IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

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

Plaintiffs,

-v.-

KING COUNTY,

Defendant.

Case No. 2:13-cv-01804-RAJ

PLAINTIFFS' REPLY BRIEF IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

[Fed. R. Civ. P. 65]

NOTE ON MOTION CALENDAR: November 1, 2013

ORAL ARGUMENT REQUESTED

INTRODUCTION

Defendant King County's opposition to Plaintiffs' motion for preliminary injunction (Doc. No. 12) and accompanying declarations and exhibits (Doc. Nos. 13 & 14) provide compelling evidence[1] demonstrating that (1) the advertising space at issue is a designated

[1] One of the difficulties often faced by a party seeking a preliminary injunction is the lack of discovery. Here, Defendant's submissions provide evidence that would not have otherwise been available to Plaintiffs (or the court) at this stage of the litigation, and this evidence provides compelling support for granting the requested injunction, as discussed further in this reply. In their submissions, Defendant presents two categories of evidence. The first category, proffered through the Declaration of Kevin Desmond (Doc. No. 13), provides various iterations of Defendant's advertising policies. These iterations are set out as Exhibits A through C of the declaration. The second category includes the various controversial political advertisements that Defendant has either approved or rejected, and, in the case of the rejected advertisements, the advertising policy basis for the rejection. This evidence is set out as Exhibits A through C of the Sharron Shinbo Declaration (Doc. No. 14).

STEPHEN PIDGEON
Attorney at Law, P.S.
3002 Colby Avenue, Suite 306
Everett, Washington 98201
(425) 605-4774

public forum for Plaintiffs' advertisement and (2) the "advertising policy" employed by Defendant to restrict Plaintiffs' speech is unconstitutional regardless of the nature of the forum.[2]

As the parties are aware, in *Seattle Mideast Awareness Campaign v. King Cnty.*, 771 F. Supp. 2d 1266, 1275-76 (W.D. Wash. 2011) (hereinafter referred to as "*SeaMAC I*"),[3] the court concluded—*based on the record and arguments presented there*—that the forum at issue was a limited public forum.[4] However, the court properly noted that its forum inquiry requires a close examination of "King County's *practice* in enforcing its policy." *Id*. at 1275 (emphasis added). Indeed, a forum analysis is not a static inquiry, as Defendant appears to concede. (*See* Def.'s Opp'n at 2 ["To be sure, AFDI is not bound by this court's prior decision. . . ."] [Doc. No. 12]). And it is often the case that "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 v. City of Pasco*, 241 F.3d 1067, 1076 (9th Cir. 2001) ("[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."). Thus, as demonstrated further below, Defendant has created a public forum for Plaintiffs' speech such that its content-based restriction[5] on Plaintiffs' advertisement cannot pass constitutional muster.

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[2] The ACLU filed a motion (Doc. No. 15) for leave to submit a proposed Brief of *Amicus Curiae* ACLU of Washington (Doc. No. 15-1). Plaintiffs do not oppose this motion and contend that the court should, in fact, grant it because the proposed brief adds additional insight that will assist the court in making the proper ruling in this important First Amendment case.

[3] Plaintiffs will refer to the court's decision in *Seattle Mideast Awareness Campaign v. King Cnty.*, No. C11-94RAJ, 2011 U.S. Dist. LEXIS 116541 (W.D. Wash. Oct. 7, 2011) as "*SeaMAC II*."

[4] The record evidence here was not before the court when it ruled in *SeaMAC I* and *Sea MAC II*.

[5] As argued in Plaintiffs' motion (Doc. No. 7) and demonstrated further in this reply, Defendant's speech restriction is viewpoint based, which is an egregious form of content discrimination that is

STEPHEN PIDGEON
Attorney at Law, P.S.
3002 Colby Avenue, Suite 306
Everett, Washington 98201
(425) 605-4774

And even if this court is not prepared to reconsider the nature of the forum at issue, Defendant's evidentiary proffer demonstrates that King County's "advertising policy" is not only viewpoint based (and it certainly allows for viewpoint-based discrimination due to its lack of objective guidelines, which itself renders the policy unconstitutional), its implementation is so inconsistent and arbitrary that there is no basis to characterize it as "reasonable." *Flint v. Dennison*, 488 F.3d 816, 831 (9th Cir. 2007) (holding that 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") (citations and quotations omitted).

