No. 99019-1

Appeal from Thurston Co. Superior Ct., # 19-2-02827-34

SUPREME COURT OF WASHINGTON

SEATTLE EVENTS, a Washington Nonprofit Corporation, MULTIVERSE HOLDINGS, LLC, a Washington Limited Liability Company, and UNIVERSAL HOLDINGS, LLC, a Washington Limited Liability Company,

Appellants,

v.

STATE OF WASHINGTON, WASHINGTON STATE LIQUOR AND CANNABIS BOARD (WSLCB), an agency of the State of Washington, and members of the WSLCB, JANE RUSHFORD, OLLIE GARRETT, RUSS HAUGE, in their official capacities only, and RICK GARZA, Director of the WSLCB, in his official capacity, only,

Respondents.

APPELLANTS' OPENING BRIEF

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I. INTRODUCTION

Washington regulates the lawful sale of both alcohol and marijuana by licensed producers, distributors and retailers. Both are regulated by the Liquor and Cannabis Board (WSLCB). Washington's statutes and regulations are more restrictive with respect to cannabis advertising than to alcohol.

The restrictions on marijuana advertising in RCW 69.50.369 fail to meet applicable tests under the First Amendment and U.S. Supreme Court decisions in *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n. of New York*, 447 U.S. 557, 566, 100 S. Ct. 2343, 2351, 65 L. Ed. 2d 341 (1980), and *Lorillard Tobacco v. Reilly*, 533 U.S. 525, 121 S.Ct. 2404, 150 L.Ed.2d 532 (2001). Further, strict scrutiny should apply to the differential treatment of marijuana advertising, contraposed to alcohol advertising.

Additionally, Washington's Article I, Section 5 constitutional protection of the right to speak freely on any subject is broader than the First Amendment. A more protective standard for the allowance of non-deceptive commercial speech applies under Art. I, § 5.

II. ASSIGNMENTS OF ERROR

1. The Superior Court erred when it granted summary judgment to Respondents on their Motion for Summary Judgment, dismissing Seattle

Events, Universal's and Multiverse's claims that Washington's restrictions on commercial speech are unreasonable or overbroad under the First Amendment and under Washington's Right to Speak Freely, Art. I, § 5.

2. The Superior Court erred when it failed to grant Appellants' Cross-Motion for Summary Judgment for declaratory and injunctive relief respecting Seattle Events, Universal's and Multiverse's claims that Washington's restrictions on commercial speech are unreasonable or overbroad under the First Amendment and under Washington's Right to Speak Freely, Art. I, § 5.

3. The Superior Court erred by not separately analyzing Appellants' free speech claims under Art. I, § 5.

4. The Superior Court erred by denying reconsideration in light of the intervening U.S. Supreme Court decision in *Barr v. American Association of Political Consultants, Inc.,* ___ U.S. ___ , 140 S.Ct. 2335 (July 6, 2020).

III. ISSUES PRESENTED FOR REVIEW

1. Are the statutory and regulatory restrictions on marijuana advertising at issue here broader than necessary to protect public health and safety and to prevent use of marijuana by minors, rendering RCW 69.50.369, Sections (1) and (7)(b) and (e) , unconstitutionally overbroad restrictions on commercial speech under the traditional *Central Hudson*

and *Mattress Outlet* tests for restrictions on commercial speech? [1]

2. Is differential treatment of marijuana advertising by licensees, as distinguished from alcohol advertising, a speaker-based restriction on commercial speech that triggers strict scrutiny?

3. Under Art. I, § 5 of the Washington Constitution, does a licensed business have a broader right to engage in non-deceptive commercial free speech than under the First Amendment?

4. If the Court Reaches Issue # 4 and decides the answer is yes, what is the standard to apply in commercial speech cases that involve non-deceptive advertising?

IV. STATEMENT OF THE CASE

A. Procedure. Appellants are Seattle Events, a non-profit corporation which is a marijuana law reform advocacy group, and two "I-502" licensees,[2] Multiverse Holdings and Universal Holdings. The Respondents are the State of Washington, the Washington State Liquor and Cannabis Board (WSLCB), its Board Members and Executive Director. The individuals are joined solely in their official capacities.

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[1] *Central Hudson*, 447 U.S. at 566 (1980); *Kitsap County v. Mattress Outlet*, 153 Wn.2d 506, 512, 104 P.3d 1280 (2005).

The challenged statutory provisions, and the parallel WAC provisions, are set forth in Appendix I to this brief.

[2] I-502 refers to Initiative 502 (2012), which established a lawful recreational marijuana industry in Washington. *Cf.* RCW 69.50.325 *et seq.*

Appellants filed suit on June 4, 2019. Their First Amended Complaint was filed June 10, 2019. (CP 1-42) Four days later, they sought a preliminary injunction against enforcement of an Administrative Bulletin that chilled the rights of licensees to support, attend and participate at Seattle Events' annual Seattle Hempfest "protestival" in August 2019. (CP 43-160). Rather than contest the motion for preliminary injunction, Respondent WSLCB agreed to substantially revise the Administrative Bulletin at issue and permit licensed marijuana businesses to participate at Seattle Hempfest with booths, sponsorships, and educational materials. Administrative Bulletin 19-01 (CP 41-42) was withdrawn and replaced by Bulletin 19-03, which unequivocally permitted licensed marijuana businesses to sponsor Hempfest-type events and have non-commercial messages, including informational and educational material along with the business name, logo, store address, telephone and contact information at Hempfest. (CP 161-67)

Appellants' Second Amended Complaint squarely challenged portions of RCW 69.50.369 that limit advertising by I-502 licensees within 1,000 feet of certain locations and in all parks, as well as certain other advertising restrictions at trade shows and fairs, and signage size restrictions at retail stores. (CP 205-48, esp. at CP 215-17) Following discovery, the parties filed cross-motions for summary judgment. (CP 302-

60 and 361-95)

The Superior Court granted the State's dispositive motion and denied Appellants' cross-motion. (CP 575-78) Appellants moved for reconsideration, based on the intervening U.S. Supreme Court decision in *Barr v. American Association of Political Consultants, Inc.,* 140 S.Ct. 2335 (July 6, 2020). (CP at 579-616) The Superior Court denied reconsideration. (CP at 676)

B. Facts.

1. Disproportionate Restrictions on Universal's and Multiverse's Advertising.

Universal and Multiverse are Washington limited liability companies that operate licensed retail marijuana businesses, I-502 licensees. (CP 52) [3] Both businesses have participated at the Seattle Hempfest "protestival" and supported its messages, including calls for marijuana law reform, to end "prison for pot," and to support those imprisoned for marijuana crimes. (CP 53-57, 396-99 and 406) As 502 licensees, they are unable to advertise their businesses at the annual Seattle Hempfest, held at Myrtle Edwards Park and Centennial Park on Seattle's

[3] Not only is the cannabis business lawful, early during the COVID pandemic Gov. Inslee declared retail cannabis business workers were "essential." March 23, 2020 Proclamation #20-25, Appendix at 1. https://www.governor.wa.gov/sites/default/files/WA%20Essential%20Critical%20Infrastructure%20Workers%20%28Final%29.pdf

Elliott Bay waterfront. (Admin. Bull. 19-01, CP 41-42, superseded by Admin. Bull. 19-03, CP 166-67) As licensed marijuana retailers, they are restricted in their ability to advertise to a far greater degree than comparable alcohol retailers. (CP 403-04, 411-40. *Compare,* RCW 66.08.060 [alcohol advertising] and RCW 69.50.369 [marijuana advertising]; WAC 314-52-070 [alcohol] and WAC 314-55-155 [marijuana])

Marijuana businesses are barred from outdoor advertising within 1,000 feet of schools, playgrounds, parks, recreation centers, child-care centers, libraries, game arcades that admit persons under 21 *per* RCW 69.50.369(1) and WAC 314-55-155(1)(b)(i), as well as at arenas, stadiums, shopping malls, state-supported fairs, farmers' markets and video-game arcades (other than adult-only facilities), *per* RCW 69.50.369(7)(b)(i) and WAC 314-55-155(2)(c). Outdoor liquor advertising, on the other hand, is allowed without any restriction, unless the administrative body of a school, church, public playground or athletic field objects, in which case the restriction is 500 feet, half the distance proscribed for marijuana. WAC 314-52-070. The provision for liquor does not extend to parks without playgrounds or athletic fields – parks like Seattle's Myrtle Edwards and Centennial Park complex. (CP 105) Nor does WAC 314-52-070 bar outdoor advertising at arenas, stadiums, shopping malls, state-supported

fairs, farmers' markets and video-game arcades.

