NO. 17-35897

UNITED STATES COURT OF APPEALS
FOR THE
NINTH CIRCUIT

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

Plaintiffs-Appellants,

v.

KING COUNTY,

Defendant-Appellee.

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

APPELLANTS' REPLY BRIEF

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INTRODUCTION

King County's ("County") misapprehension of the First Amendment is on full display in its "Introduction." (Cnty. Br. at 1-3). To begin, there is nothing *concealed* about Plaintiffs' desire to exercise their First Amendment right to freedom of speech free from government interference. (*See* Cnty. Br. at 1 [arguing that Plaintiffs are advancing this case "[u]nder the *guise* of free speech"] [emphasis added]). And the so-called "Geller Ban" referred to by the County[1] is nothing more than a concerted effort by government officials to discriminate against Plaintiffs by seeking to close forums for Plaintiffs' speech because the officials dislike the message. Plaintiffs refuse to surrender their freedoms to these government censors. *See, e.g.*, *Am. Freedom Def. Initiative v. Metro. Transp. Auth.*, 70 F. Supp. 3d 572 (S.D.N.Y. 2015) (granting motion for preliminary injunction under the First Amendment); *Am. Freedom Def. Initiative v. Metro. Transp. Auth.*, 880 F. Supp. 2d 456 (S.D.N.Y. 2012) (granting injunction under the First Amendment); *Am. Freedom Def. Initiative v. Wash. Metro. Area Transit Auth.*, 898 F. Supp. 2d 73 (D.D.C. 2012) (granting injunction under the First Amendment); *Am. Freedom Def. Initiative v. SEPTA*, 92 F. Supp. 3d 314 (E.D. Pa. 2015) (granting injunction under the First Amendment).

[1] The County is essentially advancing the farcical argument that it is Plaintiffs who are undermining the First Amendment and not the government agencies responsible for censoring Plaintiffs' protected speech. (*See* Cnty. Br. at 3 [arguing that "the purposes of the First Amendment are better served by rejecting AFDI's efforts to empower its own Geller Ban"]).

And in each of the cases where Plaintiffs had to seek judicial review to force the government transit authorities *to comply with the First Amendment*, the sky did not fall when the previously-excluded ads ran on the transit advertising space. The idea that our society is so fragile to controversial speech is ludicrous. At the end of the day, it is in the public interest to uphold Plaintiffs' right to free speech, *see 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 ensuring equal protection of the laws and protection of First Amendment liberties"), even if (and perhaps even more so when) government officials or society in general find the speech objectionable, *see Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118 (1991) ("The fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection.") (citations omitted). It is, after all, "offensive" speech that requires protection from government censorship.

The County states, with derision, that "AFDI claims a *right* to impose 'discomfort and unpleasantness' on transit customers." (Cnty. Br. at 1 [citing Pls.' Opening Br. at 41]). Here, the County is exposing its contempt for the First Amendment. The U.S. Supreme Court has long held that

> a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a

> condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech . . . is . . . protected against censorship or punishment. . . . *There is no room under our Constitution for a more restrictive view*.

Terminiello v. City of Chi., 337 U.S. 1, 4 (1949) (emphasis added); *see also Tinker v. Des Moines Indep. Comty. Sch. Dist.*, 393 U.S. 503, 509 (1969) ("In order for the State . . . to justify prohibition of a particular expression of opinion, it must be able to show that *its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint*.") (emphasis added). The County is urging this Court to impose "a more restrictive view" on free speech, in direct contravention of the First Amendment.

The County proceeds to argue that "[d]ue to the Geller Ban, this case represents one of the last remaining opportunities to formulate a First Amendment approach that preserves nonpublic transit fora." (Cnty. Br. at 2). *Translated*: the County wants this Court (contrary to the First Amendment) to permit government transit authorities to engage in overt viewpoint discrimination. The Court should (and indeed must) summarily reject the County's invitation for error.

