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IN THE SUPERIOR COURT OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

ALAN KORWIN and TRAINMEAZ, LLC, Plaintiffs, vs. DEBBIE COTTON and CITY OF PHOENIX, Defendants.	Case No.: CV2011-009838 *Hon. Mark Brain* **PLAINTIFFS' COMBINED MOTION FOR SUMMARY JUDGMENT AND RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

Plaintiffs Alan Korwin and TRAINMEAZ, LLC, pursuant to Rule 56(c)(2) of the Arizona Rules of Civil Procedure, submit this Combined Motion for Summary Judgment and Response in Opposition to Defendants' Motion for Summary Judgment.

I. INTRODUCTION

This civil rights lawsuit seeks to vindicate Plaintiffs' constitutionally-guaranteed right to free speech. Specifically, Plaintiffs seek to advertise their business, TrainMeAZ,

free from Defendants' impermissibly vague standards and arbitrary enforcement. As a threshold matter, it should be clear what this case is *not* about. This case is *not* factually or legally similar to *Children of the Rosary v. City of Phoenix*, 154 F.3d 972 (9th Cir. 1998) ("*COR*"), a case upon which Defendants rely heavily. (*See* Defs. Mot. Summ. J. 6-9, 12-13.) That is because the City's Transit Advertising Standards ("TAS's"), which were at issue in that case (PSOF ¶ 14), are different from the City's current TAS's that are at issue in this case. (PSOF ¶ 15.) Further, much of the *COR* decision, which stemmed from a motion for preliminary injunction, turned on a sparse evidentiary record that is different from the extensive one in this case. As such, Plaintiffs' as-applied challenge is distinguished from the *COR* challenge. The record in this case is replete with evidence of the haphazard manner in which Defendants review and approve advertising at City transit stops. Indeed, to the extent *COR* is relevant at all, it is because it shows how far Defendants have gone since then in terms of the advertising content they now allow on transit spaces.

Plaintiffs' vagueness challenge to Defendants' standards is not founded on Defendants' use of the word "commercial transaction,"[1] as in Seventh Circuit and Fourth Circuit cases cited by Defendants – *Lavey v. City of Two Rivers*, 171 F.3d 1110 (7th Cir. 1999) and *National Advertising Co. v. City of Raleigh*, 947 F.2d 1158 (4th Cir. 1991) (Defs.' Mot. Summ. J. 10-11) – but rather on the other language in Defendants'

[1] This is true to the extent that City transit stops are nonpublic forums, because the Supreme Court has defined the term. *Central Hudson Gas & Elec. v. Public Service Comm'n.*, 447 U.S. 557, 561 (1980) (commercial speech is "expression related solely to the economic interests of the speaker and its audience.") However, *see infra* Section IV.

standards that requires the commercial transaction to be "adequately displayed,"[2] a term for which only Defendants seem to know the definition, the application of which varies from case to case. (PSOF ¶ 23.) Thus, this case is not about whether Defendants *can* limit advertising to that which proposes a commercial transaction, because Defendants are in fact not doing so. Rather, they are allowing noncommercial speech on ads, but just what and how much they allow is dependent not on any clear standards but on their own whims. As such, the standards authorize arbitrary and discriminatory enforcement. The "Constitution abhors the misuse of discretion as a license for arbitrary procedure." *Reed v. Purcell*, 2010 WL 4394289 *3 (D. Ariz. Nov. 1, 2010).

As set forth below, Defendants' vague standards and "we know it when we see it" enforcement of them violate Plaintiffs' free speech, due process and equal protection rights under the state and federal constitutions. *Hill v. Colorado*, 530 U.S. 703, 732 (2000). Moreover, as a result of Defendants' vague standards and arbitrary enforcement, City transit stops have lost their nonpublic forum status, thus subjecting Defendants' restrictions on commercial speech to the strict scrutiny standard, rather than the lesser standard associated with nonpublic forums. *Hopper v. City of Pasco*, 241 F.3d 1067,

