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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

ALAN KORWIN, et al., Plaintiffs, vs. DEBBIE COTTON, et al., Defendant.	Court of Appeals, Division One Case No. 1 CA-CV 12-0878 Maricopa County Superior Court Case No. CV2011-009838

APPELLANTS' REPLY BRIEF

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INTRODUCTION

Even after many pages of briefing, it is still difficult to tell exactly what the City's transit advertising policy is. On its face, it purports to require advertisements to "adequately" display a commercial transaction.[1] As if that is not unclear enough, in practice—and in *post hoc* rationalization—apparently the City does not permit advertisements that "blend" commercial and political messages. The problem is that the guideline itself contains no such admonition, leaving prospective speakers to guess at what advertising will be permitted or not. Even worse, the officials who administer the rules appear equally confused. Hence we have the peculiar situation in which an advertisement that everyone concedes is commercial is disallowed while others that appear to propose no commercial transaction are allowed. All of this constitutes a brazen violation of the free speech guarantees of the state and federal constitutions.

[1] In that regard, the 2011 guidelines are even worse than the 2009 standards, which provided that "advertising shall be limited to speech that proposes a commercial transaction," which could be construed as allowing *only* commercial speech. By contrast, the 2011 guidelines provide that "a commercial transaction must be proposed and must be adequately displayed on the transit advertising panel," which in the absence of further definition or criteria informs the speaker neither what constitutes an "adequate" display nor whether the proposed commercial transaction may be "blended" with non-commercial speech.

I. THE GUIDELINES DO NOT SATISFY STATE CONSTITUTIONAL STANDARDS.

A. Waiver. Appellees assert that Appellants waived their state constitutional claims by not arguing them below. That is untrue. Appellants raised causes of action under both the First Amendment and Art. II, § 6 and the First Amendment in their Amended Complaint. (I.R. 12, ¶¶ 43, 47.) Appellees acknowledged in their Motion for Summary Judgment that "Plaintiffs have made a companion claim under Arizona's Constitution," and proceeded to argue the merits. (I.R. 21 at 8.) Appellants presented both federal and state free-speech cases in both their opening summary judgment brief (I.R. 31 at 12-14) and reply brief. (I.R. 46.) Two of the cited cases, *State v. Baldwin*, 184 Ariz. 267, 908 P.2d 483 (App. 1996) and *State v. Cole*, 18 Ariz. App. 237, 501 P.2d 413 (1972), were decided under both the state and federal constitutions. Indeed, the Court in *Baldwin*, 184 Ariz. at 273, 908 P.2d at 489, observed that the Arizona Supreme Court "has indeed given broader scope to Article II, § 6 than to the First Amendment."

Accordingly, the trial court "recognize[d] that plaintiffs' challenge is brought under both the First Amendment to the United States Constitution and its analog in the Arizona Constitution"—an odd observation had Appellants waived

the argument—but concluded as a matter of law that "there is no discernable difference as applied to the facts of this case." (I.R. 61 at 1 n.2). That legal ruling is a central ground for appeal (Appellants' Opening Br. at 4-5 and 9-10).

In any event, "it is clear that [appellate courts] may consider . . . arguments not presented below." *City of Tucson v. Clear Channel Outdoor, Inc.*, 209 Ariz. 544, 552 n.9, 105 P.3d 1163, 1171 n.9 (2005). Exercising the discretion to do so is "merely [one] of procedure, and not a matter of jurisdiction." *Rubens v. Costello*, 75 Ariz. 5, 8, 251 P.2d 306, 308 (1952). An issue is appropriate for consideration for the first time on appeal "particularly if the issues do not turn on disputed evidence and do not require the court to determine additional facts." *Resolution Trust v. Foust*, 177 Ariz. 507, 519, 869 P.2d 183, 195 (1993). Here, of course, the case was decided on cross-motions for summary judgment, and it is simply a matter of applying Arizona law to the same set of facts. Indeed, Appellees have fully argued the issues in their brief.

