HEARING ON S.B. 391
VIRGINIA GENERAL ASSEMBLY
HOUSE OF DELEGATES, GENERAL LAWS COMMITTEE
FEBRUARY 24, 2022
WRITTEN STATEMENT OF PAUL J. LARKIN, JOHN, BARBARA, AND VICTORIA RUMPEL SENIOR LEGAL RESEARCH FELLOW

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Thank you for the opportunity to testify today. My name is Paul J. Larkin. I am the John, Barbara, and Victoria Rumpel Senior Legal Research Fellow at The Heritage Foundation. I note my title and affiliation for identification purposes only. I testify on my own behalf, not on behalf of Heritage. Members of the Heritage staff testify as individuals discussing their own independent research. The views expressed here are my own and do not reflect an institutional position for Heritage or its board of trustees.

One of the areas of my research and writing is drug policy. I will draw on that work for my presentation today. For your convenience, I have attached to this written statement copies of three of my already published articles on that subject.[1] I also have included a link to an article entitled "*Driving While Stoned in Virginia*" that I have "in progress,"[2] as well as the titles of other articles of mine on this subject.[3]

I will make three points. The first two relate to the general issue of whether, and if so how, the General Assembly should revise the provisions in the Virginia Code dealing with cannabis, whether for small or large businesses. I make these points because the General Assembly could decide to treat small business differently from large corporations, in the hope that they will not become the equivalent for cannabis of what happened in the tobacco industry: the growth of an oligopoly of large-scale commercial enterprises.[4] That result is particularly likely to happen if the General

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[1] Paul J. Larkin, *Cannabis Capitalism*, 69 BUFF. L. REV. 215 (2021) [hereafter Larkin, *Cannabis Capitalism*]; Paul J. Larkin, Jr., *Reconsidering Federal Marijuana Regulation*, 18 OHIO ST. J. CRIM. L. 99 (2020) [hereafter Larkin, *Reconsidering Marijuana*]; Paul J. Larkin, Jr., *Medical or Recreational Marijuana and Drugged Driving*, 52 AM. CRIM. L. REV. 453 (2015).

[2] Paul J. Larkin, *Driving While Stoned in Virginia*, 59 AM. CRIM. L. REV. ONLINE (forthcoming 2022) (SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4004743).

[3] *See*, *e.g.*, Paul J. Larkin, Jr., *Reflexive Federalism*, 44 HARV. J. L. & PUB. POL'Y 523 (2021) (book review of MARIJUANA FEDERALISM: UNCLE SAM AND MARY JANE (Jonathan H. Adler ed., 2020)); Paul J. Larkin, Jr., *States' Rights and Federal Wrongs: The Misguided Attempt to Label Marijuana Legalization Efforts as a "States' Rights" Issue*, 16 GEO. J.L. & PUB. POL'Y 495 (2018); Paul J. Larkin, Jr., *Marijuana Edibles and "Gummy Bears*," 66 BUFF. L. REV. 313, 322-28 (2018); Paul J. Larkin, Jr., *The Problem of "Driving While Stoned" Demands an Aggressive Public Policy Response*, 11 J. DRUG POL'Y ANALYSIS Issue 2 (2018) [hereafter Larkin, *The Problem of "Driving While Stoned"*]; Paul J. Larkin, Jr., *Introduction to a Debate–"Marijuana: Legalize, Decriminalize, or Leave the Status Quo in Place?",* 23 BERKELEY J. CRIM. L. 73 (2018); Paul J. Larkin, Jr., Robert L. DuPont & Bertha K. Madras, *The Need to Treat Driving under the Influence of Drugs as Seriously as Driving under the Influence of Alcohol*, THE HERITAGE FOUND., BACKGROUNDER No. 3316 (May 16, 2018), https://www.heritage.org/sites/default/files/2018-05/BG3316_1.pdf; Paul J. Larkin, Jr., *The Proper Way to Reconsider Federal Marijuana Policy*, THE HERITAGE FOUND., ISSUE BRIEF No. 4806 (Jan. 8, 2018), http://www.heritage.org/sites/default/files/2018-01/IB4806.pdf; Paul J. Larkin, Jr., *Liberalizing Marijuana Use and Improving Driving Safety: Two Contemporary Public Policies on a Collision Course*, THE HERITAGE FOUND., LEGAL MEMORANDUM No. 156 (June 25, 2015), http://thf_media.s3.amazonaws.com/2015/pdf/LM156.pdf.

[4] Mergers and acquisitions will take place in this industry. *See*, *e.g.*, *Medicine Man Agrees to Acquire Colorado's Largest Outdoor Marijuana Grower, Manufacturer*, MARIJUANA BUSINESS

Assembly adopts provisions that favor one or more types of business over others, whether by date or location of their opening, or by the race of their owners. My last point offers an alternative to large- or small-scale privately owned and operated cannabis distribution businesses. If the General Assembly were to legalize the recreational use of cannabis, it would be a mistake to turn immediately to a private ownership and distribution model, rather than rely on the model that some states, including Virginia, have used for the distribution of distilled spirits: state ownership of distribution facilities.

My points are these:

First, the cannabis plant contains biologically active ingredients, known as cannabinoids, that have legitimate medical uses and the nation should conduct further research into their potential therapeutic value. But neither smoking cannabis nor consuming a cannabis "edible" is a therapeutically legitimate delivery mechanism. The federal Food and Drug Administration—the agency whom the nation has trusted for more than 80 years to make such calls—has never authorized any medicine to be smoked, including the agricultural form of cannabis, and has not authorized any medicine to be ingested that contains the dangerous quantities of substances that are regularly found in edible cannabis products. Accordingly, the question that the General Assembly should consider is whether to revise Virginia law to allow private parties to engage in the large-scale commercial distribution of often contaminated cannabis products.

Second, as part of that inquiry, the General Assembly should decide how to help ameliorate the injuries and deaths that will result on the Commonwealth's roads from crashes caused by people who use cannabis and drive. Experience shows that commercial cannabis distribution will lead to use by people who drive while impaired and a substantial number of those drivers will main or kill innocent parties. It would be irresponsible not to address that problem before allowing large-scale commercial distribution.

Third, there is more than one way to permit cannabis distribution. If the General Assembly decides to legalize commercial cannabis distribution, then, just as the Commonwealth owns and manages the retail sales facilities for distilled spirits, the Commonwealth should own and manage distribution cannabis retail distribution facilities. That approach would address some of the adverse consequences of cannabis use, in part by avoiding increased use through advertising.

The next parts expands on those points.