I. Defendant Designated Its Advertising Space a Public Forum for Plaintiffs' Speech.

When this court rejected SeaMAC's motion for preliminary injunction in *SeaMAC I*, it noted carefully the legal and factual analysis that must be brought to bear on a court's legal determination as to whether any given transit authority's advertising space is a designated public forum or a limited public forum. As Plaintiffs' motion details, that determination is a critical part of the First Amendment analysis. (Pls.' Mot. at 8-13 [Doc. No. 7]). And as this court made clear, determining whether a forum is a designated or limited public forum requires the court to examine not just the *stated* policy, with its rote expressions of an intent not to create a designated public forum, but notably the actual conduct of the transit authority and how it applies its policy. In the words of this court:

> When attempting to distinguish between a designated public forum and a limited public forum, 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. That intention is consistent with a designated public forum, but government restrictions (via policy *and practice*) on access to a forum based on *objective standards* indicate a limited public forum.

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prohibited in all forums. *See Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995).

STEPHEN PIDGEON
Attorney at Law, P.S.
3002 Colby Avenue, Suite 306
Everett, Washington 98201
(425) 605-4774

> Both a policy *and a consistent application thereof* must be present in order to establish that a government intended to create a limited public forum.

SeaMAC I, 771 F. Supp. 2d at 1272 (emphasis added; quotations and citations omitted).

So it is we examine "intent" by examining the stated policy, and from there we move on to "practice" as evidenced by the record herein, not the very limited record before the court in *SeaMAC I & II*. And when we examine "practice" as the application of a purported stated intent set out in lawyer-crafted policies, we must pay special attention to the "consistency" of the application.

We begin our examination of the *stated* policy by acknowledging an undisputed and, indeed, *dispositive* fact. Other than specific political campaign speech, under the extant "advertising policy," Defendant has purposefully opened up its forum to debate and public discourse about all sorts of controversial *political* issues, (*see* Def.'s Opp'n at 17 [Doc. No. 12]), including the hotly debated "Palestinian and Israeli conflict" (Shinbo Decl. at ¶¶ 9,11, Exs. A & C [Doc. No. 14]). Thus, by its very own admissions and evidence, Defendant does not limit its advertising space to "innocuous and less controversial commercial and service oriented advertising," *see Lehman v. City of Shaker Heights*, 418 U.S. 298, 304 (1974), which alone is sufficient to end this forum analysis in Plaintiffs' favor. *See 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); *United Food & Commercial Workers Union, Local 1099 v. Sw. Ohio Reg'l Transit Auth.*, 163 F.3d 341 (6th Cir. 1998) (holding that the government creates a designated public forum by accepting "political and public-issue advertisements, which by their very nature generate conflict, signal[ing] a willingness on the part of the government to open the property to controversial

STEPHEN PIDGEON
Attorney at Law, P.S.
3002 Colby Avenue, Suite 306
Everett, Washington 98201
(425) 605-4774

speech") (citing *Lehman*) (hereinafter "*United Food*"); *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).

