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MEMORANDUM

TO: David Briggs

FROM: Charles D. Tobin and Harmony Loube Jones

DATE: December 10, 2012

RE: First Amendment Analysis of Proposed DC Sign Regulations
Open Top Sightseeing: Our File Number 120893-00001

Section 609 of the proposed Title 13 (Sign Regulations) would prohibit private vehicle operators from displaying non-company advertising. The prohibition would broadly apply to all vehicles operating in D.C. including taxi cabs. The Title, however, contains an exception for metrobus public transit vehicles owned and operated by the Washington Area Transit Authority (WMATA) and D.C. Circulator buses, on which all advertisements are permitted.

The proposed Regulations violate the First and Fourteenth Amendments because the exemptions for the District-owned buses undermine the District's rationale for the Regulations, and the Regulations allow the District to select and limit the type of noncommercial information available to the public.

The following is a brief analysis of the constitutional infirmities with the proposal.

I. The Regulations Cannot Be Sustained as a Proper Regulation of Commercial Speech

While the First Amendment to the U.S. Constitution (and, by incorporation, the Fourteenth Amendment) affords less protection to commercial speech than noncommercial speech, regulation of commercial speech remains subject to constitutional limitations. In *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 562-63 (1980), the Supreme Court announced a four-part test for assessing the constitutionality of a restriction on commercial speech: (1) The First Amendment protects commercial speech only if that speech concerns lawful activity and is not misleading. A restriction on otherwise protected speech is valid only if it (2) seeks to implement a substantial governmental interest, (3) directly advances

that interest, and (4) reaches no further than necessary to accomplish the given objective. *Id.* at 564-66; *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 507 (1981).

Under the first prong of the test, the commercial advertising at issue merits protection because it is neither misleading nor related to unlawful activity. Under the second prong, it is well-established that traffic safety and aesthetics, the goals listed in the proposed regulation, constitute substantial government interests (*see* Proposed Title 13, Sign Regulation, §§ 100.3, 100.5). *See Metromedia*, 453 U.S. at 507-08. Therefore, the focus should be on the third and fourth elements of the *Central Hudson* test.

As to third prong, "direct advancement," the proposed regulation suffers from what the Supreme Court describes as underinclusivity. The Supreme Court has held that a regulation is unconstitutional if it in effect restricts too little speech because its "exemptions...diminish the credibility of the government's rationale for restricting speech in the first place." *City of Ladue v. Gilleo*, 512 U.S. 43, 52 (1994) (citation omitted). A regulation may have "exceptions that undermine and counteract the interest the government claims it adopted the law to further; such a regulation cannot directly and materially advance its aim." *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 489 (1995) (internal citations omitted) (striking down a federal law prohibiting labels on beer products from showing alcohol content but permitting beer advertisements to contain such information, and permitting such information on wine and spirits); *see also City of Ladue*, 512 U.S. at 58 (city prohibited from enforcing ordinance that banned all residential signs except those falling within one of ten exemptions).

Here, the District undermines its interest in traffic safety and aesthetics and defeats its own case by permitting all types of advertising on WMATA and D.C. Circulator buses, as well as allowing private vehicles to advertise their own businesses.¹ The proposed Regulations on their face will not diminish the total quantity of advertisements on motor vehicles. There is no indication that banning all but a business's personal advertisements from private vehicles, while allowing the sale of commercial advertising space on municipal vehicles, will promote safety or aesthetic values.² The Regulation and exceptions therefore bear no relationship to the District's asserted interest in safety and aesthetics, and the statutory scheme is constitutionally underinclusive.

The proposed Regulations also fail the fourth prong because the restrictions are more extensive than necessary to serve the District's stated interest of safety and aesthetics. In order for a speech

¹ The Supreme Court has held that a regulation that allows onsite commercial advertising directly related to the commercial use of the premises, yet prohibits all offsite commercial and noncommercial advertising, is constitutional. *See Metromedia, Inc.*, 453 U.S. at 511 (citing *Suffolk Outdoor Advertising Co. v. Hulse*, 439 U.S. 808 (1978)). In those cases, however, the regulations were uniform in restricting all billboard advertising to onsite commercial advertising. The District's proposed Regulations are not analogous because they would not merely limit all vehicles to advertising their own business, but, instead, they would permit District-owned vehicles to carry all types of advertising.

² Indeed, the only purpose the Regulation may serve is the creation of a municipal monopoly on transportation that carries certain types of advertising. Curtailing competition with private industry in this fashion is not a "substantial government interest."

restriction to pass muster under the fourth prong, there must be a reasonable fit between the stated goal and method. *See 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 487 (1996) (concurring O'Connor, J.) (striking down regulation completely banning price advertising for alcoholic beverages because its ban was more extensive than necessary to serve its stated interest). The fit here is not reasonable, since the District could impose regulations that would more directly accomplish its stated goal, such as limiting the size, form, or number of advertisements, by proposing something short of a complete ban on all forms of non-company advertising.

II. The Regulation's Restrictions on Non-Commercial Advertising Violate the First Amendment

In addition to commercial advertising, the proposed Regulations would limit to District-owned vehicles the sale of space for noncommercial advertisements -- including political advertising -- on vehicles operating in the District. The Supreme Court has consistently accorded noncommercial speech a greater degree of protection than noncommercial speech. *Metromedia*, 453 U.S. at 513. For example, in *Metromedia*, the Supreme Court invalidated an ordinance that impermissibly discriminated on the basis of content by permitting on-site commercial speech while broadly prohibiting noncommercial messages. *Id.* at 514, 515 (plurality opinion of Blackmun, J.). The Court held that the ordinance "effectively inverts this judgment, by affording a greater degree of protection to commercial than to noncommercial speech." *Id.* at 513.

Here, as in *Metromedia*, the District's proposed Regulations would "invert" the First Amendment priority for speech. The Regulations include a broad exception for commercial speech, but there is no similar exception for noncommercial speech. Private buses, such as those operated by Open Top Sightseeing, would be permitted to display commercial messages related to the *bona fide* business of the owner, but those same private vehicles could not carry noncommercial messages. *See* 609.1. The District does not explain how or why noncommercial advertisements on private vehicles would be more threatening to safe driving, or would detract more from District's beauty, than the limited business advertising the proposed Regulations would permit. *See Metromedia*, 453 U.S. at 513. Moreover, by limiting the noncommercial advertisements to District-owned buses, the Regulations allow the District to be in total control of the appropriate subjects, including political and social advertising. In effect, the District is providing more outlets for commercial speech than noncommercial speech by allowing private vehicles to advertise their own business while broadly prohibiting noncommercial messages.