[2] Defendants' citations to *Major Media* (Defs.' Mot. Summ. J. 9-10) do not address the City's current TAS's or enforcement. The court noted that "an occasional marginal case" does not render a "commercial speech" standard vague, since federal case law has defined that standard. 792 F.2d 1269, 1272-3 (1986). *See also State v. Takacs*, 169 Ariz. 392, 395, 819 P.2d 978, 981 (App. 1991) (courts look to "judicial decisions" in considering definitions in vagueness challenges). But no such definition exists for the phrase "adequately displayed." Moreover, *Major Media* did not even reach arbitrary enforcement because the City had not made any determinations. *Id.* at 1271. The record in this case, by contrast, is rife with examples of Defendants' arbitrary enforcement.

1076 (9th Cir. 2001). A policy purporting to keep a forum closed, as the City claims their TAS's do (DSOF ¶ 8A), is no policy at all for purposes of forum analysis if in practice it is not enforced or if exceptions are haphazardly permitted. *Hopper*, 241 F.3d at1076. Accordingly, Plaintiffs respectfully submit that their Motion for Summary Judgment should be granted[3] and Defendants' Motion for Summary Judgment should be denied.

II. UNDISPUTED MATERIAL FACTS

Defendant City of Phoenix provides advertising space on transit shelters and benches, which it makes available to the public by leasing the shelter and bench spaces to CBS Outdoor ("CBS"). (DSOF ¶¶ 4, 13; PSOF ¶ 6.) CBS is responsible for soliciting advertising and working with the potential customers regarding proposed advertising. (DSOF ¶ 14; PSOF ¶ 12.) CBS has the authority from the City to review proposed advertisements, determine whether they are compliant with the City's TAS's, and post them without any prior approval. (PSOF ¶ 31.) CBS has the authority to and does in fact reject advertising without informing the City. (PSOF ¶ 35; DSOF ¶ 15.)

The TAS's at issue in this case are those the City enacted in December 2009 and March 2011 (PSOF ¶¶ 13, 15), because while Defendants' ad was rejected under the 2009 TAS's, Defendants have taken the position that Plaintiffs' ad does not comply with the 2011 standards either. (DSOF ¶ 54). The 2009 standards provide in relevant part:

[3] The granting of summary judgment is proper when after examining the entire record there is no genuine dispute as to any material fact and based upon the undisputed material facts, the moving party is entitled to judgment as a matter of law. The facts presented to the Court must be viewed in a light most favorable to the party opposing the motion. *Nicoletti v. Westcor, Inc.*, 131 Ariz. 140, 142, 639 P.2d 330, 332 (1982).

"The subject matter of the transit bus, shelter, and bench advertising shall be limited to speech which proposes a commercial transaction." (PSOF ¶ 13.) These standards are substantially similar to those at issue in the *COR* case, which provided: "The subject matter of bus advertising shall be limited to speech which proposes a commercial transaction." *COR*, 154 F.3d at 974-75; (PSOF ¶ 14.)

On March 9, 2011, the City changed the standards to "guidelines," eliminated the "limited to speech that proposes a commercial transaction" language, and replaced the "limited to" language with the requirement that the ad need only "adequately display[]" a proposed commercial transaction. (PSOF ¶ 15.) Defendants did this to allow advertisers to "craft their message" because the City "just want[ed] to ensure that [ads are] commercial in nature." (PSOF ¶16.) In reviewing proposed ads, Defendants give "controversial" ads "more scrutiny." In this case, Defendants considered Plaintiffs' ad "controversial" and gave it "more scrutiny." (PSOF ¶¶ 62-63.)

Defendants claim that the City's policy of commercial-only advertising is intended to serve several purposes:

> 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;
> 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;
> 3. Maintaining a position of neutrality on religious issues; and
> 4. Not violating the Establishment Clause.

(DSOF ¶ 11); *COR*, 154 F.3d at 979.

