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October 16, 2024

Via Certified Mail and Electronic Mail

Sonia Carvalho, City Attorney
Alvara Nuñez, City Manager
City of Santa Ana
20 Civic Center Plaza (M-30)
P.O. Box 1988
Santa Ana, CA 92702-1988

Michael Culver, President
Focus Media Group, Inc.
2271 W. Malvern Avenue, Suite 407
Fullerton, CA 92833

Re: City of Santa Ana's Unconstitutional Advertising Standards

Dear Ms. Carvalho, Mr. Nuñez, and Mr. Culver:

California Justice Center, APC, represents local teacher Brenda Lebsack and the Interfaith Statewide Coalition. On or about August 14, 2024, Ms. Lebsack applied to run an advertisement with the City of Santa Ana's ("City") bus shelter advertising program managed by Focus Media Group, Inc. ("FMG"). Ms. Lebsack sought to place the following advertisement on City bus benches and kiosks:

> "70% of Santa Ana Unified School District students are not meeting reading standards and 80% are not math proficient." ("Lebsack Ad").

Ms. Lebsack asked that the Lebsack Ad include the Interfaith4Kids website underneath the fact statement with a QR code linking to supporting data in Spanish and English. She was told by a representative of FMG, "unfortunately the topics are political and we are unable to move further." Upon further inquiry, Ms. Lebsack was informed that the City determines the standards for acceptable advertisements. According to FMG, "[a]t Focus Media Group, we do not set the advertising standards or determine what is deemed acceptable for our clients' advertisements. These guidelines are dictated by our municipal contracts, in this case, specifically with the City of Santa Ana."

According to the agreement between the City and FMG dated January 18, 2022 ("Agreement"), FMG installs, maintains, and operates advertising-supported bus stops, bus shelters and kiosks throughout the City and shares revenue from advertising with the City. FMG has an exclusive license to use City-owned "Street Furniture," which includes bus stop shelters, kiosks, benches, trash receptacles, signs including LED solar signs, posts, information map cases, schedule holders, outdoor advertising displays (both static and digital), secure bicycle

racks, and ancillary equipment and structures.

The City's relevant standards for advertisements are found on pages 16, 17, 20, 26, and 27 of the Agreement.

1. The City's Advertising Standards Violate the First Amendment of the United States Constitution and Article I, Sec. 2(a) of the California Constitution

It is "axiomatic" that the government may not "induce, encourage, or promote private persons to accomplish what it is constitutionally forbidden to accomplish." *Norwood v. Harrison* (1973) 413 U.S. 455, 465. State action may be found when: (1) a challenged activity results from the State's exercise of coercive power; (2) the state has provided significant encouragement, either overt or covert, to private conduct; (3) a private actor operates as a willful participant in joint activity with the State or its agents; or (4) the private action is entwined with governmental policies, or when government is entwined in its management or control. *Tennessee Secondary School Athletic Ass'n v. Brentwood Academy* (2007) 551 U.S. 291, 296.

In this case, FMG does not set the advertising standards or determine what is deemed acceptable advertisement content. The guidelines are dictated entirely by the City, and the decision to approve or reject the advertisement is the government's—not FMG's. The City cannot shirk its obligations under the state and federal constitutions by using a private company to accept and reject advertising applications in an unconstitutional manner.

A. The City's Standards Are Facially Invalid Because They Discriminate Based on Viewpoint

When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant. *Rosenberger v. Rector and Visitors of University of Virginia* (1995) 515 U.S. 819, 829 (citing *R.A.V. v. St. Paul* (1992) 505 U.S. 377, 391). Viewpoint discrimination is an egregious form of content discrimination, and the government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction. *Rosenberger v. Rector and Visitors of University of Virginia* (1995) 515 U.S. 819, 829 (citing *Perry Ed. Assn. v. Perry Local Educators' Assn.* (1983) 460 U.S. 37, 46).

In certain instances, cities may constitutionally limit the use of advertisement space to certain issues or content. *Children of the Rosary v. City of Phoenix* (9th Cir. 1998) 154 F.3d 972. By such limitation, the city chooses the content of such expression, yet the city's choices must remain viewpoint neutral in order to pass constitutional muster. *Id.; see also Members of City Council of City of Los Angeles v. Taxpayers for Vincen*t (1984) 466 U.S. 789.

Here, the City's list of "unacceptable content" includes "[n]egative connotations of public transit - Contains images, copy or concepts that actively denigrate public transportation," and "[i]s harmful to the City of Santa Ana, its neighboring cities, or Orange County." (Agreement, p. 27).

These are viewpoint-based restrictions. If an advertisement contains positive or neutral

connotations of public transit, it is acceptable under the Agreement. But if an advertisement on the same issue contains negative connotations of public transit, it is unacceptable under the Agreement. Similarly, advertisements harmful to the City, its neighbors, or Orange County are prohibited, while advertisements on the same issue neutral or beneficial to the City, its neighbors, or Orange County would be acceptable.

