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May 15, 2007

The Honorable Martin J. O'Malley
Governor of Maryland
State House
Annapolis, Maryland 21401-1991

Re: Senate Bill 252

Dear Governor O'Malley:

We have reviewed the constitutionality and legal sufficiency of Senate Bill 252, which concerns highway advertising and solicitation of money or donations. While the bill may be signed into law, in our view a severable portion is unconstitutional and should not be enforced. While the provision banning highway solicitations is constitutional, the provision banning highway advertising is not because it is not narrowly tailored and it is overbroad, thus it violates the First Amendment.

The legislation provides that in Anne Arundel County, "A person may not stand in a highway to: (1) Solicit money or donations of any kind from the occupant of a vehicle; or (2) Advertise any message." Highway is defined as:

(1) "Rights-of-way, roadway surfaces, roadway subgrades, shoulders, median dividers, drainage facilities and structures, related stormwater management facilities and structures, roadway cuts, roadway fills, guardrails, bridges, highway grade separation structures, railroad grade separations, tunnels, overpasses, underpasses, interchanges, entrance plazas, approaches, and other structures forming an integral part of a street, road, or highway, including bicycle and walking paths; and

(2) Any other property acquired for the construction, operation, or use of the highway."[1]

The First Amendment states that "Congress shall make no law …abridging the freedom of speech." U.S. Const. amend. I. "The command of the first amendment…is directed with equal force, by way of the fourteenth amendment, to state and local governments." *Eanes v. State*, 318 Md. 436, 445 (1990). The Court of Appeals further instructed that "[t]he fundamental importance of free speech in our constitutional scheme requires…that restrictions on its exercise be subjected to searching scrutiny." *Id*. at 446.

The analysis begins by determining the nature of the forum at issue. *Id*. at 447. The forum here is a public forum. "Public streets are the archetype of a traditional public forum… ." *Frisby v. Schultz*, 487 U.S. 474, 480-481 (1988). "Identifying public streets as traditional public fora are not accidental invocations of a "cliché, but recognition that '[w]hatever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public.'" *Id*. (quoting *Hague v. CIO*, 307 U.S. 496, 515 (1939)).

In a public forum, the government may restrict speech if the restriction is content neutral and narrowly tailored to serve a significant government interest; in addition, the restriction must "leave open ample alternative channels for communication of the information." *Warren v. Fairfax County*, 196 F.3d 186, 190 (4th Cir. 1999)(quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)). Both the solicitation ban and the message ban in the legislation are content-neutral. In addition, concern for public safety is a significant state interest. Traffic and safety concerns have been upheld as valid state interests justifying "bans of certain speech in areas in close proximity to streets with moving traffic, including median strips, as reasonable time, place, or manner restrictions." *Warren*, 196 F.3d at 198. *See also Sun-Sentinel Co. v. Hollywood*, 274 F. Supp. 2d 1323,

[1] This definition was apparently taken from § 8-101(i) of the Transportation Article. Before the bill was amended in the House to add this definition, an advice letter concluded that the measure as it passed the Senate was constitutional. *See* Letter of Advice to the Honorable Janet Greenip and the Honorable Tony McConkey, dated March 20, 2007.

1331 (S.D. Fla. 2003)("it is undisputed that the state has significant interests in vehicle and pedestrian safety and the free flow of traffic").

On the question of whether the legislation is narrowly tailored to meet the State's public safety concern, we analyzed whether it "targets and eliminates no more than the exact source of the 'evil' it seeks to remedy." *Frisby*, 487 U.S. at 485. *See also Knowles v. Waco*, 462 F.3d 430 (5th Cir. 2006)(holding that city ordinance that prohibited all "street activities" and "public assemblage" in school zones "sweeps far more broadly than is necessary to further the city's legitimate concern of enhancing the safety and welfare of schoolchildren and others using Waco's public rights of way"). The prohibition need not be the least restrictive or least intrusive means; it is narrowly tailored "so long as the…regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." *Ward*, 491 U.S. at 799.

