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Lemonade Stand Law is A Good First Step towards Reining in Regulatory Crimes

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Chairman and members of the Committee:

I am a legal fellow in the Edwin Meese III Center for Legal and Judicial Studies at The Heritage Foundation.¹ I earned my J.D. from Georgetown University Law Center in 2014. Thereafter, I spent three years as a litigator at Skadden, Arps, Slate, Meagher & Flom, and then two years as a law clerk to a federal district court judge. At the Heritage Foundation, one of my areas of research is overcriminalization and other criminal justice reform efforts.

House Bill 52,² if enacted, would be a victory for children eager to take their first steps into entrepreneurship, but more than that, it would be symbolic victory against the tendency to overcriminalize and over-regulate innocent and harmless behavior. As such, it could be a critical first-step in a larger state-wide effort to reduce overcriminalization and over-regulation.

I want to begin by discussing two families whose story you are probably familiar with—the Marriotts and the Augustines. They were fined \$500 by Montgomery County because their children were operating a lemonade stand without the proper licenses and permits.³ Although the county later waived the fine, the children learned a hard lesson. Carrie Marriott, mother to some of the children said, “The message to kids is this: there’s no American dream.”⁴

Frankly, Ms. Marriott should be thankful that Montgomery County decided not to teach her children an even harsher lesson—one that involved jail time. It could have.

Under Maryland’s Health Code, operating a lemonade stand that does not comply with the state’s licensing requirements is a crime.⁵ The first offense is punishable by a fine of up to \$1,000 and 90 days imprisonment.⁶ The second is punishable by a \$2,500 fine and up to a year imprisonment.⁷ On top of these criminal penalties, children operating an unlicensed lemonade stand are liable for \$5,000 in civil penalties.⁸

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² The bill would prevent local governments from outlawing or regulating by license, permit, or fee, children’s lemonade stands. The bill’s text is available at LegiScan, *Bill Text: MD HB52*, <https://legiscan.com/MD/text/HB52/id/2081627>.

³ See Harry Bradford, *Children’s Families Fined \$500 for Operating Illegal Lemonade Stand*, HuffPost, June 17, 2011, https://www.huffpost.com/entry/us-open-lemonade-fine-neighbors-parking_n_878949.

⁴ *Id.*

⁵ See Md. Code Ann., Health-Gen. § 21-1214; Md. Code Regs. 10.15.03.38.

⁶ Md. Code Ann., Health-Gen. § 21-1214.

⁷ *Id.*

⁸ *Id.*

Exposing children to potential jail time for operating an unlicensed lemonade stand is a dramatic example of overcriminalization—the overuse and abuse of the criminal laws as part of a misguided effort to address every conceivable problem. Maryland has turned an innocent activity into a crime not because it is dangerous or infringes upon the rights of others, but simply because it falls within the overbroad shadow of an indiscriminate regulatory regime.

Overcriminalization is a problem that legal experts, law enforcement officers, legislators, and judges have been combatting for years.⁹ Not only is it unjust, but, in this case, it teaches children to fear the law and to shy away from entrepreneurship.

Don't take my word for it. The stories are numerous and span not only selling lemonade¹⁰ but lawn mowing,¹¹ shoveling snow,¹² selling water,¹³ and operating a cupcake stand.¹⁴ All perfectly innocent behavior that, for many children, is a rite of passage. In my own case, my brother and I used to drag our red wagon to the street corner and sell stickers from our sticker collections, which our parents happily replenished.

Consider again the Marriott and Augustine children. If they wanted to reopen their lemonade stand, but this time, fearful of more fines or even of jail time, do so in compliance with state and county law, what would they have to do?

⁹ See generally, The Heritage Foundation, *Heritage Explains: Overcriminalization*, <https://www.heritage.org/crime-and-justice/heritage-explains/overcriminalization>; see also Overcriminalization, Solutions 2018: The Policy Briefing Book, Heritage Foundation, <https://solutions.heritage.org/protecting-the-rule-of-law/over-criminalization/> (hereinafter *Solutions 2018*) and sources cited therein. For a brief discussion of the concept in the context of Lemonade stands, see Jonathan Zalewski, *How Your Child's Lemonade Stand Could Land You in Jail*, Heritage Commentary, July 27, 2018, <https://www.heritage.org/government-regulation/commentary/how-your-childs-lemonade-stand-could-land-you-jail>.

