October 29, 1996

The Honorable Benjamin J. Cayetano
Governor of Hawaii
State Capitol
Honolulu, Hawaii 96813

Dear Governor Cayetano:

> Re: Constitutionality of Section 445-112(11), Hawaii Revised Statutes, Imposing Durational Limitations on Political Signs

This is in response to the July 17, 1996 oral inquiry from your Office of Information about the legality of posting political signs on Oahu two months before an election.

Section 445-112(11), Hawaii Revised Statutes, is the only purported regulation of political signs on Oahu. Runyon v. Fasi, 762 F. Supp. 280 (D. Haw. 1991), invalidated a Honolulu ordinance which prohibited outdoor political signs. Honolulu Ordinance 93-02, codified at section 21-3.90-5(b), Revised Ordinances of Honolulu, subsequently amended Honolulu sign regulations to provide that they do not apply to political campaign signs. Although the posting of political signs on Oahu two months before an election appears to be in violation of section 445-112(11), we believe that section 445-112(11) is unconstitutional and unenforceable. Consequently, we believe that the posting of political signs on Oahu two months before an election is not validly prohibited.

Section 445-112(11), Hawaii Revised Statutes, purports to restrict persons' rights to post political signs to the period forty-five days before an election and ten days afterwards. No similar temporal limitation exists for commercial or for other noncommercial signs. Although section 445-112(11) does not specifically address posting political signs at private residences, its restrictions are not limited to specific geographical areas, and thus extend to private residences. Section 445-112 provides in relevant part: (top)

> §445-12 Where and when permitted. No person shall erect, maintain, or use a billboard or display any outdoor advertising device, except as provided in this section:
>
> . . . .
>
> (11) Signs urging voters to vote for or against any person or issue, if erected not more than forty-five days before, and removed not less than ten days after, the election in which the person is a candidate or in which the issue is to be voted upon.

Although the U.S. Supreme Court has not yet decided whether laws which impose durational limitations on political signs but not on other signs violate the First Amendment, it held an ordinance unconstitutional which purported to completely prohibit political yard signs. City of Ladue v. Gilleo, 512 U.S. 43, 114 S.Ct. 2038, 129 L. Ed. 2d 36 (1994). In City of Ladue the Court referred to the posting of residential signs as "a venerable means of communication that is both unique and important," and stated that such signs "play an important part in political campaigns." Id. at _____, 114 S. Ct. at 2045, 129 L. Ed. 2d at 47. (top)

The Court stated that even laws which regulate the time, place, or manner of speech rather than foreclosing "an entire medium of expression" must "leave open ample alternative channels for communication. In this case, we are not persuaded that adequate substitutes exist for the important medium of speech that Ladue has closed off." Id. at _____, S. Ct. at 2046, 129 L. Ed. 2d at 48 (citations omitted). The Court further stated:

> Displaying a sign from one's own residence often carries a message quite distinct from

> placing the same sign someplace else, or conveying the same text or picture by other means. . . .
>
> Residential signs are an unusually cheap and convenient form of communication. Especially for persons of modest means or limited mobility, a yard or window sign may have no practical substitute. . . . Furthermore, a person who puts up a sign at her residence often intends to reach neighbors, an audience that could not be reached nearly as well by other means. (top)

Id. (citations and footnotes omitted). Given the Court's strong language about the primacy of political signs, it may not readily find adequate alternative channels for such communication whether in the context of laws which prohibit or which regulate such signs. (top)

A law that contains a content-based restriction is presumptively unconstitutional. City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 46-47, 106 S. Ct. 925, 928, 89 L. Ed. 2d 29, 37 (1986). A law that makes durational limitations applicable only to political signs is a content-based restriction because it makes distinctions based solely on the sign's content or message. See City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 429-30, 113 S. Ct. 1505, 1516-17, 123 L. Ed. 2d 99, 116 (1993) (ordinance prohibiting newsracks that distributed commercial handbills, but not newspapers, was content based because the permissibility of the newsrack depended on the content of the publication within it); Linmark Assoc., Inc. v. Township of Willingboro, 431 U.S. 85, 97 S. Ct. 1614, 52 L. Ed. 2d 155 (1977) (ordinance prohibiting "For Sale" and "Sold" signs was an unconstitutional content-based restriction). A law is also a constitutionally suspect content-based restriction if it grants certain forms of commercial speech a greater degree of protection than noncommercial political speech. Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 513-19, 101 S. Ct. 2882, 2895-98, 69 L. Ed. 2d 800, 818-22 (1981). In Metromedia, the Court invalidated an ordinance which allowed on-site commercial billboards but prohibited noncommercial billboards unless permitted by one of the ordinance's specified exceptions. The Court stated: (top)

> 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, 69 L. Ed. 2d at 818 (footnote omitted). Government restrictions on protected speech are not permissible merely because they do "not favor one side over another on a subject of public controversy." Id. at 518, 101 S. Ct. at 2898, 69 L. Ed. 2d at 821. "[T]he argument that a restriction on speech is content-neutral because it is viewpoint neutral has been repeatedly rejected by the Supreme Court." Whitton v. City of Gladstone, 54 F.3d 1400, 1405 (8th Cir. 1995) (citations omitted). (top)

In determining how the Court would view a law that purported to restrict rather than prohibit residential signs, the Court's refusal to recognize a strong government interest in regulating "temperate speech from the home" is significant. The Court stated, "A special respect for individual liberty in the home has long been part of our culture and our law; that principle has special resonance when the government seeks to constrain a person's ability to speak there." City of Ladue, id. at _____, 114 S. Ct. at 2047, 129 L. Ed. 2d at 49 (citations omitted; emphasis in original). It recognized that the government's need to regulate expression in "public streets and facilities is constant and unavoidable," but stated that "its need to regulate temperate speech from the home is surely much less pressing." Id. (citations omitted). (top)

