NO. 14-35095

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' REPLY BRIEF

ROBERT JOSEPH MUISE, ESQ.
AMERICAN FREEDOM LAW CENTER
P.O. BOX 131098
ANN ARBOR, MICHIGAN 48113
(734) 635-3756

DAVID YERUSHALMI, ESQ.
AMERICAN FREEDOM LAW CENTER
1901 PENNSYLVANIA AVENUE NW
SUITE 201
WASHINGTON, D.C. 20006
(646) 262-0500

Attorneys for Plaintiffs-Appellants

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INTRODUCTION

In a strained attempt to avoid the obvious First Amendment violation in this case, Defendant-Appellee King County (hereinafter "County") offers this court an incorrect view of the law and a tendentious view of the facts. More specifically, the County invites this court to ignore controlling precedent that compels a finding that the forum at issue is a public forum for Plaintiffs' speech—a finding that proves fatal to the County's position. Indeed, the County asks this court to disregard "the 'special solicitude' [the court has] for claims alleging the abridgment of First Amendment rights," *Brown v. Cal. Dep't of Transp.*, 321 F.3d 1217, 1221 (9th Cir. 2003), and to simply rubberstamp the district court's erroneous decision.

In sum, the County's request that the court ignore the important First Amendment implications of this case and affirm without careful scrutiny the district court's erroneous order upholding the County's unreasonable, content- and viewpoint-based prior restraint on Plaintiffs' speech while Plaintiffs continue to suffer "irreparable harm," *see Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."), must be rejected lest the importance of First Amendment freedoms to our constitutional democracy be relegated to mere platitudes, *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982)

("[Speech] concerning public affairs is more than self-expression; it is the essence of self-government.") (citations omitted).

ARGUMENT

I. Standard of Review.

Before turning to the substantive arguments, we pause here to address the standard of review. According to the County, the task for this court is to essentially rubberstamp the district court's denial of Plaintiffs' request for a preliminary injunction without *any* consideration of the fact that this case involves a government restriction on the right to free speech. (Cnty.'s Br. at 18-20). The County is wrong.

As stated by this court, even in cases involving preliminary injunctions, the court "review[s] the application of facts to law on free speech questions *de novo*." *Brown*, 321 F.3d at 1221 (noting the "special solicitude" the court has for free speech claims). Moreover, as the Supreme Court noted, "the reaches of the First Amendment are ultimately defined by the facts it is held to embrace." *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 567 (1995). Consequently, as stated by the 11th Circuit, "Ordinarily, we review district court fact findings only for clear error, but First Amendment issues are not ordinary. Where the First Amendment is involved our review of the district court's findings of 'constitutional facts,' as distinguished from ordinary historical facts, is

de novo." *ACLU of Fla., Inc. v. Miami-Dade Cnty. Sch. Bd.*, 557 F.3d 1177, 1203 (11th Cir. 2009) (reviewing an order granting a preliminary injunction).

And this special care when reviewing a free speech claim in the context of a request for a preliminary injunction is reflected by the fact that even the *momentary* loss of First Amendment freedoms constitutes irreparable harm sufficient to warrant injunctive relief as a matter of law. *See Elrod*, 427 U.S. at 373; *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*). And it is further reflected by the fact that the public interest favors granting preliminary injunctions that protect First Amendment freedoms. *See Sammartano v. First Judicial Dist. Court*, 303 F.3d 959, 974 (9th Cir. 2002) (upholding the grant of a preliminary injunction and noting that the "public interest favors protecting core First Amendment freedoms").

In sum, cases such as this one raising First Amendment issues are not ordinary and thus require "special solicitude" from the court.

II. The County's Advertising Space Is a Public Forum for Plaintiffs' Speech.

The County claims that Plaintiffs "argue that any use of a government-owned nonpublic forum for noncommercial paid advertising automatically creates a designated public forum where regulation of speech is generally inappropriate."

