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February 23, 2010

Victor M Mendez, Administrator
Federal Highway Administration
1200 New Jersey Ave., SE
Washington, DC 20590

Re: Petition for rulemaking requesting FHWA to issue a definition of "flashing, moving, or intermittent light or lights."

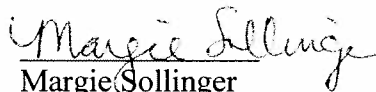
Dear Administrator Mendez:

The Institute for Public Representation (IPR) submits the enclosed petition for rulemaking, pursuant to the Department of Transportation petitioning requirements at 49 C.F.R. § 5.11, on behalf of Scenic America. IPR is a public interest law firm and clinical education program at Georgetown University Law Center that provides legal counsel for those who are otherwise unable to obtain effective legal representation on matters of broad public importance. Scenic America is a national nonprofit dedicated solely to preserving and enhancing the visual character of America's communities and countryside.

The petition asks the Federal Highway Administration (FHWA) to issue a rule that defines the phrase "flashing, intermittent, or moving light or lights," as it is used in FHWA regulations and federal/state agreements under the Highway Beautification Act. Specifically, the petition asks FHWA to define the phrase to include digital billboards. Additionally, the petition asks FHWA to immediately institute a moratorium on the erection and maintenance of off-premise commercial electronic variable message signs (CEVMS) until FHWA determines a course of action or initiates rulemaking.

Inquiries regarding this filing should be directed to my attention. I can be reached at (202) 662-4025 or mjs289@law.georgetown.edu.

Sincerely,


Margie Sollinger
Staff Attorney

Scenic America Petition for Rulemaking

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I. Introduction and Interest of Petitioner

The Institute for Public Representation (IPR) at Georgetown University Law Center submits this petition for rulemaking on behalf of Scenic America. IPR is a public interest law firm and clinical education program at Georgetown University Law Center that provides legal counsel for those who are otherwise unable to obtain effective legal representation on matters of broad public importance. Scenic America is a national nonprofit organization dedicated to preserving and enhancing the scenic character of America's communities. Pursuant to the Department of Transportation petitioning requirements at 49 C.F.R. § 5.11(b) (2010), this petition sets forth: the interest of the Petitioner; the substance of the proposed rule; and information and arguments in support of the request.

Part of Scenic America's mission is to eradicate the "billboard blight" that undermines the Highway Beautification Act (HBA or "the Act"). Scenic America opposes digital billboards because of the adverse effects they have upon the scenic beauty of the national highway system. In addition Scenic America believes these signs are not safe for the traveling public. On behalf of the public's interest in scenic and safe highways, Scenic America asks the Federal Highway Administration (FHWA) to effectuate the plain language and policy of the HBA by issuing a regulation that defines "flashing, intermittent, or moving light or lights" in a manner consistent with FHWA's interpretation prior to its 2007 guidance memorandum on digital billboards.

II. Text and Substance of Proposed Rule

Petitioner requests that FHWA enter into a rulemaking proceeding, and after due consideration of the matters set forth in this petition:

- (1) Immediately institute a moratorium on the erection and maintenance of digital billboards along the national highway system until FHWA issues a rule or otherwise

determines a course of action.

(2) Issue a regulation, to be inserted as 23 C.F.R. § 750.102(h), that defines “flashing, intermittent, or moving lights.” Specifically, Petitioner proposes the following language:

A flashing or intermittent light is defined as a light that changes color more frequently than once every twelve hours, or that switches from on to off more frequently than once every twelve hours. A moving light is defined as a light that moves or displays movement, even if only between static messages.

(3) Renumber § 750.102(h)-(s) as (i)-(t).

III. Legal Framework

Federal regulation of outdoor advertising began with the Federal-Aid Highway Act of 1958.¹ That Act established the Bonus Program, through which 23 states voluntarily agreed to control outdoor advertising in accordance with national standards in Chapter 23, Part 750, Subpart A of FHWA regulations.² Among other things, the national standards require that “[n]o sign may be permitted which contains, includes, or is illuminated by any flashing, intermittent or moving light or lights.”³ Participating states must comply with this and all provisions of the national standards in order to receive a bonus payment from the federal government.⁴

In 1965, the Bonus Program was incorporated into the HBA, which, as amended, now regulates outdoor advertising in all 50 states and the District of Columbia. While the Bonus Program remains applicable to participating states, the HBA directs every state to enter into a federal/state agreement (FSA) with FHWA that provides for “effective control” of outdoor

¹ Federal Aid Highway Act of 1958, Pub. L. No. 85-381, 72 Stat. 89 (1958).

² Federal Highway Administration, A History and Overview of the Federal Outdoor Advertising Control Program, <http://www.fhwa.dot.gov/realestate/oacprog.htm> (last visited Feb. 19, 2010) [hereinafter History of Federal Outdoor Advertising Program]. The twenty-three participating states are: California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Iowa, Kentucky, Maine, Maryland, Nebraska, New Hampshire, New Jersey, New York, Ohio, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, Washington, West Virginia and Wisconsin. *Id.*

³ National Standards for Regulation by States of Outdoor Advertising Adjacent to the Interstate System Under the 1958 Bonus Program General Provisions, 23 C.F.R. § 750.108(c) (2010).

⁴ See 23 C.F.R. § 750.13 (2010).

advertising.⁵ Among other things, each FSA must establish lighting criteria for outdoor advertising signs in commercial or industrial areas that is consistent with customary use within the state.⁶ Forty-eight FSAs explicitly prohibit “[s]igns which contain, include, or are illuminated by any flashing, intermittent, or moving light or lights ... except those giving public service information such as time, date, temperature, weather, or similar information.”⁷ A state that fails to comply with this or any provision of its FSA could be penalized with a ten-percent reduction in its annual federal-aid highway funds apportionment.⁸

As the administrator of the HBA, FHWA must ensure that each state is regulating outdoor advertising in a manner consistent with its Bonus agreement and/or FSA.⁹

IV. Factual Background

Digital billboards are 1,200 to 1,500 square foot electronic signs that change copy through remote control or automated process. The most recent incarnation of commercial, changeable, or continuously electronic variable message signs (CEVMS), digital billboards utilize light emitting diode (LED) lights to “depict[] action, motion, light or color changes through motion video, electrical, or mechanical means.”¹⁰ The primary purpose of these signs is to direct attention to a commercial activity.¹¹ To maximize advertising space and attract as much attention as possible, digital billboards can rotate through as many as fifteen advertisements per

⁵ Highway Beautification Act, 23 U.S.C. § 131(b) (2006).

⁶ *Id.* § 131(d).

⁷ *E.g.*, Federal/State Agreement Between FHWA Administrator and Executive Director of Colorado State Department of Highways (July 9, 1971). In addition, Idaho prohibits “blinking” lights, Michigan prohibits “changing illumination,” and Minnesota prohibits only “flashing” lights. *See generally* National Alliance of Highway Beautification Agencies, <http://www.nahba.org/members2/states.html>.

⁸ § 131(b).

⁹ *See id.* (authorizing the Secretary of Transportation to determine whether a state has provided for effective control of outdoor advertising).

¹⁰ *See* Federal Highway Administration, An Outdoor Advertising Control Language Guide, <http://www.fhwa.dot.gov/realestate/oacguide.htm> (Jan. 2006) (last visited February 22, 2010).

