NO. 17-35897

UNITED STATES COURT OF APPEALS
FOR THE
NINTH CIRCUIT

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

Plaintiffs-Appellants,

v.

KING COUNTY,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
HONORABLE RICHARD A. JONES
Case No. 2:13-cv-01804-RAJ

APPELLANTS' OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Plaintiff-Appellant American Freedom Defense Initiative states the following:

The American Freedom Defense Initiative is a non-profit corporation. It does not have a parent corporation and no publicly held company owns 10% of its stock.

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INTRODUCTION

In *Matal v. Tam*, 137 S. Ct. 1744 (2017), the Court held that the Lanham Act provision that prohibited trademarks that may "disparage . . . or bring . . . into contemp[t] or disrepute" any "person, living or dead" was an unlawful viewpoint-based restriction on speech. In doing so, the Court stated, "We now hold that this provision violates the Free Speech Clause of the First Amendment. It offends a bedrock First Amendment principle: Speech may not be banned on the ground that it expresses ideas that offend." *Id.* at 1751; *see also id*. at 1763 ("Giving offense is a viewpoint.").

Matal v. Tam compels this Court to conclude that King County's ("County") "demeaning or disparaging" and "harmful or disruptive" restrictions on AFDI's political speech are unconstitutional. In fact, these speech restrictions are facially invalid under *Matal*. There is no basis to conclude otherwise. Unlike a trademark, which has a commercial component, the speech at issue here is pure political speech addressing a public issue—global terrorism. Consequently, "the viewpoint discrimination rationale renders unnecessary any extended treatment of other questions raised by the parties." *Id.* at 1765 (Kennedy, J., concurring).

Despite filing supplemental briefs on the *Matal* case in the district court, the lower court ruled in favor of the County, and its decision did not cite, let alone distinguish, *Matal*.

In the final analysis, the County's restrictions on Plaintiffs' speech cannot withstand constitutional scrutiny.

STATEMENT OF JURISDICTION

On October 7, 2013, Plaintiffs-Appellants American Freedom Defense Initiative ("AFDI"), Pamela Geller, and Robert Spencer (collectively referred to as "Plaintiffs") filed a Complaint for nominal damages and declaratory and injunctive relief pursuant to 42 U.S.C. § 1983, challenging Defendant-Appellee King County's speech restriction under the First and Fourteenth Amendments to the United States Constitutions. (R-1). The district court has jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343.

On October 9, 2013, Plaintiffs filed a motion for a preliminary injunction. (R-7). The district court denied the motion (R-27), and Plaintiffs appealed (R-28). This Court affirmed. *Am. Freedom Def. Initiative v. King Cnty.*, 796 F.3d 1165 (9th Cir. 2015).

Plaintiffs filed a petition for writ of certiorari, which was denied over the dissent of Justice Thomas, who was joined by Justice Alito. *Am. Freedom Def. Initiative v. King Cnty.*, 136 S. Ct. 1022 (2016) (Thomas, J., dissenting).

On April 29, 2016, Plaintiffs filed a First Amended Complaint. (R-48). The parties conducted discovery and subsequently filed cross-motions for summary judgment. (R-56, 57).

On November 2, 2017, the district court granted the County's motion and denied Plaintiffs' motion. (R-75, Order, ER- 1-9).[1] That same day, November 2, 2017, Plaintiffs filed a timely notice of appeal. (R-76, ER-10-11). Final judgment was also entered in favor of the County on November 2, 2017. (R-78).

This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

I. Whether the advertising space on the buses operated by the County's Department of Transportation is a public forum for Plaintiffs' speech when the County accepts for display a wide array of political and public-issue advertisements, including controversial advertisements that address the same subject matter as Plaintiffs' rejected advertisements.

II. Whether the County's content- and viewpoint-based restrictions on Plaintiffs' speech—restrictions which operate as prior restraints—violate the First and Fourteenth Amendments to the United States Constitution, particularly in light of the U.S. Supreme Court's decision in *Matal v. Tam*, 137 S. Ct. 1744 (2017).

III. Whether the County's Transit Advertising Policy, facially and as applied to restrict Plaintiffs' speech, is unreasonable in violation of the First and Fourteenth Amendments to the United States Constitution.

[1] "ER" refers to the Plaintiffs' Excerpts of Record.

IV. Whether the County's Transit Advertising Policy, facially and as applied to restrict Plaintiffs' speech, grants County officials unbridled discretion such that the officials' decisions to limit speech are not constrained by objective criteria but may rest on ambiguous and subjective reasons in violation of the First and Fourteenth Amendments to the United States Constitution.

V. Whether, in light of the record developed below, the County's restriction on Plaintiffs' first advertisement (AFDI Ad I) based on a claim that this political ad was "false or misleading" violates the First Amendment.

CONSTITUTIONAL PROVISIONS INVOLVED

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

The Equal Protection Clause of the Fourteenth Amendment provides that "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

The Due Process Clause of the Fourteenth Amendment provides that "No State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE

A. Procedural Background.

On October 7, 2013, Plaintiffs filed this action (R-1), challenging the County's rejection of their proposed "Faces of Global Terrorism" advertisement, which Plaintiffs submitted for display on the advertising space of the buses operated by the County's Department of Transportation.

Plaintiffs' advertisement was similar to a "Faces of Global Terrorism" advertisement previously submitted by the U.S. State Department and accepted by the County for display on its buses. The State Department subsequently pulled its own advertisement, which, similar to Plaintiffs' advertisement, depicted a number of the FBI's most wanted global terrorists. In response to a few "hecklers" who objected to the message, the State Department withdrew the advertisement because it allegedly offended some Muslims since the majority of the wanted terrorists were Muslim or committed criminal acts of terrorism in the name of Islam. In response (and in protest) to the State Department's decision to censor its own speech as a result of a handful of complaints, Plaintiffs submitted for display their version of the "Faces of Global Terrorism" advertisement.

Despite previously accepting the State Department's advertisement, the County rejected Plaintiffs' advertisement under its Transit Advertising Policy,

claiming that it was "false or misleading," "demeaning or disparaging," and "so objectionable" that it would be "harmful or disruptive to the transit system."

On October 9, 2013, Plaintiffs filed a motion for a preliminary injunction, requesting that the court direct the County to accept their version of the "Faces of Global Terrorism" advertisement. (R-7). The district court denied the motion (R-27), and Plaintiffs appealed (R-28). This Court affirmed, finding that the forum is a nonpublic forum and that the restriction on Plaintiffs' speech as false or misleading was reasonable and viewpoint neutral. *Am. Freedom Def. Initiative v. King Cnty.*, 796 F.3d 1165, 1170, 1172 (9th Cir. 2015). The Court declined to review the other restrictions. *Id.* at 1172 ("We need not, and do not, reach Metro's other reasons for rejecting the ad.").

Plaintiffs filed a petition for writ of certiorari, which was denied over the dissent of Justice Thomas, who was joined by Justice Alito. *Am. Freedom Def. Initiative v. King Cnty.*, 136 S. Ct. 1022 (2016) (Thomas, J., dissenting).

Plaintiffs subsequently modified their original ad (AFDI Ad I), and submitted a second ad (AFDI Ad II), which remedied the "false or misleading" objection. On October 4, 2015, the County rejected AFDI Ad II under the Transit Advertising Policy guidelines that prohibit "demeaning or disparaging" and "harmful or disruptive" advertisements.

