



INSTITUTE FOR JUSTICE

February 26, 2024

Via Email

Mayor Rick Blangiardi

530 South King Street, Room 300
Honolulu, Hawaii 96813
mayor@honolulu.gov

City Council

530 South King Street, Room 202
Honolulu, Hawaii 96813
tommy.waters@honolulu.gov
ekiaaina@honolulu.gov
rcordero@honolulu.gov
atupola@honolulu.gov
mweyer@honolulu.gov
ckysay@honolulu.gov
tdossantos-tam@honolulu.gov
valokimoto@honolulu.gov
atulba@honolulu.gov

Dana M.O. Viola

Corporation Counsel
530 South King Street, Room 110
Honolulu, Hawaii 96813
cor@honolulu.gov

Re: Local businesses cannot survive Honolulu's unconstitutional Portable-Sign Ban, ROH Sec. 21-7.30(c).

Mayor Blangiardi, City Council Members, and Corporation Counsel Viola:

My name is Daniel Nelson and I am an attorney for the Institute for Justice (IJ), a national nonprofit that fights in defense of people's constitutional rights, including the right to free speech. One area of particular interest for IJ is sign regulation, as signs are often the most affordable and effective way for small businesses to advertise. Over our more than 30-year history, IJ has successfully challenged unconstitutional sign code restrictions in federal courts across the country, including in the [Fourth](#), [Sixth](#), [Eighth](#), and [Ninth](#) Circuits. We also [work with cities](#) to amend their sign codes to forestall litigation.

I am writing because of concerns IJ has with Honolulu’s Sign Regulations—specifically, its Portable-Sign Ban. ROH 21-7.30(c). This ban will soon force the shutdown of many businesses in the Waikiki District.

Waikiki resident Stewart Chung reached out to us about the Portable-Sign Ban. As explained in more detail below, his local restaurant, EbiNomi, located in the Waikiki District, is not visible from any public right of way. The only way he can effectively attract tourists—his primary customers—is with a small, A-frame menu board. For years, EbiNomi displayed its menu board on its own private property without issue. But that all changed in September 2023, when a city inspector informed Stewart that the Portable-Sign Ban prohibits him from displaying his menu board.

Without the ability to direct customers to his restaurant, Stewart will soon be forced to close EbiNomi’s doors. The Honolulu City Council should amend its Sign Regulations so that EbiNomi and other businesses similarly hurt by the Portable-Sign Ban can stay open. Doing so would not merely be good policy, it is also what the Constitution requires, because the Portable-Sign Ban, in its current state, almost certainly violates the First Amendment.

EbiNomi is a modest restaurant that cannot survive the Portable-Sign Ban.

EbiNomi is a small restaurant specializing in comfort food from around the world. Stewart Chung and his brother, Andy, opened EbiNomi in 2020 to invest for their retirement.

Times were tough to start. They had opened just before the COVID-19 pandemic. But thanks to hard work, a dedicated staff, and popular dishes (most notably their take on the North Shore’s garlic shrimp) they made it through. Today, EbiNomi is [well-loved](#), [award-winning](#), and especially popular with tourists. Recently, Stewart and his brother even got the chance to highlight EbiNomi on [Hawaii News Now Sunrise](#).

In the past, EbiNomi placed an A-frame menu sign on private property near (not on) the public right of way to attract customers. The menu sign is vital for EbiNomi. Nestled in a private courtyard (across from Kūhiō Ave’s International Market Place), EbiNomi’s storefront is invisible to tourists walking by.¹ Those tourists are EbiNomi’s largest

¹ Specifically, EbiNomi is located at 2310 Kūhiō Ave Courtyard 138, Honolulu, HI 96815. EbiNomi is situated in the Waikiki District’s Apartment Precinct/Apartment Mixed-Use Subprecinct. See Waikiki Special District’s Design Guidelines 6, https://www.honolulu.gov/rep/site/dpp/dpp_docs/waikiki-special-district-guidebook.pdf.

customer base. And Stewart’s only means of attracting them to his hard-to-find restaurant (highlighted in the aerial image below) is with his menu sign.



