TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
THIRTIETH LEGISLATURE, 2020

LATE

ON THE FOLLOWING MEASURE:
S.B. NO. 2541, RELATING TO MASSAGE THERAPISTS.

BEFORE THE:
SENATE COMMITTEE ON COMMERCE, CONSUMER PROTECTION, AND HEALTH

DATE: Thursday, January 30, 2020 **TIME:** 9:30 a.m.

LOCATION: State Capitol, Room 229

TESTIFIER(S): Clare E. Connors, Attorney General, or
Christopher J.I. Leong, Deputy Attorney General

Chair Baker and Members of the Committee:

The Department of the Attorney General provides the following comments.

The purposes of this bill are to (1) require massage therapy licensees to complete twelve hours of continuing education within the two-year period preceding each renewal date, beginning with the renewal for the licensing biennium commencing July 1, 2022 and (2) update advertising restrictions and penalties.

The portion of this bill that prohibits certain advertisements on the internet and social media platforms may be subject to challenge under the Free Speech Clauses of the United States Constitution (First Amendment) and the Constitution of the State of Hawaii (article I, section 4). Both clauses forbid the enactment of laws abridging the freedom of speech. The United States Supreme Court has established that commercial speech, such as advertising, is not stripped of First Amendment protection simply because it proposes a commercial transaction. *See Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 561-62 (1980). In the commercial speech context, although a state may prohibit misleading advertising, it may not place an absolute prohibition on potentially misleading information if the information may also be presented in a way that is not deceptive. *See In re R.M.J.*, 455 U.S. 191, 203 (1982).

Thus, we have previously opined that the complete restriction in section 452-23(a)(4), Hawaii Revised Statutes (HRS), against "pictures depicting the human form other than hands, wrists, and forearms" is broader than reasonably necessary to remedy the perceived harm that gave rise to its enactment, because such advertising is

not *per se* misleading or deceptive. *See attached* Attorney General Opinion No. 98-02, dated March 3, 1998. Because section 452-23(a)(4), HRS, may be overbroad and infringe upon commercial speech rights, the amendment to this section on page 4, lines 15-17, may similarly be subject to the same constitutional infirmity.

Thank you for the opportunity to provide comments.

BENJAMIN J. CAYETANO
GOVERNOR

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March 3, 1998

The Honorable Bertha C. Kawakami
Representative, Fourteenth District
The Nineteenth Legislature
State Capitol, Room 434
Honolulu, Hawaii 96813

Dear Representative Kawakami:

Re: Advertisements by Licensed Massage Therapists

This opinion is in response to your request as to whether there are constitutional problems with section 452-23(a)(4), Hawaii Revised Statutes (HRS),[1] pertaining to advertisements by licensed massage therapists. Your request arises from an inquiry to your office by a massage therapist who was cited for violating section 452-23(a)(4) by the prosecuting agency of the licensing authority. The massage therapist questioned whether this statute was overly restrictive and unconstitutional.

In this instance, based upon our review of United States Supreme Court rulings, we conclude that portions of the statute are overly broad and infringe upon the constitutionally protected commercial speech rights of people advertising massage services. While the statute attempts to advance the legislature's substantial interest in separating the legitimate profession of massage therapy from illegal activities, portions of the statute exceed the allowable limits for regulation of commercial speech and are, therefore, constitutionally infirm.

Although you set forth specific questions pertaining to section 452-23(a)(4), including its applicability to the regulation of trademarks, we have taken the liberty of addressing the broader constitutional issues raised rather than limiting our inquiry to the questions as stated in your request. The United

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[1] Unless otherwise indicated, all statutory references are to the Hawaii Revised Statutes.

States Supreme Court rulings reviewed in this opinion govern federal and state law, and prescribe the parameters for regulating all types of commercial speech. Similar constitutional principles govern regulation of commercial speech whether the speech appears in the form of a trademark, or an advertisement, or both. Therefore, we believe our conclusions set forth below are responsive to your concerns.