¹¹ *Id.*

minute at locations with high exposure to traffic.¹² Due to their effectiveness, digital billboards are becoming increasingly prevalent in the American landscape. Less than two years ago there were an estimated 800 digital billboards in the United States;¹³ about one year ago there were an estimated 1800.¹⁴ Widely hailed as the future of outdoor advertising, digital billboards are expected to continually increase by hundreds each year.¹⁵ In fact, Cisco Systems predicted that digital signage will be a \$2 billion market by as early as this year.¹⁶

As digital billboards became more prevalent, states requested guidance from FHWA on whether off-premise digital billboards constitute “flashing, intermittent, or moving light or lights.”¹⁷ “FHWA historically considered that the prohibition of flashing, intermittent, or moving lights in the various State/Federal agreements applied to all off-premise CEVMS regardless of message interval.”¹⁸ In 1996, FHWA issued guidance to advise FHWA divisions on how to interpret the lighting provisions of their FSAs in response to the advent of tri-vision signs, which

¹² Memorandum from Gloria M. Shepherd, Assoc. Adm’r for Planning, Env’t, and Realty, Fed. Highway Admin., to Div. Adm’rs (Sept. 25, 2007) (obtained via FOIA, on file with IPR) [hereinafter Memorandum from Gloria M. Shepherd] (stating that “[d]uration of each display is generally between 4 and 10 seconds”); Lamar Advertising, What is an LDD?, <http://www.lamaroutdoor.com> (last visited Feb. 22, 2010) (stating that digital displays are placed in areas with heavy exposure to traffic).

¹³ Sarah Goldstein, *Bright Lights, Big Impact: Why digital billboards are growing in popularity*, Mar. 1, 2008, available at <http://www.inc.com/magazine/20080301/bright-lights-big-impact.html>.

¹⁴ Louis M. Brill, Digital Billboards Ho!, http://www.signindustry.com/electronic/articles/2009-02-02-LB-Digital_Signage_Ho_staking_out_new_territories.php3#story (last visited Feb. 18, 2010).

¹⁵ Outdoor Advertising Association of America, Digital Billboards: Outdoor Advertising’s Glowing Future, <http://www.oaaa.org/marketingresources/digital.aspx> (last visited Feb. 19, 2010).

¹⁶ Bill Christensen, The Next Really Big Thing: Digital Billboards, (Jan. 17, 2007), http://www.livescience.com/technology/070117_digital_billboards.html (last visited Feb. 20, 2010).

¹⁷ Letter from John McCain, U.S. Senator for Ariz., to Mary Peters, Adm’r, Fed. Highway Admin. (Sept. 22, 2003); Letter from Timothy C. Anderson, Tex. Dep’t of Transp., to Robert M. Callan, Acting Dir., Fed. Highway Admin. – Tex. Div. (Mar. 10, 2006) (obtained via FOIA, on file with IPR); Memorandum from Andrew H. Hughes, Adm’r, Fed. Highway Admin. – Miss. Div., to Gloria Shepherd, Assoc. Adm’r for Planning, Env’t, and Realty, Fed. Highway Admin. (July 27, 2007) (obtained via FOIA, on file with IPR); E-mail from Jose Sepulveda to James Cheatham, Dennis Merida, Sandra Otto, Amy Jackson-Grove, Philip Barnes, Olivia Michael, Dennis Luhrs (Aug. 7, 2007, 17:47 EST) (obtained via FOIA, on file with IPR) (“Our Division has received ambiguous assistance from Hqtrs. . . . It would be desirable to have a clear nationwide FHWA position that strongly advocates for the integrity of the letter and intent of the law.”); E-mail from Janis Gramatins to Gloria Shepherd, Gerald Solomon, Catherine O’Hara, Robert Black (Aug. 8, 2007, 08:54 EST) (obtained via FOIA, on file with IPR) (“DAs really desire a national position on this, and HQ guidance of a more prescriptive nature.”) [collectively hereinafter Letters from States to FHWA].

¹⁸ History of Federal Outdoor Advertising Program, *supra* note 2.

display three different static advertisements by use of triangular louver construction. The guidance authorized these signs, stipulating that “[i]n nearly all States, [tri-vision] signs may still not contain flashing, intermittent, or moving lights.”¹⁹ As recently as March 2006, FHWA’s Texas Regional Division advised the Texas Department of Transportation that “any type of screen using animated or scrolling displays, such as LED . . . screen or any other type of video display, even if the message is stationary,” is “clearly prohibited” by the prohibition on “flashing, intermittent, or moving light or lights” in the Texas FSA.²⁰

However, just over one year later, FHWA issued guidance that reversed its long-standing policy on CEVMS. The guidance interprets “flashing, intermittent, or moving light or lights” as inapplicable to digital billboards and concludes that off-premise digital billboards are permitted under agreements that prohibit “flashing, intermittent, or moving light or lights.”²¹ Purported to clarify the 1996 guidance in response to new digital billboard technology, the guidance suggests that digital billboards are simply modern tri-vision signs.²² Thus, failing to address the fact that digital billboards are composed of LED lights that can display animation, scrolling, and video, the guidance simply concludes that because digital billboards display “stationary messages for a reasonably fixed time,” they do not violate the prohibition against “moving” signs.²³ Notably, the guidance does not define “reasonably fixed,” nor does it require digital billboards to display only stationary messages. Hence, FHWA’s 2007 guidance stands in stark contrast to its previous

¹⁹ Memorandum from Barbara K. Orski, Dir. of Real Estate Services, Fed. Highway Admin., to Regional Adm’rs (Jul. 17, 1996) (obtained via FOIA, on file with IPR).

²⁰ Letter from Robert M. Callan, Acting Div. Adm’r, Fed. Highway Admin. – Tex. Div., to Timothy C. Anderson, Tex. Dep’t of Transp. (Mar. 15, 2006) (obtained via FOIA, on file with IPR) (emphasis in original).

²¹ Memorandum from Gloria M. Shepherd, *supra* note 12 (“Proposed laws, regulations, and procedures that would allow permitting CEVMS subject to acceptable criteria . . . do not violate a prohibition against “intermittent” or “flashing” or “moving” lights as those terms are used in the various Federal/State agreements that have been entered into during the 1960s and 1970s.”).

²² *Id.* (“Electronic signs that have stationary messages for a reasonably fixed time merit the same considerations” as tri-vision signs permitted under the 1996 guidance.).

²³ *Id.* (“If the State set a reasonable time period [for tri-vision signs], the agreed-upon prohibition against moving signs is not violated.”).

policy, and directs states to allow digital billboards despite the regulatory prohibition on “flashing, intermittent, or moving light or lights” and the plain language of 48 FSA’s.

Whereas states could previously prohibit digital billboards under the existing language of their Bonus agreements or FSAs, now, as a result of FHWA’s 2007 guidance, states that wish to prohibit digital billboards must formally amend their agreements to explicitly do so. Thus, the 2007 guidance has effectively shifted the status quo to permitting the type of off-premise signs that have been prohibited for at least thirty years.

V. Legal Arguments in Support of Request

FHWA’s 2007 interpretation of “flashing, intermittent, or moving light or lights” is inconsistent with the plain language of HBA regulations and FSAs, and amounts to a policy reversal that is procedurally insufficient under the Administrative Procedure Act (APA). Because such an inconsistent interpretation is impermissible, FHWA should return to its previous policy on digital billboards through rulemaking.

