No. _____

In the Supreme Court of the United States

AMERICAN FREEDOM DEFENSE INITIATIVE;
PAMELA GELLER; ROBERT SPENCER,
Petitioners,

v.

KING COUNTY,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

ROBERT JOSEPH MUISE
Counsel of Record
American Freedom Law Center
P.O. Box 131098
Ann Arbor, Michigan 48113
(734) 635-3756
rmuise@americanfreedomlawcenter.org

DAVID YERUSHALMI
American Freedom Law Center
1901 Pennsylvania Avenue NW
Suite 201
Washington, D.C. 20006
(855) 835-2352

Counsel for Petitioners

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTIONS PRESENTED

There is a conflict in the United States courts of appeals regarding the application of the First Amendment to the display of public-issue advertisements on government transit authority property.

1. Whether King County created a public forum by accepting for display on its property a wide array of controversial political and public-issue ads, including ads that address the same subject matter as Petitioners' anti-terrorism ad, and thus violated the First Amendment by rejecting Petitioners' ad based on its message.[*]

2. Regardless of the nature of the forum, whether King County's rejection of Petitioners' advertisement based on a claim that this public-issue ad was false or misleading violates the First Amendment.

3. Whether Petitioners must demonstrate that there are no alternative ways to express their public-issue message in order for the court to find irreparable harm based on King County's rejection of their ad.

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[*] This question is similar to the question presented in the petition filed in *American Freedom Defense Initiative v. Massachusetts Bay Transportation Authority*, Case No. 15-141, which is currently pending in this Court.

PARTIES TO THE PROCEEDING

The Petitioners are American Freedom Defense Initiative (AFDI), Pamela Geller, and Robert Spencer (collectively referred to as "Petitioners").

The Respondent is King County ("Respondent" or "County").

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JURISDICTION

The opinion of the court of appeals affirming the denial of Petitioners' request for a preliminary injunction was entered on August 12, 2015. App. 1. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Free Speech Clause of the First Amendment provides, "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I.

STATEMENT OF THE CASE

Petitioners filed a civil rights lawsuit against Respondent King County, challenging the County's rejection of their advertisement addressing the "Faces of Global Terrorism"—a permissible subject matter for the relevant forum.

At issue here is the application of the County's advertising guidelines to restrict Petitioners' speech on the basis that their public-issue ad was allegedly false or misleading. The district court denied Petitioners' motion for preliminary injunction, holding that the County's advertising space is a limited public forum and that its restrictions on Petitioners' speech were reasonable and viewpoint neutral. App. 21-33. A Ninth Circuit panel affirmed and also concluded that Petitioners could not show irreparable harm because there were presumably alternative forums for Petitioners to express their public-issue message. App. 7-17.

As set forth below, there is currently a split among the federal courts of appeals regarding the forum question, and the Ninth Circuit's conclusion that government officials can make falsity determinations on public-issue speech and its decision on irreparable harm in this First Amendment case are contrary to this Court's precedent and the precedents of other federal appeals courts.

STATEMENT OF FACTS

Petitioners Geller and Spencer co-founded AFDI, which is a nonprofit organization dedicated to freedom of speech. *See* App. 4. One of the ways in which Petitioners engage in their free speech activity is by

purchasing advertising space on government transit authority property in major cities throughout the United States, including Seattle, Washington.[1]

Respondent King County, a municipal corporation, operates a public transportation system of buses, consisting of more than 235 routes and serving approximately 400,000 passengers daily. App. 19.

The County leases space on the exterior of its buses for use as advertising space. Pursuant to its policy and practice, the County permits a wide variety of commercial, noncommercial, public service, public-issue, and political-issue advertisements on its advertising space.[2] This includes advertisements covering a broad spectrum of political views and social commentary, including advertisements addressing, *inter alia*, the hotly debated Israeli-Palestinian conflict and terrorism.[3]

Pursuant to its policy and practice, in 2013, the County accepted the State Department's "Faces of Global Terrorism" advertisement, which appeared as follows:

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[1] 9th Cir. ER 121.

[2] 9th Cir. ER 30-33, 35, 39-45, 56-59, 71-72; ER 118 ("Metro does not deny that its advertising policy allows for a range of speech, including a handful of controversial ads . . . .").

[3] 9th Cir. ER 30-33, 35, 39-45, 56-59, 71-72.

App. 5.

The State Department's "Faces of Global Terrorism" ad was displayed on County buses in or about June 2013. According to reports, the State Department withdrew the advertisement on its own after receiving some complaints that the ad allegedly demeaned or disparaged Muslims and people of color.[4] App. 5, 20. Yet, the FBI publishes an official listing of the world's most wanted global terrorists on its government website,[5] and at the time the Complaint was filed, of the thirty-two listed terrorists, thirty were individuals with Muslim names and/or were wanted for terrorism related to organizations conducting terrorist acts in the name of Islam.[6]

Pursuant to the County's advertising policy and practice, and particularly in light of the fact that the County permitted and displayed the State

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[4] According to the County, it had received a "small" "volume" of complaints about the State Department's advertisement while it was running. 9th Cir. ER 34 (noting that the "complaint volume was small").

[5] http://www.fbi.gov/wanted/wanted_terrorists/@@wanted-group-listing ("FBI Terrorist List")

[6] 9th Cir. ER 131-33, 135-75.

Department's "Faces of Global Terrorism" advertisement, AFDI submitted for approval on or about July 30, 2013, an advertisement that was substantively similar to the State Department's ad (hereinafter referred to as the "AFDI Advertisement"). App. 6.

The AFDI Advertisement appears as follows:

App. 6.

The AFDI Advertisement includes the identical pictures and names of the wanted global terrorists that appeared in the State Department's "Faces of Global Terrorism" ad. These pictures also appeared on the FBI's most wanted website, where the rewards are offered as well.[7]

The AFDI Advertisement presents a similar educational, political, and public service message as the State Department advertisement, but from a different viewpoint. For example, both ads alert the public of the importance of stopping global terrorism by raising awareness of the threat and encouraging citizens to communicate with the appropriate government agencies when they have information leading to the

[7] 9th Cir. ER 131-33, 135-75.

possible whereabouts of a global terrorist.[8] However, the AFDI Advertisement includes AFDI's political-ideological assessment that the majority of the FBI's most wanted terrorists are "jihadis." *See* App. 6. Indeed, AFDI submitted the ad to make a political point and not so it could be a mouthpiece for the federal government.

The message of the AFDI Advertisement is timely in light of current world events where global terrorists are engaging in violent jihad against America's national security interests throughout the world and at home.[9]

Despite accepting a wide range of controversial advertisements, including the very advertisement that served as the model for Petitioner's ad, the County rejected the AFDI Advertisement, claiming that it did not comply with sections 6.2.4, 6.2.8 and 6.2.9 of the County's Transit Advertising Policy, which are set forth below.

> 6.2.4 False or Misleading. Any material that is or that the sponsor reasonably should have known is false, fraudulent, misleading, deceptive or would constitute a tort of defamation or invasion of privacy.
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> 6.2.8 Demeaning or Disparaging. Advertising that contains material that demeans or disparages an individual, group of individuals or entity. For purposes of determining whether

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[8] 9th Circuit ER 125.

[9] 9th Cir. ER 125.

> an advertisement contains such material, the County will determine whether a reasonably prudent person, knowledgeable of the County's ridership and using prevailing community standards, would believe that the advertisement contains material that ridicules or mocks, is abusive or hostile to, or debases the dignity or stature of any individual, group of individuals or entity.
>
> 6.2.9 Harmful or Disruptive to Transit System. Advertising that contains material that is so objectionable as to be reasonably foreseeable that it will result in harm to, disruption of or interference with the transportation system. For purposes of determining whether an advertisement contains such material, the County will determine whether a reasonably prudent person, knowledgeable of the County's ridership and using prevailing community standards, would believe that the material is so objectionable that it is reasonably foreseeable that it will result in harm to, disruption of or interference with the transportation system.

App. 20-21.

The district court denied Petitioners' request for a preliminary injunction, finding that the forum at issue was a limited public forum and that the restrictions on Petitioners' speech were reasonable and viewpoint neutral. App. 21-33. The Ninth Circuit affirmed,

finding that the forum is a nonpublic forum[10] and that the restriction on Petitioners' speech as false or misleading was reasonable and viewpoint neutral. App. 7-17. The court declined to review the other restrictions. App. 15 ("We need not, and do not, reach Metro's other reasons for rejecting the ad.").

REASONS FOR GRANTING THE PETITION

A split among the federal courts of appeals is among the most important factors in determining whether certiorari should be granted. *See* Sup. Ct. R. 10(a). Additionally, the Court should grant review because this case presents important First Amendment issues that should be resolved definitively by this Court. *See* Sup. Ct. R. 10(c) (providing that review is appropriate when a lower court has "decided an important question of federal law that has not been, but should be, settled by this Court").

I. The Ninth Circuit's Forum Analysis Conflicts with the Authoritative Decisions of the Majority of Other Federal Courts of Appeals.

The threshold issue presented is whether the County's advertising space is a public forum, which exists when the government intentionally opens its property for expressive activity, *Perry Educ. Ass'n v. Perry Local Educators*, 460 U.S. 37, 45 (1983), or a nonpublic forum. As this Court stated, "[A] public

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[10] The Ninth Circuit stated that in light of this Court's decision in *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239 (2015), "the proper term likely is 'nonpublic forum.' . . . For that reason, we use the term 'nonpublic forum.'" App. 8 n.1.

forum may be created by government designation of a place or channel of communication for use by the public at large for assembly and speech, *for use by certain speakers*, or *for the discussion of certain subjects*." *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 802 (1985) (emphasis added).[11]

Under the facts of this case, the Second, Third, Sixth, Seventh, and D.C. Circuits would hold that the forum at issue is a public forum for Petitioners' speech, thereby subjecting the government's content-based restrictions to strict scrutiny, whereas the First and Ninth Circuits would not.

