NOS. 11-35914 & 11-35931

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SEATTLE MIDEAST AWARENESS CAMPAIGN,

Appellant,

v.

KING COUNTY,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON
CASE NO. 11-CV-00094- RAJ (HONORABLE RICHARD A. JONES)

SECOND BRIEF ON CROSS-APPEAL: APPELLEE'S PRINCIPAL AND RESPONSE BRIEF

DANIEL T. SATTERBERG
King County Prosecuting Attorney

Cynthia S.C. Gannett, WSBA No. 17152
Endel R. Kolde, WSBA No. 25155
Jennifer Ritchie, WSBA No. 24046
Attorneys for King County
516 Third Avenue, Suite W-400
Seattle, Washington 98104
(206) 296-9015

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

Page

FEDERAL STATUTES

LOCAL STATUTES

OTHER AUTHORITIES

JURISDICTIONAL STATEMENT

Defendant-appellee, King County, accepts the statement of Plaintiff-appellant, Seattle Mideast Awareness Campaign (SeaMAC), regarding this Court's jurisdiction of the appeal that SeaMAC filed on November 3, 2011. On November 9, 2011, King County filed a timely notice of cross-appeal, within 14 days of the filing of SeaMAC's notice of appeal. SER 266-69. This Court has jurisdiction over the appeal and cross-appeal pursuant to 28 U.S.C. § 1291.

ISSUES PRESENTED FOR REVIEW

1. Whether King County created and maintained a limited public forum for advertisements on its buses when it applied an advertising policy with content restrictions that were designed to enable it to raise revenue without jeopardizing the efficiency and safety of the public transportation system. (Appeal Issue)

2. Whether King County's decision to cancel the SeaMAC advertisement was reasonable in light of the purposes of the bus-advertising forum and the following undisputed facts: 1) threats of violence and disruption King County received from the public; 2) threatening photographs left anonymously at Metro offices; 3) safety concerns expressed by transit operators; and 4) advice from law-enforcement officials regarding the existence of security risks and challenges. (Appeal Issue)

3. Whether King County's decision to cancel the SeaMAC advertisement was viewpoint-neutral where the undisputed facts established that the decision was based on restrictions that were designed to prevent harm and disruption to the transit system and not to suppress a disfavored message. (Appeal Issue)

4. Whether the District Court impermissibly allowed SeaMAC to revive its waiver of a jury trial based on an Amended Complaint, which asserted claims that arose out of the same matrix of facts as the original Complaint, and without requiring Plaintiff to show that its delay was the result of more than mere oversight or inadvertence. (Cross-Appeal Issue)

An Addendum of Primary Authority, containing pertinent sections of the King County Code, is appended hereto.

STATEMENT OF THE CASE

SeaMAC filed a Complaint for Declaratory Judgment and Injunctive Relief on January 19, 2011, alleging that King County violated Plaintiff's First Amendment rights when the Metropolitan Transit Division (Metro) refused to display SeaMAC's advertisement (SeaMAC Ad) on Metro buses; the Complaint did not request damages or include a demand for a jury trial. SER 558-63. Plaintiff simultaneously filed a Motion for Preliminary Injunction. On February 18, 2011, the District Court denied the preliminary injunction request, finding that Plaintiff was not likely to succeed on the merits. ER 122-39. The Court concluded that King County had by policy and practice created a limited public forum for

transit advertising and that the factual basis for the decision to cancel the SeaMAC Ad was reasonable and viewpoint neutral. ER 135-137. The parties then began to prepare for trial.

In their March 9, 2011 Joint Status Report and Discovery Plan, the parties agreed that the case would be tried to the court, without a jury. SER 461. King County filed its Answer to Plaintiff's Complaint on March 10, 2012. SER 452-57. The Court's scheduling order set a bench trial date of October 24, 2011. SER 447. On April 27, 2011, Plaintiff filed a Motion for Leave to Amend Complaint, which included a demand for a jury trial. SER 442-46. The District Court granted both of Plaintiff's requests, apparently concluding that the filing of the Amended Complaint revived Plaintiff's right to demand a jury trial. SER 427, 441.

At the close of discovery, King County moved to exclude the expert testimony of Richard Conte, a former FBI agent that SeaMAC retained to testify regarding the existence of a "credible threat" against the transit system. The Court denied the motion, after addressing the potential relevance of Mr. Conte's testimony. ER 79-86. But the Court also noted that the motion to exclude was not ripe because King County had not yet filed its Motion for Summary Judgment. ER 83.

King County moved for Summary Judgment on July 21, 2011. ER 96. Plaintiff opposed the motion, but did not file a cross-motion for Summary

Judgment. Instead, SeaMAC contended that the existence of material factual disputes, regarding the reasonableness and viewpoint-neutrality of King County's decision to cancel the SeaMAC Ad, precluded King County's request for judgment as a matter of law. SER 283-307.

The District Court granted King County's Motion for Summary Judgment on October 7, 2011. ER 1. First, the Court reaffirmed its prior order that King County had, by policy and practice, created a limited public forum for transit advertising. ER 7. The Court also determined that in light of the undisputed facts regarding the purpose of the forum and the factual basis for King County's application of its policy in this case, King County's decision to cancel the SeaMAC Ad was both reasonable and viewpoint-neutral. ER 7, 10-11.

STATEMENT OF FACTS

I. METRO'S MISSION AND THE PURPOSE OF ITS BUS ADVERTISING FORUM

Metro's bus service is the backbone of the public transportation system of King County, including the Seattle metropolitan area. ER 200; SER 486. It operates 245 bus routes over a service area of 2,134 square miles, with approximately 350,000 passenger-boardings daily and 110 million boardings annually. SER 487. Metro's ridership consists of people who are dependent on or choose public transportation for their mobility needs, and includes riders with special needs and disabilities. SER 486.

The King County Code (KCC) describes Metro's mission as the provision of safe, secure, comfortable, convenient, and reliable transportation services for the riding public. KCC 28.96.020.A.1-5; *see also* KCC 28.96.210; SER 486. To improve regional mobility, Metro also tries to attract new users to public transit. *Id.*; KCC 28.96.020.A.2.

Metro runs an advertising program in order to provide supplemental financial support for its transit operations. SER 312, 487; ER 182. As part of that program, Metro sells advertising space on the interior and exterior of its buses. ER 183. Titan Outdoor LLC (Titan) serves as Metro's advertising contractor. ER 181. In 2010, when the events that gave rise to this dispute occurred, King County's advertising program was governed by the specific terms contained in its contract with Titan (Titan Contract); that contract had been in effect since 2005. ER 182.

When SeaMAC submitted its proposed ad to Metro in the fall of 2010, King County's advertising policy was expressed both in the KCC and in specific restrictions outlined in Section 6 of the 2005 Titan Contract. ER 179-180, 183-84.

First, KCC 28.96.020.A provides that transit properties are not forums for public debate:

> In furtherance of its proprietary function as provider of public transportation, the county makes a variety of transit properties available to persons who use public transit services. Although transit properties may be accessed by the general public, *they are not open public forums either by nature or by designation.* Transit properties

> are intended to be used for public transit-related activities and provide little, if any space for other activities.

(emphasis added) Addendum of Primary Authority, A-1.

Similarly, KCC 28.96.210 regulates commercial activities on transit property as follows:

> As part of its proprietary function as the provider of public transportation, the county seeks to generate revenue from the commercial use of *transit vehicles*, the tunnel and other passenger facilities *to the extent such commercial activity is consistent with the security, safety, comfort and convenience of its passengers*. Accordingly, all commercial activity is prohibited on transit property except as may be permitted by the county in a written permit, concession contract, license agreement, *advertising agreement* or other written agreement.

(emphasis added) Addendum of Primary Authority, A-3.

Second, Section 6 of the 2005 Titan Contract enumerated specific subject-matter and other content-based advertising restrictions. ER 179-80, 183-84. Those restrictions prohibited advertising that depicted tobacco or alcohol products, illegal activity, certain films and video-games, and sexual or excretory activity. *Id.* In addition, Sections 6.4 (D) and (E) contained the following two restrictions that are at issue here:

> The Consultant shall not place in or on a transit vehicle any advertising that contains or involves the following:
>
> D. Any material that is so objectionable under contemporary community standards as to be reasonably foreseeable that it will result in harm to, disruption of, or interference with the transportation system.

> E. Any material directed at a person or group that is so insulting, degrading or offensive as to be reasonably foreseeable that it will incite or produce imminent lawless action in the form of retaliation, vandalism or other breach of public safety, peace and order.

ER 180.

Metro actively enforced this policy and rejected advertisements that violated its restrictions. ER 182-83; SER 313-14, 318-19. Alcohol and tobacco content were the most common reasons for rejection of a proposed ad, but ads were rejected on other bases as well. ER 183. For example, in 2009, Metro determined that a proposed series of five different ads, which included text such as, "Hate Crimes Committed by Cults are Destroying the USA; State Hate Committed by Navy Family," violated Sections 6.4(C) and (D) of the Contract. ER 146-151, 153. Another proposed ad asserted that state officials and doctors had committed Nazi medical abuse:

ER 149.

Metro directed Titan to reject the ads, but the ads' sponsor withdrew them before they were formally denied. ER 153.