A. FHWA’s 2007 guidance is inconsistent with the plain language of federal regulations and FSAs.

Digital billboards, by definition, contain, include, or are illuminated by flashing, intermittent, or moving light(s). Webster’s Dictionary defines “flash” as “to emit ... or cause light to appear ... suddenly or intermittently,” “to communicate or display at great speed,” and “a sudden, brief, intense display of light.”²⁴ FHWA’s own Manual on Uniform Traffic Control Devices, which defines the standards used by road managers nationwide, defines flashing as “an operation in which a signal indication is turned on and off repetitively.”²⁵ Webster’s Dictionary

²⁴ WEBSTER’S THE NEW COLLEGIATE DICTIONARY 434 (3d ed. 2008).

²⁵ FEDERAL HIGHWAY ADMINISTRATION, MANUAL ON UNIFORM TRAFFIC CONTROL DEVICES 1A-13 (28) (2003), available at http://mutcd.fhwa.dot.gov/htm/2003r1r2/html_index.htm. Notably, when Congress exclusively allowed on-premise CEVMS in the 1978 HBA amendments, it acknowledged that “the Department of Transportation has characterized as a flashing light electronic information displays which neither flash nor animate state (sic)

defines “intermittent” as “stopping and starting at intervals,” or “not continuous,”²⁶ and “moving” as “causing or producing motion or action.”²⁷

Digital billboards “contain,” “include,” and are “illuminated by” thousands of computer-controlled LED lights that operate together to produce a full-screen display. Each individual LED light flashes or is intermittently lit to display a message.²⁸ More broadly, the billboard screen itself flashes a message or is lit intermittently every four to ten seconds as part of a continuous series of advertisements.²⁹ Even if each message is static, the whole screen and individual LED lights go on and off seven to fifteen times per minute. Because digital billboards can display a wide range of animation including full-motion video, the individual lights may go on and off many times within the four to ten seconds that the video is displayed.³⁰ Further, they can display animated graphics or transitions that appear to move on the screen. Hence, a digital billboard is a source of light and each LED light is a source of light; both the billboard and the individual lights flash or are intermittently lit, and can display a moving message.

FHWA staff agree that digital billboards are intermittent lights. As one staff member aptly described, “any illuminations which go on or off more than once a day are intermittent

information, but where the only movement is the periodic changing of information against a solid, colorless background.” H.R. Conf. Rep. 95-1797, at 91 (1978), *reprinted in* 1978 U.S.C.C.A.N. 6693, 6705. Furthermore, during debate the Senate “made clear that the change did not affect off-property signs.” A History of the Federal Outdoor Advertising Control Program, *supra* note 2.

²⁶ WEBSTER’S THE NEW COLLEGIATE DICTIONARY 593 (3d ed. 2008).

²⁷ WEBSTER’S THE NEW COLLEGIATE DICTIONARY 734 (3d ed. 2008).

²⁸ Red, yellow, and green lights function as clusters that are programmed to combine into different hues. Individual lights are illuminated to create different colors and messages, with each requiring a different combination of clusters to be lit in order to display the text and background of the message. Thus, every four to ten seconds, the individual LED lights flash on and off, or are lit intermittently.

²⁹ Memorandum from Gloria M. Shepherd, *supra* note 12 (stating that “[d]uration of each display is generally between 4 and 10 seconds”); Clear Channel Outdoor, Digital Outdoor Network, <http://www.clearchanneloutdoor.com/products/digital/don/index.htm> (stating that each message on its digital billboard is displayed for eight seconds) (last visited Feb. 19, 2010).

³⁰ See JERRY WACHTEL & ROSS NETHERTON, FED. HIGHWAY ADMIN., REPORT NO. FHWA/RD-80/051, SAFETY AND ENVIRONMENTAL DESIGN CONSIDERATIONS IN THE USE OF COMMERCIAL ELECTRONIC VARIABLE-MESSAGE SIGNAGE 54 (1980) (“[T]he industry’s own statements about the versatility of EVM displays should serve as an indication that such displays can be programmed to perform all of the flashing . . . effects that have been so heavily criticized by those within as well as outside the industry.”).

lights.... I am no attorney, but it is as clear as day and night to me, just as these signs are as clear at day and night to the traveler.”³¹ Another FHWA staff member agreed that even a light that simply turns on at night and off during the day could be considered an intermittent light by the purest definition.³² In fact, FHWA staff suggested that the 2007 guidance declare, “signs illuminated by light emitting diode (LED) appear to be comprised of intermittent lights”³³ and even drafted guidance that stated “this language [of HBA regulations and FSAs] prohibits signs which are illuminated by lights that permits the message of the advertising to be changed at reasonable intervals by electronic process or by remote control.”³⁴ Thus, according to the plain meaning of the words, and as understood by FHWA staff, a light that repetitively and briefly displays light at intervals is considered to flash or be intermittently lit. Because digital billboards are composed of such lights, they are explicitly prohibited in nearly every state.

The text of the prohibition also reveals that FHWA intended “flashing” or “intermittent” lights to include frequently-updated displays like digital billboards. FSAs prohibit flashing, intermittent, or moving lights, “except those giving public service information such as time, date, temperature, weather, or similar information.”³⁵ This indicates that signs displaying time, date, temperature, and weather are considered to contain, include, or be illuminated by flashing, intermittent, or moving light or lights, but are exempted from the prohibition because of their

³¹ E-mail from Catherine O’Hara to Don Keith, Janis Gramatins, Robert Black, Gerald Solomon (Aug. 28, 2007, 09:06 EST) (obtained via FOIA, on file with IPR).

³² E-mail from Don Keith, Right-of-Way Manager, Fed. Highway Admin. – Ill. Div., to Janis Gramatins, Robert Black, Catherine O’Hara (Aug. 28, 2007, 08:45 EST) (obtained via FOIA, on file with IPR).

³³ E-mail from Janis Gramatins to Gloria Shepherd, Gerald Solomon, Catherine O’Hara, Robert Black (Aug. 9, 2007, 8:43am) (obtained via FOIA, on file with IPR) (suggesting changes to the Draft Sept. 25, 2007 Memorandum).

³⁴ Draft Memorandum from Gloria M. Shepherd, Assoc. Admin’r for Planning, Env’t, and Realty, Fed. Highway Admin. to Div. Adm’rs (undated) (obtained via FOIA, on file with IPR) (circulated via e-mail from Janis Gramatins to Robert Black, Catherine O’Hara, Gerald Solomon (Aug. 30, 2007, 10:50 EST)).

³⁵ E.g., Federal/State Agreement between FHWA Administrator and Chairman of Wyoming State Highway Commission (Jun. 8, 1971), <http://www.nahba.org/members2/documents/statefiles/Wyoming/state%20federal%20agreement-wyoming.pdf>.

public service value. Even the most forgiving reading of the prohibition treats a time display, which changes once per minute at most, as a “flashing, intermittent, or moving light.”

Accordingly, a digital billboard that changes up to fifteen times more frequently than a time display must be considered a sign that uses flashing or intermittent lights. Because commercial advertisements do not provide a public service value, they cannot be exempted from the prohibition.