On April 29, 2016, Plaintiffs filed a First Amended Complaint in light of the County's rejection of AFDI Ad II. (R-48). The First Amended Complaint remedied the "false or misleading" objection.

Following discovery, the parties filed cross-motions for summary judgment. (R-56, 57). On November 2, 2017, the district court issued its order granting the County's motion and denying Plaintiffs' motion. (R-75, Order, ER-1-9). In its decision, the district court concluded that the forum was a nonpublic forum and that the County's speech restrictions were reasonable and viewpoint neutral. (R-75, Order at 4-9, ER-4-9).

This timely appeal follows.

B. The Parties.

Plaintiffs Geller and Spencer co-founded AFDI, which is a nonprofit organization that is incorporated under New Hampshire law. Plaintiff Geller is the president of AFDI, and Plaintiff Spencer is the vice president. AFDI is a nonprofit organization that exercises its right to freedom of speech by, *inter alia*, purchasing advertising space on transit authority property in major cities throughout the United States, including Seattle, Washington. AFDI purchases these ads to express its message on current events and public issues, particularly including issues involving global terrorism ("AFDI's advertising campaign"). Plaintiffs Geller and Spencer engage in free speech activity through the various projects of AFDI, including

AFDI's advertising campaign. (R-56-1, Geller MSJ Decl. ¶¶ 2, 3, ER-13).

Defendant King County ("County") is a municipal corporation. It operates a public transportation system ("Metro") "which is responsible for providing public transportation services throughout all of King County, including the Seattle metropolitan area." (R-13, Desmond Decl. ¶ 5, ER-168). "Metro operates 235 bus routes," serving "approximately 400,000" passengers daily. (R-13, Desmond Decl. ¶ 6, ER-168).

C. The County's Transit Advertising Policy.

The County leases space on its Metro property, including on the exterior of its buses, for use as advertising space. (R-56-2, Gannon Dep. at 13:1-15; 16:9-17, ER-61, 63).[2] Pursuant to its Transit Advertising Policy,[3] the County does not limit advertising to just commercial advertising. (R-56-2, Gannon Dep. at 34:21-24, ER-71). Rather, the County accepts a wide variety of noncommercial and commercial advertisements for display on its advertising space, including political advertisements (with one exception: political campaign speech) and advertisements that address controversial issues. (R-56-2, Gannon Dep. at 34:25 to 35:1-13, ER-

[2] Rob Gannon, the General Manager for King County Metro Transit, was designated by the County to testify on its behalf pursuant to Rule 30(b)(6) of the Federal Rules of Civil Procedure. (R-56-2, Gannon Dep. at 9:16-25 to 11:1-18, Dep. Ex. 14 [Rule 30(b)(6) Deposition Notice], ER-58-60, 110-11).

[3] (R-56-2, Gannon Dep. at 13:22-25 to 14:1-24, Dep. Ex. 6 [Transit Advertising Policy], ER-61-62, 102-09).

71-72). The relevant and current policy was adopted in 2012, and it modified the prior policy so that it is now permissible for advertisers such as Plaintiffs "to present advertising expressing or advocating an opinion, position or viewpoint on matters of public debate about economic, political, religious, or social issues." (R-56-2, Gannon Dep. 81:6-24, ER-98). To that end, the County has leased its advertising space for political and social commentary ads covering a broad spectrum of political views and ideas, including ads on global terrorism, a permissible subject matter under the policy. (*See* R-56-2, Gannon Dep. at 36:3-9, ER-73).

Pursuant to the Transit Advertising Policy, all potential ads are first reviewed by the advertising contractor, and if the advertising contractor believes based upon his or her reading of the policy that an ad is compliant, then the ad is displayed. The County does not provide any instruction to the advertising contractor as to how the policy should be applied beyond providing the contractor with copies of the policy itself. (R-56-2, Gannon Dep. at 30:20-25 to 31:1-7, ER-68-69). If the advertising contractor has a question about compliance, then the ad is forwarded to the advertising program manager for further review. (R-56-2, Gannon Dep. at 33:1-25 to 34:1-19, Dep. Ex. 6 [Transit Advertising Policy], ER-70-71, 102-09). The advertising program manager then has discretion to either make a decision about an ad or to forward the ad to the general manager for his final determination. (R-56-2, Gannon Dep. at 21:10-25 to 22:1-23, Dep. Ex. 6 [Transit Advertising Policy], ER-

66-67, 102-09).

The Transit Advertising Policy (R-56-2, Dep. Ex. 6, ER-102-09) is the entirety of the policy, meaning that there are no other aspects of the policy that might have a definitional section or that might have some other description of how the policy is to be understood and applied. (R-56-2, Gannon Dep. at 66:12-18, ER-90).

Two of the restrictions at issue in this case (6.2.8 and 6.2.9) contain "standards" referring to "knowledge[] of the County's ridership" and "prevailing community standards." When asked to explain how these standards apply—understanding that speech restrictions must be based on definite, objective standards as a matter of law (*see infra*)—the County's Rule 30(b)(6) witness explained, in relevant part, that the "prevailing community standards" set forth in the policy is "that community understanding a standard that [it] believes the advertisement would contain material that ridicules or mocks, is abusive or hostile to, or debases the dignity or stature of any individual, group of individuals or entity." (R-56-2, Gannon Dep. at 68:1-9, ER-92). Nowhere else in the policy does the County define what those community standards are. (R-56-2, Gannon Dep. at 68:21-23, ER-92).

Most telling (and dispositive) was the following admission by the County's witness:

> Q. Are there any *objective standards* for determining whether or not something ridicules or mocks, is abusive or hostile to, or debases another individual or group?

> MR. HACKETT: Objection, calls for a legal conclusion.[4]
> THE WITNESS**:** ***There are no standards contained in this policy***.

(R-56-2, Gannon Dep. at 69:13-20, ER-93) (emphasis added).

When asked to further explain how to apply "knowledge of the County's ridership" as set forth in the policy, the County's witness testified as follows:

> Q: * * * Is there a certain percentage of the ridership that this is referring to, or can you explain what it means by knowledge of the County's ridership?
> A. Knowledge of the County's ridership means what it says, an understanding of the customers who engage the transit system for purposes of public transportation.
> Q. Do you know what percentage of the County's ridership would be demeaned or disparaged by AFDI Advertisement No. 1, which is Exhibit 4?
> A. I do not know an exact percentage.
> Q. Do you have even an estimate?
> A. I do not have an estimate, no.

(R-56-2, Gannon Dep. at 66:19-25 to 67:1-8, ER-90-91).

D. Examples of Ads Accepted under the County's Transit Advertising Policy.

Pursuant to its Transit Advertising Policy, the County leased its advertising space for an ad sponsored by the State Department that addressed the subject matter of global terrorism. (R-56-2, Gannon Dep. at 36:10-18; 38:3, ER-73, 75). The State Department ad appeared as follows:

[4] Counsel's objection is without merit, and this admission is fatal to the County (which is likely why the objection was made in the first instance).

(R-56-2, Gannon Dep. at 18:21-25, Dep. Ex. 3, ER-64, 99).