(Cnty.'s Br. at 1-2). Of course, Plaintiffs argue no such thing. Worse yet, the County incorrectly states the standard for when the government does create a public forum, claiming that "a 'designated public forum' is created when the government intentionally acts to open a nonpublic forum to *all* speech activities." (Cnty.'s Br. at 25) (emphasis added). And in an obvious attempt to bolster its incorrect statement of the law, the County engages in a sleight of hand by citing *DiLoreto v. Downey Unified Sch. Dist. Bd. of Educ.*, 196 F.3d 958, 964 (9th Cir. 1999), for the following proposition: "When the government intentionally opens a nontraditional forum for [unlimited] public discourse it creates a designated public forum." (Cnty.'s Br. at 25). But that of course is not what this court said (nor does it reflect what the law is). The actual quote from the court did not use the term "unlimited," which the County added in brackets, and for good reason: doing so would have misstated the law. 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 v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 802 (1985).

Indeed, what Plaintiffs have correctly argued is precisely what the U.S. Supreme Court and virtually every other federal circuit court, including this one, have said regarding when the government creates a public forum for speech. To

begin with, the court does not end the inquiry by simply accepting the government's self-serving statement, crafted no doubt by its lawyers, that it does not intend to create a public forum, as the County suggests here. (*See infra* n. 1). Rather, courts "look[] to the policy *and* practice of the government," as well as "the nature of the property and *its compatibility with expressive activity*." *Cornelius*, 473 U.S. at 802 (emphasis added). And when conducting this analysis, "actual practice speaks louder than words." *Grace Bible Fellowship, Inc. v. Maine Sch. Admin. Dist. No. 5*, 941 F.2d 45, 47 (1st Cir. 1991). Thus, a forum analysis "involve[s] *a careful scrutiny* of whether the government-imposed restriction on access to public property is truly part of the process of limiting a nonpublic forum to activities compatible with the intended purpose of the property." *United Food & Commercial Workers Union, Local 1099 v. Sw. Ohio Reg'l Transit Auth.*, 163 F.3d 341, 351-52 (6th Cir. 1998) (hereinafter "*United Food*") (internal quotations and citation omitted) (emphasis added).

And so we begin with the undisputed—and, indeed, conceded—facts that the nature of the forum at issue is entirely compatible with Plaintiffs' proposed expressive activity (*i.e.*, the display of a bus advertisement), and that the County accepts for display on its bus advertising space a wide array of "commercial, political and public interest ads" (Cnty.'s Br. at 16), including advertisements on exceedingly controversial subjects such as the Israeli / Palestinian conflict and

terrorism (*i.e.*, these are not "aberrations"), (Doc. 14; ER 30-33, 35, 39-45, 56-59, 71-72 [Shinbo Decl. ¶¶ 6, 9, 11, 18, Exs. A, C, H]; *see also* Doc. 12; ER 118 [Def.'s Br. in Opp'n to Mot. for Prelim. Inj. at 17 ("Metro does not deny that its advertising policy allows for a *range of speech*, including a handful of *controversial* ads . . . .") (emphasis added)]).

Armed with these indisputable facts, we turn now to what the case law *actually says* regarding the forum question. And we start with *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974), where the Court found that the city's ban on noncommercial 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. As noted, virtually every other federal circuit court, including this one, has followed *Lehman* to hold that a total ban on *noncommercial* speech may be consistent with the government acting in a proprietary capacity and have thus found transportation advertising space to be 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).

In *DiLoreto v. Downey Unified Sch. Dist. Bd. of Educ.*, this court affirmed this fundamental understanding of the law, stating:

> 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*.