In fact, the context of the prohibition within other HBA regulations suggests that digital billboards are precisely the type of distracting sign that the regulation intends to prohibit. The regulations that accompany the prohibition on “flashing, intermittent, or moving light or lights” prohibit signs which “prevent[] the driver of a vehicle from having a clear and unobstructed view of official signs and approaching or merging traffic;” or could “cause glare or impair the vision of the driver of any motor vehicle, or otherwise interfere with any driver’s operation of a motor vehicle;” or “moves or has any animated or moving parts.”³⁶ Similarly, the criteria for lighting in FSAs are meant to minimize driver distraction.³⁷ As explained below, digital billboards utilize flashing, intermittent, and moving lights to attract drivers’ attention; this is exactly why federal regulations prohibit them. Thus, taken in the context of other prohibitions on light meant to protect driver safety, the prohibition on flashing, intermittent, or moving light must include digital billboards.

Finally, the purpose of the HBA suggests such a plain and broad reading of the regulatory prohibition on flashing, intermittent, or moving light or lights. According to its legislative

³⁶ National Standards for Regulation by States of Outdoor Advertising Adjacent to the Interstate System Under the 1958 Bonus Program General Provisions, 23 C.F.R. § 750.108(b), (d), (e) (2010).

³⁷ In addition to an identical regulation prohibiting signs that cause glare, the regulation following the prohibition on flashing, intermittent, or moving lights prohibits illumination that “interferes with the effectiveness of, or obscures an official traffic sign, device, or signal.” *E.g.*, Federal/State Agreement Between FHWA Administrator and Executive Director of Colorado State Department of Highways (July 9, 1971), <http://www.nahba.org/members2/documents/statefiles/Colorado/State-Federal%20Agreement-CO.pdf>.

history, the HBA was proposed “to stem the creation of new roadside blights and to reduce the existing obstructions and hazards created along many of our nation’s highways by signs and billboards.”³⁸ Likewise, the regulations set forth under the Act are intended “[t]o promote the safety, convenience, and enjoyment of public travel ... by controlling the erection and maintenance of outdoor advertising signs, displays, and devices adjacent to that system.”³⁹ Hence, the explicit regulatory prohibition should be read to prohibit rather than permit signs that may fall within the definition of flashing, intermittent, or moving light or lights.

Therefore, FHWA’s 2007 interpretation of “flashing, intermittent, or moving light or lights” is contrary to the plain language and intent of federal regulations and FSAs.⁴⁰ For that reason, FHWA should return to its pre-2007 policy.

B. FHWA’s 2007 guidance is procedurally insufficient under the Administrative Procedure Act.

FHWA did not believe its 2007 guidance would be a “significant change,” as the agency considered it to simply update FHWA’s 1996 guidance memorandum.⁴¹ However, the guidance was not a mere update to FHWA’s interpretation of the federal prohibition on “flashing, intermittent, or moving light or lights,” at 23 C.F.R. § 750.108(c) and in FSAs. In fact, it was a substantive change to FHWA’s interpretation which reverses FHWA’s long-standing policy and imposes obligations on states. Thus, the guidance functions as a rule that requires notice and

³⁸ 89 Cong. Rec. 23,891 (1965).

³⁹ National Standards for Regulation by States of Outdoor Advertising Adjacent to the Interstate System Under the 1958 Bonus Program Purpose, 23 C.F.R. § 750.101(a)(1) (2010).

⁴⁰ This is significant because a reviewing court will not give deference to an agency’s interpretation of a regulation if “an alternative reading is compelled by the regulation’s plain language or by other indication of . . . intent at the time of the regulation’s promulgation.” *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) (citing *Gardebring v. Jenkins*, 485 U.S. 415, 430 (1988) (internal quotations omitted)).

⁴¹ *E.g.*, E-mail from Gerald Solomon to Gloria Shepherd, Janis Gramatins, Robert Black (Sept. 12, 2007, 12:57 EST) (obtained via FOIA, on file with IPR) (“There is also no reason to believe that it will be considered ‘Significant Guidance.’”).

comment rulemaking under the APA.⁴²

Until 2007, FHWA interpreted the phrase “flashing, intermittent, or moving light or lights” to include off-premise digital billboards; accordingly, FHWA policy was to prohibit them.⁴³ FHWA changed its interpretation in 2007 to exclude digital billboards, thus changing its previous policy of prohibiting them. Therefore, the 2007 guidance is a substantive reversal of a previous interpretation of a rule, which now permits something that FHWA had previously prohibited. FHWA’s new interpretation as stated in the 2007 guidance has also changed the legal status of digital billboards under FSAs, which changes the rights of digital billboard owners to erect them. Because the guidance reverses FHWA policy, it amounts to a rule that should have been promulgated through rulemaking.

Further, the 2007 guidance functions as a rule by imposing obligations on states. Before the 2007 guidance, states were able to prohibit digital billboards under the language of federal regulations or the plain language of their FSA. States were not required to amend their agreements or seek consultation with FHWA to prohibit digital billboards because FHWA considered digital billboards prohibited by FSAs that ban “flashing, intermittent, or moving light or lights.” Now, because the 2007 guidance directs states to permit digital billboards regardless of the prohibition in their FSAs, states that formerly prohibited digital billboards must allow them. This not only thwarts states’ attempts to comply with the HBA by effectively controlling outdoor advertising, but it imposes a burden on states because now states that want to prohibit

⁴² Administrative Procedure Act, 5 U.S.C. § 553 (2006); *Paralyzed Veterans of Am. v. D.C. Arena*, 117 F.3d 579, 586 (D.C. Cir. 1997) (“Once an agency gives its regulation an interpretation, it can only change that interpretation as it would formally modify the regulation itself: through the process of notice and comment rulemaking.”).

⁴³ See *Alaska Professional Hunters Ass’n, Inc., v. FAA*, 177 F.3d 1030, 1031-32 (D.C. Cir. 1999) (where the FAA’s interpretation of a federal regulation was sufficiently evidenced by 30 years of practice within the agency and advice given by its regional divisions, even though the agency never issued a written statement of its interpretation and may have been unaware of the regional division’s advice.)

digital billboards must formally amend their laws or their FSAs to explicitly do so.⁴⁴ However, doing this is a formal process that requires state and federal resources.⁴⁵ The 2007 guidance also imposes a financial burden on states, to the extent that they must compensate digital billboard owners if the signs are later deemed illegal.⁴⁶ Thus, the 2007 guidance amounts to a rule that should have been promulgated through rulemaking.⁴⁷

FHWA's failure to follow notice and comment rulemaking procedures when issuing the 2007 guidance has resulted in several procedural deficiencies. First, FHWA did not offer an opportunity for public participation, as required by the APA.⁴⁸ The legislative history of the HBA suggests that Congress envisioned the public having meaningful input into state rules and regulation.⁴⁹ Even FHWA's 2007 guidance directs its regional divisions to "confirm that the State provided for appropriate public input ... in its interpretation of the terms of their FSA as allowing CEVMS in accordance with their proposed regulations, policies, and procedures."⁵⁰ Thus, FHWA erred by not allowing the public to comment on its 2007 guidance document.

Second, FHWA ignored the substantial differences between tri-vision signs and digital billboards.⁵¹ Though the 2007 guidance is purported to be the natural outgrowth of the 1996 guidance because both digital billboards and tri-vision signs consist of static messages that can

⁴⁴ Letter from Robert M. Callan, *supra* note 20.

⁴⁵ *Id.* (describing the seven-step process for amending a federal/state agreement).

⁴⁶ Highway Beautification Act, 23 U.S.C. § 131(g) (2006); Outdoor Advertising Policy, 23 C.F.R. § 750.302(b)(1) (2010).

