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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' OPENING BRIEF

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Statement of the Case

This lawsuit is a facial and as-applied constitutional challenge to the City of Phoenix's transit advertising standards that were applied by the City to force the removal of advertisements for which the Appellants had contracted. The original Complaint, seeking injunctive and declaratory relief, was filed in Maricopa County Superior Court on May 11, 2011 (Index of Record ("I.R.") 1). An Amended Complaint, reflecting a change in the advertising standards, was filed on July 21, 2011 (I.R. 12). Following extensive discovery, both parties filed Motions for Summary Judgment. After oral argument, the court granted Defendants' motion and denied Plaintiffs' motion in a minute entry dated October 11, 2012 (I.R. 61), and final judgment was entered on November 16, 2012 (I.R. 64).

This timely appeal followed. The Court has jurisdiction over this appeal pursuant to A.R.S. § 12-2101(B). Appellants request attorney fees and costs for this appeal pursuant to A.R.S. §§ 12-341 and 12-348, the private attorney general doctrine, and 42 U.S.C. § 1988.

Statement of Facts

In December 2009, the City adopted what was then the latest in a series of "transit advertising standards" for public buses, transit shelters, and benches (App. 3), which provided in relevant part, "The subject matter of the transit bus, shelter,

and bench advertising shall be limited to speech which proposes a commercial transaction" (I.R. 33, ¶ 13). In turn, the City leases the shelter and bench spaces to CBS Outdoor ("CBS"), which contracts for advertising, reviews the ads for compliance, and posts advertisements without first having to secure City approval (I.R. 22, ¶¶ 4, 13-15; I.R. 33, ¶¶ 6, 12, 31, 35).

Appellant Alan Korwin is manager of TrainMeAZ, LLC, a for-profit Arizona limited liability corporation whose goal is to sell gun-safety and marksmanship training and advertise shooting ranges (I.R. 33, ¶¶ 1-3). To attract customers, Appellants designed an advertisement (App. 1) containing a red heart with the words "GUNS SAVE LIVES," smaller text on both sides of the heart, and larger language on the bottom that says, "ARIZONA SAYS: EDUCATE YOUR KIDS TrainMeAZ.com" (I.R. 33, ¶ 39). Among other things, the smaller text lists various gun ranges and facilities and urges readers to "Go to TrainMeAZ.com" to "learn how you can participate and improve your skills" (*id*., ¶ 40).

On October 5, 2010, Appellants and CBS entered into a contract for ads at approximately 50 transit stops. CBS reviewed and approved the ads and posted them (I.R. 22, ¶¶ 14-16, 27; I.R. 33, ¶ 38). Within days after the ads appeared, the City ordered CBS to take them down (I.R. 33, ¶ 41). The City deemed the ad to be noncompliant with its standards because in its view (1) the ad did "not propose a

commercial transaction," (2) it contained "no evidence of a product or service for commercial exchange," (3) the "exchange" or "service" was not evident, (4) there were "noncommercial elements added to the advertisement," (5) the "small print language was viewed as not proposing or enhancing a commercial transaction, but rather covering many unrelated topics and issues," and (6) it "read like a public service announcement" (I.R. 22, ¶¶ 31, 35; I.R. 33, ¶ 42).

The City approved an alternative to Appellants' original ad (App. 2), but ironically it eliminated both the express language in Appellants' original ad that directs readers to visit TrainMeAZ.com to obtain firearms training (I.R. 33, ¶ 48) and the proposed commercial transaction to sell marksmanship training and gun-safety classes (*id.* at ¶¶ 46-50). Appellants could not accept the City's alternative because of its emphasis on the message "to educate kids that guns save lives" rather than promoting Appellants' services (*id.* at 48-50).

In 2011, the City changed the standards to "guidelines," eliminated the "limited to speech which proposes a commercial transaction" language, and replaced it with a requirement that a "commercial transaction must be proposed and must be adequately displayed" (App. 4).[1] The 2011 guidelines do not define

[1] The trial court opinion mistakenly refers to the 2011 guidelines as the "March 8, 2009 standards" (I.R. 61 at 2). For clarity, we will refer to the two policies as the "2009 standards" and the "2011 guidelines."

the term "adequately displayed." The City acknowledges that Appellants' advertisement would not satisfy the 2011 guidelines.

