HONORABLE RICHARD A. JONES

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

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

Plaintiffs,

v.

KING COUNTY, a municipal corporation,

Defendant.

No. 13-CV-1804-RAJ

[PROPOSED] BRIEF OF *AMICUS CURIAE* ACLU OF WASHINGTON

NOTE ON MOTION CALENDAR:
November 22, 2013

ACLU OF WASHINGTON FOUNDATION
901 Fifth Avenue 630
Seattle, Washington 98164
(206) 624-2184

TABLE OF CONTENTS

ACLU OF WASHINGTON FOUNDATION
901 Fifth Avenue 630
Seattle, Washington 98164
(206) 624-2184

TABLE OF AUTHORITIES

Cases

ACLU OF WASHINGTON FOUNDATION
901 Fifth Avenue 630
Seattle, Washington 98164
(206) 624-2184

Other Authorities

ACLU OF WASHINGTON FOUNDATION
901 Fifth Avenue 630
Seattle, Washington 98164
(206) 624-2184

I. INTRODUCTION

The ACLU of Washington is a statewide, nonpartisan, nonprofit organization with over 20,000 members dedicated to the preservation and defense of constitutional rights and civil liberties within the state of Washington. From its inception, the ACLU has been a staunch supporter of the freedom of speech. The ACLU submits this *amicus* brief analyzing the constitutional failings of King County's transit advertising policy to raise awareness about a policy that chills and censors protected speech.

II. FACTUAL BACKGROUND

A. King County Has a Long History of Accepting Political and Public Issue Advertising in its Bus Advertising Forum.

King County has sold advertising space on its buses since 1978. Shinbo Decl. ¶3 (Dkt 14). From 1978 until December 23, 2010, King County's transit advertising forum ran commercial advertising as well as political and public issue advertising. Shinbo Decl. ¶¶ 3-9 (Dkt. 14); Press Release, King County Dept. of Transportation, *New Metro policy to allow resumption of bus ads from non-profit organizations* (April 8, 2011), *available at* http://kingcounty.gov/transportation/kcdot/NewsCenter/NewsReleases/2011/April/nr040811_TransitAds.aspx.

However, on December 23, 2010, King County changed course and began a two year practice of excluding categories of speech viewed as likely to include controversial advertisements. In its December 2010 transit advertising policy King County closed its forum to all non-commercial advertisements. *Id.* Within four months, King County revisited its policy, and on April 8, 2011 carved out an exception to its ban on non-commercial advertisements by reopening its transit advertising forum to "ads from non-profit organizations." *Id.* The April 2011 policy continued to ban public issue advertising, which it defined as "advertising expressing or advocating an opinion, position or viewpoint on matters of public debate about economic, political, religious or social issues[.]" Seven months later, on January 12, 2012, King County again revised its policy and adopted its current advertising

ACLU OF WASHINGTON FOUNDATION
901 Fifth Avenue 630
Seattle, Washington 98164
(206) 624-2184

policy, removing the categorical restrictions contained in the 2010 and 2011 policies. King County's most recent policy reopened its forum to public issue and political speech. Shinbo Decl. ¶8 (Dkt. 14); Transit Advertising Policy (Dkt. 1-5).

B. King County Accepted and Ran Puget Sound Joint Terrorism Task Force's "Faces of Global Terrorism" Ad on Buses between June and August 2013.

In May 2013, under the January 12, 2012 Transit Advertising Policy, King County accepted an ad submitted by the Puget Sound Joint Terrorism Task Force ("JTTF") entitled the "Faces of Global Terrorism." Shinbo Decl. ¶13 (Dkt 14). This ad included sixteen photos of individuals on the FBI's most wanted list, and indicated that there was a reward for the capture of the individuals:

Press Release, Fed. Bureau of Investigation – Seattle Div., *Joint Terrorism Task Force in Seattle Launches Rewards for Justice Campaign* (June 4, 2013), *available at* http://www.fbi.gov/seattle/press-releases/2013/joint-terrorism-task-force-in-seattle-launches-rewards-for-justice-campaign. The record does not indicate that King County rejected the JTTF ad or requested its alteration. Shinbo Decl. ¶¶13-14 (Dkt. 14).

