



**TESTIMONY OF  
THE DEPARTMENT OF THE ATTORNEY GENERAL  
TWENTY-SEVENTH LEGISLATURE, 2013**

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**ON THE FOLLOWING MEASURE:**

H.B. NO. 1126, RELATING TO ADVERTISING AND MARKETING.

**BEFORE THE:**

HOUSE COMMITTEE ON ECONOMIC DEVELOPMENT AND BUSINESS

**DATE:** Tuesday, February 5, 2013

**TIME:** 9:00 a.m.

**LOCATION:** State Capitol, Room 312

**TESTIFIER(S):** David M. Louie, Attorney General, or  
Margaret S. Ahn, Deputy Attorney General

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Chair Tsuji and Members of the Committee:

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

This bill regulates the labeling of beer sold or distributed in the State, if “Hawaii,” “Hawaiian,” or “any geographical area within Hawaii,” or “any Hawaiian word or statement, design, symbol, or device” appears on the label that “tends to create the impression that the beer was produced in the place or region other than that of actual production.” This bill further mandates that beer sold or distributed in the State that is labeled with “any Hawaiian brand name or adjective, Hawaiian word or statement, design, or device” shall also be labeled with the name of the bottler and place where the beer was bottled or canned. This bill further prohibits the use of any appellation of origin on a beer label unless at least seventy-five percent of the beer’s volume is derived from fruit or agricultural products grown and fermented in the region, the beer is fully produced and finished within the region, and the beer conforms to the requirements of the region.

First, article III, section 14, of the Hawaii State Constitution provides that each law shall embrace but one subject, which shall be expressed in its title. This bill—Relating to Advertising and Marketing—could be challenged on the grounds that its title does not embrace just one subject.

Second, this bill may also be challenged under the First Amendment and Commerce Clause of the United States Constitution. Product labeling constitutes commercial speech subject to the protections of the First Amendment. Under a First Amendment challenge, the court would

examine whether the labeling the State seeks to regulate is inherently likely to deceive or has in fact been deceptive. If the State is unable to prove this, and the labeling is only “potentially misleading,” then the State would be required to prove that its governmental interest in regulating the labeling is substantial, that the interest is directly advanced by the regulations, and that the regulations are not more extensive than necessary. Bronco Wine Co. v. Jolly, 129 Cal. App. 4th 988, 1004 (2005), *cert. denied*, 546 U.S. 1150 (2006). Furthermore, this burden of proof would not be satisfied by “mere speculation or conjecture.” The State would be required to “demonstrate that the harms it recites are real and that its restrictions will in fact alleviate them to a material degree.” Rubin v. Coors Brewing Co., 514 U.S. 476, 487 (1995) (regulation prohibiting beer labels from displaying alcohol content with the purpose of suppressing strength was found to be a violation of the First Amendment). This bill lacks findings and evidence to this end. If such evidence exists, then verifiable references to the evidence that shows the real and substantial harm to the State that will be directly and materially alleviated by these regulations should be inserted into the bill.

As this bill regulates all beer sold or distributed in the State without regard to where it is manufactured, it will affect interstate commerce, and under a Commerce Clause challenge, the court would examine whether the burden on interstate commerce is excessive in relation to the State’s interests that are furthered by the regulations. Bronco Wine Co., 129 Cal. App. 4th at 1022. Again, this bill lacks findings and evidence with respect to how the State’s interests are furthered. Verifiable references to evidence that shows the state interests furthered by these regulations should be inserted into the bill.

Finally, the terms “Hawaiian design, symbol, or device” are vague and should be defined.