In its cursory analysis of the legal arguments and extensive evidence, the trial court applied *Children of the Rosary v. City of Phoenix*, 154 F.3d 972 (9th Cir. 1998) to sustain the policy (I.R. 61 at 2). The "Free Speech clauses do not require a standard that would produce a clear-cut answer for every advertisement that a creative prospective advertiser can come up with" (*id.*). The logical consequence of Plaintiffs' arguments, the court went on, would be that "Phoenix could only adopt one of two policies: (a) anyone could advertise anything; or (b) no one can advertise anything" (*id.*). The court also concluded that Plaintiffs "have failed to come forward with sufficient facts to create a triable issue regarding plaintiffs' claim that Phoenix is arbitrarily applying its rules" (*id.*).

Statement of Issues Presented and Standard of Review

1. Do transit advertising standards that place unbounded discretion in the hands of government officials to determine whether a commercial advertisement is proposed and adequately displayed on their face violate Appellants' rights under the United States and Arizona Constitutions? U.S. Const. amends. I, XIV; Ariz. Const. Art. II, §§ 4, 6, 13 (App. 5).

2. Do transit advertising standards that were applied in a subjective,

arbitrary, and discriminatory manner to remove Appellants' commercial advertisements violate Appellants' rights under the United States and Arizona Constitutions? U.S. Const. amends. I, XIV; Ariz. Const. Art. II, §§ 4, 6, 13 (App. 5).

Standard of Review. The standard of review is the same for both questions. Arizona courts review summary judgment decisions *de novo* "to determine whether any genuine issues of material fact exist and whether the trial court correctly applied the law." *Urias v. PCS Health Systems, Inc.*, 211 Ariz. 81, 85, 118 P.3d 29, 33 (App. 2005). The courts "view the evidence in the light most favorable to the party against whom judgment was entered." *Bentivegna v. Powers Steel & Wire Products, Inc.*, 206 Ariz. 581, 584, 81 P.3d 1040, 1043 (App. 2003).

Argument

I. *CHILDREN OF THE ROSARY* DOES NOT CONTROL.

Although the trial court was correct to begin its analysis with the Ninth Circuit's decision 15 years ago in *Children of the Rosary*, it erred badly by ending its inquiry there as well.

In that case, the court had before it, on a motion for preliminary injunction, Phoenix's 1996 transit advertising standards, which limited the subject matter to

"speech which proposes a commercial transaction." Children of the Rosary proposed an advertisement with a logo of a fetus surrounded by a rosary. The City refused to display it because it did not propose a commercial transaction. Thereupon the organization revised the ad to include a Biblical verse and added the words "Purchase this message as a bumpersticker for your vehicle," along with its phone number. The City rejected the ad because its "primary purpose" was not a commercial message. Subsequently, the American Civil Liberties Union submitted an ad saying "The ACLU Supports Free Speech for Everyone," and "To purchase this bumper sticker please call [phone number]." The City also rejected that ad. *Id.*, 154 F.3d at 975.

In a 2-1 decision, the court concluded that bus and transit shelter advertising is a nonpublic forum, in which the government has the right to make "reasonable" distinctions on the basis of subject matter and speaker identity, so long as the distinctions are not based on a speaker's viewpoint. *Id.* at 978-80. The court accepted three City justifications for limiting advertisements to noncommercial speech: (1) maintaining a position of neutrality on political and religious issues, (2) a fear that buses and passengers could be subject to violence without such restrictions, and (3) preventing a reduction in income because advertisers might be discouraged from sharing space with political or religious messages. *Id.* at 979.

The court observed that since the standards were adopted, "the city has not accepted new noncommercial advertisements," *id.* at 980, hence there was no discrimination. "In this case, the advertisements are not 'expression[s] related solely to the economic interests of the speaker and its audience,' . . . but instead seek to blur the distinction between types of speech by blending an 'ideological communication' . . . with an offer to purchase the message." *Id.* at 982 (citations omitted). Finally, the court rejected the argument, which was made "with little elaboration," that the standard was unconstitutionally vague, holding that the meaning of "propos[ing] a commercial transaction" is well-defined in case-law. *Id.* at 982-83 (citations omitted).