The State Department ad was accepted for display by the County, and it ran from June 6, 2013 to June 25, 2013. (R-56-2, Gannon Dep. at 39:24-25 to 40:1-2, ER-76, 77). The State Department eventually pulled its ad. (R-14, Shinbo Decl. ¶ 18, ER-119).

The "faces" of global terrorism depicted in the State Department ad came directly from the FBI's most wanted global terrorists list. Of the thirty-two listed terrorists at the time, thirty were individuals with Muslim names and / or were wanted for terrorism related to organizations conducting terrorist acts in the name of Islam. (R-56-1, Geller MSJ Decl. ¶¶ 19-21, Ex. A, ER-16, 24-27). The two non-Islamic terrorists listed were Daniel Andreas San Diego, who has ties to animal rights extremist groups, and Joanne Deborah Chesimard, an escaped murderer who was part of a revolutionary extremist organization known as the Black Liberation Party. (R-56-1, Geller MSJ Decl. ¶ 21, ER-16). Consequently, the FBI's list did *not* "include[] individuals . . . associated with other religions," as Congressman Jim McDermott suggested in a June 9, 2013, letter to Robert Mueller, the director of the FBI, in which he complains about the State Department ad. (*See* R-14, Shinbo Decl.

¶ 16, Ex. F [McDermott Ltr.] [complaining that "individuals of other races and associated with other religions and causes" are "missing from this campaign"], ER-118-19, 149-51). Contrary to the Congressman's complaint, such "faces" were not "missing from this campaign"—such "faces" did not exist. Moreover, the State Department ad (and AFDI Ad I) included the picture of Jehad Serwan Mostafa—a U.S.-born, brown-haired, blue-eyed, *Caucasian* terrorist—the only one of the thirty-two listed. (R-56-1, Geller MSJ Decl. ¶ 35, Ex. J, ER-19, 49-50). Consequently, contrary to the Congressman's letter, "other races" were also included.

Shortly after the State Department pulled its "Faces of Global Terrorism" ad, it submitted an ad that stated, "The most important reason to stop a terrorist isn't the reward. Stop a terrorist. Save lives." This ad included images of five children. (R-14, Shinbo Decl. ¶ 18, Ex. H [replacement ad], ER-119, 155-56).

In addition to accepting ads that address global terrorism, the County has accepted numerous ads addressing the controversial Israeli / Palestinian conflict. For example, the County accepted in 2012 and 2013 ads expressing controversial political messages such as "*I'm a Palestinian. Equal Rights for All*," "*Equal Rights for Palestinians. The Way to Peace*," "*Share the Land. Palestinian Refugees Have the Right to Return. Equal Rights for Palestinians*," and "*The Palestinian Authority Is Calling For A Jew-Free State Equal Rights For Jews*." (R-14, Shinbo Decl. ¶ 9, Ex. A [Israeli / Palestinian ads], ER-115-16, 123-29).

E. AFDI Ad I.

Pursuant to the County's Transit Advertising Policy, and particularly in light of the fact that the County permitted and displayed the State Department ad, AFDI submitted for approval on or about July 30, 2013, the following ad ("AFDI Ad I"):

(R-56-2, Gannon Dep. at 19:10-22, Dep. Ex. 4 [AFDI Ad I], ER-65, 100; R-56-1, Geller MSJ Decl. ¶ 25, ER-17). AFDI Ad I includes the identical pictures and names of the wanted global terrorists that appeared in the State Department ad. But of course, AFDI is not a government agency, and this advertisement is not a commercial advertisement, as the County concedes. (R-56-2, Gannon Dep. at 35:18-21 [agreeing that the ad is not a commercial ad], ER-72). This is a political ad conveying a political message. (R-56-2, Gannon Dep. at 36:1-2 ["I think it is reasonable to review these ads and consider them to have a political message."], ER-73). And it was submitted as a protest to the State Department's politically correct decision to withdraw its advertisement. (R-56-1, Geller MSJ Decl. ¶ 36, ER-19). In short, as the County admits, this ad is political speech. (R-56-1, Gannon Dep. at 35:22-25 to 36:1-2, ER-72-73). And while AFDI Ad I was "political" speech, it nevertheless conveyed a message that was not materially false for several reasons.

First, AFDI Ad I was clear and unambiguous—it expressly used the term "jihadis" to refer to the Islamic terrorist *depicted in the ad*. (*See* R-56-1, Geller MSJ Decl. ¶ 25 ["If You Help Capture *One Of These* Jihadis"] [emphasis added], ER-17). Consequently, it is error to conclude, as the County does here, that this ad is misleading because it "suggest[s] that all jihadis are terrorists." (R-56-2, Gannon Dep. at 61:1-3, ER-86). It does no such thing. (*See* R-56-2, Gannon at 60:11-19 [admitting that the term "jihadi" is in reference to the individuals listed on the FBI's most wanted terrorist list], ER-85). Moreover, a simple search of the term "jihad" on the Rewards for Justice website demonstrates that this term appears on the government's website and is used in the context of referring to Islamic terrorism or Islamic terrorist organizations. (R-56-1, Geller MSJ Decl. ¶ 29, Ex. F, ER-18, 39-41; *see also id.* at ¶¶ 27, 28, Ex. D [defining "jihad'], Ex. E [Wanted Posters using "jihad"], ER-17-18, 33-34, 35-38). Second, the Rewards for Justice program authorizes the Secretary of State to offer rewards "up to $25 million" for capturing a terrorist on the most wanted terrorist list. The amounts can change based on the circumstances. (R-56-1, Geller MSJ Decl. ¶¶ 31, 32, Ex. G, ER-18-19, 42-43). Third, the rewards are "offered" through the FBI's website, which encourages those who may have information leading to the capture of a most wanted global terrorist (and thus seeking a reward) to contact the FBI. (R-56-1, Geller MSJ Decl. ¶¶ 33, 34, Exs. H, I, ER-19, 44-48). In fact, Rewards for Justice ads themselves similarly

instruct people who have such information and who could be eligible for an award under the program to contact the FBI directly. One such ad states as follows:

> The United States is offering substantial rewards for information that would help locate terrorists or that could prevent terrorism from occurring here or abroad. But we need your help. Your information could save lives and you could be eligible for a reward and relocation. Please visit www.RewardsForJustice.net to submit a confidential tip ***or contact the FBI*** or your local law enforcement agency.

(R-56-1, Geller MSJ Decl. ¶ 33, Ex. H, ER-19, 44-45) (emphasis added). Even Congressman McDermott understood that the FBI had a central (if not the preeminent) role in the Rewards for Justice program, as his letter was written to the *Director of the FBI* and not to the Secretary of State or anyone in the State Department. (R-14, Shinbo Decl. ¶ 16, Ex. F [McDermott Ltr.], ER-118-19, 149-51).

Additionally, and as noted, AFDI Ad I included the "face" of Jehad Serwan Mostafa—a U.S.-born, Caucasian terrorist—the only one of the thirty-two listed. (*See* R-56-1, Geller MSJ Decl. ¶ 35, Ex. J, ER-19, 49-50; *see also* R-56-2, Gannon Dep. at 62:19-25 to 63:1-7 [acknowledging that he did not know "as a point of fact" that one of the listed terrorists on AFDI Ad I was Caucasian but admitting that "It would begin to make a difference, yes"], ER-87-88).

