STAND. COM. REP. NO. 927

Honolulu, Hawaii
March 6, 2009

RE: H.B. No. 1417
H.D. 2

Honorable Calvin K.Y. Say
Speaker, House of Representatives
Twenty-Fifth State Legislature
Regular Session of 2009
State of Hawaii

Sir:

Your Committee on Judiciary, to which was referred H.B. No. 1417, H.D. 1, entitled:

"A BILL FOR AN ACT RELATING TO MOBILE BILLBOARDS,"

begs leave to report as follows:

The purpose of this bill is to help preserve Hawaii's natural beauty by amending the restrictions on the use of mobile billboards to clarify that the exception only applies to self-identifying advertising used by businesses on their own vehicles and trailers used in the course of regular business operations.

Na Leo Pohai, public policy affiliate of The Outdoor Circle supported this bill. The State Attorney General (AG) provided comments.

Your Committee notes the AG's concerns and appreciates their efforts to provide analysis of this measure. Your Committee has also examined recent federal case law providing guidance on similar commercial expression restrictions, as well as similar restrictions in effect in other jurisdictions, and is satisfied that this measure would withstand a constitutional challenge. It is your Committee's view that this measure is specific and content-neutral in its restriction on expression.

Your Committee has amended this bill by:

(1) Clarifying that the exception to the restriction imposed on mobile billboards is based on a two-part analysis; and

(2) Making technical, nonsubstantive changes for clarity, consistency, and style.

As affirmed by the record of votes of the members of your Committee on Judiciary that is attached to this report, your Committee is in accord with the intent and purpose of H.B. No. 1417, H.D. 1, as amended herein, and recommends that it pass Third Reading in the form attached hereto as H.B. No. 1417, H.D. 2.

Respectfully submitted on
behalf of the members of the
Committee on Judiciary,

JON RIKI KARAMATSU, Chair

State of Hawaii
House of Representatives
The Twenty-fifth Legislature

HSCR927

Record of Votes of the Committee on Judiciary

Bill/Resolution No.:	Committee Referral:	Date:
HB 1417, HD 1	EEP, JUD	3/3/09

❑ The committee is reconsidering its previous decision on the measure.

The recommendation is to: ❑ Pass, unamended (as is) ☒ Pass, with amendments (HD) ❑ Hold
❑ Pass short form bill with HD to recommit for future public hearing (recommit)

JUD Members	Ayes	Ayes (WR)	Nays	Excused
1. KARAMATSU, Jon Riki (C)	✓			
2. ITO, Ken (VC)	✓			
3. BELATTI, Della Au	✓			
4. CABANILLA, Rida	✓			
5. CARROLL, Mele				✓
6. HERKES, Robert N.				✓
7. LUKE, Sylvia	✓			
8. McKELVEY, Angus L.K.				✓
9. MIZUNO, John M.	✓			
10. MORITA, Hermina M.				✓
11. OSHIRO, Blake K.	✓			
12. SOUKI, Joseph M.				✓
13. TSUJI, Clift	✓			
14. WAKAI, Glenn				✓
15. MARUMOTO, Barbara C.	✓			
16. THIELEN, Cynthia	✓			
TOTAL (16)	10			6

The recommendation is: ☒ Adopted ❑ Not Adopted
If joint referral, _____ did not support recommendation.
committee acronym(s)

Vice Chair's or designee's signature: _____

Distribution: Original (White) – Committee Duplicate (Yellow) – Chief Clerk's Office Duplicate (Pink) – HMSO

HOUSE OF REPRESENTATIVES
TWENTY-FIFTH LEGISLATURE, 2009
STATE OF HAWAII

H.B. NO. 1417 H.D. 2

A BILL FOR AN ACT

RELATING TO MOBILE BILLBOARDS.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

SECTION 1. The purpose of this Act is to close a loophole that allows persons to place banners and other advertising devices for others on their vehicles or trailers for compensation, as long as the vehicles or trailers are not used primarily to display advertising. This Act does not prohibit vehicles from displaying advertising, provided that the vehicle is regularly used in the operations of the business to which the advertising relates. The State has a substantial interest in traffic safety and aesthetics, and fulfilling the responsibility in article XI, section 1, of the Hawaii Constitution, which states:

> *"For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawaii's natural beauty and all natural resources . . ."*

SECTION 2. Section 445-112.5, Hawaii Revised Statutes, is amended as follows:

1. By amending its title and subsection (a) to read:

"[~~[~~]§445-112.5[~~]~~] [~~Vehicular advertising~~] Mobile billboards prohibited; penalty. (a) It is unlawful for any person to operate or park, or cause to be operated or parked, on any street, roadway, or other public place, or on any private property that can be seen from any street, roadway, or other public place, any vehicle or trailer carrying [~~a vehicular~~] or displaying an advertising device for consideration or any other economic benefit [~~if the vehicle or trailer is used primarily to display a vehicular advertising device. The phrase "for consideration or any other economic benefit" shall not include any benefit derived by the owner or operator of the vehicle or trailer from the effect of the advertising.~~]; provided that this subsection shall not apply to 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."

2. By amending subsection (d) to read:

"(d) As used in this section:

"Advertising device" means any sign, writing, picture, poster, painting, notice, bill, model, display, symbol, emblem,

or similar device, which is so designed that it draws the attention of persons in any public street, roadway, or other public place.

"Trailer" means a vehicle or conveyance with or without motive power designed to be pulled or propelled by a vehicle or other form of power.

["~~Vehicular advertising" means any sign, writing, picture, poster, painting, notice, bill, model, display, symbol, emblem, or similar device, which is so designed that it draws the attention of persons in any public street, roadway, or other public place.~~]"

SECTION 3. Statutory material to be repealed is bracketed and stricken. New statutory material is underscored.

SECTION 4. This Act shall take effect on January 1, 2046.

Report Title:
Advertising; Mobile Billboards; Prohibition

Description:
Amends the restrictions on the use of mobile billboards. Exempts businesses using vehicles with advertising in the daily function of the advertised business. (HB1417 HD2)

TESTIMONY OF THE STATE ATTORNEY GENERAL
TWENTY-FIFTH LEGISLATURE, 2009

ON THE FOLLOWING MEASURE:
H.B. NO. 1417, H.D. 2, RELATING TO MOBILE BILLBOARDS.

BEFORE THE:
SENATE COMMITTEE ON COMMERCE AND CONSUMER PROTECTION

DATE: Wednesday, March 18, 2009 **TIME:** 9:00 AM

LOCATION: State Capitol, Room 229

TESTIFIER(S): Mark J. Bennett, Attorney General
or Margaret S. Ahn, Deputy Attorney General

Chair Baker and Members of the Committee:

The Department of the Attorney General provides these comments regarding constitutional issues in this bill.

The House Committee on Judiciary stated in Standing Committee Report No. 927 that it is satisfied this measure would withstand a constitutional challenge. That is certainly possible. However, for your consideration, we respectfully provide your Committee with the following brief analysis.

As currently codified, section 445-112.5, Hawaii Revised Statutes, prohibits the operation or parking of vehicles or trailers carrying an advertising device for consideration, if the vehicle or trailer is used primarily to display an advertising device. In an effort to close a loophole which allows persons to place advertising devices on vehicles or trailers for compensation, *as long as the vehicle or trailer is not used primarily to display the advertising device*, this bill deletes the current statutory language, "if the vehicle or trailer is used primarily to display a vehicular advertising device." This deletion is unobjectionable and fulfills the measure's declared intent.

This bill further includes an exemption from the advertising-for-consideration prohibition 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. To determine if an advertising device is prohibited under this measure, one would need to examine the content of the message to determine if it relates to the business for which the vehicle is being used. Therefore, this exemption potentially subjects this measure to a constitutional challenge under the First Amendment because it arguably creates an impermissible content-based regulation. Also, by allowing certain paid commercial advertising, this bill effectively discriminates against paid noncommercial speech.

In creating this exemption, the Legislature is presumably determining that the type of exempted speech--a business's paid-for advertising on a vehicle used in its day-to-day operations--is more important than the State's interests in traffic safety and aesthetics, or that with respect to this type of advertising, the State's interests should yield. In the case of Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 101 S.Ct. 2882 (1981), the United States Supreme Court examined a city ordinance which allowed onsite commercial advertising (a sign advertising goods or services available on the property where the sign is located), but which banned offsite advertising. The Supreme Court accepted the judgment of the city of San Diego that, unlike offsite commercial speech, the interest of onsite commercial speech is stronger than the city's interests in traffic safety and aesthetics. Id. at 512, 101 S.Ct. at 2895.

