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' SUPPLEMENTAL 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

While the panel's divided decision in *Seattle Mideast Awareness Campaign v. King County*, No. 11-35914, 2015 U.S. App. LEXIS 4323 (9th Cir. Mar. 18, 2015) (hereinafter "*SeaMAC*"),[1] may affect some issues in this appeal, it should not change its proper outcome: a ruling that King County (hereinafter "County") violated the First Amendment and the granting of a preliminary injunction in favor of Plaintiffs-Appellants American Freedom Defense Initiative, Pamela Geller, and Robert Spencer (hereinafter "Plaintiffs").

SeaMAC held (incorrectly in Plaintiffs' view) that the County's advertising space is a limited public forum and that at least one of the "civility" restrictions at issue, § 6.4(D), was constitutional on its face.[2] The panel further held that the application of § 6.4(D) in light of the facts presented was reasonable and viewpoint neutral. *SeaMAC* at 16. Section 6.4 (D) mirrors one of the restrictions at issue here, which is identified as Transit Advertising Policy ("TAP") § 6.2.9 (Harmful or Disruptive to Transit System).[3] However, as demonstrated below, the application

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[1] Citations to *SeaMAC* will be to the pages of the slip opinion.

[2] *See SeaMAC* at 16 ("We conclude that the County's application of § 6.4(D) was reasonable and viewpoint neutral, and therefore have no occasion to address the validity of § 6.4(E).").

[3] The advertising policy at issue in *this* case was adopted in 2012. *See* Appellee Addendum 6-13 ("2012 Transit Advertising Policy"). The advertisement at issue in *SeaMAC* was rejected under the policy that was in place in 2010.

of § 6.2.9 in light of the facts *in this case* compels the conclusion that the County violated Plaintiffs' right to freedom of speech.

As noted by the Supreme Court, "the reaches of the First Amendment are ultimately defined by the facts it is held to embrace. . . ." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Bos.*, 515 U.S. 557, 567 (1995). The egregious facts of *SeaMAC* are not the facts of *this* case, thus compelling a different outcome, as we will explain further below.

Additionally, the *SeaMAC* decision did not address, and therefore did not resolve, the issues involving whether the County's "False or Misleading" or "Demeaning or Disparaging" restrictions, facially and as applied to restrict Plaintiffs' speech, pass constitutional muster regardless of the forum.

To be sure, Plaintiffs believe that *SeaMAC* was wrongly decided in that, *inter alia*, it disregards this Circuit's prior understanding of the forum issue,[4] it

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[4] In *DiLoreto v. Downey Unified School District Board of Educations*, 196 F.3d 958 (9th Cir. 1999), this Court made the following relevant observation with regard to the forum issue:

> Government policies and practices that historically have allowed commercial advertising, but have excluded political and religious expression, indicate an intent not to designate a public forum for all expressive activity, but to reserve it for commercial speech. . . . However, where the government historically has accepted a wide variety of advertising on commercial and non-commercial subjects, courts have found that advertising programs on public property were public fora.

Id. at 965-66 (citing, *inter alia*, *Lehman v. City of Shaker Heights*, 418 U.S. 298, 303-04 (1974)); *see Children of the Rosary v. City of Phoenix*, 154 F.3d 972, 978

perpetuates a Circuit split,[5] and it ultimately weakens the First Amendment.[6] And while this panel has no authority to overrule the fractured *SeaMAC* opinion, it can

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(9th Cir. 1998) (observing that transportation advertising space is a nonpublic forum when the government "consistently promulgates and enforces policies restricting advertising on its buses to commercial advertising"); *see also Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 802 (1985) ("[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*.") (emphasis added).

[5] *See, e.g., N.Y. Magazine v. Metro. Transp. Auth.*, 136 F.3d 123, 130 (2d Cir. 1998) (concluding that the advertising space was a designated public forum and that "[a]llowing political speech . . . 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"); *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); *United Food & Commercial Workers Union, Local 1099 v. Sw. Ohio Reg'l Transit Auth.*, 163 F.3d 341, 355 (6th Cir. 1998) ("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.") (hereinafter "*United Food*"); *but see Ridley v. Mass. Bay Transp. Auth.*, 390 F.3d 65 (1st Cir. 2004) (concluding that the advertising space was a limited public forum).

[6] The *SeaMAC* panel supported its forum conclusion based on the following rationale: "Municipalities faced with the prospect of having to accept virtually all political speech if they accept any—regardless of the level of disruption caused—will simply close the forum to political speech altogether. First Amendment interests would not be furthered by putting municipalities to that all-or-nothing choice. Doing so would 'result in less speech, not more'—exactly what the Court's public forum precedents seek to avoid." *SeaMAC* at 16. This reasoning is fundamentally flawed. Permitting the government to pick and choose which "political speech" it deems acceptable does <u>*more*</u> harm to the First Amendment, which is intended to operate as a brake on the government's power to censor speech, than closing the forum altogether. The panel's reasoning thus opens a forum for politically correct speech (and speakers) which the government favors by

certainly dampen its impact on the First Amendment by limiting its reach in light of the facts presented. *Brown v. Cal. Dep't of Transp.*, 321 F.3d 1217, 1221 (9th Cir. 2003) (noting "the 'special solicitude' [this Court has] for claims alleging the abridgment of First Amendment rights").