On August 15, 2013, the County rejected AFDI Ad I on the following grounds:

> Based on our current advertising policy, the American Freedom Defense Initiative ad, "FACES OF GLOBAL TERRORISM", cannot be accepted. The advertisement does not comply with Subsections 6.2.4, 6.2.8 and 6.2.9, 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.
>
> 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 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.

(R-56-1, Geller MSJ Decl.¶¶ 38-40, ER-20-21; R-56-2, Gannon Dep. at 54:10-25 to 55:1-6, ER-80-81). According to the County, there were two "elements that were deemed to be false or misleading, one referring to the amount of the reward, and the other being the use of the term 'jihadis.'" (R-56-2, Gannon Dep. 55:7-25 to 56:1-5, ER-81-82; *see also id.* at 57:24-25 to 58:1-6 [acknowledging that the State Department Ad said "Up to $25 million reward," but not knowing if any of the

individuals listed on the ad would command a $25 million reward for his capture], ER-83-84). Additionally, according to the County, it was not "demeaning or disparaging" under the policy "to show these pictures of the most wanted global terrorists with their names." (R-56-2, Gannon Dep. at 63:24-25 to 64:1-3, ER-88-89). And there is no dispute that these were actual pictures and names of people listed on the FBI's terrorist list. (R-56-2, Gannon Dep. at 64:4-7, ER-89). The County also admits that Plaintiffs did not selectively exclude people of different religions or races from this ad. (R-56-2, Gannon Dep. at 64:8-21, ER-89).

F. AFDI Ad II.

In response to the County's rejection of AFDI Ad I, Plaintiffs modified their ad and submitted to the County's advertising contractor the following ad for approval ("AFDI Ad II"):

(R-56-1, Geller MSJ Decl. ¶¶ 41, 42, ER-21-22; R-56-2, Gannon Dep. at 72:5-10, Dep. Ex. 5 [AFDI Ad II], ER-94, 101).[5]

On October 4, 2015, Plaintiff Geller received via email from the County's

[5] AFDI Ad II did not include the "face" of Jehad Serwan Mostafa, the Caucasian terrorist. (R-56-1, Geller MSJ Decl. ¶ 41, ER-21-22).

advertising contractor the official response from the County rejecting AFDI Ad II:

> Pamela: Please see below form (sic) King County in regard to the proposed Faces of Global Terrorism ad. Thank you. Scott.
>
> Dear Mr. Goldsmith,
>
> Based on our current advertising policy, the American Freedom Defense Initiative (AFDI) ad, "FACES OF GLOBAL TERRIORISM" (sic), submitted and shown in your September 18, 2015 email cannot be accepted. The advertisements do not comply with Subsections 6.2.8 and 6.2.9 set forth below.
>
> 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 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.
>
> In the ongoing litigation with AFDI, we have explained the problems with AFDI's use of the "Faces of Global Terrorism" motif under Metro's Transit Advertising Policy. We remain willing to discuss other ways for AFDI to communicate its "catch a terrorist" message in our nonpublic forum. For example, ***AFDI may want to re-caption the ad "Most Wanted Global Terrorists" or "Wanted for Global Terrorism"—both of which would comply with our advertising policy by removing the***

> ***demeaning and disparaging aspect of the current ad copy.*** Please communicate to AFDI our willingness to accept revised ad copy that comply with the advertising policy.
>
> For your reference, I have attached a copy of Metro's Transit Advertising Policy.

(R-56-1, Geller MSJ Decl. ¶¶ 43-44, Ex. K, ER-22-23, 51-52; R-56-2, Gannon Dep. at 72:20-23, Dep. Ex. 15 [AFDI Ad II rejection email], ER-94, 112) (emphasis added). Consequently, the County did not consider this ad "false or misleading." (R-56-2, Gannon Dep. at 73:2-5, ER-95). Moreover, the County did not object to the "faces" on the advertisement; the County only objected to the view that these "faces" are the "Faces of Global Terrorism." (R-56-2, Gannon Dep. at 75:25 to 76:1-13 ["Q. Okay. So if we changed 'Faces of Global Terrorism,' as we just went through, to 'Most Wanted Global Terrorists' or 'Wanted for Global Terrorism,' everything else remaining equal, the ad would comply with the policy. Correct? A. That is correct."], ER-96-97).

G. No Evidence of Disruption or Harm.

Because AFDI Ads I and II never ran on the County's advertising space, there is no evidence of any violence being conducted against any transit advertising property as a result of these ads, there is no evidence of a diversion of substantial resources of the County as a result of these ads, and there is no evidence that these

ads caused any disruption whatsoever to the transit system.[6] (R-56-2, Gannon Dep. at 36:24-25 to 37:1-17, ER-73-74). Moreover, the State Department ad ran on the County's busses from June 6, 2013 to June 25, 2013 (nearly 3 weeks), and the County received only a "small volume" of complaints, and these complaints were mostly from a politician and advocacy groups. (R-14, Shinbo Decl. ¶ 15, ["[T]he complaint volume was small. . . ."], ER-118, Ex. F [Congressman McDermott Ltr.], ER-49-51, Ex. G [Arab American Community Coalition Ltr.], ER-152-54; *see also* ¶ 14 [referring to an email from the "Executive Director of Council on American-Islamic Relations (CAIR – WA)"], ER-118]).[7] There was no violence, reduced ridership, or a substantial diversion of resources—just a handful of complaints, mostly from political partisans.

[6] This highlights the problem with prior restraints on speech. *Alexander v. United States*, 509 U.S. 544, 550 (1993) ("The term 'prior restraint' is used to describe administrative and judicial orders *forbidding* certain communications when issued in advance of the time that such communications are to occur.") (internal quotations and citation omitted).

[7] The County's Rule 30(b)(6) witness testified that while he could not "cite an exact number of complaints," he believed that there were "between eight and ten complaints [that] were received through multiple channels, including e-mail, telephone; and in addition, there was a community meeting [held at the offices of the Washington ACLU, *see* R-14, Shinbo Decl. ¶ 21, ER-120] where a number of complaints or at least concerns were expressed about the advertisement." (R-56-2, Gannon Dep. at 48:4-12, ER-78). The witness agreed, however, that this was a "small" volume of complaints. (R-56-2, Gannon Dep. 48:24-25 to 49:1-2, ER-78-79). Indeed, when you consider the County's ridership is approximately 400,000 people *a day*, the volume is microscopic.

SUMMARY OF THE ARGUMENT

The County's restrictions on Plaintiffs' "global terrorism" ads operate as prior restraints on political speech in a public forum.

While the facts demonstrate that the County's advertising space is a public forum for Plaintiffs' speech and that its restrictions set forth in its Transit Advertising Policy are therefore impermissible content-based restrictions, the challenged restrictions are nonetheless viewpoint based and unreasonable.

In light of the Supreme Court's recent ruling in *Matal v. Tam*, 137 S. Ct. 1744 (2017), in which the Court held that the Lanham Act provision that prohibited trademarks that may "disparage" was an unlawful viewpoint-based restriction on speech, the County's restrictions on "demeaning or disparaging" and "harmful or disruptive" speech cannot withstand constitutional scrutiny, particularly as applied to restrict Plaintiffs' ads.

The County's Transit Advertising Policy, facially and as applied to restrict Plaintiffs' speech, also grants County officials unbridled discretion such that the officials' decisions to limit speech are not constrained by objective criteria but may rest on ambiguous and subjective reasons, including viewpoint, in violation of the First and Fourteenth Amendments

Indeed, in light of the purpose of the forum and all the surrounding circumstances, the County's restrictions on Plaintiffs' political ads are unreasonable.