I. The Fundamental Question Is Whether the General Assembly Should Permit Cannabis to Be Possessed, Sold, and Used on a Large-Scale Commercial Basis for Recreational Use

Gaul might have been divided into three parts, but cannabis needs only two: medical use and recreational use. The former category, however, is a ruse invented to disguise recreational use. More than 80 percent of the proffered reasons for seeking

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DAILY, June 5, 2019, https://mjbizdaily.com/medicine-man-agrees-to-acquire-colorados-largest-outdoor-marijuana-grower-manufacturer/. In this industry, as in others, there could eventually be only small number of large businesses.

a physician's recommendation is for "pain," a subjective symptom difficult to disprove. The latter category poses serious questions that demand consideration of the benefits and costs of legalizing a commodity that has minimal benefits and some potentially serious costs.[5]

A. MEDICAL CANNABIS IS (AT BEST) A HOBGOBLIN

People have practiced rudimentary forms of medicine for millennia. They used whatever plants were handy, or ancestors had found useful, in the hope of curing illness or obtaining relief from its misery. Cannabis is one of those plants; archaeological evidence shows that people used it more than 10,000 years ago. Some argue, therefore, that we should allow private parties to use cannabis as a natural treatment for pain, anxiety, and other disorders.

Until the twentieth century, it was common for pharmacists to prepare, and physicians to administer, nostrums created from complex natural plants, such as cannabis. But not today. Contemporary medicine does not rely on home grown folk remedies to treat disease. Since 1938, the nation has made entrusted the Food and Drug Administration (FDA) with the responsibility to decide what is a "drug" and whether it is "safe" and "effective."[6] The FDA has never approved agricultural cannabis for medical use.[7] Related federal public health agencies—such as the Office of the U.S. Surgeon General,[8] the Substance Abuse and Mental Health Services Administration,[9] and the National Institute on Drug Abuse,[10] as well as their parent agency, the Department of Health and Human Services[11]—also have consistently

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[5] *See*, *e.g.*, Larkin, *Cannabis Capitalism*, *supra* note 1; Larkin, *Reconsidering Marijuana*, supra note 1. For an excellent summary of the benefits and costs of the status quo versus legalization, see Mark A.R. Kleiman, *The Public-Health Case for Legalizing Marijuana*, 39 NAT'L AFFAIRS 68 (Spring 2019).

[6] Federal Food, Drug, and Cosmetic Act, ch. 675 § 1, 52 Stat. 1040 (1938) (codified as amended at 21 U.S.C. § 301 *et seq.* (2019)); Larkin, *Reconsidering Marijuana*, *supra* note 5, at 118-23.

[7] *See, e.g.*, U.S. FOOD & DRUG ADMIN., FDA REGULATION OF CANNABIS AND CANNABIS-DERIVED PRODUCTS, INCLUDING CANNABIDIOL (CBD) (Oct. 16, 2019); U.S. FOOD & DRUG ADMIN., WHAT YOU NEED TO KNOW (AND WHAT WE'RE WORKING TO FIND OUT) ABOUT PRODUCTS CONTAINING CANNABIS OR CANNABIS-DERIVED COMPOUNDS, INCLUDING CBD (July 17, 2019).

[8] *See, e.g.*, U.S. DEP'T OF HEALTH & HUMAN SERVS., OFF. OF THE SURGEON GEN'L, U.S. SURGEON GENERAL'S ADVISORY: MARIJUANA USE AND THE DEVELOPING BRAIN (Aug. 29, 2019), https://www.hhs.gov/surgeongeneral/reports-and-publications/addiction-and-substance-misuse/advisory-on-marijuana-use-and-developing-brain/index.html; U.S. DEP'T OF HEALTH & HUMAN SERVS., OFF. OF THE SURGEON GEN'L, THE SURGEON GENERAL'S WARNING ON MARIJUANA (Aug. 13, 1982), https://www.cdc.gov/mmwr/preview/mmwrhtml/00001143.htm.

[9] *See, e.g.*, SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN. (SAMHSA), MARIJUANA RISKS (Sept. 26, 2019), https://www.samhsa.gov/marijuana.

[10] *See, e.g.*, NAT'L INST. ON DRUG ABUSE, MARIJUANA AS MEDICINE (July 2019), https://www.drugabuse.gov/publications/drugfacts/marijuana-medicine ("Why isn't the marijuana plant an FDA-approved medicine? The FDA requires carefully conducted studies (clinical trials) in hundreds to thousands of human subjects to determine the benefits and risks of a possible medication. So far, researchers haven't conducted enough large-scale clinical trials that show that the benefits of the marijuana plant (as opposed to its cannabinoid ingredients) outweigh its risks in patients it's meant to treat.").

[11] Statement from FDA Commissioner Scott Gottlieb, M.D., on signing of the Agriculture Improvement Act and the agency's regulation of products containing cannabis and cannabis-derived compounds (Dec. 20, 2018) [hereinafter Gottlieb Statement], https://www.fda.gov/news-

determined that smoking cannabis is not a legitimate medical treatment and carries substantial health risks. As I've written before, "the expert federal agencies have rejected the argument that" legislatures "should approve smokable marijuana as a legitimate drug. We reject their judgment at our peril."[12]

There are several reasons for that judgment.[13] For example, so that a physician knows exactly what medications to prescribe for a patient, contemporary pharmacology requires that prescription and over-the-counter medications have standard ingredients, formulations, and potency. Cannabis does not. It contains hundreds of chemicals, and its features can vary by strain, breeding, region and process of cultivation, storage time, and so forth. Consider its primary psychoactive component—Δ^9tetrahydrocannabinol or THC.[14] Cannabis had approximately a 3-4 percent THC content from the 1960s through the 1980s, but today it can be 12-20 percent in the plant form or in hashish (dried cannabis resin and crushed plants), with hash oil (an oil-based extract of hashish) having an even greater THC content (15-50 percent), and other formulations in the 90 percent range. The FDA could never approve a drug to be used without knowing its potency.

Also critical is how a drug is treated by the body (pharmacokinetics) and how the drug affects the body (pharmacodynamics). Different doses and different formularies can access the brain and clear the body at different rates. For example, smoked marijuana enters the brain quickly, in 30 seconds or less, but ingested marijuana in the form of edibles can take more than 2-3 hours to exert an effect. The FDA extensively studies pharmacokinetics and pharmacodynamics during the drug approval process to inform physicians and patients how much and how often a drug should be used before its effects wear off or linger dangerously (such as methadone). If tolerance develops to the drug, dose escalation may be required. Marijuana in various "medicinal" forms has not been subjected to any of these rigorous tests for the myriad of the medical conditions advocates—often erroneously—claim that it is beneficial. [15]

Moreover, there is no standard "dosage" for smoked cannabis, unlike manufactured pharmaceuticals. The latter have an active ingredient specified in milligrams, and the usage directions, which by law must appear on the package's label, state precisely how many pills (for example) should be taken and when. There are no comparable uniform measurements or standards regarding the amount of smoked cannabis' components, or directions for use. There also is no standard number of inhalations, no standard depth of an inhalation, and no standard length of one. Nor are there standards for marijuana concentrates (which constitutes an increasing share of cannabis sold), vaped marijuana, or edibles. Accordingly, a physician cannot precisely know how much of those constituents someone receives. And that

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events/press-announcements/statement-fda-commissioner-scott-gottlieb-md-signing-agriculture-improvement-act-and-agencys [https://perma.cc/RP9Y-CBDP].