Similarly, the restriction on the numbers of signs at retail marijuana stores allows half of what is permitted at liquor stores. *Cf.* WAC 314-55-155(2)(a) (two signs limited to 1600 sq. inches each, for marijuana) and WAC 314-52-070(2) (four signs limited to 1600 sq. inches each, for alcohol).[4]

The WSLCB's Seattle map shows how wide the overlapping 1,000-foot zones are and how small the pockets beyond 1,000 feet are. (CP 415-19) For example, the entire downtown core is entirely off limits. (*Id*.)

The record also shows the WSLCB has used these statutory and regulatory provisions to prevent one marijuana licensee from sponsoring a rodeo under its business name, if it would result in its name being on a tee-shirt. (CP 421-25, *esp.* at 425) Even under the revised, superseding Administrative Bulletin 19-03, the WSLCB prevented another licensee from advertising in a Fair and Rodeo Guide and limited any sponsorship listing in the Guide to simply name, address and phone, without any slogan such as "Welcome to the Top." (CP 427-30) Another licensee was

[4] The King County Superior Court held that these restrictions of on-premises advertising pursuant to WAC 314-55-155(2)(a) and RCW 69.50.369(2) were unconstitutional, based on *Central Hudson. Plausible Products, LLC d/b/a Hashtag Cannabis v. WSLCB*, King Co. Superior Court #19-2-03293-6-SEA. That decision is in the record in this case. (CP 552-74) Judge Lanese did not address that ruling in his decision in this case. (CP 575) Appellants in this case did not challenge the in-store signage limit.

prevented from participating in a college job fair. (CP 432-34)

Due to these statutory and regulatory restrictions, as well as the WSLCB's staff interpretations, discovery from the WSLCB revealed that the *Spokesman-Review* was thwarted in its effort host a community educational event, 2019 Evercannafest, in Spokane Valley. (CP 436-40)

2. These Restrictions Impact Seattle Hempfest's "Protestival."

Seattle Events' Seattle Hempfest is the world's premier advocacy event of its type. Over the course of 28 years through 2019, this annual "protestival" has come to attract over 100,000 attendees over the course of a three day weekend. Hempfest celebrates the marijuana culture and serves as a gathering of activists and reformers, including mainstream local and federal elected officials, to spread a variety of messages in favor of law reform, including successful or ongoing campaigns to make marijuana law enforcement Seattle's lowest criminal law priority, to promote legal provision for medical marijuana, to decriminalize and legalize recreational use, to reform banking laws that affect the legal marijuana industry, and to advocate for release of marijuana prisoners. (CP 43-45, 52-56, 62-65, 69-71, 397-98 and 406)

The City of Seattle and Port of Seattle both impose conditions on Seattle Events' licensed use of their respective adjoining parks. (CP 43-49, 62-63 and 75-120). As a free speech event, Seattle Events cannot charge

admission and depends entirely on vendor income, donations and sponsorships. (CP 34-49, 62 and 71) The City, as well as the Port, imposes substantial obligations, including requirements to provide for load-in and load-out plans, as well as plans for communications, crowd management, public safety, security and emergency evacuation. There are additional requirements for numbers of security and event staff and staff training, traffic safety planning, signage, sanitation, hydration, ecology, first aid, protection of park property, park clean-up, insurance and indemnification. (CP 47, 62-63, and 75-120). Health, fire, building and parks permits are required, all of which involve code-compliance requirements. With annual weekend attendance of 100,000 at this Art. I, §4 assembly (CP 62, 122-25), the costs over each of the seven years from 2013 to 2019 ranged from about $625,000 to over $924,000. (CP 46, 408)

Even though the WSLCB backed down on its total ban on licensee signage of any kind at Seattle Events' Hempfest event in response to this lawsuit when the WSLCB retracted Administrative Bulletin 19-01 and issued superseding Administrative Bulletin 19-03 (CP 41-42 and 161-67), the State's and WSLCB's restrictions on outdoor advertising substantially interfere with Seattle Events' ability to continue to produce its annual "protestival." (CP 43-49, 61-125 and 407-10). As a result of these administrative bulletins, participation by I-502 licensees fell in 2019. (*Id*.)

WSLCB enforcement of the challenged statutory and regulatory restrictions on outdoor advertising since the legislature's 2017 amendments to RCW 69.50.369 have substantially inhibited sponsorships from I-502 licensees. This restricts Seattle Events' ability to continue to mount this "protestival." The loss of sponsorship and other income from licensed cannabis businesses in 2019, compared with 2018, was $52,279. (CP at 408). Sponsorship income alone had steadily declined from over $100,000 in 2016. (CP 47) Reduced income from I-502 businesses reduces Seattle Events' capacity to stage an equally large "protestival" in the future. (CP at 408)

3. The Record Fails to Demonstrate that the Restrictions on Commercial Speech Serve to Alleviate Youth Use of Cannabis.

In 2017, the legislature broadened the original Initiative 502 prohibition on advertising within 1,000 feet of schools, parks, etc. to a prohibition on "*any sign* or advertising." (Laws of 2017, ch. 317 § 14 (CP 305), emphasis added) The state's and WSLCB's justifications for the 1,000-foot restriction – to prevent marijuana use by those under 21 years of age – are supported by conjecture and speculation, rather than evidence. (CP 305-07, 444-47)

Appellants do not challenge that amelioration of youth use is a valid state interest. (CP 230, 235-40, 451-53) However, the legislature, as

well as the voters back in 2012, set these limitations without any evidence or data that these restrictions are reasonable and necessary or that they actually serve the state's interest.

The state's and WSLCB's' support for these restrictions in the Superior Court relied on the 2017 legislative history. (CP 305-07) Yet neither Sen. Rivers' March 20, 2017 cited testimony before the House Commerce and Gaming Committee (https://www.tvw.org/watch/?eventID=2017031214, at 23:58-25:57, accessed May 11, 2020), nor Seth Dawson's cited testimony that day (*id.,* at 26:56-28:20), addressed whether or how the 1,000-foot restriction and other restrictions on signage and advertising in RCW 69.50.369(1) and (7)(b) and (e) serve the interest of protecting minors. (CP 445)

Nor did their testimony address differential treatment afforded to beer, wine or other liquor, an issue raised by one industry participant at that same hearing. https://www.tvw.org/watch/?eventID=2017031214, testimony of Phillip Dawdy (April 1, 2017) at 55:33-57:05. (CP 445)

The state's and WSLCB's claim before the Superior Court that industry advocates supported the bill's advertising restrictions at issue was misleading. (CP 306) For example, Respondents cited Ezra Eickmeyer's April 1, 2017 testimony that addressed how the bill "clarifies what those

rules are for billboards." [5] His testimony in no way addressed the 1,000-foot rule or the other store and trade-event related signs at issue. Nor did he address the extension of the scope of the legislation to "*any sign* or advertising." (Added language underlined; *emphasis added*) Eickmeyer's testimony was followed by Phillip Dawdy's presentation in support of restrictions on "sign spinners and wavy blowy things," as well as "pot leaves on billboards" that led to community "blowback." [6] Mr. Dawdy also supported the provision targeted towards advertising to out-of-state residents, particularly Idaho residents who read eastern Washington newspapers. Neither witness testified to the 1,000-foot provision, signs in store windows, or signs at trade event sites. Nor did either witness, or any legislative history cited by Respondents (CP 445-46), address the entirely conclusory legislative findings to support the Washington advertising restrictions challenged in this case:

> **Findings—2017 c 317:** "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

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[5] https://www.tvw.org/watch/?eventID=2017041000 at 1:32:04-51 (accessed May 11, 2020). (CP 445)

[6] https://www.tvw.org/watch/?eventID=2017041000, at 1:32:52–1:34:08 (accessed May 11, 2020). (CP 445)

> 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." [2017 c 317 § 12.]

See, notes following RCW 69.50.325.[7] In summary, the legislature's 2017 findings are not supported by evidence considered by the legislature respecting the issues now presented, nor by reference to academic studies, nor experience in other jurisdictions. Nor do these findings address whether these restrictions are no more extensive than necessary to protect youth, nor whether they directly and materially serve that end.

The state and WSLCB cited studies not in the legislative record, attached to their counsel's declaration (CP 249-301), though these also fall short. Respondents cited a 2018 RAND Corporation study which states in its introductory paragraph:

> Recent high quality epidemiological studies have examined changes in overall marijuana use rates among adolescents before and after passage of medical marijuana legislation laws in an attempt to determine whether marijuana use rates have increased, decreased, or stayed the same following legalization. Due to heterogeneity across studies (e.g., national versus single state) and nuances in policy [citation omitted] there is no definitive conclusion [citations omitted].