Judge Noonan dissented. "It is something of an anomaly in First Amendment jurisprudence for more protection to be accorded commercial speech than is accorded noncommercial speech," which "'inverts' the normal rule" that political speech is entitled to the greatest judicial protection, he observed. *Id.* at 984 (Noonan, J., dissenting)(citation omitted). Nonetheless, he acknowledged that the government may distinguish between commercial and noncommercial speech as a proprietor in a nonpublic forum. *Id.* at 983. The problem, he observed, was that the speech at issue *did* propose a commercial transaction, which is all that the City's standards required. "It may be, as the majority suggests, that the ordinance

would be porous if the sale of bumperstickers is not barred; but that suggestion only shows the deficiency of the ordinance as applied and the difficulty of governmental restraint of speech." *Id.* at 984. By contrast, he warned, departing from a bright-line standard inevitably plunges the government into subjective, arbitrary, and discriminatory decisionmaking. *Id.* at 984-85. "What the city may not do is discriminate as to viewpoint . . . as it did in this case where in the course of applying its ordinance it effectively rewrote it to permit only 'primarily commercial' messages." *Id.* at 985 (citation omitted). He concluded, "The Phoenix ordinance, as applied, discriminates against the appellants' commercial speech and . . . fails to mark off a realm of realm of ideology-free speech from a realm where ideologues with businesses to advertise can flourish." *Id.* The absence of such precision, Judge Noonan concluded, justified the injunction.

As we will show, the majority's opinion in *Children of the Rosary* has not held up well to the test of time, while Judge Noonan's warnings have proved all-too accurate as the City has wielded what it perceives to be an open-ended license to pick and choose among advertisements based not on any clear or coherent standard but on whim.

Children of the Rosary does not control the outcome here for multiple reasons. First, Arizona courts are not bound by Ninth Circuit interpretations of

federal constitutional law. See, e.g., *Weatherford v. State*, 206 Ariz. 529, 532-33, 81 P.3d 320, 323-24 (2003); *State v. Montano*, 206 Ariz. 296, 297 n.1, 77 P.3d 1246, 1247 n.1 (2003) (and cited cases). This Court may well agree with Judge Noonan that while a requirement that advertisements must propose a commercial transaction is permissible on its face, the City's application of that standard to assess on a case-by-case basis whether the commercial transaction is the "primary" purpose of the ad plunges it into a constitutionally intolerable labyrinth of vagueness and subjectivity.[2]

Second, the Arizona Constitution accords greater protection to free speech than does the First Amendment. See, e.g., *Coleman v. City of Mesa*, 230 Ariz. 352, ¶ 36 n.9, 284 P.3d 863, 872 n.9 (2012); *State v. Stummer*, 219 Ariz. 137, 143, 194 P.3d 1043, 1049 (2008); *Mtn. States Tel. & Tel. Co. v. Ariz. Corp. Comm'n*, 160 Ariz. 350, 354-55, 773 P.2d 455, 459-60 (1989). Art. II, § 6 provides, "Every person may freely speak, write, and publish on all subjects, being responsible for the abuse of that right." Instead of merely protecting against laws that "abridge" the freedom of speech, as does the First Amendment, our Constitution affirmatively protects the right to publish *on all subjects*. Moreover, it appears to

[2] Indeed, subsequent Ninth Circuit case-law establishes significant qualifications on the rule enunciated in *Children of the Rosary* (see Part II-A, *infra*).

proscribe precisely the type of censorial prior restraint reflected by the City's policy of subjecting proposed advertising to a highly discretionary approval process to determine whether the intent and contents pass muster. As the Arizona Supreme Court declared in the context of adult bookstores, "We decline to strictly apply the federal test because it is inconsistent with the broad protection of speech afforded by the Arizona Constitution. 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." *Stummer*, 219 Ariz. at 144, 194 P.3d at 1050. That, of course, is exactly what the transit advertising standards do: they discriminate against certain categories of speech based on content.

The plain language of our Constitution establishes a presumption in favor of allowing publication rather than allowing the government to screen and prohibit it in advance. Indeed, on its face, Art. II, § 6 would appear to not tolerate distinctions among the types of speech that have been sustained in the First Amendment context. Appellants' state constitutional claim therefore further distinguishes it from the challenge in *Children of the Rosary*.

The third reason why *Children of the Rosary* does not control is that the City's standards have changed. No longer is proposing a commercial transaction

the standards' facial touchstone. The 2011 guidelines (App. 4) now say that a commercial transaction must be "adequately displayed." While the definition of commercial speech is well-defined in the law, what is "adequately" displayed—left undefined in the guidelines—lies entirely in the eye of the beholder.

Finally, since *Children of the Rosary*, we have 15 years of experience with the City's implementation of the transit advertising standards, and it isn't pretty. The City has taken an ostensibly objective standard, changed it into a facially subjective standard, and implemented it in a manner that can charitably be characterized as "We sort-of know it when we see it." Even under the highly deferential Ninth Circuit ruling, that simply will not do.

