No. 15-584

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. When a municipality, by law and written policy, expressly creates a nonpublic forum to supplement transit revenues and excludes ad content that it reasonably believes is detrimental to its core transit business, does the forum remain nonpublic even though the municipality's advertising policy allows for some political and public interest ads? Yes.

2. After establishing a nonpublic forum for transit ads, may a municipality, through a viewpoint-neutral advertising policy that is reasonably designed to protect core transit business operations, exclude advertising content that is objectively "false and misleading"? Yes.

3. When seeking a preliminary injunction challenging the decision of a municipality to reject a transit ad from its nonpublic forum, is the moving party required to submit proof of "irreparable harm" in addition to satisfying all other requirements of *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7 (2008), including demonstration of a "likelihood of success on the merits"? Yes.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTION

STATUTES

INTRODUCTION

Under county ordinance and the provisions of its 2012 Transit Advertising Policy ("TAP"), King County Metro Transit ("Metro") has established a restricted, nonpublic forum for paid transit ads consistent with *Lehman v. City of Shaker Heights*, 418 U.S. 298, 309 (1974). The TAP restrictions are designed to provide additional revenues in support of Metro's proprietary bus operations, but without adversely impacting ridership numbers, passenger safety, or efficient operations. Metro has applied the viewpoint-neutral TAP restrictions to ensure that allowed advertisements are consistent with the primary objective of running a successful bus company.

Petitioners American Freedom Defense Initiative, Pamela Geller, and Robert Spencer ("AFDI") brought suit under 42 U.S.C. §1983 after Metro rejected AFDI's proposed "Faces of Global Terrorism" ad, which violated TAP restrictions excluding ad content that is "false and misleading, "demeaning and disparaging," or interfering with the bus system. The courts below denied AFDI's motion for a preliminary injunction, but the Ninth Circuit's decision was based only on AFDI's violation of the "false and misleading" provision of the TAP.

AFDI has failed to support its request for certiorari. Under well-established precedent from this Court, a municipality may establish a nonpublic forum where viewpoint-neutral regulations restrict content and the restrictions are reasonably related to the purposes of the forum. Since *Lehman*, bus advertising has served as the quintessential example of a nonpublic forum. Municipal bus companies like Metro are charged with

the proprietary responsibility of operating efficient, comfortable, safe and well-utilized public transit systems. Like any business, Metro seeks to encourage repeat business and a positive word-of-mouth reputation. Especially because bus passengers are a captive audience, the type of restrictions found in Metro's TAP are reasonably necessary and prudent to serve these objectives.

Contrary to First Amendment case law, AFDI claims that the allowance of any political or public interest speech within a nonpublic advertising forum automatically transforms it into a designated public forum, thereby implicating strict scrutiny. If AFDI's "all or nothing" approach were correct, a public bus company would be forced either to close its advertising forum to political and public interest speech altogether, or to allow advertisers unfettered choice on *how* to present a message, even if the advertiser insists on profane, hostile, false or demeaning ad content. A public transit company in this scenario would be left with little option but to close the advertising forum to all political and public interest speech rather than subject passengers to a free-for-all of animus and malignity that would quickly reduce ridership and undermine the public transit company's core mission. AFDI's approach represents a misapplication of precedents and "would result in less speech, not more." *Arkansas Educ. Television Comm'n v. Forbes,* 523 U.S. 666, 680-81 (1998)("*AETC*").

AFDI has failed to demonstrate a split in the circuit courts on this issue. Whereas some circuit courts have relied on the allowance of political ads to surmise an intent to create a designated public forum, no court has

found that the allowance of political and public interests ads is sufficient to overcome a municipality's express intent to create a nonpublic forum. No circuit court has adopted AFDI's broad position that political and public interest ads are fundamentally incompatible with operation of a nonpublic forum. Without this broad holding, there is no conflict between the Ninth Circuit and its sister courts.

AFDI has also failed to support a grant of certiorari based on the Ninth Circuit's decision upholding Metro's application of the "false and misleading" TAP provision. Petitioners cite no conflict cases that arise out of the unique context of a nonpublic forum. In a nonpublic forum, restrictions on ad content need only be viewpoint neutral and reasonably related to the purposes of the forum. Because the factual statements made in AFDI's proposed ad were objectively false, Metro's application of the TAP is consistent with case law. Indeed, in approving Metro's actions, the Ninth Circuit applied a multi-pronged "reasonableness" analysis that *exceeded* the standard applicable to a nonpublic forum. Although the Ninth Circuit's heightened reasonableness inquiry is in tension with this Court's precedent and undermines the purposes of nonpublic forum review, the fact that Metro satisfied this heightened standard further deprives AFDI of cause for further review.

Finally, this Court should deny certiorari on AFDI's "irreparable harm" question because AFDI fails to demonstrate a conflict with this Court's precedents or a split in the Circuit Courts within the context of a nonpublic forum. Consistent with decades of precedent, this Court's decision in *Winter v. Natural*

Res. Def. Council, Inc., 555 U.S. 7 (2008) establishes four elements that a party must satisfy in order to obtain a preliminary injunction, including proof of irreparable harm *and* a demonstration of likelihood of success on the merits. The Ninth Circuit acted entirely within the *Winter* framework when it identified AFDI's failure to submit any proof of irreparable harm as an independent reason to affirm the District Court's denial of a preliminary injunction. The Circuit split identified by AFDI is also illusory because none of the cited cases address irreparable harm in the context of a nonpublic forum.

The Court should deny AFDI's request for a writ of certiorari.

ORDINANCES INVOLVED

1. KCC[1] §28.96.020 (Resp. App. A)
2. KCC §28.96.030 (Resp. App. B)
3. KCC §28.96.210 (Resp. App. C)

STATEMENT OF CASE

A. METRO OPERATES A NONPUBLIC FORUM FOR BUS ADS

Under the King County Code, Metro fulfills King County's "proprietary function as the provider of public transportation" services. KCC 28.96.020. Metro's mission is 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. Metro is tasked with providing "a quality

[1] King County Code.

transit experience for [its] customers in order to both maintain and expand [its] ridership." ER[2] 84 at ¶4. *See also* KCC 28.96.020.A.2 (Metro is to "retain existing and attract new users of public transit services.").

In order to provide supplemental financial support for its transit operations, Metro runs an advertising program governed by its TAP. ER 30 at ¶3. See Resp. App. D. As part of the advertising program, Metro sells advertising space on the interior and exterior of its buses. *Id.* at ¶3, 7. The purpose of the Metro advertising program is to generate revenue to support the on-going delivery of transportation services to the public. ER 85 at ¶9.

Although advertising provides an important source of revenue, all bus advertisements are subsidiary to Metro's proprietary mission to provide transit services. ER 85-86 at ¶11. By ordinance, transit properties are *not* open or designated public fora. KCC 28.96.020(A). Following this legislative directive, Metro's TAP specifically establishes a nonpublic forum and disavows any intent to create an open or designated forum. Resp. App. at 8. Metro has explicitly created a "[nonpublic] forum[3] for transit advertising in order to minimize and avoid any conflict between the

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[2] Citations are to the Excerpts of Record ("ER") before the Ninth Circuit.

[3] The TAP follows the old Ninth Circuit terminology that was effective until the current case. *See Am. Freedom Def. Initiative v. King Cty.*, 796 F.3d at 1169 (explaining that "limited public forum" and "nonpublic forum" are used interchangeably in the case law, but that "nonpublic forum" is the correct term).

advertising program and the maintenance of a quality transit experience for our riders." ER 86-87 at ¶13.

