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

REPLY BRIEF FOR PETITIONERS

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I. The Circuit Split on the Forum Question Is Real.

The County's assertion that "AFDI has failed to demonstrate a split in the circuit courts on [the forum] issue," Resp. Br. 2, is incorrect.

The very case that resolved the forum question in favor of the County demonstrates Petitioners' point.[1] In *Seattle Mideast Awareness Campaign v. King County*, 781 F.3d 489, 498-99 (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 majority stated, "We recognize that other courts have held that similar transit advertising programs constitute designated public forums," acknowledging that these circuit courts have "concluded that if the government opens a forum and is willing to accept political speech, it has necessarily signaled an intent to create a designated public forum."[2] *Id. at* 498-99 (citing *N.Y. Magazine v. Metro.*

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[1] The County seeks to avoid the clear circuit conflict by incorrectly recasting the issue and claiming that there is "no 'all or nothing' conflict cases." Resp. Br. at 19-21, 24.

[2] The dissenting judge would have held that the County created a designated public forum. In her dissent, Circuit Judge Christen stated, in relevant part, "The operative inquiry in this case is not, as the majority suggests, whether Metro's policy makes its buses generally available to all advertisements, but rather whether it makes its buses generally available to noncommercial, political advertisements. . . . The majority's holding impermissibly allows the County to create a designated public forum for purposes of

Transp. Auth., 136 F.3d 123, 130 (2d Cir. 1998) and *Lebron v. Wash. Metro. Area Transit Auth.*, 749 F.2d 893, 896 (D.C. Cir. 1984)); *see also Am. Freedom Def. Initiative v. Mass. Bay Transp. Auth.*, 781 F.3d 571, 591-92 (1st Cir. 2015) (Stahl, J., dissenting) ("I am in disagreement with the *Ridley* [*v. Massachusetts Bay Transportation Authority*, 390 F.3d 65 (1st Cir. 2004)] 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. Amtrak*."). In short, there is nothing "illusory" about this conflict.

And contrary to the County's position, a court does not end its forum inquiry by simply accepting the government's self-serving statement, crafted no doubt by its lawyers, that it does not "intend" to create a public forum. *See* Resp. Br. 17-18. As the Sixth Circuit correctly noted in *United Food & Commercial Workers Union, Local 1099 v. Southwest Ohio Regional Transit Authority*, 163 F.3d 341 (6th Cir. 1998):

> Were we to hold otherwise, the government could circumvent what in practice amounts to open access simply by declaring its "intent" to

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selling ad space, and then engage in discretionary, content-driven evaluation of speech on an *ad hoc* basis by invoking its infinitely amorphous 'civility clauses.'" *Seattle Mideast Awareness Campaign*, 781 F.3d at 504-05 (Christen, J., dissenting).

> designate its property a nonpublic forum in order to enable itself to suppress disfavored speech. We therefore must closely examine whether in practice [the government agency] has consistently enforced its written policy in order to satisfy ourselves that [the agency's] stated policy represents its actual policy.

Id. at 353; *see also Air Line Pilots Ass'n, Int'l v. Dep't of Aviation,* 45 F.3d 1144, 1153 (7th Cir. 1995) ("The government's stated policy, without more, is not dispositive with respect to the government's intent in a given forum.").

Consequently, as this Court stated, a reviewing court must "look[] to the policy *and* practice of the government," as well as "the nature of the property and its compatibility with expressive activity" to resolve the forum question. *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 802 (1985) (emphasis added).

Indeed, when conducting a forum analysis, "actual practice speaks louder than words." *Grace Bible Fellowship, Inc. v. Maine Sch. Admin. Dist. No. 5,* 941 F.2d 45, 47 (1st Cir. 1991). Thus, a forum analysis "involve[s] a *careful scrutiny* of whether the government-imposed restriction on access to public property is truly part of the process of *limiting a nonpublic forum to activities compatible with the intended purpose of the property*." *United Food & Commercial Workers Union, Local 1099*, 163 F.3d at 351-52 (internal quotations and citation omitted) (emphasis added). Here, the County cannot seriously argue that its transit advertising space—property that the County *purposefully* designates for advertising (*i.e.*,

expressive activity)—is incompatible with the very activity for which it is used.

The County further contends that "[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." Resp. Br. 25. This contention is wrong for several reasons. First, it presumes the conclusion by claiming that the forum is nonpublic at its inception even though the government's *policy* and *practice* permits controversial political and public issue speech. Second, it improperly favors the government's self-serving statement of "intent" over the more important factors of "practice" and "compatibility" of the forum for the speech at issue. And finally, but most important, it ignores what the cases actually say about the issue. *See, e.g.*, *Seattle Mideast Awareness Campaign*, 781 F.3d at 498-99 (acknowledging the circuit conflict); *N.Y. Magazine*, 136 F.3d at 130 (2d Cir. 1998) (holding that the transit authority's advertising space was a public forum and concluding that "[a]llowing political speech . . . 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"); *United Food & Commercial Workers Union, Local 1099*, 163 F.3d at 355 ("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."); *Lebron*, 749 F.2d at 896 ("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.").

In sum, the Court should grant review to resolve the clear circuit conflict on this important question of First Amendment law.[3]

II. There Are No First Amendment Exceptions for Government Transit Authorities.

The First Amendment applies here in full force. There is no "government-transit-authority exception" to the First Amendment's restriction on the government's authority to censor speech, as the County suggests. *See* Resp. Br. 27 (arguing that "[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"). And this is particularly true of "speech on public issues," such as Petitioners' ad, which "occupies the

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[3] The County argues that review should be denied because this case "comes before the Court missing key issues that were decided by the District Court, but omitted from the Ninth Circuit's consideration," claiming that "[e]ven 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." Resp. Br. at 35-36. The obvious problem with this argument is that if Petitioners prevail on the forum question, then all of the content-based restrictions on Petitioners' speech must satisfy strict scrutiny, *Cornelius*, 473 U.S. at 800 (applying strict scrutiny to content-based restrictions in a public forum), a burden that the County cannot sustain. Consequently, the forum question is a controlling question in this case and thus review is most appropriate.

