No. 17-35897

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

American Freedom Defense Initiative,
Pamela Geller, and Robert Spencer,
Plaintiffs-Appellants,
v.
King County,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
The Honorable Richard A. Jones
Case No. C13-1804 RAJ

BRIEF *AMICUS CURIAE* OF PENNSYLVANIA CENTER FOR THE FIRST AMENDMENT IN SUPPORT OF PLAINTIFFS-APPELLANTS

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RULE 26.1 DISCLOSURE STATEMENT

Amicus Curiae Pennsylvania Center for the First Amendment, a non-profit corporation organized under the laws of Pennsylvania, has no parent companies, subsidiaries, or affiliates and does not issue shares to the public.

All parties have consented to the filing of this *amicus* brief.

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INTEREST OF *AMICUS CURIAE*[1]

The Pennsylvania Center for the First Amendment is an educational, advocacy, and research organization dedicated to advancing the freedoms of speech and the press in the United States. For over fifteen years, the Center has continuously provided educational programs, sponsored speakers, published books and articles in the popular and academic press, and served as a media resource on a wide array of First Amendment topics.

SUMMARY OF ARGUMENT

1. Compare:

King County Metro Transit Advertising Policy	Statute struck down in *Matal v. Tam*, 137 S. Ct. 1744 (2017)
"[No a]dvertising that contains material that demeans or disparages an individual, group of individuals or entity."	"[No registration of a trademark that c]onsists of or comprises matter which may [bring into contempt or] disparage . . . persons, living or dead, [or] institutions."

[1] No party or party's counsel has authored this brief in whole or in part, or contributed money that was intended to fund preparing or submitting the brief. No person has contributed money that was intended to fund preparing or submitting the brief, except that UCLA School of Law paid the expenses involved in filing this brief.

Matal held that the statute there was viewpoint-based. King County Metro's Transit Advertising Policy, which likewise focuses on speech that "disparage[s]" people—or speech that "demeans" them, which is equivalent to "bring[ing] them into contempt"—must be viewpoint-based as well.

The District Court concluded that the County's restriction is viewpoint-neutral because it leaves AFDI free to express its views about terrorism "with different language," which is to say without "demeaning and disparaging language." I ER 8. But any such change would necessarily change the viewpoint expressed by the ad, by requiring it to stop conveying a "demeaning and disparaging" message about Muslims.

The policy in *Matal* was not rendered viewpoint-neutral by the possibility that the Slants could just rename themselves "the Asian-Americans." Likewise, the policy here cannot be rendered viewpoint-neutral by the possibility that a disparaging message about Muslims can be replaced by a nondisparaging one.

2. Because the policy is viewpoint-based, it is unconstitutional. Under Ninth Circuit and Supreme Court precedent, advertising

space on buses is a nonpublic forum, in which viewpoint discrimination is forbidden.

3. *Amici* sharply disagree with the AFDI's anti-Islam viewpoint; but the viewpoint neutrality requirement has to be enforced neutrally to protect all viewpoints. Once the government allows public issue advertising, it cannot try to promote only positive messages and suppress negative messages. Opponents of President Trump have to be free to criticize him, even if that is viewed as "disparag[ing]"; likewise with opponents of the NRA, opponents of the ACLU, and opponents of Islam and even of Muslims.

ARGUMENT

I. The County's policy is viewpoint-based

In *Matal*, the Supreme Court held that a federal law "prohibiting the registration of trademarks that may 'disparage . . . or bring . . . into contemp[t] or disrepute any persons, living or dead, [or] institutions' violated the Free Speech Clause." *Matal*, 137 S. Ct. at 1751 (quotations removed). The four-Justice lead opinion concluded that,

> Our cases use the term "viewpoint" discrimination in a broad sense, and in that sense, the disparagement clause discriminates on the bases of "viewpoint." To be sure, the clause even-handedly prohibits disparagement of all groups. It applies

> equally to marks that damn Democrats and Republicans, capitalists and socialists, and those arrayed on both sides of every possible issue. It denies registration to any mark that is offensive to a substantial percentage of the members of any group. But in the sense relevant here, that is viewpoint discrimination: Giving offense is a viewpoint.