Discussion

Section 452-23(a) states:

> **§452-23 Advertising.** (a) It is a misdemeanor for any person, including a person who is exempt by section 452-21 from this chapter, to advertise with or without any limiting qualifications as a massage therapist unless the person holds a valid license under this chapter. Further, it shall be a violation of this chapter for any person to advertise:
>
> (1) As a massage therapist or a massage therapy establishment unless the person holds a valid license under this chapter in the classification so advertised;
>
> (2) By combining advertising for a licensed massage therapy service with escort or dating services;
>
> (3) As performing massage in a form in which the person has not received training, or of a type which is not licensed or otherwise recognized by statute or administrative rule;[2]
>
> (4) By using in any mass distribution, print advertisements such as newspaper advertisements, or telephone directory listings, pictures depicting the human form other than hands, wrists, and forearms;

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[2] Although section 452-1 mentions one type of massage (i.e., lomilomi, or Hawaiian massage) and thus may be said to "recognize" that type, licenses are not issued for different types of massage. Clarification of this paragraph is recommended when amending section 452-23(a).

(5) By using any term other than therapeutic massage or massage therapy to refer to the service; or

(6) By referring to any personal physical qualities of the practitioner.

"Advertise" as used in this section includes, but is not limited to, the issuance of any card, sign, or device to any person; the causing, permitting, or allowing of any sign or marking on or in any building, vehicle or structure; advertising in any newspaper or magazine; any listing or advertising in any directory under a classification or heading that includes the word "massage therapist" or "massage therapy establishment"; or commercials broadcast by airwave transmission.

(Emphasis added.)

Generally, statutes are presumed constitutional. The Supreme Court of Hawaii has consistently held that an enactment of the legislature is presumptively constitutional, and a party challenging the statute has the burden of showing the unconstitutionality beyond a reasonable doubt. "[T]he constitutional defect must be 'clear, manifest and unmistakable.'" Sifagaloa v. Board of Trustees of the Employees' Retirement Sys., 74 Haw. 181, 191, 840 P.2d 367, 371 (1992) (citing Blair v. Cayetano, 73 Haw. 536, 542, 836 P.2d 1066, 1069 (1992)); Schwab v. Ariyoshi, 58 Haw. 25, 31, 564 P.2d 135, 139 (1977).

1. Legislative History of Section 452-23(a)

Although your opinion request focuses only upon section 452-23(a)(4), we also find paragraphs (5) and(6) troublesome. Essentially, these provisions prohibit massage therapy advertising that: (1) depicts the human form other than hands, wrists, and forearms; (2) uses any term other than therapeutic massage or massage therapy; or (3) refers to any personal physical qualities of the practitioner.

The legislative history reflects that massage therapists supported these restrictions because they wanted to "promote a more professional image" and wanted to "disassociate themselves from escort or dating services which are associated with illegal

activity." H. Stand. Comm. Rep. No. 1080-90, Haw. H.J. 1261, 1262 (1990). In addition, the prohibition on depictions of human forms was in response to advertisements at that time which the massage therapists found "objectionable" and which did "not portray the type of service massage therapists perform." Id.

The House Committees on Consumer Protection and Commerce and on Judiciary concluded that:

> Although commercial speech is protected by the first amendment, commercial speech may be restricted if the state has a substantial interest which cannot be achieved by a more carefully designed restriction. Your Committees believe that the governmental interest to be served in not deceiving or misleading the public into believing that all massage therapists are fronts for illegal activity is strong; the proposed regulation advances that interest; and the regulation proposed is not more extensive than necessary since other avenues of relief have not been successful.

Id. (emphasis added).

Such restrictions were believed necessary in advertising "to ensure honesty in representations of services offered and to prohibit advertising practices which would mislead the public or which would imply special techniques or services which are not actually available or are not permitted by state law or rule." S. Conf. Comm. Rep. No. 122, Haw. S.J. 818 (1990); H. Conf. Comm. Rep. No. 122, Haw. H.J. 817 (1990). The conference committee found that:

> [A]lthough massage is a skilled profession with a long and honorable tradition in Hawaii and throughout the world, it remains susceptible to abuse or misunderstanding when advertised in manners designed to deceive the customer or cater to prurient interests. Your Committee also finds that this bill will enable effective enforcement of the laws and rules governing massage, thus protecting legitimate practitioners and the consuming public.

Id. (emphasis added).