Plaintiffs are TrainMeAZ and its manager, Alan Korwin. (PSOF ¶¶ 1-3.) To

attract customers to purchase gun safety and marksmanship training, TrainMeAZ engages in a variety of advertising campaigns, such as the one involving the ad at issue in this case. (PSOF ¶ 4.) Plaintiffs' ad was reviewed and approved by the City's agent CBS (DSOF ¶¶ 14-16), and posted at approximately 50 City of Phoenix transit stops in October 2010 (DSOF ¶ 27), pursuant to a contract entered into between Plaintiffs and CBS on October 5, 2010. (PSOF ¶ 38.) The advertisement contains a red heart with the words "GUNS SAVE LIVES," smaller text on both sides of the heart, and larger language at the bottom that says, "ARIZONA SAYS: EDUCATE YOUR KIDS TrainMeAZ.com." (PSOF ¶ 39.)

The ad lists several gun ranges and places that offer firearms training, and directs readers to "Go to TrainMeAZ" to "learn how you can participate and improve your skills," get gun-safety training, participate in fun shoots, special training days at the range and attend gun shows and classes." (PSOF ¶ 40.) The ad promotes the state's largest promoter of gun shows, among others, and is aimed at selling marksmanship training and gun-safety classes and lists sponsors who provide firearms training. (PSOF ¶ 40.)

Within days of CBS posting Plaintiffs' ad, the City ordered CBS to remove it from all City transit ad spaces (PSOF ¶ 41) because, according to the City: 1) the ad did "not propose a commercial transaction"; 2) the ad 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." (DSOF ¶¶ 31, 35; PSOF ¶ 42.) Despite Plaintiff Korwin's request to Defendants, they did not give him a definition or otherwise provide guidelines as to what is a "public service announcement," nor did they explain Defendants' criteria for deeming an ad controversial. (PSOF ¶¶ 61, 64.) Defendants concede that during this time period, there was not an adequate review process in place to ensure the TAS's were consistently enforced. (DSOF ¶ 51.)

Defendants approved an alternative to Plaintiffs' original ad; but ironically it eliminated the express language in Plaintiffs' ad that directs readers to go to the TrainMeAZ website in order to get firearms training (PSOF ¶ 48) and their proposed commercial transaction to sell marksmanship training and gun-safety classes. (PSOF ¶¶ 46-50.) Plaintiffs could not accept the City's alternative because it promotes a philosophy "to educate kids that guns save lives," not sell Plaintiffs' products. (PSOF ¶¶ 48-50.)

III. THE CITY'S TSA'S ARE VAGUE AND/OR ARBITRARILY ENFORCED

Even assuming arguendo that the City's previous TAS's in effect from December 8, 2009, through March 6, 2011, were not unconstitutionally vague because they were substantially similar to those upheld in *COR*, the record establishes that Defendants arbitrarily enforced them. The record is replete with examples of advertisements posted under the 2009 standards and 2011 guidelines[4] that: 1) do not propose or display a commercial transaction ("Free Pregnancy Test" ad, PSOF ¶¶ 78-79); 2) display a

[4] According to Defendants' own description, the 2011 TAS's are actually merely "guidelines" (PSOF ¶ 16), bolstering the record evidence that the TAS's permit Defendants to exercise unfettered discretion.

commercial transaction along with non-commercial speech ("Jesus Heals" and "Jesus at Work" ads, PSOF ¶¶ 66-68, 70-71, 73); 3) display issues associated with contentious issues of the day, social causes, and political and religious causes (PSOF ¶¶ 66-68, 70-71, 73); and 4) fail to "adequately" display a commercial transaction. (Better Business Bureau ad, PSOF ¶ 80.)[5]

Indeed, according to Defendants' enforcement of the standards, ads posted at City transit stops contain a variety of noncommercial speech. The problem is that what and how much noncommercial speech Defendants permit depends not on any clearly-defined standards or reliable enforcement, but rather on vague criteria, including a "controversy" standard that accorded Plaintiffs' ad "more scrutiny" (PSOF ¶¶ 62-63), an undefined "public service announcement" standard (PSOF ¶¶ 58-64), and Defendants' subjective and unpredictable beliefs as to the compliancy of any given ad. (PSOF ¶ 18-19, 23.)