The U.S. Court of Appeals for the Eighth Circuit invalidated a municipal ordinance prohibiting commercial or residential owners from placing political signs on their property more than thirty days before an election and requiring them to remove it within seven days after the election. Whitton v. City of Gladstone, 54 F.3d at 1405. The court held that the ordinance's durational limitation applicable only to political signs was a content-based restriction because it made

distinctions based solely on the sign's content or message. (top)

A city ordinance that limited the posting of outdoor political signs publicizing ballot propositions or promoting candidates for public office was held unconstitutional in City of Antioch v. Candidates' Outdoor Graphic Service, 557 F. Supp. 52 (N.D. Cal. 1982). The ordinance limited such signs to a period of sixty days prior to the election to which they related. The court rejected the argument that the ordinance was a "time, place, and manner" regulation, and found that it was presumptively unconstitutional. It held that the city did not meet its burden of showing that the law bore a substantial relation to a "weighty" governmental interest and was the least drastic means of protecting that interest. The court held that the law violated the First Amendment and the Equal Protection Clause. It stated: (top)

> The city has failed to show that its legitimate interest in maintaining a clean, litter-free, visually attractive community justifies placing time limits on the posting of political signs but not on temporary signs that convey commercial messages or ideological messages unrelated to an upcoming election. Nor has the city shown that this particular time period of sixty days, even if evenhandedly applied to all temporary signs, reasonably and adequately provides for the exercise of First Amendment rights.

Id. at 60. (top)

Other cases that have held unconstitutional ordinances which impose time limits on the posting of temporary political signs include: Orazio v. Town of North Hempstead, 426 F. Supp. 1144 (E.D.N.Y. 1977) (ordinance which limited the posting of "political wall signs" to six weeks before an election invalidated on equal protection grounds); Union City Bd. of Zoning Appeals v. Justice Outdoor Displays, Inc., 266 Ga. 393, 467 S.E.2d 875 (1996) (seven-week time restriction on display of political signs was unconstitutional); Collier v. City of Tacoma, 121 Wash. 2d 737, 854 P.2d 1046 (1993) (ordinance limiting posting of political signs to a period of not more than sixty days prior to and seven days after the date of the election unconstitutional under First Amendment and state constitution); Van v. Travel Information Council, 52 Or. App. 399, 628 P.2d 1217 (1981) (statute limiting the right to erect temporary political signs on land bordering state highways to sixty days before an election violated First Amendment and Equal Protection Clause); Intervine Outdoor Advertising, Inc. v. City of Gloucester City Zoning Bd. of Adjustment, 674 A.2d 1027 (N.J. Super. Ct. App. Div. 1996) (city ordinance limiting noncommercial speech in signs to a period not to exceed sixty consecutive days a year unconstitutional under First Amendment); City of Euclid v. Mabel, 484 N.E.2d 249 (Ohio Ct. App. 1984) (municipal ordinance that prohibits political signs on residential property invalid on its face under First Amendment and Ohio Constitution because it discriminated against speech on basis of content). (top)

Even before City of Ladue, courts invalidated laws that purported to regulate political signs but which did so in ways that were not narrowly tailored to further the asserted government interests in aesthetics and traffic safety. E.g., Arlington County Republican Comm. v. Arlington County, 983 F.2d 587, 594 (4th Cir. 1993) (two-sign limit on political signs); Verrilli v. City of Concord, 548 F.2d 262 (9th Cir. 1977) (regulation of size, number, and location of signs, and requirement of cash bond to post campaign signs except at residence). Before City of Ladue and Metromedia, the Ninth Circuit suggested in dicta that a durational limit of sixty days on political signs might be a less restrictive alternative to the ordinance before the court, which prohibited such signs in residential areas, limited the aggregate area of signs that could be erected in support of any candidate or issue, and set preconditions to posting such signs (e.g., filing an application, paying a $1.00 inspection fee and depositing a $5.00 removal charge for each sign). Baldwin v. Redwood City, 540 F.2d 1360, 1363 (9th Cir. 1976). See also Verrilli v. City of Concord, 548 F.2d 262, 265 (9th Cir. 1977) (in which the court stated in dicta that time limitations were less restrictive than the provision at issue, which prohibited attachment of political signs to any structure but allowed them in a window). The dicta in Baldwin and Verrilli about durational limits cannot be considered good law in light of City of Ladue and Metromedia. (top)

Durational limitations on campaign signs have apparently not been litigated at the appellate level in Hawaii, although the U.S. District Court in Hawaii invalidated not only the above Honolulu ordinance which banned outdoor political signs, but also a Maui ordinance which effectively did the same. Runyon v. Fasi, 762 F. Supp. 280, 285 (D. Haw. 1991); Ross v. Goshi, 351 F. Supp. 949, 954 (D. Haw. 1972).

In conclusion, we believe that section 445-112(11), Hawaii Revised Statutes, contains a content-based restriction which is presumptively unconstitutional. In purporting to apply durational limitations to political signs but not to other signs, it grants commercial speech greater protection than noncommercial speech. It is not narrowly tailored to further the government's asserted interests in aesthetics and traffic safety, and there are no alternative, equally effective channels of communication. Therefore, we believe that section 445-112(11) will be held by a court to be unconstitutional under both the United States and Hawaii constitutions and that the statute is unenforceable in a court of law. (top)

Very truly yours,

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Special Deputy Attorney General

APPROVED:

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