So Stewart was devastated when, in September 2023, a local inspector came by and informed him that, due to the Portable-Sign Ban, he could no longer display his A-frame sign on private property beside the sidewalk. He feared EbiNomi’s sales would plummet without any visible signage. Sure enough, they did. Now he is losing money and struggling to pay rent.

Soon, Stewart will have to close EbiNomi’s doors for good. IJ has heard reports that other nearby, tucked-away businesses are likewise on the brink of closing after recently being forced to take their signs down. This hurts everybody: small business owners like Stewart and his brother, their employees, property owners (who will lose their tenants), and the Honolulu community at large.

Honolulu should amend its Sign Regulations to allow EbiNomi to use a portable sign.

We ask that Honolulu amend its Sign Regulations to allow EbiNomi to place, on private property, one A-frame sign as a menu board near the public right-of-way (as illustrated below). This simple amendment to the Sign Regulations would allow EbiNomi, and so many other local businesses, to continue to serve locals and tourists alike.



Amending the Sign Regulations in this way would be consistent with the proactive steps the Honolulu City Council has already implemented to address similar problems of business visibility in other contexts. For example, businesses in Waikiki’s resort mixed-use precinct are limited to “one business sign[] per building frontage.” Sec. 21-7.40(l)(2)(A). But the Sign Regulations sensibly expand the ordinary meaning of “building frontage” to include not just the portion of a building facing the street but also the portion facing a “parking area, walkway, or open space” accessible to the general public. Sec. 21-7.20. Similarly, other businesses lack visibility because they are “set back greater than 50 feet from the front property line.” The Sign Regulations have those businesses covered too, allowing them to erect a 24 sq. ft. (as opposed to a 12 sq. ft.) ground sign. *Compare* Sec. 21-7.40(g)(3)(A), *with id.* at (g)(5).

The Sign Regulations are missing a similar accommodation for businesses like EbiNomi, which are hidden from public view and in desperate need of a simple and low-cost way to alert customers to their presence. And the small menu board that EbiNomi has successfully used for this purpose in the past is less obtrusive than what Honolulu has allowed for other low-visibility businesses. For the sake of simple fairness, the Honolulu City Council should therefore stop enforcing the Portable-Sign Ban against businesses like EbiNomi and amend its Sign Regulations as soon as it can so that these businesses can survive.

Honolulu should amend its Portable-Sign Ban as it is almost certainly unconstitutional.

The Honolulu City Council should amend its Sign Regulation for this additional reason: the Portable-Sign Ban is almost certainly an unconstitutional ban on speech protected by the First Amendment. As explained below, the Portable-Sign Ban draws impermissible content-based distinctions between regulated and unregulated speech, subjecting it to the highest level of judicial scrutiny. But even if the Portable-Sign Ban were subject to the lowest potentially applicable level of judicial scrutiny—intermediate scrutiny—the ban could not survive.

1. The Portable-Sign Ban is an impermissible content-based restriction on speech.

The Portable-Sign Ban imposes a content-based restriction on protected speech. That makes the ban “presumptively unconstitutional.” *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015).

A restriction on speech is content based when it “target[s] speech based on its communicative content.” *Id.* To be sure, the Portable-Sign Ban is not *itself* content based, as it simply bans “any portable sign, except as otherwise permitted.” Sec. 21-7.30(c) (cleaned up). But the ban is subject to exceptions that *are* content based. And “where exceptions to a restriction of protected speech are based on content, the restriction itself is

based on content.” *Project Veritas v. Schmidt*, 72 F.4th 1043, 1057–58 (9th Cir. 2023) (cleaned up).