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[11] This Court's decision in *Arkansas Educational Television Commission v. Forbes*, 523 U.S. 666 (1998) (hereinafter "*AETC*"), underscores Petitioners' argument regarding the forum question. In *AETC*, the petitioner, a state-owned public television broadcaster, denied the request of respondent Forbes, an independent candidate with very little support, for permission to participate in a sponsored debate between major party candidates. The Court upheld the exclusion, finding that it was reasonable and viewpoint-neutral in that it was based on Forbes' *status* as a speaker (*i.e.*, he was not a serious candidate) and not the message he sought to convey. *Id.* at 682 (finding no "objections or opposition to his views"). Here, Petitioners, as paid advertisers, are part of the "class of speakers" for which the County's forum is open and available. And there is little doubt that had Forbes' status as a speaker made him eligible for the debate (*i.e.*, he was a serious candidate) but that he had been denied permission to participate because the sponsors deemed his political views false or misleading or demeaning and disparaging, the Court would have found a First Amendment violation.

While speech restrictions in traditional[12] and designated public forums are subject to the same heightened level of scrutiny,[13] it is a mistake to conflate the two forums. *See Am. Freedom Def. Initiative v. Mass. Bay Transp. Auth.*, 781 F.3d 571, 593 (1st Cir. 2015) (dissent) ("Building a constitutional framework around a category as rigid as 'traditional public forum' leaves courts ill-equipped to protect First Amendment expression in times of fast-changing technology and increasing insularity."). Indeed, the Ninth Circuit's approach to the forum analysis essentially does away with the designated public forum as a category and replaces it with the nonpublic forum.

In a nonpublic forum, speech restrictions need only be reasonable and viewpoint neutral, *Perry Educ. Ass'n*, 460 U.S. at 46, thereby granting the government "almost unlimited authority to restrict speech on its property." *See Am. Freedom Def. Initiative v. Mass. Bay Transp. Auth.*, 781 F.3d at 592 (dissent) (quoting *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 695 (1992) (Kennedy, J., concurring in the judgments)).

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[12] Public streets, sidewalks, and parks are typical examples of traditional public forums. *See Hague v. CIO*, 307 U.S. 496, 515 (1939).

[13] *Cornelius*, 473 U.S. at 800 ("[S]peakers can be excluded from a public forum only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest. . . . Similarly, when the government has intentionally designated a place or means of communication as a public forum speakers cannot be excluded without a compelling government interest.").

In *Lehman v. City of Shaker Heights,* 418 U.S. 298 (1974), a case in which the city's advertising program had never permitted any political or public-issue advertising, the Court found that the consistently enforced, twenty-six-year ban on political advertising was consistent with the government's role as a proprietor precisely because the government "limit[ed] car card space to *innocuous* and *less controversial* commercial and service oriented advertising." *Id*. at 304 (emphasis added); *see also Am. Freedom Def. Initiative v. Mass. Bay Transp. Auth.*, 781 F.3d at 591 (dissent) (rejecting the majority's forum analysis and noting that "*Ridley* also proclaimed that the MBTA's advertising program was 'indistinguishable' from the one described in *Lehman*, *id*. at 78, apparently ignoring the fact that the Shaker Heights advertising program in *Lehman* had never accepted any political or public issue advertising").

A majority of the circuit courts, which included the Ninth Circuit until just recently, have followed *Lehman* to conclude that transportation advertising space is a nonpublic forum when the government "consistently promulgates and enforces policies restricting advertising on its buses to commercial advertising." *Children of the Rosary v. City of Phoenix*, 154 F.3d 972, 978 (9th Cir. 1998).

As the Ninth Circuit correctly observed in *DiLoreto v. Downey Unified School District Board of Education,* 196 F.3d 958 (9th Cir. 1999):

> Government policies and practices that historically have allowed commercial advertising, but have excluded political and religious expression, indicate an intent not to

> designate a public forum for all expressive activity, but to reserve it for commercial speech. . . . However, where the government historically has accepted a wide variety of advertising on commercial and non-commercial subjects, courts have found that advertising programs on public property were public fora.

Id. at 965-66 (citing, *inter alia*, *Lehman*).

Despite this articulation of the law, the Ninth Circuit recently joined the First Circuit in its approach to the forum question. In *Seattle Mideast Awareness Campaign v. King County*, 781 F.3d 489, 498 (9th Cir. 2015), a divided panel held that the County's bus advertising space was a limited public forum even where the transit authority accepted controversial political and public-issue ads. In doing so, the Ninth Circuit acknowledged the circuit split. *See id*. ("We recognize that other courts have held that similar transit advertising programs constitute designated public forums.").

The majority of the federal appeals courts that have addressed this forum question, however, disagree with the First and Ninth Circuits. *See e.g., id*. (acknowledging circuit split).

The Second Circuit, for example, holds that "[d]isallowing political speech, and allowing commercial speech only, indicates that making money is the main goal. Allowing political speech, conversely, evidences a general intent to open a space for discourse, and a deliberate acceptance of the possibility of clashes of opinion and controversy that the Court in *Lehman* recognized as inconsistent with sound commercial

practice." *N.Y. Magazine v. Metro. Transp. Auth.*, 136 F.3d 123, 130 (2d Cir. 1998) (holding that the transit authority's advertising space was a designated public forum); *see also Am. Freedom Def. Initiative v. Metro. Transp. Auth.*, 880 F. Supp. 2d 456, 466 (S.D.N.Y. 2012) ("[T]he Court agrees with AFDI that this space is a designated public forum, in which content-based restrictions on expressive activity are subject to strict scrutiny.").

In *Christ's Bride Ministries, Inc. v. Southeastern Pennsylvania Transportation Authority,* 148 F.3d 242, 253 (3d Cir. 1998), the Third Circuit concluded that the transit authority's advertising space was a designated public forum, noting that "the purpose of the forum does not suggest that it is closed, and the breadth of permitted speech points in the opposite direction." *See also Am. Freedom Def. Initiative v. Se. Pa. Transp. Auth.*, No. 2:14-cv-5335, 2015 U.S. Dist. LEXIS 29571, *16 (E.D. Pa. Mar. 11, 2015) (finding "that SEPTA's advertising space constitutes a designated public forum").

In *Planned Parenthood Association / Chicago Area v. Chicago Transit Authority*, 767 F.2d 1225 (7th Cir. 1985), the Seventh Circuit concluded that the transit authority's advertising space was a designated public forum because the transit authority permitted "a wide variety" of commercial and non-commercial advertising.

And the Sixth Circuit similarly concluded that a transit authority's property is a designated public forum when it is open to political and public-issue advertisements, observing as follows:

> Acceptance of political and public-issue advertisements, which by their very nature generate conflict, signals a willingness on the part of the government to open the property to controversial speech, which the Court in *Lehman* recognized as inconsistent with operating the property solely as a commercial venture.

United Food & Commercial Workers Union, Local 1099 v. Sw. Ohio Reg'l Transit Auth., 163 F.3d 341, 355 (6th Cir. 1998) (hereinafter "*United Food*"); *see also Lebron v. Wash. Metro. Area Transit Auth.*, 749 F.2d 893, 896 (D.C. Cir. 1984) ("There is no doubt that the poster at issue here conveys a political message; nor is there a question that WMATA has converted its subway stations into public fora by accepting other political advertising."); *Am. Freedom Def. Initiative v. Wash. Metro. Area Transit. Auth.*, 898 F. Supp. 2d 73, 78-79 (D.D.C. 2012) ("Since WMATA conceded that it provides a public forum for advertising, the Court considers that aspect of the standard satisfied.").

Consequently, consistent with *Lehman* and the majority of federal appeals courts that have analyzed and followed its holding, the forum at issue here is a public forum for Petitioners' speech. *See Am. Freedom Def. Initiative v. Mass. Bay Transp. Auth.,* 781 F.3d at 591-92 ("I am in disagreement with the *Ridley* decision, and would have held that the MBTA, by opening its advertising facilities to all forms of public discourse, created a designated public forum akin to the fora discussed in *United Food*, *Christ's Bride*, *New York Magazine*, and *Planned Parenthood Association/ Chicago Area*, and distinguishable from the virtually

commercial-only fora addressed in *Lehman*, *Children of the Rosary*, and *Lebron* [*v. Nat'l R.R. Passenger Corp.* (Amtrak), 69 F.3d 650, 656 (2d Cir. 1995) (holding that a large billboard in New York City's Pennsylvania Station constituted a nonpublic forum where Amtrak had "never opened [the space] for anything except purely commercial advertising")]).

Here, the County accepts advertisements on controversial issues such as the Israeli-Palestinian conflict and terrorism—advertisements "which by their very nature generate conflict"—thereby "signal[ing] a willingness on the part of the government to open the property to controversial speech, which the Court in *Lehman* recognized as inconsistent with operating the property solely as a commercial venture." *See United Food*, 163 F.3d at 355.

Moreover, a forum analysis does not end simply because the government transit authority has adopted some restrictions on speech or employed these restrictions to reject certain advertisements. As stated by the Second Circuit:

> [I]t cannot be true that if the government excludes any category of speech from a forum through a rule or standard, that forum becomes *ipso facto* a non-public forum, such that we would examine the exclusion of the category only for reasonableness. This reasoning would allow every designated public forum to be converted into a non-public forum the moment the government did what is supposed to be

> impermissible in a designated public forum, which is to exclude speech based on content.

N.Y. Magazine, 136 F.3d 129-30.