Defendant seeks cover from these decisions—decisions which compel the conclusion that a designated public forum has been created here—by claiming that by policy and practice certain speech restrictions are in place, including, for example, restrictions that require truthfulness and civility and prohibit "disruption of service." (*See, e.g.*, Defs.' Opp'n at 17 [stating that "[a]ll ads, including political ones, are required to pass muster under the civility and interference with service restrictions"], at 18 ["Metro's civility and disruption of service advertising restrictions are not only reasonable—they are prudent."] [Doc. No. 12]). But this 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 ambiguous, subjective, and vague restrictions that permit viewpoint discrimination, particularly as applied to political 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 viewpoint-based and thus unconstitutional. At a minimum, Defendant'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 "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

STEPHEN PIDGEON
Attorney at Law, P.S.
3002 Colby Avenue, Suite 306
Everett, Washington 98201
(425) 605-4774

rest on 'ambiguous and subjective reasons'" (quoting *Desert Outdoor Adver., Inc. v. City of Moreno Valley*, 103 F.3d 814, 818 (9th Cir. 1996)). Thus, the court could again end its analysis here. But there is more.

Indeed, a forum analysis does not end simply because Defendant has adopted some restrictions on speech or employed the restrictions to reject certain advertisements. 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 v. Metro. Transp. Auth.*, 136 F.3d 129-30. Thus, a forum analysis also requires speech restrictions to be applied consistently, lest they operate as a fig leaf to cover up a government agency's arbitrary and subjective rejection of political 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. We now turn to that record.

First, from *SeaMAC II*, we know that Defendant considered the advertisement attacking Israel as fully compliant with its then existing advertising policy and thus authorized it to run. Once news got out of the impending advertisement, pro-Israel advocates protested, and there were even threats or perceived threats of violence. In fact, bus drivers employed by Defendant expressed their concerns and indicated that they would not work in that environment. At that point, Defendant rejected the advertisement based upon its "so objectionable" and incitement to violence standards. *SeaMAC II*, 2011 U.S. Dist. LEXIS 116541, at *4-*9. What is clear, therefore, is that Defendant did not consider the anti-Israel advertisement "so objectionable" or

STEPHEN PIDGEON
Attorney at Law, P.S.
3002 Colby Avenue, Suite 306
Everett, Washington 98201
(425) 605-4774

likely to incite violence when it conducted its "high-level-of-consistency-decision-making" (*see* Desmond Decl. at ¶ 21 [Doc. No. 13]), but only *after* certain elements from the public complained and threatened violence.

But this inability to apply its own speech restrictions consistently is not a one-off problem for Defendant, but a *consistent* inconsistency. For example, Defendant tells us that the advertisement it refers to as the "State Department Ad" was considered upon careful review to be fully compliant with the 2012 advertising policy—the very policy employed to reject Plaintiffs' (very similar) advertisement. However, after receiving three written complaints from two advocacy groups and a politician and a few complaints by telephone, all of which asserted in the main that the pictures and names suggested by way of stereotyping that all or most "global terrorists" were of a certain religion (Islam) or ethnicity (Middle Eastern, Asian, or African), Defendant concluded that it had not properly applied its speech restrictions and now claim that this was "an example of an error in appreciating how an ad violated our transit advertising policies." (*See* Def.'s Opp'n at 7 [Doc. No. 12]).

Thus, a pattern has emerged suggesting that all sorts of controversial political speech is permitted so long as the viewpoint expressed or implied by the advertisement does not draw protest from certain quarters. But this is no more than a poorly disguised heckler's veto (and a viewpoint-based veto no less) that does not transform a designated public forum in which debate on public issues is permitted into a limited public forum. If so, the constitutionally impermissible heckler's veto, *see Lewis v. Wilson*, 253 F.3d 1077, 1082 (8th Cir. 2001) ("The First Amendment knows no heckler's veto."), becomes the fig leaf and pretext for turning a designated public forum into a limited public forum at the whim of government officials who have allowed the protesting heckler to silence the speaker's viewpoint. This is what is meant by bootstrapping.

But beyond the two examples of confessed error, we now have as part of the record a

STEPHEN PIDGEON
Attorney at Law, P.S.
3002 Colby Avenue, Suite 306
Everett, Washington 98201
(425) 605-4774

bevy of highly controversial political advertisements, some of which have been accepted and some of which have been rejected. And a simple review of the decisions regarding these advertisements further exposes the fig leaf.