D'Amico, et al., "Planting the seed for marijuana use," 188 *Drug and Alcohol Dependence,* 385-391, at 385 (2019). (CP 271-77, at 271) The

[7] The findings are found at: apps.leg.wa.gov/RCW/default.aspx?cite=69.50.325

discussion section of that article recognizes:

> As the data indicated, there is a great degree of variability in exposure to MM [Medical Marijuana] ads, use, cognitions, and consequences, which is likely due to the fact that other factors are associate with these constructs, such as parental monitoring, peer use, or where an adolescent may live. Future work could begin to examine how these factors, along with advertising, may affect these associations over time. In addition, we cannot draw conclusions from this study about the reciprocal exposure to MM ads with marijuana use and related cognitions.

Id. (CP at 276) The 2019 study discussed in the WSLCB's ' Motion before the Superior Court (CP 307) and attached to counsel's declaration (CP 295-301) addresses social media advertising and promotions, not advertising visible from streets and sidewalks 1,000 feet from schools, parks, etc. Social media and internet advertising are not regulated under RCW 69.50.369, except for appeals to children through cartoon characters, etc. Those are *not* restrictions that Appellants challenge.

V. SUMMARY OF ARGUMENT

The restrictions on cannabis advertising in RCW 69.50.369(1) and (7)(b) and (e) violate the First Amendment. These overbroad restrictions do not directly and materially serve a substantial state interest. *Central Hudson*, 447 U.S. at 566; *Lorillard Tobacco v. Reilly*, 533 U.S. 525.

Strict scrutiny applies to differential treatment of marijuana advertising, contraposed to alcohol advertising, due to a "content-

preference." *City of Lakewood v. Willis*, 186 Wn.2d 210, 225-26 and 227-28, 375 P.3d 1056 (2016); *Barr v. American Association of Political Consultants, Inc.,* 140 S.Ct. at 2347; *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 566-67, 131 S. Ct. 2653, 180 L.Ed.2d 544 (2011). A statute need not explicitly describe a particular content-based discriminatory intent to effectuate a content-based restriction. *Sorrell v. IMS Health,* 564 U.S. at 563-64 and 580.

The State bears the burden to justify restrictions on speech. *Collier v. City of Tacoma,* 121 Wn.2d 737, 759, 854 P.2d 1046 (1993).

In relation to the "narrow tailoring" requirement, the government bears the burden to prove that plausible, less restrictive alternatives to restrict free speech are unavailable. *Ashcroft v. ACLU,* 542 U.S. 656, 664-670, 124 S. Ct. 2783, 159 L.Ed.2d 690 (2004) (less restrictive alternatives available to protect minors from pornographic websites). Here, the government has no evidence to justify the 1,000-foot provision for cannabis when 500 feet is sufficient for alcohol. *Cf.* RCW 66.08.060 and WAC 314-52-070.

Art. I, § 5 of Washington's Constitution provides broader protection than the First Amendment. *Bering v. SHARE*, 106 Wn.2d 212, 233–34, 721 P.2d 918 (1986). Whether Art. I, § 5 applies to regulation of commercial speech that is neither obscene nor defamatory nor deceptive is

an open question in Washington. *Kitsap Co. v. Mattress Outlet*, 153 Wn. 2d 506, 511, n. 1, 104 P.3d 1280 (2005). A *Gunwall* [8] analysis is set forth below at 27 - 39. A test for non-deceptive commercial speech under Art. I, § 5 is proposed below at 41 - 45.

VI. ARGUMENT

A. Summary Judgment Rulings Are Reviewed De Novo.

The issues before this Court, which involve the summary judgment ruling on the constitutionality of the advertising and signage restrictions, are questions of law that this Court reviews *de novo. Kitsap County v. Mattress Outlet*, 153 Wn. 2d 506 at 509; *Labriola v. Pollard Group, Inc.*, 152 Wn.2d 828, 832-33, 100 P.3d 791 (2004); *Borton and Sons, Inc. v. Burbank Properties, LLC*, 9 Wn.App.2d 599, 604, 444 P.3d 1201 (2019).

B. Washington's Restriction on Outdoor Advertising by Licensed Cannabis Businesses Fails to Satisfy First Amendment Standards Under *Central Hudson* and *Lorillard.*

Under the First Amendment, commercial speech is free speech protected under an intermediate standard. *Virginia State Bd. of Pharm. v. Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748, 762-65, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976). Where commercial speech is not regulated in a discriminatory or preferential fashion, this Court has followed the

[8] *State v. Gunwall,* 106 Wn.2d 54, 720 P.2d 808 (1986).

Central Hudson standard. Regulation of commercial speech must satisfy the following four-part test:

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n. of New York, supra, 447 U.S. at 566; *Mattress Outlet,* 153 Wn.2d at 512.

The restrictions here ban all advertising, not just misleading advertising, and ban any other sign in the restricted areas. Since passage of I-502, codified in RCW 69.50.325 *et seq.*, licensed cannabis business is legal in Washington. The first step is met. Appellants do not challenge that there is a substantial or compelling state interest in protecting against youth use. The second step is met. As to the third and fourth steps, this Court's decision in *Mattress Outlet* provides critical guidance:

> The third prong of the *Central Hudson* test requires [the government] to show that the ordinance directly and materially serves the governmental interests. [citation omitted]. The burden is not satisfied by " 'mere speculation and 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.' " *Lorillard Tobacco Co. v. Reilly,* 533 U.S. 525, 555, 121 S.Ct. 2404, 150 L.Ed.2d 532 (2001).

153 Wn.2d at 513.

> Under the fourth prong, we examine the means chosen to accomplish the government's asserted interest. *Discovery Network,* 507 U.S. at 416, 113 S.Ct. 1505. The county bears the burden of establishing that the restrictions are no more extensive than necessary to serve the county's stated interests.

153 Wn.2d at 514–15. RCW 69.50.369(1) fails this fourth prong for the same reason the 1,000-foot ban on tobacco advertising failed in *Lorillard.*

In *Lorillard Tobacco v. Reilly*, 533 U.S. 525, 121 S.Ct. 2404, 150 L.Ed.2d 532 (2001), the Supreme Court applied *Central Hudson* to regulations that prohibited advertising for smokeless tobacco and cigars within 1,000 feet of schools and parks. Even though the Court believed the third step was satisfied, the fourth was not, due to its substantial geographic overreach and the failure of the regulators to "carefully calulat[e] the costs and benefits associated with the burden on speech imposed." 533 U.S. at 561, citing *Cincinnati v. Discovery Network, Inc.,* 507 U.S. 410, 417, 113 S.Ct. 1505, 123 L.Ed.2d 99 (1993). *Accord*, *Nat'l. Ass'n. of Tobacco Outlets v. City of Worcester*, 851 F.Supp. 2d 311 (D. Mass. 2012). Significantly, here the WSLCB's map of Seattle indisputably shows the ban applies to nearly all areas in the state's largest city that are "central to the city's cultural life." *Lorillard,* 533 U.S. at 602 (Op. of Stevens, concurring in part and dissenting in part) (CP 415-17)

The overbroad approach embodied in RCW 69.50.369(1) fails on

its face. The statute contains a similar 1,000-foot ban as the overbroad law in *Lorillard,* except that the Washington statute, RCW 69.50.369(1), also refers to child care centers, libraries and arcade game centers, in addition to parks and schools. With licensed child care facilities in family homes, WAC 110-300-0010, formerly WAC 170-295-0001, the sweep is indeterminately wide. The statutory restriction also goes beyond advertising because it covers any sign that references a licensee, regardless of message. The WSLCB has applied it to prevent a licensee from participating at a college job fair. [9]

Where the government "failed to make a showing that a more limited speech regulation would not have adequately served the State's interest," the regulation is invalid. *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 500, 116 S.Ct. 1495, 134 L.Ed.2d 711 (1996), citing *Central Hudson* (ban on advertising price of liquor to promote state's interest in temperance violates First Amendment).

The U.S. Supreme Court cases uniformly require evidence, not the bare, conclusory claims that the State and WSLCB advance here. *See, e.g., Edenfield v. Fane*, 507 U.S. 761, 770-73, 113 S.Ct. 1792, 123

[9] WSLCB internal emails indicate a job fair at a state college occurred at a "school," contrary to the definitions of a school in RCW 28A.150.010 and .020. (CP 432-34). Under those statutes, schools are K-12 schools, not colleges.

L.Ed.2d 543 (1993) (Board has not demonstrated that ban on CPA solicitation advances its interests in any direct and material way, whether by anecdotal evidence or otherwise.)[10]; *City of Cincinnati v. Discovery Network*, 507 U.S. 410, 427, 113 S.Ct. 1505, 123 L.Ed.2d 99 (1993) (prohibition of "commercial handbill" newsstands while newspaper newsstands were not prohibited, "provided the most limited incremental support … [and] was invalid"); *Rubin v. Coors Brewing,* 514 U.S. 476, 483, 488-89, 115 S.Ct. 1585, 131 L.Ed.2d 532 (1995) (ban on labelling alcohol content of beer to curb "strength wars" does not directly and materially advance the interest, in light of an "irrational" differential treatment of wine labels).