II. THE CITY'S TRANSIT ADVERTISING STANDARDS, ON THEIR FACE AND AS APPLIED, VIOLATE APPELLANTS' CONSTITUTIONAL RIGHTS.

A. Applicable constitutional standards. The rules applicable to a limited public forum emanate from a plurality opinion in *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974), in which the Court upheld a ban on political ads in buses, where the government was engaged in a proprietary function and the viewers are supposedly captive. The "limited public forum" is a subset of a "designated public forum," where the government has intentionally opened a forum to certain groups or topics. Still, the restrictions must be reasonable and not

viewpoint-based. See, e.g., *Ariz. Life Coalition, Inc. v. Stanton*, 515 F.3d 956, 968 (9th Cir. 2008) (holding that the government cannot ban "Choose Life" license plates).

The government by its choices and actions can fumble away the greater deference it receives for regulation of speech in limited public forums. First, the standards themselves must be "unambiguous and definite." *Hopper v. City of Pasco*, 241 F.3d 1067, 1077 (9th Cir. 2001); accord, *State v. Cole*, 18 Ariz. App. 237, 238, 501 P.2d 413, 414 (1972). Moreover, "consistency in application is the hallmark of any policy designed to preserve the non-public status of a forum." *Hopper*, 241 F.3d at 1076. A policy regarding nonpublic forums will trigger heightened scrutiny "if, in practice, it is not enforced or if exceptions are haphazardly permitted." *Id.* Hence, the Court's inquiry here should be directed first to whether the standards are vague and then to whether they are consistently enforced.

Laws are unconstitutionally vague if they delegate policy decisions to public officials on an ad hoc and subjective basis, which can inhibit First Amendment freedoms. See *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972); accord *Craft v. Nat'l Park Serv.*, 34 F.3d 918, 922 (9th Cir. 1994) (holding that "a more stringent vagueness test applies" if First Amendment rights are

threatened). The parties appear to agree on the constitutional standard by which the City's transit standards must be assessed (I.R. 35 at 4). As the U.S. Supreme Court held in *Hill v. Colorado*, 530 U.S. 703, 732 (2000), a law "can be impermissibly vague for either of two independent reasons. First if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits. Second, if it authorizes or even encourages arbitrary and discriminatory enforcement."

A classic example of a policy that was vague on its face and inconsistently applied was presented in *AIDS Action Comm. v. Mass. Bay Transit Auth.*, 42 F.3d 1 (1st Cir. 1994). There the transit authority forbade ads "pertaining to sexual conduct," which the court found was "almost impossible to understand," thus creating opportunities for discrimination that were "borne out in practice." *Id.* at 12. For instance, while the plaintiff's public-service ads were rejected, advertisements of the provocative movie classic *Fatal Instinct* were permitted. The court emphasized that the transit authority was permitted to ban certain speech, but only pursuant to "a rational and neutral policy, implemented in a non-discriminatory fashion." *Id.* at 13.

Similarly here, Phoenix employs a highly subjective policy that gives government officials broad and unguided discretion over which ads to accept,

reject, or rewrite. It implements the policy in a haphazard and arbitrary fashion. Viewing the standards and the way the City implements them, a person of reasonable intelligence could not determine with reasonable certainty whether a particular ad will satisfy the standards or the officials who interpret them. Indeed, here even the officials charged with that responsibility cannot easily determine whether a particular ad satisfies the standards. As a result the standards on their face and as applied violate Appellants' constitutional rights.

B. The standards on their face. The 2009 standards (App. 3) provided that transit advertising "shall be limited to speech which proposes a commercial transaction." As far as that language goes, Appellants do not challenge the "commercial transaction" portion of the standard. However, it is unclear from the face of the standard what "limited to" means. Does it mean advertising may *only* propose a commercial transaction and nothing else? Or does it mean that advertising is permissible so long as it promotes a commercial transaction?

The Ninth Circuit seemed to give the standard the second of those two possible readings, observing that "the city is merely requiring that an advertisement convey a commercial message." *Children of the Rosary*, 154 F.3d at 981. But if that is the correct meaning, then Appellants' ad (as well as the ads proposed in *Children of the Rosary*) should have satisfied the standard, because

they clearly propose a commercial transaction. Yet they were all rejected. So it must be that the ads themselves may *only* contain language that proposes a commercial transaction. And in fact the Ninth Circuit seemed to change its mind by saying the ads were "not 'expression[s] related solely to the economic interests of the speaker and its audience.'" *Id.* at 982 (citations omitted). But as we will see below, the City approves lots of advertisements that go beyond a commercial proposition. In reality, as Judge Noonan pointed out, *id.* at 985 (Noonan, J., dissenting), the City "effectively rewrote" the standard "to permit only 'primarily commercial' messages." That unwritten but *de facto* standard ratchets up the level of subjectivity more than a tad.

