No. 12-35622

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WORKING WASHINGTON,
Plaintiff-Appellant,

v.

CENTRAL PUGET SOUND REGIONAL TRANSIT AUTHORITY,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON
CASE NO. 12-cv-00566-JCC (HON. JOHN C. COUGHENOUR)

PRELIMINARY INJUNCTION APPEAL

APPELLANT WORKING WASHINGTON'S OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Working Washington is a non-profit corporation with no parent corporation. No publicly held or other company owns 10% or more of the stock of Working Washington.

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INTRODUCTION

Working Washington is a non-profit coalition of individuals, neighborhood associations, immigrant groups, civil rights organizations, people of faith, and labor representatives who are united for good jobs and a fair economy. After research, it decided to run an advertisement in Sound Transit's light rail advertising forum to raise awareness about low-paying jobs at Seattle-Tacoma airport (the "Airport Ad"). A copy of the ad is set forth below:

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The ad was similar in tone and message to a previous Working Washington ad—also addressing the issue of working wages—that Sound Transit accepted and ran. Sound Transit nevertheless rejected the Airport Ad. Sound Transit's initial basis for rejecting the ad was that it was a "political type" ad barred by its advertising policy, notwithstanding that the ad on its face does not fall within the narrow definition of "political" found in Section 3.3(b) of Sound Transit's policy. In a follow up email, Sound Transit offered a second reason for excluding Working

Washington's Airport Ad. Relying on the introductory clause in Section 3.3(a) of its policy, Sound Transit argued that it rejected the Airport Ad to maintain its neutrality and avoid controversial or political messages. However, these are not valid reasons under the First Amendment for rejecting Working Washington's message.

The District Court denied Working Washington's motion for a preliminary injunction concluding that Sound Transit's rejection of the Airport Ad was "reasonable" in a limited public forum and that Working Washington did not demonstrate a likelihood of success on the merits or irreparable harm. In reaching this conclusion the District Court abused its discretion in several ways. First, though the District Court declined to adopt Sound Transit's argument that it was reasonable to reject the Airport Ad under section 3.3(b) of its policy, the District Court erroneously concluded that the ad could be "reasonably" rejected under Section 3.3(a). Second, the District Court failed to analyze Working Washington's evidence that Sound Transit applied its policies discriminatorily and directly targeted Working Washington's viewpoint. Finally, the District Court applied the wrong standard in determining whether Working Washington would suffer irreparable harm. Because Working Washington demonstrated a likelihood of prevailing on the merits, and suffered First Amendment harm, the District Court should have granted the preliminary injunction. Its failure to do so was legally

erroneous, illogical, and therefore constituted an abuse of discretion.

STATEMENT OF JURISDICTION

The District Court had subject matter jurisdiction over the dispute under 28 U.S.C. § 1331. The District Court's order denying Working Washington's request for a preliminary injunction is appealable under 28 U.S.C. § 1292(a).

The District Court entered its order denying injunctive relief on June 29, 2012. ER 1. Working Washington filed its Notice of Appeal on July 25, 2012. Working Washington's Notice of Appeal was timely filed under Rule 4 of the Federal Rules of Appellate Procedure. ER 9.

ISSUES PRESENTED FOR REVIEW

1. Whether the District Court correctly analyzed the exclusion of Working Washington's ad under the Sound Transit policy under an overall standard of reasonableness, given that the ad did not fall within the narrow definition of "political" in Section 3.3(b) of the policy, and Section 3.3(a) failed to constrain the discretion of Sound Transit administrators as required by the First Amendment.

2. Whether the District Court erred in analyzing Working Washington's as-applied viewpoint discrimination challenge by ignoring direct and comparator evidence of viewpoint discrimination and not adequately scrutinizing Sound Transit's differential treatment of Working Washington's ad.

3. Whether the District Court erred in employing an incorrect standard for injunctive relief by not giving appropriate weight to the loss of Working Washington's First Amendment rights.

STATEMENT OF THE CASE

Working Washington sought to run a message on Sound Transit's light rail trains that read: "Let's make all airport jobs good jobs." ER 61–63; 67–68. Sound Transit rejected Working Washington's proposed ad, claiming that "Sound Transit is not allowing political type ads on their buses or trains." ER 69. Working Washington brought suit in federal court to enjoin Sound Transit from applying its advertising policy in a manner that violated Working Washington's First Amendment rights. ER 86.

Working Washington moved for a preliminary injunction. ER 95. The District Court denied Working Washington's request for injunctive relief. ER 1–7. Working Washington timely filed an appeal to this Court. ER 9. At the request of the parties, the case has been stayed in the District Court pending resolution of this appeal. ER 8.

STATEMENT OF FACTS

I. SOUND TRANSIT ADOPTS AND IMPLEMENTS AN AD POLICY

Sound Transit issued the advertising standards operative in this case on July 29, 2011. ER 70. Section 3.3(b) of the current policy contains 18 different bases to

exclude advertising from its forum, including advertising promoting the sale of tobacco, firearms, or alcoholic beverages, and advertising containing profanity, depicting violence, obscenity or nudity, or prurient sexual suggestiveness. ER 70-73. The policy also excludes "political" advertisements, which it defines as political speech that:

> promotes or appears to promote any candidate for office, any political party or promotes or implies [a] position on any proposition, referendum, proposed or existing laws, or other ballot measures.

ER 72. The definition of political in Section 3.3(b) can be contrasted with other exclusions that exclude entire categories of speech. For example, the policy excludes "religious" advertisements, and defines these as any advertisement that:

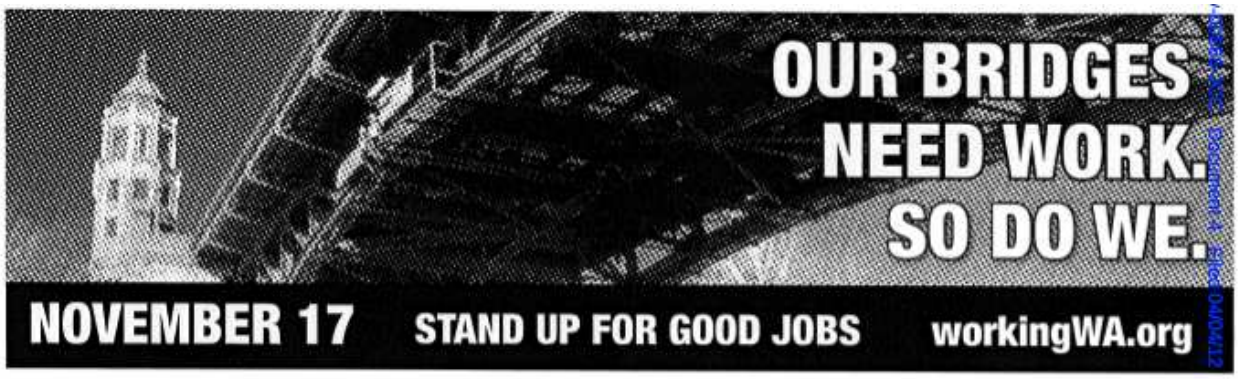
> promotes or appears to promote any identifiable or specific religious viewpoint, message, or practice.