Unlike *Renton v. Playtime Theaters,* 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986), and *Northend Cinema v. Seattle*, 90 Wn.2d 709, 712, 585 P.2d 1153 (1978), the record here is void of any studies, detailed or otherwise, from Washington or any other state. There is no evidence in the record that youth use of marijuana has changed since I-502 went into effect. Respondents sought to fill that void by reference to a 2018 national study of states that passed medical marijuana laws, published after the

[10] The Court in *Edenfield* also held that the government does not meet its burden "by mere speculation or conjecture … [but] must demonstrate that the harms that it recites are real and that its restriction will in fact alleviate them to a material degree." 507 U.S. at 767.

2017 legislation. That study is wide of the mark and is explicitly inconclusive about whether states with medical marijuana laws and advertising have experienced a change in youth use. 188 *Drug and Alcohol Dependence,* 385-91, at 385 and 390 (2019). (CP 271, 276)

The legislature failed to conduct hearings to consider research and evidence as to the effects on youth use and behavior or to craft appropriate exceptions to meet the test in *Central Hudson* and *Lorillard.* *Cf. Anheuser-Busch v. Schmoke,* 63 F.3d 1305 (4th Cir 1995), *vac.* 517 U.S. 1206 (1996), *op. adopted in part on rem.* 101 F.3d 325 (4th Cir. 1996).

Noble goals are insufficient to save an unconstitutional restriction when the government fails to meet its burden. *Cf., Ashcroft v. ACLU,* 542 U.S. at 664-70 (plaintiffs likely to prevail on claim that the Childhood Online Protection Act violated First Amendment; government has not shown less restrictive alternatives proposed should be disregarded); *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 427-30, 126 S.Ct. 1211, 163 L.Ed.2d 1017 (2006) (8-0 ruling that government failed to meet its burden to establish that religious sect was not entitled to a preliminary injunction barring Customs from seizing an Amazonian rain forest hallucinogen shipped into U.S. for religious purposes, notwithstanding government's "equipoised" health and safety concerns).

C. Differential and More Restrictive Treatment of Marijuana Advertising as Compared with Liquor Advertising Triggers Strict Scrutiny.

The differential treatment of alcohol and marijuana advertising in Washington state invites strict scrutiny because it is not content neutral.

> The First Amendment requires heightened scrutiny whenever the government creates "a regulation of speech because of disagreement with the message it conveys." *Ward v. Rock Against Racism,* 491 U.S. 781, 791, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989); see also *Renton v. Playtime Theatres, Inc.,* 475 U.S. 41, 48, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986) (explaining that " 'content-neutral' speech regulations" are "those that are *justified* without reference to the content of the regulated speech" (internal quotation marks omitted)). …Even if the hypothetical measure on its face appeared neutral as to content and speaker, its purpose to suppress speech and its unjustified burdens on expression would render it unconstitutional. *Ibid.* Commercial speech is no exception. See *Discovery Network, supra,* at 429–430, 113 S.Ct. 1505 (commercial speech restriction lacking a "neutral justification" was not content neutral).

Sorrell v. IMS Health Inc., 564 U.S. 552, 566-67, 131 S. Ct. 2653, 2664-65 (2011). *See also, City of Lakewood v. Willis*, 186 Wn.2d 210, where this Court followed *Sorrell*, as well as the U.S. Supreme Court decision in *Reed v. Town of Gilbert*, 576 U.S. 155, 135 S.Ct. 2218, 192 L.Ed.2d 236 (2015), and struck Lakewood's municipal ordinance that forbade begging at freeway ramps as facially overbroad because it was content-based. This Court held that *Sorrell* applied because other forms of solicitation, whether for votes or for charitable or commercial purposes, were not

similarly forbidden. 186 Wn.2d at 224-25 and at n. 18. *And see, Collier v. City of Tacoma, supra,* 121 Wn.2d at 748–49 (content-based restrictions on speech are presumptively unconstitutional and subject to strict scrutiny).

Last term, in *Barr v. American Association of Political Consultants, Inc.,* 140 S.Ct. 2335, a majority of the Supreme Court held that a speaker-based preference to federal student debt collectors under the 2015 amendment to the Telephone Communications Protection Act is subject to strict scrutiny.

> … "[T]he fact that a distinction is speaker based" does not "automatically render the distinction content neutral." *Reed*, 576 U.S., at 170, 135 S.Ct. 2218; *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 563–564, 131 S.Ct. 2653, 180 L.Ed.2d 544 (2011). Indeed, the Court has held that " ' laws favoring some speakers over others demand strict scrutiny when the legislature's speaker preference reflects a content preference.' " *Reed*, 576 U.S., at 170, 135 S.Ct. 2218 (quoting *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 658, 114 S.Ct. 2445, 129 L.Ed.2d 497 (1994)).
>
> *Second*, the Government argues that the legality of a robocall under the statute depends simply on whether the caller is engaged in a particular economic activity, not on the content of speech. We disagree. The law here focuses on whether the caller is *speaking* about a particular topic. In *Sorrell*, this Court held that a law singling out pharmaceutical marketing for unfavorable treatment was content-based. 564 U.S., at 563–564, 131 S.Ct. 2653. So too here.

Barr v. Am. Ass'n of Political Consultants, Inc., 140 S.Ct. at 2347 (Plurality op. of Kavanaugh, joined by Roberts, C.J., Alito and Thomas).

Justice Gorsuch joined Justice Kavanaugh's conclusion that the TCPA was a content-based restriction that violated the First Amendment and that strict scrutiny should apply. *Id.,* at 2364. A sixth Justice, Justice Sotomayor, believed that the restriction failed under the intermediate scrutiny standard, because the restriction was not narrowly tailored and because the government had not "sufficiently justified the differentiation between government-debt collection speech and other important categories of robocall speech, such as political speech, charitable fundraising, issue advocacy, commercial advertising, and the like." *Id.* at 2356-57, quoting the plurality opinion at 2347.

Here, the legislature and WSLCB have established a preference for liquor advertising, at the expense of cannabis advertising.

Moreover, there is no legitimate basis to disfavor cannabis, compared to alcohol. Unlike the equivocal findings with respect to advertising and adolescent marijuana use that Respondents placed in the record (CP 271, 276), Respondents' evidence is unequivocal with respect to advertising and related harms of alcohol use by minors:

> **Conclusions**: Longitudinal studies consistently suggest that exposure to media and commercial communications on alcohol is associated with the likelihood that adolescents will start to drink alcohol, and with increased drinking amongst baseline drinkers. Based on the strength of this association, the consistency of findings across numerous observational studies, temporality of exposure and drinking behaviours observed, dose-response

> relationships, as well as the theoretical plausibility regarding the impact of media exposure and commercial communications, we conclude that alcohol advertising and promotion increases the likelihood that adolescents will start to use alcohol, and to drink more if they are already using alcohol.

(CP 279-93, Anderson, et al., "Impact of Alcohol Advertising and Media Exposure on Adolescent Alcohol Use: a Systematic Review of Longitudinal Studies," pub. in *Alcohol and Alcoholism* Vol. 44, No. 3, pp 229-243 (2009)). That same article discusses the ill effects of alcohol use on adolescents:

> Drinking by adolescents and young adults is associated with automobile crash injury and death, suicide and depression, missed classes and decreased academic performance, loss of memory, blackouts, fighting, property damage, peer criticism and broken friendships, date rape, and unprotected sexual intercourse that places people at risk for sexually transmitted diseases, HIV infection and unplanned pregnancy.

Id. With no evidence to justify the differential treatment, the State cannot meet its burden under strict scrutiny to justify the preferential treatment for alcohol advertising compared to marijuana advertising.

D. Article 1, § 5 Protection of the Right to Speak Freely Provides Broader Protection for Commercial Speech than the First Amendment.

1. This Court's Prior Decisions Establish that Washington Broadly Protects Free Speech.

Washington's Constitution more broadly protects political and issue-oriented free speech, as well as truthful reports of courtroom events,

than the First Amendment. *Bering v. SHARE,* 106 Wn.2d at 233–34 (Time, place and manner restrictions on protestors can be limited on a showing of compelling state interest, rather than a substantial state interest); *State v. Coe,* 101 Wn.2d 364, 359-61, 679 P.2d 364 (1984) (Superior court's gag order barring news reports of proceedings was unlawful prior restraint), citing *Alderwood Assoc. v. Washington Envt'l Council,* 96 Wn.2d 230, 244, 635 P.2d 108 (1981). Washington has joined other states such as California, Arizona and New Jersey which recognize that the right to speak freely set forth in Washington's constitution provides broader protections than the First Amendment. *Cf. State v. Coe* 101 Wn.2d at 376-78; and Utter, *The Right to Speak, Write and Publish Freely; State Constitutional Protection Against Private Abridgment,* 8 U. Puget Sound. L. Rev. 157 at 166-71 (1985).