Appellate courts have decided issues presented for the first time on appeal in a wide variety of contexts, several of which are applicable here: issues of statewide importance, *City of Tucson*, 209 Ariz. At 552 n.9, 105 P.3d at 1171; constitutional issues, *Barrio v. San Manuel Div. Hosp. for Magma Copper Co.*, 143 Ariz. 101, 692 P.2d 280 (1984); clear wrongs that must be addressed,

Bohunus v. Amerco, 124 Ariz. 88, 90, 602 P.2d 469, 471 (1979); issues that were not specifically addressed below but are decisive of the case and involve no new facts, *Regan v. First Nat'l Bank*, 55 Ariz. 320, 327-28, 101 P.2d 214, 218 (1940); and situations where the public interest is better served by resolving all issues at once. *Dombey v. Phx. Newspapers, Inc.*, 150 Ariz. 476, 482, 724 P.2d 562, 568 (1986).

Although the parties agree on the federal constitutional standard that applies to vagueness and excessive discretion challenges under the First Amendment, they disagree strongly over the standards that apply to content-based speech restraints under the Arizona Constitution. That is a constitutional issue of great statewide importance, and is crucial to the determination of this case. The issue is fully joined and the Court should consider it.

B. Applicable constitutional standard. Appellees insist that the state constitutional standard applicable here should be construed in lockstep with the federal constitutional analysis. That simply is not true. Our Supreme Court has admonished, "We first consult our Constitution. Consequently, we apply here the broader freedom of speech clause of the Arizona Constitution." *Mtn. States Tel. & Tel. Co. v. Ariz. Corp. Comm'n*, 160 Ariz. 350, 356, 773 P.2d 455, 461 (1989).

In particular, "Because Arizona's speech provision safeguards the right to

speak freely on all topics, our test must more closely scrutinize laws that single out speech for regulation based on its disfavored content." *State v. Stummer*, 219 Ariz. 137, 142, 194 P.3d 1043, 1048 (2008). That, of course, describes the case here: the challenged guidelines, on their face, discriminate against noncommercial speech[2]; and the City's application of the guidelines discriminates against political speech. Such content-based regulations go to the core of Arizona's free-speech guarantee and should trigger increased judicial scrutiny regardless of the forum in which the discrimination takes place.[3]

The Court in *Stummer*, *id.*, declined to adopt the federal test, and instead held that the "appropriate test for measuring the constitutionality of content-based secondary effects must vindicate the constitutional right to free speech, yet accommodate the government's interest in protecting the public health, safety, and welfare." Such intermediate scrutiny, the Court held, "has two phases": (1) "the State must demonstrate that a content-based regulation is directed at ameliorating secondary effects" and (2) "the State must show that, in addressing the secondary

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[2] "The Arizona courts have yet to determine whether their state constitution's free speech provision allows a distinction between commercial and noncommercial speech." *Outdoor Syst., Inc. v. City of Mesa*, 997 F.2d 604, 614 (9th Cir. 1993).

[3] The only state decision holding that the federal forum analysis applies under the Arizona free-speech clause was vacated on other grounds. *Bennett v. Brownlow*, 208 Ariz. 79, 83 n.1, 90 P.3d 1245, 1249 n.1 (App. 2004), *vacated on other grounds*, 211 Ariz. 193 (2005) (en banc).

effects, the regulation does not sweep too broadly." *Id.*

Although this is not technically a secondary effects case, the *Stummer* test should apply because, in essence, the City's content-based regulations are justified in terms of the effects of the prohibited speech on the City's asserts interests. Such an approach makes sense "given Arizona's constitutional protections," which direct that "when dealing with regulations that affect speech," the government "must regulate with narrow specificity so as to affect as little as possible the ability of the sender and receiver to communicate." *Mtn. States*, 160 Ariz. at 358, 773 P.2d at 463.[4]

