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No. _____

Supreme Court, U.S.
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In the Supreme Court of the United States

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

v.

KING COUNTY,
Respondent.

*On Petition for Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit*

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

There is a conflict in the United States courts of appeals regarding the application of the First Amendment to the display of public-issue advertisements on government transit authority property.

1. Whether King County created a public forum by accepting for display on its property a wide array of controversial political and public-issue ads, including ads that address the same subject matter as Petitioners' anti-terrorism ad, and thus violated the First Amendment by rejecting Petitioners' ad based on its message.*

2. Regardless of the nature of the forum, whether King County's rejection of Petitioners' advertisement based on a claim that this public-issue ad was false or misleading violates the First Amendment.

3. Whether Petitioners must demonstrate that there are no alternative ways to express their public-issue message in order for the court to find irreparable harm based on King County's rejection of their ad.

* This question is similar to the question presented in the petition filed in *American Freedom Defense Initiative v. Massachusetts Bay Transportation Authority*, Case No. 15-141, which is currently pending in this Court.

PARTIES TO THE PROCEEDING

The Petitioners are American Freedom Defense Initiative (AFDI), Pamela Geller, and Robert Spencer (collectively referred to as “Petitioners”).

The Respondent is King County (“Respondent” or “County”).

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PETITION FOR WRIT OF CERTIORARI**OPINIONS BELOW**

The opinion of the court of appeals appears at App. 1 and is reported at 796 F.3d 1165. The opinion of the district court appears at App. 18 and is reported at 2014 U.S. Dist. LEXIS 11982.

JURISDICTION

The opinion of the court of appeals affirming the denial of Petitioners' request for a preliminary injunction was entered on August 12, 2015. App. 1. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Free Speech Clause of the First Amendment provides, "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I.

STATEMENT OF THE CASE

Petitioners filed a civil rights lawsuit against Respondent King County, challenging the County's rejection of their advertisement addressing the "Faces of Global Terrorism"—a permissible subject matter for the relevant forum.

At issue here is the application of the County's advertising guidelines to restrict Petitioners' speech on the basis that their public-issue ad was allegedly false or misleading. The district court denied Petitioners' motion for preliminary injunction, holding that the County's advertising space is a limited public forum and that its restrictions on Petitioners' speech were reasonable and viewpoint neutral. App. 21-33. A Ninth Circuit panel affirmed and also concluded that Petitioners could not show irreparable harm because there were presumably alternative forums for Petitioners to express their public-issue message. App. 7-17.

As set forth below, there is currently a split among the federal courts of appeals regarding the forum question, and the Ninth Circuit's conclusion that government officials can make falsity determinations on public-issue speech and its decision on irreparable harm in this First Amendment case are contrary to this Court's precedent and the precedents of other federal appeals courts.

STATEMENT OF FACTS

Petitioners Geller and Spencer co-founded AFDI, which is a nonprofit organization dedicated to freedom of speech. See App. 4. One of the ways in which Petitioners engage in their free speech activity is by

purchasing advertising space on government transit authority property in major cities throughout the United States, including Seattle, Washington.¹

Respondent King County, a municipal corporation, operates a public transportation system of buses, consisting of more than 235 routes and serving approximately 400,000 passengers daily. App. 19.

The County leases space on the exterior of its buses for use as advertising space. Pursuant to its policy and practice, the County permits a wide variety of commercial, noncommercial, public service, public-issue, and political-issue advertisements on its advertising space.² This includes advertisements covering a broad spectrum of political views and social commentary, including advertisements addressing, *inter alia*, the hotly debated Israeli-Palestinian conflict and terrorism.³

Pursuant to its policy and practice, in 2013, the County accepted the State Department's "Faces of Global Terrorism" advertisement, which appeared as follows:

¹ 9th Cir. ER 121.

² 9th Cir. ER 30-33, 35, 39-45, 56-59, 71-72; ER 118 ("Metro does not deny that its advertising policy allows for a range of speech, including a handful of controversial ads . . .").

³ 9th Cir. ER 30-33, 35, 39-45, 56-59, 71-72.



App. 5.