⁴⁷ See 5 U.S.C. § 551(5) (rulemaking includes amending a rule, not just making a new one).

⁴⁸ *Id.* § 553(c).

⁴⁹ For example, the Secretary of Commerce assured the House Subcommittee on Roads that "[u]nder the administration bill there would be ample time for full consultation with the States, with the industry, and with other interested persons before any final determinations are made in this respect, and it would be expected that the refinement of these standards would be a continuing process" H.R. Rep. No. 89-1084, at 1 (1965), *reprinted in* 1965 U.S.C.C.A.N. 3710, 3714.

⁵⁰ Memorandum from Gloria M. Shepherd, *supra* note 12.

⁵¹ See *Motor Vehicles Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 44 (1983) ("[A]n agency rule would be arbitrary and capricious if the agency . . . entirely failed to consider an important aspect of the problem").

transition, digital billboards are substantially different than the tri-vision signs that were authorized by FHWA's 1996 guidance.⁵² Tri-vision signs are mechanically operated static billboards with no internal lighting that can rotate quickly and easily between copies. In contrast, digital billboards are akin to giant television screens. They rely on different forms of illumination than do tri-vision signs and are capable of displaying animation and video. Thus, the comparison between tri-vision signs and digital billboards ends at their ability to transition quickly between copy. By not considering new digital billboard technology, which presents serious concerns to highway beauty and traffic safety, FHWA failed to consider a significant aspect of permitting digital billboards.

Finally, FHWA contravened the APA when it failed to supply sufficient justification for changing its interpretation of "flashing, intermittent, or moving light or lights" and reversing its policy.⁵³ The 2007 guidance effectively deregulates digital billboards by allowing them after prohibiting them for decades. However, FHWA failed to provide its rationale for doing so beyond the brief statement that,

[t]he policy espoused in the 1996 Memorandum was premised upon the concept that changeable messages that were fixed for a reasonable time period do not constitute a moving sign. If the State set a reasonable time period, the agreed-upon prohibition against moving signs is not violated. Electronic signs that have stationary messages for a reasonably fixed time merit the same considerations.⁵⁴

As the Supreme Court held in *State Farm*, deregulation requires an agency to supply a reasoned analysis for a change in its course beyond what may be required when an agency chooses not to

⁵² In addition, FHWA's 1996 memorandum did not address FHWA's interpretation of "flashing, intermittent, or moving light or lights." Rather, the guidance stated that tri-vision signs were still not permitted to utilize such lights. Memorandum from Barbara K. Orski, *supra* note 19.

⁵³ *State Farm*, 463 U.S. at 52-57; 5 U.S.C. § 553.

⁵⁴ Memorandum from Gloria M. Shepherd, *supra* note 12.

initiate rulemaking.⁵⁵ Insofar as FHWA once prohibited digital billboards and now allows them, it must provide for public input and supply a sufficient justification that is consistent with the intent of the HBA.

These deficiencies make the 2007 guidance vulnerable to legal challenge, and entitle FHWA to “considerably less deference” by a court during judicial review.⁵⁶ Therefore, FHWA should return to its pre-2007 interpretation through rulemaking.

VI. Statutory Policy Arguments in Support of Request

FHWA’s 2007 interpretation of “flashing, intermittent, or moving light or lights” is inconsistent with the policies of the HBA, to promote highway safety and preserve scenic beauty. Because FHWA has a duty to carry out those policies as the administrator of the HBA, FHWA should return to its previous policy on digital billboards.

A. FHWA’s 2007 guidance is contrary to the HBA’s policy of promoting highway safety.

In accordance with the HBA, FHWA must control outdoor advertising “to promote the safety . . . and recreational value of public travel.”⁵⁷ Because digital billboards threaten the safety of drivers on the national highway system, FHWA’s 2007 guidance that permits them is contrary to the policy of the HBA. As a result, FHWA should issue a rule that restores its previous policy of prohibiting digital billboards under Bonus agreements or FSAs that prohibit “flashing, intermittent, or moving light or lights.”

The National Highway Traffic Safety Administration (NHTSA) studied in detail the link

⁵⁵ *State Farm*, 463 U.S. at 41. Further, just as “forces of change do not always or necessarily point in the direction of deregulation,” new technology does not necessitate FHWA to permit something it formerly prohibited. *Id.* at 42.

⁵⁶ *See* U.S. v. Mead Corp., 533 U.S. 218, 227–36 (2001) (stating that an inconsistent view promulgated without notice and comment is entitled to considerably less deference by a court than rules promulgated after notice and comment); *see also* Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) (stating that an interpretation’s “consistency with earlier and later pronouncements” will be used to determine the deference due).

⁵⁷ Highway Beautification Act, 23 U.S.C. § 131(a) (2006); Delegations to Federal Highway Administrator, 49 C.F.R. § 1.48 (c)(11) (2010).

between driver inattention and safety, and concluded that even short periods of inattention increase the risk of crash or near-crash accidents. In NHTSA's April 2006 study, *The Impact of Driver Inattention on Near-Crash/Crash Risk: An Analysis Using the 100-Car Naturalistic Driving Study Data*, researchers established a direct link between driver's eyeglance behavior and crash/near-crash risk by analyzing measurements of drivers' eyeglances within five seconds prior to and one second after the onset of a crash or near-crash.⁵⁸ The report found that driver distraction that is unrelated to the driving task is detrimental to driver safety.⁵⁹ Specifically, "eyeglances away from the forward roadway greater than 2 seconds, regardless of location of eyeglance, are clearly not safe glances as the relative near-crash/crash risk sharply increases to over two times the risk of normal, baseline driving";⁶⁰ accordingly, glances away from the forward roadway were a contributing factor to 60 percent of crashes, near-crashes, and incidents.⁶¹ In addition, "as length of eyeglance from the forward roadway increases, the odds of being in a crash or near-crash also increases."⁶² NHTSA's finding that "eyes off the forward roadway, especially eyeglances greater than 2 seconds, is a key issue in crash causation"⁶³ suggests that FHWA should be concerned about an object's potential for driver distraction when approving roadside advertising.

Digital billboards compel drivers' attention for longer than two seconds in several ways. Primarily, digital billboards require more than two seconds to comprehend because they "do not

⁵⁸ KLAUER, S.G., ET. AL., NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., DEP'T OF TRANSPORTATION, NO. DOT HS 810 594, *THE IMPACT OF DRIVER INATTENTION ON NEAR-CRASH/CRASH RISK: AN ANALYSIS USING THE 100-CAR NATURALISTIC DRIVING STUDY DATA 99* (2006), available at <http://www.nhtsa.dot.gov/staticfiles/DOT/NHTSA/NRD/Multimedia/PDFs/Crash%20Avoidance/2006/DriverInattention.pdf>.

⁵⁹ *Id.* at 103. Conversely, the report found that driving related tasks, such as checking the rearview mirror, enhance driver safety so long as the eyeglance is less than two seconds. *Id.* at 102-03.

⁶⁰ *Id.* at 101.

⁶¹ *Id.* at 110.

⁶² *Id.* at 103.

⁶³ *Id.*

generally adhere to good human factors practice that suggests restrictions to the amount of information conveyed on the sign.”⁶⁴ This is significant because drivers are naturally inclined to look at a message long enough to comprehend it.⁶⁵ For this reason, drivers will instinctively watch a sequence of images until it is complete.⁶⁶ Of even greater concern is that fact that digital billboard messages become more complex at times when driving demands the most concentration. As one outdoor advertiser touts, “[o]ur digital LED billboards can be scheduled to display simple messages for most of the day and then change to intricate graphics, text animation, and high quality videos during rush hour.”⁶⁷ The average video display of eight to ten seconds can therefore divert a driver’s attention from the forward roadway for up to five times longer than is safe.