The City (Br. at 4) lists three purposes for the transit advertising standards: "to maximize revenue and avoid intricate issues of fair balance and equal time by" (1) "avoiding the appearance that the City is favoring or disfavoring any particular candidate, political view, or side in a debate over contentious issues of the day" and (2) "avoiding the appearance that the City, advertisers or the forum (bus or shelter) is associated with any particular social cause, political cause, or viewpoint"; and (3) "[r]educing the risk of vandalism and/or potential injury to the

[4] Although the question of whether to adopt the federal forum analysis is unsettled under Arizona constitutional law, we refer the Court to proposed *amicus*' excellent analysis of law from other states that have similar free-speech protections and that have adopted more-stringent free-speech protections in similar contexts. See Br. of American Civil Liberties Union of Arizona at 13-22.

users of the system as commercial speech does not arouse in people the same level of sentiment, emotion and spontaneous reaction as do political or social issues."

The City's interest in raising revenue, which is the basis for the first two of its three asserted purposes, does not rise to the level of important government interests—such as reducing crime, protecting children, or protecting other constitutional rights—that may give rise to restrictions on speech under the Arizona Constitution. *Stummer*, 219 Ariz. at 144, 194 P.3d at 1050. The City's asserted interest in preventing vandalism and injury is certainly weightier. But the connection between such goals and a line of demarcation between commercial and noncommercial speech is so attenuated as to easily flunk the second *Stummer* requirement. Cf. *Nat'l Abortion Fed. v. Metro. Atlanta Rapid Transit Auth.*, 112 F. Supp.2d 1320, 1327 (N.D. Ga. 2000) (fear of violence as a basis for speech suppression must be supported by evidence).

Indeed, the guidelines on their face are both overinclusive and underinclusive in addressing the asserted objectives. Presumably, an advertisement for condoms that proclaims "Safe Sex" would constitute a permissible commercial advertisement. Would that not wade into the "contentious issues of the day"? At the same time, an advertisement urging young people to "Practice Abstinence" would not be permissible because it is not a commercial

advertisement. The assertion that "Guns Save Lives"—which the City approved in an alternate version of the advertisement contested here—certainly might "arouse in people the same level of sentiment, emotion and spontaneous reaction as do political or social issues," but apparently it is permissible if, in the City's judgment, it is part of an advertisement that "adequately displays" a proposed commercial transaction. In other words, commercial advertisements can be as provocative as the speaker wishes, but a social or political cause is forbidden no matter how mild the message. On the face of the guidelines, public service announcements, regardless of how noncontroversial their content, are forbidden (even though we know that they are sometimes allowed) because they are not commercial in nature.

The City could avoid the appearance of sponsorship by requiring disclaimers that disassociate the City from the speech. (Obviously, the speakers wish to associate themselves with the message, whether commercial or noncommercial, so the second objective is to that extent nonsensical.) Or it could articulate far more-precise guidelines. Either of those would be more narrowly tailored than the current standards on their face, and certainly more so than the standards as applied. Given that under *Stummer* the City has the burden of proving the connection between the City's asserted interests and its content-based

speech regulations, and the record contains no such evidence, the Court should direct judgment in favor of Appellants. At the very least, because the lower court applied the wrong constitutional standard under Art. II, § 6, the Court should remand for trial on this issue.

II. THE GUIDELINES VIOLATE THE FIRST AMENDMENT BECAUSE THEY ARE VAGUE, THEY VEST EXCESSIVE DISCRETION IN GOVERNMENT OFFICIALS, AND THEY ARE INCONSISTENTLY APPLIED.

As described earlier, there is considerable tension within the City's positions: (1) it continues to insist (Br. at 3-4) that the 2011 guidelines are limited to "commercial only advertising"; (2) the guidelines on their face require only that a "commercial transaction must be proposed and must be adequately displayed on the transit advertising panel"; and (3) the City justifies its censorship of Appellants' proposed advertisement, as compared to other ads that do not appear to be commercial in nature, on the grounds that it impermissibly blends commercial with noncommercial speech. At the same time, policing advertisements to determine whether they "adequately display" a proposed commercial transaction vests excessive discretion in City officials.