After King County accepted the JTTF ad, and it began to appear on King County buses, members of the public, community organizations, and politicians criticized the ad as encouraging religious intolerance, racial animus, racial profiling, and vigilantism.[1] *See* Paige

[1] In August 2013, the ACLU met with the JTTF and community organizations. Shinbo Decl. ¶21 (Dkt. 14). At the meeting the ACLU informed the JTTF that its "Faces of Global Terrorism" ad, with the force of government imprimatur, was problematic and encouraged racial, ethnic, and religious discrimination. The ACLU did not request that the forum administrator, King County, censor the JTTF. Nor did the ACLU mount a campaign seeking to force the forum administrator to exclude the ad from its forum. Instead, the ACLU engaged in a

ACLU OF WASHINGTON FOUNDATION
901 Fifth Avenue 630
Seattle, Washington 98164
(206) 624-2184

Cornwell, *FBI's Bus Ads Taken Down Over Muslim/Terrorist Stereotyping*, SEATTLE TIMES, June 25, 2013, *available at* http://seattletimes.com/html/localnews/2021268829_fbiadsxml.html. On June 25, 2013, after discussions with various community leaders and groups, the JTTF voluntarily pulled the ad and terminated its contract with King County for the ad. *Id.*

C. King County Rejected AFDI's "Faces of Global Terrorism" Ad Even Though It Is Nearly Identical to JTTF's Ad.

On July 16, 2013, shortly after JTTF pulled its "Faces of Global Terrorism" ad, American Freedom Defense Initiative ("AFDI") submitted an ad to King County that was nearly identical to the JTTF's ad:

Geller Decl., ¶¶ 21-24 (Dkt 7-1); Shinbo Decl. ¶19 (Dkt 14). On August 15, 2013, King County rejected AFDI's ad. King County's representative advised AFDI that King County was rejecting AFDI's ad because it purportedly violated Subsections 6.2.4 (False or Misleading), 6.2.8 (Demeaning or Disparaging), and 6.2.9 (Harmful or Disruptive to Transit System) of King County's advertising policy. Geller Decl., ¶¶ 28-29 (Dkt. 7-1).

III. ARGUMENT

This brief addresses whether King County's standards for its transit advertising forum

---

transparent public discourse and sought to educate the JTTF about how their speech put them at odds with the very communities they sought to engage with the "Faces of Global Terrorism" ad. After discussions with the ACLU and other community organizations, the JTTF decided to cease using the ad as part of a larger campaign push for the Rewards For Justice program. This interaction comports with the animating principles of the First Amendment, which encourages citizens to engage and educate speakers of messages with which they do not agree. Indeed, the Supreme Court has repeatedly declared that the best way to handle speech that one finds unsavory is not to push for its censorship: instead "[t]he response to the unreasoned is the rational; to the uninformed, the enlightened." *United States v. Alvarez*, 132 S.Ct. 2537, 2550 (2012).

ACLU OF WASHINGTON FOUNDATION
901 Fifth Avenue 630
Seattle, Washington 98164
(206) 624-2184

are facially invalid in violation of the First Amendment.

A. Viewpoint Discrimination is Offensive to the First Amendment in Both Designated and Limited Public Forums.

In analyzing the constitutionality of King County's Transit Advertising Policy it is important to understand how a government entity creates a public forum, how it can regulate speech in a forum, and what the First Amendment bars in both designated and limited public forums.

1. Designated and Limited Public Forums are Created by Policy and Practice.

The broad principles applicable to forum disputes are well established. *Arizona Life Coalition, Inc. v. Stanton*, 515 F.3d 956, 968 (9th Cir. 1998). A government agency such as King County has latitude in initially drawing the boundaries of its forum, and making content-based distinctions in the process. *Cogswell v. City of Seattle*, 347 F.3d 809, 814 (9th Cir. 2003). This may include an agency choosing to accept a broad range of advertising thereby creating a designated public forum. *See New York Magazine, a Div. of Primedia Magazines, Inc. v. Metro. Transp. Auth.*, 136 F.3d 123, 130 (2d Cir. 1998) ("[a]llowing 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"). Alternatively, the government may limit the forum by allowing only certain types of content—such as commercial advertising—to be published in the forum, thereby creating a limited public forum. *Children of the Rosary v. City of Phoenix*, 154 F.3d 972, 979 (9th Cir. 1998). In a designated public, forum an agency's content-based restrictions will be subject to strict scrutiny. *Hopper v. City of Pasco*, 241 F.3d 1067, 1074 (9th Cir. 2001). On the other hand, if the forum is determined to be a limited public forum, an agency's exclusion of speech from the forum will be upheld to the extent it is (1) reasonable in light of the nature of the forum and (2) viewpoint neutral. *Cornelius v. NAACP Legal Def. & Educ. Fund.*, 473 U.S. 788, 806 (1985). Most importantly, however, viewpoint discrimination is prohibited in both designated