B. METRO'S TRANSIT ADVERTISING POLICY

The environment of the bus or other transit property is an important aspect of the transit rider's experience. ER 85-86 at ¶11. "[T]he standards and policies surrounding allowable transit advertising are for the express purpose of restricting and regulating allowable transit advertising to make it consistent with Metro's central mission of operating a quality transit system." ER 86-87 at ¶13.

The TAP contains various subject matter restrictions that limit allowable advertisements. See Resp. App. D. Some of the subject matter restrictions in the TAP are categorical bans. For example, the TAP does not allow any "political campaign speech." Resp. App. at 13 (defining term). Also barred are advertisements relating to Tobacco, Alcohol, Firearms, Adult/Mature Rated Films or Television or Video Games, as well as Adult Entertainment Facilities and Other Adult Services. Resp. App. at 14-15.

For any allowed advertisement, including political and public interest ads, the TAP imposes additional subject matter restrictions that are designed to maintain a comfortable environment for transit riders, while placing all prospective advertisers on equal footing – regardless of viewpoint. For example, the TAP bans any advertising with subject matter that is "false and misleading" or "demeaning and disparaging." Resp. App. at 16-17. An advertiser also may not use content that includes profanity, nudity, or violence to communicate the advertiser's message. *Id.* at 15-16.

The TAP also precludes ads from containing "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." Resp. App. at 17-18. The TAP forbids the use of lights, noise or special effects. *Id*. It also disallows any subject matter "that encourages or depicts unsafe behavior with respect to transit-related activities, such as non-use of normal safety precautions in awaiting, boarding, riding upon or debarking from transit vehicles." *Id*.

Under the TAP, all proposed advertising is initially submitted to Titan Outdoor LLC (Titan), which serves as Metro's advertising contractor. ER 29-30 at ¶2. If there is a question regarding compliance with the TAP, Titan forwards the ad to Sharon Shinbo, who is Metro's Transit Advertising Program Manager. ER 31 at ¶8. If compliance remains unclear, the ad is submitted to Metro's General Manager, Kevin Desmond, who applies the TAP and makes the final decision to approve or reject any proposed ad. *Id.* at ¶8.

C. THE STATE DEPARTMENT'S "FACES OF GLOBAL TERRORISM" AD

On May 17, 2013, the United States Department of State Diplomatic Security ("State Department") submitted its "Faces of Global Terrorism" ad. *See* ER 60-61. As Ms. Shinbo explains, "[d]espite our best efforts to restrict bus advertising to accurate, civil, respectful and nondisparaging ads permitted by policy, we occasionally fail to fully appreciate the implications of certain ad copy, and therefore, allow the ad to be published despite noncompliance with our transit advertising policies." ER 33 at ¶12. The State Department "Faces of Global Terrorism" ad is an

"example of an error in appreciating how an ad violated our transit advertising policies." *Id.*

About a week after the ad went on the buses, Metro started to become aware that minority populations in the Seattle area saw the ad as demeaning and disparaging to people of color. ER 34 at ¶14. The Executive Director of CAIR -WA complained that the ad would "invite more hate crimes" and attacks against people who "look Muslim." ER 34. Metro received additional complaints that the ad was "inflammatory and demeaning." ER 34 at ¶15. According to one complaint, the ad encourages "people to harass other Metro bus riders who may resemble one of the people in the photo, or to simply harass anybody on the bus who seems to be the same ethnicity as someone in the photo." ER 35 at ¶17.

While Metro was in the process of re-evaluating the "Faces of Global Terrorism" ad under the TAP, the State Department voluntarily pulled the ad from Metro's buses. ER 35 at ¶18. A replacement ad submitted by the State Department dropped the offensive and demeaning "Faces of Global Terrorism" motif and was accepted as a paid advertisement. *Id.*

D. AFDI'S ALTERED "FACES OF GLOBAL TERRORISM" AD

On August 1, 2013, AFDI submitted its own, significantly altered version of the "Faces of Global Terrorism" ad. ER 35 at ¶20. Although the new ad retained the "Faces of Global Terrorism" slogan with the same photos used by the State Department, the text was changed in significant and important ways. *Id.* It provided that "AFDI wants you to stop a

terrorist." *Id.* It represented that "[t]he FBI is offering up to $25 million reward *if you help capture one of these Jihadis*." *Id.* (emphasis added).

On August 14, 2013 -- after reviewing the ad, investigating its factual claims and considering the complaints lodged against the first State Department ad – Mr. Desmond determined that AFDI's "Faces of Global Terrorism" ad violated several subject matter restrictions under the TAP. ER 89 at ¶22. The rejection was communicated to AFDI through Titan.[4] ER 37 at ¶23.

Mr. Desmond determined that the AFDI ad violated the § 6.2.4 False and Misleading provisions of the TAP because:

> The AFDI ad represented that "The FBI is Offering Up to $25 Million Reward If You Help Capture One of These Jihadis." This statement is false, misleading and/or deceptive. The FBI is not offering the reward. It is being offered by the State Department. Further, contrary to the claim that up to $25 million is available "if you help capture *one of these*" terrorists, a reward of $25 million was being offered for none of the terrorists pictured above the AFDI caption.

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[4] After Metro Transit rejected the ad, Titan offered to discuss the matter further with AFDI. AFDI's attorney, Mr. Yerushalmi, replied: "No need to discuss. We all know what comes next." *Id. at ¶23*.

ER 89-90 at ¶24 (emphasis in original).[5] He also found that AFDI's ad violated TAP § 6.2.8 Demeaning and Disparaging and § 6.2.9 Harmful or Disruptive to Transit System subject matter restrictions. ER 90-91 at ¶25-27.

In making his decision, Mr. Desmond explained that he did not consider the viewpoint espoused by AFDI's ad. *Id.* at ¶28. The problem was not AFDI's message, *but the way in which it was communicated. Id.* "Metro customers should not be subjected to false, demeaning or disparaging advertising copy during their use of transit facilities because it harms Metro's proprietary purpose to provide transit services." *Id.* In order to protect Metro's proprietary interest in providing a high quality transit experience, "advertisers must engage in civil and respectful discourse appropriate to the environment and community standards." *Id.*

E. PROCEEDINGS BELOW

On October 7, 2013, nearly two months after Metro's decision rejecting the AFDI "Faces of Global Terrorism" advertisement, petitioners filed their Complaint and a motion for preliminary injunction. Dkt. 7. AFDI argued that Metro had created a "designated public forum," and that the agency's rejection of AFDI's ad was neither supported by a compelling state interest, nor narrowly tailored to reduce the impact on speech. *Id.*

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[5] In its Petition, AFDI cites to the FBI website for an "official listing of the world's most wanted global terrorists." Pet. at 4. The FBI's list is not contained in the record below, nor is there a record on how this appeared when Metro reviewed AFDI's ad; its relevance is not apparent.

On January 30, 2014, the District Court entered an order denying AFDI's motion for a preliminary injunction. ER 1-13. The court determined that Metro operated a nonpublic forum based on the expressed intent of the TAP and Metro's practices. ER 5-7. Metro's regulation of AFDI's ad was reasonably related to the purposes of the forum: "The court finds that the civility and interference with service restrictions in the Policy are reasonable restrictions that promote the safety, reliability and quality of the public transit system." ER 9. Moreover, Metro acted in a viewpoint-neutral manner in rejecting the AFDI ad under the TAP. ER 10-12.

A unanimous panel of the Ninth Circuit affirmed the District Court's denial of a preliminary injunction. The court determined AFDI was unlikely to prevail on the merits because Metro had established a nonpublic forum for bus advertising. *Am. Freedom Def. Initiative v. King Cty.*, 796 F.3d 1165, 1170 (9th Cir. 2015). Metro's rejection of AFDI's ad under the "false and misleading" provisions of the TAP was both reasonable (even under the Ninth Circuit's heightened reasonableness standard) and viewpoint neutral.[6] *Id.* at 1172. The Ninth Circuit further determined that, even if AFDI had established a likelihood of success on the merits, a preliminary injunction would still not issue because AFDI failed to submit proof of irreparable harm. *Id.* at 1172-73.