[12] Larkin, *Reconsidering Marijuana*, *supra* note 4, at 127.

[13] *See id*. at 118-27.

[14] LESLIE L. IVERSEN, THE SCIENCE OF MARIJUANA 100–04 (2d ed. 2008).

[15] "Many producers and sellers of medical cannabis products make unsubstantiated claims about therapeutic benefits." Chelsea L. Shover et al., *Association of State Policies Allowing Medical Cannabis for Opioid Use Disorder With Dispensary Marketing for This Indication*, 3 JAMA Network Open 2 (July 14, 2020), https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2768239.

does not even begin to address the problem caused by the presence of toxins, such as pesticides, fungi, mold, lead, formaldehyde and other substances that can and have contaminated commercial cannabis and that are forbidden in commercial pharmaceuticals. In sum, the rudimentary features of a medicine required by modern pharmacology—and demanded by federal law—are critically important for a physician to know when treating a patient.

B. Recreational Cannabis Is a Conundrum

Once the ruse of medical cannabis is put aside, we come to the real issue: Should the General Assembly approve large-scale commercial distribution of cannabis? This question is a difficult one. There are a number of factors that the General Assembly should consider.

The questions for the General Assembly are similar to the ones that first-year law students learn in torts class. What are the potential harms from permitting recreational cannabis use? What are the potential benefits? What is the likelihood and extent of each? What preventative measures can avoid the harms while not interfering with the benefits? What is the cost of those measures? What is the likelihood of error of making each of those judgments? Should the General Assembly take or avoid the risks of prohibition versus legalization? And can a mistaken judgment be remedied at a reasonable cost? The question is whether to revise Virginia law, so it is the General Assembly's duty to answer those questions. Whether the recreational benefits of cannabis use outweigh those harms is precisely the debate that the General Assembly should have, not whether there is some particular benefit for small or otherwise-favored businesses. Deciding to "let this cup pass from me"[16] is not a responsible course of action.

1. American society permits alcohol and tobacco to be sold to adults even though both can lead to severe individual and widespread societal harms. There is no serious movement afoot to outlaw either product on a nationwide basis. Regulation, not a flat ban, is the approach that the nation follows in that regard. *As for alcohol*: The Constitution leaves to the states the issue whether—and, if so, how—to permit the distribution of alcohol.[17] There is very little room for Congress to regulate alcohol distribution[18] even though it is responsible for numerous, severe harms.[19] Under the Twenty-First Amendment to the U.S. Constitution, the Commonwealth has

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[16] *Matthew* 26:39 (KJV).

[17] U.S. Const. amend. XXI, § 2.

[18] There might be some room. *See* Granholm v. Heald, U.S. 544 U.S. 460 (2005) (ruling that, notwithstanding the Twenty-First Amendment, a state law regulating the interstate sale of alcoholic beverages can violate the Commerce Clause, U.S. Const. art. I, § 8, cl. 3). But there isn't much.

[19] *See*, *e.g.*, Paul J. Larkin, Jr., *Swift, Certain, and Fair Punishment—24/7 Sobriety and HOPE: Creative Approaches to Alcohol- and Illicit Drug-Using Offenders*, 105 J. of Crim. L. & Criminology 39, 42-43 (2016) ("Alcohol has a long history of use in western civilization, and it is widely consumed in America today. Alcohol abuse, however, has been with us as long as alcohol itself. Most people can consume alcohol in moderation or intermittently without suffering any adverse long-term effect. But not all. Some individuals become dependent on alcohol, and years of overuse not only seriously impairs their health but also can prove fatal. Excessive alcohol consumption today imposes more than $200 billion on the nation each year in morbidity and mortality costs, as well as various other direct and collateral costs, expenses that dwarf tax revenues from alcohol sales. Alcohol also may be the most commonly used intoxicant by individuals who break the criminal laws.") (footnotes omitted) [hereafter Larkin, *24/7 Sobriety*].

far greater authority to decide whether and how to regulate the sale of ethanol. *As for tobacco*: For years, Congress did not fully address the issue whether the federal government should regulate the manufacture and sale of tobacco products, particularly cigarettes.[20] In 2009, Congress decided to change its stance. It passed the Family Smoking Prevention and Tobacco Control Act.[21] That law authorizes the Commissioner of Food and Drugs to regulate the distribution of tobacco products. Perhaps that approach would be a sensible one in the case of cannabis. What is not sensible, however, is for the General Assembly to delegate complete regulatory authority to a state agency to decide where, when, and how to regulate cannabis sales.

2. Long-term use of cannabis can lead some users to become subject to what is known as Cannabis (or Marijuana) Use Disorder (a subset of Substance Use Disorder, or SUD), a result of use creating a spectrum of increasing loss of control and increasing adverse consequences, which may or may not be associated with withdrawal (as a function of severity of the disease).[22] Long-term use can also lead some people to suffer serious mental disorders, such as psychosis. Of course, not everyone who uses cannabis will suffer either fate, but we cannot discern in advance which individuals will be unlucky.[23]

3. Legalization of adult recreational cannabis use will inevitably lead to greater access to and use of cannabis by minors. That is a particular problem when THC is added to edible products. Juveniles can take edibles, such as THC-laced "gummy bears," with them to school—where they can distribute them to friends or, by consuming them, remain inebriated for the entire day—because those edibles resemble normal versions of that food.

4. THC impairs cognitive ability and judgment, which compromises educational and employment performance. Canada has set stringent policies for people in their armed services because of the recognition that cannabis use would put them and others at risk. There are also numerous safety-sensitive positions in non-military positions in the Commonwealth—such as law enforcement, medicine, dentistry, fire, emergency medical services, heavy-machinery operation, and the like—that also should be subject to exclusion from any lawful use given the consequences to third parties of cognitive impairment.

5. The consequences of early-onset and heavy use of cannabis during adolescence are an increasing concern. The result can be higher rates of SUD and addiction;

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[20] *See*, *e.g.*, FDA v. Brown & Williamson Tobacco Co., 529 U.S. 120 (2000); Graham v. R.J. Reynolds Tobacco Co., 857 F.3d 1169, 1186-91 (11th Cir. 2017) (en banc) (both discussing congressional regulation of tobacco).