This Court should revisit the Ninth Circuit's inconsistent reasoning on that score because the City adopted new guidelines in 2011 (App. 4), which are even more nebulous than the predecessor standards yet, in the City's view, no less fatal to Appellants' proposed advertisement (Hr'g Tr., Aug. 23, 2012 (App. 6) at 31: 2-11). Now, a "commercial transaction must be proposed and must be adequately displayed." (App. 4). It is not clear why the City felt the need to adopt the new language, but we suspect it resulted from the conundrum that Judge Noonan and we describe above.

But rather than escaping the conundrum, the City deepened it. The term

"adequately displayed" is nowhere defined. The guidelines do not require minimum font sizes, product information, phone number, or anything that would give meaning to what will satisfy the City's dictate. Like the "pertaining to sexual conduct" standard in *AIDS Action Comm.*, 42 F.3d at 12, and the ban on "controversial art" in *Hopper*, 241 F.3d at 1078-79, absent definition the meaning of "adequately displayed" is utterly subjective. Accord, *Lewis v. Wilson*, 253 F.3d 1077 (8th Cir. 2001) (striking down policy forbidding license plates that are "contrary to public policy" and "inflammatory").

The City says, and we do not disagree, that everyone understands what the word "adequate" means. But that is not the legal standard. Rather, the relevant constitutional inquiry is whether the term is sufficiently precise to provide notice of what is permitted and what is not, and to limit the discretion of government officials applying it. The City argued below (I.R. 35 at 6) that "adequacy" is "synonymous with acceptable, all right, decent, and satisfactory." Indeed it is. So what the City is saying is that an ad is permissible if the commercial proposition is "acceptably," "decently," or "satisfactorily" displayed (or if it is just plain "all right"). Could the City possibly have found a term that is less precise, more subjective, and less constraining of discretion?

The current guidelines are far from the "unambiguous and definite"

standards that the Constitution requires. *Hopper*, 241 F.3d at 1077. The policy on its face does not "provide people of ordinary intelligence a reasonable opportunity to understand what it prohibits" and "it authorizes or even encourages arbitrary and discriminatory enforcement." *Hill*, 530 U.S. at 732. The Court need go no further than the words of the 2011 transit advertising guidelines to find that they are unconstitutional.

C. The standards as applied. Beyond the language of the policy, "[w]hat matters is what government actually does—specifically, whether it consistently enforces the restrictions on use of the forum that it adopted." *Hopper*, 241 F.3d at 1075. The City here is guilty of two constitutional transgressions: its application of the transit advertising guidelines renders them utterly incomprehensible, and even then it applies them inconsistently. "Grave damage is done if the government, in regulating access to public property, even appears to be discriminating in an unconstitutional fashion." *AIDS Action Comm.*, 42 F.3d at 12.

As we previously discussed, even at the time of *Children of the Rosary*, there was a dichotomy between the City's written policy and how the City applied it. That inconsistency has worsened dramatically, so much that it is almost impossible to fully describe the various permutations of the City's standards as

they are actually applied. As best we can distill them from the record, the standards as the City purports to apply them encompass approximately 23 elements[3]:

1. The City's policy is "clear and unambiguous" (I.R. 7, ¶ 14).

2. The advertisements must propose a commercial transaction (App. 3-4).

3. "A commercial transaction is the exchange of goods and services for something of value" (I.R. 22, ¶ 9).

4. The advertisement cannot primarily be an ideological message (I.R. 21 at 8).

5. The advertisement cannot present a tangential, hidden commercial offer (*id.* at 13).

6. The advertisement cannot have noncommercial elements added (I.R. 22, ¶ 31).

7. The advertisement cannot cover many unrelated topics and issues (*id.*).

(We pause to observe that so far, so good—but this is where things start getting murky.)

8. The advertisement can't read like a public-service announcement (*id.*, ¶ 35).

[3] We use the term "Elements" to refer to these later in the brief.

9. However, it can read like a public-service announcement if there is no evidence to show that it is *not* part of a commercial business trying to attract customers (I.R. 35 at 14).

