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April 16, 2008

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

Re: House Bill 1010 and Senate Bill 685

Dear Governor O'Malley:

We have reviewed and hereby approve the constitutionality and legal sufficiency of House Bill 1010 and Senate Bill 685, both of which prohibit the solicitation of money or donations from an occupant of a vehicle in Prince George's County. The bills are identical.

The legislation provides that in Prince George's County, "A person may not stand in a highway to solicit money or donations of any kind from the occupant of a vehicle." 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."

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)). The solicitation ban in the legislation is 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, 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." *Frishy*, 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 both bills 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. Thus, we conclude that the statute is both content-neutral and narrowly tailored.

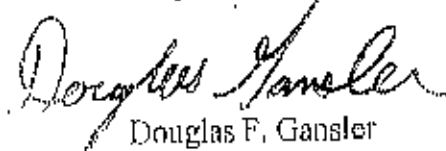
We also considered whether each ban was overbroad. A statute that "seeks to prohibit such a broad range of protected conduct" is overbroad and thus, unconstitutional on its face. *Vincent*, 466 U.S. at 796. An overbroad statute could have a chilling effect on free speech. *Eanes*, 318 Md. at 464. But 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."

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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 a ban on solicitation that applies to persons seeking to receive money or donations from persons in cars. 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). Thus, we do not believe that the statute as passed is overbroad.

In accordance with the foregoing, we hereby approve the constitutionality and legal sufficiency of both House Bill 1010 and Senate Bill 685.

Very truly yours,


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Attorney General

DFG/SB/kk

cc: The Honorable James C. Rosapepe
The Honorable Barbara Frush
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