[21] Pub. L. No. 111-31, 123 Stat. 1776 (2009).

[22] *See* NAT'L INST. ON DRUG ABUSE (July 2020), https://nida.nih.gov/publications/research-reports/marijuana/marijuana-addictive ("Marijuana use can lead to the development of problem use, known as a marijuana use disorder, which takes the form of addiction in severe cases. Recent data suggest that 30% of those who use marijuana may have some degree of marijuana use disorder. People who begin using marijuana before the age of 18 are four to seven times more likely to develop a marijuana use disorder than adults.") (footnotes omitted).

[23] For a layman's explanation of why the discussion in the text is so, see ALEX BERENSON, TELL YOUR CHILDREN: THE TRUTH ABOUT MARIJUANA, MENTAL ILLNESS, AND VIOLENCE (2019). *See also* Larkin, *Gummy Bears*, *supra* note 1, at 323-36 & nn.28-53 (collecting scientific studies and reports).

poor educational and employment outcomes; earlier onset of schizophrenia; and increased suicidality and anxiety. Older adults using marijuana for medical symptoms have higher rates of impaired cognition in proportion to marijuana potency

6. As explained below, legalizing recreational cannabis use will increase the number of roadway crashes attributable to cannabis use. Perhaps that risk would be worth running if cannabis could serve as a substitute for opioids that have caused another serious problem in this nation. But cannabis is not a useful substitute for opioids.[24] In other words, cannabis is not a drug that will save lives; on the contrary, in some cases, it will have the opposite effect.

7. It is a myth that legalized cannabis use will eliminate a black market in that drug. There will always be a black market for (at least) two reasons. One is that black marketeers can underprice licensed sellers because the former do not need to add taxes atop the price they charge. Another reason is that there will always be some people who want to use cannabis but do not want to "out" themselves by purchasing it at a retail store in public. Experience in states that have legalized cannabis sales reveals that legalization did not make the black market disappear.[25]

8. Finally, it is no answer that Virginia should serve as a "laboratory," in Justice Louis Brandeis famous phrase, to try out new policy proposals.[26] That argument is a reasonable one in many other contexts, but not this one. After all, "Dr. Frankenstein also had a laboratory."[27] With respect to the medical use of drugs, America has followed one course for eight decades. Throwing away that approach just for marijuana is not only unstable—because other interest groups will push for exemptions for other drugs, since they also could be money-makers—it is likely to injure the public.

II. VIRGINIA SHOULD ACT *NOW* TO PREVENT AND AMELIORATE THE INJURIES AND DEATHS THAT WILL RESULT FROM CRASHES CAUSED BY PEOPLE WHO CONSUME CANNABIS AND DRIVE

If the General Assembly were to decide to legalize recreational use cannabis, it should address the inevitable harmful sequelae of that decision. One of them would be an increase in roadway crashes, injuries, and fatalities caused by a larger number of people who use cannabis and drive. For decades now, the nation has sought to lower the carnage caused by people who "have had one too many" and get behind the wheel of a car. Generally, public and private efforts to stop drinking and driving

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[24] *See*, *e.g.*, Paul J. Larkin, Jr. & Bertha K. Madras, *Opioids, Overdoses, and Cannabis: Is Marijuana an Effective Therapeutic Response to the Opioid Abuse Epidemic?*, 17 GEO. J.L. & PUB. POL'Y 555 (2019) (collecting authorities).

[25] *See*, *e.g.*, Thomas Fuller, *'Getting Worse, Not Better: Illegal Pot Market Booming in California Despite Legalization*, N.Y. TIMES, Apr. 27, 2019, https://www.nytimes.com/2019/04/27/us/marijuana-california-legalization.html; Associated Press, *Oregon Lawmakers Take Aim at Explosion of Illegal Pot Farms*, OREGONIAN, https://www.oregonlive.com/marijuana/2022/02/oregon-lawmakers-take-aim-at-explosion-of-illegal-pot-farms.html.

[26] New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

[27] Mark A.R. Kleiman, *How Not to Make a Hash Out of Cannabis Legalization*, WASH. MONTHLY, Mar.-May 2014, https://washingtonmonthly.com/magazine/marchaprilmay-2014/how-not-to-make-a-hash-out-of-cannabis-legalization/. As noted below, Professor Kleiman favors controlled and regulated marijuana legalization. In his 2014 article, he supported public ownership of distribution facilities.

have successfully driven down the number of alcohol-caused crashes. Legalizing cannabis for recreational use will lead to an about-face in that effort. There will be an increase in cannabis use, some of those users will decide to drive, and some drivers who are "one toke over the line" will injure or kill innocent passengers, pedestrians, or other drivers. Legalizing cannabis use without also acting to prevent or ameliorate that problem would be irresponsible.[28]

A. THE PROBLEM OF CANNABIS-IMPAIRED DRIVING

The primary psychoactive ingredient in cannabis—Δ^9tetrahydrocannabinol (THC)—hampers a driver's ability quickly and effectively to process and respond to unexpected or rapidly changing driving scenarios. In fact, other than alcohol, cannabis is currently the biggest problem drug for roadway safety—not because it is more impairing than drugs like heroin, but because it is more commonly used, a use that is increasing rapidly. More than 30 states now permit adults to use cannabis for medical or recreational purposes. Those states might expand their current lawful uses. Other states are likely to consider joining them.

If cannabis-impaired driving alone were not a serious enough public health hazard, consider this: A large number of people combine cannabis with alcohol, which only worsens impairment. That combination is particularly common (perhaps increasingly so, given cannabis legalization) and especially troublesome given the additive or synergistic debilitating effect that such a cocktail has on safe motor vehicle handling. Someone with a blood alcohol content (BAC) level below 0.08 but who is also under the influence of cannabis would not be deemed impaired as a matter of law, but very well might be more incapacitated than someone with a BAC level above the limit. That aggravates our impaired-driving problem, because, given today's technology, we cannot use the same approach to measure THC impairment that we use for alcohol.

There is reason to be concerned that increased use of cannabis will lead to an increase in fatal and non-fatal motor vehicle crashes. Consider the data from Colorado since that state enacted a recreational cannabis initiative in 2012. According to a September 2018 report by the Strategic Intelligence Unit of the Rocky Mountain High Intensity Drug Trafficking Area (HIDTA) Task Force, since 2012 traffic deaths involving drivers who tested positive for cannabis have increased by 35 percent, while the number of cannabis-related fatalities jumped 151 percent from 55 in 2013 to 138 in 2017. In 2017, 76 of the 112 drivers involved in fatal wrecks tested positive for THC, not an inactive cannabis metabolite, in their blood—and therefore in their brain—which indicates cannabis use within hours preceding the crash. The 2017 number translates to one person killed every 2.5 days. Earlier HIDTA Task Force Reports, as well as publications by other organizations, found similar results.[29]

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[28] My submission here summarizes the views that I set forth in some of the articles cited above, such as Larkin, *Driving While Stoned in Virginia*, supra note 2. For a competing viewpoint, see Mark A.R. Kleiman et al., *Driving While Stones: Issues and Policy Options*, 11 J. DRUG POL'Y ANALYSIS Issue 2 (2018) (arguing that stoned driving is a minor risk and should be treated as a traffic offense on a par with speeding). The two *Journal of Drug Policy Analysis* articles cited above are best read together.