II. KING COUNTY'S DECISION TO DISPLAY AND THEN CANCEL THE SEAMAC AD

On October 18, 2010, Titan notified King County that SeaMAC was proposing an external bus ad with the text "ISRAELI WAR CRIMES: YOUR TAX DOLLARS AT WORK" and accompanying graphics of a refugee camp. ER 156, 185; SER 316-18. Subsequently, SeaMAC altered the graphic to show a group of children next to a bomb-damaged building. ER 158, 185; SER 320-21.

Although the County found the Ad controversial, there was insufficient information to conclude that the Ad would result in harm to or disruption of the Metro transit system at the time it was initially reviewed. ER 185, 200-201; SER 324-28. On December 14, 2010, the SeaMAC Ad was approved and scheduled to run on 12 Metro buses for four weeks, beginning December 27, 2010. ER 160-61, 185.

On Friday, December 17, 2010, a local television station aired a news story about the SeaMAC Ad. ER 186, 201. In response, King County began to receive an unprecedented numbers of phone calls and emails from the public; the overwhelming majority of the feedback regarding the ad was negative. ER 213-15, 218-20; SER 322, 342-46, 349-53, 498-538. The volume and content of the complaints were unprecedented; they far-exceeded complaints about any prior

advertisement displayed on Metro buses. ER 183-84, 220. It was estimated that, between December 20, 2010 and December 30, 2010, King County received approximately 6,000 emails regarding the SeaMAC Ad. ER 218; SER 355, 498.

In addition, numerous calls and emails conveyed the intent to block or vandalize Metro buses, while other communications expressed more violent, if less specific, intentions. ER 213-14, 219-20; SER 499-500, 515-27 ("Those signs will not go up"); SER 493; ER 208 ("If you run these ads we will … shut metro down", "KC ATTY IS FORCING ME TO VIOLENCE[.]"). Some customers also expressed fear that Metro buses or passengers would become targets for violence or disruption if the SeaMAC Ad were to run. ER 219-20, 217-21; SER 499-500, 505, 507 ("Is it safe for my son to ride the bus?", "I do not intend to endanger myself by riding on a vehicle that has emblazoned on the side of it hate messages").

On the morning of December 20, 2010, photographs were found under the door at the Metro Customer Service Center. ER 209-211, 214. The photographs depicted dead or injured passengers on buses that appeared to have been targets of a terrorist attack. The names "Taniguchi" and "Desmond" (KCDOT Director and Metro General Manager, respectively), along with the phrase "NO TO BUS ADS FOR MUSLIM TERRORISTS", were handwritten on the photos. ER 209-211, 214.

NO TO BUS ADS FOR MUSLIM TERRORISTS

TANIGUCHI, DESMOND

No To Bus Ads For Muslim Terrorists

TANIGUCHI, DESMOND

ER 209-11.

Metro officials could not definitively determine whether these messages were a threat of harm to the system or an expression of outrage over the SeaMAC Ad, but they found them to be of concern and an indication of the depth of feelings about the Ad. SER 341, 357-60, 363.

Metro transit operators also reported safety concerns about the SeaMAC Ad. Paul Bachtel, president of the transit union, informed King County that numerous operators expressed fears about their personal safety and some stated that they would not drive buses that displayed the SeaMAC Ad. ER 223, 226-27; SER 369-71.

As a result of these developments, Metro Transit Police (MTP) and the Operations Section of Metro (Metro Operations) worked on contingency plans to

address safety concerns and possible service disruptions due to operator unavailability, acts of civil disobedience, or violence. SER 373-85, 467-68, 476-78. This planning was time-consuming and resulted in the diversion of resources that affected Metro's ability to monitor other on-going security issues. SER 364-67, 373, 386-88, 467-68, 475-78, 483.

On December 21, 2010, Titan informed the County that two other groups, the Horowitz Freedom Center (HFC) and the American Freedom Defense Initiative/Stop Islamization of America (AFDI), submitted proposed ads (Counter-Ads) in response to the SeaMAC Ad. ER 187-88. The text of the ad proposed by HFC was "PALESTINIAN WAR CRIMES-YOUR TAX DOLLARS AT WORK" with two versions of accompanying graphics: one showing an image of a burning bus, the other showing injured and bleeding passengers in a damaged bus. ER 171-72, 187-88. The text of the ad proposed by AFDI was "IN ANY WAR BETWEEN THE CIVILIZED MAN AND THE SAVAGE, SUPPORT THE CIVILIZED MAN." This text was accompanied by seven graphic images; including one showing Adolf Hitler with what appeared to be a Palestinian youth wearing traditional head-garb and other images that appeared to be Muslims with Swastika flags. ER 174, 188.

Law enforcement officials also expressed safety concerns. Sheriff Sue Rahr advised that the display of the SeaMAC Ad and any potential counter-ads would

create a security risk for the Metro transit system. ER 190, 203-04; SER 333, 390-98. She stated that buses are vulnerable targets and incendiary transit messages put passengers at risk by converting them into human billboards. ER 91-2, 190; SER 333-35.

Similarly, the United States Attorney for the Western District of Washington, Jenny Durkan, advised King County Executive Dow Constantine that public transportation systems are "targets of choice" for terrorists and extremists because they are geographically dispersed and difficult to secure; she referenced the Madrid commuter train bombings and the subway and bus bombings in London. ER 204; SER 329, 332. She then advised extreme caution regarding any action "that inches up the dial" and draws the international attention of extremists to the Metro transit system. *Id*.

By December 22, 2010, the SeaMAC Ad had received international attention. Stories about the Ad appeared in the Jerusalem Post and other international press. ER 204. Information about the SeacMAC Ad was also posted on the website of the Ezzedeen Al-Qassam Brigades--the armed branch of Hamas--a known terrorist organization. ER 193-94, 204; SER 489-90, 492-93. While Executive Constantine was concerned that running the SeaMAC Ad and the Counter-Ads would focus unwanted international attention on Metro's transit

system, his decision to cancel the SeaMAC Ad was expressly not based on any specific threat of terrorist attack against Metro. ER 205-207; SER 330-31.

Rather, based on the threats of vandalism, disruption, and violence and the safety concerns of the riding public, transit operators, and law enforcement officials, Executive Constantine determined that the SeaMAC Ad and the Counter-Ads violated King County's advertising policy. ER 205-07. Both sets of ads violated the standards contained in Sections 6.4 (D) and (E) of the Titan Contract, once service disruptions, civil disobedience, and other unlawful actions had become reasonably foreseeable. ER 205-207. While the SeaMAC Ads themselves had not changed, the context had changed dramatically over the course of a few days. ER 205. Executive Constantine explained:

> Personally my desire was to have the controversy and the competing perspectives aired publicly in a way that did not present a danger to our transit systems, our drivers, or our passengers, and I was searching for that opportunity, and they didn't want to take us up on that ... I decided that it was reasonably foreseeable that running the ads was going to result in harm to our transit system or to our passengers or to our drivers, or a disruption to our transit service, and ... reluctantly I made the decision that we were not going to be able to run the ads.

SER 337-39.

On December 23, 2010, the Executive directed that neither the SeaMAC Ad nor the Counter-Ads be displayed on Metro buses. ER 205.

SUMMARY OF ARGUMENT

The District Court properly granted King County's motion for summary judgment. First, King County, like any property owner, may preserve property under its control for its intended use. King County retained control of its bus advertising forum by having a policy and practice of restricting access to its forum. The existence of content restrictions and the County's history of applying those restrictions are not in dispute. King County did not intend to create a roving speakers' corner. It is undisputed that the purpose of the forum was to generate revenues to support transit operations and not to disrupt bus service. These undisputed facts belie the claim that King County intentionally transformed this space into a traditional public forum for speech, the principal purpose of which was the free exchange of ideas. Therefore, the District Court properly determined that King County created a limited public forum for advertisements on its buses by adopting and adhering to an advertising policy with specific content limitations.

It was a matter of common sense for the County to prohibit advertising content that was so objectionable, insulting, offensive, or degrading that it would invite retaliation or disruption to the transit system. Metro is a commercial enterprise that must attract and maintain riders by providing a safe and reliable public transportation system. Restrictions aimed at those proprietary interests are not only reasonable, they are critical to the system's continued viability.

Moreover, the District Court properly held that the County's application of Contract Restrictions 6.4(D) and (E) in this case was reasonable in light of the undisputed facts. ER 10, 11. Plaintiff challenged the County's actions by arguing that other reasonable alternatives existed. But facts relevant to alternative courses of action were not material to whether the undisputed basis for the County's decision was reasonable. The reasonableness of a speech restriction need not be the only or the most reasonable; it need only be reasonable. Therefore, where the basis for the County's application of its advertising restrictions was undisputed, the District Court was required to draw a legal conclusion regarding the reasonableness of its action, which did not require a finding that other options were unavailable. ER 10.

Finally, the District Court properly held that the contract restrictions were applied in a viewpoint-neutral manner. Access restrictions to a limited public forum are viewpoint neutral if they are based on the content of the speech and not the opinion or viewpoint expressed. In contrast, viewpoint discrimination occurs when "the government denies access to a speaker solely to suppress the point of view he espouses." ER 7. When a restriction serves a government purpose unrelated to the speaker's viewpoint or opinion, it is deemed to be neutral, even if it has an incidental effect on some speakers or messages but not others.