2. A *Gunwall* Analysis for Commercial Speech.

Notwithstanding this Court's recognition that Art. I, § 5 provides greater protections than the First Amendment, this Court has yet to examine the implications of this principle in commercial speech cases. Instead, this Court has assumed the intermediate scrutiny *Central Hudson* test used by the U.S. Supreme Court applies to commercial speech in Washington. And so, whether Art. I, § 5 requires a higher standard remains a question that deserves examination under *Gunwall. See, Kitsap*

County v. Mattress Outlet, 153 Wn.2d at 511 n.1 ("although our state constitution may be more protective of [commercial] free speech … it is unnecessary to consider a state constitutional analysis because [the county code provision] fails the minimum protection provided under the federal constitution."); *Soundgarden v. Eikenberry*, 123 Wn.2d 750, 764, 871 P.2d 1050 (1994) (42 USC §1983 case brought to challenge prior restraint of constitutionally protected erotic music, holding the prior restraint unlawful; *Gunwall* not briefed, nor addressed); *Chong Yim v. City of Seattle*, 194 Wn.2d 651, 677-79, 451 P.3d 675 (2019) (plaintiffs/appellants analyze their free speech claim only in accordance with intermediate scrutiny); *National Fed. of Retired Persons v. Insur. Commissioner,* 120 Wn.2d 101, 119, 838 P.2d 680 (1992) (In a pre-*Mattress Outlet* case brought by an association challenging Insurance Commissioner prohibition of insurance solicitations by the non-licensed association, this Court avoided the issue, where law did not provide a "clear rule" and relied on decisions in earlier obscenity cases without conducting a *Gunwall* analysis)[11] ; *State v. Arlene's Flowers*, 193 Wn.2d 469, 517-18, 441 P.3d 1203 (2019) (Art. I, § 5 claim not separately argued, nor was

[11] The state's substantial interest to prevent fraud in the insurance business by an unlicensed association involves different interests than are presented in this case. Here, licensed businesses are significantly constrained from truthful, non-deceptive advertising across large swaths of the City of Seattle and elsewhere in Washington, and even signage at their own stores.

error assigned to the trial court's use of a First Amendment analysis for expressive conduct).

Whether Washington's right to speak freely provision provides broader protection than the First Amendment involves an "inquiry [that] must focus on the on the specific context in which the state constitutional challenge is raised." *Ino Ino v. City of Bellevue*, 132 Wn.2d 103, 115, 937 P.2d 154 (1997). The California Supreme Court, in interpreting its constitution,[12] has reached a similar conclusion. *Beeman v. Anthem Prescription Mgt., LLC*, 58 Cal. 4th 329, 341, 315 P.3d 71, 79, 165 Cal. Rptr. 800, 809 (2013).

Accordingly, in this case which involves broad geographic and other restrictions on commercial advertising by licensed businesses, this Court must now address the open question identified in *Mattress Outlet* in the event that this Court chooses to distinguish *Lorillard.*

Since *Mattress Outlet* held that the Kitsap County regulation failed under the *Central Hudson* test, it was unnecessary for this Court to analyze whether Art. I, § 5 provided greater protection for non-misleading commercial speech and did not address the factors for state law

[12] Washington's Art. I, §5 was directly drawn from California's free speech provision. Utter, *The Right to Speak Freely, supra,* 8 U. Puget Sound L. Rev. at 173, n.80.

constitutional analysis identified in *State v. Gunwall,* 106 Wn.2d 54, 61-62, 720 P.2d 808 (1986). *Mattress Outlet*, 153 Wn.2d at 511, n. 1. The six *Gunwall* factors are:

1. The textual language of the State Constitution.

2. Significant differences in the texts of parallel provisions of the federal and state constitutions.

3. State constitutional and common law history.

4. Preexisting state law.

5. Differences in structure between the federal and state constitutions.

6. Matters of particular state interest or local concern.

106 Wn.2d at 61-2. Each of those factors is addressed in turn, below.

(i) ***The textual language of Art. I, § 5***. This Court has repeatedly recognized that the broad language that "[e]very person may freely speak, write and publish on all subjects, being responsible for the abuse of that right" is more protective with respect to political and issue-oriented speech. *Bering v. SHARE,* 106 Wn.2d at 234; *Collier v. Tacoma*, 121 Wn.2d at 748. On the other hand, nude dancing "clings to the edge of protected expression," *Ino Ino, Inc. v. City of Bellevue,* 132 Wn.2d at 116, citing *JJR, Inc. v. City of Seattle,* 126 Wn.2d 1, 9, 891 P.2d 720 (1995). Accordingly, this Court followed federal case law.

As of 1889, newspaper and other advertising was common. For

example, *The Yakima Herald* issue of August 8, 1889, which had a story headlined "Grateful for Our Liberties" concerning the adoption of the Preamble to the Washington Constitution, contained numerous front page advertisements for attorneys, physicians, engineers, and other services, including a bank, a builder, well-digging, a meat market, etc. (Appendix II to this brief)

There is no basis to suggest that the government restricted commercial speech in 1889. Kozinski and Banner, *Who's Afraid of Commercial Speech?,* 76 Virginia L. Rev. 627 (1990). Judge Kozinski and his co-author open their article with the observation that the commercial speech doctrine, originally advanced in 1942, was "plucked … out of thin air." They trace the weakening of that doctrine from no protection, to *Virginia Board of Pharmacy,* 425 U.S. 748, recognizing that commercial speech was protected, to *Central Hudson.* In analyzing *Virginia Pharmacy,* they suggest "the Supreme Court's only two proffered justifications for affording commercial speech a lower level of protection, that it is more objective and more durable than noncommercial speech, really provide no support for treating it differently than noncommercial speech." 76 Virginia L. Rev. at 637-38.

They conclude that the distinction between commercial and noncommercial speech should be abandoned and that full protection of

commercial speech can still be subject to protection against fraud and defamation, the latter of which was once thought to also be outside the protection of the First Amendment but which was appropriately brought into the First Amendment's protection. 76 Virginia L. Rev. at 651-52, citing *Chaplinsky v. New Hampshire*, 315 U.S. 568, 62 S.Ct. 766, 86 L.Ed. 1031 (1942), and *New York Times v. Sullivan.* 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964). Art. I, § 5's language, "being responsible for the abuse of that right," is entirely harmonious with the approach suggested by Kozinski and Banner.

(ii) ***Significant differences in the parallel texts.*** The federal provision is a restraint on Congress from passing laws that are restrictive – "Congress shall make no law" – as opposed to the positive expression of an individual right. This difference justifies an independent interpretation. *Ino Ino,* 132 Wn.2d at 118. This Court has recognized these differences to support broader protection of political and issue speech, but not obscenity nor defamation, neither of which were protected at common law. *Bering* (issue speech)*, Collier* (political speech)*, Ino Ino* (erotic dancing)*, JJR* (obscenity), *State v. Reece*, 110 Wn.2d 766, 778-79, 757 P.2d 947 (1988) (obscenity), and *Richmond v. Thompson*, 130 Wn.2d 368, 381-82, 922 P.2d 1343 (1996) (defamation).

The language "being responsible for the abuse of that right" has

application in cases involving *false* speech, *cf. Richmond*, 130 Wn.2d at 380-82 (defamation) (false statement to Governor's office by disgruntled motorist about WSP trooper not protected by the petition clause, Art. I, § 4; nor by Art. I, § 5 as the common law in 1889 recognized defamation actions). Here, the limitation on speech applies to all advertising, including *truthful* advertising.