[29] Larkin, *Driving While Stoned in Virginia*, *supra* note 2.

Those sad facts are not surprising when one considers the following. An anonymous November 2017 Colorado Department of Transportation survey concluded that 69 percent of respondents admitted to driving while "high" from cannabis within the prior year, 55 percent said that driving under the influence of cannabis was safe, and 55 percent of that group said that they had driven while high an average of 12 times in the prior 30 days. The one word that best describes those results is "scary." Finally, there is evidence that this problem might last longer than the average person expects. One study found that chronic, daily, cannabis users still suffered from impairment three weeks into abstinence, past the point at which the average person might think himself free of THC's disabling effect.[30]

One final point in this regard. Legalizing any psychoactive substance puts innocent parties at risk of grave bodily injury or death if they drive because some other drivers might be impaired by any such substance. That is a critical factor to consider. As I have explained elsewhere:

> Like the debate over marijuana legalization, the challenge to the constitutionality and morality of capital punishment has been the subject of vigorous dispute for the last several decades. One of the most common and powerful arguments advanced against the death penalty is that the criminal justice system is so riddled with flaws that there is an unacceptable risk that an innocent person will be executed. In any event, the argument goes, the difference between who lives and dies is entirely arbitrary.
>
> Ironically, the adoption of medical and recreational cannabis schemes poses the same risk of killing the innocent. Yet, we do not see any discussion of this cost of reform of the nation's cannabis laws, let alone any outcry against liberalization that it will cost innocent lives. It is time that we should.
>
> There should be little doubt that the existence of medical and recreational cannabis schemes increases the risk of highway morbidity and mortality. Logic compels that conclusion. Eliminating criminal penalties for cannabis possession and use will entice some new number of people to use marijuana who avoided it because it had been a crime. Some number of those people will drive after becoming impaired. In turn, some number of those people will contribute to an accident, perhaps one involving a fatality. It certainly is the case that a legislature could decide that cannabis liberalization will lead to an increase in cannabis use and therefore decide to allocate any burden on the party—the cannabis user—who increases the risk of morbidity and mortality to deter people from using marijuana and driving.
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> The result is this: adoption of medical and recreational cannabis initiatives poses the risk of killing entirely innocent parties, whether they are other motorists, passengers, or pedestrians, in a purely random manner. Those people are no less innocent, and no less dead, than the hypothetical individual who is wrongfully convicted of a capital crime and executed.

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[30] *Id*.

> That omission deserves especial blame in the case of increased *recreational* use of marijuana. Whatever benefit *marijuana* may offer the people who smoke it, it cannot save lives. It can, however, take them.[31]

The bottom line is that the problem of cannabis-impaired driving is a serious one.

B. REMEDIES FOR THE PROBLEM OF DRUG-IMPAIRED DRIVING

The problem is not attributable to cannabis alone. Other drugs, such as opioids and benzodiazepines (minor tranquilizers), can impair someone's ability to drive a motor vehicle safely.

Numerous other parties are aware of this problem, have studied it, and have sought to develop responses to it. The National Highway Traffic Safety Administration of the Department of Transportation, the Office of National Drug Control Policy, the Governors' Highway Safety Association, numerous private organizations such as the American Automobile Association, the Institute for Behavior and Health, and the Insurance Institute for Highway Safety—those and other public and private entities are troubled by drug-impaired driving and are working to minimize its harmful consequences. I am confident that all of those entities would be willing to continue to work *today* with Virginia in any such inquiry that the General Assembly would direct.

There is far more that Virginia can do today to address this problem. The General Assembly appropriates funds for interstate highway construction, and it can place reasonable conditions on the receipt of those funds. Below is a list of reasonable policies that would help address the problem of drug-impaired driving. The General Assembly, with the Governor's approval, has the power to adopt these proposals as a condition.

- **Proposal:** Apply to every driver under age 21 who tests positive for any illicit or impairing drug, including cannabis and impairing prescription drugs, the same zero-tolerance standard specified for alcohol, the use of which in this age group is illegal.
- **Proposal:** Apply to every driver found to have been impaired by drugs, including cannabis, the same remedies and penalties that are specified for alcohol-impaired drivers, including administrative or judicial license revocation.
- **Proposal:** Test every driver involved in a crash that results in a fatality or a serious injury (including injury to pedestrians) for alcohol and impairing drugs, including cannabis.
- **Proposal:** Test every driver arrested for driving while impaired for both alcohol and impairing drugs, including cannabis.

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[31] Larkin, *The Problem of "Driving While Stoned," supra* note 1, at 5 (emphasis in original). I realize that legislators regularly make decisions with life-or-death consequences. *See* Ronald J. Allen & Amy Shavell, *Further Reflections on the Guillotine*, 95 J. CRIM. L. & CRIMINOLOGY 625 (2005); Paul J. Larkin, Jr., *The Demise of Capital Clemency*, 73 WASH. & LEE L. REV. 1295, 1317-18 (2016). My point is that the decision to legalize cannabis for recreational use fits into that category too, not that it is unique.

- **Proposal:** Require state and local law enforcement officers to use reliable oral fluid testing technology at the roadside for every driver arrested for impaired driving.
- **Proposal**: Collect data on all crashes in which cannabis is suspected to have contributed to the crash and report that data to NHTSA and the public.
- **Proposal:** Require hospitals, emergency care, and related facilities to collect/collate/publish alcohol/drug/polydrug data.
- **Proposal:** Create a database collecting the information for alcohol- and drug-impaired driving arrests and convictions that is accessible by state and local law enforcement officers and transmit that information to the FBI for its NCIS database.
- **Proposal**: Require that every person applying for a driver's license and renewing a past license to be informed of all prescription drugs that can impair driving, as well as all illicit drugs.
- **Proposal**: Implement a "*24/7 Sobriety*" program.[32]
- **Proposal:** Require that the Commonwealth's DWI recordkeeping separately classify alcohol, drugs, and polydrug use.
- **Proposal:** Lower the Blood-Alcohol Content Threshold from 0.08 g/dL to 0.05 (or lower) for every driver who has consumed cannabis.
- **Proposal:** Fund pilot projects in various districts to determine how many people are driving while impaired by drugs or alcohol.
- **Proposal:** Improve the training for state and local law enforcement officers necessary to recognize drug-impaired drivers.