Appellees suggest that because Appellants are not subject to criminal punishment or penalty, the vagueness inquiry should be relaxed. That is

emphatically not the case in the context of freedom of speech. The U.S. Supreme Court has recognized that one of the "'important values'" the void-for-vagueness doctrine serves is the "exercise of free speech, a 'delicate and vulnerable' right." *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972) (citation omitted). Indeed, "perhaps the most important factor that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights. If, for example, the law interferes with the right of free speech or of association, a more stringent vagueness test should apply." *Hoffman Estates v. Flipside*, 455 U.S. 489, 499 (1982); accord, *Bullfrog Films, Inc. v. Wick*, 847 F.2d 502, 512 (9th Cir. 1988) ("where the guarantees of the First Amendment are at stake the Court applies its vagueness standard strictly").

It is vitally important at the outset to recognize that the constitutional prohibitions against vague standards, excessive discretion, and inconsistent application all operate *regardless* of the nature of the forum.[5] Indeed, one of the cases relied upon most heavily by Appellees illustrates that point. In *Am. Freedom Def. Init. v. Suburban Mobility Auth. for Regional Transp.* (SMART), 698 F.3d

[5] We reserve until a later day and to the appropriate judicial forum the argument that the U.S. Supreme Court accords insufficient First Amendment protection to so-called nonpublic forums that it has opened up to speech by outside parties, except to urge this Court not to adopt that reasoning in the context of the broader free-speech protections of the Arizona Constitution.

885, 892 (6th Cir. 2012), the agency maintained a policy categorically prohibiting political advertising.[6] The court held that one or more instances of erratic enforcement of the policy does not defeat the agency's intent to create a non-public forum. *Id.* at 892. However, the court went on to make clear that even in a non-public forum, the standards set forth in *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-51 (1969), apply. Those standards require "precise and objective criteria" upon which officials must make decisions, without giving officials excessive discretion, and allowing persons of ordinary intelligence to readily identify the applicable standard for inclusion or exclusion. *Am. Freedom*, 683 F.3d at 893 (citations omitted). A categorical prohibition against political advertising, the court held, "do[es] not appear to have vested unbridled discretion in the manner contemplated by *Shuttlesworth*," and "there is no question that a person of ordinary intelligence can identify what is or is not political." *Id.*

The court contrasted its earlier decision in *United Food & Comm. Workers Union v. SW Ohio Reg'l Transit Auth.*, 163 F.3d 341 (6th Cir. 1998), in which the court struck down a prohibition against advertisements addressing "controversial public issues." Because the court's analysis is so probative, we quote it at length:

> We found unbridled discretion had been vested in the decisionmakers

[6] The policy also prohibited ads that were likely to hold a group of persons up to scorn or ridicule, but the decision was based on the ban on political ads.

> because there was no articulated definitive standard to determine what was "controversial." This discretion allowed for the arbitrary rejection of advertisements based on viewpoint. By contrast, SMART's policy did not vest similar wide-ranging authority in its employees. By adopting a blanket prohibition on political advertisements, SMART avoided the pitfalls of employee discretion presented by the policy in *United Food*. A SMART employee must determine whether or not something is political—a reasonably objective exercise. In the *United Food* situation, however, the employee would have to determine where—on a hypothetical spectrum of controversy—an advertisement fell. The determination in *United Food* inherently would require a more subjective evaluation than the decision required under SMART's policies.

Id. at 894.