There was no evidence that Executive Constantine cancelled the SeaMAC Ad because he disagreed with its viewpoint. As the District Court noted, if King County wanted to suppress SeaMAC's message, it would not have accepted the Ad in the first place. ER 7. Instead, the County only rejected the advertisement once the legitimate, viewpoint-neutral concerns about harm and disruption to service became reasonably foreseeable.

King County's decision to cancel SeaMAC's Ad was consistent with the appropriate limits of the bus advertising forum that the County had created. The District Court's order granting summary judgment to King County should be affirmed in all respects.

Should this Court reverse the summary judgment order, King County filed a cross-appeal of the District Court's ruling that allowed Plaintiff's untimely jury trial demand. If this case is remanded for a trial on the merits, it should be tried to the court and not a jury. Plaintiff waived its right to a jury trial by failing to comply with the applicable time limits set forth in Fed.R.Civ.P. 38. The District Court improperly granted Plaintiff's late request for a jury trial based on the damage claims raised in Plaintiff's Amended Complaint; those claims did not revive Plaintiff's jury trial right because they arose from the same matrix of facts as the original Complaint.

ARGUMENT

I. THE DISTRICT COURT PROPERLY HELD THAT KING COUNTY CREATED A LIMITED PUBLIC FORUM FOR ADVERTSING ON ITS BUSES (Response Argument, Appeal)

The First Amendment does not guarantee a forum for all constitutionally protected speech on all government-owned properly. *Captial Square Review & Advisory Board v. Pinette*, 515 U.S. 753, 761 (1995). Accordingly, the government may limit access to its property. In *Cornelius v. NAACP Legal Defense & Ed. Fund. Inc.*, the Supreme Court held:

> Even protected speech is not equally permissible in all places and all times. Nothing in the Constitution requires the Government freely to grant access to all who wish to exercise their right to free speech on every type of Government property without regard to the nature of the property or the disruption that might be caused by the speaker's activities.

473 U.S. 788, 799-800 (1985).

To balance the government's interest in regulating the use of its property and the public's interest in First Amendment access, courts utilize forum analysis. That is, "the existence of a right of access to government property--and the standard by which limitations" are evaluated--depend on the nature of the forum. *Perry Education Assn. v. Perry Local Educators' Assn.,* 460 U.S. 37, 44-5 (1983).

Therefore, the parties agree that the District Court properly focused on the nature of King County's transit advertising forum to determine the viability of SeaMAC's First Amendment claim. Dkt. #9-1 at 22.

A. Forum Analysis

The first step in forum analysis requires the court to identify the nature of the government property to which First Amendment access is sought. Courts have sorted government property into four categories: traditional public forums, non-public forums, designated public forums, and limited public forums.

Traditional public forums are streets, sidewalks, and parks, which "have immemorially been held in trust for the use of the public . . . for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hauge v. CIO*, 307 U.S. 496, 515 (1939). All other government property is non-public unless the government intentionally grants either limited or unlimited First Amendment access. However, once the government grants access to its property, it must respect the lawful boundaries of the forum it created. *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819, 829 (1995).

"When the government intentionally opens a nontraditional forum for [unlimited] public discourse, it creates a designated public forum." *DiLoreto v. Downey Unified Sch. Dis. Bd. of Educ.,* 196 F.3d 958, 964-65 (9th Cir. 1999), *cert. denied,* 120 S.Ct. 1674 (2000). But if the government elects to limit access to its property "to certain groups or certain subjects," it creates a limited public forum.

DiLoreto, 196 F.3d at 965; *Hopper v. City of Pasco,* 241 F.3d 1067, 1074 (9th Cir. 2001).

The final step in the analysis requires the Court to evaluate the lawfulness of the forum's boundaries based on the applicable constitutional standards. Content restrictions in a traditional or designated public forum are prohibited unless they are "necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest." *Cornelius*, 473 U.S. at 799. But content restrictions are permissible in a non-public or limited public forum if they are reasonable in order to preserve the property for its intended use and not solely intended to suppress a viewpoint opposed by public officials. *Cornelius,* 473 U.S. at 800 (quoting *Perry*, 460 U.S. at 46).

It is well-established that the interior and exterior panels of publicly-owned buses are ***not*** traditional public forums. In *Lehman v. City of Shaker Heights*, a political candidate sued the City of Shaker Heights when it refused to display his campaign advertisement on its buses. 418 U.S. 298, 303-304 (1974). The Court noted that transit advertising is different from other forums:

> . . . viewers of billboards and streetcar signs [have] no 'choice or volition' to observe such advertising and [have] the message 'thrust upon them by all the arts and devices that skill can produce . . .The radio can be turned off, but not so the billboard or the streetcar placard.' [citation omitted] 'The streetcar audience is a captive audience. It is there as a matter of necessity, not of choice.' [citations omitted] . . . In such situations, '(t)he legislature may recognize

> degrees of evil and adapt its legislation accordingly.' [citations omitted].

Lehman, 418 U.S. at 302 (citing *Packer Corp. v. Utah,* 285 U.S. 105, 110 (1932)).

The Court found neither a constitutional violation, nor the indicia of a traditional or designated public forum, stating:

> *Here, we have no open spaces, no meeting hall, park, street corner, or other public thoroughfare. Instead, the city is engaged in commerce.* It must provide rapid, convenient, pleasant, and inexpensive service to the commuters of Shaker Heights. The car card space, although incidental to the provision of public transportation, is a part of the commercial venture. In much the same way that a newspaper or periodical, or even a radio or television station, need not accept every proffer of advertising from the general public, *a city transit system has discretion to develop and make reasonable choices concerning the type of advertising that may be displayed in its vehicles.*

Lehman, 418 U.S. at 303 (emphasis added)*; see also International Society for Krishna Consciousness, Inc. v. Lee,* 505 U.S. 672, 678 (1992) (where government acting as a proprietor, its actions not subjected to the heightened review applicable when it is acting as a lawmaker).

Thus, the starting point for forum analysis in this case is that the advertising space on municipal buses is a non-public forum. It is equally clear that a municipal transit system does not create a designated public forum when it only grants selective access to this space on it vehicles.

For example, in *Children of the Rosary v. City of Phoenix*, an anti-abortion organization and a civil rights organization sued the city of Phoenix, after the city

refused to run the organizations' bus advertisements. 154 F.3d 972, 975-76 (9th Cir 1998). The Court held that the city had not created a designated public forum by opening up its exterior panels for advertising to the general public. *Id.* at 976-78. Instead, the city maintained control over its non-public forum by consistently applying its blanket restriction on political and religious advertising. *Id.* The Court also found that the city policy, which banned noncommercial speech, was viewpoint-neutral and reasonable in light of the purpose of the forum, i.e., to raise revenues without offending riders or the community. *Id.* at 979.

Similarly, in *Ridley v. Massachusetts Bay Transportation Authority (MBTA),* the Court held that narrow content restrictions evinced the transit agency's intent to regulate its advertising forum. 390 F.3d 65, 81-82 (1st Cir 2004). MBTA's advertising policy allowed a broad spectrum of speech, including speech concerning religious and political issues, but it also prohibited a narrowly-defined class of political speech concerning candidates and ballot measures, speech that promoted illegal activities to minors, and speech that violated civility standards. *Id.* at 77-78. The Court held that although MBTA's policy allowed a substantial amount of speech, the limited restrictions it had adopted and enforced showed that the agency had only ***selectively opened*** its non-public forum to advertising and did not intend to create a designated public forum. *Id.* at 81-82. The Court also found

that both restrictions were reasonable and did not, *on their face*, violate free speech guarantees. *Ridley*, 390 F.3d at at 85, 90.

These cases follow clear precedent; a designated public forum is only created when the government expresses an affirmative intent to transform its property into an open forum for speech. ***"The government does not create a public forum by inaction or by permitting limited discourse,*** but only by intentionally opening a nontraditional forum for public discourse." *Cornelius*, 473 U.S. at 802 (emphasis added). In non-transit settings, both the Supreme Court and the Ninth Circuit Court of Appeals have recognized that the government creates a limited public forum not only when it imposes broad categorical prohibitions, but also when it adopts targeted content-based restrictions.

In *Christian Legal Society Chapter of the University of California, Hastings College of the Law v. Martinez,* a student religious organization (CLS) alleged that the law school's "Recognized Student Organization" (RSO) policy violated the organization's First Amendment rights because it conditioned RSO status--and the attendant benefits—on compliance with the school's nondiscrimination policy. __U.S.__, 130 S.Ct. 2971, 2978 (2010). Because CLS did not allow non-Christians and "unrepentant homosexuals" to join its organization, it did not qualify as an RSO. *Id*. at 2980.

The Court employed forum analysis and determined that, as a public university, Hastings could limit access of student organizations to school funds and facilities. *Id*. at 2986-87. The Court found that by imposing a single, targeted content-restriction--conditioning RSO status on an organization's compliance with the University's nondiscrimination policy--the school had created a limited public forum. *Id*. Notably, the Court made this finding despite the fact that Hastings otherwise opened its RSO forum to a broad spectrum of organizations, with no categorical prohibitions. *Id*.

