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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

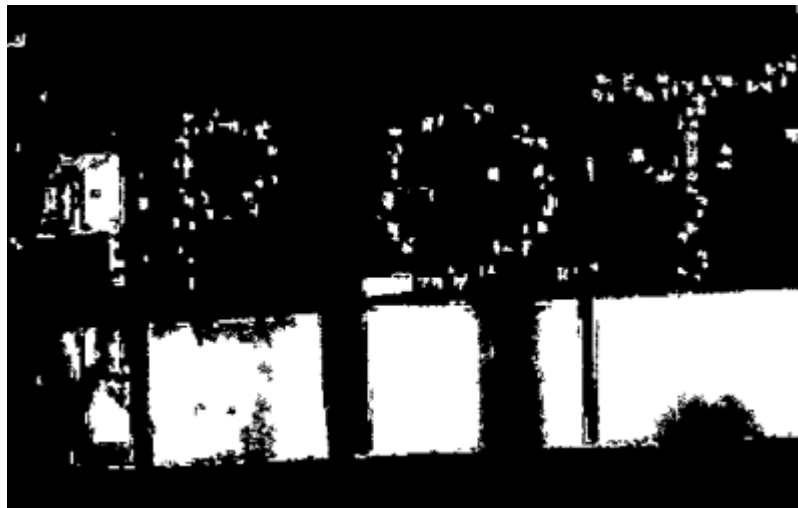
**ORDER GRANTING PETITIONER'S
REQUEST FOR RELIEF FROM
AGENCY ACTION**

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

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:



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

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

13 **II. POSTURE**

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

22 Hashtag now appeals the Board’s Final Order in this Court. Hashtag invokes what
23 it asserts is this Court’s authority under RCW 34.05.570(3)(a), which provides in relevant
24 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

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

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

7 **IV. DISCUSSION**

8 **A. *Central Hudson* Applies Under Both the U.S. and Washington** 9 **Constitutions**

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

18 The first questions under *Central Hudson* are whether the commercial speech is
19 “more likely to deceive the public than to inform it,” and whether the commercial speech is
20 “related to illegal activity.” *Id.* at 563-64 (citations omitted). If the commercial speech is
21 deceptive or relates to illegal activity, “[t]he government may ban” the speech, and thus the
22 speech gets no First Amendment protection. *Id.* (citations omitted). If the commercial
23 speech is neither misleading nor related to illegal activity, courts apply a three-part test to
24 determine whether the restriction is constitutional.
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1 Under the first part of the *Central Hudson* test, courts ask whether “[t]he State . . .
2 [has] assert[ed] a substantial interest.” *Id.* at 564.

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

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

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

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

20 Article I, Section 5 of the Washington Constitution provides that “[e]very person
21 may freely speak, [and]write and publish on all subjects.” Wash. Const. art. I, § 5. In
22 analyzing whether restrictions on commercial speech violate Article I, Section 5 of the
23 Washington Constitution, Washington courts apply *Central Hudson*. See *Nat’l Fed’n of*
24 *Retired Persons v. Ins. Comm’r*, 120 Wn.2d 101, 119, 838 P.2d 680 (1992) (applying
25 *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,

1 and explaining, “[w]e therefore follow the interpretive guidelines under the federal
2 constitution.”).

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

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

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

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

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

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

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

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

3 In its briefing, the State cites “the goal of curtailing minor children’s interest in and
4 exposure to the marijuana trade” as a substantial interest under *Central Hudson*, Answer at
5 7, and Hashtag agrees “that the State has a substantial interest in discouraging and
6 preventing the consumption of marijuana by minors, and does not dispute that the second
7 *Central Hudson* factor is therefore met,” Petitioner’s Opening Brief. at 9. In enacting laws
8 to regulate the recreational marijuana industry, the Legislature took care to express the
9 interest it was seeking to advance, while declaring that the restrictions did not infringe upon
10 retailers’ free-speech rights:

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

25 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

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

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

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

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

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

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

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

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

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

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

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,

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

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

11 *Id.* Thus, the *Rubin* court concluded that the challenged law “cannot directly and materially
12 advance its asserted interest because of the overall irrationality of the Government’s
13 regulatory scheme.” *Id.*

