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' OPENING 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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

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.

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 (hereinafter "County") speech restriction under the First and Fourteenth Amendments to the United States Constitutions. (Doc. 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. (Doc. 7). Oral argument on the motion was held on January 27, 2014, and on January 30, 2014, the court issued its order, denying Plaintiffs' motion (Doc. 27; ER 1-26 [Order]).[1]

On February 8, 2014, Plaintiffs filed a timely Notice of Appeal. (Doc. 28; ER 27-28). This court has jurisdiction over this "preliminary injunction appeal" pursuant to 28 U.S.C. § 1292.

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

STATEMENT OF THE ISSUES

I. Whether the advertising space on the buses operated by the County's Department of Transportation is a designated 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' advertisement.

II. Whether the County's content- and viewpoint-based restriction on Plaintiffs' speech violates the First and Fourteenth Amendments to the United States Constitution.

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

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.

STATEMENT OF THE CASE

On October 7, 2013, Plaintiffs filed this action (Doc. 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 "most 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 "Faces of Global Terrorism" advertisement. (Doc. 7). The district court heard oral argument on the

motion on January 27, 2014. And on January 30, 2014, the court issued its order denying Plaintiffs' motion, holding that the bus advertising space was a limited public forum and that the County's restriction on Plaintiffs' speech was reasonable and viewpoint neutral. (Doc. 27; ER 1-26 [Order]). This appeal follows.

STATEMENT OF FACTS

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. (Doc. 7-1; ER 120 [Geller Decl. ¶¶ 2, 3]).

AFDI is a human rights organization dedicated to freedom of speech, freedom of conscience, freedom of religion, freedom from religion, and individual rights. AFDI achieves its objective through a variety of lawful means, including through the exercise of its right to freedom of speech. AFDI 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 advertisements to express its message on current events and public issues, particularly including issues involving global terrorism (hereinafter referred to as "AFDI's advertising campaign"). (Doc. 7-1; ER 121 [Geller Decl. ¶¶ 5-7]).

Plaintiffs Geller and Spencer engage in free speech activity through the

various projects of AFDI, including AFDI's advertising campaign. (Doc. 7-1; ER 120-21 [Geller Decl. ¶¶ 4, 7]).

The County, a municipal corporation, operates a public transportation system of buses, consisting of more than 235 routes and serving approximately 400,000 passengers daily. (Doc. 27; ER 1 [Order at 1]).

The County leases space on the exterior of its buses for use as advertising space. Pursuant to its policy and practice,[2] the County permits a wide variety of commercial, noncommercial, public service, political, and public-issue advertisements on its advertising space. (Doc. 14; ER 30-33, 35, 39-45, 56-59, 71-72 [Shinbo Decl. ¶¶ 6, 9, 11, 18, Exs. A, C, H]; 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 . . . .")]; *see also* Doc. 7-1; ER 123-24 [Geller Decl. ¶¶ 19-20]). This includes advertisements covering a broad spectrum of political views and social commentary, including advertisements addressing, *inter alia*, the hotly debated

[2] The policy and practice at issue here is the County's Transit Advertising Policy and the County's application of that policy, which was adopted on January 12, 2012. (Doc. 14; ER 30 [Shinbo Decl. ¶ 6]). As noted in the text above, this latest version of the County's advertising policy, facially and as applied, does not limit the County's advertising space to innocuous and less controversial commercial and service oriented advertising (as it had in the past, *see* Doc. 13; ER 87 [Desmond Decl. ¶ 17 (noting that in 2012, the County "reintroduced public-issue ads")]). Rather, the County permits the display of a wide array of advertisements, including exceedingly controversial political and public-issue advertisements.

Israeli-Palestinian conflict and terrorism. (Doc. 14; ER 30-33, 35, 39-45, 56-59, 71-72 [Shinbo Decl. ¶¶ 6, 9, 11, 18, Exs. A, C, H]). For example, pursuant to its policy and practice, the County accepted the State Department's "Faces of Global Terrorism" advertisement, which appeared as follows:

(Docs. 7-1, 7-2; ER 121, 128-29 [Geller Decl. ¶¶ 5-7, Ex. A]; Doc. 14; ER 33-34, 60-61 [Shinbo Decl. ¶¶ 12, 13, Ex. D]).

The State Department's "Faces of Global Terrorism" advertisement was displayed on County buses in or about June 2013. According to reports, the State Department withdrew the advertisement on its own after receiving some complaints that the advertisement allegedly demeaned or disparaged Muslims and people of color.[3] (Doc. 27; ER 2 [Order at 2]). Yet, the FBI publishes an official listing of the world's most wanted global terrorists on its government website located at http://www.fbi.gov/wanted/wanted_terrorists/@@wanted-group-listing ("FBI Terrorist List"), and of the thirty-two listed terrorists, thirty are individuals with Muslim names and/or are wanted for terrorism related to organizations

[3] According to the County, it had received a "small" "volume" of complaints about the State Department's advertisement while it was running. (Doc. 14; ER 34 [Shinbo Decl. ¶ 15 (noting that the "complaint volume was small")]).

conducting terrorist acts in the name of Islam. (Docs. 7-1, 7-3, 7-4; ER 122, 130-75 [Geller Decl. ¶¶ 14-17, Exs. B, C]).