ACLU OF WASHINGTON FOUNDATION
901 Fifth Avenue 630
Seattle, Washington 98164
(206) 624-2184

and limited public forums. *See Kaahumanu v. Hawaii*, 682 F.3d 789, 806 (9th Cir. 2012).

2. Government Engages in Impermissible Viewpoint Discrimination Not Only When it Targets a Message, But When it Fails to Constrain Administrators' Discretion.

Courts have barred viewpoint discrimination in all government forums because viewpoint discrimination is an egregious form of content discrimination that allows the government to regulate speech based on the "motivating ideology or the opinion or perspective of the speaker." *Rosenberger v. University of Virginia*, 515 U.S. 819, 827 (1995) (citing *Perry Ed. Assn. v. Perry Local Educators' Assn.,* 460 U.S. 37, 46 (1983)). In order to comply with the directive of viewpoint neutrality an agency must treat similarly situated messages equally. This means that although a speaker may be excluded from a nonpublic forum if she addresses a topic not encompassed within the purpose of the forum, or if she is not a member of the class of speakers for whom the forum created, the government violates the First Amendment when it denies a speaker access to a forum solely because of the speaker's point of view on an otherwise includible subject. *Cornelius*, 473 U.S. at 806 (1985) (citations omitted).

Viewpoint neutrality also has a procedural component that is tied to limiting a forum administrator's discretion. An agency violates the First Amendment bar on viewpoint discrimination when it enacts a vague standard that fails to constrain the discretion of forum administrators, thereby creating an impermissible risk of viewpoint discrimination. *Hopper*, 241 F.3d at 1079. *Hopper* further warned that "'[s]tandards for inclusion and exclusion' in a limited public forum 'must be unambiguous and definite'." *Id.* at 1077-78. This is because, absent objective standards, government officials may use their discretion to interpret the policy as a pretext for censorship. *Id. See also Bd of Educ. v. Mergens*, 496 U.S. 226, 244-45 (1990) (generalized definition of permissible content poses risk of arbitrary application); *Cinevision Corp. v. City of Burbank*, 745 F.2d at 560 (9th Cir. 1984) (vague standard has "potential for abuse"); *City of Lakewood v. Plain Dealer Publ. Co.*, 486 U.S. 750, 758-59

ACLU OF WASHINGTON FOUNDATION
901 Fifth Avenue 630
Seattle, Washington 98164
(206) 624-2184

(1988) (absence of express standards in licensing context raises dual threat of biased administration of policy and self-censorship by licensees). The Ninth Circuit made the connection between viewpoint neutrality and unbridled discretion explicit in *Kaahumanu*, noting "viewpoint neutrality requires not just that a government refrain from explicit viewpoint discrimination, but also that it provide adequate safeguards to protect against the improper exclusion of viewpoints." *Kaahumanu*, 682 F.3d at 806 (quoting *Child Evangelism Fellowship of Md., Inc. v. Montgomery Cnty. Pub. Schs.*, 457 F.3d 376, 384 (4th Cir. 2006)). King County's current bus advertising standards fall short of this requirement. As set forth below, the policy fails to constrain the discretion of forum administrators, raises an impermissible risk of viewpoint discrimination, and is therefore facially invalid.[2]

B. Sections 6.2.4, 6.2.8, and 6.2.9 of King County's Transit Advertising Policy Are Facially Invalid and Violate the First Amendment.

Sections 6.2.4, 6.2.8, and 6.2.9 of King County's Transit Advertising Policy are facially invalid in violation of the First Amendment because they allow heckler's veto and listeners' reaction to be the basis for censoring speech, utilize wholly subjective standards for what may be excluded, fail to adequately constrain an administrator's discretion in excluding speech, and create an impermissible risk of viewpoint discrimination.