10. And it can read like a public-service announcement if it is the "attraction" to get customers (*id.*).

11. It is not permissible to "exchange ideas or share other information" in the ad (I.R. 33, ¶ 28).

12. But it is permissible to exchange ideas in ads on a case-by-case basis (*id.*, ¶ 29).

13. Although the guidelines do not expressly say that an exchange of ideas is not permitted, it is implicit, but it is permissible if the ad in its totality constitutes a commercial transaction (I.R. 34, Exh. Q (Cotton Depo.) at 96-97).[4]

14. Additional language in the ad is permissible if it "enhances the commercial transaction" (I.R. 33, ¶ 27).

15. That is, the additional language is acceptable in order to "entice you to enter into a commercial transaction" (I.R. 34, Exh. Q (Cotton Depo.) at 75).

[4] Exhibit Q consists of three depositions: Volume II of the deposition of Marie Christine Chapple Camacho and the deposition of Debbie Cotton, both of whom are City officials responsible for enforcing the transit advertising standards; and the deposition Colleen Marie McCarthy of CBS Outdoor. For clarity in locating the appropriate deposition, we will refer to them by the deponents' names.

16. An ad receives extra scrutiny if it is "controversial" (I.R. 31 at 5).

17. The meaning of controversial is vague (App. 6 at 8: 1-11) and lies in the eye of the beholder (I.R. 35 at 11 n.4).

18. Compliance with the standards must be apparent on the face of the ad (I.R. 33, ¶ 17).

19. Words and graphics in the ad should be understood to propose a commercial transaction by a reasonable reader (I.R. 22, ¶ 9).

20. Specifically, the ad complies if "a reasonable person would understand [it] to be commercial. . . . If you can look at it, you can determine that there's a commercial transaction" (I.R. 34, Exh. Q (Cotton Depo.) at 70: 1-10).

21. The commercial proposition must be "adequately displayed," which is "synonymous with acceptable, all right, decent, and satisfactory" (I.R. 35 at 6).

22. "Adequately displayed" means "[t]hat it can be seen and that it is clear with your eyes" (I.R. 34, Exh. Q (Cotton Depo.) at 76).

23. However, even though the commercial transaction is supposed to be apparent on the face of the ad, understood by the reasonable person to be a commercial advertisement, and adequately displayed, in some instances the City will contact the sponsor to understand the purpose of the ad (I.R. 35 at 14).

These elements of the standards as actually applied by the City are

noteworthy for several reasons. First, many of the rules are not apparent from the actual language of the policy. Second, many are extremely subjective. Third, several contradict one another. Finally, in sum, the rules that the City actually apply are anything but clear and unambiguous.

The confusion extends to the City's own officials who are responsible for enforcing the standards. When shown a variety of advertisements, the officials repeatedly could not determine whether the ads comported with the City's standards or not (I.R. 34, Exh. Q (Camacho Depo.) at 126-60; *id.* (Cotton Depo.) at 107-08). Throughout the testimony, the officials said they lacked sufficient technical or legal expertise to determine whether ads complied with the standards and would refer the question to the City's legal department. That concession is fatal. Even assuming there might be an occasional close case, a policy is unconstitutionally vague as a matter of law "if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits." *Hill*, 530 U.S. at 732; see also Elements 19 & 20, *supra*. One should not need legal or technical expertise. If the very officials charged with the responsibility of enforcing the policy can't construe and apply the policy—and if technical or legal expertise are often necessary to do so—then the policy flunks the constitutional test as a matter of law.

The rejection of the TrainMeAZ advertisement, and the suggestion of an alternative advertisement, are examples of extreme subjectivity in action. The point of the ad was to direct visitors to the commercial website, which was displayed prominently on the proposed ad (App. 1). In smaller text, the ad lists several gun ranges and other businesses that offer firearms training, and directs readers to go to the website for a variety of commercial activities. Thus the ad appears on its face to comport with the 2009 standards, which limited transit ads to "speech which proposes a commercial transaction" (App.3). The ad also would seem to comport with Elements 13 (an exchange of ideas is permissible if the ad in its totality constitutes a commercial transaction), 14 (additional language in the ad is permissible if it "enhances the commercial transaction"), and 15 (additional language is acceptable in order to "entice you to enter into a commercial transaction"). Indeed, the large heart-encased "Guns Saves Lives" is an attention-grabber that would entice or provoke people to visit the commercial website, which of course was exactly what the sponsors intended—and thus the ad would seem to fall both within the stated standards and the City's practices. But perhaps in the City's mind it ran afoul of Element 16, wherein an ad receives extra scrutiny if it is "controversial." That term, of course, is vague and invites precisely the type of viewpoint discrimination that is anathema to free speech.