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[6] Because it ruled in Metro's favor on "false and misleading," the Ninth Circuit did not address AFDI's ad under the "demeaning and disparaging" or "interference with" bus operations provisions of the TAP.

REASONS TO DENY THE WRIT

A. METRO HAS ESTABLISHED A NONPUBLIC FORUM FOR BUS ADVERTISEMENTS

The Ninth Circuit correctly determined that Metro has established and operated a nonpublic forum for transit ads. The nonpublic nature of this forum is dictated by both county ordinance and written policy. Without regard to viewpoint, Metro has regularly applied this policy to exclude any ad that addresses an excluded subject (*e.g.* alcohol, political candidates, etc.) or an ad that addresses an allowed subject in an impermissible manner (*e.g.* through use of profanity, nudity, false claims, demeaning terms, etc.). These limitations and others contained in the TAP help strike the appropriate balance between the need for supplemental revenues through advertising and the need to provide a quality transit experience for passengers.

AFDI claims that certiorari should issue because Metro's inclusion of any political and public information ads automatically transforms Metro's nonpublic advertising forum into a designated public forum. The Ninth Circuit's opinion, according to AFDI, conflicts with decisions from other circuits where the allowance of *any* political or controversial speech creates a public forum subject to strict scrutiny. But these cases do not hold that the inclusion of any political, public interest, or controversial advertisements *automatically* transforms a nonpublic forum into a public one. Instead, when faced with government silence on the nature of the forum, these circuit decisions look to proxy facts to surmise the intended nature of the forum. These case are about

how you examine evidence to determine government intent, not about establishing blanket rules regarding what can and cannot be included in a nonpublic forum.

In the current case, the nature of the forum is explicit in the governing ordinance and the TAP itself, while years of application show regular exclusion of ad content that violates the forum rules. ER 32-33. There is no need to examine evidence of Metro's intent to establish a nonpublic forum because it is explicit in law and policy. Given the facts of this case, a conflict arises with the Ninth Circuit's opinion only if another circuit court has adopted AFDI's position that the allowance of any political or public interest speech necessarily converts an express nonpublic forum into a designated one. Because there is no conflict on this more cogent point, this Court should not issue a writ of certiorari.

1. The Ninth Circuit Correctly Determined that Metro Established a Nonpublic Forum for Bus Advertisements

The First Amendment does not guarantee a forum for all constitutionally protected speech on all government-owned property. *Capital Square Review & Advisory Board v. Pinette*, 515 U.S. 753, 761 (1995); *Cornelius v. NAACP Legal Defense & Ed. Fund. Inc.*, 473 U.S. 788, 799-800 (1985) ("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."). With government-owned property, it is the nature of the forum and not the nature of the speech that controls the analysis when a speaker seeks access to

government property. *Id.* at 800; *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, ___ U.S. ___, 135 S. Ct. 2239, 2250 (2015).

Forum Analysis. In analyzing government-owned property, this Court has recognized several different types of fora. "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). A "designated public forum" is created when the government intentionally acts to open a nonpublic forum to all speech activities. *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 469-70 (2009). Government restrictions in these public fora are subject to strict scrutiny analysis. *Id.*

A "nonpublic forum," by contrast, "exists '[w]here the government is acting as a proprietor, managing its internal operations.'" *Walker*, 135 S. Ct. at 2251 (*quoting International Soc. for Krishna Consciousness, Inc. v. Lee,* 505 U.S. 672, 678–679 (1992)). The interior and exterior panels of publicly-owned buses are a typical nonpublic forum. *Walker*, 135 S. Ct. at 2252. Buses are "only a way to get to work or back home," not mobile "chautauquas." *Lehman*, 418 U.S. at 306 (Douglas, J. concurring).

In *Lehman v. City of Shaker Heights*[7], a political candidate sued the City of Shaker Heights when it refused to display his campaign advertisement on its

[7] The *Lehman* decision was comprised of a four justice plurality and a concurrence by Justice Douglas.

buses. The Court noted that transit advertising differs from other speech contexts due to the captive audience problem:

> . . . 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.' 'The streetcar audience is a captive audience. It is there as a matter of necessity, not of choice.' . . . In such situations, '(t)he legislature may recognize degrees of evil and adapt its legislation accordingly.'

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

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

> *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). Public bus advertisements generally operate as a nonpublic forum because the proprietary needs of a transit system are incompatible with unfettered free speech rights. *Lehman,* 418 U.S. at 301-02.

Intent and Practice Establishes Nonpublic Forum. Metro has established a nonpublic forum for bus advertising by expressed intent, policy, and practice. By ordinance, the legislative body of King County has determined that transit properties are *not* open or designated public fora:

> 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.

KCC 28.96.020(A) (emphasis added).

The TAP follows this legislative directive. Reflecting the mandate of KCC 28.96.020, the TAP states Metro's explicit intention to establish a nonpublic forum:

> [Nonpublic] Forum Status. The County's acceptance of transit advertising does not provide or create a general public forum for expressive activities. In keeping with its proprietary function as a provider of public transportation, and consistent with KCC 28.96.020 and .210, *the County does not intend*

> *its acceptance of transit advertising to convert its Transit Vehicles or Transit Facilities into open public forums for public discourse and debate.* Rather, as noted, the County's fundamental purpose and intent is to accept advertising as an additional means of generating revenue to support its transit operations. In furtherance of that discreet and limited objective, *the County retains strict control over the nature of the ads accepted for posting on or in its Transit Vehicles and Transit Facilities and maintains its advertising space as a [nonpublic] forum.*

Resp. App. 8 at ¶2.3.

The TAP establishes a nonpublic forum in order to maintain the primacy of proprietary transit operations. *Id.* By allowing advertising in a nonpublic forum context, Metro's transit advertising policies "are designed to strike an appropriate balance between the need for supplemental revenue, and Metro's primary mission of encouraging ridership through the provision of a quality customer experience." ER 86.

In contesting the limited nature of Metro's bus advertising forum, AFDI ignores the central role that statements of government policy and intent play in determining proper characterization of the forum. A court "will not find that a public forum has been created in the face of clear evidence of a contrary intent . . . nor will we infer that the government intended to create a public forum when the nature of the property is inconsistent with expressive activity." *Cornelius*, 473 U.S. at 803.

Forum analysis must grant due deference to the government's stated intent. It is well established that "*[t]he 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). The "decision to create a public forum must instead be made 'by intentionally opening a nontraditional forum for public discourse.'" *Lee*, 505 U.S. at 992 (quotation omitted); *AETC*, 523 U.S. at 677 ("Designated public fora, in contrast, are created by purposeful governmental action.").

Both the provisions of the TAP and Metro's administration of the TAP are consistent with the expressed intent to create a nonpublic forum.[8] As noted above, the TAP imposes various categorical bans on content, as well as subject matter restrictions to ensure the civility of allowed content. It also disallows any content that would interfere with, or disrupt the proprietary purpose of operating a transit system. Consistent with Metro's stated intent, the subject matter restrictions in the TAP are characteristic of a nonpublic forum. *See Am. Freedom Def. Initiative v.*

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[8] AFDI's suggestion that the Court ignore Metro's express statements of intent – both in ordinance and the TAP – runs contrary to the purposeful government action that is necessary to convert a nonpublic forum into a designated forum. In the context of double jeopardy and *ex post* facto challenges, as a result of the comity owed to the legislative branch, a court "will reject the legislature's manifest intent only where a party challenging the Act provides the clearest proof" of a statutory or regulatory scheme that is so contrary "in either purpose or effect as to negate the State's intention." *Seling v. Young*, 531 U.S. 250, 261 (2001). A similar rule ought to apply in the nonpublic forum context.

