

County's Exclusion Of Anti-Israel Bus Advertisement Did Not Violate 1st Amendment

In *Seattle Mideast Awareness Campaign v. King County*, 14 C.D.O.S. 2695, No. 11-35914 (March 18, 2015), the United States Court of Appeals for the Ninth Circuit, affirmed the district court's grant of summary judgment in favor of King County ("County"), holding that the County's exclusion of an anti-Israel advertisement did not violate the First Amendment because the bus advertising program created a limited public forum and the County's decision to exclude the ad was reasonable and viewpoint neutral.

Plaintiff non-profit group, Seattle Mideast Awareness Campaign ("SeaMAC"), proposed a bus ad reading: "ISRAELI WAR CRIMES: YOUR TAX DOLLARS AT WORK." Initially, the County flagged the ad as controversial, but ultimately approved it deciding that it did not violate its bus advertising policy. A public firestorm broke out after a local news broadcast reported on the impending ad. Photos depicting dead or injured bus passengers appeared under the door of a transportation authority service center, bus drivers and customers expressed safety concerns and worried that operating or riding buses displaying the ads would subject them to violence, and thousands of emails and phone calls—many threatening violence—deluged a call center that usually received no more than 80 communications per day. In the midst of the public outcry, two pro-Israel groups proposed bus ads reading: "PALESTINIAN WAR CRIMES: YOUR TAX DOLLARS AT WORK" and "IN ANY WAR BETWEEN THE CIVILIZED MAN AND THE SAVAGE, SUPPORT THE CIVILIZED MAN. Support Israel, Defeat Islamic Jihad." Ultimately, the County rejected all of the ads, saying "service disruptions, civil disobedience, and lawless and violent actions had become reasonably foreseeable." The County thereafter adopted a policy barring all viewpoint-related advertising.

SeaMAC sued, claiming the County violated its First Amendment right to free speech. The Ninth Circuit disagreed. In affirming the district court's decision granting the County's motion for summary judgment, the Ninth Circuit held that the County only created a "limited public forum"—where the government grants "selective access" by imposing either speaker-based or subject-matter restrictions—rather than a "designated public forum"—where the government grants "general access" for expressive use by the general public or a particular class of speakers. The court



by Alexandra V. Atencio

reasoned that the County only intended to grant selective access because its policy requires everyone seeking access to obtain permission through a pre-screening process, the policy imposed categorical subject-matter limitations, excluding ads for tobacco and alcohol products, for example, and the County had consistently implemented its policy by rejecting proposed ads that were non-compliant. In addition, the principal purpose of the bus advertising program is to generate revenue for the bus system, therefore, the permitted expressive activities are "incidental to the provision of public transportation" and "part of the commercial venture." Such use, the court opined, is "generally incompatible with granting the public unfettered access for expressive activities." The court acknowledged that several other circuits would disagree with its holding based on a mistaken view that if the government opens a forum and is willing to accept political speech, it has necessarily signaled an intent to create a designated public forum. The court rejected the notion that the First Amendment imposes such a categorical rule.

The Ninth Circuit's holding that the sides of the County's buses are a limited public forum, however, "does not mean the government may impose whatever arbitrary or discriminatory restrictions on speech it desires." Rather, the County must have reasonable and viewpoint neutral reasons for its restrictions. Because the County proved that SeaMAC's ad posed a real threat of disruption to the forum's purpose as a mode of transportation, as evidenced by threats of vandalism, violence, reduced ridership based on fear of endangerment, and substantial diversion of County resources, the Court held that the County's exclusion of the proposed ad was reasonable. And "[b]ecause the County simultaneously rejected all of the proposed ads on the Israeli-Palestinian conflict—from opposing viewpoints—no reasonable jury could find that it engaged in viewpoint discrimination."

In dissent, Judge Morgan Christen argued that the County intended the sides of the buses to be designated public forums, so the district judge should have applied strict scrutiny. She concluded that the case should be sent back to the district court for further factfinding. "This is not to pre-judge the outcome of the case," she elaborated. "The safety of public transit systems is of paramount importance, and it may be that credible threats created a compelling state interest. But it also may be that the County inappropriately bowed to a 'heckler's veto' and suppressed speech that should have been protected."

This case underscores the importance of well-drawn, unambiguous policies governing access to a public forum where a public entity intends to impose certain limitations on speech. Public entities that maintain similar advertising programs should review their policies to ensure they allow only "selective access" and should confirm that such policies are consistently and strictly implemented. Agencies should be cautious about maintaining policies with "civility clauses" that prohibit speech that would foreseeably result in disruption of the transportation system or in a threat to public safety. Such policies could be viewed as so broad and subjective that they cannot evince an intent to create a limited public forum. If agencies do maintain such policies, the standards for inclusion and exclusion should be unambiguous and definite. Agencies should also carefully document the disruption or threat to public safety relied upon to restrict certain speech to demonstrate the reasonableness of the restriction.

For more information, please contact:

Alexandra V. Atencio, Partner
415-995-5870
aatencio@hansonbridgett.com