Notably, the original ad was approved by the City's agent, CBS Outdoor. Obviously the City's agent believed, as did the Appellants, that the proposed ad satisfied the City's standards—further evidence that the standards are difficult to understand and apply, even by sophisticated professionals in the advertising business.[5]

The mystery over why the ad was rejected only deepens when it is compared to an alternate ad that the City would approve (App. 2). The approved ad *deleted* the language proposing a commercial transaction and substituted a large graphic urging, "To educate your kids on how guns save lives go to TrainMeAZ.com." Of course, the purpose of the website it not to teach kids how guns save lives, but to sell training and other services. Moreover, the approved verbiage appears to fit within a category that the City purports to proscribe (Element 8) but in fact

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[5] An official of CBS Outdoor, Colleen McCarthy, testified about how it construes the requirement of advertising that proposes a commercial transaction:

> A commercial transaction is either implicit or explicit, and [the ad] proposes a transaction. So if you were to look at the ad, it would tell you to go to their store, go to their website, call them; and in turn, they expect you to buy a service or product.

(I.R. 34, Exh. Q (McCarthy Depo. at 75)). In stark contrast to the City's tortured application of its standards, this expression is simple, elegant, objective, and understandable. Had the City applied its 2009 standards in this fashion, Appellants' ads would not have been removed and this lawsuit would not have been filed.

permits in some instances (Elements 9 & 10): a public-service announcement. In other words, the City transformed an acceptable commercial ad into a noncommercial ad, which supposedly isn't allowed except when it is.

Under current federal constitutional precedent, the City is given wide latitude to regulate what speech is and is not allowed in proprietary transit advertising. But it is not allowed to confuse people—prospective advertisers, advertising professionals, its own officials, and laypersons alike—about what is permitted and what is not.

But confusion abounds when considering examples of other ads that the City approved or rejected. In App. 7, Appellants have compiled several representative examples of such ads. By examining those samples, the Court can conduct a simple test: by applying the City's purported standards, can it tell which ads were accepted or rejected? If it cannot, we submit the *Hill* standard cannot be met. We have placed an answer key, indicating which ads the City deemed compliant and which it did not, on the signature page of the brief. As we will discuss those ads below, if the Court deems it worthwhile to engage in this exercise, it should do so before reading further (and definitely without first peeking at the answer key).

First up is the "Jesus Heals" ad. The vast majority of the ad is emphatically

noncommercial: "Jesus Heals. Life. Perspective. Answers." Most of the ad consists of a cross symbolically composed of two band-aids. Does the ad propose a commercial transaction? Is it "primarily" a commercial advertisement? (Presumably not, unless one is cynical about religion.) If you tune to AM 1360, is that a commercial transaction? Apparently the ad satisfied the City's scrutiny under the 2009 standards. Would the "AM 1360" portion of the ad meet the new "adequately displayed" requirement in the 2011 guidelines? It would seem very hard to tell.

Next is the "Free Pregnancy Test," with nothing but a phone number and a depiction of a pregnant tummy. This surely looks to us like a public-service announcement. On its face it does not propose a commercial transaction; it advertises a free service. It easily could have been placed by Planned Parenthood or even a pro-life organization.

But in this case, the City tells us (I.R. 35 at 14) that after inquiry, "The ad was placed by an ObGyn medical doctor, who clearly was looking for potential patients and the free test was just the attraction to get them to see the doctor." Well, maybe not so clearly. After all, the commercial transaction is supposed to be apparent from the face of the advertisement and understood as such by a reasonable viewer (Elements 18-20). But the ad was allowed because City staff

determined, upon inquiry, that it was commercial. But, of course, so was Appellants' ad. Indeed, if anything, the commercial intent was more apparent on the face of the "Guns Save Lives" ad. Yet one was permitted and the other rejected, demonstrating extreme subjectivity in the application of pervasively subjective standards.

Next are the two SRP advertisements. The first was rejected, the second was approved. SRP, whose logo is at the bottom right-hand corner in both ads, is a commercial entity (as is TrainMeAZ). Both ads feature the words, "For Just $3 A Month You Can Help Reforest Arizona." The second version adds the following verbiage: "Forests filter fresh water, making them an important asset to our watersheds. As stewards of the Valley's water, SRP works with the U.S. Forest Service to help reforest land destroyed by fire." It would appear that the added language makes it *more* like a public-service announcement rather than less. Even more so, while the rejected version invites the reader to "Learn more" at the relevant website, the approved version invites the reader "To help." Where is the commercial transaction in either of these advertisements—especially the latter? If the Court visits the website (srpnet.com/trees), it will find that customers are invited to pay more on their utility bills, with a match from SRP, to help reforest land and fight climate change. A commercial transaction is neither proposed nor

intended. Even more mystifying is why the first ad was rejected while the second was approved.