That reasoning makes abundant sense, and clearly the policy here falls on the *United Food* side of the equation. Phoenix officials first not only have to determine whether an advertisement is commercial in nature—which apparently they have great difficulty doing—but then also have to decide whether the proposed commercial transaction is "adequately displayed." No definition is given to that term. Does it mean that the advertisement itself must be clearly commercial in nature? If so, then several examples of approved advertisements would flunk that test. Does it mean that the commercial proposition may not be blended with noncommercial messages? Again, several examples of approved advertisements would flunk the test. Does it refer to some sort of typeface, or portion of the advertisement, or magic words? Plainly, the City officials do not know; and if

they do not know, a person of reasonably intelligence cannot know. Such a standard is inherently subjective and therefore confers excessive authority to the decisionmakers. By choosing *not* to categorically prohibit political speech, or even noncommercial speech, and instead embracing a nebulous and undefined standard, the City plunged into unconstitutional subjectivity.[7]

Widespread usage of a term does not determine whether it meets the constitutional test. We all know what the word "controversial" means, just as we all know what the word "adequate" means.[8] Rather, the relevant considerations are whether the term is objective or subjective; if it is subjective, whether it is defined or undefined; and whether it tethers government discretion or leaves it open-ended. Standardless criteria that confer unbridled discretion upon government officials to approve or disapprove speech are *per se* unconstitutional.

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[7] The court in *Am. Freedom, id.*, also noted that "[t]o substantiate our understanding of the apparent message of the advertisement, we may look beyond the four corners to websites that the advertisement incorporates by website." Here, the City investigated to determine the nature of a "Free Pregnancy Test" advertisement (I.R. 46 at 3), but rejected Appellants' advertisement even after it determined that it was commercial in nature, as it would also have discovered had it examined the website listed on the advertisement.

[8] Quite remarkably, Appellees assert (Br. at 42) that "we can all agree that what is or is not 'controversial' is neither commonly used nor understood. Controversy is in the eye of the beholder and it invites unfettered discretion, which is not true of the City's standards." It would be impossible to turn on the television and avoid the term "controversial." The terms "controversial" and "adequate" are both commonly used and understood—and both are devoid of any objective boundary.

As the U.S. Supreme Court has proclaimed, "the mere existence of the licensor's unfettered discretion, coupled with the power of prior restraint, intimidates parties into censoring their own speech. . . . 'It is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion'." *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 753 (1988). Hence, "the more subjective the standard used . . ., the more likely that the category will not meet the requirements of the first amendment; for, when guided only by subjective, amorphous standards, government officials retain the unbridled discretion over expression that is condemned by the first amendment." *Cinevision Corp. v. City of Burbank*, 745 F.2d 560, 575 (9th Cir. 1984).

Applying those principles, courts repeatedly have struck down subjective standards for the exercise of speech. See, e.g., *Ariz. Life Coalition v. Stanton*, 515 F.3d 956, 972 (9th Cir. 2008) (invalidating regulation of "controversial" license plates); *Hopper v. City of Pasco*, 241 F.3d 1067, 1082 (9th Cir. 2001) (disapproving prohibition against display of "controversial" works); *Lewis v. Wilson*, 253 F.3d 1077, 1080 (8th Cir. 2001) (invalidating discretion to disapprove license plates that are "contrary to public policy"); *United Foods, supra* (striking down ban on "controversial" ads); *AIDS Action Comm. of Mass., Inc. v. Mass. Bay*

Transp. Auth., 42 F.3d 1, 12 (invalidating prohibition of ads "pertaining to sexual conduct"); *Nat'l Abortion Fed.*, 112 F. Supp.2d at 1327-28 (finding impermissibly vague transit advertising standards forbidding matters involving "public controversy" and definitions including such terms as "reasonably appears").

Nor will the City's after-the-fact explanations of what the policy really means suffice to rescue a facially invalid standard. The "doctrine forbidding unbridled discretion . . . requires that the limits the city claims are implicit in its law be made explicit by textual incorporation, binding judicial or administrative construction, or well-established practice. . . . The Court will not write nonbinding limits into a silent state statute." *City of Lakewood*, 486 U.S. at 770.

Here, we have not only a subjective standard on the face of the guidelines, but also numerous instances of uneven application of the statutes and abundant evidence that the officials invested with enforcement authority are confused by the standard. See, e.g., *AIDS Action*, 42 F.3d at 12 ("the opportunities for discrimination created by this Policy have been borne out in practice"). Throughout this litigation, the City has offered a dizzying array of explanations about what the guidelines allow and don't allow. (Op. Br. at 18-20.) The City officials in charge of enforcing the standards repeatedly could not determine whether advertisements that they either had or had not approved were compliant or

non-compliant. (I.R. 34, Exh. Q (Camacho Depo.) at 107-08 & 126-60.)