Of the two non-Islamic terrorists included on the FBI Terrorist List, one (Daniel Andreas San Diego) has ties to animal rights extremist groups and the other (Joanne Deborah Chesimard) is an escaped murderer who was part of a revolutionary extremist organization known as the Black Liberation Party. (Docs. 7-1, 7-3, 7-4; ER 122, 130-75 [Geller Decl. ¶ 18, Exs. B, C]).

Pursuant to the County's advertising policy and practice, and particularly in light of the fact that the County permitted and displayed the State Department's "Faces of Global Terrorism" advertisement, AFDI submitted for approval on or about July 30, 2013, an advertisement that was substantively similar to the State Department's advertisement (hereinafter referred to as the "AFDI Advertisement"). The AFDI Advertisement appears as follows:

(Docs. 7-1, 7-5; ER 124-25, 176-77 [Geller Decl. ¶¶ 21-24, Ex. D]).

The AFDI Advertisement includes the identical pictures and names of the wanted global terrorists that appeared in the State Department's "Faces of Global Terrorism" advertisement (and on the FBI's most wanted website). Indeed, the

AFDI Advertisement presents a similar educational, political, and public service message as the State Department advertisement, but from a different viewpoint. For example, both advertisements alert the public of the importance of stopping global terrorism by raising awareness of the threat and encouraging citizens to communicate with the appropriate government agencies when they have information leading to the possible whereabouts of a global terrorist. (Doc. 7-1; ER 125 [Geller Decl. ¶ 25]). However, the AFDI Advertisement includes AFDI's political-ideological assessment that the majority of the FBI's most wanted terrorists are "jihadis." (Docs. 7-1, 7-5; ER 121, 124-25, 176-77 [Geller Decl. ¶¶ 7, 22-26, Ex. D]).

The message of the AFDI Advertisement is very timely in light of current world events where global terrorists are engaging in violent jihad against America's national security interests throughout the world and at home. (Doc. 7-1; ER 125 [Geller Decl. ¶ 26]).

On August 15, 2013, AFDI's attorney, David Yerushalmi of the American Freedom Law Center, received an email from Mr. Scott Goldsmith, Esq., the executive vice president and chief commercial officer of Titan Outdoor LLC (a/k/a Titan360 and Titan) (hereinafter "Titan"), the advertising agent working for and on behalf of the County to lease advertising space on the County's buses. This email, which sets forth the County's official rejection of the AFDI Advertisement, stated,

in relevant part, as follows:

> 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.

(Doc. 7-1; ER 125-127 [Geller Decl. ¶¶ 28, 29]).[4]

As a result of the County's rejection of the AFDI Advertisement, Plaintiffs

[4] Attached to the email was a copy of the Transit Advertising Policy, which sets forth the written advertising policy of the County. (Docs. 7-1, 7-6; ER 127, 178-86 [Geller Decl. ¶ 30, Ex. E]). This policy served as the basis for the County's rejection of the AFDI Advertisement. (*See* Doc. 27; ER 2-3 [Order at 2-3]).

have and will continue to suffer irreparable harm. (Doc. 7-1; ER 127 [Geller Decl. ¶¶ 29, 31]).

SUMMARY OF THE ARGUMENT

By accepting for display a wide array of political and public-issue advertisements, including controversial advertisements that address the same subject matter as Plaintiffs' advertisement, the advertising space on the buses operated by the County's Department of Transportation is a designated public forum for Plaintiffs' speech. Consequently, the County's content-based restriction on Plaintiffs' advertisement violates the First Amendment.

Additionally, regardless of the nature of the forum, the County's rejection of Plaintiffs' advertisement violated the First Amendment in that the County's advertising policy, facially and as applied to restrict Plaintiffs' speech, is unreasonable and viewpoint based in violation of the First Amendment. Moreover, the County's advertising policy 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.

Because the County's restriction on Plaintiffs' speech violated the First and Fourteenth Amendments, Plaintiffs have suffered irreparable harm sufficient to justify injunctive relief. Moreover, the balance of equities tips sharply in

Plaintiffs' favor, and granting the requested injunction is in the public interest. Consequently, this court should reverse the district court and remand the case with instructions to enter the requested injunction, thereby ordering the County to display Plaintiffs' advertisement.

ARGUMENT

I. Standard of Review.

This court reviews a district court's grant or denial of a preliminary injunction for abuse of discretion. *Am. Trucking Ass'ns, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009). A district court abuses its discretion if it bases its decision on an erroneous legal standard or clearly erroneous findings of fact. *Sierra Forest Legacy v. Rey*, 577 F.3d 1015, 1021 (9th Cir. 2009) (citation omitted). Application of an incorrect legal standard for preliminary relief or with regard to the underlying issues in the case are grounds for reversal. *See Earth Island Inst. v. U.S. Forest Serv.*, 351 F.3d 1291, 1298 (9th Cir. 2003); *Sports Form, Inc. v. United Press Int'l, Inc.*, 686 F.2d 750, 752 (9th Cir. 1982). The district court's interpretation of underlying legal principles is subject to *de novo* review. *McCormack v. Hiedeman*, 694 F.3d 1004, 1010 (9th Cir. 2012).