And this is particularly the case where, as here, the government is attempting to impose a "truth" restriction on what it knows is controversial political and public-issue speech—an impermissible task to begin with. *See, e.g., N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 271 (1964) ("[First Amendment] protection does not turn upon the truth, popularity, or social utility of the ideas and beliefs which are offered.") (internal quotations and citation omitted).

Additionally, it is incorrect to conclude that the County's "truth" restriction is a restriction on an ad's subject matter (such as restrictions on advertisements for alcohol, tobacco, or political candidates) that might reasonably lead a court to conclude that this forum is closed to controversial matters. Rather, this restriction, particularly as applied in this case, is an impermissible viewpoint-based restriction on speech. At a minimum, it certainly *allows for* viewpoint discrimination, as evidenced here, and this alone is sufficient to render the advertising guideline unconstitutional. *See Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995) (observing that "[v]iewpoint discrimination is thus an egregious form of content discrimination" that is prohibited "even when the limited public forum is one of [the government's] own creation"); *Perry Educ. Ass'n,* 460 U.S. at 46 (stating that in a nonpublic forum, the government "may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to

suppress expression merely because public officials oppose the speaker's view").

In sum, it is without question that the nature of the property is compatible with Petitioners' expressive activity. *See Ridley v. Mass. Bay Transp. Auth.*, 390 F.3d 65, 76-77 (1st Cir. 2004) ("As to the nature of the property, the MBTA does run advertisements and so there is nothing inherent in the property which precludes its use for some expressive activity."). And it is undisputed that the County permits advertisements expressing messages on controversial political subject matter, including the very subject matter of Petitioners' ad that was rejected. Indeed, the County is willing to accept *some* political viewpoints that generate conflict—actions which speak louder than any written policy. *Grace Bible Fellowship, Inc. v. Maine Sch. Admin. Dist. No. 5,* 941 F.2d 45, 47 (1st Cir. 1991) (stating that when conducting a forum analysis, "actual practice speaks louder than words"). Therefore, because the forum is wholly suitable for Petitioners' speech, including its subject matter, it is a a public forum for Petitioners' ad.[14] Consequently, the County must demonstrate a *compelling* reason that is *narrowly*

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[14] Concluding that the forum is a designated public forum does not mean that the County is without any authority to make certain categorical restrictions, such as restrictions on advertisements for tobacco sales, pornography, or political campaigns. *Cornelius*, 473 U.S. at 802 ("[A] public forum may be created . . . for use by certain speakers, or for the discussion of certain subjects."). However, "if the concept of a designated open forum is to retain any vitality whatever, the definition of the standards for inclusion and exclusion must be unambiguous and definite." *Gregoire v. Centennial Sch. Dist.*, 907 F.2d 1366, 1375 (3d Cir. 1990).

tailored to justify its restraint on Petitioners' speech, *Cornelius*, 473 U.S. at 800—a burden it cannot meet.

The First and the Ninth Circuits support their forum conclusion based upon a faulty rationale. As stated by the Ninth Circuit: "Municipalities faced with the prospect of having to accept virtually all political speech if they accept any—regardless of the level of disruption caused—will simply close the forum to political speech altogether. First Amendment interests would not be furthered by putting municipalities to that all-or-nothing choice. Doing so would 'result in less speech, not more'—exactly what the Court's public forum precedents seek to avoid." *Seattle Mideast Awareness Campaign*, 781 F.3d at 499 (citation omitted); *see also Ridley*, 390 F.3d at 81 (stating that "the MBTA is not to be put to an 'all-or-nothing choice'") (internal citation omitted).

This reasoning is fundamentally flawed because it permits the government to pick and choose which "political speech" it deems acceptable, thereby doing more harm to the First Amendment, which is intended to operate as a brake on the government's power to censor speech, than closing the forum altogether. In short, the First Amendment is not concerned about the quantity of speech (*i.e.*, "result in less speech, not more"), but rather preventing government officials from being the arbiters of acceptable speech. The First and Ninth Circuits' reasoning thus opens a forum for certain political speech (and speakers) which the government favors by permitting government officials to make content-based restrictions based on nothing more than "reasonableness." Thus, rather than restricting government censorship of speech, the goal

of the First Amendment, these decisions grant the government broader powers of censorship. *Se. Promotions, Ltd. v. Conrad,* 420 U.S. 546, 553 (1975) ("[T]he danger of censorship and of abridgment of our precious First Amendment freedoms is too great where officials have unbridled discretion over a forum's use.").

In the final analysis, the federal appeals courts are split on the question of whether a government transit authority creates a public forum for speech when it opens its advertising space to controversial political or public-issue advertisements. This Court should resolve this circuit split—a division that has serious implications for the First Amendment.

II. The County's "False or Misleading" Restriction Violates the First Amendment.

The County's attempt to impose a "truthfulness" standard to political and public-issue speech is constitutionally infirm as a matter of law. *See, e.g., W.V. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion."); *N.Y. Times Co.*, 376 U.S. at 271 (stating that First Amendment protection "does not turn upon the truth . . . of the ideas and beliefs which are offered"); *see also United States v. Alvarez*, 132 S. Ct. 2537, 2564 (2012) (Alito, J., dissenting) (stating that "it is perilous to permit the state to be the arbiter of truth" "about philosophy, religion, history, the social sciences, the arts, and other matters of public concern"). As noted by Judge Bork, sitting on the D.C. Circuit, a "prior administrative restraint of distinctively political

messages on the basis of their alleged deceptiveness is unheard-of—and deservedly so." *Lebron*, 749 F.2d at 898-99 (Bork, J.).

Moreover, Petitioners' ad is not materially false in the first instance. It says nothing more factually than the State Department's "Faces of Global Terrorism" advertisement, which the County accepted. The lower courts' efforts to create some meaningful and material factual distinction between the two ads is misplaced, particularly when you consider that Petitioner's advertisement is public-issue speech and not a commercial advertisement.

In its decision upholding the "false or misleading" restriction as applied to Petitioners' ad, the court stated the following:

> But we emphasize the limited nature of our holding, which applies only to objectively and demonstrably false statements where the circumstances of the case do not give rise to an inference of unreasonableness or viewpoint-based discrimination.
>
> In that regard, we note that a hypothetical rejection of an ad for a trivial inaccuracy might give rise to an inference that the rejection was, in fact, unreasonable or viewpoint-based. For example, an advertisement stating in a chart that, in a given year, 963 abortions had been performed when, in fact, the correct number was 964 could, depending on all the circumstances, suggest an unreasonable or viewpoint-based rejection. The grounds of the rejection here, however, do not raise those concerns. The ad

> states in prominent text that the FBI offers a reward of up to $25 million. There is a considerable difference between the FBI, which operates under the jurisdiction of the Department of Justice, and the State Department, a separate federal agency; and the difference between $5 million and $25 million—five times as much—is not *de minimis* or irrelevant.
>
> Similarly, we note that rejections surviving constitutional scrutiny will, in most if not all cases, concern advertisements that can be corrected easily. Here, for example, Plaintiffs could have submitted a corrected advertisement that substituted "The State Department" for "The FBI" and "$5 million" for "$25 million"—or fixed the factual inaccuracies in countless other ways. An unreasonable response by Metro to an advertiser's attempt to correct factual inaccuracies could give rise to an inference of unreasonableness or viewpoint-based conduct. Here, however, Plaintiffs declined to discuss the rejection with Metro and chose to stand on their factually inaccurate ad.

App. 14. This reasoning, however, cannot withstand scrutiny, particularly in light of the facts of this case.

First, it is improper as a matter of First Amendment jurisprudence for the government to be the arbiter of truth or falsity when addressing public-issue speech, as noted above. Indeed, what precisely is a "trivial inaccuracy," and why is it that the government gets to decide this question in the context of public-issue speech? Moreover, how does the government

account for hyperbole or exaggeration in this context? If the hypothetical ad proposed by the Ninth Circuit said that abortion harms millions of women each year, is there a measure of proof that must be provided before the ad can be displayed, and what is that measure? It is simply wrong to grant the government such broad powers of censorship.

Second, the court is simply wrong that Petitioners' ad is materially false. Petitioners' advertisement, which states, in relevant part, that "The FBI Is Offering Up To $25 Million Reward If You Help Capture One Of These Jihadis," is materially true and accurate for numerous reasons. First, the FBI is involved with and actively promotes the Rewards for Justice Program. This is evidenced by the FBI's own website (www.fbi.gov/wanted/wanted_terrorists/), which itself makes the reward offers. Second, there is no material distinction between the FBI, which is a government agency that advertises the Rewards for Justice Program, and the State Department, which apparently administers the program. If a would-be collector of a reward contacted the FBI (which is likely the first government agency someone who had a brush with a terrorist on the FBI's most wanted list would contact), the person would be directed to the appropriate agency to collect his reward. The FBI and the State Department are agencies of the same federal government, and they obviously work in tandem to promote and administer the rewards program. Third, according to the FBI website, the Rewards for Justice program as a whole offers up to $25 million for assisting in the capture of global terrorists—ranging from $1 million to $25 million, with most of the rewards at the $5 million level. Petitioners'

advertisement does not assert that the reward for any one of the global terrorists pictured will be $25 million, or even $1, but that the highest amount offered to date under the program is "up to $25 million," just as the State Department's original advertisement stated (offering "up to $25 million reward"). Thus, the clear implication of the State Department's advertisement (which included the very same pictures of the very same terrorists) is the same as Petitioners' advertisement. And finally, Petitioners' advertisement expressly directs the public to contact the State Department for details about the Rewards for Justice program by providing the actual email address (rfj@state.gov), which is a State Department address, not an FBI address. In sum, it is objectively unreasonable to conclude that Petitioners' advertisement is "false or misleading."