Finally, the County argues that "[t]he notion that a Lanham Act trademark case, *Matal v. Tam*, __ U.S. __, 137 S. Ct. 1744, 1751, 198 L. Ed. 2d 366 (2017), fundamentally reordered forum law to overrule legions of precedent *sub silencio* is

incorrect." (Cnty. Br. at 3). This argument misses the mark, and it is misses by a lot. To begin, what "legions of precedent" does the County refer to? And who is arguing that this case "reordered forum law"? The County apparently cannot comprehend the importance of *Matal v. Tam*. And Plaintiffs are not the only ones to recognize the dispositive impact of this case. Law professor and First Amendment expert Eugene Volokh reaches the same irrefutable conclusion: the County's "demeaning and disparaging" restriction on Plaintiffs' speech is a viewpoint-based restraint, as *Matal* makes clear. (Br. of *Amicus Curiae* of Penn. Ctr. for the First Am. at 3-11). And viewpoint discrimination is unlawful even in a nonpublic forum. (*See id*. at 11 ["The County's policy regarding demeaning and disparaging material draws the same distinction that *Matal v. Tam* held was viewpoint-based. The County's policy is thus equally viewpoint-based, and an unconstitutional restraint on speech in a nonpublic forum."]). Consequently, there is no "reordering [of] forum law" nor "overruling [of] legions of precedent" required here. It is simply a matter of *properly* understanding what constitutes viewpoint discrimination. *Matal* confirms Plaintiffs' understanding of this most egregious form of discrimination under the First Amendment, and its holding compels this Court to rule in Plaintiffs' favor.

ARGUMENT IN REPLY

I. The County Has Engaged in Viewpoint Discrimination.

We begin where we left off by addressing the viewpoint discrimination issue because its "rationale renders unnecessary any extended treatment of other questions raised by the parties." *Matal*, 137 S. Ct. at 1765 (Kennedy, J., concurring).

Despite the County's hyperbolic (and incorrect) claim that this Court would have to "reorder[] forum law" to rule in Plaintiffs' favor, there is no dispute that in the forum at issue here,[2] viewpoint discrimination is prohibited. *See Am. Freedom Def. Initiative v. King Cnty.*, 796 F.3d 1165, 1170 (9th Cir. 2015) ("Because it has created a nonpublic forum . . . Metro's rejection of Plaintiffs' advertisements must be . . . viewpoint neutral.").

And contrary to the County's argument (*see* Cnty. Br. at 62 ["As *Cornelius* makes clear, the concept of 'viewpoint neutrality' in a nonpublic forum is fundamentally different from the non-forum doctrine discussed in the *Matal* case"]), *viewpoint discrimination is viewpoint discrimination*, regardless of the forum, *see*

[2] Similar to Professor Volokh (*see* Br. of *Amicus Curiae* of Penn. Ctr. for the First Am. at 9 ["*Amicus* believes transit advertising programs would be better understood as limited public fora rather than nonpublic fora, because the government is opening its property to certain groups and certain subjects."]), Plaintiffs believe that it is incorrect to identify the forum at issue as a nonpublic forum, particularly since the County permits a wide array of political and public-issue advertisements, including controversial advertisements, on its transit advertising space. (*See* Pls.' Opening Br. at 8-9, 28-30). Accordingly, Plaintiffs have "preserve[d] the forum issue for potential *en banc* review or U.S. Supreme Court consideration." (*Id*. at 30).

Wandering Dago, Inc. v. Destito, 879 F.3d 20, 24 (2d Cir. 2018) (holding that "*Matal* compels the conclusion that defendants have unconstitutionally discriminated against WD's viewpoint by denying its Lunch Program application because WD branded itself and its products with ethnic slurs"); *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 806 (1985) (stating that 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*") (emphasis added); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995) ("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.") (emphasis added); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993) ("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.") (internal quotations and citation omitted).

Here, the County does not exclude ads discussing terrorism as a *subject matter*. Rather, it objects to Plaintiffs' *viewpoint* on this permissible subject. There is no room to argue otherwise. This is viewpoint discrimination.