Similarly, in *Cogswell v. City of Seattle*, the Ninth Circuit found that the city's adoption of a narrow, content-based restriction on speech was sufficient to create a limited public forum. 347 F.3d 809, 814 (9th Cir. 2003). In *Cogswell,* a Seattle city council candidate sued the city, contending that his First Amendment rights were violated by a code provision that prohibited references to political opponents in the city voters' pamphlets. *Id.* at 812-13. The Court held that the voters' pamphlet constituted a limited public forum and that "the government has substantial leeway in determining the boundaries of limited public fora it creates." *Id*. at 817. The Court then concluded that the candidate self-description limitation was viewpoint-neutral and reasonable because it furthered the intended purpose of the pamphlet--to introduce the candidates to the voters. *Id.*

Therefore, government intent, which is gleaned from written policy and the practice of enforcement and then viewed in light of the nature of the property and its compatibility with expressive activities, determines whether a non-public forum has been converted to a designated or a limited public forum. *Cornelius*, 473 U.S. at 802. Moreover, a few instances of erratic or imperfect enforcement of a restriction does not transform a limited forum into a designated public forum if the government's contrary intent is otherwise clear. *Ridley*, 390 F.3d at 78. Similarly, a prior mistake in accepting earlier ads does not preclude an agency from rejecting subsequent ads that violate its standards. *Id.* at 92.

B. Undisputed Facts Established that King County Limited Access to its Transit Advertising Forum

The District Court properly identified the nature of Metro's transit advertising forum and held that the purpose of the forum was to raise revenue for the transit system without compromising Metro's core mission of providing a safe and reliable public transportation system. ER 7. Thus, King County was acting in a proprietary and commercial capacity when it adopted its transit advertising policy. The County's intent in creating this forum was also clearly articulated in the King County Code; transit properties, including its buses, were not intended to be open public forums by nature or designation. KCC 28.96.020.A. This intent was implemented in Metro's contract with Titan.

It was undisputed that the Titan Contract enumerated specific content restrictions, which included prohibitions on advertisements for tobacco, alcohol, illegal activity or products, certain films and video games, or advertisements that depicted sexual or excretory organs or activities. ER 179-180. In addition, the content restrictions relevant to the present matter were contained in Sections 6.4 (D) and (E); these restrictions prohibited content that was either so objectionable under contemporary community standards or insulting, degrading, or offensive to a particular individual or group that harm or disruption to the transit system was reasonably foreseeable.

The District Court correctly determined that Metro consistently enforced its policy, preserving the limited public forum it created. ER 7. First, the County presented uncontroverted evidence that Metro evaluated the content of all proposed advertisements to ensure that they complied with the restrictions contained in the Titan Contract. ER 133-35.

Second, it was undisputed that Metro directed Titan to reject a proposed series of ads in 2009 because they contained content that violated one of the same advertising restrictions that is at issue in this case. ER 134, 153. For example: "Hate Crimes Committed by Cults are Destroying the USA: State Hate Committed by Politicians Against Navy Family." ER 134, 146-51. The fact that Metro previously needed to apply this restriction to one other series of ads does not

diminish its viability. Rather, it suggests that prior advertisers have been sensitive to prevailing community standards and not singled out any group for negative treatment.

Finally, the handful of prior ads concerning issues in the Middle-East generated only a few complaints and no known threats of harm or disruption. ER 134, 165-67, 186-87. Even the most controversial ad ever to run on Metro buses -- an ad promoting atheism -- was not expressly directed at any particular group and drew complaints that were different in number and content from the SeaMAC Ad. ER 169, 186-87.

In fact, plaintiff conceded that it understood Metro's advertising policy and crafted the text and graphics for the SeaMAC Ad to comply with its restrictions. SER 405, 411-12. Moreover, when the proposed Counter-Ads offended the sensibilities of SeaMAC members, SeaMAC recognized the validity of Metro's restrictions. SeaMAC Spokesman Edward Mast testified that King County properly rejected the Counter-Ads because they violated King County's "clear advertising restrictions". SER 400-402.

Plaintiff cannot have it both ways. Either King County created a designated public forum that was available for the expression of all speech, including the proposed Counter-Ads, or the County created only a limited public forum through the imposition of content limitations. It is apparent that SeaMAC understood that

the County had created a limited advertising forum, which allowed Metro to reject the ads that SeaMAC found objectionable.

The District Court applied the correct constitutional standards to the undisputed facts and properly held that King County evinced no intent to open its advertising forum to *all* public discourse.

C. The District Court Properly Found that Plaintiff's Assertion that King County Created a Designated Public Forum for Transit Advertising Was Not Supported by Any Disputed, Material Fact.

SeaMAC erroneously contends that Metro's acceptance of a broad spectrum of advertising created a question of fact regarding the nature of its advertising forum that precluded the District Court's finding that Metro created only a limited public forum. Dkt. #9-1 at 27-29. But King County did not dispute this fact; instead, this evidence was simply not material. Although Metro's policy allowed a wide variety of political and non-commercial advertising, including a handful of ads related to the Israeli-Palestinian conflict, it adopted targeted-content restrictions that allowed it to retain control of its advertising forum.

Plaintiff presented no evidence to controvert King County's proof. Instead of presenting evidence that Metro had displayed ads that posed threats of harm or disruption that were comparable to those generated by the SeaMAC Ad, Plaintiff only identified prior "controversial ads" that generated complaints but *no comparable threats* of retaliation or disruption.

Plaintiff tries to re-frame the forum question by reading into Metro's policy a non-existent restriction against controversial ads. But Metro's advertising policy did not prohibit controversial ads and Metro was not required to respect boundaries that it did not adopt. Therefore, the display of prior ads that were merely controversial did not violate any content restriction of Metro's advertising forum and was not material to the issue of consistent enforcement. In light of these undisputed facts, the District Court properly found that the transit cases on which plaintiff relied were distinguishable and unpersuasive. ER 130-33.

In *Christ's Bride Ministries, Inc. v. Southeastern Pennsylvania Transp. Auth,* the transit system expressed its intent to create an open public forum to promote "awareness of social issues" and provide "a catalyst for change". 148 F.3d 242, 249-52 (3rd Cir. 1998). In addition, it had a practice of "permitting unlimited access" and ***no written guidelines or policy*** comparable to King County's express restrictions. *Id.* at 252. In *Planned Parenthood Ass'n/Chicago Area v. Chicago Transit Auth.,* the court also found that the transit authority had created a public forum where it had a practice of accepting controversial advertisements and ***no policy*** or written guidelines that prohibited access to the advertising forum. 767 F.2d 1225, 1232-33 (7th Cir. 1985). Finally, in *New York Magazine v. Metro Transp. Auth.,* the court determined that the transit authority

had created a public forum by adopting written guidelines that imposed ***no restrictions*** on political speech. 136 F.3d 123, 130 (2nd Cir. 1998).

Metro's advertising restrictions reflected its intent to use the Transit Advertising Program to make money to support public transportation. SER 487. The restrictions also preserved Metro's core responsibility: to provide public transportation in a safe, secure, and reliable manner. SER 486. Metro clearly intended to prohibit ads that undermined these proprietary purposes of its advertising forum. Moreover, it was appropriate for Metro to limit the display of ads that would cause harm or disruption by angering or frightening operators and riders because such ads would not be good for its business of providing public transportation. *See Hopper,* 241 F.3d at 1081 (recognizing that the government can have a legitimate commercial interest in limiting speech that could tarnish its business reputation).

None of the evidence presented to the District Court supported Plaintiff's claim that Metro intended to convert the advertising space on Metro buses into a designated public forum. Plaintiff's claim to the contrary would lead to absurd results. In a designated public forum, ***all*** speakers have ***full*** First Amendment rights of access, and even hate speech, race-baiting and demagoguery would be subject to legal protection.

Indeed, had the District Court adopted SeaMAC's forum analysis and King County been mandated to run the SeaMAC Ad, then the sponsors of the two Counter-Ads would also have gained access to the same forum. Surely, Metro did not intend to create a forum for messages displaying burning buses, drawing parallels between Palestinians and Hitler or accusing state officials of Nazi medical abuse. Even SeaMAC conceded that it was "clear" that King County did not ***intend*** to provide open access to such speech on the sides of its buses.

D. A Restriction on Speech Based on Listener Reaction Is Permissible in a Limited Public Forum, Provided it is Reasonable in Light of the Nature of the Forum and not a Pretext for Viewpoint Discrimination

For the first time on appeal, SeaMAC asserts a facial challenge to the advertising restrictions at issue in this case. Issues not raised in the proceedings below should not be considered on appeal. *Baccei v. United States,* 632 F.3d 1140, 1149 (9th Cir. 2011) (court refused to reframe issues on appeal because its review would be of "a different case than the one decided by the district court"); *see also Black Star Farms v. Oliver*, 600 F.3d 1225, 1235 (9th Cir. 2010).

In the District Court, Plaintiff never argued that King County's advertising restrictions were either vague or **facially** unreasonable or non-viewpoint neutral. SER 283-307, 545-557. As the District Court stated: "Plaintiff's motion does not challenge King County's policy as either facially unreasonable or non-viewpoint neutral." ER 136. Rather, SeaMAC argued that the application of the policy in

this case presented factual questions for a jury to decide. *Id.* These late-blooming arguments are inconsistent with SeaMAC's request for a jury trial and its decision not to move for summary judgment. Plaintiff made a strategic decision to abandon those arguments and present its case to a jury; it should not now be allowed to change course and seek summary judgment for the first time on appeal. However, if the Court decides to consider Plaintiffs new contentions, King County responds, without waiving its objection, to the arguments contained in Sections I. C and D of Plaintiff's opening brief. Dkt. #9-1 at 29-39.