The California Supreme Court has recognized that its constitutional free speech provision, from which ours was drawn, protects commercial speech to a greater degree than the First Amendment:

> …Whereas the First Amendment does not embrace all subjects, article I does indeed do so, *in ipsissimis verbis*: "Every person may freely speak, write and publish his or her sentiments on all subjects ...." (Cal. Const., art. I, § 2, subd. (a), italics added.) These words are "qualified only by" those that follow (*Pines v. Tomson* (1984) 160 Cal. App. 3d 370, 393 [206 Cal. Rptr. 866] (per Arabian, J.)), which make anyone who "abuse[s] ... this right" "responsible" for his misconduct (Cal. Const., art. I, § 2, subd. (a)).
>
> Within its "unlimited" scope (*Dailey v. Superior Court, supra*, 112 Cal. at p. 97), which expressly embraces "all subjects" (Cal. Const., art. I, § 2, subd. (a)), article I's right to freedom of speech protects political speech and ideological speech. [citations omitted]
>
> It is not otherwise with respect to article I's right to freedom of speech and commercial speech. Which is to say, as we shall explain, the right in question protects such speech surely so in the form of truthful and nonmisleading messages about lawful products and services, the kind with which we are here concerned.
>
> That article I's right to freedom of speech protects commercial speech, at least in the form of truthful and nonmisleading messages about lawful products and services, is implied through the specific

> language of the free speech clause in its precise setting. Again: "Every person may freely speak, write and publish his or her sentiments on all subjects," with the sole qualification that anyone who "abuse[s] ... this right" is "responsible" for his misconduct. (Cal. Const., art. I, § 2, subd. (a), italics added.) Plainly, this "wording ... does not exclude" commercial speech from its "protection." [citation omitted]

Gerawan Farming, Inc. v. Lyons, 24 Cal. 4th 468, 488, 12 P.3d 720, 736-37, 101 Cal. Rptr. 2d 470 (2000). The California Supreme Court went on to note an additional relevant fact: the dichotomy between commercial and/noncommercial speech would not be introduced for nearly a century following the adoption of California's 1849 constitution. *Id.*

Gerawan involved a generic plum-marketing program through the State of California. Plum growers were required to contribute under the California Tree Fruit Agreement to a fund that covered research, as well as generic marketing. Gerawan did its own product advertising and argued that the compelled generic fund was compelled speech, supported a socialistic system that Gerawan opposed, and cut into its own advertising budget. 12 P.3d at 745.[13] The California Supreme Court recognized that the U.S. Supreme Court, in *Glickman v. Wileman Bros. & Elliott, Inc.*, 521

[13] Compelled funding cases like *Gerawan*, as well as *Abood v. Detroit Board of Education,* 431 U.S. 209, 97 S. Ct. 1782, 52 L. Ed. 2d 261 (1977), and its progeny, *Keller v. State Bar of California*, 496 U.S. 1, 110 S. Ct. 2228, 110 L. Ed. 2d 1 (1990), unlike the case at bar, do not affirmatively restrict a licensed lawful business' right to engage in non-misleading commercial speech.

U.S. 457, 117 S.Ct. 2130, 138 L.Ed. 585 (1997), found a comparable, federal program "did not implicate any right to freedom of speech under the First Amendment." 12 P.3d at 725. Accordingly, in *Gerawan,* the California Supreme Court found that while the California law did not implicate Gerawan's right to free speech under the First Amendment, it did implicate Gerawan's free speech rights under Art. I of California's constitution, 12 P.3d at 747-50.[14]

More recently, in *Beeman v. Anthem Prescription Management,* the California Supreme Court recognized that examination of the constitutionality of a statutory reporting mandate challenged by a prescription drug clam processor required "disentangling" related questions, whether the statutory requirement implicated free speech, and, if so, what level of scrutiny applied. 315 P.3d at 79. The California Court reasoned that the "compelled speech" was factual, rather than political or ideological, "and does not impede the free flow of commercial

[14] In a later appeal, *Gerawan Farming, Inc. v. Kawamura,* 33 Cal.4th 1, 90 P.3d 1179, 14 Cal. Rtpr.3d 14 (2004) the California Supreme Court decided, with respect to the *compelled* speech at issue, to apply the *Central Hudson* test, rather than *Glickman*, *Abood*, or *Keller*, which would not have restricted such generic marketing speech under the First Amendment, and again remanded the case to determine "whether the generic advertising program … directly advances the [statutory governmental] interest [to maintain or develop new or larger markets], and whether it is narrowly tailored in light of the availability of less-speech-restrictive alternatives." *Gerawan II,* 90 P.3d at 1194.

information … interfere with consumer choice, nor … reflect paternalism towards participants in the marketplace." 315 P.3d at 88. The compelled speech at issue merely involved disclosure of objective data statistics and facts about pharmacy fees to promote informed decision making about prescription drug reimbursement rates. The California Court then followed the lead of the Supreme Court to "distinguish[ ] between speech restrictions and compelled disclosure, and … adjust[ ] its level of scrutiny accordingly." 315 P.3d at 88. Accordingly, the California Court chose to apply the rational-basis test that the U.S. Supreme Court used in *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 105 S.Ct. 2265, 85 L.Ed.2d 652 (1985). The California Supreme Court concluded that the California constitution, in that setting, used the same test as the First Amendment. 315 P.3d at 88-89. Two dissenting judges believed that the California constitution's "rich history of protecting commercial speech … that predates the protections of the First Amendment," 315 P.3d at 105, required use of the intermediate *Central Hudson* test, rather the weaker rational basis test for the First Amendment used in *Zauderer.*

In response to the dissent, the majority of the California Supreme Court stressed the narrowness of its holding:

> Our holding today does not "all but eviscerate the commercial speech protections of article I." (Conc. & dis. opn., *post*, at p. 377.) Laws that restrict commercial speech remain subject to heightened

> scrutiny, as do laws that compel a commercial speaker to adopt, endorse, or subsidize a message or viewpoint with which it disagrees. (See *Gerawan II, supra,* 33 Cal.4th at p. 10.) Further, there is nothing " 'incongruous' " (conc. & dis. opn., *post*, at p. 371) about holding that section 2527 implicates the right to free speech under article I while also holding that section 2527 is subject to deferential judicial review. This approach parallels the settled understanding of due process and equal protection principles as applied to economic regulations. To say that the Legislature has broad discretion to enact economic regulations is not to say that the Legislature may, willy-nilly, impose burdens on private persons or entities. The exercise of legislative power must not be arbitrary, irrational, or motivated by a bare desire to harm a particular class; the Legislature must always act within constitutional bounds.

Beeman, 315 P.3d at 94.

Washington's constitution, which uses the core text of California's, equally provides for enhanced protection of commercial speech and likewise requires this Court to examine the finer questions involving the precise nature of the commercial speech at issue to determine which level of scrutiny is required. Those questions include the nature of the speech in the marketplace, whether it involves the free flow of commercial information respecting a lawful and licensed business, and whether the challenged statute constrains dissemination of accurate marketing information, untethered to curtailment of deceptive or misleading claims. *Beeman* and *Zauderer* involve compelled speech - which actually enhances the flow of objective, factual information - and do not constrain

the ability of a business to promote its market interests. Accordingly, different historic and constitutional considerations pertain.

(iii) ***Constitutional History.*** While there is no constitutional history that commercial speech was separately considered, the California Supreme Court's reasoning, quoted at p. 32-33 above from *Gerawan Farming, Inc. v. Lyons* (*Gerawan I*), is instructive. *See also,* Kozinski and Banner, *Who's Afraid of Commercial Speech?,* discussed above at p. 30-31. *See also,* Troy, *Advertising: Not "Low Value" Speech*, 16 Yale J. on Regulation 85, 92-107 (1999) (discussing the relationship between early understandings of the relationship between property and free speech, the role of advertising in the development of the American free press, the colonists' reaction to the Stamp Acts, and the limits of common law and legislative restrictions on commercial speech at the time of the framing of the U.S. Constitution). That article suggests that there were two justifications for free expression in the early eighteenth century, both as "an instrument to some collective good" and also as a "natural property right of the individual." (*id.* at 93)

The author explores *Cato's Letters* published in the early eighteenth century for the proposition that the privilege to "enjoy the fruits of [one's] labour" … "is so essential to free government, that the security of property; and the freedom of speech, always go together." (*id.* at 94) The

author goes on to trace that Benjamin Franklin first printed Cato's *Essay on Free Speech* in America and that Madison drew on Locke and Cato in linking rights of property and free speech. (*id.* at 95) The author cites Franklin's *Apology for Printers* for the proposition that "even those 'opinions' in advertisements should be 'heard by the Publick,'" from which the author concludes "America's first sustained defense of a free press, and of the very notion of a 'marketplace of ideas,' came in response to an attack on a classic example of commercial speech." (*id.* at 100) Paid advertising supported the press in colonial America. The colonists viewed the Stamp Acts' taxes on newspapers and their higher taxes on advertising as encroachments on free expression and fueled the colonists' calls for liberty. (*id.* at 101-02)

As will be discussed below in subsection (v), there is every reason to conclude that Washington's framers shared the same natural law beliefs that support an expansive view of the right to free speech as encompassing commercial speech.

(iv) ***Pre-existing state law.*** As discussed above, commercial speech and advertising were well established as of 1889. *See* Appendix II. One hundred years after the adoption of the U.S. Constitution, Washington had no pre-existing law that curtailed truthful advertising about lawful activities or business.

