No. 14-35095

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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

v.

KING COUNTY
Appellee,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON CASE NO. 2:13-cv-01804-RAJ (HON. RICHARD A. JONES)

PROPOSED *AMICUS CURIAE* BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON

VENKAT BALASUBRAMANI
Focal PLLC
800 Fifth Avenue
Suite 4100
Seattle, WA 98104-3100
Telephone: (206) 529-4827

SARAH A. DUNNE
Legal Director

LA ROND M. BAKER
Staff Attorney
ACLU of Washington Foundation
901 Fifth Avenue
Suite 630
Seattle, WA 98164
Telephone: (206) 624-2184

CORPORATE DISCLOSURE STATEMENT

Pursuant to FRAP 26.1, the American Civil Liberties Union of Washington certifies that it is a Washington non-profit corporation. It has no parent corporations, and no publicly held company owns 10 percent or more of its stock.

STATEMENT OF COMPLIANCE WITH FED. R. APP. P. 29(C)(5)

No party's counsel authored this brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting this brief. And no person other than the American Civil Liberties Union of Washington, its members, or its counsel contributed money that was intended to fund preparing or submitting this brief.

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IDENTITY AND INTEREST OF AMICUS

The ACLU is a nonpartisan, nonprofit organization, with over 20,000 members, that is dedicated to the preservation of civil liberties. To defend free speech the ACLU has participated as counsel or *amicus* in many First Amendment matters before this Court including other transit advertising and forum-related First Amendment cases. *See*, *e.g.*, *Berger v. City of Seattle*, 569 F.3d 1029, 1034 (9th Cir. 2009). The ACLU of Washington Foundation has also participated as counsel in many First Amendment matters before this Court, including other transit advertising and forum-related First Amendment cases. *See*, *e.g.*, *Seattle Mideast Awareness Campaign v. King County*, Nos. 11-35914 & 11-35931 (9th Cir.) (argued October 3, 2012; appeal pending); *Working Washington v. Central Puget Sound Regional Transit Authority*, No. 12-35622 533 Fed. Appx. 716, 717 (9th Cir. 2013); *Hopper v. City of Pasco*, 241 F.3d 1067, 1069 (9th Cir. 2001).

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, as such the ACLU submits this *amicus curiae* brief analyzing the constitutional infirmities of King County's transit advertising policy because it chills protected speech and allows King County to arbitrarily pick and choose the messages it will run in its transit advertising forum, which is anathema to the First Amendment.

II. FACTUAL BACKGROUND

King County has sold advertising space on its buses since 1978. (ER 30). From 1978 until December 23, 2010, King County's transit advertising forum ran commercial as well as political and public issue advertising. (ER 30-32).

In recent years, however, King County has adopted a variety of policies aimed at limiting controversial advertisements. First, on December 23, 2010, King County closed its forum to all non-commercial advertisements. (ER 30). Shortly thereafter, 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." (ER 30-31). 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[.]" (ER 103). The following year, on January 12, 2012, King County again revised its policy and adopted its current advertising 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. (ER 109-16).

As relevant here, King County's policy includes a number of categorical restrictions (*e.g.*, ads containing alcohol or illegal drugs). The policy however also includes restrictions on speech that a transit advertising administrator deems "false, fraudulent, misleading, or deceptive," Section 6.2.4, "disparaging or demeaning," Section 6.2.8, or that reasonably cause foreseeable harm to or disruption of the transit system, Section 6.2.9. None of the sections at issue contain objective criteria to guide administrative discretion to protect against viewpoint discrimination as require by the First Amendment.