The State Department’s “Faces of Global Terrorism” ad was displayed on County buses in or about June 2013. According to reports, the State Department withdrew the advertisement on its own after receiving some complaints that the ad allegedly demeaned or disparaged Muslims and people of color.⁴ App. 5, 20. Yet, the FBI publishes an official listing of the world’s most wanted global terrorists on its government website,⁵ and at the time the Complaint was filed, of the thirty-two listed terrorists, thirty were individuals with Muslim names and/or were wanted for terrorism related to organizations conducting terrorist acts in the name of Islam.⁶

Pursuant to the County’s advertising policy and practice, and particularly in light of the fact that the County permitted and displayed the State

⁴ According to the County, it had received a “small” “volume” of complaints about the State Department’s advertisement while it was running. 9th Cir. ER 34 (noting that the “complaint volume was small”).

⁵ http://www.fbi.gov/wanted/wanted_terrorists/@@wanted-group-listing (“FBI Terrorist List”)

⁶ 9th Cir. ER 131-33, 135-75.

Department's "Faces of Global Terrorism" advertisement, AFDI submitted for approval on or about July 30, 2013, an advertisement that was substantively similar to the State Department's ad (hereinafter referred to as the "AFDI Advertisement"). App. 6.

The AFDI Advertisement appears as follows:



App. 6.

The AFDI Advertisement includes the identical pictures and names of the wanted global terrorists that appeared in the State Department's "Faces of Global Terrorism" ad. These pictures also appeared on the FBI's most wanted website, where the rewards are offered as well.⁷

The AFDI Advertisement presents a similar educational, political, and public service message as the State Department advertisement, but from a different viewpoint. For example, both ads alert the public of the importance of stopping global terrorism by raising awareness of the threat and encouraging citizens to communicate with the appropriate government agencies when they have information leading to the

⁷ 9th Cir. ER 131-33, 135-75.

possible whereabouts of a global terrorist.⁸ However, the AFDI Advertisement includes AFDI's political-ideological assessment that the majority of the FBI's most wanted terrorists are "jihadis." See App. 6. Indeed, AFDI submitted the ad to make a political point and not so it could be a mouthpiece for the federal government.

The message of the AFDI Advertisement is timely in light of current world events where global terrorists are engaging in violent jihad against America's national security interests throughout the world and at home.⁹

Despite accepting a wide range of controversial advertisements, including the very advertisement that served as the model for Petitioner's ad, the County rejected the AFDI Advertisement, claiming that it did not comply with sections 6.2.4, 6.2.8 and 6.2.9 of the County's Transit Advertising Policy, which are set forth below.

6.2.4 False or Misleading. Any material that is or that the sponsor reasonably should have known is false, fraudulent, misleading, deceptive or would constitute a tort of defamation or invasion of privacy.

6.2.8 Demeaning or Disparaging. Advertising that contains material that demeans or disparages an individual, group of individuals or entity. For purposes of determining whether

⁸ 9th Circuit ER 125.

⁹ 9th Cir. ER 125.

an advertisement contains such material, the County will determine whether a reasonably prudent person, knowledgeable of the County's ridership and using prevailing community standards, would believe that the advertisement contains material that ridicules or mocks, is abusive or hostile to, or debases the dignity or stature of any individual, group of individuals or entity.

6.2.9 Harmful or Disruptive to Transit System. Advertising 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. For purposes of determining whether an advertisement contains such material, the County will determine whether a reasonably prudent person, knowledgeable of the County's ridership and using prevailing community standards, would believe that the material is so objectionable that it is reasonably foreseeable that it will result in harm to, disruption of or interference with the transportation system.

App. 20-21.

The district court denied Petitioners' request for a preliminary injunction, finding that the forum at issue was a limited public forum and that the restrictions on Petitioners' speech were reasonable and viewpoint neutral. App. 21-33. The Ninth Circuit affirmed,

finding that the forum is a nonpublic forum¹⁰ and that the restriction on Petitioners' speech as false or misleading was reasonable and viewpoint neutral. App. 7-17. The court declined to review the other restrictions. App. 15 ("We need not, and do not, reach Metro's other reasons for rejecting the ad.").

REASONS FOR GRANTING THE PETITION

A split among the federal courts of appeals is among the most important factors in determining whether certiorari should be granted. *See* Sup. Ct. R. 10(a). Additionally, the Court should grant review because this case presents important First Amendment issues that should be resolved definitively by this Court. *See* Sup. Ct. R. 10(c) (providing that review is appropriate when a lower court has "decided an important question of federal law that has not been, but should be, settled by this Court").