Polydrug use is sufficiently common today that the states should test every driver involved in a crash, particularly one involving a fatality, not only for alcohol but also for legal and illegal impairing drugs. Moreover, all 50 states fix 21 as the minimum drinking age *and* the minimum age for recreational cannabis use. It therefore makes sense that states should apply to everyone under that age who tests positive for any illegal drug use whatever administrative penalty the states impose for underage drinking and driving. Colorado and Washington have attempted to collect and report the data reflecting the consequences of the legalization schemes in those states. Other states, including Virginia, should do the same. That is particularly important in the case of cannabis legalization, because of the dramatic changes that we have seen since California first legalized medical cannabis in 1996. Where a state has changed its laws to allow cannabis to be used for medical or recreational purposes, that state has an obligation to its residents—and anyone else who uses the state's roadways—to inform the public whether liberalization has increased the risk of grave bodily injury of death whenever they drive.

[32] For a discussion of 24/7 Sobriety programs, see Larkin, *24/7 Sobriety*, *supra* note 15.

I previously have argued that states with medical or recreational cannabis programs should lower the BAC standard for alcohol.[33] That approach would not address the risk that cannabis use alone poses to highway injury or death, but it could help lessen the number of crashes caused by a cannabis-alcohol cocktail. I continue to believe that we should not let the perfect be the enemy of the good and that saving some lives is better than saving none. I am aware of the powerful opposition that the national alcoholic beverage industry and local drinking establishments would bring to bear against any such proposal. Yet, I do not believe that trying to keep some impaired drivers off the road by lowering the BAC level for alcohol is just tilting at windmills. At a minimum, forcing opponents of this option to justify their position would enhance the public discourse over drug-impaired driving, because there is value in forcing someone to articulate an unpersuasive argument.

III. IF THE GENERAL ASSEMBLY DECIDES TO LEGALIZE RECREATIONAL CANNABIS USE, IT SHOULD OWN AND OPERATE CANNABIS DISTRIBUTION FACILITIES

Cannabis legalization is not "a binary choice," with complete legalization and a heavy criminal justice crackdown as the only two choices.[34] There are points in between. Most legalization debates miss the boat because they focuses on the *demand* side of the matter. An important aspect of this issue is the *supply* side: who may cultivate, possess, and distribute agricultural cannabis to the ultimate consumer.[35] Even here there are multiple options. For example, one option is reducing criminal penalties for growing and possessing a limited amount of cannabis in one's home for personal use. Moreover, even for commercial distribution, the debate so far has largely focused on the choice between small- or large-scale commercial businesses. That is a mistake. Private ownership of commercial facilities is not the only option. There are at least two others that should be discussed: namely, limiting production and distribution to (1) not-for-profit companies or (2) state-owned and operated retail facilities.

The issue of who may distribute cannabis is a critical one. Even if distribution is regulated, that regulation does not prevent so-called "safe use"—that is, the use of cannabis as authorized by law. After all, pristine cigarettes and alcohol kills people. The government does not regulate the dose, quantity, or frequency of cigarette smoking or alcohol consumption. Nor can it regulate cannabis consumption at a personal level. Keep in mind that that fact is the reason why so many people initially died during the first phase of the opioid crisis, the prescription opioid phase. People misused lawfully prescribed and properly manufactured prescription opioids by consuming higher doses than prescribed, by crushing and injecting the extended-release version of those drugs, by using them more frequently than a physician would recommend, and by unintended population use (non-patients).

My point is not that someone can "OD" on cannabis, Rather, it is that the nature of the retail seller matters. Private parties want to see as many people use cannabis

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[33] *See*, *e.g.*, Larkin, *The Problem of "Driving While Stoned," supra* note 1; Larkin, *Medical or Recreational Marijuana and Drugged Driving*, *supra* note 1.

[34] Jonathan Caulkins, *Against a Weed Industry*, NAT'L REV., Mar. 15, 2018, https://www.nationalreview.com/magazine/2018/04/02/legal-marijuana-industry-leap-unknown/.

[35] *Id*.

as possible, and for those consumers to increase the frequency and amount of their use. Government-owned and operated retail stores are less likely to be motivated by profit, which might serve as a necessary brake on cannabis use.

Two experts on the subject of cannabis have endorsed alternatives to large- or small-scale private ownership of distribution businesses. In a 2018 article entitled *Against a Weed Industry*, Jonathan Caulkins, a professor at Carnegie-Mellon University and an expert on the subject of cannabis, recommended a very different model.[36] By contrast, in a 2014 article entitled *How Not to Make a Hash Out of Cannabis Legalization*, the late NYU Professor Mark Kleiman argued in favor of state ownership of cannabis stores.[37] Either option is better than recreating the same ownership and distribution system that we have for cigarettes, but I think that Professor Kleiman has the better of the argument.

A. Option 1: Large-Scale For-Profit Ownership of Cannabis Distribution

Professors Caulkins and Kleiman make a powerful case for avoiding a scheme involving the distribution of cannabis by privately owned, for-profit companies, especially large corporations. As Professors Caulkins explains, "Free-market capitalism unleashes awesome forces. The quest for ever greater profits stimulates innovation in products and production processes, yielding a wider range of cheaper and more effective products in which consumers can indulge—and sometimes over-indulge."[38] That outcome is "a blessing in the case of 99 percent of products, but not all of them. We do not allow corporations to sell human organs, sexual favors, or performance-enhancing steroids for non-medical use, and some harbor misgivings about for-profit prisons and universities."[39]

Professor Caulkins argues that "this cautious approach" is necessary because cannabis is not "a regular article of commerce."[40] It is quite unlike ordinary commercial products, like automobiles, flashlights, telephones, and the like. It is far closer to items such as alcohol and tobacco. Why? For several reasons, such as the ones that I mentioned above: It has the potential to render users dependent on or addicted to the drug; it can lead to severe mental health problems; it can create havoc on the roadways; and so forth—all of which can wind up creating major problems for a significant proportion of the population.[41] "The trick to legalizing cannabis, then,"

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[36] *Id*.

[37] Kleiman, *supra* note 23.

[38] Caulkins, *supra* note 16.

[39] *Id*.

[40] *Id*.