(v) ***Structural differences in the two constitutions.*** The U.S. Constitution is a grant of limited powers to the federal government, further circumscribed by the adoption of the Bill of Rights, while the state constitution is a limitation on the otherwise plenary power of the state, coupled with the Declaration of Rights set forth in Article 1. Utter, *The Right to Speak Freely,* 8 U. Puget Sound L. Rev. 163

The Preamble to Washington's constitution is an homage to the spirit of natural law widely felt in the American west in the 19th century: "We the people of the State of Washington, grateful to the Supreme Ruler of the Universe for our liberties, do ordain this constitution."[15] Art. I, § 1 stresses the natural law concept of government: "All political power is inherent in the people, and governments derive their just powers from the consent of the governed, and are established to protect and maintain individual rights." The last enumerated provision in the original 1889 Declaration of Rights, Art. I, § 32 referred to Fundamental Principles: "A frequent recurrence to fundamental principles is essential to the security of individual right and the perpetuity of free government." Art. I, § 32 was used early to analyze whether the legislature had the power to restrict

[15] Whether to include a reference to the Deity was hotly debated. A week earlier, a preamble with no reference to the Deity was the majority view. Rosenow, *Journal of the Washington State Constitutional Convention*, at 493. "We, the people of the State of Washington, to secure the blessings of liberty, insure domestic tranquility, and preserve our rights, do ordain this constitution."

property rights, *Dennis v. Moses,* 18 Wash. 537, 571, 52 P. 333, 339 (1898), and those same natural law principles were considered by this Court more recently in *Southcenter Joint Venture v. National Democratic Policy Committee,* 113 Wn.2d 413, 422-23, 780 P.2d 1282 (1989), when it ruled that Washington's right to speak freely was implicitly limited to freedom from state interference.[16]

(vi) ***Matters of particular state interest or local concern.***

Washington and Colorado were the first states to approve a legal recreational marijuana industry. In any nascent industry, advertising is vital. Moreover, a local "consumer's concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue." *Bates v. State Bar of Ariz*., 433 U.S. 350, 364, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977).

3. The *Gunwall* Analysis Demonstrates that Washington's Right to Speak Freely Protects Non-Misleading Commercial Speech.

The *Gunwall* factors strongly lead to the conclusion that Washington's Art. I, § 5 more broadly protects non-misleading commercial

[16] Justice Utter, on the other hand, would have used Art I, § 32 to more broadly protect the right to speak freely from private interference. *Southcenter,* 113 Wn.2d at 440 (dissenting op.). *See also*, Thompson, *The Washington Constitution's Prohibition on Special Privileges and Immunities: Real Bite for "Equal Protection" Review of Regulatory Legislation*, 69 Temple L. Rev. 1247 (1996).

speech than the First Amendment. All six factors lead to that conclusion.

The people of Washington jealously guarded their liberties when the Constitution was adopted. They limited governmental power to interfere with those liberties. This Court should follow the lead of the California Supreme Court in *Gerawan I,* 12 P.3d 720, and recognize that our identical free speech language affords greater protection for commercial speech, in those contexts where neither compelled speech nor the abuse of the right to speak freely is at issue. The California Court later recognized:

> [N]ot "*all* commercial speech regulations are subject to a similar form of constitutional review simply because they target a similar category of expression. …
>
> When a State regulates commercial messages to protect consumers from misleading, deceptive, or aggressive sales practices, *or requires the disclosure of beneficial consumer information*, the purpose of its regulation is consistent with the reasons for according constitutional protection to commercial speech …" and thus justifies the application of judicial review less strict than the standard applicable to suppression of commercial speech. (*44 Liquormart, supra*, 517 U.S. at p. 501, second italics added.)

Beeman, 315 P.3d at 89. Where the converse is true and the state's regulation affirmatively suppresses commercial speech, stricter scrutiny is required.

Washington should follow California's lead where non-misleading commercial speech in the form of advertising is unduly restricted in terms of time, place and manner, or where speakers are differentially treated due

to the subject or content of their speech. Recognition that Art. I, § 5 mandates higher standards for protection of non-misleading commercial speech accords with this Court's decisions in *Bering v. SHARE,* 106 Wn.2d at 233–34, and *City of Lakewood v. Willis*, 186 Wn.2d at 225-28.

The final clause of Art. I, § 5, "being responsible for the abuse of that right," provides the State and individuals the means to regulate or seek redress from false, deceptive or defamatory speech, types of speech not at issue in this case. In such cases, Washington courts have held traditional First Amendment standards and common law provide the appropriate framework. *State v. Living Essentials, LLC*, 8 Wn.App.2d 1, 23-25, 436 P.3d 857 (2019)[17]; *Richmond v. Thompson,* 130 Wn.2d at 380-88.

E. Under Article 1, § 5, Restriction of Non-Misleading Commercial Speech is Allowable Only as Necessary to Serve a *Compelling* State Interest, Based on *Specific* Findings.

Since the Washington Constitution does provide broader protection for the right to speak freely, attention must now be given to the level of "heightened scrutiny" appropriate to non-misleading commercial speech. *Beeman,* 315. P.3d at 94. *Bering,* 106 Wn.2d at 232-34. *Bering* provides some specific guidance with respect to time, place and manner restrictions.

[17] No *Gunwall* analysis was undertaken in either *Living Essentials*, nor the case upon which it relies, *National Federation of Retired Persons v. Insur. Comm'r.*, *supra*. *National Federation* simply followed an earlier obscenity case, without further analysis. 120 Wn.2d at 119.

The state interest to be served must be a *compelling* interest, rather than a *significant* or *substantial* interest. *Id.* This provides some minimal level of protection.

Just as this Court, in *Bering*, started with the traditional First Amendment test for time, place and manner restrictions, 106 Wn.2d at 221-22, citing *United States v. Grace,* 461 U.S. 171, 176-77, 103 S.Ct. 1702, 75 L.Ed.2d 736 (1983), but then modified that test to provide for a *compelling* state interest standard, this Court should also adapt the *Central Hudson* test to satisfy Washington's broader right to speak freely. A proposed adaptation of the *Central Hudson* test follows:

> At the outset, we must determine whether the expression is protected by ~~the First Amendment~~ Article I, § 5. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is ~~substantial~~ compelling. If both inquiries yield positive answers, we must determine whether the regulation directly and materially advances the governmental interest asserted, and whether the legislative or administrative body that has adopted the regulation has specifically found it is not more extensive than is necessary to serve that interest, based on evidence or studies directly related to the regulation.

This adaptation incorporates many elements of the case law discussed above at 16-21. What is changed is the nature of the governmental interest involved, from a substantial one to a compelling one, as well as the requirement that the evidence or

studies that form the basis for the regulation be "directly related" to the regulation. This requirement better assures that the legislature or other regulatory body undertakes an appropriate study to assure that the regulation directly and materially serves the governmental interest at stake. This proposed test will better serve to prevent overbroad or arbitrary restrictions like the ones stricken in *Lorillard* and *Rubin v. Coors Brewing,* 514 U.S. 476.

The government bears the burden to prove that plausible, less restrictive alternatives to restrict free speech are unavailable. *Ashcroft v. ACLU,* 542 U.S. at 664-670; *Long Beach Area Peace Network v. City of Long Beach*, 574 F.3d 1011, 1024-25, 1036 (9th Cir. 2009), *cert. den.* 559 U.S. 936 (2010) . Here, the government has no evidence to support the 1,000-foot provision for cannabis when 500 feet is sufficient for alcohol. *Cf.* RCW 66.08.060 and WAC 314-52-070.[18]

Additionally, this Court should apply strict scrutiny to any regulatory scheme that provides for differential treatment of commercial speech based on the speaker or based on the content or subject of the speech. *City of Lakewood v. Willis*, 186 Wn.2d at 225-26 and 227-28;

[18] Further, WAC 314-52-070 forbids liquor advertisements from "public playgrounds, or athletic fields used primarily by minors where the administrative body of said schools, churches, public playgrounds or athletic fields object to such placement," a far narrower restriction than the ban from all public parks in RCW 69.50.369(1) and WAC 314-15-155(1)(b)(i).

Barr v. American Association of Political Consultants, Inc., 140 S.Ct. 2335; *Reed v. Town of Gilbert*, 576 U.S. 155; *Sorrell v. IMS Health Inc.*, 564 U.S. at 566-67.

A statute need not explicitly describe a particular content-based discriminatory intent to effectuate a content-based restriction. In *Sorrell v. IMS Health,* 564 U.S. 552, a state statute that prevented sale of pharmacy prescriber data for marketing purposes, but allowed such sales for specified "educational communications," unconstitutionally disfavored marketing. That was an unlawful "content-based" statute that impermissibly imposed burdens on speech aimed at a particular viewpoint. 564 U.S. at 563-64 and 580. The U.S. Supreme Court has reasoned:

> This Court's precedents are deeply skeptical of laws that "distinguis[h] among different speakers, allowing speech by some but not others." *Citizens United v. Federal Election Comm'n,* 558 U.S. 310, 340, 130 S.Ct. 876, 175 L.Ed.2d 753 (2010). Speaker-based laws run the risk that "the State has left unburdened those speakers whose messages are in accord with its own views." *Sorrell,* 564 U.S., at 580, 131 S.Ct. 2653.