ER 72.

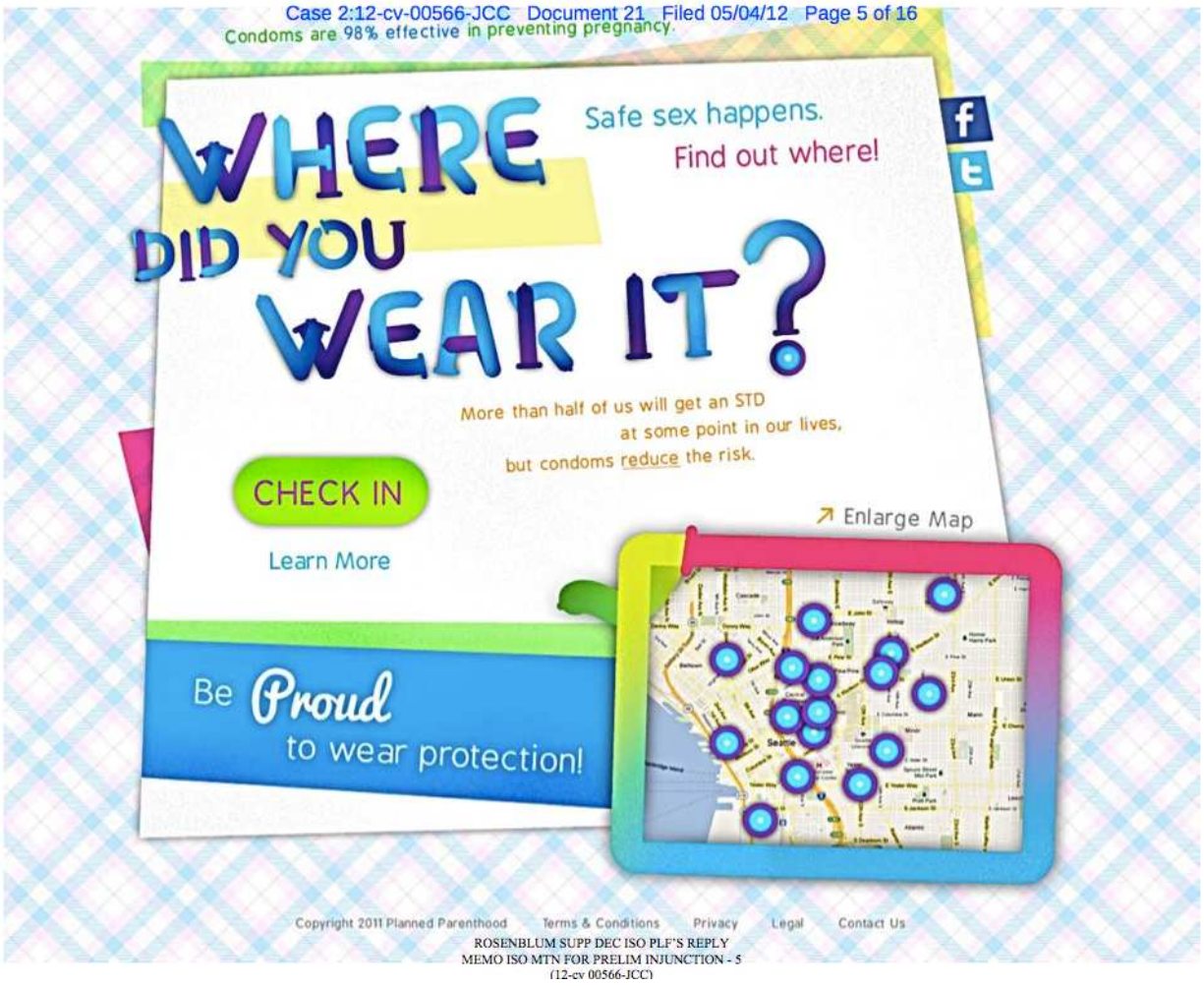
Separately, the first sentence of Section 3.3(a) contains a pronouncement of Sound Transit's intent to "[maintain] a position of neutrality on political, religious and controversial matters." ER 70. These generalized intentions are also embodied in Section 3.2 of the policy. ER 70. Sound Transit's policy fails to enunciate standards by which administrators are to determine what it means to maintain a position of neutrality or what is considered controversial. ER 70–73.

The record of Sound Transit's application of this policy is partial and

incomplete. But even this limited record shows that Sound Transit has run at least two ads under the current policy that could be considered political or controversial. These included a Working Washington pro-labor message that emphasized the importance of good jobs in bridge construction (the "Bridges Ad"). ER 74. A copy of this message, which ran on one or more Sound Transit buses, is reproduced below:



ER 74. Sound Transit also accepted an advertisement for safe sex from Planned Parenthood (the "Planned Parenthood Ad"). ER 29–31. A copy of this ad is reproduced below:



ER 30.[1]

II. SOUND TRANSIT REJECTS THE AIRPORT AD

In early 2012, Working Washington sought to place the Airport Ad on the interiors of selected light rail trains. ER 61–62. A copy of the ad appears below:

[1] Sound Transit also ran an ad for the "Vitae Foundation," a crisis pregnancy center (under a previous policy) that can be generally characterized as a pro-life ad. ER 75-85.

ER 68. Working Washington designed its message to educate the public on the issue of low-wage jobs at Seattle-Tacoma Airport. ER 66.

Clear Channel Outdoor, the contractor who administers the Sound Transit forum, informed Working Washington via an email dated March 20, 2012 that Sound Transit would not run its message because "Sound Transit is not allowing political type ads on their buses or trains." ER 69. In an email dated April 4, 2012, Sound Transit further explained that it would not run the Airport Ad because Working Washington's message triggered the "policy's provisions related to political and controversial content." ER 51. Although Sound Transit did not cite to a specific section of the policy, it further elaborated that Sound Transit found Working Washington's efforts to unionize Seattle-Tacoma Airport workers to be "inherently political and controversial." ER 51. Sound Transit also expressly referred to Working Washington's past activities "such as picketing and petitioning the Port of Seattle Commission" to support its decision not to run the Airport Ad.

ER 51. Sound Transit also alleged in the April 4th email that the Airport Ad violated Sound Transit's policy because it did not appropriately identify the organization who sponsored the ad, and because the ad referred to a website that included "controversial and political content [which] is not permitted under [Sound Transit's] policy." ER 51.

III. THE DISTRICT COURT DENIES WORKING WASHINGTON'S REQUEST FOR INJUNCTIVE RELIEF

The District Court denied Working Washington's request for a preliminary injunction finding that because Working Washington was seeking a mandatory injunction and asking for the full relief to which it would be entitled if it prevailed its request was "doubly disfavored." ER 3. The court concluded that because Sound Transit's policy and practice demonstrated an intent to "prohibit speech on certain topics and to avoid controversy that could bear the imprimatur of the government," the light rail forum was a limited public forum. ER 4. It then concluded that the appropriate standard for determining whether speech was appropriately excluded from a limited public forum asks whether the restrictions on speech were "reasonable and viewpoint neutral." ER 4.