2. Commercial Speech Case Law

The United States Supreme Court has clearly established that

commercial speech is not stripped of First Amendment protection[3] merely because it appears in the form of a paid commercial advertisement. Bigelow v. Virginia, 421 U.S. 809 (1975) (statute that criminalized abortion clinic advertisement in newspaper struck down).[4] Commercial speech is expression that relates solely to the economic interest of the speaker and its audience, and does no more than propose a commercial transaction. Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557 (1980) (regulation banning advertising that promoted the use of electricity violated the First and Fourteenth Amendments) (citing Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 762 (1976));[5] Bates v. State Bar of Arizona, 433 U.S. 350, 363-64 (1977) (restraint against attorney advertising availability and terms of legal services struck down).

In rejecting the paternalistic view that government has complete power to suppress or regulate commercial speech to protect the public, the Central Hudson decision fashioned a four-part test for determining the validity of government restrictions on commercial expression.

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next,

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[3] The First Amendment to the United State Constitution provides in part that "Congress shall make no law . . . abridging the freedom of speech, or of the press." The Due Process Clause of the Fourteenth Amendment has been interpreted to make this prohibition applicable to state action. See Stromberg v. California, 283 U.S. 359, 368 (1931).

[4] Previously, purely commercial advertising received no First Amendment protection. See Valentine v. Chrestensen, 316 U.S. 52, 54 (1942) (city ordinance banning distribution of handbill advertising submarine tour upheld).

[5] In Virginia State Bd. of Pharmacy, the Court held that the State may not completely suppress the dissemination of truthful information about an entirely lawful activity (the sale and pricing of prescription drugs) merely because it is fearful of that information's effect upon the public. 425 U.S. at 776. However, as compared to "pure," non-commercial speech, commercial speech is afforded a lesser degree of First Amendment protection.

> we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest affected, and whether it is not more extensive than is necessary to serve that interest.

Central Hudson, 447 U.S. at 566.[6]

Subsequent case law has continued to refine what constitutes permissible regulation of commercial speech. In 1982, the Court addressed whether the advertisement was likely to deceive. In re R.M.J., 455 U.S. 191, 202 (1982).[7] Striking down ten categories of information a lawyer could include in advertising, the Court held that states may not impose an absolute prohibition "on certain types of potentially misleading information, e.g., a

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[6] The Hawaii Supreme Court followed the Central Hudson decision, holding that a city ordinance that banned the posting of commercial handbills violated the First Amendment. Although the government's interest in maintaining the attractiveness of Waikiki for tourism was substantial, the regulation was more extensive than necessary to serve that interest. State v. Bloss, 64 Haw. 148, 637 P.2d 1117 (1981). See also State v. Hawkins, 64 Haw. 499, 643 P.2d 1058 (1982) (ordinance prohibiting in-person solicitation cannot be saved from constitutional attack because the handbill was not deceptive, false, or misleading, and the State did not show that a more limited regulation could not adequately protect the asserted government interest).

[7] Before Central Hudson, case law established that regulation of commercial speech is permitted where the advertising is inherently likely to deceive or where the record indicates that a particular form or method of advertising has in fact been deceptive. Bates, 433 U.S. at 383-84. See also Ohralik v. Ohio State Bar Ass'n, 436 U.S. 477, 462 (1978) (the prevention of "fraud, undue influence, intimidation, overreaching, and other forms of 'vexatious conduct'" is a legitimate state interest to support the ban of direct solicitation by attorneys); Friedman v. Rogers, 440 U.S. 1, 12-15 (because of a considerable history of deception and abuse of optometrical trade names, the prohibition of trade name usage was upheld). Post Central Hudson, the Court still considered whether the speech was misleading but expanded its review to include the three other parts of the Central Hudson test. In re R.M.J., 455 U.S. at 206-07.

listing of areas of practice, if the information also may be presented in a way that is not deceptive." In re R.M.J., 455 U.S. at 203. The Court acknowledged that the potential for deception and confusion is particularly strong in the context of advertising professional services. However, as the Court in Bates suggested, the remedy is "not necessarily a prohibition but preferably a requirement of disclaimers or explanation." Id.

