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Lemonade Stand Law is A Good First Step Towards Reining in Regulatory Crimes¹

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¹ This testimony was originally submitted in 2020 when a prior version of HB961 was introduced. Although it has been updated, but the substance of it, like that of the bill, remains the same.

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.² 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 961,³ 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 good 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.⁴ 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.”⁵

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.⁶ The first offense is punishable by a criminal fine of up to \$1,000 and 90 days imprisonment.⁷ The second is punishable by a \$2,500 fine and up to a year imprisonment.⁸ On top of these criminal penalties, children operating an unlicensed lemonade stand are liable for \$5,000 in civil penalties.⁹

² The title and affiliation are for identification purposes. Members of The Heritage Foundation staff testify as individuals discussing their own independent research. The views expressed here are my own and do not reflect an institutional position for The Heritage Foundation or its board of trustees. The Heritage Foundation is a public policy, research, and educational organization recognized as exempt under section 501(c)(3) of the Internal Revenue Code. It is privately supported and receives no funds from any government at any level, nor does it perform any government or other contract work. The Heritage Foundation is the most broadly supported think tank in the United States. During 2017, it had hundreds of thousands of individual, foundation, and corporate supporters representing every state in the U.S. Its 2017 income came from the following sources: Individuals 71%, Foundations 9%, Corporations 4%, Program revenue and other income 16%. The top five corporate givers provided The Heritage Foundation with 3.0% of its 2017 income. The Heritage Foundation’s books are audited annually by the national accounting firm of RSM US, LLP.

³ 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 HB961*, https://legiscan.com/MD/bill/HB961/2021?utm_campaign=rss&guid=65RvT0tUnclbwk02qjVvQm.

⁴ 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.

⁵ *Id.*

⁶ See Md. Code Ann., Health-Gen. § 21-1214; Md. Code Regs. 10.15.03.38.

⁷ Md. Code Ann., Health-Gen. § 21-1214.

⁸ *Id.*

⁹ *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 to fix 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.¹⁰ It is one of those rare issues that attracts broad bipartisan support.¹¹ Not only is it unjust, but, in this case, it teaches children to fear the law and to shy away from entrepreneurship.

¹⁰ 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>.

¹¹ For example, The Heritage Foundation has worked, and continues to work, on this issue with organizations on the other side of the political divide such as the National Association of Criminal Defense Lawyers and The American Bar Association. See, e.g., Brian W. Walsh & Tiffany M. Joslyn, *Without Intent: How Congress is Eroding the Criminal Intent Requirement in Federal Law*, The Heritage Foundation & National Association of Criminal Defense Lawyers, 2010, <https://www.nacdl.org/Document/WithoutIntentHowCongressIsErodingCriminalIntentReq>.

The stories are numerous and span not only selling lemonade¹² but lawn mowing,¹³ shoveling snow,¹⁴ selling water,¹⁵ and operating a cupcake stand.¹⁶ All perfectly innocent behavior that, for many children, is a rite of passage.¹⁷

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?

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:¹⁸

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.¹⁹

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

¹² 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/>.

¹³ 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>.

¹⁴ 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=IwAR0vLT71Q5KJT7TC5FuUbcOLA93eXjaTE0llpZD443tnrDkAh5xZTnNXIXU>.

¹⁵ *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>.

¹⁶ 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/>.

¹⁷ 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 generously replenished.

¹⁸ See Montgomery County Business Portal, *Business Licenses & Permits*, <https://www.montgomerycountymd.gov/Biz-Resources/licenses-permits.html>.

¹⁹ 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>.

Montgomery County’s publically 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.²⁰

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 most serious of intentional misconduct.²¹ That’s no longer the case; both state and federal criminal law now applies to a vast array of innocent conduct.²² 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.

²⁰ See the assorted fee schedules available on the Montgomery County Business Portal, <https://www.montgomerycountymd.gov/Biz-Resources/licenses-permits.html>.

²¹ See *Solutions 2018*, *supra* note 9.

²² 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>.

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.”²³

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.²⁴ 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 problem—and there is no evidence that they do—tort liability and good judgment are sufficient safeguards.

When I testified last year about this bill’s predecessor, Delegate Healey asked why local governments shouldn’t have the power to regulate lemonade stands as they see fit. This is the wrong question. The right one is: why should any government forbid children from operating a lemonade stand when there is no evidence that lemonade stands are a source of harm for which prohibition is necessary? They answer is that no government should.

For these reasons, House Bill 961 is a good first step to addressing overcriminalization and over-regulation.

But Maryland should not stop there. House Bill 961 can serve as the springboard for a larger effort to eliminate laws and regulations that stifle innocent economic activity and expose citizens to criminal liability for blameless behavior.

North Carolina has recently set an example that Maryland should follow.²⁵ With overwhelming bipartisan support, that state enacted a law that allows the legislature to rein in runaway regulation.²⁶ 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 opportunity for the legislature to rein in regulatory expansion.

²³ Robert J. Rhee, *The Tort Foundation of Duty of Care and Business Judgment*, 88 NOTRE DAME L. REV. 1139, 1151 (2013).

²⁴ 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/>.

²⁵ See Canaparo, *supra* note 19.

²⁶ See N.C. Senate Bill 584, available at <https://www.ncleg.gov/Sessions/2019/Bills/Senate/PDF/S584v5.pdf>.

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.”²⁷ As part of that ongoing assessment, the legislature reviews and, if appropriate, eliminates certain regulations.²⁸

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.

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²⁷ 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>.

²⁸ *Id.*, at 9–13.