1. Section 6.2.9 of King County's Ad Policy Invites a Heckler's Veto and Creates an Impermissible Risk of Viewpoint Discrimination.

Section 6.2.9 fails to meet constitutional muster for two reasons: (1) it relies on a heckler's veto or third parties' reactions to the speech to determine whether speech will be

[2] The Supreme Court and the Ninth Circuit have repeatedly allowed facial attacks premised on the grant of unbridled discretion to a licensing official. *See City of Lakewood v. Plain Dealer Publ'g Co.,* 486 U.S. 750, 759 (1988) ("[A] facial challenge lies whenever a licensing law gives a government official or agency substantial power to discriminate based on the content or viewpoint of speech by suppressing disfavored speech or disliked speakers."); *Long Beach,* 574 F.3d 1011, 1020 (9th Cir. 2009) (allowing unbridled discretion claim to proceed as facial challenge); *Seattle Affiliate of the Oct. 22nd Coal. to Stop Police Brutality, Repression, & the Criminalization of a Generation v. City of Seattle,* 550 F.3d 788, 794 (9th Cir. 2008) (collecting cases allowing facial challenge to regulation that confers unbridled discretion on government official to restrict expressive activity).

ACLU OF WASHINGTON FOUNDATION
901 Fifth Avenue 630
Seattle, Washington 98164
(206) 624-2184

censored; and (2) it allows for a wholly subjective determination of what is sufficiently harmful or disruptive to warrant exclusion, which creates an impermissible risk of viewpoint discrimination.

The Supreme Court has repeatedly rejected the heckler's veto as offensive to the First Amendment, finding that any standard that looks to audience reaction or the threat of violence inevitably leaves room for viewpoint discrimination. *See Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134-35 (1992); *Terminiello v. City of Chicago*, 337 U.S. 1, 5 (1949). Thus, even in a limited public forum, where a speaker's message falls within the category of speech that is accepted within the forum, federal appellate courts have uniformly rejected the government's attempt to exclude speech based on the perceived offensiveness of the speech as measured by the audience reaction. *See*, *e.g., Sammartano v. First Judicial District Court*, 303 F. 3d 959, 969 (9th Cir. 2002) (concluding that a courthouse was a "nonpublic forum," and holding that rules prohibiting: (1) the use of "words, pictures or symbols which are degrading or offensive to any ethnic, racial, social or political group" and (2) the use of "[w]ords, pictures or symbols with clearly offensive meanings" could not withstand scrutiny under *Cohen*)[3] (internal quotations omitted). *See also*, *Robb v. Hungerbeeler*, 370 F.3d 737, 743 (8th Cir. 2004) (holding that Missouri could not exclude a unit of the Ku Klux Klan from the State's "adopt-a-highway" program, which the court found was a "nonpublic forum," on the basis of the potential responses of travelers on the highways); *Chicago Acorn v. Metro. Pier and Exposition*, 150 F.3d 695, 701 (7th Cir. 1998) (holding that, although Chicago's Navy Pier meeting rooms were "nonpublic" facilities under the First Amendment, the Metropolitan Pier and Exposition Authority could not vary its rental rates based on potential adverse publicity generated by the users). As these decisions

[3] The Ninth Circuit recognized that, although *Cohen v. California*, 403 U.S. 15 (1971), was decided prior to the Supreme Court's articulation of the current forum analysis, *Cohen*'s central holding—that the mere offensiveness of speech from the point of view of listeners is presumptively an invalid basis for restricting

ACLU OF WASHINGTON FOUNDATION
901 Fifth Avenue 630
Seattle, Washington 98164
(206) 624-2184

implicitly recognize, a "desire to stem listeners' reactions to speech is simply not a viewpoint-neutral basis for regulation." *Erickson v. City of Topeka*, 209 F. Supp. 2d 1131, 1145 (D. Kan. 2002).