The County's claim that this is a restriction on the "manner" of speech as opposed to a restriction on the viewpoint of a speaker on a permissible subject (*i.e.*,

terrorism) is simply false.[3] (*See* Cnty. Br. at 48, 53). The "manner" of speech is advertising via printed ads on the County's transit advertising space. And this "manner" of speech is plainly compatible with the forum at issue—it is the very "manner" of speech that this forum permits.

The County also argues that it is not a viewpoint-based restriction because it applies even-handedly to prohibit all advertisers from expressing a message the County's censors deem "demeaning or disparaging." (Cnty. Br. at 43). The County misapprehends viewpoint discrimination. As stated by the Supreme Court:

> Our *cases* use the term "viewpoint" discrimination in a broad sense, and in that sense, the disparagement clause discriminates on the bases of "viewpoint." To be sure, the clause even-handedly prohibits disparagement of all groups. It applies equally to marks that damn Democrats and Republicans, capitalists and socialists, and those arrayed on both sides of every possible issue. It denies registration to any mark that is offensive to a substantial percentage of the members of any group. But in the sense relevant here, *that is viewpoint discrimination*: *Giving offense is a viewpoint*.

[3] The County wants to decide for Plaintiffs what message they are conveying by repeatedly and incorrectly arguing that the message is simply "catch a terrorist." While the County's assertion is false, it is nonetheless meaningless as to whether its restriction is viewpoint based. *See, e.g.*, Br. of *Amicus Curiae* of Penn. Ctr. for the First Am. a 5 ["The County was thus discriminating based on viewpoint, and the alternative that the District Court pointed to would use 'different language' only because it was expressing a different viewpoint."]). In short, Plaintiffs submitted the ads that they submitted because those are the ads they want to display—not some politically correct, government-sanitized message that the County wants to impose upon them. Plaintiffs' viewpoint is as their ads state: these are the "Faces of Global Terrorism," and it is this viewpoint the County rejects. (R-56-2, Gannon Dep. at 75:25 to 76:1-13, ER-96-97).

Matal, 137 S. Ct. at 1763 (citation omitted, emphasis added).

In sum, the County rejected Plaintiffs' ads, claiming that they violate the Transit Advertising Policy prohibiting "demeaning or disparaging" messages. *Matal v. Tam* compels this Court to "hold that this provision violates the Free Speech Clause of the First Amendment. It offends a bedrock First Amendment principle: Speech may not be banned on the ground that it expresses ideas that offend." *Id.* at 1751.

In the final analysis, it was the County's objection to Plaintiffs' viewpoint that was the motivating factor for rejecting Plaintiffs' ads—the other bases were mere pretexts, as the rejection of AFDI Ad II demonstrates.

II. The County's Prior Restraint Based on a Claim of Disruption Is an Impermissible Viewpoint-Based "Heckler's Veto."

Just as the First Amendment prohibits the County from restricting Plaintiffs' speech because County officials are offended by Plaintiffs' viewpoint, the First Amendment also prohibits the County from enforcing a "heckler's veto" by claiming that it may restrict Plaintiffs' speech because others might be offended by its viewpoint. "The First Amendment knows no heckler's veto." *Lewis v. Wilson*, 253 F.3d 1077, 1082 (8th Cir. 2001); *Ctr. for Bio-Ethical Reform, Inc. v. L.A. Cnty. Sheriff Dep't*, 533 F.3d 780, 790 (9th Cir. 2008) (noting that there is no "minors" exception to the heckler's veto). As stated by the Sixth Circuit, sitting *en banc*:

> An especially "egregious" form of content-based discrimination is that which is designed to exclude a particular point of view from the marketplace of ideas. . . . The heckler's veto is precisely that type of odious viewpoint discrimination.

Bible Believers v. Wayne Cty., 805 F.3d 228, 248 (6th Cir. 2015) (internal citations omitted).

Here, the only basis for the County's claim that Plaintiffs' speech might be disruptive is based on an objection (by the County and a handful of other political partisans) to the viewpoint of Plaintiffs' message.