The Court in Peel v. Attorney Registration & Disciplinary Comm'n, 496 U.S. 91, 110 (1990), affirmed that a "[s]tate may not, however, completely ban statements that are not actually or inherently misleading." Relying on In re R.M.J., 455 U.S. at 203, the Court ruled that the State could not prohibit Peel from holding himself out as a specialist in a particular area of law because this communication did not contain any false or misleading representations. Peel, 496 U.S. at 110-11.

In Ibanez v. Florida Department of Business & Professional Regulation, Board of Accountancy, 512 U.S. 136 (1994), the Court held that the state's censure of Ibanez for "false, deceptive, and misleading" advertising cannot be upheld when Ibanez used truthful, accurate designations in her advertising. The state's burden in seeking to uphold its restriction[8] "is not slight; the 'free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the harmful.'" Ibanez, 512 U.S. 143 (quoting Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 471 U.S. 626, 646 (1985)).

In Zauderer, the Court rejected the state's argument that it was too difficult to distinguish truthful from deceptive advertisements. 471 U.S. at 647. Despite arguments by the State that "illustrations may produce their effects by operating on a subconscious level," and thus visual advertising was particularly difficult to police, the Court held that restrictions prohibiting an accurate representation of a Dalkon Shield, which had no features that were likely to deceive, mislead, or confuse the reader, must be scrutinized under the Central Hudson test. Zauderer, 471 U.S. at 647-49. The State carries a heavy burden

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[8] "It is well established that '[t]he party seeking to uphold a restriction on commercial speech carries the burden of justifying it.'" Edenfield v. Fane, 507 U.S. 761, 770 (1993) (quoting Bolger v. Young Drug Products Corp., 463 U.S. 60, 71, n.20 (1983)).

in justifying the prohibition of accurate, truthful information but failed to present any evidence showing that "the potential abuses associated with the use of illustrations in attorneys' advertising cannot be combatted by any means short of a blanket ban." Zauderer, 471 U.S. at 648. The regulation, therefore, failed under the fourth part of the Central Hudson test. Zauderer, 471 U.S. at 649.

Supreme Court decisions also have clarified Central Hudson's standard that the government's restrictions may be no more broad or more expansive than "necessary" to serve its substantial interest. Central Hudson, 447 U.S. at 566. The word "necessary" does not always mean "least restrictive means." Rather, the court will uphold a restriction so long as it is narrowly tailored and meets the other requirements of Central Hudson. Board of Trustees of the State University of N.Y. v. Fox, 492 U.S. 469, 478 (1989). The fit between the restriction and the government interest need not be perfect, but reasonable. Fox, 492 U.S. at 480. See Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico, 478 U.S. 328, 341 (1986) (statute restricting advertising of casino gambling to nonresidents of Puerto Rico was an appropriate regulation which directly advanced the government's interest in the health, safety, and welfare of its citizens); Ward v. Rock Against Racism, 491 U.S. 781, 798 (1989) (state's content-neutral sound-amplification guidelines are reasonable regulations of place and manner of protected speech); United States v. Edge Broadcasting Co., 509 U.S. 418 (1993) (restriction against gambling advertising was a reasonable law directly advancing the state's interest).

In Edenfield v. Fane, 507 U.S. 761 (1993), the Court acknowledged the state had substantial interest in protecting consumers from fraud or overreaching certified public accountants (CPAs), as well as in maintaining the professional appearance of CPAs. However, the Court was not convinced that CPAs who advertised were "obviously in need of business and may be willing to bend the rules" and struck down a Florida ban on in-person solicitation by CPAs. Edenfield, 507 U.S. at 765. Furthermore, the Court required a "governmental body seeking to sustain a restriction on commercial speech [to] demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." Edenfield, 507 U.S. at 770-71.

In City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410 (1993), the Court further reviewed the balance between the governmental interest and the degree of permissible regulation

and ruled that the city's attempt to ban news racks for commercial handbills was not a "reasonable fit" between its legitimate interest in safety and esthetics and its choice of means to achieve that interest. Rather than regulating the size, shape, appearance, or number of news racks, the city made a distinction between commercial and noncommercial speech. By allowing other news racks of noncommercial publications to remain, the city's focus only on commercial speech bore no reasonable relationship to its asserted interests. 507 U.S. at 417.