Although less overt than the previous iteration of its policy, the current version of King County's Transit Advertising Policy still incorporates a heckler's veto in violation of the First Amendment. Section 6.2.9 excludes speech 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." Courts have long barred censorship of speech simply because it might offend a hostile mob. *Forsyth County,* 505 U.S. at 134-35. Pure speech cannot disrupt or interfere with the transit system in a way that is independent of a particular message.[4] Indeed, the only method by which pure speech can cause interference with a transit system is if listeners, hecklers, or third parties react to the speech and take action (criminal or legal) that interferes with the transit system. Hinging the determination of whether speech will be excluded from a transit system based on whether *the message* will be harmful or interruptive is simply another method of allowing listener reaction to determine whether speech will be censored. This is forbidden by the First Amendment.

Section 6.2.9 is further problematic because allowing the exclusion of purportedly "harmful and disruptive" speech without a showing of how the message may impact King County's interests is an impermissible grant of undue discretion similar to an exclusion at issue in *United Food* and the one disapproved in *Hopper*. *See Hopper v. City of Pasco*, 241 F.3d 1067, 1080 (9th Cir. 2001) (disapproving of a standard that was "contingent upon the subjective reaction of viewers" of the message, "as perceived by [forum administrators]" and noting that "such 'censorship by public opinion' only adds to the risk of constitutional

[4] By its terms, Section 6.2.9 is not directed to expression whose secondary effects may be disruptive, such as flashing lights around advertising. Any possible disruptive aspects of an advertisement that are separate from the underlying message are covered by Section 6.2.10.

ACLU OF WASHINGTON FOUNDATION
901 Fifth Avenue 630
Seattle, Washington 98164
(206) 624-2184

impropriety"). King County's policy directs administrators to make the determination of what is likely to be harmful or disruptive based on whether the "County's ridership" and "prevailing community standards" would believe that the material is likely to cause disruption. This invites administrators to utilize listener reaction (hypothetical or actual) to censor speech. In *United Food*, the Sixth Circuit held that "[i]n the absence of requiring a demonstrable causality between an advertisement's controversial nature and SORTA's interests, the Policy invites 'subjective or discriminatory enforcement' by permitting the decisionmaker to speculate as to the potential impact of the controversial advertisement[.]" 163 F.3d at 361. Such a grant of discretion raises the specter of viewpoint censorship and gives administrators unreviewable authority to exclude speech. It is for this reason that the transit advertising cases evince a deep distrust of the government's invocation of public offense as a rationale for not accepting proposed advertising, and why Section 6.2.9 should be found facially invalid. *See Airline Pilots Ass'n*, 45 F.3d at 1157; *Lebron*, 69 F.3d at 658.

Section 6.2.9's grant of undue administrative discretion is further problematic because it directs an administrator to look to "community standards" to determine whether speech is sufficiently offensive to warrant exclusion. The Supreme Court considered an analogous issue in *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 872-73 (1997). In *Reno*, the Court held that Communications Decency Act of 1996 ("CDA") was overbroad, in part, because the restriction on "patently offensive" material as determined by "community standards" failed to include additional objective limiting principles. The Court reasoned that obscenity could not be defined simply by invoking "community standards"—rather, the First Amendment required courts to look to additional objective factors articulated in *Miller*. Section 6.2.9 fails to provide appropriate limiting principles cabining administrators' discretion. Without objective criteria in place, these types of standards can also act as a public referendum on speech, which is at odds with the requirement of viewpoint neutrality. *See Bd. Of Regents v. Southworth*, 529 U.S. 217, 235 (2000) (public referendum for

ACLU OF WASHINGTON FOUNDATION
901 Fifth Avenue 630
Seattle, Washington 98164
(206) 624-2184

defunding student organizations "would undermine the constitutional protection the [university's registered student organization] program requires" – *i.e.* "viewpoint neutrality"). As such, because Section 6.2.9 fails to impose objective limitations on the subjective terms (*i.e.* "harmful and disruptive" or "community standards") it violates the First Amendment by failing to protect against viewpoint discrimination. *Reno*, 521 U.S. at 873-74.