I. The Ninth Circuit's Forum Analysis Conflicts with the Authoritative Decisions of the Majority of Other Federal Courts of Appeals.

The threshold issue presented is whether the County's advertising space is a public forum, which exists when the government intentionally opens its property for expressive activity, *Perry Educ. Ass'n v. Perry Local Educators*, 460 U.S. 37, 45 (1983), or a nonpublic forum. As this Court stated, "[A] public

¹⁰ The Ninth Circuit stated that in light of this Court's decision in *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239 (2015), "the proper term likely is 'nonpublic forum.' . . . For that reason, we use the term 'nonpublic forum.'" App. 8 n.1.

forum may be created by government designation of a place or channel of communication for use by the public at large for assembly and speech, *for use by certain speakers, or for the discussion of certain subjects.*" *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 802 (1985) (emphasis added).¹¹

Under the facts of this case, the Second, Third, Sixth, Seventh, and D.C. Circuits would hold that the forum at issue is a public forum for Petitioners' speech, thereby subjecting the government's content-based restrictions to strict scrutiny, whereas the First and Ninth Circuits would not.

¹¹ This Court's decision in *Arkansas Educational Television Commission v. Forbes*, 523 U.S. 666 (1998) (hereinafter "*AETC*"), underscores Petitioners' argument regarding the forum question. In *AETC*, the petitioner, a state-owned public television broadcaster, denied the request of respondent Forbes, an independent candidate with very little support, for permission to participate in a sponsored debate between major party candidates. The Court upheld the exclusion, finding that it was reasonable and viewpoint-neutral in that it was based on Forbes' *status* as a speaker (*i.e.*, he was not a serious candidate) and not the message he sought to convey. *Id.* at 682 (finding no "objections or opposition to his views"). Here, Petitioners, as paid advertisers, are part of the "class of speakers" for which the County's forum is open and available. And there is little doubt that had Forbes' status as a speaker made him eligible for the debate (*i.e.*, he was a serious candidate) but that he had been denied permission to participate because the sponsors deemed his political views false or misleading or demeaning and disparaging, the Court would have found a First Amendment violation.

While speech restrictions in traditional¹² and designated public forums are subject to the same heightened level of scrutiny,¹³ it is a mistake to conflate the two forums. See *Am. Freedom Def. Initiative v. Mass. Bay Transp. Auth.*, 781 F.3d 571, 593 (1st Cir. 2015) (dissent) (“Building a constitutional framework around a category as rigid as ‘traditional public forum’ leaves courts ill-equipped to protect First Amendment expression in times of fast-changing technology and increasing insularity.”). Indeed, the Ninth Circuit’s approach to the forum analysis essentially does away with the designated public forum as a category and replaces it with the nonpublic forum.

In a nonpublic forum, speech restrictions need only be reasonable and viewpoint neutral, *Perry Educ. Ass’n*, 460 U.S. at 46, thereby granting the government “almost unlimited authority to restrict speech on its property.” See *Am. Freedom Def. Initiative v. Mass. Bay Transp. Auth.*, 781 F.3d at 592 (dissent) (quoting *Int’l Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 695 (1992) (Kennedy, J., concurring in the judgments)).

¹² Public streets, sidewalks, and parks are typical examples of traditional public forums. See *Hague v. CIO*, 307 U.S. 496, 515 (1939).

¹³ *Cornelius*, 473 U.S. at 800 (“[S]peakers can be excluded from a public forum only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest. . . . Similarly, when the government has intentionally designated a place or means of communication as a public forum speakers cannot be excluded without a compelling government interest.”).

In *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974), a case in which the city's advertising program had never permitted any political or public-issue advertising, the Court found that the consistently enforced, twenty-six-year ban on political advertising was consistent with the government's role as a proprietor precisely because the government "limit[ed] car card space to *innocuous* and *less controversial* commercial and service oriented advertising." *Id.* at 304 (emphasis added); see also *Am. Freedom Def. Initiative v. Mass. Bay Transp. Auth.*, 781 F.3d at 591 (dissent) (rejecting the majority's forum analysis and noting that "*Ridley* also proclaimed that the MBTA's advertising program was 'indistinguishable' from the one described in *Lehman*, *id.* at 78, apparently ignoring the fact that the Shaker Heights advertising program in *Lehman* had never accepted any political or public issue advertising").