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

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

24 The advertising restrictions provide in relevant part that:

25 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

1 the nature of the business. Each sign must be no larger than one thousand
2 six hundred square inches and be permanently affixed to a building or other
3 structure.
4 RCW 69.50.369(2); WAC 314-55-155(2)(a). When it displayed the Pot Sign, Hashtag
5 violated these restrictions because: (1) Pot was not Hashtag’s business or trade name; (2)
6 the Pot Sign put Hashtag over the two-sign limit; (3) the Pot Sign was large than 1,600
7 square inches; and (4) the Pot Sign was not permanently affixed.

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

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

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

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

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

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

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

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

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

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**
10 **Sufficiently Tailored to Advance the State’s Substantial Interest**

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

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

1 69.50.369(2) and WAC 314-55-155(2)(a) are more extensive than necessary to advance the
2 State’s interest in preventing underage consumption.

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

18 The Court concludes that the content, size, and affixing restrictions in RCW
19 69.50.369(2) and WAC 314-55-155(2)(a) are more extensive than necessary to advance the
20 State’s interest in preventing underage consumption. Given that the restrictions are both
21 more extensive than necessary and yet also underinclusive, there is a poor fit between the
22 restrictions and the State’s interest; too poor to withstand *Central Hudson*’s last step.

23 **F. The Court’s Holding is Limited**

24 The Court is not holding that all of the State’s advertising restrictions violate the
25 U.S. and Washington Constitutions. The State warns that “the elimination of all advertising

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

10 The Court’s ruling is limited to the on-premises content, size, and affixing
11 restrictions applicable to marijuana retailers, set out in RCW 69.50.369(2) and WAC 314-
12 55-155(2)(a). The lawful sale of recreational marijuana is relatively new, and it is perhaps
13 not surprising if there is not much research into the effect of advertising on potential
14 underage consumers. The Board could not address the constitutionality of the advertising
15 restrictions. This Court can only say that, on this record, as supplemented, the advertising
16 restrictions violate the U.S. and Washington constitutions. The Court’s ruling does not
17 eliminate all advertising restrictions or suggest a free-for-all. If anything, the research cited
18 by the State and the case law cited herein might suggest other targeted, rational restrictions
19
20

21 ¹ The State also notes that “[t]he signs were created using bright, multi-colored
22 electric lights, which are more likely to be particularly appealing to children,” citing WAC
23 314-55-105(5)(b). Respondent’s Answer at 11. Advertising by marijuana retailers cannot
24 include advertising “Especially appealing to children,” which includes, among other
25 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.

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

3 **V. CONCLUSION**

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

- 8 • The restriction to “signs identifying the retail outlet by the licensee’s
9 business or trade name,” RCW 69.50.369(2), and “signs identifying the retail
10 outlet by the licensee’s business name or trade name,” WAC 314-55-
11 155(2)(a).
- 12 • The restriction to signs “no larger than one thousand six hundred square
13 inches,” RCW 69.50.369(2), and signs no larger than “sixteen hundred
14 square inches,” WAC 314-55-155(2)(a).
- 15 • The requirement that signs be “permanently affixed.” RCW 69.50.369(2).
16 (In contrast to RCW 69.50.369(2)’s requirement that each sign be
17 “permanently affixed to a building or other structure,” WAC 314-55-
18 155(2)(a) requires that signs simply be “affixed to a building or permanent
19 structured.”)

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

22 It is so ordered.

23 DATED this 17th day of November, 2019.

24
25 _____
David S. Keenan
Judge

King County Superior Court
Judicial Electronic Signature Page

Case Number: 19-2-03293-6
Case Title: PLAUSIBLE PRODUCTS, LLC d/b/a HASHTAG CANNABIS vs
WASHINGTON STATE LIQUOR AND CANNABIS BOARD
Document Title: ORDER GRANTING PETITION FOR RELIEF

Signed by: David Keenan
Date: 11/18/2019 9:00:00 AM



Judge/Commissioner: David Keenan

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