2. Section 6.2.8 of King County's Ad Policy is a Vague Restriction that Invites Viewpoint Discrimination.

The Ninth Circuit has yet to address a speech restriction similar to Section 6.2.8. However, Ninth Circuit precedent rejects the use of subjective standards to determine whether speech may be excluded from a forum, even a limited public forum. In *Hopper*, the court held that a ban on "controversial" art did not comport with the First Amendment because such a standard was inherently subjective. 241 F.3d 1067. The court further warned that "'[s]tandards for inclusion and exclusion' in a limited public forum 'must be unambiguous and definite'." *Id.* at 1077-78 (quoting *Christ's Bride Ministries, Inc. v. SEPTA*, 148 F.3d 242, 251 (3rd Cir. 1998)). Therefore, "the more subjective the standard used, the more likely that the category will not meet the requirements of the first amendment." *Hopper*, 241 F.3d at 1077 (quoting *Cinevision Corp. v. City of Burbank*, 745 F.2d 560, 575 (9th Cir. 1984)); *see also Christ's Bride*, 148 F.3d at 251.

Under the above line of cases, Section 6.2.8's ban on ads that may be perceived as "disparaging and demeaning" fails to provide meaningful guidance for those administering the transit advertising forum and therefore creates an impermissible risk of viewpoint discrimination. This is because "disparaging and demeaning" is a value-laden restriction, unlike, for example, the categorical restriction of advertising for alcoholic beverages. A determination of whether speech is sufficiently "disparaging and demeaning" to warrant exclusion can only be determined based on subjective grounds or by reference to other listeners' purported negative reaction to the speech. Neither of these is permissible. *Hopper*,

ACLU OF WASHINGTON FOUNDATION
901 Fifth Avenue 630
Seattle, Washington 98164
(206) 624-2184

241 F.3d at 1077 ("the more subjective the standard used, the more likely that the category will not meet the requirements of the [F]irst [A]mendment."); *Sammartano*, 303 F.3d at 969 (citing *Cohen* for the proposition that listener reaction is an unconstitutional basis for restricting speech).

King County may argue that restrictions on demeaning or disparaging material have been approved by the First Circuit, in *Ridley*. However, any reliance on the majority decision in *Ridley* would be misplaced. A majority of the panel held that the MBTA's guidelines, which excluded any material that "demeans or disparages an individual or group of individuals" and used "prevailing community standards" to determine whether advertisements fall afoul of this standard, were not unreasonably vague or overbroad. Judge Torruella disagreed that the MBTA's standard satisfied First Amendment standards and found the standard to be inherently subjective:

> [T]he very idea that the MBTA considers that there is such a thing as a "prevailing community standard" for demeaning or disparaging expression is itself ridiculous. How would such a rule be discerned? What evidence is there in the record that the third advertisement violated this standard, other than the MBTA's subjective and conclusory assertion that it did?

Ridley, 390 F.3d at 98 (Torruella, J., concurring and dissenting); *but see Am. Freedom Def. Initiative v. Metro. Transp. Auth.*, 880 F. Supp. 2d 456, 477 (S.D.N.Y. 2012) (invalidating a standard that excluded expression that demeaned individuals but only based on certain characteristics and citing *Ridley* favorably for the proposition that a more broadly drafted provision may pass constitutional muster). Judge Torruella added that importing the "prevailing community standard" prong from the obscenity test in *Miller v. California* did not cure the guideline's First Amendment defect.

The dissenting view in *Ridley* is more in line with Ninth Circuit precedent. "Disparaging and demeaning," just as "controversial," fails to protect against viewpoint

ACLU OF WASHINGTON FOUNDATION
901 Fifth Avenue 630
Seattle, Washington 98164
(206) 624-2184

discrimination and pass Ninth Circuit scrutiny.

The "reasonable person" and "community standards" language of Section 6.2.8 of King County's Transit Advertising Policy raises the same concerns as in Section 6.2.9. The policy directs administrators to determine whether speech violates the policy by channeling a "reasonably prudent person" to judge how the "County's ridership" and prevailing "community standards" will respond to the proposed speech. If the administrator determines that the majority might have a negative reaction to the speech, under the policy, the administrator can reject the message. This is an untenable grant of discretion to an administrator and effectuates a heckler's veto, but without making the hecklers come forward to voice their dissent.

Section 6.2.8 of the policy thus invites an entirely subjective determination of whether listeners, hecklers, or third parties would deem the speech disparaging or demeaning making it likely that ads will be accepted or rejected by reference to majoritarian views. The "reasonable person" and "community standards" language in Section 6.2.8 does not sufficiently constrain the subjectivity of the standard.