Plaintiff contends that a restriction based on listener response is facially invalid--regardless of the nature of the forum--because it constitutes a heckler's veto. SeaMAC confronts a "heavy burden in advancing their facial constitutional challenge" to Metro's advertising restrictions. *National Endowment for the Arts v. Finley*, 524 U.S. 569, 570 (1998). To prevail, SeaMAC must " 'establish that no set of circumstances exists under which the [restriction] would be valid. The fact that the [restriction] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid.' " *Cogswell,* 347 F.3d at 813-14 (citing *S.D. Myers, Inc v. City of San Francisco*, 253 F.3d 461, 467 (9th Cir. 2001) (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)).

In a limited or nonpublic forum, the First Amendment does not prohibit "a viewpoint-neutral exclusion of speakers who would disrupt . . . [the] forum and

hinder its effectiveness for its intended purpose." *Cornelius,* 473 U.S. at 811. Common-sense requires that the government have greater latitude to consider listener reaction when it is acting in a commercial and common carrier capacity, where attracting and keeping riders and advertisers is a valid goal that is supported by avoiding ads that make riders feel unsafe. *Children of the Rosary,* 154 F.3d at 979 (protecting passengers and maintaining ad revenue supports reasonableness of City's restrictions on bus advertising); *Hopper,* 241 F.3d at 1081 ("Nor is this a case involving advertising or commercial speech, where the government is engaged in commerce and where allowing certain expressive activity might harm advertising sales or tarnish business reputation."). The First Amendment should not require a public transit system to run ads that undermine that very system and dissuade people from using it.

Moreover, SeaMAC's argument fails because (1) restrictions based on listener response, which do not favor one side or another of a debate, are simply content-based; (2) SeaMAC relies on traditional public forum cases that prohibit content-based restrictions that are permissible in a limited public forum; and (3) SeaMAC relies on limited public forum cases where facially-valid restrictions were found to be impermissible as applied because there was no factual basis for application of the restriction or there was evidence of pretext. In contrast, there was ample factual support for King County's application of the restrictions in this

case and no indication that that the County used its policy to favor a particular viewpoint.

A restriction based on listener-reaction is not inherently viewpoint discriminatory. In *Boos v. Barry*, 485 U.S. 312 (1988), the Supreme Court established that a speech restriction based on listener reaction may be viewpoint-neutral. In that case, the District of Columbia prohibited the display of signs critical of a foreign embassy on sidewalks within 500 feet of the embassy's entrance. Although the Court concluded that the ordinance was an impermissible ***content restriction*** in a ***traditional*** public forum, it first determined that the restriction was ***viewpoint-neutral*** because it did "not favor either side of a political controversy." *Boos,* 485 U.S. at 319.[1]

Despite the distinction between content-based and viewpoint-based restrictions recognized in *Boos*, Plaintiff maintains that any restriction based on listener response is an impermissible "heckler's veto." Plaintiff first relies on

[1] Also, relying on its decision in *Renton v. Playtime Theatres, Inc.,* 475 U.S. 41 (1986), the Court noted that not all regulations of speech that reference listener reaction are necessarily content-based. For example, if the justification for a speech restriction is only based on its "secondary effects", then it is content-neutral. *Boos*, 485 U. S. at 320. The Court explained that if the embassy ordinance was only based on the secondary effects of picketing, such as avoiding congestion or protecting security, then it could have been defended as content-neutral. However, the government's justification for the ordinance --"the need to protect the dignity of foreign diplomatic personnel by shielding them from speech that is critical of their governments"-- was strictly content-based. *Boos*, 485 U.S. at 321.

public forum and designated public forum cases to support its claim. Dkt. #9-1 at 29-31. This reliance is misplaced. First, speech restrictions based on listener response, unless they fall within the "secondary effects" exception, are content-based restrictions, which are generally invalid in open public forums, but permissible in limited public forums. Second, every speech restriction based on listener response is not a heckler's veto. A heckler's veto is simply a form of viewpoint discrimination. If the restriction based on listener reaction operates in a viewpoint-neutral fashion, as described above in *Boos*, then it is not a heckler's veto.

The *Ridley* court used the same reasoning when it held that MBTA's guideline prohibiting demeaning or disparaging advertisement was, on its face, view-point neutral:

> [T]he guideline is just a ground rule: there is no viewpoint discrimination in the guideline because the state is not attempting to give one group an advantage over another in the marketplace of ideas.
> . . . .
> [A]ll advertisers on all sides of all questions are allowed to positively promote their own perspective and even to criticize other positions so long as they do not use demeaning speech in their attacks. No advertiser can use demeaning speech: atheists cannot use disparaging language to describe the beliefs of Christians, nor can Christians use disparaging language to describe the beliefs of atheists. Both sides, however, can use positive language to describe their own organizations, beliefs, and values. Some kinds of content (demeaning and disparaging remarks) are being disfavored, but no viewpoint is being preferred over another.

390 F.3d 65 at 91; *see also Cogswell*, 347 F.3d at 816 (ground rule prohibiting references to opponents in voters' pamphlet did not lead to viewpoint discrimination because it was equally applicable to all candidates and did not tilt the playing field for speech).

By definition, limited public forums involve limiting access through some combination of content-based and viewpoint-neutral restrictions. If a restriction based on listener reaction is reasonable and viewpoint-neutral, then, at most, it is a permissible content-based restriction. Such a restriction only becomes an illegal heckler's veto if the government's actions are motivated by the same viewpoint animus as the listeners. A restriction that serves purposes unrelated to the viewpoint expressed is "deemed neutral even if it has an incidental effect on some speakers or messages but not others." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

The limited public forum cases on which Plaintiff relies do not stand for the proposition that restrictions based on listener reaction are *per se* prohibited in a limited public forum. Instead, the challenged restrictions were found to be unreasonable in light of the nature of the forum or motivated by viewpoint discrimination.

Moreover, Plaintiff's authorities all involved non-transit forums. Not one case involved a government acting as a commercial enterprise or a common carrier

with risks and obligations comparable to those of a provider of public transportation. In each case, the government was regulating the speech of individuals who happened to be on government property. The concerns about listener reaction were highly speculative; they were not comparable to an organized advertising campaign waged on the sides of buses, involving a captive audience.

For example, in *Sammartano v. First Judicial District Court,* 303 F.3d, 959, 969 (9th Cir. 2002), the Court found that the restriction on courthouse apparel was unreasonable because it was based on what "officials merely presume[d] could 'incite problems.'" In *Robb v. Hungerbeeler*, 370 F.3d 735, 744 (8th Cir. 2004), the Court held that the evidence of selective enforcement of the "Adopt a Highway" eligibility requirement "strongly suggest[ed] that it [had] been used as a pretext to target the Klan group in a viewpoint-discriminatory manner." Similarly, in *Chicago Acorn v. Metropolitan Pier and Exposition,* 150 F.3d 695, 700 (7th Cir. 1998), the Court essentially found that the government had engaged in viewpoint discrimination when it "employ[ed] political criteria to decide who may use its facilities." In the case at bar, Plaintiff has put forth no material evidence of selective enforcement or political favoritism. King County has not run other ads in the face of comparable threats and it appropriately declined to take a side in the debate between SeaMAC and the Counter-Ad proponents.

The other cases on which Plaintiff relies were not decided based on the classification of the forum. In *Lewis v. Wilson*, 253 F.3d 1077, 1079 (8th Cir. 2001), the Court declined to classify the specialty license-plate forum but stated that its evident purpose was "to give vent to the personality, and to reveal the character or views, of the plate's holder." As in *Sammartano*, the Court found that "the mere possibility of a violent reaction" to an individual's offensive license plate was not a sufficient basis to restrict speech. *Lewis*, 253 F.3d at 1081. *Erickson v. City of Topeka*, 209 F.Supp.2d 1131(D.Kan. 2002) was another vanity license plate case, but it involved a restriction on markings on cars in an employee parking lot; therefore, the court did not engage in forum analysis. In *Ayers v. University of Wyoming*, 10-cv-00079 (D. Wyo. Apr. 27, 2010) the court discussed forum analysis, but never identified the standard applicable to the facts presented. The court simply concluded that a restriction on speech based on listener reaction is an "impermissible content-based restriction." But the decision suggests that the University created a designated public forum and that it engaged in viewpoint discrimination.

These forums are all fundamentally different from transit advertising, where the government is appropriately concerned about both safety and perceptions of safety. Given the evidence in this case, it was reasonable to conclude that a

significant number of people would be uncomfortable riding on buses displaying the SeaMAC Ad or the Counter-Ads.

Contract Restriction 6.4(D) and (E) were, at most, facially viewpoint-neutral, content-restrictions. Like the limitations in *Boos, Ridley,* and *Cogswell*, the restrictions did not favor the viewpoint of one advertiser over another. Rather, they operated without regard to the viewpoint expressed whenever the specified impacts of harm or disruption became reasonably foreseeable. As explained below, the undisputed facts also established that the restrictions were applied reasonably and view-point neutrally. *See* discussion *infra* at 42-54.

E. A Restriction on Speech that is Sufficiently Clear to Guide Official Discretion and does not Present a Serious Danger of Chilling Expression is not Unconstitutionally Vague.