The ban on solicitation in Senate Bill 252 is narrowly tailored. As the court noted in *ACORN v. Phoenix*, a ban on solicitation from persons in vehicles is narrowly tailored to assure "free movement of vehicle traffic on city streets." 798 F.2d 1260, 1268-1269 (9th Cir. 1986). Moreover, "successful solicitation requires the individual to respond by searching for currency and passing it along to the solicitor….The direct personal solicitation from drivers distracts them from their primary duty to watch the traffic and potential hazards in the road, observe all traffic control signals or warnings, and prepare to move through the intersection." *Id*. at 1269. In addition, a person soliciting donations has ample alternative channels. *Id*. at 1271 ("with the myriad and diverse methods of fund-raising available in this country, including solicitation on the sidewalk from pedestrians, canvassing door-to-door, telephone campaigns, or direct mail, it strains credulity to believe that ACORN is left without ample alternatives"). *See also Sun-Sentinel*, 274 F. Supp. 2d at 1331-1332; Letter of Advice on H.B. 250, dated Feb. 21, 2007.

Unlike the solicitation ban, which targets activity at occupants of vehicles, the total ban on standing in a highway to advertise any message is not narrowly tailored. Rather than prohibiting advertising that distracts drivers or impedes them from seeing traffic controls or causes other safety hazards, the legislation prohibits the display of any message regardless of whether it furthers the State's legitimate public safety concern. Thus, it burdens more speech than necessary. "Although prohibitions foreclosing entire

media may be completely free of content or viewpoint discrimination, the danger they pose to the freedom of speech is readily apparent – by eliminating a common means of speaking, such measures can suppress too much speech." *City of Ladue v. Gilleo*, 512 U.S. 43, 47 (1994)(banning all signs on private property, even if done without regard to content, violated the First Amendment). "Access to the 'streets, sidewalks, parks, and other similar public places…for the purpose of exercising [First Amendment rights] cannot constitutionally be denied broadly…" *Grayned v. City of Rockford*, 408 U.S. 104, 117 (1972).

Although the State could legitimately prohibit the posting of signs in the public right-of-way, by equating humans with stationary signs, the legislation goes too far. In *City Council of Los Angeles v. Taxpayers for Vincent*, the Supreme Court upheld an ordinance banning the posting of signs on public property. 466 U.S. 789 (1984). In determining that the ordinance did not violate the First Amendment, the Court noted that the ordinance curtailed no more speech than necessary to protect the government's legitimate interest in stopping "the visual assault on the citizens of Los Angeles presented by an accumulation of signs posted on public property." *Id*. at 807-810. In doing so, the Court recognized that individuals were free to communicate "in the same place where posting of signs on public property is prohibited." *Id*. at 812. *See also Tucker v. City of Fairfield*, 398 F.3d 457 (6th Cir. 2005)(finding that city's ban on the display of a temporary and movable inflatable rat balloon during a protest by individuals that took place on the public right of way between two highways was not narrowly tailored).

To address the State's concerns about public safety, it would not violate the First Amendment to enact a specific and narrowly tailored statute that would prohibit messages that may cause safety and traffic hazards to drivers and pedestrians. But a justification for a total ban that "evokes images of freeways strewn with human carcasses and wrecked automobiles—the detritus of high-speed collisions between drivers distracted by activity on freeway overpasses—overpasses teeming with demonstrators competing to display their message to the motoring public. There is no basis for such wild imaginings." *Sanctity of Human Life Network v. California Highway Patrol*, 129 Cal. Rptr. 708, 719 (App. Ct. 2003)(concurring opinion arguing that an overpass was a public forum). The majority in that case determined that the highway patrol did not violate protesters' First Amendment rights by stopping them from displaying signs during rush hour at a busy highway where the display caused traffic congestion, but noted that there could be a

situation where there would be a free speech violation. "Many variables, such as traffic congestion, safety, and the exercise of the [highway patrol]'s statutory authority, may combine to change whether the [highway patrol] may appropriately interfere with plaintiffs' activities in any given situation." *Id*. at 718.[2]