In Rubin v. Coors Brewing Co., 514 U.S. 476 (1995), the Court unanimously upheld the lower court decision that the First Amendment was violated by the 1935 Federal Alcohol Administration Act's prohibition against disclosing alcohol content on beer labels unless required by state law. Although the regulation advanced one of the government's interests in curbing "strength wars" among brewers of malt liquor, the ban violated the First Amendment because it failed to advance that interest in a direct and material way. Other alternatives such as directly limiting the alcohol content of beers, prohibiting marketing efforts emphasizing high alcohol strength, and limiting the ban to malt liquors would be less intrusive on speech. Rubin, 514 U.S. at 488-91.

Most recently, the Court unanimously struck down a statute banning the advertisement of liquor except at the place of sale. 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 116 S. Ct. 1495 (1996). However, in a splintered ruling consisting of four opinions with four different approaches, in which there was no majority opinion on the commercial speech rationale, the Court illustrated the juxtaposition of two constant principles of commercial speech: one principle holding that advertising is protected by the First Amendment because it allows the free flow of ideas, and the other principle holding that government restrictions of advertisements are justified in light of a substantial government interest.

In evaluating the ban's effectiveness in advancing the state's interest of promoting temperance, the Court considered whether the ban was a reasonable fit. "In order for a speech restriction to pass muster under the fourth prong, there must be a reasonable fit between the legislature's goal and method." 44 Liquormart, 517 U.S. at ___, 116 S. Ct. at 1500. In this instance, the fit was not reasonable because the state had alternatives, such as setting "minimum prices and/or increasing

sales taxes on alcoholic beverages," other than a total ban on price advertising at its disposal. Id.

Ultimately, the Court reasoned that the prohibition against price advertising for alcohol, "like a collusive agreement among competitors to refrain from such advertising, will tend to mitigate competition," will keep alcohol prices high and might keep consumption somewhat lower. However, there was no evidence that the prohibition will significantly advance the state's interest in reducing consumption. 44 Liquormart, 517 U.S. at ___, 116 S. Ct. at 1509-10. Thus, the Court concluded that the ban was overly broad and abridged speech in violation of the First Amendment. 44 Liquormart, 517 U.S. at ___, 116 S. Ct. at 1515.[9] Commercial speech regulation may not be sustained if it provides only ineffective or remote support for the government's purpose and fails Central Hudson's fourth part by being broader than necessary. 44 Liquormart, 517 U.S. at ___, 116 S. Ct. at 1509.

3. Constitutionality of Section 452-23(a)

To determine whether section 452-23(a)'s proscription against certain types of advertising is constitutional,[10] we apply Central Hudson's four-part test and first ask whether the speech concerns lawful activity and is not misleading. Central Hudson, 447 U.S. at 566. As stated above, we find the prohibitions of section 452-23(a)(4), (5), and (6) problematic as they essentially ban massage therapy advertising which: (1) depicts the human form other than hands, wrists, and

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[9] When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." Marks v. United States, 430 U.S. 188 (1977). In 44 Liquormart, eight justices concluded that keeping legal users of alcoholic beverages ignorant of prices through a blanket ban on price advertising does not further any legitimate end. 44 Liquormart, 517 U.S. at ___, 116 S. Ct. at 1509-10, 1518, 1521-22.

[10] It is interesting to note that the restrictions on advertising contained in section 452-23(a) apply not only to those who hold massage therapist licenses but to any person.

forearms;[11] (2) uses any terms other than therapeutic massage or massage therapy; or (3) refers to any personal physical qualities of the practitioner.[12]

Is a back massage unlawful activity? Is the depiction of a foot massage misleading? Is the practice of "lomilomi" or "Hawaiian massage" unlawful activity? Is the use of these terms, terms which are recognized in section 452-1, misleading? Is the reference to the Swedish or Japanese ethnicity of a massage therapist unlawful or misleading? Although a specific advertisement may be misleading or particular acts unlawful in certain circumstances, these activities are not per se unlawful or deceptive. Thus, it is our opinion that advertising that concerns lawful activity and is not misleading is entitled to a

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[11] With respect to section 452-23(a)(4)'s ban on depictions of the human form other than hands, wrists, and forearms, the use of pictures in advertisements serves important communicative functions, as recognized by the Court in Zauderer.