[41] Cannabis is not as severe a threat to individual and public health as alcohol, he notes. *Id*. ("Cannabis is a dependence-inducing intoxicant, but a relatively safe one. Overdoses—particularly from edibles—prompt many thousands of people to seek care in emergency rooms every year, but overdose deaths are all but impossible. Even long-term use doesn't cause much organ damage. Yes, cannabis smoke contains carcinogens, but not enough to make excess cancers visible in epidemiological studies. Cannabis intoxication impairs reaction time, memory, and one's ability to perform tasks that require attention, but it does not produce reckless or aggressive behavior the way alcohol does."). But it is not a harmless product. *Id*.; *see also* Kleiman, *supra* note 13 ("The undeniable gains from legalization consist mostly of getting rid of the damage done by prohibition. . . . Another gain from legalization would be to move the millions of Americans whose crimes begin and end with using illegal cannabis from the wrong side of the law to the right one, bringing an array of

Professor Kleiman put it, "is to keep at bay the logic of the market—its tendency to create and exploit people with substance abuse disorders."[42]

The reason is that different people will consume cannabis in different ways and in different amounts. Moderate use of cannabis by adults at home is not likely to lead to major health or societal problems. "Adults' using a few times a week when not at work, school, or minding children is pretty harmless, and that describes almost half of cannabis users."[43] But that practice "describes only a tiny share of cannabis *use*."[44] As he explained, "Such moderate, adult use is engaged in by about one in three cannabis users, but accounts for only 2 percent of consumption and so a trifling share of sales and profits."[45] A far smaller number of daily or dependent users consume far more cannabis person. "[D]aily and near-daily users who account for about 80 percent of consumption. As policy liberalized, cannabis transformed from a weekend party drug to a daily habit, becoming more like tobacco smoking and less like drinking. The number of Americans who self-report using cannabis daily or near-daily grew from 0.9 million in 1992 to 7.9 million in 2016."[46]

If you think that is bad, hold on. It gets worse.

"Just under half of consumption is by people who report either having been in alcohol or drug treatment or suffering enough current problems to meet medical criteria for substance-use disorder. (Since denial is a hallmark of addiction, this proportion is likely conservative.)"[47] Moreover, [a]bout 60 percent of consumption is by people with a high-school education or less, a group with lower disposable income and greater sensitivity to falling prices."[48] And prices have declined—"sharply."[49] The result is that legalization will create serious problems for an unknown—albeit hopefully small—number of Americans.

Professor Kleiman voiced the same concerns:

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benefits to them and their communities in the form of a healthier relationship with the legal and political systems. Current cannabis users, and the millions of others who might choose to start using cannabis if the drug became legal, would also enjoy an increase in personal liberty and be able to pursue, without the fear of legal consequences, what is for most of them a harmless source of pleasure, comfort, relaxation, sociability, healing, creativity, or inspiration. For those people, legalization would also bring with it all the ordinary gains consumers derive from open competition: lower prices, easier access, and a wider range of available products and means of administration, held to quality standards the illicit market can't enforce.").

[42] Kleiman, *supra* note 23.

[43] Caulkins, *supra* note 16.

[44] *Id*. (emphasis in original).

[45] *Id*. ("Likewise, many kids use, but most do not use daily, and there are some adults who use ten to 20 times per month.").

[46] *Id*.

[47] *Id*.

[48] *Id*.

[49] Product variety has also increased. *Id*. ("Product variety has exploded, including THC-infused candies and edibles, oils that can be vaped (akin to e-cigarettes), and chunks of 70-plus percent THC that are suitable for flash-vaporization ("dabbing"). The increase in average daily dose has been startling. Until 2000, the average potency of seized cannabis never exceeded 5 percent, and 4 percent was typical. Someone consuming one 0.4-gram joint each weekend night was consuming 0.032 grams of THC per week, or 4.6 milligrams per day. Daily users now average about 1.3 grams per day. At 20 percent potency, that is 260 milligrams per day—nearly 60 times as much.").

> The losses from legalization would mainly accrue to the minority of consumers who lose control of their cannabis use. About a quarter of the sixteen million Americans who report having used cannabis in the past month say they used it every day or almost every day. Those frequent users also use more cannabis per day of use than do less frequent users. About half of the daily- and near-daily-use population meets diagnostic criteria for substance abuse or dependence—that is, they find that their cannabis habit is interfering with other activities and bringing negative consequences, and that their attempts to cut back on the frequency or quantity of their cannabis use have failed. (Those estimates are based on users' own responses to surveys, so they probably underestimate the actual risks.)
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> And then, of course, there are the extreme cases. A substantial number of these daily users spend virtually every waking hour under the influence. Legal availability is likely to add both to their numbers and to the intensity of their problems.[50]

Put differently,

> Cannabis consumption, like alcohol consumption, follows the so-called 80/20 rule (sometimes called "Pareto's Law"): 20 percent of the users account for 80 percent of the volume. So from the perspective of cannabis vendors, drug abuse isn't the problem; it's the target demographic. Since we can expect the legal cannabis industry to be financially dependent on dependent consumers, we can also expect that the industry's marketing practices and lobbying agenda will be dedicated to creating and sustaining problem drug use patterns."[51]

Using a purely private distribution system is part of the problem. As Professor Kleiman estimated in 2014:

> The systems being put into place in Washington and Colorado roughly resemble those imposed on alcohol after Prohibition ended in 1933. A set of competitive commercial enterprises produce the pot, and a set of competitive commercial enterprises sell it, under modest regulations: a limited number of licenses, no direct sales to minors, no marketing obviously directed at minors, purity/potency testing and labeling security rules. The post-Prohibition restrictions on alcohol worked reasonably well for a while, but have been substantially undermined over the years as the beer and liquor industries consolidated and used their economies of scale to lower production costs and their lobbying muscle to loosen regulations and keep taxes low . . . .
>
> The same will likely happen with cannabis. As more and more states begin to legalize cannabis over the next few years, the cannabis industry will begin to get richer—and that means it will start to wield considerably more political power, not only over the states but over national policy, too.
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> That's how we could get locked into a bad system in which the primary downside of legalizing pot—increased drug abuse, especially by minors—will be greater than it needs to be, and the benefits, including tax revenues, smaller than they could be. It's easy to imagine the cannabis equivalent of

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[50] Kleiman, *supra* note 23.
[51] *Id*.

> an Anheuser-Busch InBev peddling low-cost, high-octane cannabis in Super Bowl commercials. We can do better than that, but only if Congress takes action—and soon.[52]

Virginia should not wait for Congress to act. If it decides to permit cannabis to be sold for recreational use, the General Assembly should limit sales to already existing ABC stores.