These are not content- or issue-specific restrictions, which may be constitutionally permissible in certain contexts. These restrictions target particular views taken by speakers on a subject. As such, the City's standards as set forth in the Agreement are facially unconstitutional.

B. The City's Vague Standards Act as a Prior Restraint on Speech

The prior restraint doctrine requires that a licensing regime for advertising "avoid placing unbridled discretion in the hands of government officials." *Outdoor Media Group, Inc. v. City of Beaumont* (9th Cir. 2007) 506 F.3d 895, 903 (citing *GK Ltd. Travel v. City of Lake Oswego* (9th Cir. 2006) 436 F.3d 1064, 1082). This requirement seeks to "alleviate the threat of content-based, discriminatory enforcement that arises where the licensing official enjoys unduly broad discretion in determining whether to grant or deny a permit." *Id.* To avoid impermissible discretion, an ordinance must "contain adequate standards to guide the official's decision and render it subject to judicial review." *Outdoor Media Group, Inc. v. City of Beaumont* (9th Cir. 2007) 506 F.3d 895, 903-904 (citing *Thomas v. Chicago Park Dist*. (2002) 534 U.S. 316, 323). A facial challenge lies whenever a licensing law gives a government official or agency substantial power to discriminate based on the content or viewpoint of speech by suppressing disfavored speech or disliked speakers. *City of Lakewood v. Plain Dealer Publishing Co*. (1988) 486 U.S. 750, 759 (ordinance vesting in the mayor unbridled discretion to grant or deny annual permit for location of newsracks on public property is facially invalid as prior restraint).

There are two major First Amendment risks associated with unbridled licensing schemes: self-censorship by speakers in order to avoid being denied a license to speak; and the difficulty of effectively detecting, reviewing, and correcting content-based censorship "as applied" without standards by which to measure the licensor's action. *City of Lakewood v. Plain Dealer Publishing Co.* (1988) 486 U.S. 750, 759.

When a policy allows an official to deny for any reason, including disagreement with the content (beliefs, political views, goals) of a group's proposed expressive activity, it violates the free speech and assembly provisions of the state and federal Constitutions. *U.C. Nuclear Weapons Labs Conversion Project v. Lawrence Livermore Laboratory* (1984) 154 Cal.App.3d 1157, 1172. In addition, such policies have a significant "chilling" effect on the exercise of free speech rights, as they encourage self-censorship in order for an applicant to obtain a license to speak. *Id.*

Here, the City imposes a number of nebulous restrictions (*see* Agreement pp. 16, 17, 26, 27) that give the City unbridled discretion to accept or reject advertisements, and allows viewpoints favorable to the City while explicitly prohibiting criticism. (Agreement, pp. 20, 26, 27). Further, the City prohibits content "which the City in its sole discretion deems offensive to community standards of good taste." (Agreement, p. 16). Such a standardless policy gives unbridled discretion to decisionmakers to deny advertising applications based on the speaker's

viewpoint, and is constitutionally impermissible.

C. As Applied, the City's Standards are an Effort to Suppress a Speaker's Activity due to Disagreement with the Speaker's View

Even in a nonpublic forum, efforts to suppress a speaker's activity due to disagreement with the speaker's view are constitutionally impermissible. *International Soc. for Krishna Consciousness v. Lee* (1992) 505 U.S. 672, 679; *Clark v. Burleigh* (1992) 4 Cal.4th 474, 483.

FMG is required to run at least one "public service announcement" four times per year in up to 16 bus shelters, and the City is required to approve such public service messages. (Agreement, p. 20). The Agreement does not define "public service announcement," nor dictate who can make a public service announcement. On the other hand, the Agreement prohibits "messages that are political in nature, including messages of political advocacy, that support or oppose any candidate or referendum, or that feature any current political office holder or candidate for public office, or take positions on issues of public debate." (Agreement, p. 26).

The Lebsack Ad is arguably a public service announcement, as it is a short, factual message that is intended to educate the public and change their attitudes and behaviors. If a statement of fact can be considered "political in nature," then the prohibition against political speech in the Agreement could apply to anything, and the City could use such a nebulous standard as a pretext to deny applications for disfavored speech.

The City appears to have done just that in this case. Here, it appears the City rejected the Lebsack Ad because it criticizes the government and shares important information that is inconvenient for certain government interests. Had the Lebsack Ad instead praised the school district for its graduation rates without mentioning the low proficiency numbers, the City arguably would not have denied the application. We cannot know for sure, however, because the City's standards are so nebulous that they give unbridled discretion to government officials to determine whether to allow certain speech.

The plain langage of the Agreement demonstrates the City's preference for speech that praises, rather than criticizes, the government. (*See* Agreement, p. 27). As applied here, the City's standards were used to suppress a disfavored viewpoint: that the Santa Ana Unified School District is failing to educate its students.

2. Lebsack Ad Placement

Brenda Lebsack and the Interfaith Statewide Coalition would very much like to avoid legal action. We look forward to the City and FMG facilitating placement of the Lebsack Ad at the regular fee by **October 25, 2024,** and revising the advertising standards.

Sincerely,

Julie A. Hamill
California Justice Center, APC