As human factors expert Jerry Wachtel⁶⁸ aptly describes, “more than any previous technology used for roadside advertising, [digital billboards] are capable of commanding drivers’ attention by employing extremely high luminance levels, bright, rich colors, and a pattern of message display that may appear to flash.”⁶⁹ Hence, a primary component of digital billboards’ ability to distract drivers is the use of bright lights. Designed to be the brightest object in a driver’s view, digital billboards must project luminance that is brighter than the sun during the day, and they remain significantly brighter than the dark landscape at nighttime.⁷⁰ Not

⁶⁴ JERRY WACHTEL, NAT’L COOPERATIVE HIGHWAY RESEARCH PROGRAM, PROJECT NO. 20-7 (256), SAFETY IMPACTS OF THE EMERGING DIGITAL DISPLAY TECHNOLOGY FOR OUTDOOR ADVERTISING SIGNS 116 (2009).

⁶⁵ This phenomenon, known as the Zeigarnik Effect, describes the feelings of anxiety and the desire to complete the task that humans experience when initiated tasks are interrupted before completion. *Id.* at 117.

⁶⁶ *Id.*

⁶⁷ Advantage LED Lighting Signs, Digital LED Billboards (2009), <http://www.advantageledsigns.com/led-signs/digital-led-billboards/> (last visited Feb. 19, 2010).

⁶⁸ Jerry Wachtel is a certified professional ergonomist (CPE), and president of the Veridian Group. With Ross Netherton, Wachtel authored FHWA’s 1980 report on CEVMS.

⁶⁹ WACHTEL, *supra* note 64, at 116, 119.

⁷⁰ See *id.* at 152; Bob Van Enkenvoort, *Jones Signs takes the leap to digital billboards*, Green Bay Press-Gazette, Oct. 3, 2007, available at <http://www.jonessign.com/documents/PGLedArticle.pdf> (quoting Christine Martens, Jones Signs Nationwide senior sales director of outdoor advertising, “[t]hey are actually going to burn as bright as or

surprisingly, most public complaints about digital billboards concern their “excessive brightness, particularly at night, to the extent that they become the most conspicuous item in the visual field, and draw the eye away from other objects that need to be seen.”⁷¹ The conspicuousness of digital billboards preys upon drivers’ physiological response to brightness, which instinctively draws the eye to the brightest object in a field of view, thereby pulling drivers’ eyes away from the forward roadway.⁷² The brightness of digital billboards also distracts drivers from official signs, traffic signals, and brake lights of other vehicles.⁷³ Because digital billboards are bright enough to be visible before they are legible, they attract attention as soon as they enter the driver’s horizon.⁷⁴ Thus, a driver is needlessly distracted by the billboard long before she can decipher or comprehend the image.

Likewise, the transition from one message to the next is distracting to drivers. Once a driver notices that the images on the screen rotate in a series, she may be instinctively engaged until the series returns to the original image or glance back to see the new messages.⁷⁵ Further, as the New York Department of Transportation found, “the change [in message] itself is likely to be a distraction, especially among older drivers, causing the motorist to focus their attention on the sign, not the road.”⁷⁶ Because a motorist traveling at fifty-five miles per hour can typically see a digital billboard for sixty-two seconds, she can see the messages transition (and hence be

brighter than the sun during the day . . .”).

⁷¹ WACHTEL, *supra* note 64, at 117.

⁷² *Id.* at 119. This response is commonly known as the “moth effect.”

⁷³ *Id.* at 153.

⁷⁴ For example, some digital billboards are visible from up to six miles away. *Id.* at 117–18.

⁷⁵ *Id.* at 117 (“[I]t is thought that [the Zeignarik Effect] causes drivers to continue looking at the changing messages on [digital billboards] to learn what comes next.”).

⁷⁶ New York Dep’t of Transportation, Draft, Proposed Criteria for Regulating Off-Premise Changeable Electronic Variable Message Signs (CEVMS) in New York State, 1–2 (Apr. 11, 2008) (circulated via e-mail from Bruce Davis to New York Dep’t of Transportation Staff (Apr. 15, 2008, 15:28 EST)) (obtained via FOIA, on file with IPR). For this reason, the Department proposed a 62-second minimum duration requirement for each message so that a motorist traveling at 55 miles per hour would be unlikely to see the message change while the billboard is legible to her. *Id.*

distracted) nearly eight times in just over one minute.⁷⁷

In addition, the ability of digital billboards to be immediately and continuously updated takes advantage of the novel stimulus effect, which enables objects that have not been previously encountered to capture one's attention and lead to a response.⁷⁸ While drivers can learn to ignore static billboards for weeks or months at a time until the copy changes, digital billboards present new and different images every few seconds, and can display different message content throughout the day.⁷⁹ Thus, digital billboards are capable of presenting novel messages to a driver every time she approaches the sign.⁸⁰ Hence, digital billboards effectively and consistently compel the attention of drivers who would otherwise be able to remain focused on the driving task.

Notably, the outdoor advertising industry offers enthusiastic proof of how effectively digital billboards distract drivers. Clear Channel Outdoor lauds that "[t]he colors are vibrant, the images are crystal-clear and every few seconds a new design is displayed, keeping your audience engaged."⁸¹ CBS Outdoor calls digital billboards "eye-catching" and "unavoidable."⁸² In fact, "[n]ot only are electronic billboards full color and large format, but they also . . . display[] animation and in effect show[] specialized television commercials outdoors."⁸³ As opposed to

⁷⁷ *Id.*

⁷⁸ WACHTEL, *supra* note 64, at 118.

⁷⁹ *Id.*

⁸⁰ *Id.* The novel stimulus effect is clearly working, as Arbitron reported in a 2008 study that almost one-quarter of viewers say they notice the advertisement on a digital billboard *each* time they drive by. ARBITRON, INC., ARBITRON DIGITAL BILLBOARD REPORT: CLEVELAND CASE STUDY 3 (2008), *available at* www.arbitron.com/downloads/arbitron_digital_billboard_study.pdf.

⁸¹ Clear Channel Outdoor, Digital Outdoor Network, <http://www.clearchanneloutdoor.com/products/digital/don/index.htm> (last visited Feb. 19, 2010).

⁸² CBS Outdoor, Digital Billboards, <https://www.cbsoutdoor.com/media/billboards/digitalbulletins/> (last visited Feb. 19, 2010).

⁸³ Louis M. Brill, LED Billboards: Outdoor Advertising in the Digital Age, <http://signindustry.com/led/articles/2002-07-30-LBledBillboards.php3> (last visited Feb. 19, 2010).

static billboards that “won’t hold anyone’s attention” during rush hour,⁸⁴ digital billboards are “ideally suited for . . . video . . . and animated text and graphics display” because they offer “instant display of messages,” “multiple product advertisements on scrolling rotation,” and “day & night visibility.”⁸⁵ As a result, “the advertisements can . . . create the most ideal visual impact.”⁸⁶ The outdoor advertising industry seems to agree that digital billboards are effective at not just attracting, but *compelling*, drivers’ attention.