Plaintiff alleges that Contract Restriction 6.4(D) is vague because it lacks objective criteria. Dkt. #9-1 at 35-39. This is Plaintiff's second challenge to King County's advertising restrictions that was neither pled nor argued to the District Court. Without waiving its objection to this untimely claim, King County provides the following substantive response if the Court elects to consider this new contention. *See* waiver argument above, *supra* at 31-32.

In analyzing whether a regulation impermissibly chills First Amendment expression or raises concerns that excessive discretion is vested in enforcement officials, the context in which the regulation operates is critical and often

dispositive. *California Teachers Association v. State Board of Education*, 271 F.3d 1141, 1154 (9th Cir. 2001) (citing *Hoffman Estates v. Flipside, Hoffman Estates, Inc*., 455 U.S. 489, 498 (1982) (the degree of vagueness that the Constitution tolerates depends on the nature of the forum)).

Advertising restrictions in a limited public forum must be sufficiently clear to ensure that government discretion is exercised in a consistent, viewpoint-neutral manner. Plaintiff contends that Restriction 6.4(D) is analogous to a bare restriction on controversial speech, which allows the decision-maker to engage in a wholly subjective evaluation of the content. This argument ignores the objective criteria in Section 6.4(D) that prevent decision-makers from exercising unbridled discretion.

The unambiguous terms of Restriction 6.4(D) do not allow purely subjective enforcement. Instead, Metro is required to assess "prevailing community standards" and the "reasonable foreseeability" of the enumerated threats of "harm, disruption or interference with the transportation system". Although all language is subject to some degree of interpretation, these terms and assessments are far more precise and exacting than a regulation that simply permits a decision-maker to determine whether speech is "controversial". "The mere fact that a *regulation requires interpretation does not make it vague.*" *Ridley,* 390 F.3d at 94 (emphasis added); *see also Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972)

("Condemned to the use of words, we can never expect mathematical certainty from our language"); *California Teachers Association,* 271 F.3d at 1151 ("even when a law implicates First Amendment rights, the [C]onstitution must tolerate a certain amount of vagueness.").

Plaintiff also contends that the standard adopted in Restriction 6.4(D) is inadequate because it does not mirror restrictions used in other contexts. Dkt. #9-1 at 38. But the degree of precision that is required when the government is acting as a proprietor is not as great as when it is acting in its capacity as a lawmaker. *Lee*, 505 U.S. at 678. As the *Ridley* court observed in the context of transit advertising, there is "no serious concern about either notice or chilling effects, where there are no consequences for submitting a non-conforming advertisement and having it rejected." 390 F.3d at 94; *see also Children of the Rosary*, 154 F.3d at 983) (vagueness standard in the context of a city transportation system's advertising policy is relaxed because enforcement of restrictions is "unlike the usual vagueness challenge involving a fine or other sanction that has the potential to chill conduct.").

Moreover, it is undisputed that this restrictions has only been sparingly invoked; it was applied on one occasion in 2009 and then to the SeaMAC Ad and the Counter-Ads in 2010. The restrained use of this restriction reflects the gravity

of the showing that it requires, which contrasts with the typical risks posed by vague or overly broad regulations.

Finally, Plaintiff reiterates its assertion that this restriction, like Contract Restriction 6.4(E), is an impermissible heckler's veto because it is based on listener response. For the same reasons set forth in the preceding section of this brief, this claim is meritless.

II. THE DISTRICT COURT PROPERLY HELD THAT KING COUNTY REASONABLY APPLIED METRO'S ADVERTISING RESTRICTIONS IN LIGHT OF THE NATURE OF THE FORUM AND ALL THE SURROUNDING CIRCUMSTANCES (Response Argument, Appeal)

Speech regulation in a limited or nonpublic forum must be reasonable; reasonableness is evaluated "in light of the purpose of the forum and all the surrounding circumstances." *Cornelius,* 473 U.S. at 809. Additionally, the Supreme Court has made clear that the "decision to restrict access to a nonpublic forum need only be *reasonable*; it need not be the most reasonable or the only reasonable limitation...[A]finding of strict incompatibility between the nature of the speech or the identity of the speaker and the functioning of the nonpublic forum is not mandated." *Cornelius,* 473 U.S. at 808; *see also Lee,* 505 U.S. at 683.

It was undisputed that the primary purpose of Metro's advertising program was to raise revenue to support the operation of the public transit system. ER 182;

SER 487.[2] But it was also undisputed that the program was designed to ensure that advertisements did not have the unintended consequence of undermining Metro's core mission: to provide secure, safe, comfortable, and convenient service without reducing ridership. KCC 28.96.210. Courts have consistently held that it is reasonable for a public transportation system to utilize restrictions to serve these purposes. The *Lehman* Court stated:

> The city consciously has limited access to its transit advertising space in order to minimize chances of abuse, the appearance of favoritism, and the risk of imposing upon a captive audience. These are reasonable legislative objectives advanced by the city in a proprietary capacity.

418 U.S. at 304.

This Court held in *Children of the Rosary,* a transit ban on noncommercial speech was not only reasonable, but "especially strong", in light of the city's dual interests of "protecting revenue and maintaining neutrality on political and religious issues." 154 F.3d at 979. In *Ridley,* the court held that MBTA's

[2] Plaintiff misleadingly cites to an email drafted by a Titan employee for the contrary proposition. *See* 19-1 at 28; ER 116. But Titan does not speak for King County as to the purposes of its transit advertising program. This attempted sleight-of-hand began below, where Plaintiff went so far as to assert, without evidence, that King County's program manager Sharon Shinbo had made such a claim, a misstatement not lost on the District Court. ER 7 at n.4 ("there is no evidence in the record showing that King County intended to use its property to promote political or non-profit causes").

regulatory scheme -- which included a civility restriction -- was "eminently reasonable." 390 F.3d at 93.

In addition, courts have emphasized that a restriction on access to a limited public forum is reasonable and does not constitute censorship when "alternative channels for communication" remain open. *Perry*, 460 U.S. at 53; *Lee*, 505 U.S. at 684-85; *Cogswell,* 347 F.3d at 818. Here, Plaintiff conceded the existence of plentiful alternative forums for the communication of its message.

In fact, SeaMAC spokesman Edward Mast declared that the phrase "Stop Funding Israel's War Crimes" has been "prevalent in Seattle for several years" and prominently displayed during public demonstrations in traditional public forums. ER 245-46. This slogan and other messages were displayed during events in public streets and parks where the identity of the proponents was evident. Also, there was no captive audience and no one was forced to become a potential target as the result of a message that they did not endorse.


Stop Funding
Israel's War Crimes


SEATTLE JEWS SAY
END MILITARY
AID
TO ISRAEL


STOP ETHNIC CLEANSING
IN PALESTINE

SER 539-44.

Based on the purpose of Metro's advertising forum and the undisputed facts regarding Metro's decision to cancel the Ad, the District Court held that King County's application of its advertising restrictions was reasonable, as a matter of law. Plaintiff challenges this holding on two bases. First, Plaintiff contends that the District Court utilized the wrong reasonableness standard because it simply deferred to King County's decision. Second, Plaintiff asserts that the Court failed to consider conflicting evidence regarding material issues of fact. Dkt. #9-1 at 39-43. These claims are incorrect and reflect a misunderstanding of the test described above.

In *Sammartano,* this Court held that the "reasonableness" requirement for a restriction on speech in a nonpublic forum must be based on evidence in the record

that supports its application. 303 F.3d at 967-68. In the absence of such evidence, a Court should not simply defer to the government regarding the reasonableness of its actions. *Id.* This Court distinguished the bare record it received from the record presented in *Cornelius*, "where there was evidence in the record--thousands of letters complaining about the inclusion of advocacy groups in [a] fund drive--that supported the inference that the restriction in question would serve the government's legitimate concern about disruption." *Id.* at 967.

Here, King County presented ample evidence supporting its decision. Moreover, the District Court did not merely defer to the County's determination. Rather, the Court considered all of the undisputed evidence that King County considered in reaching its decision to cancel the SeaMAC Ad and then concluded that no reasonable fact-finder could find that King County's decision was unreasonable. ER 8-10. The Court properly recognized that "reasonableness is a legal conclusion about a factual circumstance". *Id.* at 10. In the absence of a material, factual dispute about those circumstances, the District Court determined the reasonableness of King County's cancellation decision, as a matter of law. *Id.* at 10-11.

The court identified the following undisputed facts to support its legal conclusion: 1) the unprecedented threats of violence and disruption King County received from the public; 2) the threatening photographs left anonymously at

Metro offices; 3) the safety concerns expressed by transit operators; and 4) the advice from law-enforcement officials regarding the existence of security risks and challenges. ER 8, 137.[3]

Instead of controverting these facts, Plaintiff essentially argued that it would have reached different conclusions. Dkt. #9-1 at 45-52. But disputes about the conclusions to be drawn from undisputed facts do not constitute factual disputes. *Ridley*, 390 F.3d at 71. Similarly, evidence of a dissenting opinion regarding the nature of the threats and the possibility of other courses of action are not material to the reasonableness the County's decision. At most, Plaintiff posited potentially relevant evidence, but its claim that the cancellation decision was unreasonable was "implausible" in light of the "factual context of the case." *California Architectural Bldg. Products, Inc. v. Franciscan Ceramics, Inc.,* 818 F.2d 1466, 1468 (1987) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574 (1986)).

