

POSITION PAPER OF SCENIC AMERICA ON THE PROPOSED TRANSFORMATION OF CALIFORNIA'S OFFICIAL ELECTRONIC MESSAGE BOARDS INTO PLATFORMS FOR COMMERCIAL ADVERTISING

It has been reported that the state of California is proposing to permit the use of the state's 674 official electronic message boards for commercial messages, via an exclusive agreement with Clear Channel Outdoor. The signs are located on the right of way of state and federal roads, and are currently used only for official messages posted by the state department of transportation, Caltrans. Official signs of this type have never been used in this manner before, in California or any other state. Media reports indicate that Clear Channel would be able to "enhance" the current signs, presumably making them more closely resemble digital billboards with full color capacity and crisper graphics. The state would share revenue from the sale of advertising on the signs.

This proposal is patently illegal, extraordinarily dangerous, and threatens not only the safety of the motoring public, but fundamentally undermines federal, state, and local sign control efforts, including the Highway Beautification Act and the core federal highway statute governing the appropriate use of the right of way. It is a reckless and unconscionable plan with far-reaching national implications, and it should be immediately and unequivocally rejected by federal and state authorities.

The proposal is catastrophic for the citizens of California for the following reasons:

Commercial Advertising on the Right of Way Violates the Highway Beautification Act

The incorporation of commercial advertising in "enhanced" official signs within the right of way violates the Highway Beautification Act (HBA) and would subject California to severe penalties equal to 10 percent of the state's federal highway funds.

Although the language of the HBA does not address the right of way directly, it is implicit in the law that billboards and commercial advertising are prohibited there. There is absolutely no question that the law prohibits commercial signs within the boundaries of the roadway, a principle borne out by the fact that there are none in any state and there never have been.

This concept is explained clearly in a December 19, 1996, memorandum from Jerry L. Malone, chief counsel of the Federal Highway Administration (FHWA), specifically addressing the issue of the commercialization of the right of way, in response to an inquiry by the state of New Jersey. The opinion expressed in the memorandum, entitled, "Legal Opinion on the Erection of Billboards on the Right-of-Way of an Interstate Highway by a State," is indisputable:

"While the bulk of the HBA focuses on signs adjacent to, rather than on the right-of-way, it seems clear to us that the Congress never intended to broadly allow commercial signs on the right-of-way. Under the maxim of statutory construction, *expressio unius est exclusio alterius* [the expression of one thing is the exclusion of another], the fact that the HBA allows only these exceptions means that other forms of advertising on the right-of-way is forbidden. It would be ludicrous to suggest that Congress, while mandating the States to control advertising along thousands of miles of Interstate and Federal-aid primary highways, would also allow the States to erect billboards on the right-of-way of those same miles of highways."

Without any doubt commercial messages on the right of way violate the Highway Beautification Act and congressional intent. In no conceivable way can the inclusion of commercial advertising on official signs within the right of way be consistent with the Highway Beautification Act's central provisions or the law's fundamental requirement that "outdoor advertising signs, displays, and devices in areas adjacent to the Interstate System and the primary system should be controlled in order to protect the public investment in such highways, to promote the safety and recreational value of public travel, and to preserve natural beauty."

Implicitly, this proposal would also violate the Federal-State Agreement (FSA) that California has had with the Federal Highway Administration since 1968, which requires the state to maintain "effective control" of outdoor advertising under the Highway Beautification Act. Violation of the agreement would subject the state to a penalty equal to 10 percent of its federal highway funds. In the case of California, the state's federal highway allocation in fiscal year 2009 is over \$3.6 billion, meaning the penalty would amount to over \$360 million.

It is also worth pointing out that under Section III of California's FSA, there is a prohibition on "Signs which imitate or resemble any official traffic sign, signal, or device." The proposed melding of official sign with commercial sign blurs the distinction between the two and creates potential confusion in the mind of the driver. There is a danger that when the sign is used to display commercial messages for much of the time, the official messages may appear to be subordinate. The purpose of this provision in the FSA is to ensure that high-priority messages dealing with safety or the smooth operation of traffic on the roadway are always foremost in the minds of drivers and are not in competition with anything else.

The California plan deliberately creates competition with the official messages since they would occupy the same sign. It goes without saying that advertisers want people to look at the sign to receive their marketing messages. They don't want motorists to glance at the sign only when an official highway message appears; otherwise the whole exercise is pointless. Motorists, who in the past would look at the official signs only when there was something important to see and a message was present, will now have to sort through a constant stream of messages to determine which images are ads and which are messages they must have for the safe operation of the car or to promote traffic flow. One could not conceive of a plan that more directly contradicted the intention of the law than this. Without doubt, the proposed plan could be construed as a violation of the FSA, both in letter and spirit, since not only would Clear Channel's new commercial signs "imitate and resemble" official signs, they would be the official signs.