Suburban Mobility Auth. for Reg'l Transp. (SMART), 698 F.3d 885, 890 (6th Cir. 2012)(noting "SMART's tight control over the advertising space and the multiple rules governing advertising content"); *Ridley v. Massachusetts Bay Transp. Auth.*, 390 F.3d 65, 81-82 (1st Cir. 2004) (narrow content restrictions evinced the transit agency's intent to regulate its advertising forum).

No "All or Nothing" Conflict Cases. Against Metro's policy and practice of operating a nonpublic forum for advertising on buses, AFDI fails to cite any case holding that a nonpublic forum must exclude all political or controversial public interest content. Indeed, the Supreme Court *AETC*, 523 U.S. at 680-81 rejected an "all or nothing" approach to political speech in a nonpublic forum because it was a misapplication of precedents and "would result in less speech, not more." In *AETC*, a candidate with marginal support asserted a right to participate in a televised candidate's debate. Although forum principles do not generally apply to publicly owned television stations, the Court determined that "candidate debates present the narrow exception to the rule." *Id.* at 675. The "debate was by design a forum for political speech by the candidates." *Id.* The Court determined that it was appropriately classified as a nonpublic forum "from which AETC could exclude Forbes in the reasonable, viewpoint-neutral exercise of it journalistic discretion." *Id.* at 675-76.

The key to distinguishing between the creation of a designated public forum versus a nonpublic forum was *not* the political subject matter of the forum, but whether the government allows "selective access for

individual speakers rather than general access for a class of speakers." *AETC*, 523 U.S. at 679. Selective access is the hallmark of a nonpublic forum. *Id.* at 680. Although the forum in *AETC* differentiated by speaker status, AFDI cites no authority that would preclude differentiation in a nonpublic forum by subject matter or means of presentation. Indeed, in *Lehman*¸ this Court approved a nonpublic forum that differentiated based on subject matter. 418 U.S. at 304.

Rejecting the notion that a nonpublic forum must allow all speech on a topic or no speech, this Court in *AETC* stated that a motivating factor in forum analysis is to "encourage the government to open its property to some expressive activity in cases where, if faced with an all-or-nothing choice, it might not open the property at all." *Id.* The Court further recognized the "reality that, with the exception of traditional public fora, the government retains the choice of whether to designate its property as a forum for specified classes of speakers." *Id.*

AFDI's proposed rule of law to forbid nonpublic forum status anytime political and public interest speech are allowed would likely result "in less speech, not more." *Id.* at 680-81. In addressing the concerns of the forum operator in *AETC*, the court observed that:

> Were it faced with the prospect of cacophony, on the one hand, and First Amendment liability, on the other, a public television broadcaster might choose not to air candidates' views at all. A broadcaster might decide "'the safe course is to avoid controversy,'. . . and by so doing diminish the free flow of information and ideas."

AETC, 523 U.S. at 681 (citations omitted). Metro would face the same decision to remove political and public interest speech from the forum, rather than risk a decrease in ridership due to discourse unregulated by civility and other TAP subject matter restrictions.

Because the Ninth Circuit's decision is consistent with this Court's forum analysis and *AETC* rejects a rule automatically precluding nonpublic forum status for political and public interest speech, this Court should deny issuance of certiorari.

2. AFDI has Failed to Establish a Split In the Circuit Courts

The cases cited by AFDI to claim a circuit split are easily distinguished. In *New York Magazine v. Metro. Transp. Auth.*, 136 F.3d 123 (2d Cir. 1998), the record before the Second Circuit did not establish a specific intent by the Metropolitan Transit Authority ("MTA") to establish a nonpublic forum. With no statement in the record of the MTA's intent to create a nonpublic forum, the Second Circuit looked to other indicia, including "the nature of the property and its compatibility with expressive activity, as well as the nature of the restraints on speech imposed." *Id.* at 129. Although MTA had adopted limited advertising standards, they "impose[d] no restriction on political speech." 136 F.3d at 126. Because the Second Circuit did not consider how the allowance of political speech weighs against a specific statement of intent to create a nonpublic forum, it does not conflict with the Ninth Circuit's decision.

Similarly, the Third Circuit, in *Christ's Bride Ministries, Inc. v. Se. Pennsylvania Transp. Auth.*, 148

F.3d 242, 249 (3d Cir. 1998), analyzed a transit advertising forum where there was no express statement of intent to create a nonpublic forum. Rather than limiting advertising to the transit agency's proprietary interests, one stated intent of the advertising policy was "promoting 'awareness' of social issues and 'providing a catalyst for change.'" *Id.* In addition to generating revenue, a stated purpose of the forum was to promote expression. *Id.* at 250. The advertising policy broadly allowed the transit agency to "reject [any] advertisements that it does not like." *Id.* at 250. The agency's practices provided "no conclusive answer as to whether the forum is intended to be closed or open." *Id.* at 251. In contrast, the Ninth Circuit was presented with a case where the intent to establish a nonpublic forum was unambiguous and the forum itself was governed by detailed written standards. See Resp. App. D.

AFDI's claimed conflict with the Seven Circuit's decision in *Planned Parenthood Ass'n / Chicago Area v. Chicago Transit Auth.*, 767 F.2d 1225, 1227 (7th Cir. 1985) is also illusory. The Chicago Transit Authority ("CTA") contracted with Winston Network, Inc. ("Winston") to place ads on transit properties. The sole restriction imposed by CTA was that "Winston may not accept 'immoral, vulgar, or disreputable advertisements'." *Id.* at 1227. For ads from nonprofit organizations, Winston had a practice of screening them with CTA for "controversy." *Id.* The CTA claimed no policy or ordinance specifying the creation of a nonpublic forum against these ad hoc practices. After a bench trial, the District Court found that even the minimal "controversial" ad policy claimed by CTA "had been contrived for this action," and that "it was

neither consistently enforced nor applied to any issue except abortion." 767 F.2d at 1228. These facts, which are far afield from what the Ninth Circuit considered in the current case, do not constitute a conflict justifying a grant of certiorari. The CTA made no effort to create a nonpublic forum and instead operated a "laissez-faire" ad forum open to (almost) "anyone willing to pay the fee." *Id.* at 1232.

There is also no conflict between the Ninth Circuit and the D.C. Circuit's decision in *Lebron v. Washington Metro. Area Transit Auth.*, 749 F.2d 893 (D.C. Cir. 1984). The *Lebron* decision operates from the premise that the Washington, D.C. subway stations are a public forum and does not engage in any forum analysis. *Id.* at 896. Because *Lebron* is about prior restraints in a public forum, not about how to properly characterize the forum, it does not raise a conflict.

Finally, there is no conflict between the Ninth Circuit's analysis and the Sixth Circuit's decision in *United Food & Commercial Workers Union v. S.W. Ohio Regional Transit Authority*, 163 F.3d 341 (6th Cir. 1998). Although the advertising policy in *United Food* did contain an express statement of intent to create a nonpublic forum, it was not supported by the type of detailed transit advertising policy that the Ninth Circuit considered in the current case. The Sixth Circuit rejected the transit company's claim to establish a nonpublic forum due to the "lack of definitive standards guiding the application of [its] advertising policy." *Id.* at 354. The lack of advertising standards allowed the transit company "to reject a proposed advertisement deemed objectionable for any reason." *Id.* at 354. Unlike the current case, in *United*

Food, the lack of a detailed policy and the practices of the transit company substantially diverged from the stated intent to create a nonpublic forum. It is not at all clear that the Sixth Circuit would have ruled contrary to the Ninth Circuit if it had been presented with the same facts.