> [I]t attracts the attention of the audience to the advertiser's message, and it may also serve to impart information directly. Thus, commercial illustrations are entitled to the First Amendment protections . . . restrictions on the use of visual media of expression in advertising must survive scrutiny under the Central Hudson test.

Zauderer, 471 U.S. at 647.

[12] Section 452-23(a)(2) concerning escort and dating services initially appeared constitutionally suspect. However, if experience proves that certain forms of advertising are in fact misleading, although they did not appear at first to be "inherently" misleading, such experience may be taken into account. In re R.M.J., 455 U.S. at 200 n.11. The State may prohibit commercial advertising of matters which are illegal (e.g., prostitution), or advertising which is untruthful, misleading or deceptive. Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376 (1973) (ordinance that prohibited advertising system designating help wanted ads by sex was narrowly drafted and constitutional in forbidding illegal discriminatory practice). Thus, considering the history of massage advertisements in conjunction with escort or dating services as implicit solicitations to prostitution, we believe section 452-23(a)(2) passes constitutional scrutiny.

limited form of First Amendment protection. Posadas, 478 U.S. at 341.

> [P]eople will perceive their own best interests if only they are well enough informed, and . . . the best means to that end is to open the channels of communication, rather than to close them. . . . Even when advertising communicates only an incomplete version of the relevant facts, the First Amendment presumes that some accurate information is better than no information at all.

Bloss, 64 Haw. at 157, 637 P.2d at 1124 (quoting Central Hudson, 447 U.S. at 562). "'[D]isclosure of truthful, relevant information is more likely to make a positive contribution to decisionmaking than is concealment of such information,' [thus] only false, deceptive, or misleading commercial speech may be banned." Ibanez, 512 U.S. at 142 (quoting Peel, 496 U.S. at 108, and citing Zauderer, 471 U.S. at 638).

The second part of the Central Hudson test asks whether the governmental interest is substantial. As discussed above, the legislature's implicit concern was to prohibit advertising that would mislead the public into associating the advertised services with illegal activities such as prostitution. We believe there is no dispute that this constitutes a substantial interest justifying regulation.

However, if the governmental interest is substantial, the third and fourth parts of the Central Hudson test require the regulation to directly advance the government interest and be no more extensive than necessary to serve that interest. Central Hudson, 447 U.S. at 566. While section 452-23(a)'s restrictions support the State's interest in banning advertisements that solicit prostitution, section 452-23(a)(5), which proscribes the use of any term other than "therapeutic massage" or "massage therapy," also prohibits informative advertisements such as a narrative describing various massage techniques available, for example, lomilomi and shiatsu. Ironically, the statute precludes advertising that would be designed to educate the public to the legitimate, therapeutic uses of massage. Commercial speech, which serves individual and societal interests in assuring informed and reliable decisionmaking, is entitled to First Amendment protection. Virginia State Bd. of Pharmacy, 425 U.S. at 763-65.

> [T]he First Amendment mandates that speech restrictions be narrowly drawn. The regulatory technique may extend

> only as far as the interest it serves. The State cannot regulate speech that poses no danger to the asserted state interest, nor can it completely suppress information when narrower restrictions on expression would serve its interests as well.

Bloss, 64 Haw. at 160, 673 P.2d at 1126 (quoting Central Hudson, 447 U.S. at 565) (emphasis added). The legislative history of section 452-23(a) reflects the legislature's attempt to comply with constitutional parameters. H. Stand. Comm. Rep. No. 1080-90, Haw. H.J. 1262 (1990). However, we conclude that the statute fails to pass constitutional scrutiny.

With respect to section 452-23(a)(6), which prohibits reference to the physical qualities of the massage therapist, advertisements illustrating the appealing characteristics of people are not illegal, misleading, or untruthful. A challenged restriction must serve a substantial state interest in a "direct and effective way." Edenfield v. Fane, 507 U.S. at 773 (quoting Ward, 491 U.S. at 800). Prohibiting the common practice of having attractive persons in advertisements fails to directly advance the State's interest, is far broader than necessary, and thus fails to satisfy the third and fourth parts of the Central Hudson test.