This appeal is a result of King County's rejection of an ad submitted by

American Freedom Defense Initiative ("AFDI"). The ad in question is substantially similar to an ad previously run in King County's transit advertising forum by the Joint Terrorism Task Force ("JTTF") which subsequently chose to remove the ads after members of the public, community organizations, and politicians criticized the ad as encouraging religious intolerance, racial animus, and vigilantism.[1]

III. PROCEDURAL BACKGROUND

AFDI filed a Motion for Preliminary Injunction in the Western District of Washington, No. C13-1804RAJ. The trial court denied AFDI's motion finding that King County's transit advertising forum was likely a limited public forum and that the decision to exclude AFDI's ad was permissible. (ER 5-9, 13). The court further found that, "even though it has grave concerns about defendant's Policy where application of the civility provisions appear to be somewhat of a moving target," King County's decision to reject AFDI's message was viewpoint neutral.

[1] Indeed, the ACLU was involved in this criticism, meeting in August 2013with the JTTF and community organizations. (ER 36). 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 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 with 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).

(ER 10-12). The court did not analyze the validity of the policy or determine whether the sections it applied to AFDI's speech comported with the First Amendment. The trial court instead held that King County appropriately rejected the ad by proper application of Section 6.2.4. *See* Order (ER 11).

IV. ARGUMENT

King County's transit advertising policy is facially unconstitutional, and *amicus* urges this Court to deem it so. The ACLU assumes without conceding that King County's bus advertising forum is a limited public forum. Additionally, apart from the merits of the First Amendment discussion, the brief does not discuss application of the preliminary injunction factors. The brief focuses on the failure of King County's advertising standards to comport with the First Amendment and the improper extent of discretion granted to administrators under those standards. Accordingly, the ACLU supports reversal of the District Court's decision.

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

It is well settled that regardless of the type of forum, the government may not engage in viewpoint discrimination without running afoul of the First Amendment. *See Kaahumanu v. Hawaii*, 682 F.3d 789, 806 (9th Cir. 2012). This is true even in a limited public forum where 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).

In any forum, government cannot regulate speech based on the "motivating ideology or the opinion or perspective of the speaker" *Rosenberger v. Univ. of*

Virginia, 515 U.S. 819, 829 (1995) (citing *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983)).

To ensure that a forum is administered in a viewpoint neutral way, the government must adopt objective criteria to guide the exercise of discretion. "[V]iewpoint 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)). This means that an agency must create "'[s]tandards for inclusion and exclusion' in a limited public forum '[… that are]…. unambiguous and definite'." *Hopper*, 241 F.3d at 1077-79. This protects against the possibility that 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'g. Co.*, 486 U.S. 750, 758-59 (1988) (absence of express standards in licensing context raises dual threat of biased administration of policy and self-censorship by licensees). 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]

[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 Area*

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, fail to adequately constrain an administrator's discretion in excluding speech, create an impermissible risk of viewpoint discrimination, and/or are overly broad.

1. Section 6.2.4 Is 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." (ER 113).

a. The government may not act as a "truth board" and policies that allow such are in violation of the First Amendment.

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. Yet, "[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,

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Peace Network v. City of 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).

popularity, or social utility of the ideas and beliefs which are offered." *Id.* Instead, "'[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)(citation omitted). 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).

The Supreme Court recently reaffirmed this principle 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).

b. The policy's restriction on "false" and "misleading" speech in a forum that allows for political and social issue speech creates an impermissible risk of viewpoint discrimination.

Section 6.2.4 is further unconstitutionally infirm 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 or viewpoint. *See State v. 119 Vote No! Comm.*, 135 Wn.2d 618, 957 P.2d 691, 695 (Wash. 1998); *New York Times*, 376 U.S. at 271.

This problem is evident in the trial court's ruling. The court found AFDI's use of 'jihadi' as synonymous with 'terrorist' was misleading. It did so even though it found that "there is no dispute that each of the individuals [in the ad] engaged in terrorist activities," (ER 11-12), and that the terms 'jihad' and

'terrorism' are often conflated (ER 11). Instead, the court's analysis turned on a nuanced understanding of the term 'jihad' that was not the speaker's:

> While many individuals have conflated the terms jihad and terrorism, the term 'jihad' has several meanings, including: (1) 'a holy war waged on behalf of Islam as a religious duty'; (2) 'a personal struggle in devotion to Islam especially involving spiritual discipline'; (3) 'a crusade for a principle or belief'; (4) '(among Muslims) a war or struggle against unbelievers'; (5) '(also greater jihad) Islam the spiritual struggle within oneself against sin.'" (ER 11). (internal citations omitted).