DiLoreto, 196 F.3d at 965 (citing, *inter alia*, *Lehman*, 418 U.S. at 303-04) (emphasis added). The Second Circuit agrees: "Disallowing 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). The Seventh Circuit similarly holds that the advertising space on a bus system is a public forum where the transit authority permits "a wide variety" of commercial and non-commercial advertising. *Planned Parenthood Ass'n/Chicago Area v. Chicago Transit Auth.*, 767 F.2d 1225 (7th Cir. 1985). And the Sixth Circuit agrees as well, setting out the following cogent analysis, which is applicable here:

> In accepting a wide array of political and public-issue speech, [the government] has demonstrated its intent to designate its advertising space a public forum. Acceptance of a wide array of advertisements, including political and public-issue advertisements, is indicative of the government's intent to create an open forum. 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, 163 F.3d at 355; *see also Lebron v. Wash. Metro. Area Transit Auth.*, 749 F.2d 893, 896 n.6 (D.C. Cir. 1984) (Bork, J.) ("Unlike *Lehman* . . ., where the Supreme Court sustained a ban on all political advertising inside a city transit system, the Authority here, by accepting political advertising, has made its subway stations into public fora.").

In short, the County's claim that this court should simply accept its policy statement that it did not intend to create a public forum and disregard *all* of the factual evidence to the contrary *must* be rejected.[1] There is simply no escaping this

[1] Remarkably, the County attempts to distinguish this case law by making the counterfactual claim that these cases are not applicable because they "did not involve clear statements of written government intent to create a limited public forum." (Cnty.'s Br. at 31; *see also* Cnty.'s Br. at 29 [claiming that Plaintiffs "ignore[] the central role that statements of government policy and intent play in determining proper characterization of the forum"]). The County is wrong. As the Sixth Circuit stated quite clearly in *United Food*,

> We do not believe [the government transit agency's] stated intent to operate its advertising space as a nonpublic forum, without more, is dispositive, for we must look to both "the policy *and practice* of the government to ascertain whether it intended to designated a place . . . as a public forum." *Cornelius*, 473 U.S. at 802 (emphasis added); *see also Air Line Pilots Ass'n, Int'l v. Department of Aviation*, 45 F.3d 1144, 1153 (7th Cir. 1995) ("The government's stated policy, without more, is not dispositive with respect to the government's intent in a given forum."); *Grace Bible Fellowship, Inc.*,[941 F.2d at 47] (in determining whether the government has designated public property a public forum, "actual practice speaks louder than words").

conclusion: the forum at issue here is a public forum for Plaintiffs' advertisement. Therefore, the County's prior restraint[2] on Plaintiffs' speech cannot withstand constitutional scrutiny. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995) ("It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys.").

III. The County's Speech Restrictions Are Unconstitutional.

A. The Speech Restrictions Are Content Based.

There is little need to spend much time on this undisputed point of law. A content-based restriction "restrict(s) expression because of its message, its ideas, its subject matter, or its content." *Consol. Edison Co. of N.Y. v. Pub. Serv. Comm.*

> Were we to hold otherwise, the government could circumvent what in practice amounts to open access simply by declaring its "intent" to designate its property a nonpublic forum in order to enable itself to suppress disfavored speech. We therefore must closely examine whether in practice [the government agency] has consistently enforced its written policy in order to satisfy ourselves that [the agency's] stated policy represents its actual policy.

United Food, 163 F.3d at 352-53.

[2] The County boldly asserts that Plaintiffs' "repeated citations to general First Amendment case law sheds little light on the resolution of this case. . . . The claim of a 'prior restraint' is overwrought." (Cnty.'s Br. at 41). Yet, in support of their argument that the County's speech restriction is a prior restraint as a matter of law, Plaintiffs cite to *Lebron v. Wash. Metro. Area Transit Auth.*, 749 F.2d 893, 896 (D.C. Cir. 1984), which is a case involving the rejection of an advertisement by a transit authority (the very situation at issue here). (*See* Pls.' Opening Br. at 13). And this *unanimous* decision was written by Judge Bork, and the three-judge panel also included then-Circuit Judge Scalia and Judge Starr. Simply put, the County's disturbing view of the First Amendment is, thankfully, not the view of those judges (and lawyers) who properly understand the importance of this constitutional safeguard.

of N.Y., 447 U.S. 530, 537 (1980). Here, it is undisputed that, at a minimum, the County rejected Plaintiffs' advertisement based on its content. And such restrictions in a public forum violate the First Amendment. *S.O.C., Inc. v. Cnty. of Clark*, 152 F.3d 1136, 1145 (9th Cir. 1998) (stating that content-based restrictions "are presumptively unconstitutional").