The Supreme Court in Metromedia, however, ultimately struck down San Diego's ordinance on First Amendment grounds, stating, "[a]lthough the city may distinguish between the relative value of different categories of commercial speech, the city does not have the same range of choice in the area of noncommercial speech to evaluate the strength of, or distinguish between, various communication interests." Id. at 514, 101 S.Ct. at 2896. The Court further stated:

> The city does not explain how or why noncommercial billboards located in places where commercial billboards are permitted would be more threatening

> to safe driving or would detract more from the beauty of the city. Insofar as the city tolerates billboards at all, it cannot choose to limit their content to commercial messages; the city may not conclude that the communication of commercial information concerning goods and services connected with a particular site is of greater value than the communication of noncommercial messages. Id. at 513, 101 S.Ct. at 2895.

Applying the rationale in the Metromedia case, this bill is vulnerable to a similar ruling because exempting paid commercial vehicular advertising that relates to the business for which the vehicle is being used leaves the prohibition in place for most paid noncommercial advertising. While it is true that under this measure, a political candidate could pay to advertise her candidacy on a vehicle that is used in the day-to-day operations of her campaign, that same candidate, or anyone else for that matter, could not pay to display a noncommercial message without there being a business for which the vehicle operates on a day-to-day basis and which relates to the content of the noncommercial message. This measure thus clearly allows some commercial speech while disallowing much noncommercial speech, in potential violation of the above quotation from Metromedia.

Some courts in other jurisdictions have upheld *seemingly similar* language, but such language may be distinguished from that of this measure. The 11th Circuit Court of Appeals, in the case of Supersign of Boca Raton, Inc. v. City of Fort Lauderdale, 766 F.2d 1528 (11th Cir. 1985), upheld a city ordinance which banned "advertising vehicles or watercraft...designed or used for the primary purpose of displaying advertisements," but which exempted:

> Any vehicle or watercraft which displays an advertisement or business notice of its owner, so long as such vehicle or craft is engaged in the usual business or regular work of the owner, and not used merely, mainly or primarily to display advertisements.

However, in that case, the court construed the language of the ordinance to regulate commercial speech only and reiterated the common

rule, "commercial speech does not receive the same degree of constitutional protection as other forms of constitutionally guaranteed expression, and the former may be forbidden and regulated in situations where the latter may not be." Id. at 1530.

In the case of Showing Animals Respect and Kindness v. City of West Hollywood, 166 Cal. App.4th 815 (2008), the court upheld an ordinance banning mobile billboard advertising. The ordinance read in relevant part:

> Mobile billboard advertising includes any vehicle, or wheeled conveyance which carries, conveys, pulls, or transports any sign or billboard for the primary purpose of advertising.
>
> This section shall not apply to any vehicle which displays an advertisement or business identification of its owner so long as such vehicle is engaged in the usual business or regular work of the owner, and not used merely, mainly or primarily to display advertisements.

The court and the City of West Hollywood agreed that the ordinance applied to both commercial and noncommercial speech. In upholding the ordinance, however, the court focused on the ordinance's language, "so long as such vehicle is...not used merely, mainly or primarily to display advertisements," to conclude that the ordinance was not content-based. The court stated, the "business identification provision is not an 'exemption' in the sense that a vehicle displaying an advertisement of its owner would otherwise violate the ordinance....a vehicle bearing an advertisement or business identification of its owner does not violate the ordinance. But the vehicle does violate the ordinance if the vehicle is driven 'merely, mainly or primarily to display advertisements.'" Id. at 822. The court essentially concluded that to determine a violation of the ordinance, one would look at whether the vehicle was used for the primary purpose of advertising, and not at the content of the advertising.

This rationale would not apply to this bill, because the subject of this bill's prohibition on mobile billboards is not vehicles used primarily to display advertisements, but rather vehicles carrying or displaying an advertising device for consideration. Therefore, the exemption for vehicles carrying or displaying an advertising device that relates to a business is just that, an exemption to a law that would otherwise prohibit the paid business-related advertising. It would be difficult to determine a violation under this measure in any way other than to examine the content of the advertising message to see if it relates to the business for which the vehicle is being used.

We further note that the bill's deletion of the clarification that "consideration or other economic benefit" does not include the benefit derived from the effect of the advertising could result in the prohibition of even unpaid advertising, because any advertising could be deemed to render an "economic benefit," even if the operator of the vehicle is not compensated for displaying the advertising. Furthermore, the inclusion of this language avoids Equal Protection and First Amendment issues. For example, without the clarification, 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.

