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Hawaii State Legislature
Senate Committee on Judiciary and Government Operations

April 2, 2009
10:15 a.m.
Room 016

Testimony on HB 1417, HD 2, SD1 Relating to Mobile Billboards

Submitted by
Jon M. Van Dyke
on behalf of
The Outdoor Circle

This Bill is designed to reinforce the longstanding commitment of our community to prohibit offsite advertising. For many decades, offsite advertising such as billboards have been prohibited by state statutes to protect the outstanding scenic vistas of our community, to enrich the experiences of residents and visitors, and to promote and protect the economic vitality of our tourist industry. This Bill closes a loophole in our legislative scheme by prohibiting mobile billboards. The Outdoor Circle strongly urges passage of this Bill.

This testimony addresses the concerns that have been raised by the Department of the Attorney General in testimony submitted to the Senate Committee on Commerce and Consumer Protection at the March 18 hearing regarding this Bill. The Outdoor Circle greatly appreciates the efforts of the Department of the Attorney General to suggest language designed to address and resolve possible constitutional issues. After reexamining recent federal decisions that have addressed issues related to signage, however, The Outdoor Circle has concluded that the concerns raised by the Department of the Attorney General are technical in nature, that the language in HD 2 is clear and straight-forward, and that the Bill as presently drafted meets the standards required by the Constitution and recent federal appellate decisions.

The first concern raised by the Department of the Attorney General addresses the exemption for a vehicle or trailer that:

> (1) Is regularly driven or moved as part of the day-to-day operations of a business; and
> (2) Carries or displays an advertising device that relates to that business.

The Department of the Attorney General has testified that such an exemption potentially subjects this Bill to a challenge under the First Amendment "because it arguably creates an impermissible content-based regulation. [B]y allowing certain paid commercial advertising, this bill effectively discriminates against paid non-commercial speech."

The exemption is designed to allow vehicles and trailers to self-identify their products

and services. The language in this exemption was adapted from language used in an ordinance enacted by the City of Myrtle Beach, South Carolina. *See Taxi Cabvertising, Inc. v. City of Myrtle Beach,* 26 Fed.Appx 206, 2002 WL 23165 (4th Cir.2002). The distinction between self-identification and advertising for others has long been recognized as valid. In *Railway Express Agency, Inc. v. New York,* 336 U.S. 106, 116 (1949), for instance, Justice Robert Jackson explained in his concurring opinion that "there is a real difference between doing in self-interest and dong for hire, so that it is one thing to tolerate action from those who act on their own and it is another thing to permit the same action to be promoted for a price." More recently, in *Center for Bio-Ethical Reform, Inc. v. City and County of Honolulu,* 455 F.3d 910 (9th Cir. 2006), the U.S. Court of Appeals for the Ninth Circuit upheld Honolulu's prohibition on aerial advertising, even though it contained an exemption allowing aircraft to carry signs identifying themselves. The Ninth Circuit stated that this exception "is a common sense one," and it rejected the argument that the distinction "discriminates between commercial advertising and political speech" by explaining that "the identifying mark exception" applies even-handedly to all aircraft and does not differentiate "on the basis of any particular viewpoint." *Id.* at 921-22.

The Department of the Attorney General has suggested that this exemption may possible run afoul of the decision in *Metromedia, Inc. v. City of San Diego,* 453 U.S. 490 (1981), because, according to the Department is permits certain paid commercial advertising while prohibiting paid noncommercial advertising. But the exemption does not distinguish between commercial and noncommercial advertising. It permits signage related to the day-to-day activities of the vehicle, whether it is paid or unpaid, commercial or noncommercial. This distinction has been upheld in numerous cases, as explained in the previous paragraph. This same distinction is also upheld in the two cases cited by the Department, *Supersign of Boca Raton, Inc. v. City of Fort Lauderdale*, 766 F.2d 1528 (11th Cir. 1985) (relying upon *Metromedia* and *Railway Express* in upholding a prohibition on mobile advertising that contained an exemption for "an advertisement or business notice of its owner"), and *Showing Animals Respect and Kindness v. City of West Hollywood,* 166 Cal.App.4th 815, 823, 83 Cal.Rptr.3d 134, 141 (2008) (upholding a similar prohibition on mobile advertising with a similar exemption, concluding that the exemption did not create a "content-based" ordinance, because it "draws no distinctions based on the content of the speech or the viewpoints expressed"). The concerns expressed by the Department thus seem to be unsupported by any recent caselaw.