B. The Speech Restrictions Are Viewpoint Based.

Viewpoint discrimination is prohibited in all forums. *See Rosenberger*, 515 U.S. at 829. And it occurs "[w]hen the government targets *not subject matter*, but particular views taken by speakers *on a subject*." *Id.* (emphasis added). As this court explained in *Cogswell v. City of Seattle*, 347 F.3d 809, 815 (9th Cir. 2003), 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." Here, there is no question that the subject matter of Plaintiffs' advertisement ("terrorism") is acceptable in the forum at issue. And this is not a "gross categor[y] like 'political speech," (*see* Cnty.'s Br. at 42), but a well-defined subject matter that the County admits is acceptable, (*see, e.g.*, the State Department's advertisement urging viewers to "Stop a terrorist. Save lives," which the County readily accepted), (Doc. 14; ER 33-35, 60-61, 71-72 [Shinbo Decl. ¶¶ 12-13, 33-34, Exs. D, H]).

The County argues that "[t]he problem was not the 'most wanted terrorist' viewpoint of AFDI's ad, but its decision *to communicate that viewpoint* in a manner that was in violation of the TAP subject matter restrictions." (Cnty.'s Br. at 44). This argument is fatal to the County. As an initial matter, the County is impermissibly telling Plaintiffs what their viewpoint is—and it is obviously and most certainly not a "'most wanted terrorist' viewpoint," whatever that might be.[3] But most important, the County admits here that it is objecting to the *viewpoint* that Plaintiffs have *communicated* on an acceptable subject matter—terrorism. Clearly, the *viewpoint* that the County objects to is the *viewpoint* that the "Faces of Global Terrorism" are the faces of Islamic jihadis (a viewpoint, by the way, that is supported by the indisputable facts).

The County's reliance on *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666 (1998) (hereinafter "*AETC*"), is misplaced. (Cnty.'s Br. at 36-38). Indeed, *AETC* highlights quite nicely the County's violation of Plaintiffs' First Amendment rights in this case.

In *AETC*, the petitioner, a state-owned public television broadcaster, denied the request of respondent Forbes, an independent candidate with very little support,

[3] Consider further the County's restrictions. How is it that "civility, accuracy and system disruption" constitute "subject matter limitations" in the first instance? Indeed, they do not. And even if they were construed to be "subject matter," the subject matter of Plaintiffs' advertisement is clearly "terrorism" and not "civility, accuracy or system disruption"—so how can it be excluded on these bases? Indeed, it cannot.

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, there is no question that Plaintiffs, 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 he held the view that Islamic jihadis were responsible for global terrorism (an acceptable subject of the debate), the Court would have found a First Amendment violation. And so should the court here.

C. The Speech Restrictions Are Unreasonable.

Even assuming, *arguendo*, that the forum at issue is a limited public forum, the County's speech restrictions do not meet the "reasonableness" requirements of the First Amendment. The "reasonableness" requirement for speech restrictions "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 government 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 fulfils a legitimate need*." *Sammartano v. First Judicial Dist. Court*, 303 F.3d 959, 966-67 (9th Cir. 2002) (internal quotations and citations omitted).

The three bases for restricting Plaintiffs' political speech, as described by the County in its opposition brief, are "civility, accuracy and system disruption." (Cnty.'s Br. at 16). None of these restrictions as applied here meet the "reasonableness" requirement under the First Amendment.