¹⁰ See, e.g., Paul Meara, *11-Year-Old Girl's Lemonade Stand Shut Down By Officials*, BET, Aug. 1, 2019, https://www.bet.com/news/national/2019/08/01/girl-s-lemonade-stand-shut-down.html?fbclid=IwAR1xld3_nrh8huS3_6o-BKSUIfdvkonthBrPj71vCDlp1FAduelYSdsQUw; Tyler Pager, *Boy's Lemonade Stand, Shut Down for Lack of Permit, Reopens With Fanfare*, The New York Times, Aug. 19, 2018, <https://www.nytimes.com/2018/08/19/nyregion/brendans-lemonade-stand-reopens.html>; Fox News, *Rhode Island police shut down kids' lemonade stand, citing city ordinance concerning commercial vendors*, FoxNews.com, Aug. 8, 2018, <https://www.foxnews.com/food-drink/rhode-island-police-shut-down-kids-lemonade-stand-citing-city-ordinance-concerning-commercial-vendors>; Elizabeth Hernandez, *Beverage outlaws or just kids being kids? Lemonade stands in Denver are illegal without a permit, but a Stapleton mom is taking on the system*, Denver Post, June 1, 2018, <https://www.denverpost.com/2018/06/01/denver-stapleton-lemonade-stand-shut-down-memorial-day/>.

¹¹ Emily Correll, *Teens in Irmo Legally Can't Ask to Cut People's Grass for Money*, WLTX19, May 15, 2019, <https://www.wltx.com/article/news/local/street-squad/irmo/teens-in-irmo-legally-cant-ask-to-cut-peoples-grass-for-money/101-c0891780-28b6-4908-974a-5324358f525d>; Amber Grigley, *Business License Required for Teens to Cut Grass*, ABC3340, May 30, 2017, <https://abc3340.com/news/local/business-license-required-for-teens-to-cut-grass>.

¹² Matt Agorist, *Innocent Child Harassed, Threatened by Cops for Shoveling Snow Without A Permit*, The Free Thought Project, January 22, 2019, <https://thefreethoughtproject.com/innocent-child-harassed-threatened-by-cops-for-shoveling-snow-without-a-permit/?fbclid=IwAR0vLT71Q5KJT7TC5FuUbcOLA93eXjaTE0llpZD443trDkAh5xZTnNXIXU>.

¹³ *Woman dubbed 'Permit Patty' Calls Cops on Girl Selling Water in San Francisco*, FoxKTVU, June 24, 2018, <https://www.ktvu.com/news/woman-dubbed-permit-patty-calls-cops-on-girl-selling-water-in-san-francisco-video>.

¹⁴ Katrina Lamansky, *Illinois Shuts Down 11-Year-Old's Cupcake Business*, WQAD, Feb. 6, 2014, <https://wqad.com/2014/02/06/state-shuts-down-11-year-old-girls-bakery/>.

First, they would need to get licenses and permits that complied with state and county law. In Montgomery County, they could be required to obtain as many as six licenses and permits:¹⁵

1. A sidewalk vendor license;
2. A site-specific vendors license;
3. A limited duration sign permit;
4. An awning or canopy permit;
5. A mobile food service unit license; and
6. A special food service facility license for temporary events.¹⁶

Next, they would have to submit to and pay for inspections.

Montgomery County's publicly available resources do a poor job of clarifying which licenses and permits are required for a particular venture. Accordingly, given that failure to have the proper licenses or permits could expose them to large fines and jail time, it would probably be wise for the children to hire a lawyer before they open a lemonade stand. That costs a lot of money. The licenses, permits, and mandatory inspection fees do too. Even if just a few of the licenses and permits listed above are required for their particular lemonade stand, the children will have to pay hundreds of dollars for them.¹⁷

Putting aside the deterrent effect of criminal fines and jail time, these fees likely close the lawful lemonade-stand market to any children unable to secure venture capital.

The one argument I have heard in favor of subjecting lemonade stands to the full panoply of business and food-service regulation is safety. So the argument goes: children are selling a beverage and their business needs to meet health and safety standards so they don't make anyone sick. But that argument fails for several reasons.

First, concerns that lemonade sold from lemonade stands may make people sick appear to be entirely hypothetical. I searched in vain through the judicial opinions not only of Maryland, but all state and federal courts for any case involving an allegation of illness contracted from a lemonade stand and found none. I also reviewed news archives for similar cases and, again, found none. This is not to say no such case exists, but there is no evidence that this is a problem in need of a solution.

Second, even if this was a problem, criminal fines and jail time are not only unnecessary, but unjust. Traditionally, the criminal law, with its harsh punishments, has been reserved only for the

¹⁵ See Montgomery County Business Portal, *Business Licenses & Permits*, <https://www.montgomerycountymd.gov/Biz-Resources/licenses-permits.html>.

¹⁶ The Marriotts and Augustines were selling lemonade near the U.S. Open golf tournament, which likely qualifies as a "temporary event at a fixed location not exceeding 14 days." See Montgomery County MD, *Food and Facilities Licensing: Licensing Services - Special Food Service Facility (Temporary Event)*, <https://www.montgomerycountymd.gov/hhs-special/LandRLicensingSpecialFood.html>.