We also considered whether each ban was overbroad. A statute that "seeks to prohibit such a broad range of protected conduct" is overbroad and thus, unconstitutional on its face. *Vincent*, 466 U.S. at 796. An overbroad statute could have a chilling effect on free speech. *Eanes*, 318 Md. At 464. But finding a statute overbroad "is 'strong medicine' and should be used sparingly. It should not be invoked when a limiting construction can be placed on the statute." *Id*. at 465 (quoting *Broderick v. Oklahoma*, 413 U.S. 601 (1973)). "There must be a realistic danger that the statute itself will significantly compromise recognized first amendment protections…" *Id*. (citing *Vincent*, 466 U.S. at 801). Such a danger is not present with regard to the ban on solicitation. *See Sun-Sentinel*, 274 F. Supp. 2d at 1330 (holding that plain language of ban on soliciting money from occupants in vehicles will not encompass protected activity).

On the other hand, it is our view that the ban on making any message from the broadly defined "highway" area[3] carries a significant risk that valid expressions that are clearly protected by the First Amendment will be chilled. The court in *Sun-Sentinel*, in fact, reasoned that the solicitation ban was not overbroad because it did not reach individuals who stand on the sidewalk or the median and who did not solicit occupants of vehicles. *Id*. at 1332. *See also Vincent*, 466 U.S. at 809 (distinguishing the ban on public signs, which was not overbroad, from ordinances that prohibited activities such as handbilling, which were overbroad). "There, individual citizens were actively exercising their right to communicate directly with potential recipients of their message. The conduct continued only while the speakers or distributors remained on the scene." *Id*. *See also Eanes*, 318 Md. at 456 (sound ordinance constitutional because speaker could

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[2] The court upheld the highway patrol's actions as a valid exercise of their statutory emergency powers to expedite traffic and ensure safety. But the court went on to add that if "expressive activities on freeway overpasses" were "the terrifying problem" suggested, then the legislature should enact a "specific and narrowly tailored statute".

[3] A more narrowly defined place restriction could include the one used in *Sun-Sentinel*, which prohibited the standing "in the portion of a roadway paved for vehicle traffic."

still present his or her message a number of other ways in the street, including "use of placards"). The message ban in Senate Bill 252 will reach individuals who are doing no more than standing on the side of the road, expressing a message.

"[T]he mere fact that one can conceive of some impermissible applications is not sufficient to render [the legislation] susceptible to an overbreadth challenge," *Vincent*, 466 U.S. at 800. In this case, however, the number of permissible applications are dwarfed by the vast number of potential impermissible applications. While the ban could legitimately be applied to a situation akin to that in *Sanctity of Human Life Network*, that is, where the activity was causing traffic disruption, there are easily hundreds of other potential instances where the legislation bans protected, expressive speech. A few examples quickly come to mind: holding an American flag, walking in a group of political supporters with similar campaign t-shirts, holding a sign advertising a car wash to benefit a certain school, holding a sign that says "Repent," wearing a t-shirt that says "make levees, not war," wearing a peace symbol.

The ban at issue is similar to the situation in *Board of Airport Commissioners v. Jews for Jesus*, 482 U.S. 569 (1987). There the board banned all expression in the airport. In finding the statute overbroad, the Court reasoned that by banning all First Amendment activities in the terminal area, the ban was not limited to expressions that caused problems such as congestion or disruption but would include activities such as wearing campaign buttons or symbolic clothing. *Id*. at 575. The Court went on to conclude that the statute was unconstitutional on its face, stating "it is difficult to imagine that the resolution could be limited by anything less than a series of adjudications, and the chilling effect of the resolution on protected speech in the meantime would make such a case-by-case adjudication intolerable." *Id*. at 576.

In sum, it is our view that while the solicitation ban in Senate Bill 252 is constitutional, we do not believe that the total ban on advertising will survive a facial challenge to its constitutionality. Senate Bill 252 has a severability clause that if any provision is held invalid "for any reason in a court of competent jurisdiction, the invalidity does not affect other provisions or any other application of this Act." Thus, the bill may be signed into law and its solicitation provisions given effect. However, it is our view that the advertising provision should not be enforced by local officials or the State's Attorney.

Sincerely,

/s/
Douglas F. Gansler
Attorney General

DFG:SBB:as
cc: Joseph Bryce
Secretary of State
Karl Aro