As a threshold matter, none of these restrictions are "reasonable" as a matter of law because they give government officials unbridled discretion over the forum's use. *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553 (1975) ("[T]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."). Indeed, as this case demonstrates, "[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. Consequently, the County's speech restrictions "offend[] the First Amendment" because they "grant[] 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.'"[4] *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). We turn now to each restriction separately.

1. The County's "Civility" Restriction.

As demonstrated above, this restriction is not a permissible "subject matter" restriction but a restriction on viewpoint. And this is evident by its application in this case. Indeed, this restriction is not even confined to restricting the use of certain words, symbols, or language, such as obscenity (or "profanity, violence, nudity, etc." [Cnty.'s Br. at 50 n.9]), *but see Sammartano*, 303 F.3d at 969 (stating that *Cohen v. California*, 403 U.S. 15 (1971) "undermines any argument in support of the reasonableness of Rule 1's ban on words, pictures, or symbols because of their 'degrading or offensive' nature and of Rule 4's prohibition of those with 'clearly offensive meaning"), but is plainly aimed at restricting a *viewpoint* that the County finds objectionable (*i.e.*, that the "Faces of Global Terrorism" are the faces of Islamic jihadis).

Moreover, the County's stated rationale for its "civility" restriction is "to maintain a comfortable environment for transit riders, while placing all prospective

[4] The County claims that "[t]he cases cited by AFDI and Amicus regarding the need for 'objective criteria' are inapposite because they arise in contexts outside the limited public forum case law." (Cnty.'s Br. at 58). The County is wrong. *United Food*, cited above and which relied upon a Ninth Circuit case for this point of law, *is* a case involving the rejection of a bus advertisement by a transit authority—the precise situation presented by this case.

advertisers on an equal footing." (Cnty.'s Br. at 7). How does a sign on the outside of a bus make a rider inside the bus less "comfortable"? Was the County so concerned about the "comfort" of their Jewish passengers who rode on buses with signs calling for "equal rights for Palestinians"? (*See, e.g.*, Doc. 14; ER 39-45 [Shinbo Decl. Ex. A (permitting ads expressing a viewpoint in favor of "equal rights for Palestinians")]). How does a County official objectively measure a passenger's "comfort" level to begin with (and here, the County must be referring to a passenger's mental tranquility because the signs cause no physical impairments or obstructions)? In short, under the First Amendment, this restriction is not reasonable "in light of the purpose of the forum and all the surrounding circumstances." *Cornelius*, 473 U.S. at 809. Indeed, it is quite absurd under the circumstances.

Consider further the undisputed fact that the State Department's "Faces of Global Terrorism" advertisement was accepted by the County on May 17, 2013, and posted on June 6, 2013. The State Department did not voluntarily agree to withdraw its advertisement until June 25, 2013, which was nearly 3 weeks later, and it wasn't until the beginning of July 2013 that all of the advertisements were removed. (Doc. 14; ER 33-35 [Shinbo Decl. ¶¶ 13, 18]). And yet there is no evidence of any passengers, let alone a significant number of them, refusing to board any buses on account of this advertisement. And there is certainly no

evidence of any "harm to, disruption of or interference with the transportation system." At best, the County can point to a "small" "volume" of complaints and a few politically-motivated letters and email. (Doc. 14; ER 34-35 [Shinbo Decl. ¶¶ 14-18]). In short, there is no "evidence that the restriction reasonably fulfills a legitimate need," *Sammartano*, 303 F.3d at 967, and certainly not as applied in this case.

2. The County's "Accuracy" Restriction.

As Judge Bork observed in *Lebron v. Wash. Metro. Area Transit Auth.*, 749 F.2d 893, 896 (D.C. Cir. 1984), a "prior administrative restraint of distinctively political messages on the basis of their alleged deceptiveness is unheard-of—and deservedly so." Indeed, the County's attempt to apply an "accuracy" standard to Plaintiffs' political speech "is unheard-of" because such a restraint is impermissible under the First Amendment in any forum. *See id.; 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).