There was no violence, reduced ridership, or a substantial diversion of resources—just a handful of complaints, mostly from political partisans—that would justify the County's rejection of Plaintiffs' ads. The County banned the ads because it disagrees with the viewpoint expressed, in violation of the First and Fourteenth Amendments.

Finally, in light of the record developed below, it is improper to conclude that AFDI Ad I is "false or misleading." Moreover, broad, content-based restrictions on false statements in political messages are impermissible. Consequently, this Court's ruling on Plaintiffs' motion for preliminary injunction—a preliminary ruling based on an incomplete record—should be reconsidered.

ARGUMENT

I. Standard of Review.

The Court reviews the district court's grant of summary judgment *de novo*. *Branch Banking & Tr. Co. v. D.M.S.I., LLC*, 871 F.3d 751, 759 (9th Cir. 2017). It reviews denials of summary judgment *de novo*. *Id*. And constitutional questions are reviewed *de novo*. *Id*.

The standard for granting summary judgment is well known: "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56. "[W]hen simultaneous cross-motions for summary judgment on the same claim are before the court, the court must consider the appropriate evidentiary

material identified and submitted in support of both motions, and in opposition to both motions, before ruling on each of them." *Fair Hous. Council v. Riverside Two*, 249 F.3d 1132, 1134 (9th Cir. 2001).

And because this case involves the violation of First Amendment rights, the Court is required to "conduct an independent examination of the record as a whole, without deference to the trial court." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 567 (1995). This is so "because the reaches of the First Amendment are ultimately defined by the facts it is held to embrace, and [this Court] must thus decide for [itself] whether a given course of conduct falls on the near or far side of the line of constitutional protection." *Id.; see also Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 499 (1984) (noting that in cases raising First Amendment issues appellate courts must make an independent examination of the whole record in order to ensure that lower court decisions do not infringe free speech rights).

II. A Ruling on a Preliminary Injunction Is Not "Law of the Case."

A preliminary decision on a request for an injunction, as in this case, is not binding at trial on the merits or when deciding a motion for summary judgment, and thus does not constitute the "law of the case." *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981) ("[T]he findings of fact and conclusions of law made by a court granting a preliminary injunction are not binding at trial on the merits."); *Wilcox v.*

United States, 888 F.2d 1111, 1114 (6th Cir. 1989) (holding that the trial court's denial of a preliminary injunction did not establish the law of the case with respect to the court's subsequent summary judgment determination); *Technical Publ'g Co. v. Lebhar-Friedman, Inc*., 729 F.2d 1136, 1139 (7th Cir. 1984) ("A factual finding made in connection with a preliminary injunction is not binding" on a motion for summary judgment); *City of Angoon v. Hodel*, 803 F.2d 1016, 1024, n.4 (9th Cir. 1986) (determinations corresponding to a preliminary injunction do not constitute law of the case). Applying the "law of the case" doctrine in such circumstances constitutes reversible error. *Wilcox*, 888 F.2d at 1114.

III. Analysis of Plaintiffs' Constitutional Claims.

To resolve Plaintiffs' First Amendment claim, the Court must (1) determine whether Plaintiffs' advertisements are protected speech; (2) conduct a forum analysis as to the forum in question to determine the proper constitutional standard to apply; and then (3) determine whether the County's speech restriction comports with the applicable standard. *Am. Freedom Def. Initiative v. Metro. Transp. Auth.*, 880 F. Supp. 2d 456, 466 (S.D.N.Y. 2012) (analyzing a free speech claim in "three parts"); *see generally Seattle Mideast Awareness Campaign v. King Cnty.*, 781 F.3d 489 (9th Cir. 2015) (evaluating a First Amendment claim by conducting a forum analysis and applying the appropriate standard) (hereinafter "*SeaMAC*").

Moreover, the County's "refusal to accept [Plaintiffs' advertisements] for display because of [their] content is a clearcut prior restraint." *Lebron v. Wash. Metro. Area Transit Auth.*, 749 F.2d 893, 896 (D.C. Cir. 1984) (Bork, J.); *see also Alexander*, 509 U.S. at 550 (stating that "prior restraint" refers to "administrative and judicial orders *forbidding* certain communications when issued in advance of the time that such communications are to occur") (internal quotations and citation omitted). And "[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963) (collecting cases). This is important because the *County* must come forward with clear evidence demonstrating that it restrictions are justified in this case. No such evidence exists. (*See, e.g.* R-56-2, Gannon Dep. at 36:24-25 to 37:1-17, ER-73-74).

A. Plaintiffs' Advertisement Is Protected Speech.

Signs posted on government transit advertising space constitute protected speech under the First Amendment. *United Food & Commercial Workers Union, Local 1099 v. Sw. Ohio Reg'l Transit Auth.*, 163 F.3d 341 (6th Cir. 1998) (hereinafter "*United Food*"); *see also SeaMAC*, 781 F.3d 489. This question is not at issue here.

B. The County Created a Forum for Plaintiffs' Speech.

"The [Supreme] Court has adopted a forum analysis as a means of determining when the Government's interest in limiting the use of its property to its intended

purpose outweighs the interest of those wishing to use the property for [expressive] purposes." *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 800 (1985). Forum analysis has traditionally divided government property into three categories: traditional public forums, designated public forums, and nonpublic forums. *Cornelius*, 473 U.S. at 800. Once the forum is identified, the court must then determine whether the speech restriction is justified by the requisite standard. *Id.*

A designated public forum exists when the government intentionally opens its property for expressive activity. *Perry Educ. Ass'n v. Perry Local Educators*, 460 U.S. 37, 44 (1983). As the Supreme Court stated, "[A] public 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*, 473 U.S. at 802.

In a designated public forum, restrictions on speech are subject to strict scrutiny. *Id.* at 800. Thus, "speakers 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. . . ." *Id.* (stating that this standard applies in a designated forum as well).

At the opposite end of the spectrum is the nonpublic forum. The nonpublic forum is "[p]ublic property which is not by tradition or designation a forum for

public communication." *Perry Educ. Ass'n*, 460 U.S. at 46. 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." *Id*. Thus, in a nonpublic forum, a speech restriction must be reasonable and viewpoint neutral to pass constitutional muster. *Id*. And the "reasonableness" requirement in the First Amendment context is not a pushover. As stated by this Court:

> The "reasonableness" requirement for restrictions on speech in a nonpublic forum requires more of a showing than does the traditional rational basis test; *i.e.*, it is not the same as establishing that the regulation is rationally related to a legitimate governmental objective, as might be the case for the typical exercise of the government's police power. *There must be evidence in the record to support a determination that the restriction is reasonable*. That is, there must be evidence that the restriction reasonably fulfills a legitimate need.

Sammartano v. First Judicial Dist. Ct., 303 F.3d 959, 966-67 (9th Cir. 2002), *abrogated on other grounds by Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7 (2008) (emphasis added) (citations omitted). As demonstrated further below, the County's prior restraints fail this test.