The Sign Regulations are replete with content-based exceptions to the Portable-Sign Ban. As just a few examples, the Sign Regulations allow:

- **Special Event Displays.** Signs which “advertise an opening, occasion, or particular event, and not an establishment, service, price, product, or commodity.” Sec. 27-7.20.
- **Real Estate Signs.** Signs which “advertis[e] the sale, rental, or lease of the premises on which the sign is displayed” and are similar in size (or larger) than A-frame signs. Sec. 27-7.20.
- **Flags.** Which include “emblems of on-premises business firms and enterprises.” Sec. 27-7.20.
- **Political Campaign Signs.** Sec. 27-7.60(b).

That these signs are allowed, but not EbiNomi’s, renders the Portable-Sign Ban content-based and subject to the highest level of judicial scrutiny, which it cannot survive. In fact, the ban mirrors a similar ban that the U.S. Supreme Court struck down in *Reed*. As here, the town ordinance in *Reed* banned outdoor signs yet contained various exemptions based on the content of the signs (*e.g.*, “political, ideological, and temporary event signs”). 576 U.S. at 169. The ordinance fell well short of the test applied to content-based restrictions—strict scrutiny—which demands that a content-based restriction on speech serve a “compelling interest and [be] narrowly tailored to achieve that interest.” *Id.* at 171. Even assuming interests of traffic safety and aesthetics were “compelling,” there was no reason to believe that the exempted signs were more aesthetically pleasing or less distracting to drivers. *Id.* at 172. The same is true here.

2. *The Portable-Sign Ban fails the lowest level of scrutiny it could be subject to.*

Even if the Portable-Sign Ban did not contain the content-based exemptions that subject it to strict scrutiny, it would still be subject to intermediate scrutiny. The ban would fail under that standard too. The Ninth Circuit case *Ballen v. City of Redmond*, 466 F.3d 736 (2006) shows why.

Like here, *Ballen* concerned a local restaurant (a bagel shop) that could not be seen from a main road and wanted to advertise its business with a portable sign. And, like here, the city ordinance in *Ballen* “bann[ed] the display of most portable and offsite signs” but made content-based exceptions for “real estate signs and other portable signs,” like “banners,” “construction signs,” “celebration displays,” “political signs,” and “temporary window signs.” *Id.* at 740. But *Ballen* was decided before the Supreme Court in *Reed* clarified that content-based distinctions in sign regulations were subject to strict scrutiny.

Thus, the Ninth Circuit reviewed the law under intermediate scrutiny. Despite applying this lower level of scrutiny, however, the Ninth Circuit still found the Portable-Sign Ban in *Ballen* unconstitutional because it banned more speech than needed to serve the city's stated interests of aesthetics and traffic safety. *Id.* at 743.

Here, the Portable-Sign Ban is even less justified than the ban held unconstitutional in *Ballen*. In *Ballen*, the bagel shop “hired an employee to stand on the sidewalk” to wear a sign and “direct[] ... passing motorists.” *Id.* at 740. Here, in contrast, EbiNomi wishes to place, on *private* property, a small, nonmoving menu board intended for pedestrians. EbiNomi's sign is thus both less obtrusive and poses less of a risk to traffic safety. Given that *Ballen* remains controlling precedent in the Ninth Circuit, in which Hawaii sits, there can be little doubt that Honolulu's Portable-Sign Ban, especially as applied to EbiNomi, is unconstitutional.

Conclusion

For these reasons, the City and County of Honolulu should stop enforcing the Portable-Sign Ban until it amends its Sign Regulations to allow businesses like EbiNomi to use a portable sign for their protected speech. As noted earlier, IJ has worked with several city councils to help bring their sign codes into compliance with the First Amendment. We would be happy to assist Honolulu in doing the same. And I would be happy to discuss this issue with you further—either by phone at (574) 310-4987 or email at dnelson@ij.org.

Sincerely,

A handwritten signature in black ink, appearing to read "Daniel Nelson". The signature is stylized, with a large, sweeping "D" and a long, horizontal stroke extending from the end of the name.

Daniel Nelson
Attorney
INSTITUTE FOR JUSTICE