3. The County's "System Disruption" Restriction.

As demonstrated previously, there is nothing in the record to show that the asserted claim that Plaintiffs' advertisement will cause "system disruption" is real. *Sammartano*, 303 F.3d at 967 (holding that in order to satisfy the "reasonableness"

requirement for restrictions on speech, "[t]here must be evidence in the record to support a determination that the restriction is reasonable"). The "small" "volume" of complaints and the few politically-motivated letters and email, (Doc. 14; ER 34-35 [Shinbo Decl. ¶¶ 14-18]), hardly demonstrate that Plaintiffs' advertisement is more likely to cause "system disruption" than any of the other advertisements on controversial topics that the County accepts, such as the explosively controversial Israeli / Palestinian conflict.

In *Tucker v. Cal. Dep't of Educ.*, 97 F.3d 1204, 1215 (9th Cir. 1996), for example, this court struck down a speech restriction in a nonpublic forum, holding that it was unreasonable and stating that there is "nothing in the record to indicate that religious materials are more likely to disrupt harmony in the workplace than any other materials on potentially controversial topics such as same-sex marriage, labor relations, and even in some instances sports. Thus, this case is unlike *Cornelius* where there was evidence in the record—thousands of letters complaining about the inclusion of advocacy groups in the fund drive—that supported the inference that the restriction in question would serve the government's legitimate concern about disruption in the workplace." The situation in *Tucker* is the same here.

In sum, in the First Amendment context the "reasonableness" requirement is not a simple pushover where the government can prevail simply because it says so, as the County incorrectly urges here.

IV. Plaintiffs Satisfy the Requirements for an Injunction.

Having made a clear showing that they should prevail on the merits of their First Amendment claim, Plaintiffs have also demonstrated irreparable harm as a matter of law. *Elrod*, 427 U.S. at 373; *Newsom*, 888 F.2d at 378.

The County's claim that there is no irreparable harm because Plaintiffs have "numerous alternate channels available to communicate [their] message" (Cnty.'s Br. at 61) is incorrect and ignores the long standing First Amendment principle that "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider v. New Jersey*, 308 U.S. 147, 163 (1939). Moreover, there is absolutely no support in the law for the County's assertion that "[a] claim of 'irreparable harm' is less persuasive in the context of a limited public forum." (Cnty.'s Br. at 61 n. 12). Indeed, as this court stated in a case involving a speech restriction in a nonpublic forum, "To establish irreparable injury in the First Amendment context, [the plaintiffs] need only 'demonstrat[e] the existence of a colorable First Amendment claim.'" *Brown*, 321 F.3d at 1225 (citation omitted).

Additionally, granting the requested injunction is appropriate because the "public interest favors protecting core First Amendment freedoms." *Sammartano*, 303 F.3d at 974; *G & V Lounge, Inc. v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994) ("[I]t is always in the public interest to prevent the violation of a party's constitutional rights.").

In the final analysis, an injunction is warranted in this case.

CONCLUSION

For the foregoing reasons, this court should reverse the district court and remand with instructions to enter the requested injunction, thereby ordering the County to display Plaintiffs' "Faces of Global Terrorism" advertisement.

Respectfully submitted,

AMERICAN FREEDOM LAW CENTER

/s/ *Robert J. Muise*
Robert Joseph Muise, Esq.

/s/ *David Yerushalmi*
David Yerushalmi, Esq.

Attorneys for Plaintiffs-Appellants

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 4,600 words, excluding those sections identified in Fed. R. App. P. 32(a)(7)(B)(iii).

AMERICAN FREEDOM LAW CENTER

/s/ *Robert J. Muise*
Robert J. Muise, Esq.

Attorney for Plaintiffs-Appellants

CERTIFICATE OF SERVICE

I hereby certify that on April 28, 2014, 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.

AMERICAN FREEDOM LAW CENTER

/s/ *Robert J. Muise*
Robert J. Muise, Esq.

Attorney for Plaintiffs-Appellants