This Court previously recognized a "limited public forum," which it considered a "sub-category of the designated public forum." *See Flint v. Dennison*, 488 F.3d 816, 830-31 (9th Cir. 2007) (describing a "limited public forum" as "a type of nonpublic forum that the government has intentionally opened to certain groups or to certain topics") (internal citations and quotations omitted). In a "limited public

forum, strict scrutiny is accorded . . . to restrictions on speech that falls within the designated category for which the forum has been opened." *Hotel Emples. & Rest. Emples. Union, Local 100 v. City of N.Y. Dep't of Parks & Rec.*, 311 F.3d 534, 545 (2d Cir. 2002). Here, the forum is open to paying advertisers (the "certain group[]") and to advertisements addressing global terrorism (the "certain topic"). Consequently, under a proper limited public forum analysis, because Plaintiffs (paying advertisers) want to display an advertisement on a permissible topic (global terrorism), the County's restrictions are subject to strict scrutiny. *See id*. This Court, however, has backed away from this approach and considers a limited public forum to be the same as a "nonpublic" forum.[8]

There is little doubt that under the facts of this case, the Second, Third, Sixth, Seventh, and D.C. Circuits would hold that the forum is a public forum, thereby subjecting the County's content-based restrictions to strict scrutiny,[9] whereas the

[8] In *American Freedom Defense Initiative v. King County*, 796 F.3d 1165, 1169 n.1 (9th Cir. 2015), this Court stated that in light of the Supreme 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.'"

[9] *See N.Y. Magazine v. Metro. Transp. Auth.*, 136 F.3d 123 (2d Cir. 1998) (holding that the transit authority's advertising space was a designated public forum); *Christ's Bride Ministries, Inc. v. Se. Penn. Transp. Auth.*, 148 F.3d 242 (3d Cir. 1998); *United Food*, 163 F.3d 341 (6th Cir. 1998); *Planned Parenthood Ass'n/Chi. Area v. Chi. Transit Auth.*, 767 F.2d 1225 (7th Cir. 1985); *Lebron v. Wash. Metro. Area Transit Auth.*, 749 F.2d 893 (D.C. Cir. 1984).

First[10] and this Court would not.

This Court joined the First Circuit in its approach to the forum question in *SeaMAC*, where a divided panel held that the County's bus advertising space was a limited public forum (actually, a nonpublic forum, *see supra* n.8) even where the transit authority accepted controversial political ads, thus furthering the circuit split. *See SeaMAC*, 781 F.3d at 498.

While the majority of the federal appeals courts that have addressed the forum question presented here disagree with this Court, Plaintiffs acknowledge that the Court is bound to follow this minority approach. Plaintiffs hereby preserve the forum issue for potential *en banc* review or U.S. Supreme Court consideration.

Nonetheless, at the end of the day, the County's prior restraints on Plaintiffs' speech do not survive constitutional muster even in a limited (or nonpublic) forum, as demonstrated below.

C. The County's Prior Restraints Cannot Survive Constitutional Scrutiny.

1. The County's Prior Restraints Are Viewpoint Based.

The County's prior restraints on Plaintiffs' speech are viewpoint based facially and as applied. Viewpoint discrimination is an egregious form of content discrimination that is prohibited in all forums. *See Rosenberger v. Rector & Visitors*

[10] *Ridley v. Mass. Bay Transp. Auth.*, 390 F.3d 65 (1st Cir. 2004).

of the Univ. of Va., 515 U.S. 819, 829 (1995). "The principle that has emerged from [Supreme Court] cases is that the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others." *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993) (internal quotations and citation omitted). "When the government targets *not subject matter*, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant." *Rosenberger*, 515 U.S. at 829 (emphasis added).

Consequently, when speech "fall[s] within an *acceptable subject matter* otherwise included in the forum, the State may not legitimately exclude it from the forum based on the viewpoint of the speaker." *Cogswell v. City of Seattle*, 347 F.3d 809, 815 (9th Cir. 2003) (emphasis added). Thus, viewpoint discrimination occurs when the government "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 (emphasis added).

In *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819 (1995), for example, the Court concluded that the challenged restriction was viewpoint based. In doing so, the Court stated that "[t]he prohibited perspective, not the general subject matter, resulted in the refusal to make third-party payments, for the subjects discussed were otherwise within the approved category of publications."

Id. at 831.

As the Court further explained:

> The dissent's assertion that no viewpoint discrimination occurs because the Guidelines discriminate against an entire class of viewpoints *reflects an insupportable assumption that all debate is bipolar* and that antireligious speech is the only response to religious speech. Our understanding of the complex and multifaceted nature of public discourse has not embraced such a contrived description of the marketplace of ideas. If the topic of debate is, for example, racism, then exclusion of several views on that problem is just as offensive to the First Amendment as exclusion of only one. It is as objectionable to exclude both a theistic and an atheistic perspective on the debate as it is to exclude one, the other, or yet another political, economic, or social viewpoint. *The dissent's declaration that debate is not skewed so long as multiple voices are silenced is simply wrong; the debate is skewed in multiple ways*.

Id. at 831-32 (emphasis added).

Here, there is no dispute, and indeed, *the County admits*, that the subject matter of Plaintiffs' ads (*global terrorism*) is permissible. (R-56-2, Gannon Dep. at 36:3-9, ER-73). Indeed, even the display of the "faces" of global terrorists as found on the FBI's most wanted list and included in Plaintiffs' ads is permissible. What is not permissible under the County's policy is Plaintiffs' viewpoint regarding this subject matter: that these faces are the "Faces of Global Terrorism." This is classic viewpoint discrimination, which is prohibited in all forums. There is no escaping this conclusion. It is compelled by controlling law. *See Rosenberger*, 515 U.S. at 830-31; *Cornelius*, 473 U.S. at 806; *see also Good News Club v. Milford Cent. Sch. Dist.*, 533 U.S. 98, 107-08 (2001) (finding that a public school's exclusion of a

Christian club from meeting on its school grounds discriminated on the basis of viewpoint because the school permitted non-religious groups "pertaining to the welfare of the community" to meet at the school). And it also demonstrates why Plaintiffs should prevail on their equal protection claim, which is "fused" with their claim arising under the First Amendment. *See Police Dept. of the City of Chi. v. Mosley*, 408 U.S. 92, 96 (1972) ("[U]nder the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views."); *Carey v. Brown*, 447 U.S. 455, 459-63 (1980) (holding that the challenged speech restricting ordinance violated the Equal Protection Clause); *see also R. A. V. v. St. Paul*, 505 U.S. 377, 384 n.4 (1992) (noting that the "Court itself has occasionally fused the First Amendment into the Equal Protection Clause").

This conclusion is further buttressed by the County's enforcement of a policy that is itself viewpoint based (*i.e.*, the restriction on "demeaning or disparaging" speech). And as noted in the Introduction, this conclusion is compelled by *Matal v. Tam*, 137 S. Ct. 1744, 1751 (2017), where the Court struck down on First Amendment grounds the Lanham Act provision that prohibited trademarks that may "disparage" because it was an unlawful viewpoint-based restriction on speech. *See also id*. at 1763 ("Giving offense is a viewpoint."); *Rosenberger*, 515 U.S. at 830-

31; *R.A.V.*, 505 U.S. at 389 (stating that "a State may not prohibit only that commercial advertising that depicts men in a demeaning fashion" without violating the First Amendment); *Ridley v. Mass. Bay Transp. Auth.*, 390 F.3d 65, 100 (1st Cir. 2004) (Torruella, J., dissenting) ("The government cannot allow dissemination of one viewpoint that it finds inoffensive or bland, and prohibit the dissemination of another viewpoint that it finds offensive or 'demeaning,' . . . . Such distinctions are viewpoint based, not merely reasonable content restrictions.").