Nat'l Inst. of Family & Life Advocates v. Becerra, ___ U.S. ___, 138 S. Ct. 2361, 2378, 201 L. Ed. 2d 835 (2018) (reversing denial of a preliminary injunction in a facial challenge to a California law that required some centers providing services to pregnant women to give certain notices, while other providers were exempt). *See also,* Justice Breyer's dissent in *Becerra.* 138 S.Ct. at 2391 ("speaker-based laws

warrant heightened scrutiny…").

The above proposed modification of the *Central Hudson* test is consistent with *Bering* and is harmonious with the broader protections afforded under Art. I, § 5. The application of strict scrutiny to content-based or speaker-based discrimination respecting commercial speech is consistent with First Amendment case law.

VII. CONCLUSION

For the reasons stated above, this Court should reverse the Superior Court and hold that the restrictions on non-misleading advertising at issue in RCW 69.50.369(1) and (7)(b) and (e) violate the First Amendment and Article I, § 5 of the Washington Constitution.

RESPECTFULLY SUBMITTED, December 17, 2020.

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APPENDIX I

Plaintiffs challenge portions of RCW 69.50.369 and WAC 314-55-155:

RCW 69.50.369
Marijuana producers, processors, researchers, retailers—Advertisements—Rules—Penalty.

(1) No licensed marijuana producer, processor, researcher, or retailer may place or maintain, or cause to be placed or maintained, any sign or other advertisement for a marijuana business or marijuana product, including useable marijuana, marijuana concentrates, or marijuana-infused product, in any form or through any medium whatsoever within one thousand feet of the perimeter of a school grounds, playground, recreation center or facility, child care center, public park, or library, or any game arcade admission to which is not restricted to persons aged twenty-one years or older.

* * *

(7) A marijuana licensee that engages in outdoor advertising is subject to the advertising requirements and restrictions set forth in this subsection (7) and elsewhere in this chapter.

* * *

(b) Outdoor advertising is prohibited:

(i) On signs and placards in arenas, stadiums, shopping malls, fairs that receive state allocations, farmers markets, and video game arcades, whether any of the foregoing are open air or enclosed, but not including any such sign or placard located in an adult only facility; and

(ii) Billboards that are visible from any street, road, highway, right-of-way, or public parking area are prohibited, except as provided in (c) of this subsection.

* * *

(e) The restrictions and regulations applicable to outdoor advertising under this section are not applicable to:

(i) An advertisement inside a licensed retail establishment that sells marijuana products that is not placed on the inside surface of a window facing outward; or

(ii) An outdoor advertisement at the site of an event to be held at an adult only facility that is placed at such site during the period the facility or enclosed area constitutes an adult only facility, but in no event more than fourteen days before the event, and that does not advertise any marijuana product other than by using a brand name to identify the event.

WAC 314-55-155
Advertising requirements and promotional items—Coupons, giveaways, etc.

The following provisions apply in addition to the requirements and restrictions in RCW 69.50.369.

(2) Outdoor advertising. In addition to the requirements for advertising in subsection (1) of this section, the following restrictions and requirements apply to outdoor advertising by marijuana licensees:

(a) Except for the use of billboards as authorized under RCW 69.50.369 and as provided in this section, licensed marijuana retailers may not display any outdoor signage other than two separate signs identifying the retail outlet by the licensee's business name or trade name, stating the location of the business, and identifying the nature of the business. Both signs must be affixed to a building or permanent structure and each sign is limited to sixteen hundred square inches.

(i) All text on outdoor signs, including billboards, is limited to text that identifies the retail outlet by the licensee's business or trade name, states the location of the business, and identifies the type or nature of the business.

(ii) No outdoor advertising signs, including billboards, may contain depictions of marijuana plants or marijuana products. Logos or artwork that do not contain depictions of marijuana plants or marijuana products as defined in this section are permissible.

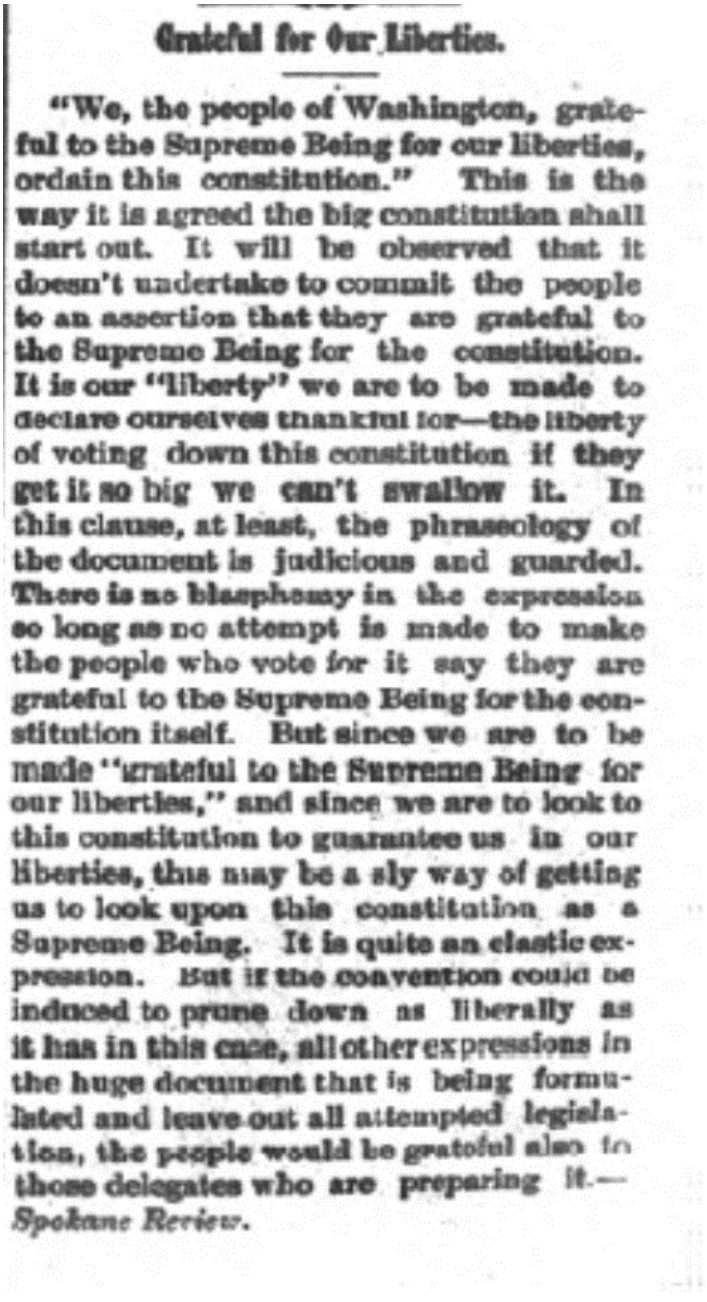
* * *

(c) Outdoor advertising is prohibited on signs and placards in arenas, stadiums, shopping malls, fairs that receive state allocations, farmers markets, and video game arcades, whether any of the foregoing are open air or enclosed, but not including any such sign or placard located at an adult only facility.

(d) The restrictions in this section and RCW 69.50.369 do not apply to outdoor advertisements at the site of an event to be held at an adult only facility that is placed at such site during the period the facility or enclosed area constitutes an adult only facility, but must not be placed there more than fourteen days before the event, and that does not advertise any marijuana product other than by using a brand name, such as the business or trade name or the product brand, to identify the event. Advertising at adult only facilities must not be visible from outside the adult only facility.

APPENDIX II

From **The Yakima Herald,** August 8, 1889, p. 1



Grateful for Our Liberties.

"We, the people of Washington, grateful to the Supreme Being for our liberties, ordain this constitution." This is the way it is agreed the big constitution shall start out. It will be observed that it doesn't undertake to commit the people to an assertion that they are grateful to the Supreme Being for the constitution. It is our "liberty" we are to be made to declare ourselves thankful for—the liberty of voting down this constitution if they get it so big we can't swallow it. In this clause, at least, the phraseology of the document is judicious and guarded. There is no blasphemy in the expression so long as no attempt is made to make the people who vote for it say they are grateful to the Supreme Being for the constitution itself. But since we are to be made "grateful to the Supreme Being for our liberties," and since we are to look to this constitution to guarantee us in our liberties, this may be a sly way of getting us to look upon this constitution as a Supreme Being. It is quite an elastic expression. But if the convention could be induced to prune down as liberally as it has in this case, all other expressions in the huge document that is being formulated and leave out all attempted legislation, the people would be grateful also to those delegates who are preparing it.—*Spokane Review.*

THE YAKIMA HERALD.

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THE YAKIMA HERALD.

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Fire Wood & Draying.

Contractor and Builder,

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WELL DIGGING.

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WHITECHAPEL SCENES.

CERTIFICATE OF SERVICE

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