For example, Plaintiff argued that the threats of harm or disruption were not "reasonably foreseeable" because there were no "credible threats" against the transit system; this contention was based on the testimony of former FBI agent Richard Conte and the claimed absence of law enforcement investigations of the

[3] Plaintiff spuriously asserts that King County's justifications shifted from the decision to the litigation. But the public announcement and Executive Constantine's declaration are consistent. ER 21, 201-207.

threats received by the County. Dkt. #9-1 at 45-48. But an event can be "reasonably foreseeable" without rising to the level of a threat that can be investigated as a potential criminal act. ER 9 ("The policy requires neither crystal-ball certainty nor the occurrence of actual disruption or lawlessness...").

The restrictions regarding harm and disruption to the transit system were designed to prevent events when it was reasonable to predict that they would occur. Preventive actions would have been severely constrained if law enforcement intervention was required before King County could reject an advertisement under Restriction 6.4(D) or (E). Mr. Conte's opinion regarding the foreseeability of the risks posed by the Ad was not shared by the chief law enforcement officials that King County consulted, but that difference of opinion did not make the decision unreasonable. As the Supreme Court stated in *Cornelius*, "the [g]overnment need not wait until havoc is wreaked to restrict access to a nonpublic forum." 473 U.S. at 810, citing *Perry*, 460 U.S. at 52, n.12.

In addition, the determination of "reasonableness" did not require a finding that Metro implemented the best strategy of those it considered during the SeaMAC crisis; Metro's decision only needed to be reasonable. The fact that Plaintiff would have pursued a different course of action--by discounting the threats of harm and disruption from the public, minimizing the safety concerns expressed by transit operators, and implementing the response plan developed by

Metro Operations and Metro Transit Police--did not render King County's decision unreasonable. King County could also have shut down all bus service or requested federal law enforcement assistance to protect the buses and riders bearing the SeaMAC Ad, but these alternatives only illustrate that the decision to cancel was reasonable. Plaintiff seeks to shift, or externalize, the costs of running the SeaMAC Ad onto the public, but this is not required by the First Amendment. There would almost always be something more that King County could have done to protect SeaMAC's message.

Finally, Plaintiff repeats its assertion of viewpoint discrimination. Dkt. #9-1 at 43-45. As explained above, a restriction on speech based on listener response is a permissible content restriction in a limited public forum. *See* discussion, *supra* at 31-39. Plaintiff also seems to argue that the County should have adopted a more stringent test than the "reasonable foreseeability" test contained in Metro's policy. This speculation is irrelevant.

Theoretically, King County could have adopted a restriction that only prohibited disparaging advertisements that created a clear and present danger of violence, but it choose a more cautious approach. In order to preserve its property for its intended use, Metro made a business decision and adopted the "reasonable forseeability" standard contained in Restrictions 6.4(D) and (E). As a result, the reasonableness of King County's actions in this case must be evaluated in light of

the existing ground rules, not rules that Plaintiff would conjure up. This argument, like the speculation about alternatives to cancellation, ignores the Supreme Court's admonishment that a speech restriction in a limited public forum must just be reasonable, not the only or most reasonable limitation.

III. THE DISTRICT COURT PROPERLY HELD THAT KING COUNTY APPLIED METRO'S ADVERTISING RESTRICTIONS IN A VIEWPOINT-NEUTRAL MANNER (Response Argument, Appeal)

In a limited public forum, the government is free to reserve access "for certain groups or for the discussion of certain topics." *Rosenberger*, 515 U.S. at 829. However, once the government creates a limited public forum, it must respect the boundaries it set. *Id*. Viewpoint discrimination occurs when government officials selectively enforce those boundaries because they oppose "the speaker's specific motivating ideology, opinion, or perspective." *Id.* at 820 (citing *Perry,* 460 U.S. at 46). Here, Plaintiff failed to present any evidence of viewpoint discrimination. Rather, the facts of this case and the County's prior history of enforcement unambiguously establish that King County has consistently enforced Contract Restrictions 6.4(D) and (E) in an even-handed manner.

The uncontroverted facts that gave rise to the current controversy present the most conclusive evidence of King County's extraordinary effort to ensure that these restrictions were applied in a viewpoint-neutral manner. As the District Court emphasized, the County initially approved the SeaMAC Ad and only reversed

course when harm and disruption became reasonably foreseeable. ER 205-07. King County then rejected the proffered Counter-Ads on the same basis. ER 206. These actions unequivocally proved that King County did not apply its policy to favor one side of this debate.

Plaintiff also erroneously contends that evidence of Metro's display of two prior ads about the Middle East was sufficient to raise an inference of viewpoint discrimination. But this assertion is predicated on a mischaracterization of Metro's advertising restrictions. The decisions to display the prior ads reflect the consistency of the County's application of its policy to advertisements involving the Middle East.

Nothing in Metro's policy prohibited advertising content about the Middle East or any other "controversial" issues. Nevertheless, Plaintiff's claim of viewpoint discrimination--like its persistent mischaracterization of the nature of the advertising forum the County intended to create for transit advertising--is based on the false premise that Metro's policy prohibited "controversial content." But the evidence is clear and uncontroverted that this was not the content boundary that Metro adopted or enforced. Instead, Metro's policy and practice prohibited a specifically defined-category of speech if it was foreseeable that it would result in harm, disruption, or interference with the transit system. Evaluating the prior ads

and the SeaMAC Ad based upon the content limitations that the County ***actually*** adopted, the SeaMAC Ad violated those limitations, while the prior ads did not.

The content of the prior ads--which presented different sides of the Middle East debate--was not comparable to the SeaMAC Ad. ER 165-67. First, the messages in the two prior ads--"End Siege of Gaza", "Thousands haven fallen in pursuit of peace" and "Remember Israel's soldiers and victims of terror"--did not contain an express accusation against a specific person or group. The SeaMAC Ad was not subtle. It lodged accusations and assessed blame, accusing Israel of war crimes and stating that Americans were financing those international criminal actions. Its message was qualitatively different from the messages in the prior ads, which primarily urged an end to aggression and offered a tribute to those who died.

Second, the SeaMAC Ad triggered an unprecedented response, which in turn made the risks of harm and disruption reasonably foreseeable. ER 183-84, 213-215; SER 500. In contrast, the prior ads generated some complaints, but drew no threats. ER 186-87. In light of these obvious distinctions, Plaintiff's comparator claim fails. What Plaintiff needed to do, but could not, was establish through evidence that King County failed to reject or cancel another transit advertisement in the face of comparable threats of disruption and retaliation.

The evidence that King County did not favor one side of the debate was uncontroverted. In fact, it not only attempted to move the debate away from Metro

buses and into the public square, where it belonged, ER 206-07, it also offered to investigate the availability of alternative County forums where SeaMAC could express its views. For example, County representatives suggested that SeaMAC participate in a broadcast on King County TV where its representative would be given the opportunity to fully present the position SeaMAC was attempting to communicate in its Ad. SER 337-38, 403, 406. SeaMAC rebuffed these efforts, maintaining that "we should not be expected to accept an alternative to King County buses for publishing our ad." ER 245; SER 403, 406-07.

Moreover, Plaintiff conceded that King County's restrictions were "clear" and that the County properly applied those restrictions to exclude the Counter-Ads. SER 400-02. Plaintiff's allegation of viewpoint discrimination is comparable to the hollow school-yard refrain, "It's not fair". That is, the rules are eminently clear, valid, and fair when applied to others, but they become vague, unreasonable, and unfair when applied to you. The undisputed facts established that King County has served as an unbiased referee. Therefore, the District Court correctly held, as a matter of law, that the County applied Metro's advertising restrictions in a viewpoint-neutral manner.

IV. IN DETERMINING THE APPROPRIATENESS OF INJUNCTIVE RELIEF, COURTS SHOULD CONSIDER CHANGED CIRCUMSTANCES (Response Argument, Appeal)

King County properly informed the District Court that Plaintiff's request for injunctive relief should be assessed in light of King County's amendment of its policy in the wake of the SeaMAC controversy. ER 11.

An injunction is an exercise of a court's equitable authority and should only be ordered after taking into account all of the circumstances that bear on the need for prospective relief. *United States v. Swift & Co*., 286 U.S. 106, 114 (1932); *see also Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982); 11A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2942, 39-42 (2d ed. 1995). Because injunctive relief "is drafted in light of what the court believes will be the future course of events, . . . *a court must never ignore significant changes in law or circumstances underlying an injunction* lest the decree be turned into an 'instrument of wrong.'" Wright & Miller, § 2961 at 393-949 (quoting *Swift & Co*., 286 U.S. at 115)(emphasis added).

It is undisputed that King County has amended its advertising policy since the events that gave rise to this litigation. SER 288. It is also well-established that King County has "an inherent right to control its property, which includes the right to close a previously open forum." *DiLoreto*, 196 F.3d at 970. As this Court recognized in *DiLoreto*, it is constitutionally permissible for the government to

change the ground rules and close a forum in response to "the dilemma caused by concerns about providing equal access" to an otherwise nonpublic forum. 196 F.3d at 970.

Therefore, the changes to King County's advertising policy represent a "substantial change in circumstances" that any court should consider in deciding whether to grant equitable relief.