For example, advertisements accepted by Defendant that state "I'm a Palestinian: Equal Rights for All" and "Equal Rights for Palestinians: the Way to Peace" are most assuredly delivering the message that Palestinians are being deprived of their "equal rights." (*See* Shinbo Decl. at Ex. A [Doc. No. 14 at 12 to 15]). Thus, the implication from these accepted advertisements is clear: Palestinians are being unjustly discriminated against by Israeli Jews. So why, then, are these advertisements not considered "demeaning or disparaging" toward Jews or Israelis or "false or misleading"[6] or even "harmful or disruptive"? And yet, Defendant rejected an advertisement calling for "Equal Rights for Non-Muslims in Muslim Countries" under the same advertising policy.[7] (*See* Shinbo Decl. at Ex. A [Doc. No. 14 at 24]).

Given the limited space for this reply brief and the obviousness of the problem Defendant now confronts, we need not belabor this point, especially given the advertisements on display as exhibits to the Shinbo Declaration. But what level of disparagement is too nasty (or uncivil) in this war of words Defendant has willingly permitted on its buses, and how provocative must the advertisement be before Defendant may claim a "reasonable" fear that the advocates on the other side of the argument will be disparaged and angry enough to take it out on the transit service itself? We do not and cannot know the answer to this because not only

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[6] This demonstrates further the constitutional infirmity with a "truthfulness" restriction on political speech. *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. 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).

[7] According to Defendant, this advertisement was rejected because it was "demeaning or disparaging," "harmful or disruptive," and containing "profanity and violence." Defendant's claim that it contained "profanity and violence" is impossible to square with the fact that the advertisement simply contains an image of an apparently rubbled church.

STEPHEN PIDGEON
Attorney at Law, P.S.
3002 Colby Avenue, Suite 306
Everett, Washington 98201
(425) 605-4774

can we *not* glean the "reasonable" (let alone "objective") yet quite invisible line drawing carried out by Defendant among the advertisements accepted versus those rejected, on at least two such occasions, Defendant concedes that *it was woefully wrong when it accepted the advertisements*. In sum, Defendant's application of its advertising policy is nothing short of arbitrary.

Turning further to Defendant's application of its advertising policy to reject Plaintiffs' advertisement, and it is evident that the fig leaf has now wilted away, exposing the naked policy for what it is: an unreasonable and viewpoint-based restriction on political speech.

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 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, but that the highest amount offered to date under the program is "up to $25 million," just as the State Department's original

STEPHEN PIDGEON
Attorney at Law, P.S.
3002 Colby Avenue, Suite 306
Everett, Washington 98201
(425) 605-4774

advertisement stated (offering "up to $25 million reward"). 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."

Regarding Defendant's conclusion that Plaintiffs' advertisement is "demeaning or disparaging," Plaintiffs offer the following. First, the use of the term "jihadis" to describe the global terrorists pictured in the advertisement is factually accurate. A review of the actual wanted posters offering rewards for the capture of the respective terrorists (*see* Geller Decl. at Ex. C [Doc. No. 7-4]) demonstrates that these men belong to groups that self-describe as "jihadis," such as Al Qaeda, Palestinian Islamic Jihad, Egyptian Islamic Jihad, Hezbollah, and al-Shabaab. 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. Moreover, federal court opinions in cases prosecuting self-described "jihadis" utilize that word and "jihad" as well routinely 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.[8]

[8] 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, 132 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

STEPHEN PIDGEON
Attorney at Law, P.S.
3002 Colby Avenue, Suite 306
Everett, Washington 98201
(425) 605-4774

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 (who are also mostly "black" or "brown" or with "foreign sounding names") engage in violent terrorist acts in the name of Islam. 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 such speech on that basis is viewpoint based, in violation of the First Amendment.

