

Ohio Association of Broadcasters
Testimony before the Senate General Government Committee
Sub. H.B. 86
December 5, 2023

Good morning, Chairman Rulli and members of the Senate General Government Committee. My name is Tim Bechtold, Of Counsel at Vorys, Sater, Seymour and Pease LLP.

I appear before you today on behalf of the Ohio Association of Broadcasters whose membership is the over-the-air radio and television stations in the state. The Vorys law firm serves as Ohio counsel for the OAB, and provides OAB member stations with resources related to Ohio law, including advice on advertising rules and regulations.

I am presenting testimony today on the marijuana advertising provisions contained in Sub. H.B. 86. We understand the Legislature's interest in limiting the exposure of children to marijuana advertising and need for regulation of marijuana advertising. However, we strongly believe that this should occur through the rulemaking process. Regulatory agencies are in the best position to develop detailed rules and regulations, based upon the current environment and can address necessary changes as they arise.

This is Ohio's approach for alcohol advertising regulations, in which the Ohio Liquor Control Commission promulgates rules for alcoholic beverage advertising and periodically reviews and updates these rules. Similarly, the Ohio Casino Control Commission is responsible for promulgating rules regulating the advertising of the gambling industry.

Further we oppose the prohibition on broadcast advertising that is contained in both the bill and the current rules. We believe this prohibition is unnecessary and may be unconstitutional. Let me briefly elaborate on both points.

First, the prohibition on broadcast advertising is unnecessary because it is unlikely that stations would accept marijuana ads at this time. Over-the-air radio and television stations are licensed by the federal government and regulated by the Federal Communications Commission; they are obligated to operate in the public interest and can lose their federally issued license to broadcast if they do not do so. Stations may be subject to significant fines or other enforcement actions if they air ads for products that are illegal under federal law. This puts broadcasters in a different position than other advertising media.

Since marijuana is still a controlled substance and illegal for sale under federal law, stations would risk enforcement action by the federal government by accepting marijuana advertisements.

We believe a better approach is to apply consistent restrictions across all forms of media on advertising that may reach individuals under the age of twenty-one. The current rules and language in the bill contain some restrictions, including a prohibition of any form of advertising that appeals to children (such as use of cartoon characters, fictional characters whose target

audience is children or youth, and pop culture icons), as well as prohibitions on the use of false or misleading statements and slang terms. If needed, additional regulations focused on the substance and presentation of the advertising message could be added.

Moreover, the requirement that cultivators, processors, testing laboratories and dispensaries submit advertisements for review by their administering agencies provides further control, as agencies have the opportunity to identify advertising that may be attractive to minors and to exercise their respective authority to make recommendations for changes to an ad or prohibit the use of the ad.

In addition to being unnecessary, we believe the prohibition on broadcast advertising may be unconstitutional. As you know, commercial speech is generally protected by the First Amendment. In several cases in which the government attempted to restrict advertising, the federal courts have required the government to articulate a substantial governmental interest, but also narrowly tailor the applicable advertising ban or restriction. A prohibition specifically on broadcast advertising does not appear to fulfill either of these requirements.

Indeed, we are not aware of any other Ohio statute or regulation that prohibits radio and television stations from advertising a legal product. I would also note that the legislation makes no specific reference on social media, which arguably is highly influential with individuals under the age of twenty-one.

Again, we understand and appreciate the Legislature's interest in limiting exposure to marijuana advertising, and we believe applying consistent rules and restrictions across all forms of media will be more effective in fulfilling that intended policy objective. The development of these rules and restrictions should be handled through the rulemaking process, and for this reason, we strongly urge the Committee to remove this language from Sub. H.B. 86.

Thank you for the opportunity to testify today.