And because this case involves the violation of First Amendment rights, this court is required to "conduct an independent examination of the record as a whole, without deference to the trial court." *Hurley v. Irish-American Gay, Lesbian and*

Bisexual Group of Boston, 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. Plaintiffs Have Made a Clear Showing that They Satisfy the Standard for a Preliminary Injunction.

"A plaintiff seeking a preliminary injunction must establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest."[5] *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). As set forth further below, Plaintiffs satisfy each of these considerations in light of the undisputed facts and controlling law.

[5] *See also Alliance For The Wild Rockies v. Cottrell*, 632 F.3d 1127, 1132 (9th Cir. 2011) (stating that "'serious questions going to the merits' and a hardship balance that tips sharply toward the plaintiff can support issuance of an injunction, assuming the other two elements of the *Winter* test are also met") (quotations and citations omitted).

III. Plaintiffs Are Likely to Succeed on the Merits of Their First Amendment Claim.

Plaintiffs' First Amendment claim is reviewed in essentially three steps. First, the court must determine whether the speech in question—Plaintiffs' advertisement—is protected speech. Second, the court must conduct a forum analysis as to the forum in question to determine the proper constitutional standard to apply. And third, the court must then determine whether the County's speech restriction comports with the applicable standard. *See 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"); *Saieg v. City of Dearborn*, 641 F.3d 727, 734-35 (6th Cir. 2011) (same); *see also Ariz. Life Coal., Inc. v. Stanton*, 515 F.3d 956, 968 (9th Cir. 2008) ("The first step in assessing a First Amendment claim relating to private speech on government property is to identify the nature of the forum.").

Moreover, the County's "refusal to accept [Plaintiffs' advertisement] for display because of its content is a clearcut prior restraint." *Lebron v. Wash. Metro. Area Transit Auth.*, 749 F.2d 893, 896 (D.C. Cir. 1984) (Bork, J.). 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).

A. Plaintiffs' Advertisement Is Protected Speech.

The first question is easily answered. Sign displays constitute protected speech under the First Amendment, *Hill v. Colorado*, 530 U.S. 703, 714-15 (2000) ("[S]ign displays . . . are protected by the First Amendment."), and this includes signs posted on bus advertising space, *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 Ctr. for Bio-Ethical Reform, Inc. v. L.A. Cnty. Sheriff Dep't*, 533 F.3d 780, 786-87 (9th Cir. 2008) (treating sign displays on trucks as fully protected speech).

Moreover, "speech on public issues," such as Plaintiffs' AFDI Advertisement, "occupies the 'highest rung of the hierarchy of First Amendment values,' and is entitled to special protection." *Connick v. Myers*, 461 U.S. 138, 145 (1983) (quoting *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886. 913 (1982); *Carey v. Brown*, 447 U.S. 455, 467 (1980)).

Thus, there is no dispute that Plaintiffs' advertisement constitutes speech that is accorded protection under the First Amendment.

B. The County Created a Public 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.*

On one end of the spectrum lies the traditional public forum. Traditional public forums, such as streets, sidewalks, and parks, are places that "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague v. CIO*, 307 U.S. 496, 515 (1939). This forum is not at issue.

Next on the spectrum is the designated public forum, which exists when the government intentionally opens its property for expressive activity. *Perry Educ. Ass'n v. Perry Local Educators*, 460 U.S. 37, 44 (1983); *see also DiLoreto v. Downey Unified Sch. Dist. Bd. of Educ.*, 196 F.3d 958, 964 (9th Cir. 1999) ("When the government intentionally opens a nontraditional forum for public discourse it creates a designated public forum."). 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 (emphasis added).

In a traditional or 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. . . . Similarly, when the government has intentionally designated a place or means of communication as a public forum speakers cannot be excluded without a compelling government interest." *Id.*

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, even in a nonpublic forum, a speech restriction must be reasonable and viewpoint neutral to pass constitutional muster. *Id.*

This Circuit also recognizes a "limited public forum," which is a subcategory of the designated public forum. *See Flint v. Dennison*, 488 F.3d 816, 830-31 (9th Cir. 2007). A "limited public forum" is "a type of nonpublic forum

that the government has intentionally opened to certain groups or to certain topics." *Id*. at 831; *Hopper v. City of Pasco*, 241 F.3d 1067, 1074 (9th Cir. 2001) (same). And "[o]nce a government has opened a limited forum, it must respect the lawful boundaries it has itself set." *Flint*, 488 F.3d at 831 (quoting *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995)) (internal quotations and punctuation omitted) (emphasis added). Accordingly, in a limited public forum "the government may not exclude speech where its distinction is not reasonable in light of the purpose served by the forum, nor may the government discriminate against speech on the basis of its viewpoint." *Flint*, 488 F.3d at 831 (citations and quotations omitted).