A majority of the circuit courts, which included the Ninth Circuit until just recently, have followed *Lehman* to conclude that transportation advertising space is a nonpublic forum when the government "consistently promulgates and enforces policies restricting advertising on its buses to commercial advertising." *Children of the Rosary v. City of Phoenix*, 154 F.3d 972, 978 (9th Cir. 1998).

As the Ninth Circuit correctly observed in *DiLoreto v. Downey Unified School District Board of Education*, 196 F.3d 958 (9th Cir. 1999):

Government policies and practices that historically have allowed commercial advertising, but have excluded political and religious expression, indicate an intent not to

designate a public forum for all expressive activity, but to reserve it for commercial speech. . . . However, where the government historically has accepted a wide variety of advertising on commercial and non-commercial subjects, courts have found that advertising programs on public property were public fora.

Id. at 965-66 (citing, *inter alia*, *Lehman*).

Despite this articulation of the law, the Ninth Circuit recently joined the First Circuit in its approach to the forum question. In *Seattle Mideast Awareness Campaign v. King County*, 781 F.3d 489, 498 (9th Cir. 2015), a divided panel held that the County's bus advertising space was a limited public forum even where the transit authority accepted controversial political and public-issue ads. In doing so, the Ninth Circuit acknowledged the circuit split. *See id.* ("We recognize that other courts have held that similar transit advertising programs constitute designated public forums.").

The majority of the federal appeals courts that have addressed this forum question, however, disagree with the First and Ninth Circuits. *See e.g., id.* (acknowledging circuit split).

The Second Circuit, for example, holds that "[d]isallowing political speech, and allowing commercial speech only, indicates that making money is the main goal. Allowing political speech, conversely, evidences a general intent to open a space for discourse, and a deliberate acceptance of the possibility of clashes of opinion and controversy that the Court in *Lehman* recognized as inconsistent with sound commercial

practice.” *N.Y. Magazine v. Metro. Transp. Auth.*, 136 F.3d 123, 130 (2d Cir. 1998) (holding that the transit authority’s advertising space was a designated public forum); *see also Am. Freedom Def. Initiative v. Metro. Transp. Auth.*, 880 F. Supp. 2d 456, 466 (S.D.N.Y. 2012) (“[T]he Court agrees with AFDI that this space is a designated public forum, in which content-based restrictions on expressive activity are subject to strict scrutiny.”).

In *Christ’s Bride Ministries, Inc. v. Southeastern Pennsylvania Transportation Authority*, 148 F.3d 242, 253 (3d Cir. 1998), the Third Circuit concluded that the transit authority’s advertising space was a designated public forum, noting that “the purpose of the forum does not suggest that it is closed, and the breadth of permitted speech points in the opposite direction.” *See also Am. Freedom Def. Initiative v. Se. Pa. Transp. Auth.*, No. 2:14-cv-5335, 2015 U.S. Dist. LEXIS 29571, *16 (E.D. Pa. Mar. 11, 2015) (finding “that SEPTA’s advertising space constitutes a designated public forum”).

In *Planned Parenthood Association / Chicago Area v. Chicago Transit Authority*, 767 F.2d 1225 (7th Cir. 1985), the Seventh Circuit concluded that the transit authority’s advertising space was a designated public forum because the transit authority permitted “a wide variety” of commercial and non-commercial advertising.

And the Sixth Circuit similarly concluded that a transit authority’s property is a designated public forum when it is open to political and public-issue advertisements, observing as follows:

Acceptance of political and public-issue advertisements, which by their very nature generate conflict, signals a willingness on the part of the government to open the property to controversial speech, which the Court in *Lehman* recognized as inconsistent with operating the property solely as a commercial venture.