Contrary to AFDI's claim of a conflict, the only two circuits to consider transit advertising forums that included (1) an express statement of intent to create a nonpublic forum, (2) detailed regulations for allowed advertisements, and (3) a regular practice of rejecting nonconforming ads, found the existence of a nonpublic forum. *Compare Am. Freedom Def. Initiative v. Massachusetts Bay Transp. Auth.*, 781 F.3d 571 (1st Cir. 2015), *petition for certiorari pending*, No. 15-141 (U.S. July 30, 2015) *with Seattle Mideast Awareness Campaign v. King County,* 781 F.3d 489 (9th Cir. 2015). The facts in *AFDI v. MBTA* and *SeaMAC* differ substantially from the first generation transit policies considered by the other circuit courts in the 1980s and 1990s. The Court should allow the other circuits to consider further the reasoning of the First and Ninth Circuit courts – under the more developed transit ad policies represented in those cases – before accepting review of these issues.

Because the alleged conflict cases cited by AFDI are fact-intensive and lack the focus of the current case on express statements of government intent in both ordinance and policy, AFDI has failed to establish any conflict with the Ninth Circuit's decision. A real conflict would arise only if AFDI pointed to a case where the inclusion of political or public interest speech in a non-public forum automatically converted that

forum into a designated forum regardless of government intent, but no such case exists. Consistent with *AETC*, no circuit decision has adopted AFDI's rule that political or public interest speech negates nonpublic forum status. With no conflict between the circuits, there is no need for a writ of certiorari.

B. METRO ACTED IN A VIEWPOINT NEUTRAL AND REASONABLE MANNER WHEN IT REJECTED AFDI'S AD UNDER THE "FALSE AND MISLEADING" PROVISIONS OF THE TAP

Ignoring the limited nature of First Amendment protections in a nonpublic forum, AFDI claims that false and misleading ad content cannot be regulated when it touches on a political or public interest topic. Pet. at 19. The Ninth Circuit correctly held that AFDI's ad contained "objectively and demonstrably false statements" and that "Metro's rejection of the ad on the ground of falsity likely was reasonable and viewpoint neutral." *Am. Freedom Def. Initiative v. King Cty.*, 796 F.3d at 1171-72. AFDI has failed to identify any conflict with this reasoning.

1. Applying this Court's Precedent, the Ninth Circuit Correctly Held That Metro's Decision Was Viewpoint Neutral and Reasonable, Despite the Use of a "Reasonableness" Inquiry That Exceeded Constitutional Requirements

Regulation of ad content in a nonpublic forum must be viewpoint neutral and reasonable in light of the purposes served by the forum. *Cornelius,* 473 U.S. at 806; *Rosenberger v. Rector and Visitors of University of*

Virginia, 515 U.S. 819, 829 (1995). Unlike the "compelling interest" and "narrow tailoring" necessary to regulate an open or designated public forum, the touchstone for evaluating viewpoint-neutral regulation in a nonpublic forum is "reasonableness." *Lee*, 505 U.S. at 672.

Public Forum Cases Inapplicable. AFDI's claim to additional First Amendment protections beyond the viewpoint neutral and reasonableness requirements of a nonpublic forum are misplaced. First Amendment principles applicable to public or designated public fora have little application to a nonpublic forum. *E.g., AETC,* 523 U.S. at 672-673. Public forum principles "are out of place" in a case that does not involve a public forum. *United States v. Am. Library Ass'n, Inc.,* 539 U.S. 194, 205 (2003); *Pleasant Grove City,* 555 U.S. at 478. Distinctions that "may be impermissible in a public forum . . . are inherent and inescapable in the process of limiting a nonpublic forum to activities compatible with the intended purpose of the property." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 49 (1983).

Because resolution depends on the nature of the forum, AFDI's repeated citation to general First Amendment case law sheds little light on resolution of this case. The First Amendment issues raised by AFDI are not in the *New York Times v. Sullivan*, 376 U.S. 254, 285 (1964) category. This is not a case where the legal apparatus of the state is used "to impose sanctions upon expression critical of the official conduct of public officials." *Id.* at 268, 84 S. Ct. 710. The decision in "*New York Times* does not bear on whether the government may prohibit demonstrably false

statements in a nonpublic forum created by the government." *Am. Freedom Def. Initiative v. King Cty.*, 796 F.3d at 1171.

AFDI's related claim of a prior restraint is overwrought because petitioners remain free to communicate their message anywhere except for on a Metro bus. *See CAMP Legal Defense Fund, Inc. v. City of Atlanta*, 451 F.3d 1257, 1263 (11th Cir. 2006) (moratorium in nonpublic forum not a "prior restraint"). The Court should not grant certiorari based on a heightened public interest. A paid ad on a transit bus simply does not occupy the same pantheon of First Amendment protection as a newspaper article, or a protest in the public square. *See Cornelius*, 473 U.S. at 811 ("a nonpublic forum by definition is not dedicated to general debate or the free exchange of ideas").

Viewpoint Neutral. Metro has applied its ban on "false and misleading" ads in a viewpoint-neutral manner. Barring selective enforcement, which AFDI does not claim, the "false and misleading" standard is particularly amenable to viewpoint neutrality because it focuses on objectively and demonstrably false statements.[9]

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[9] It is worth noting that AFDI presents no argument that the TAP regulations are somehow biased against its specific viewpoint, or favor its ideological opponents. A seemingly viewpoint-neutral regulation can also run afoul of the First Amendment if it inherently favors one side over the other. *RAV v. St. Paul*, 505 U.S. 377 (1992). A regulation is impermissible under this concept if it allows "one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules." *Id.* at 392. The record here establishes that Metro has allowed and permitted ads

Metro did not discriminate against AFDI's viewpoint. The problem was *not* AFDI's "most wanted terrorist" viewpoint, but its decision to include false statements as to the sponsor of the reward and the amount of the reward. Rather than discriminating based on viewpoint, Metro has applied the TAP to exclude and allow speech on all sides of the Middle Eastern debates. *See Seattle Mideast Awareness Campaign v. King Cty.*, 781 F.3d 489, 503 (9th Cir. 2015) (Noting Metro's history of accepting and rejecting "speech from opposing sides of the Israeli–Palestinian conflict" depending on application of TAP regulations.).

Reasonable. Application of the "false and misleading" provision of the TAP was reasonable for the purpose of operating a bus system, including maintenance of a high value advertising forum.[10] As the operator of a proprietary enterprise, Metro has the "discretion to develop and make reasonable choices concerning the type of advertising' it [will] display."

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representing all sides of the Middle Eastern conflict without regard to viewpoint depending on compliance with the TAP. ER 32-33, 39-59.

[10] Metro has an interest in insuring the basic accuracy of an advertisement for the protection of its customers and the maintenance of a valuable forum. The value of the forum will suffer if it becomes known for inaccurate and misleading information. The government, "no less than a private owner of property, has the power to preserve the property under its control for the use to which it is lawfully dedicated." *United States v. Grace*, 461 U.S. 171, 178 (1983). "One reason [the TAP] prohibit[s] false advertising, or demeaning and disparaging advertising, is to maintain a respectful and courteous level of discourse on [Metro] buses. ER 85-86 at ¶11.

Lehman, 418 U.S. at 303. In evaluating the reasonableness of a restriction, consideration may be given to "the disruptive effect that [certain speech] may have on business. *Lee*, 505 U.S. at 683. Metro's desire to avoid disruption to the transit system, including its advertising business, is a valid content-neutral consideration. *Cornelius*, 473 U.S. at 811 ("The First Amendment does not forbid a viewpoint-neutral exclusion of speakers who would disrupt a nonpublic forum and hinder its effectiveness for its intended purpose.") After all, the interests of a municipality acting in a proprietary transit function to impose basic accuracy requirements for display ads mirror those of any private business. *See Int'l Soc'y for Krishna Consciousness of California, Inc. v. City of Los Angeles*, 764 F.3d 1044, 1051 (9th Cir. 2014) (recognizing the "legitimate interest" in an airport nonpublic forum of "protecting travelers from the risk of 'fraud' and 'duress'").