Under this deferential standard, the District Court concluded that Sound Transit's rejection of the Airport Ad was reasonable. ER 5–6. While the District Court did not expressly agree with Sound Transit that the ad could be excluded under Section 3.3(b)'s specific definition of "political" advertising, the court

concluded that the ad could reasonably be excluded under Section 3.3(a)'s broader language regarding Sound Transit's intent to maintain positions of neutrality on controversial or political issues. ER 5.

SUMMARY OF ARGUMENT

The District Court reviewed Sound Transit's decision to exclude Working Washington's ad under an overall "reasonableness" standard, despite the fact that Section 3.3(a) of the policy failed to adequately constrain the discretion of Sound Transit administrators. It also concluded that Section 3.3(b) served to limit the broad statement of intent to exclude controversial advertising set forth by Section 3.3(a) of Sound Transit's policy but at the same time, found that Working Wasington's ad could be excluded under Section 3.3(a). These conclusions were legal error. The District Court further failed to consider the comparator evidence offered by Working Washington as well as the direct evidence of viewpoint discrimination. Finally, the District Court employed the incorrect standard for determining whether Working Washington is entitled to injunctive relief.

STANDARD OF REVIEW

This Court reviews the District Court's denial of a motion for preliminary injunction for abuse of discretion. Pimentel v. Dreyfus, 670 F.3d 1096, 1105 (9th Cir. 2012) (citing Alliance for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1131 (9th Cir. 2011)). Under this standard, the Court first determines *de novo* whether

the trial court identified the correct legal rule, and then determines whether the trial court's application of that rule was "(1) illogical, (2) implausible, or (3) without support in inferences that may be drawn from the facts in the record." Id. (quoting Cal. Pharmacists Ass'n v. Maxwell-Jolly, 596 F.3d 1098, 1104 (9th Cir. 2010)). "A decision based on an erroneous legal standard . . . amounts to an abuse of discretion." Id. In First Amendment cases, the Court makes an independent examination of the record to "ensure that the judgment does not constitute a forbidden intrusion on free expression." Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 486 (1984). "Given the 'special solicitude' [this Court has] for claims alleging the abridgment of First Amendment rights, [the Court] review[s] a district court's findings of fact when striking down a restriction on speech for clear error." Brown v. Cal. Dep't of Transp., 321 F.3d 1217, 1221 (9th Cir. 2003) (citing Lovell v. Poway Unified Sch. Dist., 90 F.3d 367, 370 (9th Cir. 1996)). "Within this framework, [the Court] review[s] the application of facts to law on free speech questions de novo." Id. (citing Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coalition of Life Activists, 290 F.3d 1058, 1070 (9th Cir. 2002) (en banc)).

ARGUMENT

The District Court ignored relevant First Amendment principles in concluding that Sound Transit appropriately excluded Working Washington's

message under Sound Transit's advertising policy and applied its forum restrictions to Working Washington in a non-discriminatory manner. Finally, the District Court employed the incorrect standard for injunctive relief.

I. THE DISTRICT COURT FAILIED TO APPLY THE CORRECT LEGAL STANDARD IN REVIEWING SOUND TRANSIT'S EXCLUSION OF THE AIRPORT AD

Even assuming that the District Court was correct to conclude that the light rail advertising forum is a limited public forum,[2] the District Court failed to analyze whether Sound Transit's policy on its face created an impermissible risk of viewpoint discrimination. Because the District Court's analysis of whether Sound Transit was likely to prevail on the merits was based on an erroneous legal standard, it "amounts to an abuse of discretion." Pimentel, 670 F.3d at 1105.

[2] The District Court concluded that Working Washington abandoned its designated public forum argument by not raising the issue in its reply brief. ER 4. A reply brief is required to be responsive to the arguments made by the opposing party in their response. It need not readdress every issue raised in the opening brief in order to preserve the issue. See, e.g., Saldana v. Borem, No. 11cv0633–LAB (WMc), 2012 WL 667390, at *5 (S.D. Cal. Feb. 29, 2012) (noting that it is "erroneous" to conclude that because a reply brief did not address an argument, the argument has been abandoned), reconsidered on other grounds by Saldana v. Borem, No. 11cv0633–LAB (WMc), 2012 WL 1068987 (S.D. Cal. Mar. 28, 2012); see also Civ. Loc. Rule 7(b)(3) (presenting reply brief as optional). Given the incompleteness of the record on the forum question, Working Washington is not raising the issue in this appeal. Nevertheless, Working Washington intends to argue at summary judgment that Sound Transit created a designated public forum given the type of advertising its policy invited.

A. In A Limited Public Forum, the First Amendment Prohibits Both Express Viewpoint Discrimination and Standardless Discretion

The state may impose content-based restrictions when it creates a limited public forum. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45–46 (1983). On the other hand, viewpoint-based distinctions, in either a limited or designated public forum, are an impermissible "egregious form of content discrimination." Rosenberger v. Rectors & Visitors of the Univ. of Va., 515 U.S. 819, 829 (1995).

The Supreme Court set forth a general framework for analyzing a claim for access to a limited public forum in Cornelius, where it stated that a restriction in a limited public forum would be upheld as long as the restriction is (1) reasonable and (2) viewpoint neutral. Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 806 (1985).

Under Cornelius, the reasonableness question looks to whether the content-based exclusions from the forum are reasonable in light of the purposes of the forum. Cornelius, 473 U.S. at 806; see also Rosenberger, 515 U.S. at 830 (noting that the state may regulate access to the forum by subject matter, provided that the exclusion of the subject matter "preserves the purposes of that limited forum"). The viewpoint neutrality inquiry hinges on whether the government excludes certain viewpoints as opposed to certain categories of subject matter. For example, in Cogswell v. Seattle, this Court held that the applicable policy did not create

viewpoint concerns because it sought to exclude the overall topic of "candidate self-discussion." 347 F.3d 809, 815 (9th Cir. 2003).

As the Court noted in Cogswell, the line between viewpoint and subject matter is not always clear. Id. However, courts have found that the more categorical an exception the more likely it is content-based and not impermissibly viewpoint-based. See Lehman v. City of Shaker Heights, 418 U.S. 298, 304 (1974); United States v. Kokinda, 497 U.S. 720, 736–37 (1990); see also Children of the Rosary v. City of Phoenix, 154 F.3d 972, 978 (9th Cir. 1998) (affirming a determination that a forum was a limited public forum where the forum excluded all messages other than commercial advertising). In contrast, courts have not upheld forum restrictions that seek to exclude particular views. See Am. Freedom Def. Initiative v. Metro. Transp. Auth, --- F. Supp. 2d. ----, No. 11 Civ. 6774 (PAE), 2012 WL 2958178, at *16–19 (S.D.N.Y. July 20, 2012) (invalidating a "no demeaning" standard for transit advertising on the basis that it specially singled out certain categories of disfavored views).