Nonetheless, despite *SeaMAC*'s ruling on the forum issue, Plaintiffs believe that the forum question is still an open issue in this appeal. In *SeaMAC*, the panel stated the following:

> After unsuccessfully asking SeaMAC to withdraw its proposed ad, the County Executive withdrew his approval of SeaMAC's ad and, at the same time, rejected the HFC and AFDI ads. The County Executive explained that "*the context had changed dramatically*" and that *all of the pending ads on the Israeli-Palestinian conflict were non-compliant* with §§ 6.4(D) and 6.4(E). *Metro simultaneously revised its advertising policy to exclude all political or ideological ads from that point forward.*

SeaMAC at 9 (emphasis added).

Under the advertising policy at issue here, which was adopted on January 12, 2012, the County has not "exclude[d] all political or ideological ads." In fact, in 2012, the County "*re-introduced public-issue ads*." (Doc. 13; ER 87 [Desmond

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permitting the government to make content-based restrictions based on nothing more than "reasonableness." Thus, rather than restricting government censorship of speech, the goal of the First Amendment, the panel's decision grants the government broader powers of censorship. *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553 (1975) ("[T]he danger of censorship and of abridgment of our precious First Amendment freedoms is too great where officials have unbridled discretion over a forum's use.").

Decl. ¶ 17 (emphasis added]). Therefore, pursuant to its *extant policy*, 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 controversial and hotly-debated subjects such as *the 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]; *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 . . . .")]).

For example, under this *revised* policy, in 2012 and 2013 the County accepted advertisements expressing messages such as "*I'm a Palestinian. Equal Rights for All*," "*Equal Rights for Palestinians. The Way to Peace*," "*Share the Land. Palestinian Refugees Have the Right to Return. Equal Rights for Palestinians.*," and "*The Palestinian Authority Is Calling For A Jew-Free State Equal Rights For Jews*." (Doc. 14; ER 40-45 [Shinbo Decl., Ex. A]). *See United Food*, 163 F.3d at 355 ("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.").

In light of the extant policy and practice at issue in *this* appeal, Plaintiffs contend that this Court can and should revisit the forum issue. *See also supra* nn.4-5.

We turn now to what are clearly the material factual differences between *SeaMAC* and this case.

ARGUMENT

I. The Facts in *SeaMAC* Are Materially Different from this Case.

The *SeaMAC* panel's decision turned on the legally relevant and material fact that "the threat of disruption [to the transportation system caused by the ad] was real rather than speculative." *SeaMAC* at 19 (citing *Sammartano v. First Judicial Dist. Court*, 303 F.3d 959, 967 (9th Cir. 2002) for the proposition that the record must "show that the asserted risks were real"). In reaching this conclusion, the panel conducted an independent examination of the record "without deference to the threat assessment made by County officials" and concluded that "[t]he County identified three types of potential disruption, *each of which is supported by the record*: (1) vandalism, violence, or other acts endangering passengers and preventing the buses from running; (2) reduced ridership because of public fear of such endangerment; and (3) substantial resource diversion from Metro's day-to-day operations." *SeaMAC* at 19 (emphasis added). There are *no* analogous facts in this case. *See, e.g.*, *Tucker v. Cal. Dep't of Educ.*, 97 F.3d 1204, 1215 (9th Cir.

1996) (striking down as unreasonable a speech restriction in a nonpublic forum, 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," and noting that "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").

As noted previously, it is undisputed that in light of the 2012 policy, the County accepts for display on its bus advertising space a wide array of commercial and public-issue ads, including advertisements on controversial and hotly-contested political issues such as the Israeli-Palestinian conflict. Thus, controversial, public-issue messages are not prohibited.

But even more to the point, pursuant to the 2012 policy, the analogous 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. There is no evidence of violence or vandalism. Indeed, there is *no* evidence whatsoever of a material disruption to the transportation system. *See Sammartano*, 303 F.3d at 966-67 ("[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 fulfills a legitimate need.") (internal quotations and citations omitted).

Consequently, there is ***no*** evidence of "(1) vandalism, violence, or other acts endangering passengers and preventing the buses from running; (2) reduced ridership because of public fear of such endangerment; [or] (3) substantial resource diversion from Metro's day-to-day operations." In sum, there is 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])—the very type of subjective, politically-driven opposition to a speaker's opinion that the majority in *SeaMAC* assured us could never serve as a basis for

suppressing speech. *See SeaMAC* at 19 (upholding the restriction and stating that "we are not left with the specter of a 'standardless standard' whose application will be immune from meaningful judicial review").

No doubt realizing that it had no "real" evidence of any harm or disruption to the operation of its transit system, the County invoked two additional speech restrictions to suppress Plaintiffs' message. Neither of these restrictions was at issue in *SeaMAC*. Therefore, they were not addressed by the panel. Briefly, these restrictions are as follows:

> 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.

