VCAF

VERMONT CANNABIS ACTION FUND

May 1, 2024

Senate Committee on Economic Development
Senator Kesha Ram Hinsdale, Chair
Senator Alison Clarkson, Vice Chair
Senator Randy Brock
Senator Ann Cummings
Senator Wendy Harrison, Clerk

Dear Senators,

I write on behalf of the Vermont Cannabis Action Fund, a coalition of dozens of Vermont's leading licensed cannabis retailers, manufacturers, cultivators, testing laboratories, and medical dispensaries. I am also an attorney with nearly 25 years' experience, admitted to practice law in both Vermont and New York.

I write today to provide you additional background on the unconstitutionality of Vermont's laws regarding cannabis advertising, and again urge you to fix these laws in a way that recognizes the constitutional rights of Vermonters engaged in the legal cannabis industry, while still providing for reasonable regulation of undesirable activities. To be clear: VCAF's position, consistent with extensive caselaw, is that narrowly tailored regulations which directly advance a substantial government interest are constitutional and enforceable; Vermont's current law, however, is not.

The remainder of this letter summarizes the pertinent caselaw on cannabis advertising. Recognizing that not everyone enjoys reading about court decisions as much as I do, you will find our request right here. Specifically, we request that you:

(1) eliminate the requirement that the CCB pre-approve all advertising by striking 7 V.S.A. §864 section (e) in its entirety;

(2) allow normal promotional discounts by eliminate subparagraph (4) of 7 V.S.A. §864 (d); and

(3) exempt in-store signage and direct consumer communications from the definition of "Advertising" in 7 V.S.A. §861.

* * *

The threshold inquiry in determining whether a constitutional right to protected commercial speech exists was laid out in 1980 by the Supreme Court of the United States

in *Central Hudson Gas & Electric v. Public Service Commission of New York*, 447 US 557 (1980): does the speech at issue "concern a lawful activity". Some long-time opponents of cannabis legalization have argued to you that this ends the inquiry, as cannabis remains federally illegal. That simplistic argument, however, fails a diligent analysis.

Courts have addressed this threshold question three times. In *Montana Cannabis Industry Association vs. State of Montana*, 382 Mont. 256 (2016), the Montana Supreme Court ruled against a First Amendment challenge to a state law prohibiting advertising by a medical marijuana company, finding that in seeking a remedy under the *United States Constitution*, federal illegality trumps state law.

More recently, in *Seattle Events v. State*, 22 Wash. App. 2d 640 (2022), a Washington State appellate court found that the plaintiff met the *Central Hudson* lawfulness standard, as that plaintiff brought free speech claims under the *Washington state constitution*, thus invoking state law rather than federal law, and recognizing licensed cannabis business' free speech rights under state law.

Just a few months ago, a federal trial court in Mississippii acknowledged this dichotomy in *Cocroft v. Graham*, __ F. Supp. 3d __ (2024). In *Cocroft*, the plaintiff sought to prevent enforcement of medical cannabis advertising under federal First Amendment grounds. The *Concroft* court found against the plaintiff, relying on *Montana Cannabis*, but expressly noted that *Seattle Events* was distinguishable because Concroft was relying solely on federal, not state, constitutional grounds.

Vermont's constitution, like Washington, provides a right to free speech, independently of the First Amendment: Article 13 expressly provides a "right to freedom of speech". Moreover, the Supreme Court of Vermont has consistently held that the rights granted under our state constitution are to be interpreted *more broadly* than the analogous rights granted by the U.S. Constitution. We have no doubt that a Vermont court would recognize our free speech rights under the "legality" prong of the *Central Hudson* test.

The threshold question having been met, the Supreme Court in *Central Hudson* went on to hold that a government regulation restricting protected commercial speech must be "narrowly tailored, and "directly advance" a "substantial government interest" in order to be enforceable.

The Supreme Court affirmed and clarified *Central Hudson* as recently as 1999, ruling in *Greater New Orleans Broadcasting Assn., Inc. v. United States*, 527 US 173 (1999), that to survive a challenge, a regulation restricting commercial speech must be "reasonable" and "proportional" to the governmental interest. The *Greater New Orleans*

court further held that the government (not the plaintiff!) must "demonstrate narrow tailoring" to advance the government's asserted substantial interest.

Vermont's restrictions on advertising contained in 7 VSA §§ 861 and 864, and the Cannabis Control Board's regulations promulgated thereunder, are neither reasonable, proportional, or narrowly tailored, and accordingly they will not survive the *Central Hudson* or *Greater New Orleans* tests.

Rather than being narrowly tailored to achieve the government's legitimate interest in preventing youth access to cannabis, Vermont's current law effectively operates to muzzle all manner of speech by the cannabis industry entirely, by subjecting every "written or verbal statement, illustration or depiction" to an unprecedented *prior restraint* on speech, and further imposing arbitrary restrictions on what can and cannot be said.

Current law requires licensed cannabis businesses to *submit for pre-approval* not only traditional advertising such as television, radio, or print advertising, but also in-store signage, email and text communications with customers who have expressly consented to receive such messages, and a licensee's own website. Read literally, 7 VSA §864 prohibits a licensed business from replying to a customer's questions about a product without ringing up the Control Board and asking for permission. Even the innocuous act of updating a store's online menu triggers the untenably broad "statement, illustration, or depiction" test laid out by §861. The CCB's review typically takes two weeks, an unreasonable length of time for a review of such basic, real-time communications.

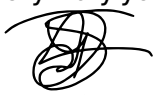
While portions of the statute may well be reasonable and appropriate (such as the prohibition on making false or misleading statements, which in any event is duplicative of federal and state consumer protection laws, or the prohibition on depicting minors consuming cannabis), others are arbitrarily prescriptive in a manner that reveals the true unconstitutional intent of the entire scheme, such as the prohibition on "offering a prize, award, or inducement" which the Control Board has recently declared prohibits entirely innocuous activities such as "buy one get one" sales or promotions where customers "spin a wheel" to get a surprise discount on future purchases. The Control Board, in its official guidance, has stated that virtually all statements by licensed cannabis establishments, even ones promoting non-cannabis merchandise such as clothing or non-psychoactive CBD items (which are wholly outside the Control Board's licensing authority), are "advertisements" subject to their approval under §864.

Instead of narrowly tailoring its restrictions as required under *Central Hudson* and its progeny, the General Assembly intentionally drafted them to be as restrictive as possible while, technically, falling just short of an outright ban. The legislative history makes this

intent abundantly clear, and Vermont's courts will recognize this flagrant contravention of our constitutional rights.

To be clear, Vermont's licensed cannabis industry supports reasonable advertising regulations, including reasonable restrictions that prevent targeting minors or making false or misleading statements.

Very truly yours,



Dave Silberman, Esq.