United Food & Commercial Workers Union, Local 1099 v. Sw. Ohio Reg'l Transit Auth., 163 F.3d 341, 355 (6th Cir. 1998) (hereinafter “*United Food*”); *see also* *Lebron v. Wash. Metro. Area Transit Auth.*, 749 F.2d 893, 896 (D.C. Cir. 1984) (“There is no doubt that the poster at issue here conveys a political message; nor is there a question that WMATA has converted its subway stations into public fora by accepting other political advertising.”); *Am. Freedom Def. Initiative v. Wash. Metro. Area Transit. Auth.*, 898 F. Supp. 2d 73, 78-79 (D.D.C. 2012) (“Since WMATA conceded that it provides a public forum for advertising, the Court considers that aspect of the standard satisfied.”).

Consequently, consistent with *Lehman* and the majority of federal appeals courts that have analyzed and followed its holding, the forum at issue here is a public forum for Petitioners’ speech. *See Am. Freedom Def. Initiative v. Mass. Bay Transp. Auth.*, 781 F.3d at 591-92 (“I am in disagreement with the *Ridley* decision, and would have held that the MBTA, by opening its advertising facilities to all forms of public discourse, created a designated public forum akin to the fora discussed in *United Food*, *Christ’s Bride*, *New York Magazine*, and *Planned Parenthood Association/Chicago Area*, and distinguishable from the virtually

commercial-only fora addressed in *Lehman, Children of the Rosary*, and *Lebron v. Nat'l R.R. Passenger Corp.* (Amtrak), 69 F.3d 650, 656 (2d Cir. 1995) (holding that a large billboard in New York City's Pennsylvania Station constituted a nonpublic forum where Amtrak had "never opened [the space] for anything except purely commercial advertising"))).

Here, the County accepts advertisements on controversial issues such as the Israeli-Palestinian conflict and terrorism—advertisements “which by their very nature generate conflict”—thereby “signal[ing] a willingness on the part of the government to open the property to controversial speech, which the Court in *Lehman* recognized as inconsistent with operating the property solely as a commercial venture.” See *United Food*, 163 F.3d at 355.

Moreover, a forum analysis does not end simply because the government transit authority has adopted some restrictions on speech or employed these restrictions to reject certain advertisements. As stated by the Second Circuit:

[I]t cannot be true that if the government excludes any category of speech from a forum through a rule or standard, that forum becomes *ipso facto* a non-public forum, such that we would examine the exclusion of the category only for reasonableness. This reasoning would allow every designated public forum to be converted into a non-public forum the moment the government did what is supposed to be

impermissible in a designated public forum, which is to exclude speech based on content.

N.Y. Magazine, 136 F.3d 129-30.

And this is particularly the case where, as here, the government is attempting to impose a “truth” restriction on what it knows is controversial political and public-issue speech—an impermissible task to begin with. *See, e.g., N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 271 (1964) (“[First Amendment] protection does not turn upon the truth, popularity, or social utility of the ideas and beliefs which are offered.”) (internal quotations and citation omitted).

Additionally, it is incorrect to conclude that the County’s “truth” restriction is a restriction on an ad’s subject matter (such as restrictions on advertisements for alcohol, tobacco, or political candidates) that might reasonably lead a court to conclude that this forum is closed to controversial matters. Rather, this restriction, particularly as applied in this case, is an impermissible viewpoint-based restriction on speech. At a minimum, it certainly *allows for* viewpoint discrimination, as evidenced here, and this alone is sufficient to render the advertising guideline unconstitutional. *See Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995) (observing that “[v]iewpoint discrimination is thus an egregious form of content discrimination” that is prohibited “even when the limited public forum is one of [the government’s] own creation”); *Perry Educ. Ass’n*, 460 U.S. at 46 (stating that in a nonpublic forum, the government “may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to

suppress expression merely because public officials oppose the speaker's view").

In sum, it is without question that the nature of the property is compatible with Petitioners' expressive activity. See *Ridley v. Mass. Bay Transp. Auth.*, 390 F.3d 65, 76-77 (1st Cir. 2004) ("As to the nature of the property, the MBTA does run advertisements and so there is nothing inherent in the property which precludes its use for some expressive activity."). And it is undisputed that the County permits advertisements expressing messages on controversial political subject matter, including the very subject matter of Petitioners' ad that was rejected. Indeed, the County is willing to accept *some* political viewpoints that generate conflict—actions which speak louder than any written policy. *Grace Bible Fellowship, Inc. v. Maine Sch. Admin. Dist. No. 5*, 941 F.2d 45, 47 (1st Cir. 1991) (stating that when conducting a forum analysis, "actual practice speaks louder than words"). Therefore, because the forum is wholly suitable for Petitioners' speech, including its subject matter, it is a public forum for Petitioners' ad.¹⁴ Consequently, the County must demonstrate a *compelling* reason that is *narrowly*