Because AFDI Ads I and II never ran on the County's advertising space, there is no evidence of any disruption whatsoever to the transit system, highlighting the problem with prior restraints. *See Alexander v. United States*, 509 U.S. 544, 550 (1993) ("The term 'prior restraint' is used to describe administrative and judicial orders forbidding certain communications when issued in advance of the time that such communications are to occur.") (internal quotations and citation omitted).

Moreover, the State Department ad containing the same offending "motif" ("Faces of Global Terrorism") ran on the County's busses for nearly 3 weeks, and the County received only a "*small volume*" of complaints—mostly from a politician and advocacy groups. There was no violence, reduced ridership, or a substantial diversion of resources—just a handful of complaints, mostly from political

partisans.[4]

As this Court cautioned in *Seattle Mideast Awareness Campaign v. King County*, 781 F.3d 489 (9th Cir. 2015)

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

Id. at 502-03 (emphasis added). Here, the County's claimed fear of hostile audience reaction is a pretext for suppressing Plaintiffs' speech because County officials oppose Plaintiffs' point of view. This is the only conclusion compelled by the evidence.

In the final analysis, the County's prior restraint on Plaintiffs' ads based on a claim that the ads would be disruptive is nothing more than a "heckler's veto," which is a "type of odious viewpoint discrimination" prohibited by the First Amendment.

II. The County's "False or Misleading" Restriction Is Impermissible under the First Amendment and a Pretext for Viewpoint Discrimination.

"King County bans ads that it deems 'false or misleading,' but [the U.S. Supreme Court] considers broad, content-based restrictions on false statements in political messages to be generally impermissible." *Am. Freedom Def. Initiative v.*

[4] The County's Rule 30(b)(6) believed that there were "between eight and ten complaints," (R-56-2, Gannon Dep. at 48:4-12, ER-78), a miniscule number given that the County's ridership is approximately 400,000 people *a day*.

King Cnty., 136 S. Ct. 1022, 1025 (2016) (Thomas, J., dissenting) (citing *United States v. Alvarez*, 132 S. Ct. 2537 (2012)); *see also Lebron v. Wash. Metro. Area Transit Auth.*, 749 F.2d 893, 898-99 (D.C. Cir. 1984) (Bork, J.) (stating that a "prior administrative restraint of distinctively political messages on the basis of their alleged deceptiveness is unheard-of—and deservedly so."); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 271 (1964) ("Authoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth—whether administered by judges, juries, or administrative officials . . . .").

Here, the County admits that AFDI Ad I expresses a *political message*[5]—it is *not commercial speech*[6] subject to a claim of false advertising nor is there any claim that Plaintiffs' message contains defamatory statements which might be restricted under the First Amendment. Consequently, it is wrong as a matter of law to restrict this political ad on the basis that it is false. *See supra*.

Moreover, there is nothing *materially* false about this political ad in the first instance. To begin, there is no dispute that AFDI Ad I was modeled after the State Department ad—an ad which even *Congressman McDermott believed was*

[5] (R-56-2, Gannon Dep. at 36:1-2 ["I think it is reasonable to review these ads and consider them to have a political message."], ER-73).
[6] (R-56-2, Gannon Dep. at 35:18-21 [agreeing that the ad is not a commercial ad], ER-72).

sponsored by the FBI.[7] Indeed, the "faces" of global terrorism depicted in the ad came directly *from the FBI's most wanted global terrorists list*. Next, the State Department ad listed *sixteen* "Faces of Global Terrorism" with a caption stating, "Stop a Terrorist. Save Lives. *Up to $25 Million Reward*." (emphasis added). Consequently, any *reasonable* viewer of the State Department ad would conclude that at least *one* of these sixteen terrorists would yield an award of up to $25 million. Why else include these *specific* terrorists and this *specific* dollar amount? Yet, the County accepted this ad for display, and it *never* claimed, even to this day, that the ad was false or misleading in any way. Finally, the contact email listed on the State Department ad is rjf@state.gov.