Accuracy of Ad. AFDI dedicates much of its petition to arguing that its ad was somehow accurate. Pet. at 20-23. Even if AFDI were correct that the Ninth Circuit was "simply wrong that petitioner's ad is materially false" Pet. at 22, its request for mere error correction would not justify a writ of certiorari.

But AFDI's claims of accuracy are contrary to the record. Although AFDI made relatively few changes to the State Department ad, the ones it did make rendered the ad objectively inaccurate:

> Plaintiffs' proposed ad states, in prominent text: "The FBI Is Offering Up To $25 Million Reward If You Help Capture One Of These Jihadis." That statement is demonstrably and

> indisputably false. The FBI is not offering a reward up to $25 million for the capture of one of the pictured terrorists. The FBI is not offering rewards at all, and the State Department offers a reward of at most $5 million, not $25 million, for the capture of one of the pictured terrorists. Plaintiffs do not, and cannot, refute those basic facts.

Am. Freedom Def. Initiative v. King Cty., 796 F.3d at 1171.

The Ninth Circuit's Heightened Reasonableness Review. Although Metro survived the Ninth Circuit's heightened reasonableness standard – what the Ninth Circuit called its second and third "reasonableness criterion" – this multi-pronged approach lacks the deference appropriate when reviewing reasonableness in a nonpublic forum. By undertaking an "independent review" and requiring an overly tight fit, the Ninth Circuit leaves municipal bus companies open to costly litigation and possible liability. Because the purpose of an advertising forum is to make money and substantial litigation risk is antithetical to this goal, the end result of the Ninth Circuit's approach is the further restriction of nonpublic fora and "less speech, not more."

The Ninth Circuit's reasonableness approach is contrary to this Court's precedents. The reasonableness inquiry is a deferential one. "Limitations on expressive activity conducted on this ... category of property must survive only a much more limited review." *Lee,* 505 U.S. at 679. "The Government's decision to restrict access to a nonpublic forum need only be *reasonable;* it need not be the most

reasonable or the only reasonable limitation." *Cornelius*, 473 U.S. 808. There is no requirement that a restriction be "narrowly tailored" in a nonpublic forum. *Id.* at 809. The Ninth Circuit's reasonableness inquiry fails to provide sufficient deference to allow the sound and beneficial operation of a nonpublic advertising forum.[11]

2. AFDI Has Failed to Establish a Split In the Circuit Courts

Although AFDI claims a circuit split on the reasonableness issue, it fails to cite any cases. In the context of a nonpublic forum, the Ninth Circuit's reasonableness inquiry exceeds case law requirements. If anything, the Ninth Circuit's approach worked to AFDI's advantage. A writ of certiorari is not justified under these circumstances.

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[11] The Ninth Circuit's third reasonableness criterion, "whether an independent review of the record supports Metro's conclusion that the ad is false," 796 F.3d at 1171, represents a misapplication of the obligation to "make an independent examination of the whole record" from *New York Times v. Sullivan,* 376 U.S. 254, 285 (1964). As noted above, the Ninth Circuit itself recognized that *New York Times* has no application in a nonpublic forum, but then inexplicably uses a test directly from *New York Times* to expand the reasonableness inquiry.

C. THE NINTH CIRCUIT FOLLOWED THIS COURT'S PRECEDENT AND ACTED CONSISTENT WITH ITS SISTER CIRCUITS BY REQUIRING AFDI TO SUBMIT PROOF OF IRREPARABLE HARM IN A NONPUBLIC FORUM CASE BEFORE ISSUING A MANDATORY PRELIMINARY INJUNCTION

AFDI's challenge to the Ninth Circuit's irreparable harm holding – which independently supports denial of the preliminary injunction – does not justify a grant of certiorari. The Ninth Circuit correctly held that AFDI could not obtain a preliminary injunction because it failed to establish a likelihood of "irreparable harm in the absence of preliminary relief." *Am. Freedom Def. Initiative v. King Cty.*, 796 F.3d at 1172 (*quoting Winter,* 555 U.S. at 20). AFDI submitted no record below alleging irreparable harm. Instead, AFDI argued that the "irreparable harm" element was automatically satisfied through proof of "likelihood of success on the merits." *Id.* at 1172. The Ninth Circuit's holding that "irreparable harm" requires proof beyond a "likelihood of success on the merits" is entirely consistent with this Court's precedent and not contrary to any Circuit Court decision arising out of a nonpublic forum context.

AFDI cites *Elrod v. Burns*, 427 U.S. 347, 373 (1976) for the broad proposition that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury," *but fails to disclose* that only a three-justice plurality joined this statement. See AFDI Petition at 25. The crucial two-justice concurrence in *Elrod* declined to "join the plurality's wide-ranging opinion" and joined in

the judgment only. *Elrod*, 427 U.S. at 374 (Stewart, J. concurring). No subsequent case from this Court has cited the plurality's automatic "irreparable harm" statement. To the contrary, *Winter* and other cases from this Court adhere to "irreparable harm" as a separate element that must be established in order to obtain a preliminary injunction. *See, e.g., Glossip v. Gross*, ___ U.S. ___, 135 S. Ct. 2726, 2736 (2015) (noting need to prove irreparable harm).

AFDI seeks to generate a circuit split by citing First Amendment cases that allegedly depart from *Winter's* irreparable harm requirement. But there is no conflict because none of the cases cited by AFDI arise out of the unique context of a nonpublic forum.

The primary conflict case cited by AFDI, *New York Magazine*, was decided in the context of a designated public forum. Other cases cited by AFDI do not involve forum analysis at all. *See Newsom v. Norris*, 888 F.2d 371, 378 (6th Cir. 1989) (appointment of prisoner to inmate board); *Swartzwelder v. McNeilly*, 297 F.3d 228, 241-42 (3d Cir. 2002) (expert testimony by police officer); *B.H. ex rel. Hawk v. Easton Area Sch. Dist.*, 725 F.3d 293, 323 (3d Cir. 2013) *cert. denied,* 134 S. Ct. 1515, 188 L. Ed. 2d 450 (2014) (middle school apparel); *Newsom ex rel. Newsom v. Albemarle Cty. Sch. Bd.*, 354 F.3d 249, 261 (4th Cir. 2003) (same); *Sindicato Puertorriqueno de Trabajadores v. Fortuno*, 699 F.3d 1, 15 (1st Cir. 2012) (campaign finance restriction). The Ninth Circuit's reasoning is not in conflict with these cases due to the "much more limited review" applicable to nonpublic forum analysis. *Lee,* 505 U.S. at 679 (1992).

In the context of a nonpublic forum, the Ninth Circuit's reasoning is correct. AFDI is not being deprived of its message, but only of forcing Metro to print its message on the side of the bus:

> [T]he 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.

Am. Freedom Def. Initiative v. King Cty., 796 F.3d at 1173. *See also Hodge v. Talkin*, 799 F.3d 1145, 1169 (D.C. Cir. 2015) ("'[O]ther available avenues for the . . . exercise [of] First Amendment rights lessen the burden' of a restriction in a nonpublic forum."; *quoting Christian Legal Soc. Chapter of the Univ. of California, Hastings Coll. of the Law v. Martinez*, 561 U.S. 661, 690 (2010)).