¹⁴ Concluding that the forum is a designated public forum does not mean that the County is without any authority to make certain categorical restrictions, such as restrictions on advertisements for tobacco sales, pornography, or political campaigns. *Cornelius*, 473 U.S. at 802 ("[A] public forum may be created . . . for use by certain speakers, or for the discussion of certain subjects."). However, "if the concept of a designated open forum is to retain any vitality whatever, the definition of the standards for inclusion and exclusion must be unambiguous and definite." *Gregoire v. Centennial Sch. Dist.*, 907 F.2d 1366, 1375 (3d Cir. 1990).

tailored to justify its restraint on Petitioners' speech, *Cornelius*, 473 U.S. at 800—a burden it cannot meet.

The First and the Ninth Circuits support their forum conclusion based upon a faulty rationale. As stated by the Ninth Circuit: "Municipalities faced with the prospect of having to accept virtually all political speech if they accept any—regardless of the level of disruption caused—will simply close the forum to political speech altogether. First Amendment interests would not be furthered by putting municipalities to that all-or-nothing choice. Doing so would 'result in less speech, not more'—exactly what the Court's public forum precedents seek to avoid." *Seattle MidEast Awareness Campaign*, 781 F.3d at 499 (citation omitted); *see also Ridley*, 390 F.3d at 81 (stating that "the MBTA is not to be put to an 'all-or-nothing choice'") (internal citation omitted).

This reasoning is fundamentally flawed because it permits the government to pick and choose which "political speech" it deems acceptable, thereby doing more harm to the First Amendment, which is intended to operate as a brake on the government's power to censor speech, than closing the forum altogether. In short, the First Amendment is not concerned about the quantity of speech (*i.e.*, "result in less speech, not more"), but rather preventing government officials from being the arbiters of acceptable speech. The First and Ninth Circuits' reasoning thus opens a forum for certain political speech (and speakers) which the government favors by permitting government officials to make content-based restrictions based on nothing more than "reasonableness." Thus, rather than restricting government censorship of speech, the goal

of the First Amendment, these decisions grant the government broader powers of censorship. *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553 (1975) (“[T]he danger of censorship and of abridgment of our precious First Amendment freedoms is too great where officials have unbridled discretion over a forum’s use.”).

In the final analysis, the federal appeals courts are split on the question of whether a government transit authority creates a public forum for speech when it opens its advertising space to controversial political or public-issue advertisements. This Court should resolve this circuit split—a division that has serious implications for the First Amendment.

II. The County’s “False or Misleading” Restriction Violates the First Amendment.

The County’s attempt to impose a “truthfulness” standard to political and public-issue speech is constitutionally infirm as a matter of law. *See, e.g., W.V. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (“If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.”); *N.Y. Times Co.*, 376 U.S. at 271 (stating that First Amendment protection “does not turn upon the truth . . . of the ideas and beliefs which are offered”); *see also United States v. Alvarez*, 132 S. Ct. 2537, 2564 (2012) (Alito, J., dissenting) (stating that “it is perilous to permit the state to be the arbiter of truth” “about philosophy, religion, history, the social sciences, the arts, and other matters of public concern”). As noted by Judge Bork, sitting on the D.C. Circuit, a “prior administrative restraint of distinctively political

messages on the basis of their alleged deceptiveness is unheard-of—and deservedly so.” *Lebron*, 749 F.2d at 898-99 (Bork, J.).

Moreover, Petitioners’ ad is not materially false in the first instance. It says nothing more factually than the State Department’s “Faces of Global Terrorism” advertisement, which the County accepted. The lower courts’ efforts to create some meaningful and material factual distinction between the two ads is misplaced, particularly when you consider that Petitioner’s advertisement is public-issue speech and not a commercial advertisement.

In its decision upholding the “false or misleading” restriction as applied to Petitioners’ ad, the court stated the following:

But we emphasize the limited nature of our holding, which applies only to objectively and demonstrably false statements where the circumstances of the case do not give rise to an inference of unreasonableness or viewpoint-based discrimination.