The viewpoint neutrality inquiry under Cornelius is not limited to an examination of whether the policy expressly limits particular viewpoints. There is another aspect: unbridled discretion. See Kaahumanu v. Hawaii, 682 F.3d 789, 806 (9th Cir. 2012). In Kaahumanu, this Court joined the Fourth and Seventh Circuits in holding that "the viewpoint neutrality requirement includes the prohibition on a

licensing authority's unbridled discretion." Id. (citing Child Evangelism Fellowship of Md., Inc. v. Montgomery Cnty. Pub. Schs., 457 F.3d 376, 384 (4th Cir. 2006) ("[V]iewpoint neutrality requires not just that a government refrain from explicit viewpoint discrimination, but also that it provides adequate safeguards to protect against the improper exclusion of viewpoints."); Southworth v. Bd. of Regents of Univ. of Wis. Sys., 307 F.3d 566, 579 (7th Cir. 2002) ("[W]e conclude that the prohibition against unbridled discretion is a component of the viewpoint-neutrality requirement.")). Therefore, even if a forum restriction is categorically based on subject matter (not viewpoint), a standard that does not adequately constrain the discretion of the administrators also does not pass First Amendment muster. Id. at 806–07. Put another way, whether the policy sufficiently constrains the administrators' discretion is a question that is a part of the Cornelius viewpoint neutrality inquiry.

Thus, reasonableness is the appropriate standard for reviewing the exclusion of a message from a forum *only* where a particular policy does not present viewpoint discrimination concerns, either in the form of (1) a policy that on its face excludes certain viewpoints (rather than certain subjects), or (2) a policy that raises the specter of viewpoint discrimination due to the fact that it grants administrators

unbridled discretion. Kaahumanu, 682 F.3d at 806.[3]

In this case, the District Court examined two provisions of Sound Transit's policy. Section 3.3(b) contains a narrow definition of the term "political" encompassing only speech about specific laws or candidates for political office. Section 3.3(a) expresses Sound Transit's general intention to remain neutral on "political" or controversial issues.

The District Court held that reasonableness was the appropriate standard because Sound Transit's policy as a whole does not grant administrators unbridled discretion. The District Court stated that Sound Transit's "discretion is not unbounded [because] the policy includes numerous categories with specific detailed descriptions of impermissible materials." ER 5. It implied then, that section 3.3(b) limits Sound Transit's discretion. The District Court went on, though, to hold that "[r]egardless of whether the Airport Ad fell within the narrow

[3] In addition to viewpoint concerns that arise due to either of these types of infirmities in a policy, the government agency may also apply a facially viewpoint neutral and otherwise acceptable policy "to suppress a particular point of view." Cornelius, 473 U.S. at 812. Courts have allowed speakers to raise "as-applied" viewpoint discrimination challenges where a party can show (typically through comparator evidence) that regardless of the viewpoint neutrality of the policy, the government failed to treat similarly situated speakers equally. See, e.g., Pittsburgh League of Young Voters Educ. Fund v. Port Auth., 653 F.3d 290, 296 (3d Cir. 2011) (affirming district court's finding of viewpoint discrimination based on comparator evidence). Working Washington presented such evidence to the District Court, and its arguments as to the as-applied viewpoint discrimination claim are discussed in Section II, *infra*.

definition of Political in Paragraph 3.3(b), Sound Transit could reasonably reject the Ad under Paragraph 3.3(a) . . .” ER 5.

The District Court erred in concluding that Sound Transit’s decision, regardless of its basis in the policy, was “reasonable.” To the extent that Sound Transit rejected the Airport Ad under Section 3.3(b), its decision was unreasonable because the ad did not fall within the narrow definition of political in that section. To the extent that Section 3.3(a) is a free-standing substantive exclusion unlimited by Section 3.3(b), it affords Sound Transit unbridled discretion and is not entitled to reasonableness review. Either: (1) Section 3.3(b) limits Sound Transit’s discretion to reject “political” ads and the Airport Ad does not reasonably fit within that policy; or (2) Section 3.3(a) leaves the determination of what is controversial or political to the subjective whims of the Sound Transit administrators and is untenable from a First Amendment standpoint. Either conclusion points to a violation of Working Washington’s First Amendment rights. The District Court’s conclusion to the contrary was internally inconsistent, based on legal error, and was thus an abuse of discretion.

B. Working Washington’s Ad Did Not Fit Within the Narrow Definition of “Political” in Section 3.3(b) the Policy

The District Court raised the question of whether Working Washington’s ad fit within definition of “political” in Section 3.3(b) of Sound Transit’s advertising policy, which excludes:

> [any advertisement that] promotes or appears to promote any candidate for office, any political party or promotes or implies [a] position on any proposition, referendum, proposed or existing laws, or other ballot measures.

ER 72. The District Court did not expressly adopt a position on this question, but the answer is clearly, no.

1. Section 3.3(b) of the policy employed a narrow definition of "political".

Political speech exists on a broad spectrum ranging from flag burning on one end, to advocating enactment of specific legislation or supporting a particular candidate on the other end. "The word 'political' may be used in a broader context than the partisan political context." Pittsburgh League of Young Voters Educ. Fund v. Port Auth., No. 2:06-cv-1064, 2008 WL 4965855, at *28 (W.D. Pa. Aug. 14, 2008). Although the Supreme Court has found that an agency can categorically exclude political advertising from a forum while allowing commercial advertising, it has not mandated a specific definition for political advertising in this context. Lehman, 418 U.S. at 300 & n.1, 304. Courts have warned that the term "political" in the forum context "is not immediately obvious. That is, the term is not self-defining." Air Line Pilots Ass'n, Int'l v. Dep't of Aviation, 45 F.3d 1144, 1155 n.7 (7th Cir. 1995); Pittsburgh League of Young Voters, 653 F.3d at 296 ("[I]t is less than obvious that the ad could even be considered 'political' in nature" where "[i]t would not have called on citizens to, say, vote for a specific candidate or publicly support a certain cause."). Courts have not approved open-ended or imprecise

definitions of political or public-issue advertising. See, e.g., Air Line Pilots, 45 F.3d at 1155 (lamenting lack of evidence regarding enforcement of claimed policy of excluding "political" advertisements); Planned Parenthood Ass'n v. Chi. Transit Auth., 767 F.2d 1225, 1230 (7th Cir. 1985) (criticizing claimed policy of excluding "controversial" public issue ads where enforcement "depends on a series of events that can only be described as whimsical"); see also Lehman, 418 U.S. at 300 & n.1, 304 (upholding a restriction on political advertising which only excluded advertising about political candidates or politicians and measures that were subject to a vote).

In limiting political and commercial speech, agencies have taken several approaches to avoiding unbridled discretion, from defining "commercial" speech and excluding all speech that is not commercial, to defining political speech. See, e.g., Children of the Rosary, 154 F.3d at 975 (limiting bus advertising to "speech which proposes a commercial transaction"); Lebron v. AMTRAK, 69 F.3d 650, 656 (2d Cir. 1995) (policy excluding noncommercial advertisements); Ridley v. Mass. Bay Transp. Auth., 390 F.3d 65, 75 (1st Cir. 2004) (defining political content as "speech that (1) refers to a specific ballot question, initiative, petition, or referendum, or (2) refers to any candidate for public office"). Section 3.3(b) of Sound Transit's policy takes the latter approach, and contains a narrow definition of "political" ads (at the partisan end of the "political" spectrum) that are

ostensibly excluded by the policy.