FHWA has explicitly recognized the potential safety risks of digital billboards. Citing “concerns about possible effects of further advances in technology and affordability of LED and other complex electronic message signs,” FHWA internally circulated draft guidance that prohibited digital billboards under the “flashing, intermittent, or moving light or lights” language present in HBA regulations and FSAs.⁸⁷ Indeed, former FHWA Administrator J. Richard Capka noted that, though FHWA lacked “definitive proof,” it shares Scenic America’s “concern about the potential safety impacts of CEVMS.”⁸⁸ Nonetheless, in the absence of definitive proof, FHWA chose to change its policy in favor of the outdoor advertising industry, permitting potentially hazardous digital billboards until research into safety effects is complete.

However, FHWA need not wait for definitive proof to issue a rule that prohibits digital billboards. In *Radio Ass’n on Defending Airwave Rights, Inc. v. U.S. Dep’t of Transp., Fed.*

⁸⁴ Advantage LED Lighting Signs, Digital LED Billboards, <http://www.advantageledsigns.com/led-signs/digital-led-billboards/> (last visited Feb. 19, 2010).

⁸⁵ MIC Electronics, Digital Billboards, http://www.micelectronics.com/Digital_Billboards.html (last visited Feb. 19, 2010).

⁸⁶ Advantage LED Lighting Signs, *supra* note 84.

⁸⁷ Draft Memorandum from Gloria M. Shepherd, *supra* note 34. In addition, another FHWA staff member suggested that FHWA’s approval of digital billboards be subject to the results of FHWA’s upcoming safety study. E-mail from Gerald Solomon to Gloria Shepherd, Janis Gramatins, Catherine O’Hara, Robert Black (Aug. 9, 2007 08:08 EST) (obtained via FOIA, on file with IPR) (suggesting that the guidance be subject to “[p]ending additional information that may result from resources such as a pending research project on ‘The Safety Effects of Electronic Advertising Signs on Driver Attention’. . .”).

⁸⁸ Letter from J. Richard Capka, Adm’r, Fed. Highway Admin., to Kevin Fry, President, Scenic America (Oct. 5, 2007).

Highway Admin., the court found that FHWA's decision to ban radar detectors was sufficiently justified by evidence that radar detector users are simply "more likely" to speed than non-users and that speeding increases severity of accidents.⁸⁹ Even though FHWA admitted that "unequivocal scientific proof establishing a direct causative linkage between radar detector use and [commercial motor vehicle] accidents may not exist,"⁹⁰ it had two studies from the Insurance Institute for Highway Safety and comments that suggested a connection between radar use and speeding, and speeding and severity of accidents.⁹¹ This information was sufficient for the court to conclude that FHWA's decision to "promulgat[e] rulemaking without finding that radar detector use causes or contributes to the occurrence of . . . accidents" was reasonable.⁹²

Likewise, FHWA has the authority to issue a rule based on existing evidence that proves less than a "direct causative link" between digital billboards and highway accidents. NHTSA's study proves that longer-than-two-second eyeglances are detrimental to driver safety, and Jerry Wachtel and the digital billboard industry provide proof that digital billboards are likely to compel such eyeglances. Thus, FHWA can reasonably conclude that prohibiting digital billboards will result in a lower likelihood of driver distraction, which will result in a lower risk of crash to drivers. Consequently, FHWA can and should prohibit digital billboards without waiting for unequivocal scientific proof that digital billboards cause or contribute to the occurrence of accidents. Because FHWA is statutorily directed to protect driver safety, it should act now to keep drivers safe from unnecessary harm.

⁸⁹ 47 F.3d 794, 802–03 (6th Cir. 1995), *cert. denied* 516 U.S. 811 (Oct. 2, 1995).

⁹⁰ *Id.* at 800.

⁹¹ *Id.* at 804.

⁹² *Id.* at 803–04.

B. FHWA's 2007 guidance is contrary to the HBA's policy of preserving natural beauty.

FHWA must also control outdoor advertising “to preserve natural beauty.”⁹³ Because digital billboards are contradictory to natural beauty, FHWA's 2007 guidance that permits them is contrary to the policy of the HBA. As a result, FHWA should issue a rule that restores its previous policy of prohibiting digital billboards under Bonus agreements or FSAs that prohibit “flashing, intermittent, or moving light or lights.”

The preservation of natural beauty is the heart of the HBA. The title and explicit policy of the Act make Congress' intent clear: highway beautification is paramount, and controlling outdoor advertising is essential to its achievement.⁹⁴ The legislative history of the Act also reveals that

the authors and administrators of America's highway programs have long been concerned with the highway's impact on the environment... These farsighted enactments [of the Federal-Aid Highway Acts and the HBA] reflected a growing awareness of the need to protect the highway corridor, and to blend the highway into the existing landscape.⁹⁵

In an era of increased travel and appreciation for the environment, the Act was “designed to help insure that the Nation's highways would be avenues to the true natural beauty of America.”⁹⁶

Billboards have long been recognized as a clear and obvious contradiction to scenic beauty. More than thirty years ago, the Environment and Public Works Committee acknowledged that “[v]isual blight caused by uncontrolled billboards is perhaps one of the most obvious, visible forms of environmental pollution.”⁹⁷ The Supreme Court has stated, and most courts agree, that “[i]t is not speculative to recognize that billboards by their very nature,

⁹³ Highway Beautification Act, 23 U.S.C. § 131(a) (2006); Delegations to Federal Highway Administrator, 49 C.F.R. § 1.48 (c)(11) (2010).

⁹⁴ 23 U.S.C. § 131(a).

⁹⁵ Staff of Comm. on Public Works, *supra* note 95, at 40.

⁹⁶ H.R. Rep. No. 89-1084, at 1 (1965), *reprinted in* 1965 U.S.C.C.A.N. 3710, 3711.

⁹⁷ Staff of Comm. on Public Works, *supra* note 95, at 40.

wherever located and however constructed, can be perceived as an ‘esthetic harm,’”⁹⁸ and “a legislative body reasonably can conclude that every large billboard adversely affects the environment, for each destroys a unique perspective on the landscape and adds to the visual pollution of the city.”⁹⁹

While the HBA explicitly recognizes that billboards must be controlled in order to preserve scenic beauty, the same is even more true for digital billboards. Digital billboards exacerbate the aesthetic harms posed by traditional billboards by utilizing bright lights and eye-catching graphics that deliberately stand out from the landscape. As FHWA’s *Final Report on Safety and Environmental Design Considerations in the Use of Commercial Electronic Variable-Message Signage* points out, “Harsh visual contrast with the ambient environment is generally considered to be unaesthetic The capability of CEVMS for commanding and holding attention permits them to dominate their surroundings, and involves the risk of incompatibility with the natural or man-made environment in which they reside.”¹⁰⁰ Because the conspicuousness that is so advantageous to outdoor advertisers is equally detrimental to the public’s enjoyment of scenic beauty, digital billboards are inherently harmful to the scenic environment.

FHWA, as the administrator of the HBA, must ensure that outdoor advertising is regulated in a manner consistent with the preservation of natural beauty.¹⁰¹ This means protecting the natural beauty of public roads from the private interests that threaten them. In commending the lawmakers who “stood up against private greed for public good” by passing the Act, President Johnson stated, “we are not going to allow [any private industry, organization,

⁹⁸ *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 510 (1981).

⁹⁹ *Id.* at 560 (Burger, J., dissenting).