To resolve the forum question, courts "look[] to the policy and practice of the government to ascertain whether it intended to designate a place not traditionally open to assembly and debate as a public forum," as well as "the nature of the property and its compatibility with expressive activity." *Cornelius*, 473 U.S. at 802. 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); *see also Hopper*, 241 F.3d at 1076 ("[C]onsistency in application is the hallmark of any policy designed to preserve the non-public status of a forum. A policy purporting to keep a forum closed (or open to expression only on certain subjects) is no policy at all for purposes of public forum analysis if, in practice, it

is not enforced or if exceptions are haphazardly permitted."); *United Food*, 163 F.3d at 353 (stating that "we . . . must closely examine whether in practice [the transit authority] has consistently enforced its written policy in order to satisfy ourselves that [its] stated policy represents its actual policy").

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." *Id.* at 351-52 (internal quotations and citation omitted); *see also Christ's Bride Ministries, Inc. v. Southeastern Pa. Transp. Auth.*, 148 F.3d 242, 253 (3d Cir. 1998) (holding that "the purpose of the forum does not suggest that it is closed, and the breadth of permitted speech points in the opposite direction").

Here, the district court's conclusion that the County's "policy and practice indicate[] an intention to create a limited public forum" is clearly erroneous. (*See* Doc. 27; ER 5-9 [Order at 5-9]). And, as discussed further in section C.1. below, this error is dispositive because the County's restriction on Plaintiffs' speech was, at a minimum, content based in violation of the First Amendment.

We turn now to the relevant case law regarding the forum question, starting with *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974). In *Lehman*, the Court found that the consistently enforced, twenty-six-year 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. Other courts, including this Circuit, have 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).

As this court correctly observed in *DiLoreto v. Downey Unified Sch. Dist. Bd. of Educ.*:

> 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); *see also N.Y. Magazine v. Metro. Transp. Auth.*, 136 F.3d 123, 130 (2d Cir. 1998) ("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*.") (emphasis added); *Planned Parenthood Ass'n/Chicago Area v. Chicago Transit Auth.*, 767 F.2d 1225 (7th Cir. 1985) (concluding that the advertising space on a bus system became a public forum where the transit authority permitted "a wide variety" of commercial and non-commercial advertising).

As the Sixth Circuit correctly observed in *United Food*:

> 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*.

163 F.3d at 355 (emphasis added).

Consequently, consistent with *Lehman* and the majority of circuit courts that have analyzed and followed its holding, including this Circuit, the forum at issue here is a designated public forum. As the undisputed evidence demonstrates, the County "has accepted a wide variety of advertising on commercial and non-commercial subjects," including very controversial, political and public-issue advertisements such as advertisements addressing the hotly debated Israeli-Palestinian conflict and global terrorism. (Doc. 14; ER 30-33, 35, 39-45, 56-59,

71-72 [Shinbo Decl. ¶¶ 6, 9, 11, 18, Exs. A, C, H]). Indeed, the County accepted an advertisement from the State Department *that conveyed precisely the same message content* as Plaintiffs' advertisement (*i.e.*, the State Department's "Faces of Global Terrorism" advertisement),[6] as well as a subsequent State Department advertisement that also addressed the subject of terrorism, (*i.e.*, the State Department's advertisement urging viewers to "Stop a terrorist. Save lives."). (Doc. 14; ER 33-35, 60-61, 71-72 [Shinbo Decl. ¶¶ 12-13, 33-34, Exs. D, H]). Consequently, the County's actions are inconsistent with operating the property solely as a commercial venture and thereby create a public forum for speech such as Plaintiffs' advertisement. (*See* 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 . . . .")].

[6] The State Department withdrew its "Faces of Global Terrorism" advertisement on or about June 25, 2013 (the advertisement was accepted by the County on May 17, 2013, it was posted on June 6, 2013, and "[a]ll of the ad copy was removed by the beginning of July 2013"). (Doc. 14; ER 33-35 [Shinbo Decl. ¶¶ 13, 18]). However, the County now claims that it made a mistake by accepting the advertisement in the first instance, citing to a "small" "volume" of complaints and a few politically-motivated letters and email. (Doc. 14; ER 34-35 [Shinbo Decl. ¶¶ 14-18]). Noticeably absent, however, is evidence that the advertisement caused any "harm to, disruption of or interference with the transportation system." Moreover, as the County's evidence demonstrates, this wasn't the first time the County made such an "oversight" when applying its speech restricting policy, (Doc. 14; ER 33 [Shinbo Decl. ¶ 12]), demonstrating further the inconsistency in its application, *see Hopper*, 241 F.3d at 1076 (noting that "consistency in application is the hallmark of any policy designed to preserve the non-public status of a forum").

Contrary to the district court's conclusion, a forum analysis does not end simply because the County has adopted some restrictions on speech or employed these restrictions to reject certain advertisements. (*See* Doc. 27; ER 7-9 [Order at 7-9 (setting forth the County's speech restrictions)]). And this is particularly the case when the government is attempting to impose "civility" restrictions on what it knows is controversial political and public-issue speech, (*see* Doc. 27; ER 8 [Order at 8 ("The fact that defendant has allowed prior advertising that is considered political or controversial does not change the fact that it has consistently subjected all potential advertisements to the civility provisions to ensure that the advertisements are not false or misleading, demeaning or disparaging, or harmful or disruptive to the transit system.")])—a fool's errand under the First Amendment, *see, e.g., N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 271 (1964) ("[First Amendment] protection does not turn upon the truth, popularity, or social utility of the ideas and beliefs which are offered.") (internal quotations and citation omitted).