Lastly, section 452-23(a)(4), which bans depictions of the human form other than hands, wrists, and forearms, would not allow an illustration of shoulders, the neck, or feet being massaged. Yet a picture of hands using various sexual apparatus would not violate section 452-23(a)(4). The need for a complete prohibition against any use of pictures depicting the human form other than hands, wrists, and forearms is undermined by the fact that this very ban still allows the type of advertisements the legislature sought to avoid. The restrictions of section 452-23(a)(4), (5), and (6) are broader than reasonably necessary to prevent the perceived evil.[13] Furthermore, the mere fact that

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[13] The difficulty with an overly broad regulation is not insignificant. An overly broad statute risks a chilling effect upon protected speech. First Amendment interests are fragile and a person considering certain activity "might choose not to speak because of uncertainty whether his claim of privilege would prevail if challenged. . . . [T]he possible harm to society from allowing unprotected speech to go unpunished is outweighed by the possibility that protected speech will be muted." Bates, 433 U.S. at 380.

the speech in question may be unprofessional, suggestive, or even offensive to some persons does not justify broad, prophylactic restrictions.[14]

Although a state may prohibit misleading advertising entirely, it may not place an absolute prohibition on potentially misleading information if the information may also be presented in a way that is not deceptive. Each state may decide for itself, within First Amendment constraints, how best to prevent such claims from being misleading. Peel, 496 U.S. at 111. If the "protections afforded commercial speech are to retain their force," we cannot simply rely upon the legislature's rote recitation of Central Hudson-type criteria in determining the constitutionality of the statute.[15] Ibanez, 512 U.S. at 146. Rather, the legislature must carry its heavy burden of "distinguishing the truthful from the false, the harmful from the misleading, and the harmless from the harmful." Ibanez, 512 U.S. at 143 (quoting Zauderer, 471 U.S. at 646). "Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." Edenfield, 507 U.S. at 777 (quoting NAACP v. Button, 371 U.S. 415, 438 (1963)).

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[14] In striking down a state prohibition of contraceptive advertisements, the Court stated that offensiveness and embarrassment were "classically not justifications validating the suppression of expression protected by the First Amendment. At least where obscenity is not involved, we have consistently held that the fact that protected speech may be offensive to some does not justify its suppression." Carey v. Population Services International, 431 U.S. 678, 701 (1977). The First Amendment "does not permit the government to prohibit speech as intrusive unless the 'captive' audience cannot avoid the objectionable speech." Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 542 (1980).

[15] It is significant to note that the Court rejected the Posadas application of Central Hudson, holding that Posadas erred in concluding that it was "up to the legislature" to choose suppression over a less restrictive speech policy. 44 Liquormart, 517 U.S. at ___, 116 S. Ct. at 1511. The Court declined to give force to the highly deferential approach of Posadas and concluded that "a state legislature does not have the broad discretion to suppress truthful, nonmisleading information for paternalistic purposes that the Posadas majority was willing to tolerate." Id.

Conclusion

It is our opinion that paragraphs (4), (5), and (6) of section 452-23(a) are overly broad and infringe upon the commercial speech rights afforded by the First Amendment. These paragraphs concern lawful activity, and advertisements containing the prohibited components not always would be misleading. We also acknowledge that they attempt to implement the legislature's substantial interest in separating the legitimate profession of massage therapy from illegal activities such as prostitution. Nevertheless, paragraphs (4), (5), and (6) of section 452-23(a) do not directly advance that interest.

Very truly yours,

Shari J. Wong
Deputy Attorney General

APPROVED:

Margery S. Bronster
Attorney General

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LATE

Testimony of the Board of Massage Therapy

Before the
Senate Committee on Commerce, Consumer Protection, and Health
Thursday, January 30, 2020
9:30 a.m.
State Capitol, Conference Room 229

On the following measure:
S.B. 2541, RELATING TO MASSAGE THERAPISTS

Chair Baker and Members of the Committee:

My name is Risé Doi, and I am the Executive Officer of the Board of Massage Therapy (Board). The Board offers comments on this bill.