II. Defendant's Speech Restriction Is Viewpoint Based.

Viewpoint discrimination need not be blatant. When the government targets not *subject matter* (*i.e.*, tobacco, alcohol, or political candidate advertisements), but particular messages conveyed about an acceptable subject matter (*i.e.*, referring to terrorists as "jihadis"),[9] that is viewpoint discrimination. *Rosenberger*, 515 U.S. at 829 ("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."); *Cogswell v. City of Seattle*, 347 F.3d 809, 815 (9th Cir. 2003) (stating that when speech "fall[s] within an *acceptable subject matter* otherwise included

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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 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).

[9] Defendant does not object to advertisements about stopping terrorism, as evidenced by the revised advertisement from the State Department stating, "The most important reason to stop a terrorist isn't the reward. Stop a terrorist. Save lives." (Shinbo Decl. at ¶ 18, Ex. H [Doc. No. 14]).

STEPHEN PIDGEON
Attorney at Law, P.S.
3002 Colby Avenue, Suite 306
Everett, Washington 98201
(425) 605-4774

in the forum, the State may not legitimately exclude it from the forum based on the viewpoint of the speaker"); *see also Cornelius*, 473 U.S. at 806.

Here, it is undisputed that the content of Plaintiffs' message (and thus its subject matter) is permissible in this forum. (*See, e.g.,* Shinbo Decl. at ¶ 18, Ex. H [Doc. No. 14] [noting that the State Department resubmitted its "stop terrorism" advertisement, having "dropped the offensive and demeaning 'Faces of Global Terrorism' motif"]). 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 R.A.V. v. St. Paul*, 505 U.S. 377, 389 (1992) (stating that "a State may not prohibit only that commercial advertising that depicts men in a demeaning fashion" without violating the First Amendment).

Indeed, in *Ridley v. Mass. Bay Transp. Auth.*, 390 F.3d 65 (1st Cir. 2004), the court held that the transit authority's restriction on certain advertisements that were critical of laws prohibiting drug use were viewpoint based in violation of the First Amendment. The transit authority 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 that "[v]iewpoint 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 (emphasis added). In sum, Defendant's restriction on Plaintiffs' advertisement was viewpoint based in violation of the First Amendment.

CONCLUSION.

For the foregoing reasons, Plaintiffs respectfully request that the court grant this motion and preliminarily enjoin Defendant's prior restraint on Plaintiffs' speech, thereby permitting the display of the AFDI Advertisement on Defendant's buses.

STEPHEN PIDGEON
Attorney at Law, P.S.
3002 Colby Avenue, Suite 306
Everett, Washington 98201
(425) 605-4774

Respectfully submitted,

Stephen Pidgeon Attorney at Law, P.S.

/s/ Stephen Pidgeon
Stephen Pidgeon, Esq. WSBA # 25265
Attorney at Law, P.S.
3002 Colby Avenue, Suite 306
Everett, Washington 98201
attorney@stephenpidgeon.com
Tel: (425) 605-4774; Fax: (425) 818-5371

AMERICAN FREEDOM LAW CENTER

/s/ Robert J. Muise
Robert J. Muise, Esq.* (MI P62849)
P.O. Box 131098
Ann Arbor, Michigan 48113
rmuise@americanfreedomlawcenter.org
Tel: (734) 635-3756; Fax: (801) 760-3901

/s/ David Yerushalmi
David Yerushalmi, Esq.* (DC # 978179)
1901 Pennsylvania Avenue NW, Suite 201
Washington, D.C. 20001
david.yerushalmi@verizon.net
Tel: (646) 262-0500;Fax: (801) 760-3901

*Admitted *pro hac vice*.

CERTIFICATE OF SERVICE

I hereby certify that on November 1, 2013, a copy of the foregoing was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system. Parties may access this filing through the Court's system. I further certify that a copy of the foregoing has been served by ordinary U.S. mail upon all parties for whom counsel has not yet entered an appearance electronically: none.

AMERICAN FREEDOM LAW CENTER

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

STEPHEN PIDGEON
Attorney at Law, P.S.
3002 Colby Avenue, Suite 306
Everett, Washington 98201
(425) 605-4774