The definition found in Section 3.3(b) of the policy is admittedly narrower than the definition for political speech found in other contexts. See, e.g., Menotti v. Seattle, 409 F.3d 1113, 1170 (9th Cir. 2005) (noting that any form of protest is political speech under the First Amendment). The definition of political in Section 3.3(b) does not raise viewpoint concerns: it excludes a discrete category of speech, as in the policies upheld in Kokinda, 497 U.S. at 736–37 (1990), Lehman, 418 U.S. at 300 & n.1, 304, and Cogswell, 347 F.3d at 818. Section 3.3(b) also offers an objective standard for measuring what constitutes political speech; it sufficiently constrains the discretion of Sound Transit administrators. Working Washington acknowledges that the narrow question of whether its ad fit within the definition of political under Section 3.3(b) of the policy is determined under a reasonableness standard.

2. Working Washington's ad does not "promote or impl[y] any position on any" ballot proposition or law.

Sound Transit argued that Working Washington's ad fell within Section 3.3(b)'s definition of "political" on the basis that the ad "promotes or implies [a] position on any proposition." ER 72. Sound Transit reads the term "proposition" broadly to encompass general public interest issues rather than specific pieces of legislation, but the text of Section 3.3(b) precludes this reading. The section overall speaks to ads that support candidates, political parties, or legislation. The clause

containing the word "proposition" refers to other laws (e.g., "ballot measures," "proposed or existing laws," or "ballot measures"). The logical interpretation of the term "proposition" in this context is that it refers to ballot measures, which are also called "ballot propositions" under Washington law. See RCW 42.17A.005(4) ("'Ballot proposition' means any 'measure' as defined by RCW 29A.04.091, or any initiative, recall, or referendum proposition proposed to be submitted to the voters of the state or any municipal corporation, political subdivision, or other voting constituency . . . ."). It is unreasonable to conclude otherwise.

Sound Transit's own practice provides a final reason to reject its expansive reading of section 3.3(b). Sound Transit accepted other advertising that can be equally characterized as advancing "propositions" that are of interest to the public. In particular, Sound Transit accepted Working Washington's own previous Bridges Ad and the Planned Parenthood Ad, both of which addressed issues of public concern and controversy (i.e., union organizing and birth control). ER 74; ER 30. There is no reasonable way to conclude that the Bridges Ad and the Planned Parenthood Ad did not advance any "propositions" that are of public concern, but the Airport Ad did.

The only rational conclusion with respect to Section 3.3(b) is that the Airport Ad did not fall within the narrow definition of "political" as defined by this Section. The key question, therefore, is whether Section 3.3(a) provided a valid

viewpoint neutral basis to exclude the ad. The answer to this must be no as well.

C. The District Court Erred in Reviewing Section 3.3(a) For Reasonableness Because the Policy Contains No Standards To Limit Official Discretion

As a preliminary matter, the District Court should have concluded that Section 3.3(a) was a recital or an introductory clause and not a substantive part of Sound Transit's policy. The purported exclusion on controversial or political advertising is contained in a section that sets forth Sound Transit's generalized intentions it had when it created its transit advertising forum. ER 70. A fair reading of this sentence is that it merely illustrates Sound Transit's intent, while Section 3.3(b) provides the actual substantive restrictions. Another principle of interpretation also supports the view that Section 3.3(a) was not intended to set forth exclusions from the forum. Section 3.3(b) contains specific definitions for religious and political advertising, which are two categories that are also referenced in the first sentence of Section 3.3(a). If Section 3.3(a) were intended to supply specific exclusions, there would be no reason to include specific definitions of "religious" or "political" under Section 3.3(b). Additionally, Section 3.3(b) contains a long list of (18) specific items that are excluded. ER 70–72. Longstanding maxims of interpretation provide that where specific exclusions are enumerated, anything that is not contained in these exclusions may not be deemed excluded under more general statements within a policy or statute. See, e.g., Pauley

v. BethEnergy Mines, Inc., 501 U.S. 680, 719 (1991) (Scalia, J., dissenting) (noting that under the "canon of construction, *expressio unius est exclusio alterius*," "[w]hen a provision sets forth a general rule followed by specific exceptions to that rule, one must assume—absent other evidence—that no further exceptions are intended."). The District Court's conclusion that Section 3.3(a) operates as an independent substantive restriction on what type of speech was permitted in the forum is illogical and irrational. Cf. United Food & Commercial Workers Union, Local 1099 v. Sw. Ohio Reg'l Transit Auth., 163 F.3d 341, 357 (6th Cir. 1998) (noting the "distinction between policy determinations and application of state policy").

Setting aside these issues of interpretation, the larger problem with the District Court's reliance on Section 3.3(a) is that the section does not offer workable standards to confine government discretion under the First Amendment. Given that Section 3.3(a), standing alone, does not sufficiently constrain Sound Transit's discretion, the District Court's "reasonableness" review of this section was an abuse of discretion.

1. Sound Transit interpreted Section 3.3(a) as a free-floating restriction on controversial advertising.

Section 3.3(a) of the policy sets forth Sound Transit's policy to restrict advertising consistent with its interests in raising revenue, "maintaining a . . . welcoming environment for its customers, and maintaining a position of neutrality

on political, religious and controversial matters." ER 70. Sound Transit's follow-up email and its briefing in the District Court stressed the supposedly "controversial" nature of Working Washington's ad. ER 51 (April 4, 2012 email ("Issues around working conditions and unions have a long and controversial history in this area and around the country.")); ER 56 ("the Airport Ad . . . raises on its face the controversial issue of 'poverty wages'"); ER 27A (the Airport Ad "emphasizes economic class issues and is designed to make travelers using Sea-Tac airport . . . feel uncomfortable about their traveling privileges compared to the conditions of airport workers . . . . That is controversial . . . .").

Unlike Section 3.3(b), which offered a viewpoint-neutral basis for excluding political and other types of speech, Section 3.3(a) purports to be a free-floating exclusion of controversial (and religious or political) speech. Courts disapprove of these types of restrictions. See Hopper v. City of Pasco, 241 F.3d 1067, 1079 (9th Cir. 2001); see also United Food, 163 F.3d at 359 ("We have no doubt that standing alone, the term "controversial" vests the decision-maker with an impermissible degree of discretion."); Planned Parenthood, 767 F.2d at 1230 ("We question whether a regulation of speech that has as its touchstone a government official's subjective view that the speech is "controversial" could ever pass constitutional muster."); Nat'l Abortion Fed'n v. Metro. Atlanta Rapid Transp. Auth., 112 F. Supp. 2d 1320, 1327–28 (N.D. Ga. 2000) (transit advertising policy

that defined the term "public controversy" found to be vague and unduly subjective).

2. The First Amendment requires any ban on "controversial" material to have guiding standards to protect against viewpoint discrimination.