The purposes of this bill are to: (1) require massage therapy licensees to complete 12 hours of continuing education within the two-year licensing period preceding the renewal date, two hours of which shall include first aid, cardiopulmonary resuscitation, or emergency related courses, beginning with the renewal cycle for the licensing biennium commencing July 1, 2022, and every biennial renewal thereafter; and (2) update advertising restrictions and penalties.

The Board will review this bill at its next publicly noticed meeting on January 29, 2020. In the meantime, the Board offers comments based on its discussion from 2018 regarding a similar matter. At that time, the Board noted that jurisdictions with a continuing education requirement for massage therapist license renewals included that requirement when the regulation of the trade was first established. Further, at that time, the Board supported the intent of amending its statutes to include a continuing education requirement. However, the Board wanted to first develop the details of any future legislative proposal with the Hawaii chapter of the American Massage Therapy Association.

Lastly, the Board respectfully requests amending the commencement date on page 3, line 6 of the bill to July 1, 2024. This date will allow the Board to provide ample notice to affected licensees of the continuing education requirement and for licensees to meet that requirement prior to license renewal. In addition, the Board requests language that would require a random audit of the continuing education hours for renewal.

Thank you for the opportunity to testify on this bill.

amta
american massage therapy association

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January 30, 2020

Aloha Chair Baker, Vice Chair Chang, and Members of the Senate Committee on Commerce, Consumer Protection, and Health:

My name is Olivia Nagashima and I am testifying in my role as the President of the American Massage Therapy Association – Hawaii Chapter. More than 8,000 state licensed massage therapists currently practice in Hawaii.

Our chapter **supports Senate Bill 2541,** requiring state licensed massage therapists to complete twelve hours of continuing education within the two-year period preceding their renewal date. These requirements include two hours of first aid, cardiopulmonary resuscitation, or emergency related courses.

SB2541 also modernizes advertising restrictions and penalties as the original statute licensing massage therapy in Hawaii was enacted when social media platforms did not exist.

We view this bill as an effort to elevate the massage therapy profession to the highest standards of qualifications and safety. By requiring 12 hours of continuing education courses every two years, including CPR training, Hawaii residents can be assured they are being treated by a professional who has studied the most current trends and best practices of our industry.

Thank you for your consideration, we strongly urge your support of SB2541.

SB-2541
Submitted on: 1/28/2020 9:47:28 PM
Testimony for CPH on 1/30/2020 9:30:00 AM

Submitted By	Organization	Testifier Position	Present at Hearing
Caryl Burns	Individual	Oppose	No

Comments:

I request that SB2541 be change to reflect the real costs of living in Hawaii. Minimum wage

$13 an hour is about $27,000 a year for full-time work. That's not enough to live on in 2020, let alone 4 years from now. In the most expensive state in the nation, Hawai'i's minimum wage workers need to make enough to be able to afford the basics.

The last time Hawai'i's minimum wage earners got a raise—to $10.10 an hour—was January 1, 2018. They already have been stuck at that level—$21,000 a year for full-time work—for more than 2 years. With inflation eroding their pay, **$10.10 now is worth only $9.68**, so full-time minimum wage workers in Hawai'i are losing the equivalent of over $500 per year to inflation.

Hawai'i's current minimum wage is already lower than in all other highest cost-of-living states. And Hawai'i will be falling further behind. The next 8 most expensive states have passed laws to raise their minimum wages to at least $15 over the next 5 years—and the cost of living in all of those states is *lower* than in Hawai'i.

The Institute for Women's Policy Research (IWPR) estimates the annual income needed for basic economic security. They find that a single working adult without children and with benefits needed to earn $21.85 per hour in Hawai'i in 2016, or $23.82 in 2020. Without benefits, that person needed $25.22 per hour, or $27.48 an hour in 2020, to be economically secure. The National Low-Income Housing Coalition (NLIHC) calculates a housing wage for each state. To afford a one-bedroom apartment in Hawai'i, a worker needed to make $28.04 an hour in 2019, or $28.70 in 2020.

Let's do what's right for Hawaii's workers. Pay a real living wage.

Thank you,

Caryl Burns, MPH, RD