In that regard, we note that a hypothetical rejection of an ad for a trivial inaccuracy might give rise to an inference that the rejection was, in fact, unreasonable or viewpoint-based. For example, an advertisement stating in a chart that, in a given year, 963 abortions had been performed when, in fact, the correct number was 964 could, depending on all the circumstances, suggest an unreasonable or viewpoint-based rejection. The grounds of the rejection here, however, do not raise those concerns. The ad

states in prominent text that the FBI offers a reward of up to \$25 million. There is a considerable difference between the FBI, which operates under the jurisdiction of the Department of Justice, and the State Department, a separate federal agency; and the difference between \$5 million and \$25 million—five times as much—is not *de minimis* or irrelevant.

Similarly, we note that rejections surviving constitutional scrutiny will, in most if not all cases, concern advertisements that can be corrected easily. Here, for example, Plaintiffs could have submitted a corrected advertisement that substituted “The State Department” for “The FBI” and “\$5 million” for “\$25 million”—or fixed the factual inaccuracies in countless other ways. An unreasonable response by Metro to an advertiser’s attempt to correct factual inaccuracies could give rise to an inference of unreasonableness or viewpoint-based conduct. Here, however, Plaintiffs declined to discuss the rejection with Metro and chose to stand on their factually inaccurate ad.

App. 14. This reasoning, however, cannot withstand scrutiny, particularly in light of the facts of this case.

First, it is improper as a matter of First Amendment jurisprudence for the government to be the arbiter of truth or falsity when addressing public-issue speech, as noted above. Indeed, what precisely is a “trivial inaccuracy,” and why is it that the government gets to decide this question in the context of public-issue speech? Moreover, how does the government

account for hyperbole or exaggeration in this context? If the hypothetical ad proposed by the Ninth Circuit said that abortion harms millions of women each year, is there a measure of proof that must be provided before the ad can be displayed, and what is that measure? It is simply wrong to grant the government such broad powers of censorship.

Second, the court is simply wrong that Petitioners' ad is materially false. Petitioners' advertisement, which states, in relevant part, that "The FBI Is Offering Up To \$25 Million Reward If You Help Capture One Of These Jihadis," is materially true and accurate for numerous reasons. First, the FBI is involved with and actively promotes the Rewards for Justice Program. This is evidenced by the FBI's own website (www.fbi.gov/wanted/wanted_terrorists/), which itself makes the reward offers. Second, there is no material distinction between the FBI, which is a government agency that advertises the Rewards for Justice Program, and the State Department, which apparently administers the program. If a would-be collector of a reward contacted the FBI (which is likely the first government agency someone who had a brush with a terrorist on the FBI's most wanted list would contact), the person would be directed to the appropriate agency to collect his reward. The FBI and the State Department are agencies of the same federal government, and they obviously work in tandem to promote and administer the rewards program. Third, according to the FBI website, the Rewards for Justice program as a whole offers up to \$25 million for assisting in the capture of global terrorists—ranging from \$1 million to \$25 million, with most of the rewards at the \$5 million level. Petitioners'

advertisement does not assert that the reward for any one of the global terrorists pictured will be \$25 million, or even \$1, but that the highest amount offered to date under the program is “up to \$25 million,” just as the State Department’s original advertisement stated (offering “up to \$25 million reward”). Thus, the clear implication of the State Department’s advertisement (which included the very same pictures of the very same terrorists) is the same as Petitioners’ advertisement. And finally, Petitioners’ advertisement expressly directs the public to contact the State Department for details about the Rewards for Justice program by providing the actual email address (rfj@state.gov), which is a State Department address, not an FBI address. In sum, it is objectively unreasonable to conclude that Petitioners’ advertisement is “false or misleading.”

Finally, the court is simply wrong about the fact that there is no evidence of viewpoint discrimination. The main reason the County rejected Petitioners’ ad was because the County believes the ad is demeaning and disparaging toward Muslims—an inherently viewpoint-based claim.¹⁵ And this was recently confirmed by the County’s rejection of the below ad, which “fixed” the factual issues described by the Ninth Circuit.¹⁶

¹⁵ A challenge to a similar “demeaning and disparaging” speech restriction in the context of a free speech claim involving the advertising space of a government transit authority is currently pending review by this Court. *Am. Freedom Def. Initiative v. Mass. Bay Transp. Auth.*, Case No. 15-141

¹⁶ This latest rejection will be the subject of an amended complaint.