V. THE DISTRICT COURT IMPERMISSIBLY GRANTED PLAINTIFF'S UNTIMELY JURY TRIAL DEMAND (Principal Argument, Cross-Appeal)

A. Standard of Review

Fed.R.Civ.P. 39(b) gives a district court the discretion to grant a party's untimely request for a jury trial. But a district court's discretion to allow a late jury demand is "narrow". *Pac. Fisheries Corp. v. HIH Cas. & Gen. Ins. LTD.*, 239 F.3d 1000, 1002 (9th Cir), *cert. denied* 534 U.S. 944 (2001). Rule 39(b) "does not permit a court to grant relief when the failure to make a timely demand results from an oversight or inadvertence" such as a good faith mistake of law or fact regarding the applicable deadline. *Id.* at 1002; *see also Zivlovic v. Southern California Edison*, 302 F.3d 1080, 1086 (9th Cir. 2002). Therefore, in the absence of an adequate showing regarding the cause of the delay, a district court has no discretion to allow a party's late demand for a jury trial.

B. Plaintiff waived its Right to a Jury Trial and that Right was not revived by the Filing of an Amended Complaint

The right to a jury trial is preserved by the Seventh Amendment to the Constitution and codified in Fed.R.Civ.P. 38(a). But the right is not self-executing: a party must file and serve a timely demand for a jury trial. Fed.R.Civ.P. 38(b). The written demand, which may be included in a pleading, must be served "no later 14 days after the last pleading directed to the issue is served." Fed.R.Civ.P. 38(b)(1). A failure to file and serve the required demand constitutes a waiver of the jury trial right. Fed.R.Civ.P. 38(d).

A "pleading" for Rule 38 purposes means only those pleadings enumerated in Fed.R.Civ.P. 7; i.e., complaint, answer, reply to counterclaim, answer to cross-claim, and third party complaint or answer. But where, as here, the pleadings consisted of a complaint and answer, Plaintiff's jury demand was due within 14 days of service of King County's answer. King County filed and served its answer on March 10, 2011. SER 452-57. Therefore, SeaMAC had 14 days, or until March 24, 2011 to demand a jury trial. Instead, SeaMAC waited to file its demand until April 27, 2011, when it filed its Motion for Leave to Amend Complaint. SER 442-46.

SeaMAC argued below that its demand was timely because the Amended Complaint raised new claims for nominal and compensatory damages. SER 425-27. But when a party waives its right to a jury trial as to claims asserted in the

original complaint, the filing of an amended complaint has no effect on the prior waiver unless the amendment is based on new facts. *Trixler Brokerage Co. v. Ralston Purina Co*., 505 F.2d 1045, 1049-50 (9th Cir 1974). An amended pleading based on the same "matrix of facts" as those of the original pleading does not revive the time for demanding a jury. *Lutz v. Glendale Union High School*, 403 F.3d 1061, 1066 (9th Cir 2005); *Las Vegas Sun. Inc. v. Summa Corp.*, 610 F.2d 614, 620 (9t Cir 1979).

Here, Plaintiff's damage claims were based on the following facts: 1) "SeMAC paid $445.91 to have its ad printed in the format required by King County" and 2) "SeaMAC was deprived of the economic value of the [ad's] local publication and dissemination." SER 417. These were facts that Plaintiff knew or should have known in January, when it filed its original Complaint. As Plaintiff conceded in its Motion for Leave to Amend, "the claims for damages . . . [were] premised on the same core facts that [gave] rise to SeaMAC's claims for declaratory and injunctive relief." SER 447.

Nevertheless, even after losing its Motion for Preliminary Injunction in February, Plaintiff waited more that two months to file a jury demand. This delay was apparently based on the erroneous assumption that the mere filing of an Amended Complaint would revive Plaintiff's right to demand a jury trial. But "oversight and inadvertence due to a good faith mistake of law or fact" does not

excuse an untimely request for a jury trial. In the absence of any other basis for the Plaintiff's failure to file a demand within the time required by Rule 38(b), SeaMAC waived its right to a jury trial. Under these circumstances, the District Court had no discretion to grant Plaintiff's untimely request. Therefore, if this case is remanded for trial, it should be tried to the court and not to a jury.

CONCLUSION

To generate revenue, King County decided to sell advertising space on the exterior panels of its buses. But to ensure that the advertising did not interfere with transit services, the County adopted and enforced an advertising policy with clear rules regarding prohibited content. The policy was applied without regard to the motivating ideology or viewpoint expressed by the speaker. Although King County allowed advertising on a broad spectrum of subjects, including advertisements on controversial issues, it prohibited a specifically-defined category of speech in order to preserve its property for its intended use--the provision of a safe and reliable public transportation. The limited public forum King County created does not violate any First Amendment principles.

A reversal of the District Court's well-reasoned decision would not only legitimize plaintiff's speculative constitutional challenge, it would also have the unintended consequence of reducing the number of forums for speech that are

available on even on a limited basis. This is precisely the problem that amici urge this Court to remedy.

King County does not want to unnecessarily restrict access to its transit advertising forum, but it is faced with a Hobson's choice. If the County limits access to only certain advertisers, then it loses much-needed revenue. If the County allows broader access to generate greater revenues, then it becomes vulnerable to time-consuming and expensive legal challenges in federal court.

King County respectfully requests that this Court affirm the District Court's summary judgment order and, thereby, the balance of interests that Metro's advertising policy has successfully struck for the last twenty five years. In the alternative, King County requests that the Court reverse the District Court's June 6, 2011 ruling, which granted Plaintiff's untimely request for a jury trial.

RESPECTFULLY SUBMITTED this 12th day of March, 2012.

s/ *Cynthia S.C. Gannett*
Cynthia S.C. Gannett, WSBA No. 17152
Endel R. Kolde, WSBA No. 25155
Jennifer Ritchie, WSBA No. 24046
Senior Deputy Prosecuting Attorneys
Attorneys for Respondents King County

ADDENDUM OF PRIMARY AUTHORITY
Ninth Circuit Rule 28-2.7

Table of Contents

II. PUBLIC COMMUNICATION ACTIVITIES

28.96.020 General.

A. In furtherance of its proprietary function as provider of public transportation, the county makes a variety of transit properties available to persons who use public transit services. Although transit properties may be accessed by the general public, they are not open public forums either by nature or by designation. Transit properties are intended to be used for public transit-related activities and provide little, if any, space for other activities.

Most public communication activities are generally prohibited in or on transit properties, regardless of viewpoint expressed, because they are incompatible with the county's legitimate interests, including, but not limited to:

1. Securing the use of scarce parking spaces and shelter space for persons who are using public transit services;

2. Maintaining safe, clean and secure transit properties to retain existing, and attract new users of public transit services;

3. Reducing litter pick-up and other maintenance or other administrative expenses so as to maximize the provision of public transit services;

4. Preventing delays and inconvenience to passengers by minimizing congestion, and expediting their boarding, transferring and deboarding of transit vehicles; and

5. Securing scarce space at the tunnel and other passenger facilities for potential commercial activities intended to produce revenues for the system and attract riders with convenience services and goods.

It is the purpose of this chapter to describe the varying degrees to which passengers and the public are allowed to engage in public communication activities on the three categories of transit property identified in K.C.C. 28.96.030, 28.96.040 and 28.96.050. This chapter does not apply to county activities or to county employees engaged in authorized activities in the course of their employment.

28.96.030 Transit vehicles and tunnel platform areas.

Public communication activities are prohibited in transit vehicles and tunnel platform areas. (Ord. 11950 § 15 (part), 1995).

III. COMMERCIAL ACTIVITIES

28.96.210 Regulation of commercial activities on transit property.

As part of its proprietary function as the provider of public transportation, the county seeks to generate revenue from the commercial use of transit vehicles, the tunnel and other passenger facilities to the extent such commercial activity is consistent with the security, safety, comfort and convenience of its passengers. Accordingly, all commercial activity is prohibited on transit property except as may be permitted by the county in a written permit, concession contract, license agreement, advertising agreement or other written agreement. Provided, however, posting of commercial literature in accordance with department regulations is permitted on kiosks or bulletin boards installed by the department for use by passengers and the general public for such purpose. (Ord. 11950 § 16, 1995).

STATEMENT OF RELATED CASES

King County, Defendant/Appellee/Cross-Appellant, is not aware of any related cases pending in this Court.

RESPECTFULLY SUBMITTED this 12th day of March, 2012.

s/ *Cynthia S.C. Gannett*
Cynthia S.C. Gannett, WSBA No. 17152
Endel R. Kolde, WSBA No. 25155.
Jennifer Ritchie, WSBA No. 24046
Senior Deputy Prosecuting Attorneys
Attorneys for King County

CERTIFICATION OF COMPLIANCE TO FED. R. APP. P. 32(A)(7)(C) AND CIRCUIT RULE 32-1 FOR CASE NUMBER NO. 11-35592

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached Second Brief on Cross-Appeal: Appellee's Principal and Response Brief is:

Proportionately spaced, has a typeface of 14 points or more and contains 12,698 words.

RESPECTFULLY SUBMITTED this 12th day of March, 2012.

s/*Cynthia S.C. Gannett*
Cynthia S.C. Gannett, WSBA No. 17152
Endel R. Kolde, WSBA No. 25155
Jennifer Ritchie, WSBA No. 24046
Senior Deputy Prosecuting Attorneys
Attorneys for King County

CERTIFICATE OF SERVICE

I, RILEY GLANDON, hereby certify that on March 12, 2012, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated this 12th day of March, 2012 at Seattle, Washington.

s/Riley Glandon