For those reasons alone, FHWA must reject this proposal, even if it is couched as a test or pilot program. The federal government cannot and should not subject the citizens of California or visiting motorists to a safety experiment that might endanger lives and property just because the state and its corporate partners seek revenue.

Mr. Malone in the 1996 FHWA memorandum concludes his opinion by saying, "... we believe that FHWA clearly has the authority to withhold funds from a State that allows the erection of billboards on rights-of-way, an act which constitutes a failure to comply with Title 23 requirements. Further, we believe that such an action by FHWA would be consistent with established policies for administering the MUTCD [Manual on Uniform Traffic Control Devices] and would further the statutory policies of the HBA."

What was true in 1996 is equally true today. It would now be unconscionable and inconsistent for FHWA in 2008 to give the state of California a different response to its request than it gave to New Jersey in 1996. The only appropriate response to California from FHWA is a total rejection of its proposal and a reminder that failure to comply would lead to the forfeiture of 10 percent of its federal highway funds, as required by the Highway Beautification Act.

Commercial Advertising on the Right of Way Violates the Federal Highway Statute

The federal law governing the appropriate use of the federal right-of-way specifically prohibits its use for commercial activity, including advertising. The California plan is illegal and violates this key tenet of highway policy. The law is crystal clear. 23 CFR § 1.23(b) states:

"Use for highway purposes. Except for as provided under paragraph (c) of this section, all real property, including air space, within the right-of-way boundaries of a project shall be devoted exclusively to public highway purposes.... The State highway department shall be responsible for preserving such right-of-way free of all public and private installations, facilities or encroachments ..."

Commercial advertising on digital signs is not a public highway purpose and is therefore prohibited. This long-standing provision has been rigorously enforced since the inception of the federal highway program to ensure that the public investment in the roadway is used only for official purposes, to protect the safety of American motorists, and to ensure the efficient movement of traffic. An exception granted to California will have to be granted to all states and the inevitable flood of commercialization will destroy the integrity of the nation's highways.

Further, this plan also violates 23 U.S.C. 109(d), which states:

"On any highway project in which Federal funds hereafter participate, or on any such project constructed since December 20, 1944, the location, form and character of informational, regulatory and warning signs, curb and pavement or other markings, and traffic signals installed or placed by any public authority or other agency, shall be subject to the approval of the State transportation department with the concurrence of the Secretary, who is directed to concur only in such installations as will promote the safe and efficient utilization of the highways." [emphasis added]

In other words, the only signs permitted on the right of way itself are those that "promote the safe and efficient utilization of the highways." Commercial advertising fulfills neither of those requirements and is therefore banned. The prohibition on the commercialization of the right of way must not be trampled in this instance, lest the floodgates be opened nationwide and the fundamental character of our highways be permanently destroyed.

The law is plain and precedent clear: the Federal Highway Administration should immediately inform the state of California that the federal government is committed to protecting the integrity of the nation's highways and to enforcing the law, and that no waivers can or will be granted in this circumstance or any other.

Commercial Advertising on the Right of Way is a Willful Violation of the Manual on Uniform Traffic Control Devices

The Manual on Uniform Traffic Control Devices (MUTCD) sets the standards for traffic control devices along the nation's highways, including signs, and is the law of the land, carrying penalties for noncompliance. Its core principle is uniformity across all states and it exists to "reduce crashes and congestion, and improve the efficiency of the transportation system." States must adopt the MUTCD, but may modify it with their own supplements. California last did this in 2006.

The California MUTCD (and the 2003 federal MUTCD) says in bold type on page 1A-1 that "Traffic control devices or their supports shall not bear any advertising message or any other message that is not related to traffic control." The state's proposal is a clear and blatant violation of this provision.

The MUTCD also deals explicitly with changeable message signs (the term of art for digital displays of the type in dispute here), and is very clear about what these signs can be used for and how they must be operated. There is an unambiguous recognition that digital displays with changing images located in the right of way pose inherent safety issues and must be operated only under the strictest guidelines and that their use as advertising is prohibited.

As stated on Page 2A-3, "Changeable message signs, both permanent and portable, may be used by State and local highway agencies to display safety or transportation-related messages ..." This provision clearly limits the purpose of digital displays on the right of way to official purposes.

This section further states, "When a changeable message sign is used to display a safety or transportation-related message, the display format shall not be of a type that could be considered similar to advertising displays. The display format shall not include animation, rapid flashing, or other dynamic elements that are characteristic of sports scoreboards or advertising displays."