Courts recognize that a government entity can design a limited forum so as to exclude controversial speech by excluding entire categories of speech that are more likely to encompass controversial messages or cause a disruption. See, e.g., Lehman, 418 U.S. at 303–04. Accordingly, Lehman affirmed as reasonable, the exclusion of any "paid political advertising on behalf of a candidate for public office" from a transit advertising forum. Id. at 299, 304. Similarly, in Kokinda, a plurality of the Supreme Court upheld a Postal Service regulation that categorically banned *all* in-person solicitations, agreeing with the Postal Service that solicitation was "inherently disruptive" and thus incompatible with the purposes of the forum. 497 U.S. at 732–33. Sound Transit's specific definitions of "political" and "religious" that are found in Section 3.3(b) exemplify this approach.

Categorical prohibitions on anything deemed "controversial" have not met with the same type of judicial approval. Courts, including the Ninth Circuit, have held that "controversialness" alone cannot serve as an appropriate line for demarcating what content is permitted within a forum and what is appropriately excluded. See Hopper, 241 F.3d at 1079; see also United Food, 163 F.3d at 359

("We have no doubt that standing alone, the term "controversial" vests the decision-maker with an impermissible degree of discretion."); Planned Parenthood, 767 F.2d at 1230; Nat'l Abortion Fed'n, 112 F. Supp. 2d at 1327–28 (transit advertising policy that defined the term "public controversy" found to be vague and unduly subjective).

The Court in Hopper noted that the City of Pasco's ban on controversial art relied on an inherently subjective standard and was therefore untenable. 241 F.3d at 1079. The Court pointed out that the policy did not contain any further definition of what is controversial. Id. Among other reasons, the Court found the "controversialness" standard problematic because it would "all too easily lend itself to viewpoint discrimination, a practice forbidden even in limited public fora." Id. Such a policy would preclude judicial review and also result in the suppression of ideas deemed offensive to a majority of the population. Id. This Court raised similar concerns in Arizona Life Coalition, noting that the statute in that case did not "create objective criteria for limiting 'controversial' material." Ariz. Life Coalition v. Stanton, 515 F.3d 956, 972 (9th Cir. 2008) (finding that an abortion-related message could not be excluded because it did not fall into any of the specific exclusions of the forum's policy).

These principles extend to the context of transit advertising. See United Food, 163 F.3d at 359 ("We have no doubt that standing alone, the term

'controversial' vests the decision-maker with an impermissible degree of discretion."); Air Line Pilots, 45 F.3d at 1151 (holding that the exclusion of advertisements in the airport setting on the basis that the City was entitled to exclude advertising that was critical of airlines violated the First Amendment because such a grant of discretion "would virtually guarantee discrimination"); Planned Parenthood, 767 F.2d at 1230 ("We question whether a regulation of speech that has as its touchstone a government official's subjective view that the speech is 'controversial' could ever pass constitutional muster.").

3. Sound Transit's avowed purpose of maintaining a "welcoming environment" for customers and employees is not a viewpoint neutral reason for excluding Working Washington's ad.

Sound Transit argues that its dual desires to maintain a "safe and welcoming environment" and raise revenue are sufficient First Amendment guidelines for determining what is for controversial and may be excluded from a government forum. Courts have, however, rejected similar arguments. While business interests and concerns over the reaction of patrons are appropriate bases to restrict speech within a forum, these interests do not function as sufficiently neutral standards for defining the boundaries of a forum. See Hopper, 241 F.3d at 1079; United Food, 163 F.3d at 359–60; Air Line Pilots, 45 F.3d at 1157; Planned Parenthood, 767 F.2d at 1233. Indeed, being guided by these interests alone raises the specter of viewpoint discrimination.

The Seventh Circuit confronted a very similar case in Chicago Acorn v. Metropolitan Pier and Exposition Authority, where it held that a government agency could not vary its rental rates to prevent potential adverse publicity generated by the users. 150 F.3d 695, 701 (7th Cir. 1998). Chicago Acorn is directly on point. As in this case, in Chicago Acorn the government tried to justify regulation of access to the forum to limit negative publicity, which could in turn undercut government's economic interests. Id. at 700. The Court of Appeals concluded that this was not permitted under the First Amendment, even though the government's "motive may indeed be innocently commercial rather than invidiously political." Id. at 700–01 ("MPEA may not . . . employ political criteria to decide who may use its facilities and on what terms, even if they are not public forums in even the most limited sense") (citing Forsyth Cnty. v. Nationalist Movement, 505 U.S. 123 (1992)). The court rested its conclusion on the fact that the City's financial justification could not be separated from political criteria which was based on listener reaction, and would inevitably lead to viewpoint discrimination.

The Seventh Circuit's earlier decision in Air Line Pilots is also on point. There, the City of Chicago sought to exclude the Air Line Pilots Association, a collective bargaining representative for the pilots of Air Wisconsin Incorporated, from placing an advertisement at O'Hare airport that was critical of United Air

Lines, which had acquired and sold off parts of Air Wisconsin. 45 F.3d at 1147. The City sought to exclude the association's ad on the basis that it was contrary to the "commercial interests" of the businesses that used the airport (i.e., the ad would be offensive to United). Id. at 1157. The two judge majority said this justification raised viewpoint concerns (citing R.A.V. v. St. Paul, 505 U.S. 377 (1992)). A concurring judge noted that this justification "rapidly devolves into a form of viewpoint-based discrimination." Id. at 1161 (Flaum, J., concurring).

As in Air Line Pilots, Chicago Acorn, Hopper and Arizona Life, Section 3.3(a) does not "create objective criteria for limiting 'controversial' material." In practice, as discussed in Section II below, Sound Transit accepted ads that do not square with its current interpretation of Section 3.3(a)'s exclusion of political or controversial material. To the extent Section 3.3(a) as previously applied by Sound Transit operated as a substantive restriction on controversial speech, it allowed administrators to make decisions based on their own subjective experience as to what is controversial. Sound Transit's desire to remain neutral on controversial issues likely stems from a similar impulse as the government's in Chicago Acorn or Air Line Pilots. While this impulse may be laudable, without sufficient standards to constrain the discretion of the administrators, it runs afoul of the First Amendment.

4. Sound Transit's interpretation of "political" as contained in Section 3.3(a) suffers from the same Constitutional infirmities.

Sound Transit may argue an alternate basis for excluding the ad under Section 3.3(a): the ad was political, notwithstanding the fact that it did not advocate public action on any candidate, legislation, or political party. As mentioned above, given that Section 3.3(b) contains a specific and narrow definition of political, it is illogical to conclude that the introductory sentence in Section 3.3(a) even operates as a substantive restriction on speech within the forum. However, even if the District Court was correct in concluding otherwise, the definition of political in Section 3.3(a) as a substantive restriction on speech cannot be squared with the First Amendment.

Cases have noted that the term "political" cannot be used in isolation to define speech that fits within a forum. The First Amendment requires more to guide the discretion of administrators. See, e.g., Air Line Pilots, 45 F.3d at 1162 ("the very terms 'political' or 'nonpartistan' are themselves incapable of principled application") (Flaum, J., concurring). Although it is unclear exactly what meaning Sound Transit gave to this term in the context of Section 3.3(a), it is clear that Sound Transit linked it to controversial—i.e., ads that were deemed political by virtue of the fact that they addressed controversial issues. This is not a workable standard from a First Amendment standpoint for the reasons stated above.