Finally, the court is simply wrong about the fact that there is no evidence of viewpoint discrimination. The main reason the County rejected Petitioners' ad was because the County believes the ad is demeaning and disparaging toward Muslims—an inherently viewpoint-based claim.[15] And this was recently confirmed by the County's rejection of the below ad, which "fixed" the factual issues described by the Ninth Circuit.[16]

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[15] A challenge to a similar "demeaning and disparaging" speech restriction in the context of a free speech claim involving the advertising space of a government transit authority is currently pending review by this Court. *Am. Freedom Def. Initiative v. Mass. Bay Transp. Auth.*, Case No. 15-141

[16] This latest rejection will be the subject of an amended complaint.

The County's and the Ninth Circuit's disregard for the First Amendment compels review by this Court.

III. The Ninth Circuit's Conclusion Regarding Irreparable Harm Is Contrary to This Court's Precedent and the Precedent of Other Federal Appeals Courts, and It Threatens to Undermine First Amendment Protections.

In its decision affirming the denial of Petitioners' request for a preliminary injunction, the Ninth Circuit held that regardless of Petitioners' likelihood of success on the merits, the injunction should nonetheless be denied because Petitioners failed to demonstrate irreparable harm. The Ninth Circuit stated, in relevant part, the following:

> [B]ecause the district court's denial of a preliminary injunction constrains Plaintiffs' speech in only a small way: They cannot express their message on the sides of Metro's buses while this case is pending. Nothing in the district court's denial of a preliminary injunction prevents Plaintiffs from displaying the same ad in many alternative fora, for example, on Seattle billboards, in Seattle newspapers, on Seattle television stations, on Seattle buses run by companies other than Metro, or in many venues

> in other cities. The availability of alternative fora for Plaintiffs' speech weighs against the issuance of a preliminary injunction. . . . In sum, even if Plaintiffs had demonstrated some likelihood of success on the merits, they still would not have been entitled to a preliminary injunction because they have not shown that "extreme or very serious damage will result" from the denial of a preliminary injunction. . . .

App. 16-17 (internal citations omitted).

The Ninth Circuit's conclusion is contrary to controlling precedent. It is well established that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). *Newsom v. Norris*, 888 F.2d 371, 378 (6th Cir. 1989) ("The Supreme Court has unequivocally admonished that even minimal infringement upon First Amendment values constitutes irreparable injury sufficient to justify injunctive relief.") (citing *Elrod*); *Swartzwelder v. McNeilly*, 297 F.3d 228, 241 (3d Cir. 2002) (same); *B.H. v. Easton Area Sch. Dist.*, 725 F.3d 293, 323 (3d Cir. 2013) (en banc) ("The ban [on wearing bracelets that were part of a breast-cancer-awareness campaign] prevents B.H. and K.M. from exercising their right to freedom of speech, which 'unquestionably constitutes irreparable injury.'") (quoting *Elrod*). *Newsom v. Albemarle Cnty. Sch. Bd.*, 354 F.3d 249, 261 (4th Cir. 2003) (granting preliminary injunction and stating, "As to Newsom's irreparable injury, the Supreme Court has explained that 'loss of First Amendment freedoms, for even minimal periods of

time, unquestionably constitutes irreparable injury'") (quoting *Elrod*).

The Second Circuit explained this issue as follows:

> As for irreparable harm, the district court noted that if New York Magazine were correct as a matter of law that MTA's action unlawfully abridged its freedom of speech as guaranteed by the First Amendment, New York Magazine established irreparable harm. The "'loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.'" *Deeper Life Christian Fellowship, Inc. v. Board of Educ.*, 852 F.2d 676, 679 (2d Cir. 1988) (quoting *Elrod v. Burns*, 427 U.S. 347, 373, 96 S. Ct. 2673, 2689, 49 L. Ed. 2d 547 (1976)). As the district court correctly found that the facts presented constitute a violation of New York Magazine's First Amendment freedoms, New York Magazine established *a fortiori* both irreparable injury and a substantial likelihood of success on the merits.

N.Y. Magazine, 136 F.3d at 127; *see also Sindicato Puertorriqueño de Trabajadores v. Fortuño*, 699 F.3d 1, 11 (1st Cir. 2012) ("[I]rreparable injury is presumed upon a determination that the movants are likely to prevail on their First Amendment claim.").

The Ninth Circuit's decision is contrary to this Court's precedent and the precedent of the majority of other federal appeals courts, and it will ultimately undermine the protections afforded by the First Amendment by imposing a nearly insurmountable, and entirely unnecessary and improper, burden upon those

parties seeking a preliminary injunction to protect their right to free speech.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

ROBERT JOSEPH MUISE
Counsel of Record
American Freedom Law Center
P.O. Box 131098
Ann Arbor, MI 48113
(734) 635-3756
rmuise@americanfreedomlawcenter.org

DAVID YERUSHALMI
American Freedom Law Center
1901 Pennsylvania Ave. N.W. Suite 201
Washington, D.C. 20006
(646) 262-0500
dyerushalmi@americanfreedomlawcenter.org

Counsel for Petitioners

APPENDIX

APPENDIX

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 14-35095
D.C. No. 2:13-cv-01804-RAJ

[Filed August 12, 2015]

AMERICAN FREEDOM DEFENSE INITIATIVE; PAMELA GELLER; ROBERT SPENCER, *Plaintiffs-Appellants*,	)
v.	)
KING COUNTY, *Defendant-Appellee*.	)

Appeal from the United States District Court
for the Western District of Washington
Richard A. Jones, District Judge, Presiding

Argued June 15, 2015
Resubmitted August 5, 2015
San Francisco, California

Filed August 12, 2015

Before: Michael Daly Hawkins, Susan P. Graber, and Ronald M. Gould, Circuit Judges.

SUMMARY*

Civil Rights

The panel affirmed the district court's denial of a preliminary injunction in an action brought under 42 U.S.C. § 1983 by plaintiffs, American Freedom Defense Initiative and two individuals, after King County's public transit agency, Metro, rejected plaintiffs' "Faces of Global Terrorism" advertisement, which plaintiffs sought to have displayed on the exterior of Metro's buses.

Applying *Seattle Mideast Awareness Campaign v. King County*, 781 F.3d 489 (9th Cir. 2015), the panel first held that plaintiffs had not demonstrated a likelihood of success on their claim that Metro's rejection of their ad violated the First Amendment's guarantee of the freedom of speech. The panel held that the advertising space on buses under the 2012 transit advertising policy was a nonpublic forum, and that Metro's rejection of plaintiffs' ad, on the ground that it was false, likely was reasonable and viewpoint neutral.

The panel also held that plaintiffs had not demonstrated irreparable harm. The panel determined that the district court's denial of a preliminary injunction constrained plaintiffs' speech in only a small way: they cannot express their message on

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

the sides of Metro's buses while their case is pending. The panel stated that nothing in the district court's denial of a preliminary injunction prevented plaintiffs from displaying the same ad in many alternative fora.

COUNSEL

Robert Joseph Muise (argued), American Freedom Law Center, Ann Arbor, Michigan; and David Yerushalmi, American Freedom Law Center, Washington, D.C., for Plaintiffs-Appellants.

David J. Hackett (argued) and Linda M. Gallagher, Senior Deputy Prosecuting Attorneys, Seattle, Washington, for Defendant-Appellee.

Sarah A. Dunne, Legal Director, and La Rond M. Baker, ACLU of Washington Foundation; and Venkat Balasubramani, Focal PLLC, Seattle Washington, for Amicus Curiae American Civil Liberties Union of Washington.

OPINION

GRABER, Circuit Judge:

Defendant King County's public transit agency, Metro, operates an extensive public transportation system in the greater Seattle metropolitan area, with the primary purpose of providing safe and reliable public transportation. Like many transit agencies, Metro finances its operations in part by selling advertising space, including on the exteriors of its buses. Advertisements must meet guidelines specified in Metro's transit advertising policy. In 2013, Metro rejected an advertisement submitted by Plaintiff

American Freedom Defense Initiative, a nonprofit entity headed by Plaintiffs Pamela Geller and Robert Spencer, because Metro concluded that the ad failed to meet the guidelines. Plaintiffs declined to discuss the rejection with Metro and, instead, filed this action under 42 U.S.C. § 1983. Arguing that Metro's rejection violated the First Amendment, Plaintiffs sought a preliminary injunction requiring Metro to publish the ad. The district court denied the motion, and Plaintiffs filed this interlocutory appeal. Because we conclude that the district court did not abuse its discretion, *Friends of the Wild Swan v. Weber*, 767 F.3d 936, 942 (9th Cir. 2014), we affirm.

FACTUAL AND PROCEDURAL HISTORY

Metro's 2012 transit advertising policy, which was in effect at all times relevant to this appeal, requires that ads on Metro's buses meet certain substantive criteria. In general, advertisements are allowed unless they fall within one of the following eleven categories listed in section 6.2 of the policy:

1. Political campaign speech
2. Tobacco, alcohol, firearms, and adult-related products and services
3. Sexual or excretory subject matter
4. False or misleading
5. Copyright, trademark, or otherwise unlawful
6. Illegal activity
7. Profanity and violence

8. Demeaning or disparaging

9. Harmful or disruptive to transit system

10. Lights, noise, and special effects

11. Unsafe transit behavior

Metro enforces the criteria by screening advertisements for compliance with the policy.

In 2013, the United States Department of State submitted the following advertisement:

Metro reviewed the advertisement, concluded that it met the transit advertising policy's substantive criteria and, accordingly, approved it for display on the exterior of Metro's buses.

After the ad began appearing on bus exteriors, Metro received a small number of complaints from the public, including from a member of Congress and at least two community leaders. The complaints characterized the ad as offensive and expressed concerns that the ad would increase mistreatment of racial, ethnic, and religious minorities who have a similar appearance or name to the persons shown in the ad. In response to the complaints, Metro began a process of reevaluating its approval of the ad. Before

that reevaluation concluded, the State Department voluntarily retracted the ad.