In comparison, AFDI Ad I includes the *very same* sixteen "Faces of Global Terrorism" and a caption stating, "The FBI Is Offering *Up To $25 Million Reward* If You Help Capture One Of These Jihadis." (emphasis added). It provides the correct contact information for the program as follows: "Contact – rjf@state.gov." And the ad makes clear that it is "PAID FOR BY THE AMERICAN FREEDOM DEFENSE INITIATIVE." In other words, this is not an ad sponsored by the FBI or the State Department or any other government agency associated with the Rewards for Justice program.

[7] (R-14, Shinbo Decl. ¶ 16, Ex. F [McDermott Ltr.] [complaining about the ad in a letter written to the FBI director], ER-118-19, 149-51).

There is no fact dispute that the Rewards for Justice program authorizes rewards "up to $25 million" for capturing a terrorist on the FBI's most wanted terrorist list, and the amounts can change based on the circumstances.[8] Moreover, the rewards are in fact "offered"[9] through the FBI's website, which encourages those who may have information leading to the capture of a most wanted global terrorist (and thus seeking a reward) to contact the FBI.[10] The Rewards for Justice program ads themselves instruct people who have such information and who could be eligible for an award to contact the FBI directly.[11] Indeed, as noted above, Congressman McDermott believed that the State Department ad was in fact sponsored by the FBI. There is no doubt that, at a minimum, the State Department and the FBI are working jointly on this program. In short, there is nothing materially false about AFDI Ad I.

At the end of the day, and as the evidence shows without serious contradiction, the County's real reason for rejecting Plaintiffs' ads (AFDI Ad I and AFDI Ad II) was the County's objection to Plaintiffs' *viewpoint* that the pictured terrorists represent the "Faces of Global Terrorism." In *American Freedom Defense Initiative*

[8] (R-56-1, Geller MSJ Decl. ¶¶ 31, 32, Ex. G, ER-18-19, 42-43).
[9] Sponsoring an ad is not the same as offering a reward. The FBI, through its website, conveys the reward offers.
[10] (R-56-1, Geller MSJ Decl. ¶¶ 33, 34, Exs. H, I, ER-19, 44-48).
[11] (*See* R-56-1, Geller MSJ Decl. ¶ 33, Ex. H, ER-19, 44-45) ("Your information could save lives and *you could be eligible for a reward* and relocation. Please visit www.RewardsForJustice.net to submit a confidential tip *or contact the FBI* or your local law enforcement agency.") (emphasis added).

v. King County, 796 F.3d 1165 (9th Cir. 2015), this Court upheld the County's "false and misleading" restriction as applied to AFDI Ad I when it affirmed the district court's denial of Plaintiffs' request for a preliminary injunction. That, of course, was a preliminary ruling. *See Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981) ("[T]he findings of fact and conclusions of law made by a court granting a preliminary injunction are not binding at trial on the merits."). However, in that ruling, the Court noted with importance that "[n]othing in the record suggests that Metro would have accepted the ad with the same inaccuracy if only the ad had expressed a different viewpoint . . . ." *Id*. at 1171. Here, the record overwhelming suggests—indeed, demonstrates—that the principal reason for the County's rejection of the ads was its objection to Plaintiffs' viewpoint. Like all of the restrictions at issue here, the County applied them because it opposes Plaintiffs' message, attempting to advance every reason possible to censor Plaintiffs' "offensive" viewpoint. Thus, as noted in the beginning of this brief, the viewpoint discrimination "rationale" is dispositive of this entire case. *See Matal*, 137 S. Ct. at 1765 (Kennedy, J., concurring).

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P. 32(a)(7)(c) and Circuit Rule 32-1, the foregoing Brief is proportionally spaced, has a typeface of 14 points Times New Roman, and contains 3,578 words, excluding those sections identified in Fed. R. App. P. 32(a)(7)(B)(iii).

AMERICAN FREEDOM LAW CENTER

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CERTIFICATE OF SERVICE

I hereby certify that on June 1, 2018, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. I also certify that all participants in this case are registered CM/ECF users.

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