The court reasoned that AFDI's use of the term 'jihadi' was misleading because there are multiple definitions of 'jihadi' and "there [was] no evidence before the court that any of the individuals pictured in the ad referred to themselves as 'jihadis' or performed the terrorist acts in the name of 'jihad.' So although any of the aforementioned definitions could have been attributed to the individuals in the ad the court found the ad sufficiently misleading under Section 6.2.4. (ER 12).

If the Section 6.2.4 is deemed constitutional and the convoluted standard applied by the trial court is utilized in King County's transit advertising forum every potential speaker would need to consult the Oxford English Dictionary and scrutinize all possible connotations of each word in their message prior to engaging in protected political speech, and hope that the reviewing administrator agrees with the connotation the speaker believes best reflects their message. Alternatively, the speaker would need to present signed affidavits from any individuals or group that the speaker wishes to communicate a political or social message about.

This is an unreasonable standard because it provides no notice to the speaker as to what may trigger a reviewer to determine a political or social message is false or misleading. Further, the standard does not provide sufficient protections against viewpoint discrimination as it grants the clever administrator unbridled discretion

to exclude messages with which the administrator may not agree. As such, King County's restriction of "false" and "misleading" messages in a forum that runs political and social advertisements runs afoul of the First Amendment.

2. 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 bars 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." (ER 114). Section 6.2.9 fails to pass constitutional muster because it relies on third parties' reactions, known as a hecklers' veto, to the speech to determine whether speaker can engage in protected speech. It further fails constitutional scrutiny because the policy allows for a wholly subjective determination of what is sufficiently harmful or disruptive to the transit system to warrant exclusion. Therefore, Section 6.2.9 ban on "harmful or disruptive" speech creates an impermissible risk of viewpoint discrimination.

a. Restricting speech that may offend third parties is not a viewpoint neutral restriction on speech.

The Supreme Court has rejected the heckler's veto as an impermissible ground for restricting speech. *See Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134-35 (1992) ("Speech cannot be financially burdened, any more than it can be punished or banned, simply because it might offend a hostile mob."). Following this guidance, this Court and other federal Courts of Appeals have repeatedly, even in a limited public forum, 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). These decisions affirm that 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) (citing *Forsyth*, 505 U.S. at 134).

Furthermore, the plain language of the restriction incorporates a heckler's veto. This is because speech itself cannot disrupt or harm or interfere with the transit system.[4] For example AFDI's message could not, without individuals or organizations taking action, delay the efficient delivery of transportation services.

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[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 speech—applies regardless of the classification of the forum. *Sammartano v. First Judicial District Court*, 303 F. 3d 959, 969 (9th Cir. 2002).

[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.

Any harm to a transit system will result only if hecklers or third parties react to the speech and take action (criminal or legal) to interfere with the transit system. Yet, courts have long barred the exclusion or punishment of speech simply because it might offend a hostile mob. *Forsyth*, 505 U.S. at 134-35. This Court has held that such a standard is impermissible under the First Amendment. See *Hopper*, 241 F.3d T 1080 (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 impropriety").

Though Section 6.2.9 purports to exclude speech based on whether *the message* will be harmful or interruptive, in reality it is simply another method of allowing listener reaction to determine whether speech will be censored. Although less overt than the previous iteration of its policy, the current version of King County's Transit Advertising Policy still creates an impermissible risk of viewpoint discrimination by allowing administrators to rely on third-party reactions, or heckler's veto, to determine whether speech will be allowed to run in the forum. This is forbidden by the First Amendment.

b. Utilizing "community standards" to determine whether speech is sufficiently offensive to warrant does not comport with the First Amendment.