The next month, Plaintiffs submitted their own advertisement, which is very similar—but not identical—to the State Department's ad:

Metro rejected the ad because, in Metro's view, it failed to comply with sections 6.2.4, 6.2.8, and 6.2.9 of the transit advertising policy. Those provisions prohibit advertisements that are false or misleading, demeaning or disparaging, or harmful or disruptive to the transit system.

Plaintiffs then filed this action under 42 U.S.C. § 1983. Plaintiffs allege that Metro's rejection of the ad violated their constitutional rights of free speech, equal protection, and due process. Plaintiffs moved for a preliminary injunction on the ground that they are likely to prevail on their First Amendment claim. The district court denied the motion, concluding that Plaintiffs had established none of the requirements for a preliminary injunction. Plaintiffs timely filed this interlocutory appeal.

We initially deferred submission pending this court's resolution of *Seattle Mideast Awareness Campaign ("SeaMAC") v. King County*, 781 F.3d 489

(9th Cir. 2015). After that decision upheld Metro's rejection of a public-issue advertisement under an earlier version of Metro's advertising policy, we ordered supplemental briefing on the effect of that case. We now affirm.

DISCUSSION

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

A. Likelihood of Success on the Merits

Plaintiffs argue that they are likely to prevail on the merits of their claim that Metro's rejection of the ad violated the First Amendment's guarantee of the freedom of speech. Our recent decision in *SeaMAC* guides our analysis. That case concerned Metro's rejection of a proposed anti-Israel advertisement under an earlier version of Metro's transit advertising policy. *SeaMAC*, 781 F.3d at 493–95. Metro had rejected the ad, in part on the ground that the ad was harmful or disruptive to the transit system. *Id.* at 493 & n.1, 495. SeaMAC sued under 42 U.S.C. § 1983, alleging a violation of the First Amendment. *Id.* at 495. The district court granted summary judgment to King County, and SeaMAC appealed. *Id.*

We first considered, at great length, the type of forum that Metro had created on the exteriors of its buses. *Id.* at 495–99. We held that Metro had created only a nonpublic forum and not a designated public

forum.[1] *Id*. at 498. We clarified that, even in a nonpublic forum, the government may not impose "whatever arbitrary or discriminatory restrictions on speech it desires[;] . . . any subject-matter or speaker-based limitations must still be reasonable and viewpoint neutral." *Id.* at 499. We then held that Metro's application of the prohibition against ads considered harmful or disruptive to the transit system met both requirements. *Id.*

Under the heading of the "reasonableness" requirement, *SeaMAC* rejected three separate arguments that are relevant here. First, we held that the standard was reasonable "in light of the purpose served by the forum" because the intended purpose of Metro's buses "is to provide safe and reliable public transportation," and prohibiting harm or disruption to that purpose is reasonable. *Id.* at 499–500. Second, we held that the standard is "sufficiently definite and objective to prevent arbitrary or discriminatory enforcement by County officials," chiefly because the standard is tied to an objectively measurable criterion: whether the ad caused harm or disruption to the

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[1] We noted in *SeaMAC* that the Supreme Court and this court have used the terms "limited public forum" and "nonpublic forum" interchangeably to describe areas that fall short of a classification that warrants heightened scrutiny. 781F.3dat 496n.2. Noting that "[t]he label doesn't matter," we chose to use the term "limited public forum." *Id.* We agree that the label is immaterial, because the relevant question is whether we apply heightened scrutiny. But, in light of the Supreme Court's recent decision in *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239 (2015), the proper term likely is "nonpublic forum." *See id.* at 2250–51 (discussing the types of fora). For that reason, we use the term "nonpublic forum."

transit system. *Id.* at 500. Third, we held that we must ensure that the perceived threat to the transit system was legitimate: "We must independently review the record, without deference to the threat assessment made by County officials, to determine whether it shows that the asserted risks were real." *Id.* at 500–01 (internal quotation marks and brackets omitted). In that regard, we agreed with Metro's assessment of disruption to the transit system because of the significant number, and serious nature, of the threats that Metro had received. *Id.* at 501; *see id.* at 494–95 (detailing the threats Metro received and their effect on Metro's operations). Finally, we held that Metro's rejection of the proposed ad was viewpoint neutral, primarily because Metro decided to reject all pending ads on the topic, both pro-Israel and pro-Palestine. *Id.* at 501–03.

Turning to the case at hand, Plaintiffs first contend that the advertising space on buses is a designated public forum. We disagree. As noted above, we held in *SeaMAC* that the ad space under the earlier version of Metro's transit advertising policy was a nonpublic forum only. The earlier policy and the 2012 policy differ slightly, but those differences either confirm that Metro intended to create a nonpublic forum or have no effect on the forum analysis.

In conducting the forum analysis, "we focus on the government's intent." *Id.* at 496. The 2012 policy states, in a lengthy section dedicated to addressing the type of forum created, that "the County does not intend its acceptance of transit advertising to convert [its ad spaces] into open public forums." *See Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 789,

803 (1985) ("We will not find that a public forum has been created in the face of clear evidence of a contrary intent . . . ."); *see also Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 680 (1998) (holding that, "with the exception of traditional public fora, the government retains the choice of whether to designate its property as a forum for specified classes of speakers"). Additionally, all three of the factors discussed by *SeaMAC* are identical under the earlier and current policies: (1) Metro adopted a pre-screening process (the policy at issue); (2) Metro has rejected a range of proposed ads, including other public-issue ads; and (3) the nature of the government property—space on buses whose primary purpose is to provide safe and efficient public transportation—suggests a nonpublic forum. *SeaMAC*, 781 F.3d at 497–98; *see also Walker*, 135 S. Ct. at 2251 (holding that the fact that "the State exercises final authority over [content]. . . militates against a determination that Texas has created a public forum"). Accordingly, we conclude that the advertising space on Metro's buses under the 2012 transit advertising policy is a nonpublic forum.

Because it has created a nonpublic forum only, Metro's rejection of Plaintiffs' advertisement must be reasonable and viewpoint neutral. *SeaMAC*, 781 F.3d at 499. Metro rejected Plaintiffs' advertisement in part because it concluded that the ad violated section 6.2.4 of the 2012 policy. That section prohibits advertisements in the following category:

> *False or Misleading*. Any material that is or that the sponsor reasonably should have known is false, fraudulent, misleading, deceptive or would

> constitute a tort of defamation or invasion of privacy.

The first "reasonableness" criterion asks whether that standard is reasonable "in light of the purpose served by the forum." *SeaMAC*, 781 F.3d at 499 (internal quotation marks omitted). The purpose of Metro's transit system is to provide safe and efficient public transportation to its customers. Public transit riders are, by necessity, a "captive audience." *Lehman v. City of Shaker Heights*, 418 U.S. 298, 302 (1974) (four-justice plurality) (internal quotation marks omitted); *id.* at 307 (Douglas, J., concurring); *see also Children of the Rosary v. City of Phoenix*, 154 F.3d 972, 977 (9th Cir. 1998) (holding that this concern applies to advertisements on bus exteriors). Metro has an interest in preventing the dissemination of false information to a captive audience that it has created by providing public transit services. Rules designed to avoid "imposing upon a captive audience" further a "reasonable legislative objective[]" in a nonpublic forum. *Lehman*, 418 U.S. at 304. Accordingly, Metro's prohibition on false ads likely is sufficiently reasonable in light of the purpose served by Metro's buses. *See Int'l Soc'y for Krishna Consciousness of Cal., Inc. v. City of Los Angeles*, 764 F.3d 1044, 1052 (9th Cir. 2014) (holding that a prohibition on the in-person solicitation of funds from airport travelers in a nonpublic forum was reasonable given the "risk of deceit"); *see also Cornelius*, 473 U.S. at 808 ("The Government's decision to restrict access to a nonpublic forum need only be *reasonable*; it need not be the most reasonable or the only reasonable limitation.").

The second reasonableness criterion is that the standard must be "sufficiently definite and objective to prevent arbitrary or discriminatory enforcement by County officials." *SeaMAC*, 781 F.3d at 500. Plaintiffs properly point out that truth or falsity may often be in the eye of the beholder. For example, whether God exists can be considered a question of metaphysics or personal belief. Whatever merit that observation has in the abstract, however, there are also some subjects that can be assessed for factual accuracy.

This case provides a good example. Plaintiffs' proposed ad states, in prominent text: "The FBI Is Offering Up To $25 Million Reward If You Help Capture One Of These Jihadis." That statement is demonstrably and indisputably false. The FBI is not offering a reward up to $25 million for the capture of one of the pictured terrorists. The FBI is not offering rewards at all, and the State Department offers a reward of at most $5 million, not $25 million, for the capture of one of the pictured terrorists.[2]

Plaintiffs do not, and cannot, refute those basic facts. Instead, Plaintiffs speculate that the factual inaccuracies are not relevant because, for example, someone calling the FBI to collect a reward will likely be directed to the State Department. In addition to being speculative, Plaintiffs' assertions are beside the point. It is indisputable that Plaintiffs' proposed ad is plainly inaccurate as a simple matter of fact. As applied here, then, section 6.2.4 likely is "sufficiently

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[2] The State Department does offer a reward up to $25 million for the capture of some persons, but not for one of the persons pictured in Plaintiffs' ad.

definite and objective to prevent arbitrary or discriminatory enforcement by County officials." *SeaMAC*, 781 F.3d at 500.

For the same reasons, the third "reasonableness" criterion—whether an independent review of the record supports Metro's conclusion that the ad is false—also is met. As just explained, two prominent statements in Plaintiffs' proposed advertisement are indisputably false.