Although a party seeking an injunction bears the burden of proving irreparable harm, *Granny Goose Foods, Inc. v. Bhd. of Teamsters & Auto Truck Drivers Local No. 70 of Alameda Cty.*, 415 U.S. 423, 441 (1974), AFDI failed to submit any record on this point. There is no record demonstrating why alternative advertising markets were inferior, especially to the point of

establishing irreparable harm for a mandatory injunction. Absent a record, this case is a poor vehicle to test AFDI's assertion that the Ninth Circuit's irreparable harm holding establishes a "nearly insurmountable, and entirely unnecessary and improper, burden" on those seeking preliminary injunctions. Petition at 27.

This Court should reject AFDI's effort to effectively eliminate the "irreparable harm" element of the preliminary injunction test in nonpublic forum First Amendment cases. There is nothing constitutionally suspect about putting litigants to their proof on this element. Regardless of the merits of AFDI's other arguments, its failure to adequately address the irreparable harm element necessitates affirmance of the Ninth Circuit's decision on denial of the preliminary injunction and obviates any need to grant certiorari.

D. OTHER REASONS TO DENY CERTIORARI

Metro rejected AFDI's Faces of Global terrorism ad due to multiple TAP violations, including sections of the policy prohibiting content that is "demeaning and disparaging," or interfering with the transit system. In denying AFDI's motion for a preliminary injunction, the District Court relied on all three grounds. ER 9. On review, the Ninth Circuit opinion addressed only the "false and misleading" TAP provision and did "not, reach Metro's other reasons for rejecting the ad." *Am. Freedom Def. Initiative v. King Cty.*, 796 F.3d at 1172.

The case thus comes before the Court missing key issues that were decided by the District Court, but omitted from the Ninth Circuit's consideration. Even

if AFDI prevails on the "false and misleading" ground, it would win only a remand to the Ninth Circuit to decide the balance of the case. *See Bragdon v. Abbott*, 524 U.S. 624, 654 (1998) ("When attention has been focused on other issues, or when the court from which a case comes has expressed no views on a controlling question, it may be appropriate to remand the case rather than deal with the merits of that question in this Court."). The Court should not grant certiorari under these circumstances.

CONCLUSION

For the foregoing reasons, AFDI's petition for a writ of certiorari should be denied.

Respectfully submitted.

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December 22, 2015

APPENDIX

APPENDIX

TABLE OF CONTENTS

APPENDIX A

King County Ordinance §28.96.020

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.

B. In addition to any civil infraction or criminal sanctions which may be applicable under this chapter or applicable federal, state and local law, any person engaged in public communication activities and found responsible for litter, damages or destruction of property, whether by accident or intent, shall be responsible for cleaning up and shall be liable for the cost of clean-up, repair and replacement as necessary.

C. The county reserves the right to enter into licenses, leases or other use agreements permitting noncounty uses of transit properties that are not otherwise limited or prohibited by this chapter and are found to be compatible with the county's proprietary public transit function and interests; provided, the executive shall comply with applicable King County Charter, King County Code and state law requirements

in executing such licenses, leases and agreements. (Ord. 16770 § 3, 2010: Ord. 11950 § 15 (part), 1995).

APPENDIX B

King County Ordinance §28.96.030

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).

APPENDIX C

King County Ordinance §28.96.210

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).

APPENDIX D

2012 Transit Advertising Policy

King County
Department Policies and Procedures

General Department Policies & Procedures

Tide TRANSIT ADVERTISING POLICY	Document Code No. CON 1-1-1 (D-P)
Department/Issuing Agency King County Department of Transportation, Transit Division	Date January 12, 2012
Approved /s/ , Kevin Desmond, Transit General Manager	

1.0 SUBJECT TITLE: King County Department of Transportation, Transit Division, Transit Advertising Policy

1.1 EFFECTIVE DATE: January 12, 2012

1.2 TYPE OF ACTION: Superseding CON 1-1 (D-P)

1.3 KEY WORDS: (1) Transit; (2) Advertising

2.0 PURPOSE:

2.1 King County Transit System. The King County Department of Transportation, through its Transit Division, operates one of the largest bus systems in the nation, one that includes more than 225 bus routes throughout the County, with nearly 9,000 bus stops and more than 130 park-and-ride facilities connecting riders with those routes. The transit system is a vital component of the broad spectrum of public services the County provides. The County's transit advertising program is intended to generate revenue to support the transit system.

2.2 Advertising as Revenue Source. The County's transit operations are funded by a combination of federal, state and local funds, including grants and taxes, as well as fare box revenue. Advertising revenues are an important additional source of revenue that supports transit operations. The County's fundamental purpose in accepting transit advertising is to generate revenue to augment the Transit Division's operating budget.

The primary purpose of the County's transit system is to provide safe and efficient public transportation within its service area. Consistent with this purpose, the County places great importance on maintaining secure, safe, comfortable and convenient Transit Facilities and Transit Vehicles in order to, among other things consistent with

the provision of effective and reliable public transportation, retain existing riders and attract new users of public transit services (KCC 28.96.020 and .210). To generate additional revenue while also accomplishing the primary objectives of transit operations, the County will accept advertising on its Transit Facilities and Transit Vehicles only if such advertising complies with this Advertising Policy.

2.3 Limited Public Forum Status. The County's acceptance of transit advertising does not provide or create a general public forum for expressive activities. In keeping with its proprietary function as a provider of public transportation, and consistent with KCC 28.96.020 and .210, the County does not intend its acceptance of transit advertising to convert its Transit Vehicles or Transit Facilities into open public forums for public discourse and debate. Rather, as noted, the County's fundamental purpose and intent is to accept advertising as an additional means of generating revenue to support its transit operations. In furtherance of that discreet and limited objective, the County retains strict control over the nature of the ads accepted for posting on or in its Transit Vehicles and Transit Facilities and maintains its advertising space as a limited public forum.

In the County's experience, certain types of advertisements interfere with the program's

primary purpose of generating revenue to benefit the transit system. This policy advances the advertising program's revenue-generating objective by prohibiting advertisements that could detract from that goal by creating substantial controversy, interfering with and diverting resources from transit operations, and/or posing significant risks of harm, inconvenience, or annoyance to transit passengers, operators and vehicles. Such advertisements create an environment that is not conducive to achieving increased revenue for the benefit of the transit system or to preserving and enhancing the security, safety, comfort and convenience of its operations. The viewpoint neutral restrictions in this policy thus foster the maintenance of a professional advertising environment that maximizes advertising revenue.

This policy is intended to provide clear guidance as to the types of advertisements that will allow the County to generate revenue and enhance transit operations by fulfilling the following goals and objectives:

- Maximizing advertising revenue;
- Preventing the appearance of favoritism by the County;
- Preventing the risk of imposing demeaning or disparaging views on a captive audience;
- Maintaining a position of neutrality on controversial issues;

- Preserving the marketing potential of the advertising space by avoiding content that the community could view as demeaning, disparaging, objectionable, inappropriate or harmful to members of the public generally or to minors in particular;
- Maximizing ridership;
- Avoiding claims of discrimination and maintaining a non-discriminatory environment for riders;
- Preventing any harm or abuse that may result from running demeaning, disparaging or objectionable advertisements;
- Reducing the diversion of resources from transit operations that is caused by demeaning, disparaging, objectionable, inappropriate or harmful advertisements.

The County's Transit Facilities and Transit Vehicles are a limited public forum and, as such, the County will accept only that advertising that falls within the categories of acceptable advertising specified in this viewpoint neutral policy and that satisfies all other access requirements and restrictions provided herein.

The County reserves the right to suspend, modify or revoke the application of any of the standards in this Policy as it deems necessary to comply with legal mandates, to accommodate its primary transportation function, or to fulfill the goals and objectives

identified above. All of the provisions in this Policy shall be deemed severable.