In *Ridley v. Massachusetts Bay Transportation Authority*, 390 F.3d 65 (1st Cir. 2004), the court held that the transit authority's restriction on certain advertisements that were critical of laws prohibiting drug use were viewpoint based. The MBTA asserted that the restriction was viewpoint neutral, arguing that a similar message could run if a different manner of expression was used. The court rejected the argument, stating,

> The MBTA's concession means simply that it will run advertisements which do not attract attention but will exercise its veto power over advertisements which are designed to be effective in delivering a message. Viewpoint discrimination concerns arise when the government intentionally tilts the playing field for speech; *reducing the effectiveness of a message, as opposed to repressing it entirely, thus may be an alternative form of viewpoint discrimination*.

Ridley, 300 F.3d at 88 (emphasis added).

Thus, attempting to "reduc[e] the effectiveness of a message" or the thrust of its meaning—even if the entire message itself is not prohibited—is a form of

viewpoint discrimination. And even more to the point, as recently stated by the Supreme Court, "Giving offense is a viewpoint." *Matal*, 137 S. Ct. at 1763.

The fact that the County has engaged in viewpoint discrimination was laid bare by its admission that AFDI Ad II would be acceptable if Plaintiffs changed the caption (and thus the viewpoint of the message) from "Faces of Global Terrorism" to "Most Wanted Global Terrorists" or "Wanted for Global Terrorism," leaving all else the same. (R-56-2, Gannon Dep. at 75:25 to 76:1-13 ["Q. Okay. So if we changed 'Faces of Global Terrorism,' as we just went through, to 'Most Wanted Global Terrorists' or 'Wanted for Global Terrorism,' everything else remaining equal, the ad would comply with the policy. Correct? A. That is correct."], ER-96-97). It is not possible to conclude that this is anything but viewpoint discrimination in violation of the Constitution.[11]

Indeed, the suppression of this viewpoint is also the very basis for the County's assertion that the advertisements would somehow cause disruption. As demonstrated below, there is no evidence whatsoever of the type of disruption (violence, reduced ridership, substantial diversion of resources) that would permit

[11] Contrary to the district court's view of the law, when the County is the one deciding the acceptable viewpoint for a speaker, (*see* R-75, Order at 8, n.3, ER-8 [finding no viewpoint discrimination and stating that "Metro is amenable to running AFDI's advertisement with different language"]), that *is* viewpoint discrimination, *Matal*, 137 S. Ct. at 1763 ("Giving offense is a viewpoint."). Plaintiffs' viewpoint is as their ads state: these are the "Faces of Global Terrorism," and it is this viewpoint the County rejects. (R-56-2, Gannon Dep. at 75:25 to 76:1-13, ER-96-97).

this type of censorship. *None*.

2. The Transit Advertising Policy Permits Subjective Application.

In its order denying Plaintiffs' motion for a preliminary injunction, the district court noted with concern "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." *Am. Freedom Def. Initiative v. King Cnty.*, No. C13-1804-RAJ, 2014 U.S. Dist. LEXIS 11982, at *13 n.1 (W.D. Wash. Jan. 30, 2014). That concern is now realized and, as noted above, laid bare by how the County applied its Transit Advertising Policy in this case.

As noted by the Supreme Court, "the 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." *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553 (1975). Thus, "[t]he absence of clear standards guiding the discretion of the public official vested with the authority to enforce the enactment invites abuse by enabling the official to administer the policy on the basis of impermissible factors." *United Food*, 163 F.3d at 359; *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 130 (1992) ("A government regulation that allows arbitrary application . . . has the potential for becoming a means of suppressing a particular point of view.") (internal quotations omitted).

Consequently, a speech restriction "offends the First Amendment when it

grants a public official 'unbridled discretion' such that the official's decision to limit speech is not constrained by *objective criteria*, but may rest on 'ambiguous and subjective reasons.'" *United Food*, 163 F.3d at 359 (quoting *Desert Outdoor Adver., Inc. v. City of Moreno Valley*, 103 F.3d 814, 818 (9th Cir. 1996)) (emphasis added). Such restrictions also offend the due process clause of the Fourteenth Amendment. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) ("It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined."); *United Food*, 163 F.3d at 358-59 (same).

Here, the County's proffered bases for restricting Plaintiffs' speech are not based on any *objective criteria*, but, instead, allow for *ambiguous* and *subjective reasons* for restricting speech in violation of the First and Fourteenth Amendments. Indeed, in reality, the dressed-up disguise of objectivity merely hides a viewpoint-based censorship of speech (and speaker) with which the County does not agree or simply does not like. The way in which the County handled AFDI Ad II—admitting that the pictures (and names associated with them) were permissible but stating that the "Faces of Global Terrorism" message was not—is dispositive (in addition to the County's witness admitting that no objective standards exist [R-56-2, Gannon Dep. at 69:13-20 ["There are no standards contained in this policy."], ER-93). Note also that AFDI Ad I included the only picture of a U.S.-born, *Caucasian* terrorist listed on the FBI's most wanted list, and that picture was not on AFDI Ad II. In short,

there are no *objective* criteria that explain why the County rejected Plaintiffs' ads, only a *subjective* dislike of Plaintiffs' message.

> *SeaMac* is both instructional and distinguishable.
>
> SeaMAC contends that the County's application of § 6.4(D) is unconstitutional because SeaMAC's proposed ad does not actually violate § 6.4(D). In particular, SeaMAC argues that the threat of disruption posed by its ad was merely "speculative," and that the County's attempts to organize a law enforcement response plan indicated any threat could have been "neutralized." *We must independently review the record, without deference to the threat assessment made by County officials, to determine whether it "show[s] that the asserted risks were real."* *Sammartano v. First Judicial Dist. Court*, 303 F.3d 959, 967 (9th Cir. 2002), *abrogated on other grounds by Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7 (2008).
>
> We agree with the district court that the threat of disruption here was *real* rather than speculative. The County identified three types of potential disruption, *each of which is supported by the record*: (1) vandalism, violence, or other acts endangering passengers and preventing the buses from running; (2) reduced ridership because of public fear of such endangerment; and (3) substantial resource diversion from Metro's day-to-day operations. As discussed earlier, the County received *numerous threats* to vandalize or block Metro buses, which were sufficiently credible to cause Metro to seek the advice of law enforcement. In addition, riders and drivers threatened not to ride or drive, citing legitimate safety concerns generated by the negative reaction to SeaMAC's proposed ad. And Metro had to divert substantial resources away from its normal day-to-day operations in order to address those safety concerns. Taken together, we think these facts establish that, if permitted to run, SeaMAC's ad would foreseeably have resulted in "harm to, disruption of, or interference with the transportation system," as § 6.4(D) requires.

SeaMAC, 781 F.3d at 500-01 (emphasis added); *see also Am. Freedom Def. Initiative v. King Cnty.*, 796 F.3d 1165, 1169 (9th Cir. 2015) (explaining its holding in

SeaMAC and stating that "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*") (emphasis added).