Id. at 1763 (citation removed). The four-Justice concurrence agreed: "As the Court is correct to hold, § 1052(a) constitutes viewpoint discrimination." *Id.* at 1765 (Kennedy, J., concurring in the judgment).

Given that the distinction in *Matal*—which turned on whether speech "may disparage . . . or bring . . . into contemp[t] or disrepute any persons, living or dead, [or] institutions"—is viewpoint-based, a distinction based on whether advertising material "demeans or disparages an individual, group of individuals or entity," II ER 107, is equally viewpoint-based. The speech here might be more offensive than the speech in *Matal*. Indeed, offensive speech prominently displayed on city buses may generally offend people more than speech that is simply a part of a registered trademark. But both speech restrictions are equally viewpoint-discriminatory.

The District Court concluded otherwise, on the theory that the County was "amenable to running AFDI's advertisement with different language," which would leave AFDI free to "espous[e] its

basic viewpoint that stopping one of the listed terrorists will save lives." I ER 8. But the District Court itself concluded that the County excluded the ad because it "leads riders to believe that, generally, people of Middle Eastern or South Asian descent, and especially those who practice Islam, are terrorists." *Id.* at 7. That message, which the County understandably found "demeaning or disparaging," is demeaning or disparaging precisely because of the viewpoint it expresses. The County was thus discriminating based on viewpoint, and the alternative that the District Court pointed to would use "different language" only because it was expressing a different viewpoint.

The District Court defended its position by asserting that AFDI did not actually mean to convey the viewpoint about Middle Easterners, South Asians, and Muslims to which the County objected. I ER 8 n.3. But this cannot matter: Whether a rule is viewpoint-discriminatory depends on the distinctions drawn by the rule itself, not on the intentions of the speakers.

After all, in *Matal v. Tam*, Simon Tam did not mean to convey a disparaging message using the band name *The Slants*, either: He

was an Asian-American trying to reclaim an offensive term, not a racist trying to disparage Asians. 137 S. Ct. at 1750, 1754 (lead op.). Tam's "application was denied not because the Government thought his object was to demean or offend but because the Government thought his trademark would have that effect on at least some Asian-Americans." *Id.* at 1766 (Kennedy, J., concurring in the judgment).

Yet the ban on registering disparaging marks was still found to be viewpoint-based, regardless of Tam's own viewpoint. And an argument that the Patent and Trademark Office was "amenable to [registering Tam's band name] with different language," perhaps *The Asian-Americans* or *Reclaimers of Racist Slurs*, would have been entirely beside the point—Tam was entitled to use the wording he chose, and not the government's proposed substitute wording crafted to prevent a possible derogatory interpretation.

Likewise, even if AFDI does not want to disparage various groups, the County's openness to nondisparaging versions of AFDI's ad is beside the point. When the County, like the PTO, restricts speech based on its "disapproval of a subset of messages it finds

offensive," that "is the essence of viewpoint discrimination." *Matal*, 137 S. Ct. at 1766 (Kennedy, J., concurring in the judgment).

Indeed, the reasoning of *Matal* has already been applied by the Second Circuit to restrictions on allegedly disparaging speech in a nonpublic forum. In *Wandering Dago, Inc. v. Destito*, 879 F.3d 20 (2d Cir. 2018), the New York State Office of General Services excluded a food truck vendor from a state-organized program "solely because of [the vendor's] ethnic-slur branding." *Id.* at 24. (The food truck sold Italian food, and was labeled "Wandering Dago.") "*Matal* compels the conclusion that defendants have unconstitutionally discriminated against WD's viewpoint by denying its Lunch Program applications because WD branded itself and its products with ethnic slurs." *Id.* at 33.

