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May 18, 2010

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

RE: Senate Bill 542 and House Bill 1322

Dear Governor O'Malley:

We have reviewed Senate Bill 542 and House Bill 1322, identical bills entitled "Business Regulation - Lodging Establishments - National Human Trafficking Resource Center Hotline Information," for constitutionality and legal sufficiency. While we approve the bills, we recommend that they be administered carefully to avoid constitutional issues.

Senate Bill 542 and House Bill 1322 permit a State, county, or municipal law enforcement agency to issue a civil citation to a lodging establishment requiring it to post a sign in each guest room for one year. The sign is to be developed by the Department of Labor, Licensing, and Regulation and will provide information about reporting human trafficking and contain the telephone number for the National Human Trafficking Resource Center. A citation may be issued if "the lodging establishment is located on property where an arrest leading to convictions of prostitution, solicitation of a minor, or human trafficking" has occurred. The law enforcement agency must consider any assistance it receives from a lodging establishment in an investigation leading to a conviction in determining whether to issue a citation. No other factor, including whether the owners or managers knew of, or had any connection with, the offenses is mentioned, but other factors clearly could be considered in the exercise of the law enforcement agency's discretion in deciding whether to issue a citation.¹ An establishment that fails to post the signs as required by the citation is subject to a civil penalty not exceeding \$1,000.

¹ As introduced, House Bill 1322 would have required that a lodging establishment post the signs for a year if the lodging establishment was found to keep a common nuisance under Criminal Law Article § 5-605 or was the location of an arrest of an individual for prostitution, solicitation of a minor, or human trafficking. The first reader version of Senate Bill 542 would have required the Department of Health and Mental Hygiene to adapt regulations establishing which "buildings and commercial establishments" were to be required to post signs.

Ordinarily, a "citation" is "a written charging document that a police officer or fire marshal issues to a defendant, alleging that the defendant has committed a crime." Criminal Procedure Article, § 4-101(a)(2)(i); Maryland Rules 4-102(b). Although some citations offer the defendant the option of simply paying the fine, all offer at least the opportunity for a hearing on the charges. The Maryland Rules permit the trying of offenses on citation in the District Court if it is a petty offense or if the use of the citation is otherwise authorized by law, but make no provision for the trying of any offense on citation in the circuit courts. Maryland Rule 4-201(b).

The citation provided for by Senate Bill 542 and House Bill 1322 appears not to be a citation in the ordinary sense at all. It does not charge the recipient with an offense of any kind, and no fine or imprisonment may be imposed under it. It clearly does not fall within the criminal jurisdiction of the District Court, Courts and Judicial Proceedings Article ("CP"), § 4-101(b), and it is not included among the civil matters that come before that Court, CP § 4-401. In fact, the bill gives no indication that the matter is to come before any court at all. Nor does it specify what procedures should be used in the determination to issue a citation. Because the issuance of a citation implicates First Amendment rights, we suggest that some opportunity be provided for a lodging establishment to be heard with respect to whether it should be required to post the signs before a citation requiring the posting is issued.²

The requirement that certain lodging establishments engage in specified speech – the posting of the sign – implicates First Amendment rights. Generally, "freedom of speech prohibits the government from telling people what they must say." *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 61 (2006); see also *United States v. United Foods, Inc.*, 533 U.S. 405, 410 (2001); *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 795 (1988). Compelled speech has been upheld in the commercial context, however, where the state required inclusion of "purely factual and uncontroversial information" in connection with commercial enterprises. *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985). In fact, lodging establishments are already subject to the requirement that they post a copy of certain laws, "together with all rules of the lodging establishment, in

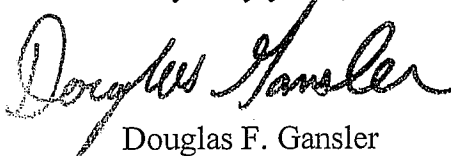
² The fact that the presence of the signs implies some level of involvement of the lodging establishment in human trafficking while a citation could be issued to a lodging establishment with no actual involvement in such offenses also provides support for a hearing. Many hotels are located in shopping centers or mixed use developments, making it possible that convictions for human trafficking offenses that occurred on the property where the hotel is located arose from conduct in a location with no relation to the hotel. Although reputational damage of this type does not, in itself, give rise to due process rights, *Paul v. Davis*, 424 U.S. 693, 701 (1976); *City of Annapolis v. Rowe*, 123 Md. App. 267, 284-292 (1998), it is a valid basis for concern about the accuracy of proceedings.

The Honorable Martin O'Malley
May 18, 2010
Page 3

a conspicuous place at or near the guest registration desk and in each guest room.” Business Regulation Article, § 15-206. The requirements of Senate Bill 542 and House Bill 1322, however, are not applicable to every lodging establishment, but are imposed based on circumstances deemed to indicate the possibility that human trafficking offenses have occurred on the premises. In similar situations, courts have generally required that the required speech be reasonably related to the government interest for which it is imposed. Specifically, where businesses have been found to have engaged in deceptive or misleading speech, courts have held that they may be required to make disclosures designed to prevent the public from being deceived or misled, but have stated that the requirements must be no broader than necessary to serve this purpose. *Commodity Trend Service, Inc. v. Commodity Futures Trading Com'n*, 233 F.3d 981, 994-995 (7th Cir. 2000); *Encyclopaedia Britannica, Inc. v. F. T. C.*, 605 F.2d 964, 972-973 (7th Cir. 1979); *Consumer Protection Div. Office of Atty. Gen. v. Consumer Pub. Co., Inc.*, 304 Md. 731, 774 (1985).

The disclosure required by Senate Bill 542 and House Bill 1322 is purely factual and noncontroversial. Moreover, it is clearly related to the State's aim in protecting victims of human trafficking in the places where it occurs. Thus, the required disclosure is not overly broad. The requirement may be applied too broadly, however, if precautions are not taken to ensure that citations are not issued to lodging establishments that have not, in fact, had any connection to human trafficking offenses. For this reason, we recommend that some form of hearing be provided before citations requiring the posting are issued. We also suggest that the General Assembly may wish to codify this hearing requirement in a future legislative session.

Very truly yours,



Douglas F. Gansler
Attorney General

DFG/KMR/kk

cc: The Honorable David C. Harrington
The Honorable Tom Hucker
The Honorable John P. McDonough
Joseph Bryce
Karl Aro