The "JESUS HEALS" and JESUS at WORK" ads are the most striking examples of Defendants' arbitrary enforcement of their vague standards. The "JESUS HEALS" ad prominently displays a blue cross that takes up half of the approximately 72" by 48" ad space and contains the words "JESUS HEALS" in the largest font size on the ad. It further contains the words "Life. Perspective. Answers," along with "AM 1360." (PSOF ¶¶ 68, 70-71.) The "JESUS at WORK" ad prominently displays a yellow yield-shaped traffic sign with the words "JESUS at WORK," which also takes up nearly half of the ad's space. (PSOF ¶¶ 68, 70-71, 73.) By Defendants' own admission, these ads

[5] Because the City has given CBS authority to reject ads without sending them to the City for review, it is unknown how many otherwise compliant ads are rejected; therefore, the true extent of speech that is suppressed is unknown. (DSOF ¶ 15; PSOF ¶ 35.)

prominently contain noncommercial speech (PSOF ¶¶ 70-71, 73) – the very type Defendants sought to avoid by issuing the TSA's. (DSOF ¶ 11); *COR*, 154 F.3d at 979. Furthermore, the noncommercial speech (graphics and the language) dominates the ads by taking up nearly all their space (PSOF ¶ 68), leaving only "AM 1360" as the sole purportedly commercial speech Defendants identified. (PSOF ¶¶ 72.) The City's approval of these ads flies in the face of their purported practice of judging whether a commercial transaction is "adequately displayed" by looking to the font and location of the speech. (PSOF ¶ 17.)[6]

If these ads do not represent "noncommercial speech dressed up to marginally make a commercial offer," which Defendants argue is impermissible under their written standards (Defs.' Mot. Summ. J. 12), it is unclear what would. How can these ads be seen as anything other than religious ads with a tacked-on commercial offer? And that commercial offer being, according to Defendants, the mere words "AM 1360"?

Indeed, there is no discernible difference between these ads and the ad the City rejected in *COR*, which read:

> Before I formed you in the womb, I knew you" – G-d
> Jeremiah 1:5
> Purchase this message as a bumpersticker for your vehicle!
> Contact [phone number]
> [COR logo] Children of the Rosary CHOOSE LIFE!

COR, 154 F.3d at 975. Both ads do more than simply identify a product or service; they include religious messages. Thus, if Defendants' standards prohibit the *COR* ad, either the

[6] Some would consider "JESUS HEALS" to be controversial and taking a position on religious issues, yet apparently not in the eyes of the City's censors.

TAS's must also prohibit the "JESUS HEALS" and "JESUS at WORK" ads, or this shows Defendants have abandoned their previous standards altogether (to the extent the "limited to" language was ever properly enforced). In either case, there is one constant: in ordering Plaintiffs' ad to be removed, Defendants violated Plaintiffs' rights to free speech because of their arbitrary enforcement of the standards.

In their Motion, Defendants perhaps unwittingly support Plaintiffs' case when they argue that "even if one believes there is a proposed commercial transaction referenced by [Plaintiffs' ad] . . . [it] impermissibly sought to combine political advertisement . . . in the ad," thus making it a "political public service type message." (Defs.' Mot. Summ. J. 13.) This is because Defendants themselves admit that combining noncommercial and commercial speech in an ad does not violate the City's standards, either expressly or as Defendants apply them. (PSOF ¶¶ 66-68, 72-74.) Therefore, while Plaintiffs submit that their original ad adequately displays a commercial transaction (PSOF ¶¶ 39-40), even if Defendants take the position that it also contains noncommercial speech, this would not render it noncompliant given the City's admissions (PSOF ¶¶ 16, 18-19, 66-67, 71) and practices. (POSF ¶¶ 68-79.)[7] What remains is that Defendants do permit noncommercial speech on ads, but whether an ad passes muster depends on the exercise of Defendants' unfettered discretion as to how much noncommercial speech they will allow. Unfortunately for Plaintiffs, Defendants

[7] The City's retention of the large red heart with the words "GUNS SAVE LIVES" in the City-revised and approved ad (DSOF ¶ 43; PSOF ¶ 47) must either be an admission that it is a commercial element of the ad, or that noncommercial elements are allowed in ads. Either way, it evinces the haphazard manner in which the City reviews and approves ads.

decreed their ad noncompliant.