2.4 Application of Policy. This Transit Advertising Policy applies to the posting of all new advertisements on Transit Facilities and Transit Vehicles on or after the Effective Date. Any advertisements which would be prohibited under this policy, but which were posted pursuant to the terms of a fully executed advertising contract prior to the Effective Date of this policy, will be allowed to remain posted for the duration of that contract.

2.5 Disclaimer of Endorsement. The County's acceptance of an advertisement does not constitute express or implied endorsement of the content or message of the advertisement, including any person, organization, products, services, information or viewpoints contained therein, or of the advertisement sponsor itself. This endorsement disclaimer extends to and includes content that may be found via internet addresses, quick response (QR) codes, and telephone numbers that may appear in posted ads and that direct viewers to external sources of information.

3.0 ORGANIZATIONS AFFECTED: King County Department of Transportation, Transit Division

4.0 REFERENCES:

4.1 Transit Code of Conduct, chapter 28.96 KCC

4.2 Public Transit Definitions, chapter 28.92 KCC

4.3 King County Charter Section 320.20: Provides that the county executive "shall have the power to assign duties to administrative offices and executive departments which are not specifically assigned by this charter or ordinance. . . ."

4.4 Executive Policy/Procedures No. INF 7-1D-1 (AEP): Approval and Routing Procedures for General Department Policies/Procedures (D-P's) and Department Work Procedures (D-W)

5.0 DEFINITIONS:

5.1 Transit Facilities. Transit Facilities include the downtown Seattle transit tunnel (KCC 28.92.190), transit tunnel mezzanine areas (KCC 28.92.200) and transit tunnel platform areas (KCC 28.92.210).

5.2 Transit Vehicles. Transit Vehicles include all transit passenger buses, trolleys and street railcars.

6.0 POLICIES:

6.1 Permitted Advertising Content: The following classes of advertising are authorized on or in Transit Facilities and Transit Vehicles:

6.1.1 General Allowance for Advertising. Advertising that does not include any material that qualifies as

Prohibited Advertising under Subsection 6.2 of this Advertising Policy.

6.1.2 King County Transit Advertising. The County has the right to display advertising sponsored by the King County Transit Division to promote the King County Transit System or any of the functions or programs carried out by the Transit Division.

6.2 Prohibited Advertising Content: Advertising is prohibited on or in Transit Facilities and Transit Vehicles if it includes any of the following content:

6.2.1 Political Campaign Speech. Advertising that promotes, or opposes a political party, the election of any candidate or group of candidates for federal, state or local government offices, or initiatives, referendums or other ballot measures.

6.2.2 Prohibited Products, Services or Activities. Any advertising that (i) promotes or depicts the sale, rental, or use of, participation in, or images of the following products, services or activities; or (ii) that uses brand mimes, trademarks, slogans or other material that are

identifiable with such products, services or activities:

(a) Tobacco. Tobacco products, including but not limited to cigarettes, cigars, and smokeless (e.g., chewing) tobacco;

(b) Alcohol. Beer, wine, distilled spirits or any alcoholic beverage licensed and regulated under Washington law, however, this prohibition shall not prohibit advertising that includes the name of a restaurant that is open to minors;

(c) Firearms. Firearms, ammunition or other firearms-related products.

(d) Adult/Mature Rated Films, Television or Video Games. Adult films rated "X" or "NC-17", television rated "MA" or video games rated "A" or "M";

(e) Adult Entertainment Facilities. Adult book stores, adult video stores, nude dance clubs and other adult entertainment establishments;

(f) Other Adult Services. Adult telephone services, adult internet sites and escort services.

6.2.3 Sexual and/or Excretory Subject Matter. Any advertising that contains or involves any material that describes, depicts or represents sexual or excretory organs or activities in a way:

(a) that the average adult person, applying contemporary community standards, would find, when considered as a whole, appeals to the prurient interest of minors in sex; or

(b) which is patently offensive to contemporary standards in the adult community as a whole with respect to what is suitable material for minors to see; or

(c) that depicts, or reasonably appears to depict, a person under the age of eighteen (18) exhibiting his or her sexual or excretory organs or engaging in sexual or excretory activities.

For purposes of this subsection, "sexual or excretory organs" shall mean and include the male or female pubic area, anus, buttocks, genitalia, or any portion of the areola or nipple

of the female breast and "sexual or excretory activities" shall mean and include actual or simulated sex acts of every nature (including but not limited to touching of one's own or another's clothed or unclothed sexual or excretory organs), urination and defecation.

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.

6.2.5 Copyright, Trademark or Otherwise Unlawful. Advertising that contains any material that is an infringement of copyright, trademark or service mark, or is otherwise unlawful or illegal.

6.2.6 Illegal Activity. Any advertising that promotes any activity or product that is illegal under federal, state or local law.

6.2.7 Profanity and Violence. Advertising that contains any profane language, or portrays images or descriptions of graphic violence, including dead, mutilated or disfigured human beings or animals, the act of killing,

mutilating or disfiguring human beings or animals, or intentional infliction of pain or violent action towards or upon a person or animal.

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 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.

6.2.10 Lights, Noise and Special Effects. Flashing lights, sound makers, mirrors or other special effects that interfere with the safe operation of the bus or the safety of bus riders, drivers of other vehicles or the public at large.

6.2.11 Unsafe Transit Behavior. Any advertisement that encourages or depicts unsafe behavior with respect to transit-related activities, such as non-use of normal safety precautions in awaiting, boarding, riding upon or debarking from transit vehicles.

6.3 Additional Requirements:

6.3.1 Sponsor Attribution and Contact Information. Any advertising in which the identity of the sponsor is not readily and unambiguously identifiable must include the following phrase to identify the sponsor in clearly visible letters (no smaller than

72 point type for exteriors and 24 point type for interiors):

Paid for by _____

"Teaser ads" that do not identify the sponsor will, however, be allowed so long as a similar number of follow up advertisements are posted within eight weeks of the initial teaser ads that do identify the sponsor of those initial ads.

7.0 PROCEDURES:

Action By:	Action:
Transit Advertising Contractor	7.1 All proposed transit advertising must be submitted to the Transit Advertising Contractor for initial compliance review. The Transit Advertising Contractor will perform a preliminary evaluation of the submission to assess its compliance with this policy. If, during its preliminary review of a proposed advertisement, the Transit Advertising Contractor is unable to make a compliance determination, it will forward the submission to the Transit Advertising Program Manager for further evaluation. The Transit Advertising Contractor may at any time discuss with the entity proposing the advertisement one or more revisions to an

	advertisement, which, if undertaken, would bring the advertisement into conformity with this Advertising Policy. The Transit Advertising Contractor will immediately remove any advertisement that the Transit Division at any time directs it to remove.
Transit Advertising Program Manager	7.2 The Transit Advertising Program Manager will review the proposed advertisement for compliance with the guidelines set forth in this policy and will direct the Transit Advertising Contractor as to whether the proposed advertisement will be accepted. In the discretion of the Transit Advertising Program Manager, any proposed transit advertising may be submitted to the Transit Division General Manager for review.
Transit Division General Manager	7.3 The Transit Division General Manager shall conduct a final review of proposed advertising at the request of the Transit Advertising Program Manager. The decision of the Transit Division General Manager to approve or

	reject any proposed advertising shall be final.
Transit Advertising Program Manager and Transit Division General Manager	7.4 The Transit Advertising Program Manager or the Transit Division General Manager may consult with other appropriate County employees, including the County's legal counsel, at any time during the review process.

8.0 RESPONSIBILITIES: The Transit Advertising Program Manager and Transit Division General Manager are responsible for the implementation of this Transit Advertising Policy.