Based on the foregoing, we believe this bill remains vulnerable to a constitutional challenge.

Hawaii State Legislature
Senate Committee on Commerce and Consumer Protection

March 18, 2009
9:00 a.m.
Room 229

Testimony on HB 1417, HD 2 Relating to Mobile Billboards

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

This testimony addresses the concerns that have been raised by the Department of the Attorney General at earlier hearings 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 (using the language now in HD 2):

> (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 Constitution's First Amendment because it creates an impermissible content-based regulation. By 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 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' and be prohibited 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 Outdoor Circle has determined, however, 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.

The *Metro Lights* 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 meets constitutional standards, and it strongly urges passage of this Bill.

Testimony of Bob Loy
For Na Leo Pohai—Public Policy Affiliate of The Outdoor Circle
Senate Committee on Commerce and Consumer Protection
March 18, 2009

In 1927, at a time when huge advertisements literally lined the main thoroughfares of Honolulu, the Territorial Legislature created one of the most valuable and enduring laws in the history of our islands…. it banned billboards.

I'm sure all of you have been to the mainland and seen first hand how these outrageously large advertisements by the hundreds and thousands…. line the freeways— of nearly every city. Your wise predecessors had the vision to see that this type of advertising and the unique, unparalleled beauty of Hawaii simply cannot coexist.

Over the years, through the great depression and the hard times that have come and gone the billboard ban has remained. And when advertisers devised alternative ways to display their huge signs Hawaii's leaders have always answered the call by taking decisive action to protect the fragile beauty of our home. First, when advertisers wanted to take their billboards into the sky, aerial advertising was prohibited. Then when sophisticated billboard trucks invaded the islands—they too were banned.

But unfortunately that law only banned vehicles whose sole purpose is to display advertising. That left a loophole that is now bringing another type of mobile billboards to Hawaii. This picture shows a local beverage distribution company truck on Oahu that is displaying large billboards for Magic Johnson and Tax Busters. On the Big Island the same company has displayed billboards for Sports Authority and it has other trucks in the other counties. The billboards are provided by a mainland advertising company which specializes in what is called "truckside billboards." These 18 to 24 foot signs have the ability to turn our roadways into a constant eyesore….and create the kind of distractions and diversions that will make Hawaii's roads even more dangerous than they already are.

This mainland company's marketing materials provide a stronger argument for this scenario than I could ever create: "These truckside billboard ads ride above the traffic lanes and they can't be tuned out or turned off." The billboards are: "…unobstructed and guaranteed to grab customer attention." "As more regions ban billboards, look to mobile billboards to deliver your message."

This assault on the beauty of Hawaii and the safety hazard these billboards create for our motorists can be eliminated by passing HB1417 HD2.

Locally a few other companies also display large advertisements on vehicles that create similar problems in the same way as the truckside billboards. Most notable are dozens of trolleys that display temporary banners advertising everything from sashimi to cosmetics to credit cards. The advertisers, mostly large corporations located outside Hawaii, pay thousands of dollars each month to have their banners carried throughout Honolulu….rates few local companies can even afford. Trolley advertising creates a steady source of complaints by the public who call The Outdoor Circle for help. But we have to tell them that while these banners would be illegal if hung from any building in any county in the state, because the laws do not include signs on vehicles, nothing can be done to stop it.

SB1091 will close the loopholes that allow these two unacceptable forms of advertising to exist. Simply put, it allows all businesses to display their vehicles company names, logos, images of its products—virtually anything related to the company's business. It prohibits that same business from receiving any economic benefit for displaying signs for unrelated businesses or products. In other words, under this law, the Frito-Lay truck could display a big bag of potato chips, but could not sell advertising space on its trucks to Pepsi.

We strongly urge this committee to take action to protect public safety and to continue to protect the visual environment of our islands. In banning billboard trucks three years ago, the legislature nipped in the bud an outdoor advertising industry that now runs rampant on the mainland. Truckside billboards are the next wave of inappropriate advertising that must be stopped at our shores before they become so big, pervasive and entrenched that we will never be rid of them.

The people are our greatest resource….the beauty of the Hawaii—our greatest treasure. By passing HB1417 HD2 you have the great opportunity to both protect the safety our people and preserve the magnificence of our islands for future generations.