'highest rung of the hierarchy of First Amendment values,' and is entitled to special protection." *Connick v. Myers*, 461 U.S. 138, 145 (1983) (quoting *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982); *Carey v. Brown*, 447 U.S. 455, 467 (1980)).

To begin, the ad at issue is not a commercial advertisement. Petitioners are making a political point through their ad. They are not acting as a mouthpiece for the government. That is, this is not a "Rewards for Justice Program" ad. In short, the County's "falsity" restriction is unconstitutional as applied to Petitioners' public issue speech.[4]

Contrary to the County's suggestion, *see* Resp. Br. 27, the cases establishing this important First Amendment principle do not limit its application to

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[4] Moreover, as noted in the petition, there is nothing *materially* false about Petitioners' ad in the first instance. Pet. 22-23. Also, in its response, the County complains about Petitioners' citation "to the FBI's website for an 'official listing of the world's most wanted global terrorists,'" incorrectly claiming that "[t]he 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." Resp. Br. 10 n.5. First, the FBI's listing of the most wanted global terrorists as it appeared at or near the time when the County reviewed Petitioners' ad <u>*is*</u> contained in the record below. In fact, Petitioners even went to the trouble of printing the website pages and including them in the record. *See* 9th Cir. ER 130-75. And second, this information is relevant for several reasons. It shows that the vast majority of the most wanted global terrorists are jihadis—that is, persons who commit terrorist acts in the name of Islam. And it shows the FBI's involvement in the Rewards for Justice Program, including the fact that the FBI is offering the rewards on its website—facts the County claims were false. *See also* Pet. 22-23.

only "newspaper article[s], or . . . protest[s] in the public square," nor do they exclude "a paid ad on a transit bus system." This principle applies to all speech protected by the First Amendment, *including* the "paid ad" at issue here. As stated by Circuit Judge Bork in *Lebron v. Washington Metropolitan Area Transit Authority*—a case involving the D.C. transit authority's restriction on a paid ad that the challenger wanted to display on the transit bus system—"[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.). And the very case the County cites (*i.e.*, *New York Times*) to support its claim that generally applicable First Amendment principles should not apply here,[5] refutes the claim. As noted by this Court in *New York Times v. Sullivan*, when applying First Amendment principles, "[t]he test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised." *N.Y. Times v. Sullivan*, 376 U.S. 254, 265 (1964); *see id*. at 271 (applying the principle in a case involving the standard for asserting a defamation claim on behalf of a public figure). Indeed, *New York Times* involved the application of First Amendment principles to a *paid advertisement* that was carried by the newspaper. *Id*. at 256.

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[5] Resp. Br. 26 ("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.").

In the final analysis, it would be a significant departure from this Court's precedent to exempt government transit authorities from certain proscriptions of the First Amendment as the County suggests.

III. The County Is Mistaken; the Loss of First Amendment Freedoms *Is* Irreparable Harm as a Matter of Well-Established Law.

The County seeks to dismiss the well-established principle of law 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), by claiming that Petitioners "*fail*[*ed*] *to disclose* that only a three-justice plurality joined this statement." Resp. Br. at 32. This assertion is patently erroneous. A simple Westlaw or Lexis search reveals far too many cases to cite here that have relied upon and cited this fundamental principle of First Amendment jurisprudence in the context of a preliminary injunction analysis. The County's attempt to distinguish the numerous cases cited by Petitioners (Pet. 25-26) demonstrating the widespread application of this legal principle is unavailing. *See* Resp. Br. 32-33.

The County nonetheless seeks to distinguish these cases by concluding that this principle of law is inapplicable in "the unique context of a nonpublic forum." Resp. Br. 33. The County is mistaken.

In fact, the Ninth Circuit itself has applied this legal principle in the "unique context of a nonpublic forum." In *Brown v. California Department of Transportation*, 321 F.3d 1217, 1222-23 (9th Cir. 2003),

the Ninth Circuit preliminarily enjoined the enforcement of the Department of Transportation's policy of permitting the display of American flags, but prohibiting the display of all other banners and signs on highway overpass fences, a nonpublic forum.

In assessing the irreparable injury prong of the preliminary injunction analysis, the court stated:

> To establish irreparable injury in the First Amendment context, [the plaintiffs] need only demonstrate the existence of a colorable First Amendment claim. . . . [The plaintiffs] have not only stated a colorable First Amendment claim, but one that is likely to prevail; they have thus established the potential for irreparable injury.

Id. at 1225 (internal quotations and citation omitted).

The court further held that "the delay involved in obtaining advertising space deals the same blow as does the permit requirement. 'The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.'" *Brown*, 321 F.3d at 1226 (quoting *Elrod*, 427 U.S. at 373).

Indeed, there is no dispute that this principle applies when conducting a preliminary injunction analysis in the context of a case in which a government transit authority rejects a paid ad, the very context presented here. *See, e.g., N.Y. Magazine*, 136 F.3d at 127 ("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.") (quoting *Elrod*, 427 U.S. at 373).

In conclusion, the "context" in which this principle of law applies is the First Amendment context. The Ninth Circuit's decision on this issue is contrary to the great weight of authority, and it threatens to undermine the protections of the First Amendment by imposing an undue 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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