The Supreme Court's decision in *New York Times v. Sullivan*, 376 U.S. 254 (1964), is not to the contrary. In that case, the Court held that the government could not punish false private speech about "the official conduct of public officials." *Id.* at 268. *New York Times* does not bear on whether the government may prohibit demonstrably false statements in a nonpublic forum created by the government. King County could not, of course, extend its prohibition on false speech to, for example, traditional public fora or private publications. But Plaintiffs have not cited—and we have not found—any case suggesting that the holding of *New York Times* applies to reasonable restrictions in a nonpublic forum. We decline to do so here. Because Metro's application of the accuracy standard likely meets all three "reasonableness" criteria announced in *SeaMAC*, we hold that Metro's rejection of the ad for inaccuracy likely was reasonable.

Finally, we conclude that Metro's rejection of the ad for inaccuracy likely was viewpoint neutral. Nothing in the record suggests either that Metro would have accepted the ad with the same inaccuracy if only the ad had expressed a different viewpoint or that Metro has accepted other ads containing false statements.

In sum, we agree with the district court that Plaintiffs have not demonstrated a likelihood of success on the merits, because Metro's rejection of the ad on the ground of falsity likely was reasonable and viewpoint neutral. But we emphasize the limited nature of our holding, which applies only to objectively and demonstrably false statements where the circumstances of the case do not give rise to an inference of unreasonableness or viewpoint-based discrimination.

In that regard, we note that a hypothetical rejection of an ad for a *trivial* inaccuracy might give rise to an inference that the rejection was, in fact, unreasonable or viewpoint-based. For example, an advertisement stating in a chart that, in a given year, 963 abortions had been performed when, in fact, the correct number was 964 could, depending on all the circumstances, suggest an unreasonable or viewpoint-based rejection. The grounds of the rejection here, however, do not raise those concerns. The ad states in prominent text that the FBI offers a reward of up to $25 million. There is a considerable difference between the FBI, which operates under the jurisdiction of the Department of Justice, and the State Department, a separate federal agency; and the difference between $5 million and $25 million—five times as much—is not de minimis or irrelevant.

Similarly, we note that rejections surviving constitutional scrutiny will, in most if not all cases, concern advertisements that can be corrected easily. Here, for example, Plaintiffs could have submitted a corrected advertisement that substituted "The State Department" for "The FBI" and "$5 million" for "$25

million"—or fixed the factual inaccuracies in countless other ways. An unreasonable response by Metro to an advertiser's attempt to correct factual inaccuracies could give rise to an inference of unreasonableness or viewpoint-based conduct. Here, however, Plaintiffs declined to discuss the rejection with Metro and chose to stand on their factually inaccurate ad.

On this record, we find no inference of unreasonableness or viewpoint-based conduct by Metro. Accordingly, we conclude that Plaintiffs have not established a likelihood of success on the merits with respect to Metro's rejection of the ad on the ground that it was false. We need not, and do not, reach Metro's other reasons for rejecting the ad. *See SeaMAC*, 781 F.3d at 499 ("We conclude that the County's application of [one policy provision] was reasonable and viewpoint neutral, and therefore have no occasion to address the validity of [another policy provision].").

B. The Remaining Three Winter *Factors*

To warrant a preliminary injunction, Plaintiffs must demonstrate not only a likelihood of success but also irreparable harm, a favorable balance of equities, and a finding that an injunction is in the public interest. *Winter*, 555 U.S. at 20. Both before the district court and before us, Plaintiffs have argued only that those three requirements are met because, in their view, they have shown a likelihood of success on the merits. Because we concluded above that Plaintiffs have not demonstrated a likelihood of success, their argument necessarily fails.

But even if Plaintiffs had demonstrated some likelihood of success, they nevertheless would not be entitled to a preliminary injunction. We recently reiterated that, "although a First Amendment claim certainly raises the specter of irreparable harm and public interest considerations, proving the likelihood of such a claim is not enough to satisfy *Winter*." *Vivid Entm't, LLC v. Fielding*, 774 F.3d 566, 577 (9th Cir. 2014) (internal quotation marks omitted). Here, Plaintiffs cannot satisfy *Winter*, even if they had shown a likelihood of success.

Plaintiffs seek to alter the status quo ante by obtaining an order requiring Metro to publish an ad previously unpublished. Accordingly, they seek a "mandatory injunction." *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 878–79 (9th Cir. 2009). Mandatory injunctions are "particularly disfavored." *Id.* at 879 (internal quotation marks omitted). "In general, mandatory injunctions are not granted unless extreme or very serious damage will result and are not issued in doubtful cases . . . ." *Id.* (internal quotation marks omitted).

Plaintiffs cannot meet that high bar, because the district court's denial of a preliminary injunction constrains Plaintiffs' speech in only a small way: They cannot express their message on the sides of Metro's buses while this case is pending. Nothing in the district court's denial of a preliminary injunction prevents Plaintiffs from displaying the same ad in many alternative fora, for example, on Seattle billboards, in Seattle newspapers, on Seattle television stations, on Seattle buses run by companies other than Metro, or in many venues in other cities. The availability of

alternative fora for Plaintiffs' speech weighs against the issuance of a preliminary injunction. *Cf. Cornelius*, 473 U.S. at 809 ("The First Amendment does not demand unrestricted access to a nonpublic forum merely because use of that forum may be the most efficient means of delivering the speaker's message."); *Cogswell v. City of Seattle*, 347 F.3d 809, 818 (9th Cir. 2003) ("Cogswell and other candidates have not been unreasonably censored because they have other forums for campaigning where they are able to communicate material limited by the restriction on this forum."). In sum, even if Plaintiffs had demonstrated some likelihood of success on the merits, they still would not have been entitled to a preliminary injunction because they have not shown that "extreme or very serious damage will result" from the denial of a preliminary injunction. *Marlyn Nutraceuticals*, 571 F.3d at 879.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CASE NO. C13-1804RAJ

HONORABLE RICHARD A. JONES

[Filed January 30, 2014]

AMERICAN FREEDOM DEFENSE INITIATIVE, et al.,	)
Plaintiffs,	)
v.	)
KING COUNTY,	)
Defendant.	)

ORDER

I. INTRODUCTION

This matter comes before the court on a motion for preliminary injunction by plaintiffs American Freedom Defense Initiative ("AFDI"), Pamela Geller, and Robert Spencer. Dkt. # 7. Defendant King County opposes (Dkt. # 12), and also moves the court for a stay after the court rules on the preliminary injunction motion (Dkt. # 10). Having considered the memoranda,

exhibits, oral argument, and the record herein, the court DENIES plaintiffs' motion for preliminary injunction and DENIES defendant's motion for a stay in the proceedings.

II. BACKGROUND

Defendant King County's Department of Transportation operates a public transportation system of buses ("Metro"), consisting of more than 235 routes and serving approximately 400,000 passengers daily. Dkt. # 13 (Desmond Decl.) ¶ 6. Metro runs a revenue-based advertising program to generate supplemental financial support, and as a part of that program, Metro sells advertising space on the exterior of its buses. *Id.* ¶¶ 7-8, 11; Dkt. # 14 (Shinbo Decl.) ¶ 3. Prior to 2010, advertising restrictions were accomplished through restrictive clauses in Metro's advertising contract with Titan Outdoor LLC ("Titan"). Dkt. # 13 (Desmond Decl.) ¶ 14; Dkt. # 14 (Shinbo Decl.) ¶¶ 4-5. However, beginning in 2010, Metro adopted an Interim Metro Advertising Policy, which was replaced by the Transit Advertising Policy. Dkt. # 13 (Desmond Decl.) ¶¶ 15-l6; Dkt. # 14 (Shinbo Decl.) ¶¶ 5-6. The Transit Advertising Policy (the "Policy") was adopted in January 2012, and is incorporated into general department policies and procedures. Dkt. # 13 (Desmond Decl.) ¶ 17; Dkt. # 14 (Shinbo Decl.) ¶ 6. All potential ads are screened by Titan, and, if there is a question about compliance with the Policy, the ads are passed to Sharron Shinbo, the Advertising Program Manager, for further evaluation. Dkt. # 13 (Desmond Decl.) ¶ 19; Dkt. # 14 (Shinbo Decl.) ¶ 8. Ms. Shinbo has discretion to submit the ad to Kevin Desmond, the General Manager at Metro, who makes the final

determination of whether an ad is consistent with the Policy. Dkt. # 13 (Desmond Decl.) ¶ 19; Dkt. # 14 (Shinbo Decl.) ¶ 8.

On May 17, 2013, defendant accepted a "Faces of Global Terrorism" advertisement submitted by the United States Department of State. Dkt. # 14 (Shinbo Decl.) ¶ 13. After receiving numerous complaints that the advertisement was demeaning and disparaging to Muslims and people of color, the State Department withdrew the ad on its own and submitted a replacement advertisement, which defendant accepted. *Id.* ¶¶ 14-18, Exs. E-H. On August 1, 2013, AFDI submitted its own version of the "Faces of Global Terrorism" advertisement. *Id.* ¶ 20, Ex. J. On August 14, 2013, defendant rejected AFDI's ad because it violated three provisions of the Policy: 6.2.4, 6.2.8, and 6.2.9. *Id*. ¶ 23, Ex. K.

Section 6.2.4 of the Policy provides: "False or Misleading. Any material that is or that the sponsor reasonably should have known is false, fraudulent, misleading, deceptive or would constitute a tort of defamation or invasion of privacy." Dkt. # 7-6 at 6 (Ex. E to Geller Decl.); # 13 at 31 (Ex. C to Desmond Decl.). Section 6.2.8 of the Policy provides:

> Demeaning or Disparaging. Advertising that contains material that demeans or disparages an individual, group of individuals or entity. For purposes of determining whether an advertisement contains such material, the County will determine whether a reasonably prudent person, knowledgeable of the County's ridership and using prevailing community standards, would believe that the advertisement

> contains material that ridicules or mocks, is abusive or hostile to, or debases the dignity or stature of any individual, group of individuals or entity.