Moreover, as this Court has explained, censoring a particular message from

a forum opened to political speech, based on a desire to avoid offending either side of a controversial issue, is an impermissibly viewpoint-driven rationale. Arizona Life, 515 F.3d at 972. Sound Transit's acceptance of Working Washington's previous Bridges Ad highlights the flaws in its interpretation of the policy in this manner. Sound Transit admittedly accepted speech in the forum on the issue of wages for workers. It cannot then turn around and exclude an ad addressing the same topic from a different perspective without running afoul of the First Amendment. "Once the government has chosen to permit discussion of certain subject matters, it may not then silence speakers who address those subject matters from a particular perspective." Id. (quoting Cogswell, 347 F.3d at 815)).

D. The District Court's Conclusion that the Ad Could Be Legitimately Excluded as Political SpeechWas Erroneous

To summarize, the District Court declined to conclude that Working Washington's ad fit within the narrow definition of "political" in Section 3.3(b). Any conclusion to the contrary would have been unreasonable or irrational. Even assuming the District Court was correct in concluding that Section 3.3(a) was an independent restriction, it should not have reviewed Sound Transit's decision that the ad fit within Section 3.3(a) under a standard of reasonableness because the provisions of Section 3.3(a) fail to guide the discretion of administrators and raise the specter of viewpoint discrimination. Under Kaahumanu, this question is not reviewed for reasonableness. Rather, because the standardless definitions in

Section 3.3(a) have been found in other cases to not be viewpoint-neutral bases to exclude speech from a forum, Section 3.3(a) could not serve as a constitutionally appropriate basis to exclude Working Washington's ad.

II. THE DISTRICT COURT FAILED TO TAKE INTO ACCOUNT EVIDENCE OF VIEWPOINT DISCRIMINATION

The District Court also erred by failing to consider Working Washington's evidence, in the form of direct evidence, comparator evidence, and evidence of pretext, that Sound Transition's decision was viewpoint-driven. Courts generally rely on these types of evidence to evaluate an as-applied claim of viewpoint discrimination. See, e.g., Pittsburgh League of Young Voters, 653 F.3d at 297 (comparator evidence); Ridley, 390 F.3d at 88 (direct statements).

A. Working Washington Offered Direct Evidence of Viewpoint Discrimination

In seeking to justify its conclusion that Working Washington's ad was "political" under Sound Transit's policy, Sound Transit pointed to the fact that (1) Working Washington engaged in picketing and lobbying to increase union presence at Seattle-Tacoma Airport; and (2) Working Washington's director had a Linked-In profile indicating that he was politically active. ER 58–59; ER 49. Sound Transit's consideration of Working Washington's activities outside of the forum improperly penalized Working Washington for the exercise of its First Amendment rights.

"State action designed to retaliate against and chill political expression strikes at the very heart of the First Amendment." Gibson v. United States, 781 F.2d 1334, 1338 (9th Cir. 1986). The Supreme Court has similarly noted that "the First Amendment means that government has no power to restrict expression because of its message [or] its ideas." Police Dep't of Chi. v. Mosley, 408 U.S. 92, 95 (1972). If those seeking access to a forum are penalized for their First Amendment activities outside the forum, this could lead precisely to the type of chilling effect that led courts to develop the retaliation doctrine in the First Amendment context. Indeed, courts assessing as-applied viewpoint discrimination claims have held that it is improper for an agency to consider the political motivations or activities of a speaker in determining whether to include or exclude a message from a forum. See Ridley, 390 F.3d at 88 (statement that Change the Climate's ads "were part of [its] effort to 'reform marijuana laws' . . . was a direct statement of viewpoint discrimination"); United Food, 163 F.3d at 355 (noting that agency's consideration of union's use of the transit agency's bus "at a protest" was improper, and evidence of "effort to suppress [the ad] due to disagreement with its . . . message").

United Food presented a situation similar to the one in this case. There the transit agency offered several justifications for why it rejected United Food's message, and one of the reasons was the administrator's "displeasure" over the

union's prior protest activities. United Food, 163 F.3d at 356. While the Sixth Circuit assumed for purposes of resolving the appeal that the agency's stated reasons, which did not involve a reaction to the protest outside the forum, were the actual reasons behind rejection of the ad, the court nevertheless noted that "any effort to suppress [the ad] due to disagreement with its pro-union message offends the values underlying the First Amendment." Id. at 355.

Sound Transit's reliance on Working Washington's alleged "picketing" or "petition[ing]" activities was improper. The District Court should have considered this evidence of viewpoint discrimination.

B. Working Washington Offered Comparator Evidence That Supported a Finding of Viewpoint Discrimination

Working Washington also introduced evidence that Sound Transit had previously run two ads on issues of public concern. The District Court concluded that Sound Transit was sufficiently "reasonable" in deciding that the Bridges Ad (unlike the Airport Ad) was non-controversial and non-political under Sound Transit's policy. Nevertheless, Sound Transit offered no standards used to determine why the Bridges Ad fell on the non-controversial and non-"political type" side of the line while the Airport Ad fell on the other side. Sound Transit's acceptance of the Bridges Ad alongside rejection of the Airport Ad was sufficient to undermine Sound Transit's claims that it applied its policy of rejecting political ads in an even-handed manner. See AIDS Action Committee of Mass. v. Mass.

Bay Transp. Auth., 42 F.3d 1, 1 (1st Cir. 1994); Pittsburgh League of Young Voters, 653 F.3d at 297; Ridley, 390 F.3d at 87.

Moreover, Working Washington submitted evidence that Sound Transit accepted another ad discussing the use of birth control. In January 2012, Sound Transit accepted an ad from Planned Parenthood that extolled the virtues of safe sex. ER 30. There can be no question that the issue of abortion is a controversial and political topic, and evokes at least the same amount of controversy, if not more, as wages for airport workers. See Planned Parenthood, 767 F.2d at 1230 n. 7 ("All [Transit Authority] officials agree that the issue of abortion is controversial."). The District Court should have shifted the burden to Sound Transit and required Sound Transit to offer evidence as to why the Planned Parenthood Ad and Bridges Ad were not controversial or political, but the Airport Ad was. However, Sound Transit did not offer any credible arguments or evidence to this effect, and the District Court accepted Sound Transit's position at face value. It is also worth noting that the Airport Ad in question was displayed inside the Seattle-Tacoma Airport terminal, the very facility which would presumably suffer the most adverse commercial effects from being associated with Working Washington's allegedly "controversial" message. ER 34–35. The District Court also did not require Sound Transit to explain why placement of the Airport Ad in the light rail forum would cause adverse effects while placement in the airport

itself would not.

C. Sound Transit's Invocation of the "Website Rule" was Pretextual and Also Demonstrates Differential Treatment

Sound Transit also advised that it rejected the Airport Ad because of a purported violation of Sound Transit's website policy. ER 49. This is an after-the-fact justification that should be viewed with skepticism by the Court. Pittsburgh League of Young Voters, 653 F.3d at 296 (rejecting a basis articulated after a lawsuit had been filed as a "post hoc rationalization"). The District Court appropriately did not rely on this justification in determining whether the ad was properly excluded.