3. Section 6.2.4 Operates As an Impermissible Restriction of Political Speech.

Section 6.2.4 bars speech "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." Section 6.2.4's ban on false or misleading speech is impermissible as it grants King County the ability to function as a "truth board" that determines the propriety of political and public issue speech in its forum. However, "[a]uthoritative 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 provide truth on the speaker." *New York Times Co. v. Sullivan*, 376 U.S. 254, 276 (1964). This is because First Amendment protections "do[] not turn upon the truth, popularity, or social utility of the ideas and beliefs which are offered." *Id.* Instead,

ACLU OF WASHINGTON FOUNDATION
901 Fifth Avenue 630
Seattle, Washington 98164
(206) 624-2184

"'[t]he very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind.'" *Thomas v. Collins,* 323 U.S. 516, 545 (1945) (Jackson, J., concurring) (emphasis added). Indeed, the theory underlying the First Amendment is "that the best test of truth is the power of the thought to get itself accepted in the competition of the market." *Abrams v. United States,* 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). This principle was recently reaffirmed by the Supreme Court when it held that the First Amendment affords no less protection for false speech than for other protected categories of speech. *United States v. Alvarez*, 132 S.Ct. 2537, 2550 (2012).

Here, it is doubtful that King County's prohibition on false and misleading speech, even in a limited public forum, is constitutional. Although content-based restrictions are allowed in a limited public forum, King County's restriction on false speech could not pass either prong of the limited public forum test. *See Arizona Life*, 515 F.3d at 969 (restrictions in a limited public forum must be viewpoint neutral and reasonable in light of the purpose of the forum). *First*, a restriction on false speech in a forum that allows social issue ads on matters of public debate is wholly subjective and creates an impermissible risk of viewpoint discrimination. This type of a restriction allows an administrator to determine the truthfulness or falsity of a message based on their own, explicit or implicit, political, social, or religious ideologies or the ideologies of the majority of the individuals making the decision to exclude speech. *Second*, in a limited public forum, that runs social and public issue ads, a ban on false or misleading ads is unreasonable. This is because conclusively determining the truthfulness or falsity of a political or public issue ad is almost impossible. For example, would an ad claiming that global warming does not exist be truthful or false? Is an ad stating that the 2013 shutdown of the federal government was a good use of political power truthful or false? Is an ad stating that emergency pregnancy centers are fraudulent false or truthful? None of these questions can be answered independently from an administrator's subjective view of the message.

ACLU OF WASHINGTON FOUNDATION
901 Fifth Avenue 630
Seattle, Washington 98164
(206) 624-2184

Section 6.2.4 is unconstitutional because it creates an impermissible risk of viewpoint discrimination by allowing subjective determinations of truthfulness to be the touchstone for censorship. As applied to political and public issue speech, standards such as "misleading" and "deceptive" are unreasonable and unworkable. Much of political and public issue speech is nuanced, and the "truthfulness" of the messages conveyed is inextricably intertwined with the speaker's and the listener's subjective opinion. *List v. Driehaus*, 2013 U.S. Dist. LEXIS 10261 (S.D. Ohio Jan. 25, 2013) (collecting cases, and noting: "each of these cases reflects the truth that courts have 'consistently refused to recognize . . . any test of truth . . . by judges [or] juries' as to public debate." (citing *State v 119 Vote No! Comm.*, 135 Wn.2d 618, 957 P.2d 691, 695 (Wash. 1998) (quoting *New York Times*, 376 U.S. at 271)).

IV. CONCLUSION

For the reasons states above, the Court should find that Sections 6.2.4, 6.2.8, and 6.2.9 of King County's Transit Advertising Policy are unconstitutional.

Respectfully submitted and DATED this 31st day of October, 2013.

/s La Rond Baker
La Rond Baker, WSBA No. 43610
ACLU OF WASHINGTON FOUNDATION
Sarah A. Dunne, WSBA No. 34869
La Rond Baker, WSBA No. 43610
901 5th Avenue, Suite 630
Seattle, WA 98164-2008
Telephone: (206) 624-2184
sdunne@aclu-wa.org
lbaker@aclu-wa.org

/s Venkat Balasubramani
Venkat Balasubramani, WSBA No. 28269
FOCAL PLLC
800 Fifth Avenue, Suite 4100
Seattle, WA 98104
Telephone: (206) 529-4827
venkat@focallaw.com