Id. at 7; Dkt. # 13 at 32. Section 6.2.9 provides:

> Harmful or Disruptive Transit System. Advertising that contains material that is so objectionable as to be reasonably foreseeable that it will result in harm to, disruption of or interference with the transportation system. For purposes of determining whether an advertisement contains such material, the County will determine whether a reasonably prudent person, knowledgeable of the County's ridership and using prevailing community standards, would believe that the material is so objectionable that it is reasonably foreseeable that it will result in harm to, disruption of or interference with the transportation system.

Id.

III. ANALYSIS

"A preliminary injunction is 'an extraordinary and drastic remedy, one that should not be granted unless the movant, *by a clear showing,* carries the burden of persuasion.'" *Lopez v. Brewer,* 680 F.3d 1068, 1072 (9th Cir. 2012) (emphasis in original). "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Natural Res. Def Council, Inc.,* 555 U.S. 7, 129 S. Ct.

365, 374 (2008). An injunction will not issue if the moving party merely shows a possibility of some remote future injury or a conjectural or hypothetical injury. *Park Village Apartment Tenants Ass'n v. Mortimer Howard Trust,* 636 F .3d 1150, 1160 (9th Cir. 2011). Under the "serious questions" variation of the test, a preliminary injunction is proper if there are serious questions going to the merits; there is a likelihood of irreparable injury to the plaintiff, the balance of hardships tips sharply in favor of the moving party, and the injunction is in the public interest. *Lopez,* 680 F.3d at 1072. The elements must be balanced, so that a stronger showing of one element may offset a weaker showing of another. *Id.*

Additionally, mandatory injunctions are particularly disfavored, and are not warranted unless extreme or very serious damage will result, and are not issued in doubtful cases. *Id*.

A. Likelihood of Success on the Merits

When considering a First Amendment claim regarding free speech on government-owned property, the court must first "identify the nature of the forum, because the extent to which the Government may limit access depends on whether the forum is public or nonpublic." *Cornelius v. NAACP Legal Def & Educ. Fund*, 473 U.S. 788, 797 (1985). If the forum is public, then a speech exclusion must be "necessary to serve a compelling state interest and the exclusion [must be] narrowly drawn to achieve that interest." *Cornelius,* 473 U.S. at 800. If the forum is non-public, then the government may restrict speech "as long as the restrictions are 'reasonable and [are] not an effort to suppress expression merely because public officials

oppose the speaker's view.'" *Cornelius,* 473 U.S. at 800 (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983)). "When the government intentionally opens a nontraditional forum for public discourse it creates a designated public forum." *DiLoreto v. Downey Unified Sch. Dist. Bd. of Educ.,* 196 F.3d 958, 964 (9th Cir. 1999). "Restrictions on expressive activity in designated public fora are subject to the same imitations that govern a traditional public forum." *Id.* at 964-65.

The Ninth Circuit has also recognized an additional type of forum that shares features of both public and non-public spaces: the limited public forum. The limited public forum is "a subcategory of a designated public forum that 'refer[s] to a type of nonpublic forum that the government has intentionally opened to certain groups or to certain topics.'" *Hopper v. City of Pasco,* 241 F.3d 1067, 1074 (9th Cir. 2001) (quoting *DiLoreto*, 196 F.3d at 965). Speech restrictions in a limited public forum must be "viewpoint neutral and reasonable in light of the purpose served by the forum[.]" *DiLoreto,* 196 F.3d at 965.

1. Metro's Advertising Space is Likely a Limited Public Forum

When attempting to distinguish between a designated public forum and a limited public forum, courts look to "the policy and practice of the government to ascertain whether it intended to designate a place not traditionally open to assembly and debate as a public forum." *Cornelius,* 473 U.S. at 802. That intention is consistent with a designated public forum, but government restrictions (via policy and practice) on access to a forum based on objective

standards indicate a limited public forum. *See Hopper*, 241 F.3d at 1077-78. Both a policy and a consistent application thereof must be present in order to establish that a government intended to create a limited public forum. *Hopper*, 241 F.3d at 1076.

In *Lehman v. City of Shaker Heights,* the Supreme Court examined a city's policy of excluding political advertising from the space inside its transit vehicles. 418 U.S. 298 (1974). The Court found that a designated public forum had not been created:

> Here, we have no open spaces, no meeting hall, park, street corner, or other public thoroughfare. Instead, the city is engaged in commerce. It must provide rapid, convenient, pleasant, and inexpensive service to the commuters of Shaker Heights. The car card space, although incidental to the provision of public transportation, is a part of the commercial venture. In much the same way that a newspaper or periodical, or even a radio or television station, need not accept every proffer of advertising from the general public, a city transit system has discretion to develop and make reasonable choices concerning the type of advertising that may be displayed in its vehicles . . . .
>
> No First Amendment forum is here to be found. The city consciously has limited access to its transit system advertising space in order to minimize chances of abuse, the appearance of favoritism, and the risk of imposing upon a captive audience. These are reasonable legislative objectives advanced by the city in a proprietary capacity.

Lehman, 418 U.S. at 303-04. Similarly, the Ninth Circuit has found exterior advertising space on buses to be a limited public forum where a city "consistently promulgates and enforces policies restricting advertising on its buses to commercial advertising." *Children of the Rosary v. City of Phoenix*, 154 F.3d 972, 978 (9th Cir. 1998). Based on that policy, the court held that "[t]he city has not designated the advertising space on the exterior of its buses as a place for general discourse." *Id.*

Here, the Policy expressly identifies defendant's intent to create a limited public forum:

> Limited Public Forum Status. The County's acceptance of transit advertising does not provide or create a general public forum for expressive activities. In keeping with its proprietary function as a provider of public transportation, and consistent with KCC 28.96.020 and .210, the County does not intend its acceptance of transit advertising to convert its Transit Vehicles or Transit Facilities into open public forums for public discourse and debate. Rather, as noted, the County's fundamental purpose and intent is to accept advertising as an additional means of generating revenue to support its transit operations. In furtherance of that discreet and limited objective, the County retains strict control over the nature of the ads accepted for posting on or in its Transit Vehicles and Transit Facilities and maintains its advertising space as a limited public forum.

> In the County's experience, certain types of advertisements interfere with the program's primary purpose of generating revenue to benefit the transit system. This policy advances the advertising program's revenue-generating objective by prohibiting advertisements that could detract from that goal by creating substantial controversy, interfering with and diverting resources from transit operations, and/or posing significant risks of harm, inconvenience, or annoyance to transit passengers, operators and vehicles. Such advertisements create an environment that is not conducive to achieving increased revenue for the benefit of the transit system or to preserving and enhancing the security, safety, comfort and convenience of its operations. The viewpoint neutral restrictions in this policy thus foster the maintenance of a professional advertising environment that maximizes advertising revenue.)

Dkt. # 13 at 28 (Ex. C to Desmond Decl., Policy § 2.3). The "viewpoint neutral restrictions" in the Policy include a prohibition on political campaign speech, and advertising that is false or misleading, demeaning and disparaging, or harmful or disruptive to the transit system, among others. *Id.* at 30-32 (Policy §§ 6.21, 6.24, 6.28, 6.29). Additionally, defendant's advertising policies "are designed to strike an appropriate balance between the need for supplemental revenue, and Metro's primary mission of encouraging ridership through the provision of quality customer experience." Dkt. # 13 (Desmond Decl.) ¶ 12.

Defendant's practice in implementing the Policy also evinces its intent to create a limited public forum. Defendant's policy does not prohibit all forms of political speech. Rather, it prohibits political campaign speech, as well as advertising that is false or misleading, demeaning and disparaging, or harmful or disruptive to the transit system. In reviewing any advertisement, defendant follows the procedural process mandated by the Policy in order to ensure compliance with the policy directives. Dkt. # 13 (Desmond Decl.) ¶ 19. All ads are initially screened by Titan, and if compliance with the Policy cannot be determined, the ad is submitted to Ms. Shinbo. *Id.* If Ms. Shinbo has concerns about compliance, she elevates the advertisement to Mr. Desmond. *Id.* Mr. Desmond has implemented a process to ensure that his decisions are consistent with the Policy and fair to the proponent of the proposed advertising. *Id.* ¶ 20. All ads, regardless of whether they are political or public-issue in subject matter, must adhere to the Policy to ensure that the advertisements are consistent with the primary purpose of operating a transit system.[1] *See*

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[1] The court is aware of potential constitutional problems when government officials are given unbridled discretion in regulating speech, including in limited public fora. However, at his preliminary injunction stage, AFDI has not demonstrated a likelihood that government employees were given unbridled discretion where defendant has a set procedural process it consistently follows that imposes limitations on the exercise of discretion and where all ads are subject to the prohibitions in the Policy against content that is false, misleading, demeaning or disparaging, and that interfere with service. The court notes that this case presents a close question and the court has grave concerns about defendant's Policy where application of the civility provisions appear to be somewhat of a moving target.

Dkt. # 13 (Desmond Decl.) ¶¶ 11-13, 19-21; Dkt. # 14 (Shinbo Decl.) ¶ 6.