The next two SRP ads—the first of which was rejected and the second approved—simply defy explanation, unless the larger text in the second ad is dispositive. But the larger question, again, is where is the commercial transaction? If anything, the ads are asking customers to use *less* water. Both genuinely appear to be public-service rather than commercial advertising.

Most puzzling of all are the Department of Veterans Affairs advertisements. The Court may have been tempted to assume that the first ad was accepted because it is pictured at a transit shelter. However, as in the case of TrainMeAZ, that advertisement was ordered removed by the ad police. The second version, incredibly, was approved. The changes in the approved version remove any doubt that a commercial transaction is *not* being proposed because it is advertising a suicide prevention hotline. That is completely laudatory—but it is also completely contrary to the City's transit advertising standards, in which by any reading a commercial transaction supposedly *must* be proposed.

These examples illustrate the heavy hand of government not only in approving or rejecting ads on a highly subjective basis but also in insinuating itself deeply into the editorial process. See also I.R. 27, Exh. 4(G). They demonstrate

vividly how prescient Judge Noonan's warnings of excessive subjectivity were, see *Children of the Rosary*, 154 F.3d at 984-85 (Noonan, J., dissenting), and how the City has abused the discretion that the Ninth Circuit accorded it in that decision.

At oral argument in the trial court, the City attempted to distinguish the rejection of the TrainMeAZ advertisement from others that were accepted despite appearing to lack a commercial proposal. "The difference between the Korwin, the original ad here and every other ad, is the political diatribe extolling the great virtues," the City's counsel argued (App. 6 at 33-34). "What we want is advertisers [sic] commercial products that do not get into ideological, political debates as part of the proposed ad" (*id.* at 33). Apparently religious debates ("Jesus Heals") are all right as part of an ambiguously commercial ad, but extolling the virtues of guns is not.

So is the City saying that in fact its dividing line is not between commercial and noncommercial speech, but between political/ideological and non-political/ideological speech? Such a standard would represent an even greater inversion of normal free-speech values, given that political speech is accorded the greatest First Amendment protection. See, e.g., *Buckley v. Valeo*, 424 U.S. 1, 14 (1976).

But the City's bigger problem in this regard is that one can search the 2009 standards—and the 2011 guidelines that were adopted after this lawsuit was filed—in vain for any indication that noncommercial messages are permissible so long as they do not include political or ideological speech. A policy "must give a person of ordinary intelligence adequate notice of the conduct it proscribes." *Craft*, 34 F.3d at 921. The standards must be "unambiguous and definite." *Hopper*, 241 F.3d at 1077. Here the policy "fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits," *and* "it authorizes or even encourages arbitrary and discriminatory enforcement." *Hill*, 530 U.S. at 732. Either is sufficient to declare the policy unconstitutional.

If the City wishes to enforce what appears to all the world (including its own advertising agent) to be a ban on noncommercial speech, it must do so consistently and coherently, see, e.g., *Hopper*, 241 F.3d at 1075-76; and it must clarify the inherent ambiguity and subjectivity encompassed by the term "adequately displayed." If it wishes to enforce a ban on political or ideological speech, it must actually create such a policy, and do so with precision and specificity. The policy both on its face and as applied must give notice to prospective advertisers of what is permitted and what is not. The City's policy and its application of that policy are today a considerable distance from that

constitutional harbor.

Request for Relief

Appellants respectfully request that this honorable Court reverse the decision of the trial court with instructions to enter summary judgment in favor of Plaintiffs, see, e.g., *Lewis*, 253 F.3d 1077 (8th Cir. 2001) (striking down discretionary license plate standards and ordering issuance of plates); or, in the alternative, to remand for trial over disputed issues of fact pursuant to the appropriate constitutional standards.

Answer Key

Ad	Accepted or rejected	I.R. citation
1. Jesus Heals	Accepted	I.R. 34, Exh. J
2. Free pregnancy test	Accepted	I.R. 34, Exh. K
3. SRP (shovel)	Rejected	I.R. 27, Exh. 4(G)
4. SRP (shovel w/ extra text)	Accepted	I.R. 27, Exh. 4(G)
5. SRP (water w/ man)	Rejected	I.R. 27, Exh. 4(G)
6. SRP (water w/ woman)	Accepted	I.R. 27, Exh. 4(G)
7. Veterans hotline	Rejected	I.R. 27, Exh. 4(G)
8. Veterans hotline ("press 1")	Accepted	I.R. 27, Exh. 4(G)

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Respectfully submitted,

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