Indeed, the district court's analysis is fundamentally flawed in that these restrictions are not restrictions on an advertisement's subject matter (such as restrictions on advertisements for alcohol, tobacco, or political candidates) that might reasonably lead a court to conclude that this forum is closed to controversial matters and thus limited to less controversial and innocuous commercial advertisements such that the government's intent to operate as a proprietor and not

a speech regulator is clear. Rather, they are vague, ambiguous, and subjective restrictions that permit viewpoint-discrimination, particularly as applied to political and public-issue speech. Consequently, these restrictions do not justify concluding that the forum at issue is a limited public forum. Rather, these restrictions compel the conclusion that regardless of the forum, the restrictions are vague, unreasonable, and viewpoint-based in violation of the Constitution. (*See infra* sec. C [discussing the constitutionality of the speech restrictions]). At a minimum, the County's subjective criteria certainly *allow for* viewpoint-based restrictions, and this alone is sufficient to render its advertising policy unconstitutional. *See United Food*, 163 F.3d at 359 (holding that a speech restriction violates the First Amendment when it permits government officials to limit speech based on "ambiguous and subjective reasons") (citation and internal quotation omitted).

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

forum, which is to exclude speech based on content." *N.Y. Magazine*, 136 F.3d 129-30.

And finally, to preserve the non-public status of a forum the government must apply its speech restrictions with consistency, *see Hopper*, 241 F.3d at 1076 (noting the importance of "consistency in application . . . of any policy designed to preserve the non-public status of a forum"), lest they operate as a fig leaf to cover up a government agency's arbitrary and subjective rejection of political and public-issue speech it deems outside some invisible boundaries, or worse, a pretense to apply a viewpoint-based restriction. Indeed, the record in this case evidences both the fig leaf and the pretense. (*See, e.g.*, Doc. 14; ER 33 [Shinbo Decl. ¶ 12 (acknowledging the County's inconsistent application of its advertising policy)]).

In the final analysis, it is without question that the nature of the property—the advertising space on County buses—is compatible with Plaintiffs' proposed expressive activity. *See United Food*, 163 F.3d at 355 (concluding that the advertising space on a bus system was a public forum and stating that "acceptance of political and public-issue speech suggests that the forum is suitable for the speech at issue"—a pro-union message). Thus, because the forum is wholly suitable for Plaintiffs' speech, including its subject matter, *Christ's Bride Ministries, Inc.*, 148 F.3d at 252 (concluding that the transit authority had "created a forum that is suitable for the speech in question"), it is a designated public forum

for the display of the AFDI Advertisement. Therefore, the County must demonstrate a *compelling* reason that is *narrowly tailored* to justify its prior restraint on Plaintiffs' speech—a burden that it cannot meet.

C. The County's Prior Restraint on Plaintiffs' Speech Cannot Survive Constitutional Scrutiny.

1. The County's Speech Restriction Is Content Based.

Content-based restrictions on speech in a public forum are subject to strict scrutiny. *Cornelius*, 473 U.S. at 800. That is, "[s]peakers can be excluded from a public forum only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest." *Id*. For "[i]t is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys." *Rosenberger*, 515 U.S. at 828; *see also R.A.V. v. St. Paul*, 505 U.S. 377, 386-92 (1992) (holding that the government may not "impose special prohibitions on those speakers who express views on disfavored subjects" or on the basis of "hostility—or favoritism—towards the underlying message expressed"); *see also Frudden v. Pilling*, No. 12-15403, 2014 U.S. App. LEXIS 2832, at *21 (9th Cir. Feb. 14, 2014) (reversing the dismissal of a First Amendment challenge to a public school's mandatory uniform policy and stating, "It is axiomatic that we 'apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content'") (quoting *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 642 (1994)).

Thus, content-based restrictions "are presumptively unconstitutional." *S.O.C., Inc. v. Cnty. of Clark*, 152 F.3d 1136, 1145 (9th Cir. 1998).

To determine whether a restriction is content based, the court looks at whether it "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. of N.Y.*, 447 U.S. 530, 537 (1980). Here, at a minimum, it is undisputed that the County rejected the AFDI Advertisement based on the content of its message (and its messenger) in clear violation of the First Amendment.[7]

Indeed, as noted previously and discussed further below, the County's advertising policy, facially and as applied to restrict Plaintiffs' speech, cannot survive constitutional scrutiny regardless of the nature of the forum because it is viewpoint based, unreasonable, and it grants government officials unbridled and subjective discretion over the forum's use.[8]

2. The County's Speech Restriction Is Viewpoint Based.

Viewpoint discrimination is an egregious form of content discrimination that

[7] Nothing makes this point clearer than the County's rationale that the AFDI Advertisement was demeaning because it labelled the pictured terrorists as "jihadis." The County might disapprove of that political message, but it is Plaintiffs' view that terrorists who claim to be jihadis or who commit murder and mayhem in the name of Islam are jihadis. (*See, e.g.*, Doc. 7-1; ER 121, 124-25, 176-77 [Geller Decl. ¶¶ 7, 22-24, 26, Ex. D]).