The Department of the Attorney General has further contended that the Bill should contain language saying that the phrase "'consideration or other economic benefit' does not include the benefit derived from the effect of the advertising," suggesting that without this language "any advertising could be deemed to render an 'economic benefit,' even if the operator of the vehicle is not compensated for displaying the advertising" and that "the inclusion of this language avoids Equal Protection and First Amendment issues." The Department suggests that without this additional phrase "a Toyota dealership owner could violate the law by displaying on his vehicle, 'Save our Environment. Drive a hybrid Prius.' Any other citizen, however, could display the same message without violating the law." The Department's suggested signage, however, *could* be displayed on a vehicle utilized by a Toyota dealership owner for business purposes, because the sign would "relate[] to that business" pursuant to the present exemption. It

is unrealistic to think that the Toyota dealership owner has a Toyota designed solely for her personal use, because she would be driving the Toyota, even in the off hours, to demonstrate the merits of the vehicle to the community, and so even a vehicle used for commuting and other personal activities would probably, in this example, be viewed as a business expense by the dealership owner, and thus the suggested sign would be permitted under the exemption.

The Outdoor Circle has determined that the language in the present exemption for signage that relates to the day-to-day operations of the vehicle or trailer addresses the concerns of the Department of the Attorney General and does so in a more direct and straight-forward fashion. This conclusion is informed by the very recent decision of the U.S. Court of Appeals for the Ninth Circuit in *Metro Lights, L.L.C. v. City of Los Angeles,* 551 F.3d 898 (9th Cir. 2009), which upheld the outdoor sign ordinance of the City of Los Angeles in a long and carefully-written opinion. This decision examines and explains in detail the U.S. Supreme Court's earlier decision in *Metromedia, Inc. v. City of San Diego,* 453 U.S. 490 (1981), and it rules that state and local governments have considerable discretion to regulate signs. The decision explains that enactments regulating commercial speech are governed by a different standard than enactments regulating noncommercial speech, that commercial speech receives "reduced protection," *id.* at 903 n.6, and that distinctions between these two types of speech can be supported by well-established substantial governmental interests such as traffic safety and aesthetics. This decision also explains that *Metromedia* ruled that signs advertising for others can be regulated or prohibited, even if self-identifying signs are permitted, because "offsite advertising, with its periodically changing content, presents a more acute problem than does onsite advertising." *Id.* at 908 and 910 (*quoting from* 453 U.S. at 511). As the *Metro Lights* opinion explains, it is appropriate and constitutional for state and local governmental bodies to target the "uncontrolled and incoherent proliferation" of offsite advertising which creates "more distracting ugliness" than does onsite or self-identifying signage. *Id.* at 910. This decision thus ensures that state and local governmental bodies have substantial leeway to target visual pollution and that enactments will be upheld so long as they are logically designed to reduce such visual pollution and thus to promote traffic safety and aesthetics.

For these reasons, The Outdoor Circle has concluded that the language in H.B. No. 1417 HD 2 SD 1 meets constitutional standards, and it strongly urges passage of this Bill.

From: mailinglist@capitol.hawaii.gov
Sent: Thursday, April 02, 2009 10:43 AM
To: JGO Testimony
Cc: carolhe@hawaii.rr.com
Subject: Testimony for HB1417 on 4/2/2009 10:15:00 AM

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Testimony for JGO 4/2/2009 10:15:00 AM HB1417

Conference room: 016
Testifier position: oppose
Testifier will be present: No
Submitted by: Carol Hendricks
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Submitted on: 4/2/2009

Comments:
It is very important that sign laws in Hawaii are not weakened (HB1417) To allow even one company to use traveling vehicle billboards will open the door for other unsightly clutter in our beautiful state which depends on tourism. Please don't kill the golden goose while making it ugly for residents as well.