A prime example of this unfettered discretion and arbitrary treatment of Plaintiffs' ad is Defendants' position that the words "Guns Save Lives" in Plaintiffs' original ad do not constitute a commercial transaction (PSOF ¶ 43), while later approving a revised version of Plaintiffs' ad that retained the phrase. (PSOF ¶¶ 47, 55.) What is worse, Defendants eliminated language in the original ad that specifically directed readers where to go to engage in a commercial transaction. (PSOF ¶¶ 48-49.) Then, incredibly at their depositions, neither Cotton, the Director of Public Transit and final decision maker in the advertising review process (PSOF ¶ 7), nor Chapple, the Department's Public Information Officer who is responsible for enforcing the TAS's and City-CBS contract (PSOF ¶¶ 9-10), could opine as to whether this revised ad – the ad the City previously approved – proposed a commercial transaction at all. (PSOF ¶¶ 53-57.)[8] Further, even though the words "To educate your kids on how guns save lives" was in the City-approved ad, Chapple could not determine whether that language proposes a commercial transaction, whether it describes the nature of the product or service being advertised, or is a public service announcement. (PSOF ¶¶ 56-57.) The standards are so vague that Defendants themselves cannot apply them and when they do, they do so arbitrarily. "[A] law forbidding or requiring conduct in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates due process of law." *Baggett v. Bullitt*, 377 U.S. 360, 366-67 (1964).

[8]At her deposition, Cotton could not say whether Plaintiffs' original ad complied with the TAS's either. (PSOF ¶¶ 7, 52.)

There is no doubt that a statute or ordinance must be definite and subject to being understood by men of common intelligence. *State v. Cole*, 18 Ariz. App. 237, 238, 501 P.2d 413, 414 (1972). But whereas typically the government defends against a vagueness challenge by asserting a "reasonable person" or "common intelligence" defense, here *Defendants themselves* cannot even apply the standards. As a result, they are saying either: 1) they are not reasonable persons or persons of common intelligence because they cannot apply the standards to any given ad without a collaborative tribunal; or 2) the standards are too vague for anyone to understand short of a team collaboration or expert opinion.[9] (PSOF ¶¶ 26; 51-52-57.) So haphazard is Defendants' enforcement of the TAS's, the magnitude may be best illustrated via the following record excerpts:

What Defendants say:

- Whether an advertisement contains a commercial transaction must be apparent to the reasonable reader on the face of an ad. (PSOF ¶ 17; DSOF ¶¶ 9-10.)
- "Adequately" displayed means that which can be seen by a reasonable reader. (PSOF ¶ 22; DSOF ¶¶ 9-10.)

What Defendants do:

- Approve ads where a commercial transaction is not apparent on its face if the advertiser is contacted and explains what it is trying to sell in its ad. (PSOF ¶ 80.)
- Approve ads if Chapple knows the advertiser and assumes what they are selling, even if there is no adequately displayed proposed commercial transaction. (PSOF ¶¶ 75-76, Carpenters Union ad.)
- Approve ads that solely promote a free products (PSOF ¶¶ 78-79, "Free Pregnancy Test"; "Newly diagnosed with HIV and unsure what do next")
- Cannot look at the face of ads and determine whether they comply with the TAS's

[9] Needing "expertise" to determine whether an ad adequately displays a commercial transaction is inconsistent with Defendants' claim that "[p]ersons of ordinary intelligence" understand what is or is not commercial speech and what does or does not propose a commercial transaction. (Defs.' Mot. Summ. J. 11.)

but instead need a collaborative tribunal to make such determinations. (PSOF ¶¶ 26, 51-57.)

- Chapple was shown an ad during her deposition that Defendants produced to Plaintiffs, which had been rejected for posting for failing to comply with the TAS's. However, upon reviewing it, she determined it *did* comply with the City's TAS's. (PSOF ¶ 65.)