[8] Even in a nonpublic forum, a government speech regulation must be "reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." *Perry Educ. Ass'n*, 460 U.S. at 46. As demonstrated above, the County's restriction on Plaintiffs' speech fails this test as well.

is prohibited in all forums. *See Rosenberger*, 515 U.S. at 829. "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). 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.

Here, the content of Plaintiffs' message (and thus its subject matter) is permissible in this forum, as evidenced by the fact that the County had previously accepted the *same* message content that was submitted by the State Department ("Faces of Global Terrorism"), and the County subsequently accepted another State Department advertisement ("Stop a terrorist. Save lives.") that addressed the same subject matter: *terrorism*. Consequently, it is not the subject matter that is

being restricted, but Plaintiffs' viewpoint on the subject. This is a classic form of viewpoint discrimination that is prohibited in all forums. *See 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).

This conclusion is further buttressed by the County's enforcement of a policy that is itself viewpoint based in its application (we refer here to the restriction on "demeaning or disparaging" speech). *See, e.g., 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); *see also Nieto v. Flatau*, 715 F. Supp. 2d 650 (E.D.N.C. 2010) (holding that a speech restriction on a military base, a nonpublic forum, was viewpoint based as applied to speech that the government deemed disparaging toward Islam in violation of the First Amendment); *see also 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. Mass. Bay Transp. Auth.*, 390 F.3d 65 (1st Cir. 2004), for example, the court held that the transit authority's restriction on certain advertisements that were critical of laws prohibiting drug use were viewpoint based in violation of the First Amendment. The MBTA attempted to avoid the fact that its restriction was viewpoint based by 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.

Id. at 88; *see also Cohen v. California*, 403 U.S. 15, 26 (1971) ("[W]e cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process. Indeed, governments might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views.").

Thus, attempting to reduce the effectiveness of a message or the thrust of its meaning (*e.g.*, accepting "terrorist" but rejecting "jihadi")—even if the entire message itself is not prohibited—by way of a "civility" standard is a form of

viewpoint discrimination that is impermissible in every forum.

3. The County's "Transit Advertising Policy" Permits Arbitrary, Capricious, and Subjective Application.

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).

As the Sixth Circuit held in a case involving the government's regulation of bus advertising: "The 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; *see also 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.").

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).

Here, the County's proffered bases for restricting Plaintiffs' speech under its Transit Advertising Policy are threefold: (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." (*See* Doc. 27; ER 2-3 [Order at 2-3]).

The first basis, which attempts to impose a "truthfulness" standard to political and public-issue speech, is constitutionally infirm as a matter of law. *See, e.g.*, *W.V. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion."); *N.Y. Times Co.*, 376 U.S. at 271 (stating that First Amendment protection "does not turn upon the truth . . . of the ideas and beliefs which are offered"). Moreover, as discussed further below, there is nothing materially false about the advertisement, which says nothing more factually than the State Department's "Faces of Global Terrorism" advertisement, which the County accepted. The district court's effort to create some meaningful and material factual

distinction between the two is misplaced, (*see* Doc. 27; ER 10-12 [Order at 10-12]), particularly when you consider that this advertisement is political/public-issue speech and not a commercial advertisement, (*see also infra* sec. C.4. [discussing the unreasonableness of the County's speech restriction as applied to Plaintiffs' advertisement]).

The second basis—that Plaintiffs' advertisement was "demeaning or disparaging"—is entirely a subjective endeavor that is inherently viewpoint based, as discussed above. The district court cannot avoid this conclusion by creating a straw man—that is, by incorrectly concluding that *all* viewpoints are binary and thus mischaracterizing the viewpoint at issue here as simply "an anti-terrorism, stop-a-terrorist viewpoint."[9] (Doc. 27; ER 10 [Order at 10]). Indeed, Plaintiffs' viewpoint is not so simplistic. What prompted Plaintiffs to propose this advertisement in the first instance was the State Department's willingness to acquiesce to political correctness by accepting the "viewpoint" that it is improper to highlight the fact that Islam (at least the Islam that is practiced by the jihadis

[9] So what, then, is the single opposing viewpoint: a view that those engaged in a religious "struggle" against the United States and Israel are freedom fighters? Would the County have objected to an advertisement expressing a message in favor of Palestine and opposed to Israel and describing those involved in the struggle as freedom fighters (as opposed to jihadis)? Of course not. (*See, e.g.*, Doc. 14; ER 39-45 [Shinbo Decl. Ex. A (permitting ads expressing a viewpoint in favor of "equal rights for Palestinians")]). However, to permit the "freedom fighter" description, but to prohibit the use of the factually correct term "jihadis" (or even to reject "jihadis" and simply use "terrorist," thereby censoring the speaker's view of the motive for the terrorism) is to impose a viewpoint restriction.