Nevertheless, the evidence indicated that Sound Transit assisted at least one other prospective advertiser in complying with this website requirement. ER 31. In fact, the evidence indicated that, as with the Planned Parenthood website in question, the Working Washington site had no content at the time it was reviewed. ER 46. This was far from a hard and fast rule as enforced by Sound Transit, and Sound Transit citing to this rule against Working Washington, but not Planned Parenthood, points to its differential treatment of Working Washington.

III. THE DISTRICT COURT EMPLOYED AN INCORRECT LEGAL STANDARD FOR WHETHER INJUNCTIVE RELIEF WAS APPROPRIATE

The general standard for obtaining a preliminary injunction requires Working Washington to establish four elements: (1) a likelihood of success on the

merits, (2) "that [it is] is likely to suffer irreparable harm in the absence of preliminary relief," (3) "that the balance of equities tips in [its] favor," and (4) "that an injunction is in the public interest." Associated Press v. Otter, 682 F.3d 821, 823–24 (9th Cir. 2012) (quoting Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 20 (2008) (internal quotation marks omitted)). Under the sliding scale approach employed by this Court "the elements of the preliminary injunction test are balanced, so that a stronger showing of one element may offset a weaker showing of another." M.R. v. Dreyfus, — F.3d —, No. 11-35026, 2012 WL 2218824, at *17 (9th Cir. 2012) (citing Alliance for the Wild Rockies, 632 F.3d at 1131–32)).

The District Court abused its discretion by employing a legally erroneous standard for determining whether to grant Working Washington's request for injunctive relief. The District Court correctly noted that as a general matter, injunctive relief is disfavored where it would constitute a departure from the status quo (a "mandatory" injunction) or would "grant the moving party the full relief to which it might be entitled if successful at trial." ER 2–3. The District Court erred, however, in excluding from its analysis the countervailing and more specific principle that governs First Amendment claims. It is well-established that "'[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury' for purposes of the issuance of a

preliminary injunction." Klein v. City of San Clemente, 584 F.3d 1196, 1207–08 (9th Cir. 2009) (quoting Elrod v. Burns, 427 U.S. 347, 373 (1976)). Moreover, "[t]he harm is particularly irreparable where . . . a plaintiff seeks to engage in political speech, as 'timing is of the essence in politics' . . . ." Id. (quoting Long Beach Area Peace Network v. City of Long Beach, 522 F.3d 1010, 1020 (9th Cir. 2008)). Numerous courts have granted preliminary injunctions where the denial of preliminary relief would likely have resulted in the loss of First Amendment freedoms. See, e.g., Brown, 321 F.3d 1217 (affirming grant of preliminary injunction against transportation authority's policy exempting American flags from permit requirements applying to all other expressive signs and banners); Bronx Household of Faith v. Bd. of Educ., 331 F.3d 342 (2d Cir. 2003) (affirming grant of preliminary injunction enjoining public school from refusing to rent space to plaintiffs); United Food, 163 F.3d at 363 (affirming grant of preliminary injunction requiring transit authority to accept union advertisement); New York Magazine v. Metro. Transp. Auth., 136 F.3d 123 (2d Cir. 1998), cert. denied, 525 U.S. 824, 119 S. Ct. 68, 142 L.Ed.2d 53 (1998) (affirming grant of preliminary injunction enjoining transit authority from refusing to display advertisement).

Because it neglected the Klein standard, the District Court abused its discretion. First, it erroneously held that "Working Washington has made no showing that extreme or very serious damage would result in the absence of

preliminary relief." ER 3. The District Court noted that "[t]his is all the more the case given the numerous other advertising venues available for the Airport Ad." ER 6. But Klein makes clear that even minimal periods of lost First Amendment freedoms, especially in the context of politically relevant speech, are sufficiently extreme and serious to warrant preliminary injunctive relief. As the Second Circuit concluded, "[w]here a plaintiff alleges injury from a rule or regulation that directly limits speech, the irreparable nature of the harm may be presumed." Bronx Household of Faith, 331 F.3d at 349. Working Washington chose its venue deliberately. It is legal error to suggest that the theoretical existence of alternative venues for Working Washington's speech is adequate to prevent irreparable harm. To the extent that Sound Transit violated Working Washington's First Amendment rights, Working Washington has suffered and continues to suffer irreparable harm, and its motion for preliminary injunction should be granted.

Where the status quo represents an ongoing violation of the moving party's First Amendment rights, and where these rights will continue to be violated until the party receives full relief, justice strongly favors a preliminary injunction. The District Court abused its discretion by concluding otherwise.

CONCLUSION

The District Court incorrectly reviewed Sound Transit's decision to exclude Working Washington's ad under an overall test of reasonableness. While the

definition of political in Section 3.3(b) of the policy was objective and sufficiently constrained Sound Transit's discretion, the introductory clause which purported to exclude controversial or political advertising did not. Accordingly, the District Court should not have subjected Sound Transit's exclusion of Working Washington's ad under Section 3.3(a) to reasonableness review. As numerous cased hold, a vague exclusion on controversial speech from a forum violates the First Amendment. The District Court also failed to take into account Working Washington's evidence of viewpoint discrimination, which included direct evidence, comparator evidence, and evidence that one of Sound Transit's proffered reasons was mere pretext. The District Court did not require Sound Transit to articulate viewpoint neutral reasons for its differential treatment of Working Washington's ad. Finally, the District Court employed the incorrect standard for determining whether Working Washington was entitled to injunctive relief. It treated Working Washington's request as "doubly disfavored," despite the probability of irreparable harm, stemming from the loss of Working Washington's First Amendment rights.

For the reasons set forth above, Working Washington respectfully requests that the District Court's order be reversed and that the Court direct the District Court to issue the preliminary injunction.

Dated August 22, 2012.

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CERTIFICATE OF COMPLIANCE
FOR CASE NUMBER No. 12-35622

The undersigned certifies under Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure and Ninth Circuit Rule 32-1, that the attached opening brief is proportionally spaced, has a type face of 14 points or more and, pursuant to the word-count feature of the word processing program used to prepare this brief, contains 8,549 words, exclusive of the matters that may be omitted under Rule 32(a)(7)(B)(iii).

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STATEMENT OF RELATED CASES
NINTH CIRCUIT RULE 28-2.6

Appellant Working Washington identifies the following case as being related under Ninth Circuit Rule 28-2.6(c): Seattle Mideast Awareness Campaign v. King County, Ninth Circuit Case Nos. 11-35914 & 11-35931 (SeaMAC). Both cases involve transit advertising and the propriety of a government agency's decision to exclude advertising from a forum. Oral argument in the SeaMAC case is currently scheduled for October 3, 2012.

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CERTIFICATE OF SERVICE

U.S. Court of Appeals Docket Number: No. 12-35622

I hereby certify that I electronically filed the foregoing Opening Brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on August 22, 2012. With the exception of James Edward Niemer, I certify that all counsel for Appellee are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system. I caused a copy of this notice to be mailed via first class mail (postage prepaid) to the address for Mr. Niemer set forth below:

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Signature: /s Venkat Balasubramani