The County's and the Ninth Circuit's disregard for the First Amendment compels review by this Court.

III. The Ninth Circuit's Conclusion Regarding Irreparable Harm Is Contrary to This Court's Precedent and the Precedent of Other Federal Appeals Courts, and It Threatens to Undermine First Amendment Protections.

In its decision affirming the denial of Petitioners' request for a preliminary injunction, the Ninth Circuit held that regardless of Petitioners' likelihood of success on the merits, the injunction should nonetheless be denied because Petitioners failed to demonstrate irreparable harm. The Ninth Circuit stated, in relevant part, the following:

[B]ecause the district court's denial of a preliminary injunction constrains Plaintiffs' speech in only a small way: They cannot express their message on the sides of Metro's buses while this case is pending. Nothing in the district court's denial of a preliminary injunction prevents Plaintiffs from displaying the same ad in many alternative fora, for example, on Seattle billboards, in Seattle newspapers, on Seattle television stations, on Seattle buses run by companies other than Metro, or in many venues

in other cities. The availability of alternative fora for Plaintiffs' speech weighs against the issuance of a preliminary injunction. . . . In sum, even if Plaintiffs had demonstrated some likelihood of success on the merits, they still would not have been entitled to a preliminary injunction because they have not shown that "extreme or very serious damage will result" from the denial of a preliminary injunction. . . .

App. 16-17 (internal citations omitted).

The Ninth Circuit's conclusion is contrary to controlling precedent. It is well established that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). *Newsom v. Norris*, 888 F.2d 371, 378 (6th Cir. 1989) ("The Supreme Court has unequivocally admonished that even minimal infringement upon First Amendment values constitutes irreparable injury sufficient to justify injunctive relief.") (citing *Elrod*); *Swartzwelder v. McNeilly*, 297 F.3d 228, 241 (3d Cir. 2002) (same); *B.H. v. Easton Area Sch. Dist.*, 725 F.3d 293, 323 (3d Cir. 2013) (en banc) ("The ban [on wearing bracelets that were part of a breast-cancer-awareness campaign] prevents B.H. and K.M. from exercising their right to freedom of speech, which 'unquestionably constitutes irreparable injury.'") (quoting *Elrod*). *Newsom v. Albemarle Cnty. Sch. Bd.*, 354 F.3d 249, 261 (4th Cir. 2003) (granting preliminary injunction and stating, "As to Newsom's irreparable injury, the Supreme Court has explained that 'loss of First Amendment freedoms, for even minimal periods of

time, unquestionably constitutes irreparable injury”) (quoting *Elrod*).

The Second Circuit explained this issue as follows:

As for irreparable harm, the district court noted that if New York Magazine were correct as a matter of law that MTA’s action unlawfully abridged its freedom of speech as guaranteed by the First Amendment, New York Magazine established irreparable harm. The “loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” *Deeper Life Christian Fellowship, Inc. v. Board of Educ.*, 852 F.2d 676, 679 (2d Cir. 1988) (quoting *Elrod v. Burns*, 427 U.S. 347, 373, 96 S. Ct. 2673, 2689, 49 L. Ed. 2d 547 (1976)). As the district court correctly found that the facts presented constitute a violation of New York Magazine’s First Amendment freedoms, New York Magazine established *a fortiori* both irreparable injury and a substantial likelihood of success on the merits.

N.Y. Magazine, 136 F.3d at 127; see also *Sindicato Puertorriqueño de Trabajadores v. Fortuño*, 699 F.3d 1, 11 (1st Cir. 2012) (“[I]rreparable injury is presumed upon a determination that the movants are likely to prevail on their First Amendment claim.”).

The Ninth Circuit’s decision is contrary to this Court’s precedent and the precedent of the majority of other federal appeals courts, and it will ultimately undermine the protections afforded by the First Amendment by imposing a nearly insurmountable, and entirely unnecessary and improper, burden upon those

parties seeking a preliminary injunction to protect their right to free speech.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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