themselves) is at the center of "global terrorism," as the FBI's most wanted list makes plain. Plaintiffs' advertisement exposes the government's politically correct position for what it is: an absurdity. Moreover, the district court's claim that "there is no evidence before the court that any of the individuals pictured in the ad referred to themselves as 'jihadis' or performed the terrorist acts in the name of 'jihad,' as opposed to any other reason," (Doc. 27: ER 12 [Order at 12]), is not only demonstrably false, but is itself imposing the district court's viewpoint on Plaintiffs' advertisement. Indeed, there *is* ample evidence in the record that these most wanted "global terrorists" are aligned with Islamic terrorists organizations. (*See, e.g.* Doc. 7-4; ER 134-75 [Geller Decl. at Ex. C (FBI's most wanted posters)]). Is it the district court's *viewpoint* that those who engage in terrorist acts in the name of al-Shabaab (which is formally aligned with al-Qaeda), the Abu Sayyaf Group, the Taliban, or Al Qaeda, as examples, are not jihadis? Based on what? As Plaintiffs demonstrated below, the use of the term "jihadis" to describe the global terrorists pictured in the advertisement is not only factually accurate, but, more important, it expresses Plaintiffs' viewpoint on the issue of global terrorism. A review of the actual wanted posters offering rewards for the capture of the respective terrorists (*see* Doc. 7-4; ER 134-75 [Geller Decl. at Ex. C]) demonstrates that these men belong to groups that self-describe as "jihadis," such as Al Qaeda (Gadahn, as an example), Palestinian Islamic Jihad, Egyptian Islamic

Jihad, Hezbollah, al-Shabaab (Ahmed Aw-Mohamed, Jehad Mostafa, and Omar Hammami, as examples), Abu Sayyaf Group (Sahiron, Usman, and Hapilon, as examples), the Caucus Emirate[10] (Doku Umarov, as an example), and the Taliban. And the fact that "jihad" might also have a non-violent meaning does not render the public stupid. Thus, it is clear to any reasonable person that the use of the accurate descriptor "jihadi" in the context of global terrorism does not disparage those Muslims engaging in a self-reflective internal struggle. And to further illustrate this point, federal court opinions in cases prosecuting self-described "jihadis" routinely utilize that descriptor and "jihad" as well without disparagement because the use of these terms to describe terrorists fighting in the name of Islam and committing terrorist acts in the name of Islam is ubiquitous, and the meaning of the terms is again clear to any *reasonable* person.[11]

---

[10] According to the "Rewards for Justice" website (which the County itself referenced in its filings in the district court, *see* Doc. 14; ER 79-82 [Shinbo Decl. Ex. L]), the Caucus Emirate's "goal is to establish an Islamic Emirate through violence." (*See* http://www.rewardsforjustice.net/index.cfm?page=umarov, last visited on Feb. 18, 2014).

[11] See the following sample of such cases: *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2725 (2010) (referring to a scholarly article, the very title of which uses the word "jihad" to mean terrorism); *Hamdan v. Rumsfeld*, 548 U.S. 557, 600 n.31 (2006) ("Justice Thomas would treat Usama bin Laden's 1996 declaration of jihad against Americans as the inception of the war."); *United States v. Farhane*, 634 F.3d 127, 134 n.4 (2d Cir. 2011) ("Al Qaeda is the most notorious terrorist group presently pursuing jihad against the United States. In February 1998, its leaders, including Osama bin Laden and Ayman al Zawahiri, issued an infamous fatwa (religious decree) pronouncing it the individual duty of every Muslim to kill Americans and their allies—whether civilian or military—in any

Finally, the third basis plainly requires a government official to make a wholly arbitrary determination as to "whether a reasonably prudent person, knowledgeable of the County's ridership and using prevailing community standards," would find the proposed advertisement "objectionable." Adding objective language to a wholly subjective endeavor does not save the County's restriction from its constitutional infirmities. Consider, for example, the following hypothetical speech restriction: "The transit authority bans all advertisements that a reasonably prudent person, knowledgeable of the County's ridership and using prevailing community standards, would find to be in poor taste or aesthetically displeasing." This hypothetical example, similar to the County's policy, is not based on any *objective criteria*, but, instead, allows for *ambiguous* and *subjective reasons* for restricting speech in violation of the First Amendment. 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, in direct violation of the First and Fourteenth Amendments.

4. The County's Speech Restriction Is Not Reasonable.

Reasonableness is evaluated "in light of the purpose of the forum and all the

---

country where that could be done."); *United States v. Ghailani*, No. 11-320-CR, 2013 U.S. App. LEXIS 21597, at *6-*7 (2d Cir. Oct. 24, 2013) (acknowledging that "Al Qaeda is the most notorious terrorist group presently pursuing jihad against the United States"); *United States v. Hayat*, 710 F.3d 875 (9th Cir. 2013) (using the words "jihad" and "jihadist" throughout the opinion to describe the defendants, who refer to themselves as such).

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 the enforcement of the California Department of Transportation'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").

Here, as noted, the County proffers three justifications for its prior restraint on Plaintiffs' speech. First, that Plaintiffs' advertisement is "false or misleading." Second, that the advertisement is "demeaning or disparaging." And third, that the advertisement is "so objectionable" that it is "harmful or disruptive to the transit system." However, in light of the purpose of the forum and all the surrounding circumstances, these justifications are patently unreasonable.

As noted previously, there is nothing false, defamatory, demeaning, disparaging, or reasonably objectionable about publicly displaying *factually correct information about global terrorists*—information that is made available to the public by the federal government no less. Indeed, this is the *same information* that was included on an advertisement that the County had previously accepted.[12]

[12] Moreover, any reasonable viewer of the AFDI Advertisement would conclude that this advertisement is sponsored by Plaintiffs and not the federal government.