Thus, pursuant to the Policy, defendant has accepted and rejected ads on varying sides of the Israeli-Palestinian conflict, despite the politicized nature of the subject matter. Dkt. # 14 (Shinbo Decl.) ¶¶ 9-11, Exs. A & B. The fact that defendant has followed prior advertising that is considered political or controversial does not change the act that it has consistently subjected all potential advertisements to the civility provisions to ensure that the advertisements are not false or misleading, demeaning or disparaging, or harmful or disruptive to the transit system. *See DiLoreto,* 196 F.3d at 967 ("Although not dispositive, the fact that the District screened and rejected the ad is evidence that the District intended to create a limited public forum closed to certain subjects, such as religion."). Additionally, a few instances of imperfect enforcement of a restriction or a mistake in accepting a prior ad do not preclude an agency from rejecting subsequent ads that violate its standard. *See Cornelius*, 473 U.S. at 805 ("The Government did not create the [charity funding drive] for purposes of providing a forum for expressive activity. That such activity occurs in the context of the forum created does not imply that the forum thereby becomes a public forum for First Amendment purposes."); *see also Ridley v. Mass. Bay Transp. Authority*, 390 F.3d 65, 78 (1st Cir. 2004) ("One or more instances of erratic

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Nevertheless, at this stage of the proceeding, AFDI, as the moving party, has not met its burden to demonstrate that a mandatory injunction is warranted.

enforcement of a policy does not itself defeat the government's intent not to create a public forum.").

Accordingly, the court finds that defendant's policy and practice indicates an intention to create a limited public forum.

2. Defendant's Decision to Reject Plaintiffs' Advertisement Was Reasonable

Courts uphold speech restrictions in limited public forums as long as they are reasonable and viewpoint neutral. *DiLoreto*, 196 F.3d at 965. Reasonableness is evaluated "in light of the purpose of the forum and all the surrounding circumstances." *Cornelius*, 473 U.S. at 809. "The restriction need only be reasonable; it need not be the most reasonable or the only reasonable limitation." *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 683 (1992) (internal quotations and emphasis omitted).

The purpose of the Metro advertising program is to generate revenue to support the on-going delivery of transportation services to the public. Dkt. # 13 (Desmond Decl.) ¶ 8; *see* KCC 28.96.210 ("As part of its proprietary function as the provider of public transportation, the county seeks to generate revenue from the commercial use of transit vehicles, the tunnel and other passenger facilities to the extent such commercial activity is consistent with the security, safety, comfort and convenience of its passengers."). Transit advertising is subsidiary to Metro's primary mission of providing a quality transit service. *Id*. ¶ 11. The advertising copy that Metro allows on its properties significantly impacts the ridership experience, and the prohibition against advertising

that is false or misleading, demeaning or disparaging, or harmful or disruptive to the transit system applies to all advertising to maintain a courteous and respectful level of discourse. *Id.*

The court finds that the civility and interference with service restrictions in the Policy are reasonable restrictions that promote the safety, reliability and quality of the public transit system.

3. Defendant's Decision to Reject Plaintiffs' Advertisement Was Viewpoint Neutral

The government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject. *Cornelius,* 473 U.S. at 806. Viewpoint discrimination is a form of content discrimination in which the government targets not subject matter, but particular views taken by speakers on a subject. *Children of the Rosary,* 154 F.3d at 980. If the speech at issue does not fall within an acceptable subject matter otherwise included in the forum, the government may legitimately exclude it from the forum it has created. *Cogswell v. Seattle*, 347 F.3d 809, 815 (9th Cir. 2003). However, if the speech does fall within an acceptable subject matter otherwise included in the forum, the government may not legitimately exclude it from the forum based on the viewpoint of the speaker. *Id.*

Defendant has accepted an advertisement on the subject of terrorism. Dkt. # 14 (Shinbo Decl.) ¶18, Ex. H. The advertisement provides an anti-terrorism, stop-a-terrorist viewpoint. *Id.* The advertisement submitted by AFDI provides a similar anti-terrorism, stop-a-

terrorist viewpoint. *Id*. ¶ 20, Ex. J; Dkt. # 7-1 (Geller Decl.) ¶ 25. In addition to the similar viewpoint, however, the AFDI ad also contains false, misleading, demeaning and/or disparaging content, which is prohibited by the Policy for all advertisements regardless of viewpoint. The content of the AFDI advertisement provides: "The FBI Is Offering Up To A $25 Million Reward If You Help Capture One Of These Jihadis." *Id.* First, there is no evidence before the court that the FBI is offering a reward for any of the individuals pictured. Rather, the United States Department of State, through the Rewards for Justice Program, is offering the rewards. *See* Dkt. # 7-4 (Ex. C to Geller Decl.). The court notes that the FBI is offering a reward of up to $250,000 for information leading directly to the arrest of Daniel Andreas San Diego, and up to $1,000,000 for information directly leading to the apprehension of Joanne Chesimard. Dkt. # 7-4 at 5, 7 (Ex. C to Geller Decl.). However, neither of these individuals is pictured in the advertisement. Second, AFDI has presented evidence that the State Department provided rewards for only six of the sixteen individuals pictured in the advertisement. *Cf.* Dkt. # 14 at 48 (Ex. J to Shinbo Decl.) *with* Dkt. # 7-4 at 1-42 (Ex. C to Geller Decl.).[2] Nevertheless, defendant has provided evidence that the State Department provided rewards for all of the individuals pictured. Dkt. # 14 at 52-54 (Ex. L to Shinbo Decl.). However,

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[2] AFDI has provided the court with evidence that the State Department provided rewards for the following individuals who also appeared in the advertisement: Adam Gadahn, Jehad Mostafa, Omar Hammami, Isnilon Hapilon, Zulkifli Abdhir (or Bin Hir), and Raddulan Sahiron. Dkt. # 7-4 at 8, 10, 16, 18, 40, 42 (Ex. C to Geller Decl.).

stating that a reward of up to $25 million is available if you help capture "one of these" individuals is false and misleading where none of the rewards for the individuals pictured offered a $25 million reward.[3]

Finally, the term "jihadis" has varying meanings. While many individuals have conflated the terms jihad and terrorism, the term "jihad" has several meanings, including: (1) "a holy war waged on behalf of Islam as a religious duty";[4] (2) "a personal struggle in devotion to Islam especially involving spiritual discipline"; (3) "a crusade for a principle or belief"; (4) "(among Muslims) a war or struggle against unbelievers"; (5) "(also greater jihad) Islam the spiritual struggle within oneself against sin." *See Merriam-Webster*, http://www.merriam-webster.com/dictionary/jihad (last visited Jan. 15, 2014); *Oxford English Dictionary*, http://english.oxforddictionaries.com/definition/jihad?region=us (last visited Jan. 15, 2014); *see also* Dkt. # 13 (Desmond Decl.) ¶ 26 ("By my understanding of the term, the concept of 'jihad' refers not only to physical struggles, but more importantly, to the inner struggle by a believer to fulfill his religious duties to Islam."). Additionally, there is no dispute that each of the individuals included in Exhibit C to Geller's declaration engaged in terrorist activities. However, there is no evidence before the court that any of the individuals

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[3] The court notes that the State Department offered a reward "of up to $25 million for information leading directly to the apprehension or conviction of Ayman Al-Zawahiri." Dkt. # 7-4 at 27 (Ex. C to Geller Decl.).

[4] This appears to be the definition of the term that AFDI invokes in referring to terrorists as jihadis.

pictured in the ad referred to themselves as "jihadis" or performed the terrorist acts in the name of "jihad," as opposed to any other reason.[5] *See* Dkt. # 7-4 at 8, 10, 16, 18, 40, 42 (Ex. C to Geller Decl.). Accordingly, the court finds that the ad's use of the term "jihadis" to mean terrorist is likely misleading.[6]

Accordingly, the court finds that plaintiffs have not demonstrated that they are likely to prevail on the merits.

B. Irreparable Harm, Balance of the Equities, and Public Interest

Plaintiff's arguments regarding irreparable harm, balance of the equities, and public interest rely on a finding of the likelihood of a First Amendment violation. Dkt. # 7 at 18-19. Since AFDI has not demonstrated the existence of a colorable First Amendment claim, the court finds that AFDI has not met its burden on the remaining factors as well.

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[5] Indeed, the only reference to the term "jihad" that appears in the evidence is with respect to Abd Al Aziz Awda, who does not appear in the ad and for whom there is no reward. Dkt. # 7-4 at 20 (Ex. C to Geller Decl.) ("wanted for conspiracy to conduct the affairs of the designated international terrorist organization known as the 'Palestinian Islamic Jihad[.]").

[6] For the same reasons, the court also notes that it is likely that a reasonably prudent person would believe that the AFDI ad contains material that is abusive or hostile to, or debases the dignity of stature of practitioners of the Muslim faith who are not terrorists and take their sacred duty of "jihad" (the personal or spiritual struggle) seriously.

Plaintiff has not demonstrated that it is entitled to injunctive relief.

IV. MOTION TO STAY

Defendant moves the court for a stay pending issuance of a final decision from the Ninth Circuit in *Seattle Mideast Awareness Campaign v. King County,* Case No. 11-35914. Dkt. # 10. AFDI indicates that if the court denied the preliminary injunction motion, it might appeal the court's ruling or not oppose defendant's motion to stay. Dkt. # 11 at 3. The court agrees with AFDI that defendant's motion was premature. Accordingly, the court DENIES defendant's motion without prejudice. Dkt. # 10. The Court ORDERS the parties to meet and confer regarding the possibility of a renewed motion to stay now that the parties have the court's analysis denying preliminary injunction within ten days of this order. Defendant may file a motion to stay thereafter if the parties do not reach an agreement on the course of conduct.

V. CONCLUSION

For all the foregoing reasons, the court DENIES plaintiffs' motion for preliminary injunction (Dkt. # 7), and DENIES defendant's motion for a stay without prejudice (Dkt. # 10). Additionally, the court exercises its discretion to DENY American Civil Liberties Union of Washington's motion for leave to file an amicus brief. Dkt. # 15.

Dated this 30th day of January, 2014.

/s/_____
The Honorable Richard A. Jones
United States District Judge