¹⁰⁰ WACHTEL & NETHERTON, *supra* note 30, at 4.

¹⁰¹ Highway Beautification Act, 23 U.S.C. § 131(a) (2006); Delegations to Federal Highway Administrator, 49 C.F.R. § 1.48 (c)(11) (2010).

group, or association] to intrude their own specialized private objective on the larger public trust.

Beauty belongs to all the people.”¹⁰² As FHWA’s Final Report similarly recognized,

the declared purposes of the HBA require that an advertiser’s license to use innovative, attention-getting visual displays aimed at motorists on adjacent highways shall not be exercised at the expense of either traffic safety or damage to the public’s right to and investment in environmental quality.¹⁰³

Hence, President Johnson, Congress, and FHWA agree that the administrator of the HBA must prioritize the public’s enjoyment of natural beauty over private interests. Therefore, protecting natural beauty from dominance by commercial advertising is squarely within FHWA’s responsibility to carry out the policy of the HBA.

Because FHWA is statutorily directed to preserve natural beauty, it must protect the roadside environment from unnecessary scenic degradation. FHWA’s 2007 guidance fails to do so, and consequently fails to effectuate the policy of the HBA. FHWA can, however, continue to fulfill its duty under the HBA to preserve natural beauty by returning to its previous policy.

VII. Request for Moratorium and Rule

A. FHWA should institute a moratorium on the erection and maintenance of digital billboards until it determines a course of action or issues a final rule.

Before issuing a rule, FHWA should immediately issue a moratorium on the erection and maintenance of digital billboards. As detailed above, the 2007 guidance reversed FHWA’s long-standing policy on digital billboards without engaging in rulemaking. Issuing a moratorium on the effectiveness of the 2007 guidance, and therefore on the erection and maintenance of digital billboards, will restore the status quo as it was before the 2007 guidance impermissibly reversed it. FHWA can and should immediately restore the status quo until it formalizes its policy on

¹⁰² The President’s Remarks at the Signing Ceremony in the East Room at the White House, 1 WEEKLY COMP. PRES. DOC. 403, 414-16 (Oct. 25, 1965).

¹⁰³ WACHTEL & NETHERTON, *supra* note 30, at 60.

digital billboards through proper rulemaking procedures.

Moreover, as detailed above, digital billboards pose serious threats to driver safety and aesthetic beauty. Until FHWA's safety study is complete, its default position should not be to permit distractions that put drivers at unnecessary risk. As digital billboards are erected across the country, further delay by FHWA will exacerbate the economic burden resulting from the just compensation requirement of the Act. If FHWA deems digital billboards illegal as the result of its pending research study, digital billboards will have to be removed.¹⁰⁴ However, states and FHWA will have to provide just compensation for billboards that were legally erected but subsequently deemed illegal.¹⁰⁵ Thus, the longer FHWA waits to issue a rule, the more billboards will go up, and the more that will eventually need to be paid to outdoor advertisers for the removal of the billboards. Rather than put states and FHWA in such a fiscally perilous position, and in the meantime favor the outdoor advertising industry which will undoubtedly erect as many billboards as possible while they are still legal, FHWA should immediately stop erection and maintenance of digital billboards until it can issue a final rule.

B. FHWA should issue the requested definitional rule.

As the administrator of the HBA, FHWA has the authority to issue regulations that provide for effective state control of outdoor advertising.¹⁰⁶ A formal declaration of FHWA's policy on "flashing, intermittent, or moving light or lights" is essential to effective regulation by states. States need to know FHWA's policy in order to avoid penalties for violating their Bonus agreements or FSAs. If FHWA continues to toggle between permitting and prohibiting digital billboards, states will be forced to continually reassess or possibly amend their FSAs. In the

¹⁰⁴ 23 U.S.C. § 131(g).

¹⁰⁵ FHWA is responsible for 75 percent of each payment and states are responsible for 25 percent. 23 U.S.C. § 131(g); 23 C.F.R. § 750.302(b)(1).

¹⁰⁶ 23 C.F.R. § 750.701.

meantime, states will be forced to compensate owners of billboards that were lawfully erected but must be removed as a result of later guidance.¹⁰⁷ FHWA can protect states from this financial risk and enable them to effectively regulate outdoor advertising by issuing the requested rule.

Specifically, FHWA has the authority to formally interpret federal regulations and FSAs by issuing the requested rule. The 1996 and 2007 guidance demonstrate that, while Congress did not intend FHWA to occupy the field of outdoor advertising regulation,¹⁰⁸ interpreting federal regulations and FSAs is well within FHWA's authority. Importantly, it is states that want FHWA to step in. States have repeatedly expressed their desire for a national standard,¹⁰⁹ evidencing their need for a formal, consistent definition that will make their own FSAs more clear and easy to enforce. Thus, states recognize that the safety and natural beauty of national highways are issues of national importance that call for federal action. FHWA implicitly acknowledged this by issuing the 2007 guidance, which was intended to "achieve national consistency given the variations in Federal/State agreements, State law, and State regulations, policies and procedures."¹¹⁰ A definition in the form of a rule rather than guidance will provide the procedural safeguards outlined above, as well as a clearer and more consistent guideline by which states can regulate outdoor advertising.

The requested rule, meant to assist states in interpreting their Bonus agreements or FSAs, is also consistent with FHWA's current regulatory scheme under the HBA. In fact, Congress has allowed FHWA to regulate states even more specifically than it would through the requested rule. The HBA was amended in 1978 to state,

no such State transportation department shall be entitled to [Bonus] payments unless the

¹⁰⁷ 23 U.S.C. § 131(g); 23 C.F.R. § 750.302(b)(1).

¹⁰⁸ H.R. Rep. No. 89-1084, at 1 (1965), *reprinted in* 1965 U.S.C.C.A.N. 3710, 3718.

¹⁰⁹ Letters from States to FHWA, *supra* note 17.

¹¹⁰ Memorandum from Gloria M. Shepherd, *supra* note 12.

State maintains the control required under such agreement: *Provided*, That permission by a State to erect and maintain information displays which may be changed at reasonable intervals by electronic process or remote control and which provide public service information or advertise activities conducted on the property on which they are located shall not be considered a breach of such agreement or the control required thereunder.¹¹¹

Just as Congress has allowed FHWA to specifically regulate changeable message signs in the past, FHWA can do so now.

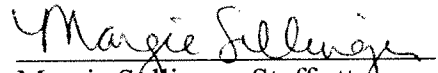
Thus, the requested rule will restore FHWA's previous policy while operating within FHWA's established and already-exercised authority.

VIII. Conclusion

Federal regulations, Bonus agreements, and FSAs explicitly prohibit signs that “contain, include, or are illuminated by flashing, intermittent, or moving light or lights” to protect the safety of motorists and the beauty of the highways they traverse. Quite simply, FHWA cannot rightfully allow digital billboards that contain, include, and are illuminated by flashing, intermittent, or moving lights. Moreover, because Congress intended FHWA to protect the public's interest in highway safety and scenic beauty, FHWA has a duty to prioritize the public's interest in safety and beauty over private, corporate interests in profit from commercial advertising. FHWA effectively did so until the release of its 2007 guidance. In light of the information presented herein, Petitioner thus asks FHWA to restore its previous policy and the policy of the HBA by issuing a moratorium and the requested rule.

¹¹¹ 23 U.S.C. § 131(j) (emphasis in original).

Respectfully submitted,


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