Even assuming, *arguendo*, that it is proper (which it is not) to impose a "truthfulness" or "civility" standard to political and public-issue speech, the County's application of these standards to Plaintiffs' advertisement is patently unreasonable.

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

---

Thus, there is nothing misleading or deceptive about this advertisement—it is all spelled out in plain view.

terrorists—ranging from $1 million to $25 million, with most of the rewards at the $5 million level. Plaintiffs' advertisement does not assert that the reward for any one of the global terrorists pictured will be $25 million, or even $1, but that the highest amount offered to date under the program is "up to $25 million," just as the State Department's original advertisement stated (offering "up to $25 million reward"). (Doc. 14; ER 33-34, 60-61 [Shinbo Decl. ¶¶ 12, 13, Ex. D]). Thus, the clear implication of the State Department's advertisement (which included the very same pictures of the very same terrorists) is the same as Plaintiffs' advertisement. And finally, Plaintiffs' advertisement expressly directs the public to contact the State Department directly for details about the Rewards for Justice program by providing the actual email address (rfj@state.gov), which is a State Department address, not an FBI address. In sum, it is objectively unreasonable to conclude that Plaintiffs' advertisement is "false or misleading."

For similar reasons, there is no basis (reasonable or otherwise) for claiming that Plaintiffs' advertisement is "demeaning or disparaging" or "contains material that is *so objectionable* as to be reasonably foreseeable" that it will harm, disrupt, or interfere with the County's transportation system—nor has the County proffered any facts to support such a basis so as to justify its prior restraint on Plaintiffs'

speech.[13] Indeed, what could be "so objectionable" about the FBI's most wanted list for global terrorists? Perhaps the terrorists whose names and images appear on this list might object, but that is certainly *not* a reasonable basis for restricting Plaintiffs' right to freedom of speech.

Indeed, the use of the word "jihadis" in the context of global terrorism and where 30 out of the 32 terrorists with rewards offered by the U.S. government for their capture are self-described "jihadis" engaged in jihad is no more disparaging or demeaning of Muslims generally than calling any of these men terrorists rather than freedom fighters. Language and words have meaning only in context. Muslims might feel uncomfortable that out of 32 global terrorists sufficiently dangerous that the government is prepared to pay up to $25 million for their capture, 30 of them engage in violent terrorist acts in the name of Islam. But this is the reality in which we live. Feeling uncomfortable or even embarrassed by factually correct speech is neither "disparaging" nor "demeaning," and a government regulation that restricts speech on that basis is viewpoint based, in violation of the First Amendment.

In sum, regardless of the nature of the forum, the County's prior restraint on

[13] In fact, the opposite is true. The evidence demonstrates that when the State Department ran a similar "Faces of Global Terrorism" advertisement, the County only received a "small" "volume" of complaints and a few politically-motivated letters and email. (Doc. 14; ER 34-35 [Shinbo Decl. ¶¶ 14-18]). This hardly amounts to harm, disruption, or interference with the operation of the transit system.

Plaintiffs' speech is unreasonable and thus unconstitutional.

IV. Plaintiffs Will Suffer Irreparable Harm in the Absence of an Injunction.

The proof of irreparable harm suffered by Plaintiffs is clear and convincing. It is well established that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *see also Brown*, 321 F.3d at 1225 ("To establish irreparable injury in the First Amendment context, [Plaintiffs] need only 'demonstrat[e] the existence of a colorable First Amendment claim.'"); *S.O.C., Inc.*, 152 F.3d at 1148 (holding that a civil liberties organization that had demonstrated probable success on the merits of its First Amendment claim had thereby also demonstrated irreparable harm); *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*).

V. The Balance of Equities Tips Sharply in Favor of Granting the Injunction.

The likelihood of harm to Plaintiffs without the injunction is substantial because the deprivation of First Amendment rights, even for minimal periods, constitutes irreparable injury. *See supra* sec. IV. On the other hand, if the County is enjoined from enforcing its prior restraint on Plaintiffs' speech, it will suffer no

harm because the exercise of constitutionally protected rights can never harm any of the County's legitimate interests. *See infra* sec. VI.

VI. Granting the Injunction Is in the Public Interest.

Courts, including this Circuit, considering requests for preliminary injunctions have consistently recognized that the public interest is best served by upholding 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 because the "public interest favors protecting core First Amendment freedoms"); *Dayton Area Visually Impaired Persons, Inc. v. Fisher*, 70 F.3d 1474, 1490 (6th Cir. 1995) (stating that "the public as a whole has a significant interest in . . . protection of First Amendment liberties"); *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."); *Gordon v. Holder*, 721 F.3d 638, 653 (D.C. Cir. 2013) ("[E]nforcement of an unconstitutional law is always contrary to the public interest."). Thus, the public interest favors granting the requested injunction.

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' AFDI Advertisement.

STATEMENT OF RELATED CASES

Seattle Mideast Awareness Campaign v. King Cnty., 771 F. Supp. 2d 1266 (W.D. Wash. 2011), *appeal docketed*, No. 11-35914 (9th Cir. Nov. 3, 2011).

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 9,860 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 March 7, 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