Defendants' claim that their approval of "gun advertising" "weaken[s]" Plaintiffs' claims of viewpoint discrimination" (Defs.' Mot. Summ. J. 12), wholly misses the point, as does their argument that other ads for "for profit business" have been rejected too. (Defs. Mot. Summ. J. 12.) First, Defendants' viewpoint discrimination arises from their employing standards that are not defined, such as "adequately displayed" and "controversial" (PSOF ¶¶ 62-64), which invite viewpoint discrimination. *Lewis v. Wilson*, 253 F.3d 1077, 1080 (8th Cir. 2001). Second, Defendants do not even attempt to explain why the ads they cite in their brief (Defs.' Mot. Summ. J. 12:13-15) were rejected or if and how they would be similarly situated to Plaintiffs' ad. In fact, rejecting ads using a "we know it when we see it" approach gives the appearance of viewpoint discrimination, which is likewise impermissible. *AIDS Action Committee of Massachusetts, Inc. v. Massachusetts Bay Transp. Auth*, 42 F.3d 1, 10-11 (1st Cir. 1994). Further, when controversiality is the primary criteria for restricting speech, the danger of viewpoint discrimination is too high. *Ariz. Life Coalition Inc. v. Stanton*, 515 F.3d 956, 972 (9th Cir. 2008). According more scrutiny to advertising officials deem "controversial" only infuses the process with subjective determinations that "lend[s] itself to viewpoint discrimination, a practice forbidden even in limited public fora." *Hopper*, 241 F.3d at 1079 (citing *Cohen v. California*, 403 U.S. 15, 25 (1971)). *See also Arizona*

Dept. of Revenue v. Great W. Pub'g., Inc., 197 Ariz. 72, 77, 3 P.3d 992, 997 (App. 1999).

The government may not "grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favorable or more controversial views." *Police Dep't of City Chicago v. Mosely*, 408 U.S. 92, 95-96 (1972). "One might easily infer that ads tend to be screened not because they threaten to violate the Policy but because they appear likely to generate controversy or even more surely, where controversy actually results." *AIDS Action Committee*, 42 F.3d at 11-12.

IV. DEFENDANTS' ARBITRARY ENFORCEMENT OF THE STANDARDS OPENED THE FORUM

While Defendants claim "bus shelters are non-public limited forums where the City can lawfully limit advertising to commercial advertising" (Defs.' Summ. J. Mem. 1), they have lost their nonpublic forum status because of Defendants' vague standards and arbitrary enforcement. *Hopper*, 241 F.3d at 1076. To the extent Defendants have opened transit advertising furniture to designated public forum status, Defendants' policy that ads at transit shelters must be commercial is an unconstitutional content-based restriction on speech. In public forums, the government may not impose greater restrictions on noncommercial than on commercial speech. *See Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 513 (1981). Indeed, in public forums, content-based restrictions on speech, such as those prohibiting noncommercial speech, are presumptively invalid. *See State v. Boehler*, 228 Ariz. 33, 262 P.3d 637, 641 (App. 2011).

V. CONCLUSION

While Defendants argue that their decisions are within the exercise of "reasonable

discretion afforded to any other proprietor," the City is not a private proprietor but is bound by constitutional limits that safeguard individual liberty. *Lehman v. City of Shaker Heights*, 418 U.S. 298, 303 (1974). This case is not giving the City an "all or nothing" choice in terms of opening the forum or not permitting advertising at all. Instead, Defendants must either adopt and enforce standards that truly limit advertising to speech that proposes a commercial transaction (and that alone), and prohibit the exercise of unfettered discretion that permits *ad hoc* noncommercial speech as Defendants see fit; or it must open the forum entirely.

In light of the foregoing, Plaintiffs respectfully submit that Plaintiffs' Motion for Summary Judgment should be granted and Defendants' Motion denied. Further, Plaintiffs request that the Court enter an order for injunctive relief that requires Plaintiffs' original ad to be posted, as well as Defendants to issue new standards that either open up the forum to commercial and non-commercial advertisement, or enact clear and unambiguous standards that wholly limit the speech that may be used on ads to only speech that is commercial and proposes a commercial transaction.

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