The post-hoc rationalizations for ads that were approved, disapproved, or modified do not add clarity (nor even if they did could they salvage an unconstitutionally vague standard, see *City of Lakewood*, 486 U.S. at 770 ("The Court will not write nonbinding limits into a silent state statute")). We learn from the City (Br. at 49) in the context of the "Jesus Heals" ad that "[n]ot every single word or phrase by itself need independently propose a commercial transaction, but the words and graphics must all support the proposed commercial transaction." So much for an ad being "limited" to a commercial transaction. The City notes (Br. at 11) that the official reason given for turning down Appellants' ad was "there was no evidence of a product or service for commercial exchange and that there was other information or other elements in the ad that made it noncommercial." So too with the Jesus Heals ad, in which the vast majority of the ad was comprised of that text and two band-aids in the shape of a cross. Similarly, Appellants' ad was comprised of a large text message, a graphic, and a website. From the disparate treatment accorded those two advertisements, what can we infer about the meaning of a commercial advertisement being "adequately displayed"?

Likewise, the City concludes that the advertisement offering a free pregnancy test, without including the name of the doctor or any other details, "was

just the attraction to get them to see the doctor." (*Id.* at 50.) And yet so was the "Guns Save Lives" ad intended as an attraction to induce people to visit a commercial website. (Op. Br. at 22.) The proposed commercial transaction in the SRP water conservation ads, the City says, was "using a nozzle to reduce water usage." (Br. at 51.) Would a person of ordinary intelligence viewing an ad suggesting that consumers use *less* of a product think it proposed a commercial transaction? Or would they think it was a public service advertisement, which would not seem to fall within the scope of a commercial-only policy? The same goes for the SRP reforestation ads (*id.* at 50-51), as well as the Veterans Administration advertisements. (*Id.* at 51-52.)[9]

We learn further (*id.* at 52) that the "City looks at all words (including the font, location, and placement of words), graphics for each advertisement, and the nature of the business being advertised." What does it look for in all of those features? We are left to guess. Moreover, "[a]n advertisement need not contain the words of an actual offer to be compliant with the City's standards." (*Id.*) In other words, in order that a "commercial transaction must be proposed and must be adequately displayed," it is not necessary to actually propose a commercial

[9] All of these post-hoc rationalizations fly in the face of the City's assertion elsewhere in its brief (at 33) that it has a policy of "limiting advertisements to pure commercial advertisements."

transaction.

It is tempting to speculate that the City merely erred in articulating a policy of limiting advertisements to commercial propositions when it reality it intended merely to ban political advertising. Indeed, the City repeatedly distinguishes Appellants' proposed ad from other ads on that basis. (See, e.g., Br. at 32 ("The company's ad was unlike any other[s]" . . . because it combined "substantial political rhetoric as part of an ostensible commercial advertisement.")) But in reality, when the Court examines the various advertisements that were rejected and replaced by alternatives, it is clear that the confusion runs far more deeply than that, with ads that contain no political "rhetoric" being disapproved and ads containing no apparent commercial transaction being approved. The vagueness inherent in the 2011 guidelines is amplified by the City's haphazard enforcement. It is literally impossible for a person of ordinary intelligence to determine with any degree of assurance whether a particular advertisement will be accepted or rejected. Even the advertising agency, which approved Appellants' ad, can't tell for sure. The decision in each instance depends upon the subjective determinations of a "collaborative effort" of City officials, uncontrolled by the "precise and objective criteria" the First Amendment requires. On their face and as applied, the 2011 guidelines are unconstitutional.

For all of the foregoing reasons, this case should be remanded with instructions to enter summary judgment for Appellants.

DATED: May 21, 2013

Respectfully submitted,

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