Section 6.2.9's is further problematic because it directs an administrator to look to "community standards" to determine whether speech is sufficiently offensive to warrant exclusion. 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 decision-maker to speculate as to

the potential impact of the controversial advertisement[.]" 163 F.3d at 360-61. Such a grant of discretion raises the specter of viewpoint censorship and gives administrators unreviewable authority to exclude speech. Indeed, 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 defunding student organizations "would undermine the constitutional protection the [university's registered student organization] program requires" – *i.e.* "viewpoint neutrality"). 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 at least one reason why Section 6.2.9 should be found facially invalid. *See Airline Pilots Ass'n, Intern. v. Department of Aviation of City of Chicago*, 45 F.3d at 1157; *Lebron v. National Railroad Passenger Corporation (Amtrak)*, 69 F.3d at 658.

Further, the Supreme Court considered an analogous "community standards" 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 v California*, 413 U.S. 15 (1973).

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

Section 6.2.8 prohibits ads that are "demeaning or disparaging" and fails to

provide meaningful guidance but fails to provide meaningful guidance for determining whether an ad "disparaging or demeaning." (ER 114) Though this Court has yet to address a speech restriction similar to Section 6.2.8, it has repeatedly warned that "'[s]tandards for inclusion and exclusion' in a limited public forum 'must be unambiguous and definite'." *Hopper*, 241 F.3d at 1077-78 (quoting *Christ's Bride Ministries, Inc. v. SEPTA,* 148 F.3d 242, 251 (3rd Cir. 1998)). It has further warned that "the more subjective the standard used, the more likely that the category will not meet the requirements of the first amendment." *Id.* (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. "[T]he more subjective the standard used, the more likely that the category will not meet the requirements of the [F]irst [A]mendment." *Id.*, 241 F.3d at 1077.

Here, the restriction on "disparaging and demeaning" speech is extraordinarily subjective. Unlike a categorical advertising restriction (such as a ban on ads for alcoholic beverages), a ban on "disparaging and demeaning" speech is inherently value-laden and almost impossible to extricate from an administrator's personal views on a particular subject matter or from speculation of listener's reaction to the speech. King County has argued that restrictions on demeaning or disparaging material have been approved by the First Circuit, in *Ridley v. Massachusetts Bay Transportation Authority*, 390 F.3d 65 (1st Cir. 2004). However, any reliance on the majority decision in *Ridley* would be misplaced. A majority of the *Ridley* panel upheld guidelines excluding any material that "demeans or disparages and individual or group or individuals" based on "prevailing community standards." Any, reliance on the majority decision in *Ridley* would nevertheless be misplaced.

The dissenting view in *Ridley* is more in line with Ninth Circuit precedent. *See Hopper*, 241 F.3d at 1077. In dissent, 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 "reasonable person" and "community standards" language of Section 6.2.8 of King County's Transit Advertising Policy raise the same concerns as 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.

V. 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 as well as the district court's application of that policy to exclude AFDI's ad are unconstitutional.

Respectfully submitted and DATED this 17th day of March, 2014.

/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

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 28.1(e)(2)(A)(i) for case number 14-35095, I certify that the attached Motion of American Civil Liberties Union of Washington for Leave to File *Amicus Curiae* Brief is:

> Proportionately spaced, has a typeface of 14 points or more and contains 4,325words.

/s La Rond Baker

LA ROND BAKER
SARAH A. DUNNE
ACLU of Washington Foundation
901 5th Avenue, Suite 630
Seattle, WA 98164-2008
Telephone: (206) 624-2184

VENKAT BALASUBRAMANI
Focal PLLC
800 Fifth Avenue
Suite 4100
Seattle, WA 98104-3100
Telephone: (206) 529-4827

Cooperating Attorneys for ACLU of Washington Foundation

CERTIFICATE OF SERVICE

U.S. Court of Appeals Docket Number: 14-35095

I hereby certify that I electronically filed the attached Motion of American Civil Liberties Union of Washington for Leave to File *Amicus Curiae* 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 on March 17, 2014.

I certify that counsel for all parties are registered CM/ECF users and that service of this motion will be accomplished by the appellate CM/ECF system.

Signature: s/ La Rond Baker