This principle is reinforced again in Section 2E.21 with the plain-language statement that "Changeable message signs shall display pertinent traffic operational and guidance only, not advertising."

Beyond any shadow of a doubt, the MUTCD does not allow advertising on changeable message signs on the right of way. Period.

The Guidance then spells out standards for the behavior of the signs, including: "Changeable message signs should be capital letters ... limited to not more than three lines with not more than 20 characters per line... No more than two displays should be used within any message cycle.... Each display should convey a single thought." These strict constraints on the operation of the signs are a recognition of the inherent danger of digital signage located within the right of way and directly in the field of vision of drivers. The MUTCD, which is based on scientific research and the experience of traffic engineers, has these rules for a reason. Commercial advertising on "enhanced" digital signs will not comply with these rules.

The Federal Highway Administration and responsible officials in California must unequivocally reject any attempt to override well-established MUTCD standards and subject motorists to the clear and present danger from changeable message devices that operate in inherently unsafe ways.

It is also important to remember that the MUTCD, which applies by law to all roads in the United States, is rooted in the concept of uniformity. An exception for California would undermine that core principle and threaten the integrity of the entire MUTCD standards, even those not at issue here. Almost certainly, if FHWA grants California the right to ignore the MUTCD, other states will seek the same treatment and one would be hard pressed to imagine how FHWA could treat other supplicants differently, particularly since this is a completely discretionary action by California and is not related to any higher public purpose or a response to a one-time emergency scenario. If California does this, many other states will also, and the consequences will be catastrophic, both from public policy and public safety standpoints. FHWA can only make one legitimate response to California, and that is to inform the state that they may not proceed.

Commercial Advertising on the Right of Way is a Clear Threat to Highway Safety

It would be difficult to imagine a bigger threat to highway safety than the addition of colorful commercial billboards built directly into the right of way. Unlike normal digital billboards on private property adjacent to the road, which are dangerous enough, these signs would be placed directly and unavoidably in the line of sight of every driver on the road. One assumes that the “enhanced” signs erected by Clear Channel will mimic the technologies employed on their other digital signage, and thus provide the capacity for highly detailed, colorful images, and be vividly bright, especially at night. Drivers will have no choice but to view them, and because of their brightness and changing images, they will command glances far longer than are normally ascribed to official changeable message signs operating under normal MUTCD standards.

It’s worth noting, as well, that because the signs are placed directly in the forward view of the driver, and are much more likely to be seen and to command attention, one could reasonably anticipate that drivers may slow down to observe the signs and therefore increase congestion, which would be catastrophic on California’s already clogged freeways. This fear of adverse driver behavior is well known to safety researchers and is one of the motivating factors for the exceptionally strict MUTCD rules for changeable message signs.

There are very good, well-researched reasons why the behavior of signs within the right of way is strictly regulated. It will be impossible for commercial advertising to operate within those guidelines and so, by definition, they will pose significant dangers. Just as one example, Section 2A.06 of the MUTCD specifies that “phone numbers of more than four characters should not be shown on any sign,” and that “Internet addresses or phone numbers with more than four characters may be shown on signs ... that are intended for viewing only by pedestrians, bicyclists, occupants of parked vehicles, or drivers of vehicles on low-speed roadways where ... drivers can reasonably safely stop out of the traffic flow to read the message.” None of those conditions apply to the freeways of California and it is hard to imagine a commercial message that doesn’t provide the motorist with information about how to communicate with the advertiser. The requirements of commercial messaging are utterly incompatible with even the most basic requirements of the MUTCD. By seeking to place these signs on the right of way and willfully break the rules, the clear inference is that the state of California is rejecting as either erroneous or irrelevant the principles underlying the MUTCD. Implicitly, the state is saying that its previous adoption of the MUTCD has been made in bad faith since its principles are apparently of little merit to the state transportation department.

Additionally, one can reasonably wonder if the public will begin to perceive these signs as merely digital billboards that occasionally carry notices from the state, rather than official signs that carry commercial advertising. If that occurs, it will almost certainly undermine the effectiveness of the official messages and further endanger the motoring public. In fact, Section 2A.07 of the MUTCD specifically warns that “A changeable message sign should not be used to display a safety or transportation-related message if doing so would adversely affect the respect for the sign.” In other words, in order for official messages to be received, understood, and accepted as valid, the sign carrying them must be credible. The addition of commercial messages undermines the validity and credibility of the sign, confuses the driver about who is the author of the message, and invites the potential for being ignored.