B. OPTION 2: NOT-FOR PROFIT OR STATE OWNERSHIP OF CANNABIS DISTRIBUTION

To avoid those problems, Professor Caulkins proposes that a legislature use a ten-year period to study the effects of a radical change in our controlled substances laws. In his words:

> I suggest that we pause for a decade and restrict legal supply to nonprofit organizations. One option would require organizations applying for a state license to be nonprofit groups whose governance structures focus them on serving the public interest. I suggest two conditions. First, the majority of governing-board members must come from the child-welfare and treatment communities. Second, the organization's charter must define its mission as meeting existing demand, in order to undercut the black market, but not promoting greater consumption.[53]

In 2014, Professor Kleiman argued in favor of a government distribution mechanism:

> What's needed is federal legislation requiring states that legalize cannabis to structure their pot markets such that they won't get captured by commercial interests. There are any number of ways to do that, so the legislation wouldn't have to be overly prescriptive. States could, for instance, allow cannabis to be sold only through nonprofit outlets, or distributed via small consumer-owned co-ops (see Jonathan P. Caulkins, "Nonprofit Motive"). The most effective way, however, would be through a system of state-run retail stores.
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> There's plenty of precedent for this: states from Utah to Pennsylvania to Alabama restrict hard liquor sales to state-operated or state-controlled outlets. Such "ABC" ("alcoholic beverage control") stores date back to the end of Prohibition, and operationally they work fine. Similar "pot control" stores could work fine for cannabis, too. A "state store" system would also allow the states to control the pot supply chain. By contracting with many small growers, rather than a few giant ones, states could check the industry's political power (concentrated industries are almost always more effective at lobbying than those comprised of many small companies) and maintain consumer choice by avoiding a beer-like oligopoly offering virtually interchangeable products.
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> Of course, there's a danger that states themselves, hungry for tax dollars, could abuse their monopoly power over pot, just as they have with state lotteries. To avert that outcome, states should avoid the mistake they

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[52] *Id*.

[53] Caulkins, *supra* note 16.

> made with lotteries: housing them in state revenue departments, which focus on maximizing state income. Instead, the new cannabis control programs should reside in state health departments and be overseen by boards with a majority of health care and substance-abuse professionals. Politicians eager for revenue might still press for higher pot sales than would be good for public health, but they'd at least have to fight a resistant bureaucracy.[54]

I think that the government ownership option is preferable to using not-for-profit companies. Virginia uses this approach for the distribution of distilled spirits (e.g., bourbon, vodka). They can be sold only at a state-operated Alcoholic Beverage Control store.[55] State operation of the means of distribution has several advantages over not-for-profit companies.

1. Advertising restrictions are a reasonable means of reducing demand, and they can be more easily defended against a Free Speech Clause challenge if the state owns the distribution facilities. Privately owned and operated businesses will seek to expand their client base as far as possible—that is, until the last dollar spent on expanding the business returns a dollar in new revenue. Advertising is a means of attracting new customers, and private businesses will seek to advertise their business until the marginal cost of advertising equals the marginal revenue from that business strategy. For some time now, the Supreme Court of the United States has protected purely commercial speech against federal and state regulation, striking down a host of advertising regulations[56] that, in years gone by, would easily have passed muster.[57] Whether Virginia can limit advertising by a private for-profit or not-for-profit entity is debatable under current Supreme Court case law, but it is unlikely that such a limitation would survive. States, however, are not "persons"[58] and therefore have no First Amendment rights.

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[54] Kleiman, *supra* note 23.

[55] *See*, *e.g.*, VA. CODE ANN. § 4.1-101 (2019) (creating the Virginia Alcoholic Beverage Control Authority).

[56] *See*, *e.g.*, Sorrell v. IMS Health, Inc., 564 U.S. 552 (2011) (holding unconstitutional a state law restricting the sale, disclosure, and use of pharmacy records of patients to enable pharmaceutical companies to discern physician prescription practices); Greater New Orleans Broadcasting Ass'n v. United States, 527 U.S. 173 (1999) (*GNOBA*) (holding unconstitutional a federal statute restricting gambling advertising to residents of a state where gambling is legal); Rubin v. Coors Brewing Co., 514 U.S. 476 (1995) (holding unconstitutional a federal law prohibiting beer labels from disclosing alcohol content); 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996) (holding unconstitutional a state law flatly banning the advertising of liquor prices). *Contra* United States v. Edge Broadcasting Co., 509 U.S. 418 (1993) (upholding constitutionality of the federal law discussed in *GNOBA* to a broadcaster in a state where gambling is illegal).

[57] *Compare*, *e.g.*, Valentine v. Christian, 316 U.S. 52 (1942) (holding that commercial speech is not entitled to Free Speech Clause protection), *with*, *e.g.*, Va. Bd. Of Pharmacy v. Va. Consumer Citizens Council, Inc., 425 U.S. 748 (1976) (overruling *Valentine*).

[58] *See* South Carolina v. Katzenbach, 383 U.S. 301, 323-24 (1966) ("The word 'person' in the context of the Due Process Clause of the Fifth Amendment cannot, by any reasonable mode of interpretation, be expanded to encompass the States of the Union, and to our knowledge this has never been done by any court."). *See generally* Return Mail, Inc. v. U.S. Postal Service, 139 S. Ct. 1853, 1861-62 (2019) ("In the absence of an express statutory definition, the [Supreme] Court applies a 'longstanding interpretive presumption that "person" does not include the sovereign.'") (citation omitted) (collecting authorities).

2. State ownership of distribution stores would make it easier for a state to monitor cannabis sales and for store employees to prevent the unauthorized distribution to minors and to the black market. Businesses always have an incentive to increase profits. Some stores or bars that sell alcohol or cigarettes are willing to "wink" at the requirement that a purchaser prove that he is an adult. The same phenomenon is likely to occur with the private sale of cannabis. Yes, some state employees would have the same motivation. But it is far easier for a state to monitor activities in its own stores, staffed with its own employees, than to investigate the goings-on of a large number of private businesses. State undercover law enforcement officers can also enter and look around in any part of a state-owned store, while officers would not ordinarily be able to enter non-public portions of a private business.

3. State ownership would help avoid the problems that arise whenever the law permits only one particular business form—such as not-for-profit concerns—to participate in an activity, even though other forms—such as for-profit concerns—are preferred by the members of the industry. Corporation law is largely within the bailiwick of the states to devise, and there is a risk that particular states might bend their own laws to encourage parties to obscure the true ownership of a not-for-profit enterprise. That risk might be slight, but there is little or no risk of such legal chicanery if the state itself must own the cannabis distribution business.

4. States ownership of cannabis distribution facilities might not have the same banking problems that for-profit and not-for-profit business would have with using the national banking system for receipts from the sale of cannabis. States that have the same structure as the federal government—that is, states that have a state-owned and operated treasury—can deposit the proceeds into the treasury rather than use the interstate banking system. That might avoid the need to revise the banking laws to avoid the problems resulting from the operation of a large-scale cash business.

CONCLUSION

Thank you for the opportunity to testify. I am glad to answer your questions.

APPENDIX

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