Neither of these restrictions applies to Plaintiffs' "Faces of Global Terrorism" advertisement *as a matter of fact*. Substantively, Plaintiffs' ad is similar to the State Department's "Faces of Global Terrorism" ad that the County previously accepted. And it is unreasonable to argue that displaying the actual names and faces of the FBI's most wanted global terrorists (names and faces

appearing on the FBI's official website) demeans or disparages anyone (except, perhaps, the identified terrorists, but their views are not relevant here).

But more important, neither of these restrictions comports with the requirements of the First Amendment, particularly when the government is seeking to censor public-issue speech (*i.e.*, Plaintiffs' ad), which is entitled to "special protection." *Connick v. Myers*, 461 U.S. 138, 145 (1983) ("[T]he Court has frequently reaffirmed that speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.") (internal quotations and citation omitted).

To begin, *SeaMAC* does not (and cannot) alter the fact that the First Amendment does not permit the government to be the arbiter of truth on public issues. *N.Y. Times Co.* v. *Sullivan*, 376 U.S. 254, 270-71 (1964) (affirming our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open" and that First Amendment protection for public-issue speech "does not turn upon the truth, popularity, or social utility of the ideas and beliefs which are offered") (internal quotations and citation omitted); *see also id.* at 271 ("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—and especially one that puts the burden of proving truth on the speaker."); *United States v. Alvarez*, 132 S.

Ct. 2537, 2564 (2012) (stating that "it is perilous to permit the state to be the arbiter of truth" about "matters of public concern") (Alito, J., dissenting).

Additionally, the County's "demeaning and disparaging" restriction is inherently a viewpoint-based restriction that is impermissible even in a limited public forum. *SeaMAC* at 10 (noting that in a limited public forum, content-based restrictions must be reasonable and viewpoint neutral); *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" and noting that "a State may not prohibit only that commercial advertising that depicts men in a demeaning fashion" without violating the First Amendment); *Ridley v. Mass. Bay Transp. Auth.*, 390 F.3d 65, 100 (1st Cir. 2004) (Torruella, J., dissenting) ("The government cannot allow dissemination of one viewpoint that it finds inoffensive or bland, and prohibit the dissemination of another viewpoint that it finds offensive or 'demeaning,' . . . . Such distinctions are viewpoint based, not merely reasonable content restrictions.").

At a minimum, 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, the subject matter of

Plaintiffs' advertisement ("terrorism") is acceptable in the forum. Consequently, the County's restriction is viewpoint based and therefore unconstitutional as a matter of law. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) (stating that viewpoint discrimination, which is prohibited in all forums, occurs "[w]hen the government targets not subject matter, but particular views taken by speakers on a subject"). *SeaMAC* does not change this conclusion.

II. *SeaMAC* Supports the Conclusion that the County's Application of Its "Harmful and Disruptive" Restriction in this Case Violates the First Amendment.

In upholding the constitutionality of the County's restriction on speech that "is so objectionable under contemporary community standards as to be reasonably foreseeable that it will result in harm to, disruption of, or interference with the transportation system," the *SeaMAC* panel relied upon *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969). *See SeaMAC* at 18. The panel noted that an analogous standard was upheld in *Tinker* where the Court "concluded that school officials may exclude student speech if the speech could reasonably lead to 'substantial disruption of or material interference with school activities.'" *SeaMAC* at 18 (quoting *Tinker*, 393 U.S. at 514). Accordingly, the *SeaMAC* panel concluded that the County's speech restriction is constitutional because it "is tied to disruption of or interference with the normal operations of the transit system," thereby "suppl[ying] courts with a sufficiently definite and

objective benchmark against which to judge the 'disruption' assessments made by County officials." *SeaMAC* at 18. Therefore, pursuant to *SeaMAC*, in order for the County to apply this standard consistent with the First Amendment, the disruption or interference *must be real*.

Thus, applying the rationale in *Tinker*, "[i]n order for the State [in the person of government transit officials] to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. Certainly where there is no finding and no showing that engaging in the forbidden conduct would materially and substantially interfere with the [normal operations of the transit system], the prohibition cannot be sustained." *See Tinker*, 393 U.S. at 509 (internal quotations omitted).

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

As the Supreme Court observed in *Tinker* (with slight paraphrasing to make the relevant point here):

> [I]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any

> departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken [or message displayed] that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk[;] and our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.

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

In the final analysis, *SeaMAC* misapplied important First Amendment principles resulting in the erosion of the "delicate and vulnerable" right to freedom of speech. *NAACP v. Button*, 371 U.S. 415, 433 (1963) ("[First Amendment] freedoms are delicate and vulnerable, as well as supremely precious in our society."). However, with this case, the Court has the opportunity to minimize the damage done by *SeaMAC* by limiting its holding to the factual record presented. Consequently, this case will allow the Court to breathe new life back into the First Amendment by reversing the district court, finding that the County violated Plaintiffs' right to freedom of speech, and 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' "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), Circuit Rule 32-1, this Court's order of March 20, 2015, the foregoing Supplemental Brief is proportionally spaced, has a typeface of 14 points Times New Roman, and does not exceed 15 pages.

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 10, 2015, 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