¹⁷ See the assorted fee schedules available on the Montgomery County Business Portal, <https://www.montgomerycountymd.gov/Biz-Resources/licenses-permits.html>.

most serious of intentional misconduct.¹⁸ That's no longer the case; both state and federal criminal law now applies to a vast array of innocent conduct.¹⁹ Not only is that unjust, but it exposes citizens—like the Marriott and Augustine children and their parents—to criminal liability and punishment for morally blameless conduct.

Third, these regulations are an unnecessary deterrent. Tort liability serves as an adequate deterrent against producing toxic lemonade. As one law professor put it, “Even a child knows the risks of running a lemonade stand.”²⁰

Fourth, tort law provides a remedy for anyone injured by toxic lemonade.

Fifth, people are perfectly capable of weighing the risks of buying lemonade from a lemonade stand. Lemonade is not a complicated or dangerous product—it is water, sugar, and lemon juice.²¹ Government regulation adds no value to public health and safety beyond that provided by ordinary judgement.

In sum, subjecting lemonade stands to the health and safety regulatory regime, complete with criminal liability, does not protect health and safety. Even if lemonade stands pose a health and safety risk—and there is no evidence that they do—tort liability and good judgment are sufficient safeguards.

For these reasons, House Bill 52 is a good first step to addressing overcriminalization and over-regulation.

But Maryland should not stop there. House Bill 52 can serve as the springboard for a larger effort to eliminate laws and regulations that stifle innocent economic activity and expose unsuspecting citizens to criminal liability for blameless behavior.

North Carolina has recently set an example that Maryland should follow.²² With overwhelming bipartisan support, that state enacted a law that allows the legislature to rein in runaway

¹⁸ See *Solutions 2018*, *supra* note 9.

¹⁹ See, e.g., *id.*; GianCarlo Canaparo, *North Carolina is Tackling Crimes Run Amok. Congress Should Take Notes*, Heritage Commentary, Sept. 13, 2019, <https://www.heritage.org/crime-and-justice/commentary/north-carolina-tackling-crimes-run-amok-congress-should-take-notes>; Paul J. Larkin Jr. & John-Michael Seibler, *Taking Stock of Federal Regulatory Crimes*, HERITAGE LEGAL MEMO. No. 219, Oct. 3, 2017, <https://www.heritage.org/sites/default/files/2017-10/LM-219.pdf>; Josh Sepherd, *Morning Bell: The Government vs. You*, The Daily Signal, June 14, 2013, <https://www.dailysignal.com/2013/06/14/morning-bell-the-government-vs-you/>; John G. Malcolm, *Defining the Problem and Scope of Overcriminalization and Over-federalization*, Testimony before the Committee on the Judiciary Over-criminalization Task Force, U.S. House of Reps., June 14, 2013, <https://www.heritage.org/testimony/defining-the-problem-and-scope-over-criminalization-and-over-federalization>; John S. Baker, Jr., *Revisiting the Explosive Growth of Federal Crimes*, HERITAGE LEGAL MEMO. NO. 26, June 16, 2008, <https://www.heritage.org/report/revisiting-the-explosive-growth-federal-crimes>.

²⁰ Robert J. Rhee, *The Tort Foundation of Duty of Care and Business Judgment*, 88 NOTRE DAME L. REV. 1139, 1151 (2013).

²¹ See Elise Bauer, *Perfect Lemonade*, Simply Recipes, https://www.simplyrecipes.com/recipes/perfect_lemonade/; Jo, *Best Lemonade Ever*, Allrecipes, <https://www.allrecipes.com/recipe/32385/best-lemonade-ever/>.

²² See Canaparo, *supra* note 19.

regulation.²³ That law requires all state agencies to report to the legislature their rules and regulations that carry criminal penalties. It then empowers the legislature’s General Statutes Commission to review the regulations and recommend to the full legislature whether they should be amended or repealed. That law is an excellent exemplar that the Maryland legislature should follow to rein in unwise and excessive regulatory expansion.

Texas also sets a good example in this regard. The Texas legislature maintains a Sunset Advisory Commission that assesses “the continuing need for a state agency or program to exist.”²⁴ As part of that ongoing assessment, the legislature reviews and, if appropriate, eliminates certain regulations.²⁵

Maryland would be well served by following suit. At the very least, a similar effort will allow the state to avoid being purely reactionary to the unintended—and unpopular—effects of runaway regulation. If Maryland regularly reviewed the rules and regulations of its agencies and local governments, it might spare families like the Marriotts and Augustines their trouble before it starts.

Thank you for the opportunity to testify today. I look forward to answering any questions you might have.

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²³ See N.C. Senate Bill 584, available at <https://www.ncleg.gov/Sessions/2019/Bills/Senate/PDF/S584v5.pdf>.

²⁴ Sunset Advisory Commission, *Sunset in Texas*, Report of the 87th Legislature, Sept. 2019, <https://www.sunset.texas.gov/public/uploads/u64/Sunset%20in%20Texas%202017-2019.pdf>.

²⁵ *Id.*, at 9–13.