In this case, there is no such evidence of vandalism, reduced ridership, or substantial resource diversion supported by the record. ***None***. At best, in light of the County's experience with the State Department's ad (an experience that is not entirely compatible because it is certainly likely that the State Department ad would cause more complaints because it represents the position of the federal government and not the position of an outspoken advocacy group like AFDI), there was a "small volume" of complaints, and these complaints were largely from a politician and advocacy groups.

Indeed, this case fits squarely within the words of caution expressed by this Court:

> A claimed fear of hostile audience reaction could be used as a mere pretext for suppressing expression because public officials oppose the speaker's point of view. That might be the case, for example, where the asserted fears of a hostile audience reaction *are speculative and lack substance*, or where speech on only one side of a contentious debate is suppressed.

SeaMAC, 781 F.3d at 502-03 (emphasis added).

In upholding the County's restriction on speech that "is so objectionable under contemporary community standards as to be reasonably foreseeable that it will result in harm to, disruption of, or interference with the transportation system," the

SeaMAC panel relied upon *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969). *See SeaMAC* at 781 F.3d at 500. The panel noted that an analogous standard was upheld in *Tinker* where the Court "concluded that school officials may exclude student speech if the speech could reasonably lead to 'substantial disruption of or material interference with school activities.'" *Id.* (quoting *Tinker*, 393 U.S. at 514). Accordingly, the *SeaMAC* panel concluded that the County's speech restriction was valid because it "is tied to disruption of or interference with the normal operations of the transit system," thereby "suppl[ying] courts with a sufficiently definite and objective benchmark against which to judge the 'disruption' assessments made by County officials." *Id.* Therefore, pursuant to *SeaMAC*, in order for the County to apply this standard consistent with the Constitution, the disruption or interference must be *real*. And it is the County's burden to "supply" the Court with the definite and objective evidence to support its "disruption" assessment. The County has failed to do so here.

Applying the rationale in *Tinker*, "[i]n order for the State [in the person of government transit officials] to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. Certainly where there is no finding and no showing that engaging in the forbidden conduct would *materially* and *substantially* interfere with

the [normal operations of the transit system], the prohibition cannot be sustained." *See Tinker*, 393 U.S. at 509 (internal quotations omitted) (emphasis added).

Consequently, the "discomfort and unpleasantness" that might accompany Plaintiffs' "unpopular viewpoint" cannot serve as the basis for suppressing it. And there is no evidence that Plaintiffs' advertisement has caused (or will cause) material and substantial interference (let alone any interference) with the normal operations of the transit system.

As the Supreme Court observed in *Tinker* (with slight paraphrasing):

> [I]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken [or message displayed] that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk[;] and our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.

Tinker, 393 U.S. at 508-09 (internal citation omitted). This firm commitment to protecting the freedom of speech as expressed in *Tinker* is even more pertinent here since "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings," *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 682 (1986), such as the "setting" at issue in this case.

3. The County's Prior Restraints Are Not Reasonable.

Reasonableness is evaluated "in light of the purpose of the forum and all the surrounding circumstances." *Cornelius*, 473 U.S. at 809; *see also Brown v. Cal. Dep't of Transp.*, 321 F.3d 1217, 1222-23 (9th Cir. 2003) (preliminarily enjoining California DOT's policy of permitting the display of American flags, but prohibiting the display of all other banners and signs on highway overpass fences, a nonpublic forum, concluding, *inter alia*, that the "proffered justification" for the restriction was "patently unreasonable"). And "there must be evidence that the restriction reasonably fulfills a legitimate need." *Sammartano*, 303 F.3d at 967. The County's prior restraints fail this test.

The County proffers three justifications for its prior restraint on AFDI Ad I: (1) the advertisement contains "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"; (2) the advertisement "contains material that demeans or disparages an individual, group of individuals or entity"; and (3) the advertisement "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." And the County proffers two justifications for its prior restraint on AFDI Ad II: (1) the advertisement "contains material that demeans or disparages an individual, group of individuals or entity"; and (2) the advertisement

"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." However, in light of the purpose of the forum and all the surrounding circumstances, these justifications are patently unreasonable.

There is nothing false, defamatory, demeaning, or disparaging about a private party conveying a political message that displays *factually correct information about global terrorists*—information that is made available to the public by the federal government no less. Indeed, this is the *very same information* that was included on an advertisement that the County had previously accepted.[12] For similar reasons, there is no basis (reasonable or otherwise) for claiming that Plaintiffs' advertisement "contains material that is *so objectionable* as to be reasonably foreseeable" that it will harm, disrupt, or interfere with the County's transportation system in any way—nor has the County proffered any facts to support such a basis so as to justify its prior restraints. In sum, regardless of the nature of the forum, the County's prior restraints on Plaintiffs' speech are unreasonable.

[12] Any reasonable viewer of AFDI Ads I and II would also conclude that these ads are sponsored by Plaintiffs and not the federal government. In fact, the ads expressly make this point. AFDI Ad I states, "Paid for by the American Freedom Defense Initiative" (R-56-1, Geller MSJ Decl. ¶ 25, ER-17), and AFDI Ad II states, "This ad sponsored by AFDI not the U.S. government" (R-56-1, Geller MSJ Decl. ¶ 41 42, ER-21-22).

4. It Is Error to Apply a Falsity Standard on Political Speech.

On March 7, 2016, the U.S. Supreme Court denied review of Plaintiffs' petition for writ of certiorari, with Justice Thomas, joined by Justice Alito, writing a dissent from the denial. In that dissent, Justice Thomas stated, in relevant part: "King County bans ads that it deems 'false or misleading,' *but this Court considers broad, content-based restrictions on false statements in political messages to be generally impermissible*." *Am. Freedom Def. Initiative v. King Cnty.*, 136 S. Ct. 1022, 1025 (2016) (Thomas, J., dissenting) (citing *United States v. Alvarez*, 132 S. Ct. 2537 (2012)) (emphasis added). Judge Bork echoed this sentiment, observing that 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.); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 271 (1964) ("Authoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth—whether administered by judges, juries, or administrative officials . . . ."). Because the County admits that AFDI Ad I was a political message, it is impermissible under the First Amendment to restrict it based on a "false or misleading" speech restriction. This panel should revisit this issue now that the record is more fully developed and complete. Rulings on preliminary injunctions are just that: preliminary rulings. *See, e.g., Univ. of Tex.*, 451 U.S. at 395.

CONCLUSION

The Court should reverse the district court and grant judgment in Plaintiffs' favor, thereby permitting the display of Plaintiffs' political ads.

STATEMENT OF RELATED CASES

Seattle Mideast Awareness Campaign v. King County, 781 F.3d 489 (9th Cir. 2015) (Ninth Circuit Case No. 11-35914) and *American Freedom Defense Initiative v. King County*, 796 F.3d 1165 (9th Cir. 2015) (Ninth Circuit Case No. 14-35095) are cases previously heard in this Court which concern the case being briefed and / or raise the same or closely related issues.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P. 32(a)(7)(c) and Circuit Rule 32-1, the foregoing Brief is proportionally spaced, has a typeface of 14 points Times New Roman, and contains 10,725 words, excluding those sections identified in Fed. R. App. P. 32(a)(7)(B)(iii).

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CERTIFICATE OF SERVICE

I hereby certify that on March 14, 2018, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. I also certify that all participants in this case are registered CM/ECF users.

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