This leads to an important question: How will drivers be able to pick out the official messages from the commercial ones? Drivers, as they encounter these signs, will be required first to rapidly sort out whether what they are seeing is a high-priority official message or a low-priority commercial message, then, in whatever time is left before they pass the sign, process the information. How many drivers will miss the official messages because they have tuned out the signs because they perceive them as merely billboards? These information-sorting and prioritizing tasks are unnecessary when the sign is devoted exclusively to official messages. Currently, the driver knows that if a message is displayed on the state’s sign, they should pay attention to the information being conveyed. If the same sign is also carrying advertising, that certainty is eliminated.

It is important to remember that the purpose of official changeable message signs on the right of way is to deliberately distract the motorist from the driving task. They occupy a privileged position on the roadway, are highly conspicuous, and often convey complex but essential messages. (If the new “enhanced” versions are illuminated like normal digital billboards they will also be visible from great distances.) Even though official signs are conveying crucial information, they are an inherently dangerous device, which is why there are very strict rules governing their safe operation. They are, in effect, a necessary evil. To convert their use to something that is unnecessary and which violates requirements that “changeable message signs should not be used to display information other than regulatory, warning, and guidance information related to traffic control,” is to deliberately and gratuitously subject the motorists of California to significant dangers.

No state government that cares about the health, safety, and welfare of its citizens could propose this plan. The same concerns about driver distraction that motivated California’s new rules about text messaging while driving should apply here. To do otherwise is the height of hypocrisy.

Commercial Advertising on the Right of Way Undermines the Integrity of the State’s Outdoor Advertising Code

The California Outdoor Advertising Act does not directly address commercial signage on the right of way for the simple reason that it is illegal and, for good reason, has never been contemplated. The law (§ 5226) acknowledges only that “Outdoor advertising is a legitimate commercial use of property adjacent to roads and highways.” It does not—and cannot—acknowledge that outdoor advertising is a legitimate use of the right of way itself.

However, the Act does require the state to comply with the Highway Beautification Act (§131 of Title 23 of the United States Code) and to comply with the terms of the state’s formal agreement with the

Federal Highway Administration regarding the maintenance of “effective control” over outdoor advertising.

In other words, the state cannot unilaterally break federal law, which, as has been pointed out above, clearly and unequivocally does not permit commercial advertising on the right of way.

But more than mere compliance with federal or state law is at stake here. This proposal fundamentally undermines the entirety of billboard control along California’s highways by demonstrating a callous disregard for aesthetic harms and highway safety, which are the twin underpinnings of all sign regulation. Clearly, the state is showing absolutely no concern for safety by willingly ignoring all established standards for the behavior of changeable message signs on the right of way. Likewise, by permitting digital signage within the boundaries of the highway itself, it is turning its back on highway beautification goals, especially along landscaped freeways.

How can the state hope to enforce rules against private parties when it exempts itself from those same laws and undercuts the only legally legitimate justifications for them, and then compounds the problem by deriving financial benefits from a monopoly contract with a private outdoor advertising company?

Two recent cases in California, *Metro Lights v. City of Los Angeles* and *World Wide Rush v. City of Los Angeles*, both turn on this principle. The federal district court has enjoined the city of Los Angeles from enforcing its sign ordinance on the grounds that the city’s stated interests in visual quality and traffic safety ring hollow when it grants itself exceptions to its own rules and profits from the exception. Now, the entire state wants to exempt itself from long-established rules and federal and state laws in order to derive profit from what was heretofore illegal, and do it in the context of a monopoly arrangement with a single private company, to boot. One might reasonably ask what consequence this plan would have for the future legal viability of the state’s outdoor advertising laws, or for its moral authority in enforcing the law (or any law, for that matter) with private parties and local governments.

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The plan being presented by the state to convert official signs on the right of way into part-time billboards is an affront to the citizens of California. It is in violation of several federal and state statutes, willingly sacrifices the safety of California families in the name of private and public profit, provides benefits to privileged private companies at the expense of the public interest, and undermines the state’s sign laws, exposing it to potential litigation aimed at weakening outdoor advertising control and, therefore, the quality of California’s built environment. It also undermines the national standards governing the right of way as expressed in the Manual on Uniform Traffic Control Devices, the core federal highway statute, and the Highway Beautification Act, and threatens the integrity of the federal highway system.

The state should immediately withdraw its proposal, and if it chooses not to do so, the Federal Highway Administration should immediately and unequivocally inform the state that this action is impermissible and will be opposed with every available regulatory and legal means, including the forfeiture of 10 percent of the state’s highway funds. No waivers or exceptions can be granted. No so-called pilot programs or tests can be approved. FHWA is obligated to enforce the law and protect the nation’s highway system and the well-being of the American motorist and has no choice but to reject in its entirety and without equivocation the California proposal.

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