment Law, 102(2) Am J Public Health 214 (Feb. 2012); see Bates v State Bar of Arizona, 433 US 350, 383 (1997) ("The public and private benefits from commercial speech derive from confidence in its accuracy and reliability.")
[9] Rebecca Tushnet, It Depends on What the Meaning of "False" Is: Falsity and Misleadingness in Commercial Speech Doctrine, 41 LOY. L.A. L. REV. 227, 227–28 (2007).
[10] Mass. Ass'n of Private Career Schs. v. Healey, 159 F. Supp. 3d 173, 203 (D. Mass. 2016); Central Hudson Gas & Electric Corp v Public Service Commission of New York, 447 US 557, 566 (1980); In re R.M.J., 455 US 191, 203 (1982); Friedman v Rogers, 440 US 1, 12 (1979).
[11] Seattle Events v. State, 512 P.3d 926 (Wash. App. 2022); Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001); Anheuser-Busch, Inc. v. Schmoke, 101 F.3d 325 (4th Cir. 1996).
[12] Plausible Products, LLC d/b/a Hashtag Cannabis v. Washington State Liquor and Cannabis Board, Case No. 19-2-03293-6 SEA (2019).
[13] 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)).

[14] Fla. Bar v. Went For It, Inc., 515 U.S. 618, 628 (1995).
[15] Greater New Orleans Broad. Ass'n, Inc. v. United States, 527 U.S. 197, 198 (1999) (quoting Edenfield v. Fane, 507 U.S. 761, 770–71 (1993)).
[16] Greater New Orleans Broad. Ass'n, 527 U.S. at 188.
[17] 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).
[18] Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, § 2(15), (17)-(27), 123 Stat. 1776, 1777-78 (2009); Lorillard, 533 U.S. at 558-61, 121 S.Ct. 2404.
[19] Anheuser-Busch, 101 F.3d at 327 (quoting Anheuser-Busch v. Schmoke, 63 F.3d 1305, 1314 (4th Cir. 1995)).
[20] Pamela J. Trangenstein et al., Cannabis Marketing and Problematic Cannabis Use Among Adolescents, 82 J. Stud. Alcohol & Drugs 288 (2021).
[21] Seattle Events, 512 P.3d at 936.
[22] 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)).
[23] Bd. of Trustees of State Univ. of N.Y. v. Fox, 492 U.S. 469, 480 (1989) (quoting In re R. M. J., 455 U.S. 191, 203 (1982)).
[24] *Id*.
[25] Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001).
[26] Seattle Events v. State, 512 P.3d 926 (Wash. App. 2022).
[27] Plausible Products, LLC d/b/a Hashtag Cannabis v. Washington State Liquor and Cannabis Board, Case No. 19-2-03293-6 SEA (2019).