It did not matter that the owners of Wandering Dago did not want to express a derogatory viewpoint, like Tam did not want to express a derogatory viewpoint using *The Slants*, and like AFDI (according to the District Court) did not want to express the viewpoint "that all men of Middle Eastern or South Asian descent, especially those who practice Islam" are terrorists. What mattered was

that the government was imposing a viewpoint-based restriction on the speech that it allowed into the program, based on the message that it thought the speech would convey to viewers. 879 F.3d at 33.

Amici understand the County's desire to avoid displays of disparaging speech on its buses. The government is trying to run an enterprise that provides a service to paying customers. Disparaging ads, whether they disparage Muslims, President Trump, NRA members, or anyone else, might upset some riders and may even lead some people to stop riding. But *Matal* holds that exclusion of disparaging messages is viewpoint-based, regardless of whether or not it might seem reasonable.

II. Viewpoint-based restrictions on transit advertising are unconstitutional

"[T]he advertising space on city buses" is "a nonpublic forum." *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2252 (2015) (citing *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974)). Nor can advertising space on city buses be treated as government speech. *Walker* itself made that clear: Transit advertising is "located in a context (advertising space) that is traditionally available for private speech," and "in contrast to license

plates, [bears] no indicia that the speech was owned or conveyed by the government." 135 S. Ct. at 2252.

"Because it has created a nonpublic forum . . ., Metro's rejection of Plaintiffs' advertisement must be . . . viewpoint neutral." *American Freedom Defense Initiative v. King County*, 796 F.3d 1165, 1170 (9th Cir. 2015). Because the exclusion of disparaging speech from this nonpublic forum is viewpoint-based, it is unconstitutional.

(*Amicus* believes transit advertising programs would be better understood as limited public fora rather than nonpublic fora, because the government is opening its property to certain groups and certain subjects. *Christian Legal Soc'y v. Martinez*, 561 U.S. 661, 679 n.11 (2010). But this does not matter for purposes of this case, because in both nonpublic fora and limited public fora, speech restrictions must be viewpoint-neutral. *Wright v. Incline Village General Improvement Dist.*, 665 F.3d 1128, 1138 n.5 (9th Cir. 2011).)

III. The issue in this case goes far beyond anti-Islam ads

Applied evenhandedly, the County policy will exclude much more than anti-Islam ads. "[M]aterial that demeans or disparages an individual, group of individuals or entity" can include ads

sharply critical of politicians, of political advocacy groups, of controversial businesses (say, tobacco companies), even of foreign dictatorships.

Indeed, applied on its own terms, the policy should ban even the ad that the District Court suggested would be acceptable: one "espousing [the] basic viewpoint that stopping one of the listed terrorists will save lives." I ER 8. After all, even labeling an individual terrorist a terrorist—entirely apart from any connection to an ethnicity or a religion—"disparages an individual." And if such an ad is allowed, presumably on the theory that people who commit heinous crimes rightly merit disparagement, that would just be a further viewpoint discrimination.

But whether or not disparagement of individual terrorists is covered by the policy, the policy covers a wide range of speech. To be sure, many today disapprove of disparaging speech, as being unduly negative or divisive. Yet for that very reason, private property owners, which are not governed by a viewpoint neutrality requirement, might be reluctant to rent advertising space for it as well.

One advantage of the Supreme Court's nonpublic forum doctrine is that it assures that there will be at least some spaces where viewpoint-neutrality is indeed enforced, and where speech—positive and negative—on all sides of an issue can be seen. When speech that praises politicians is allowed, speech that disparages them is, too. When speech that praises the NRA or the ACLU is allowed, speech that disparages them is, too. And that means that, when speech that advocates for tolerance and equality is allowed, speech that disparages certain groups must be, too.

CONCLUSION

The County's policy regarding demeaning and disparaging material draws the same distinction that *Matal v. Tam* held was viewpoint-based. The County's policy is thus equally viewpoint-based, and an unconstitutional restraint on speech in a nonpublic forum.

Respectfully Submitted,

s/ Eugene Volokh

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STATEMENT OF RELATED CASES

There are no related cases covered by 9th Cir. R. 28-2.6.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 1,998 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word 2016 in 14-point Century Schoolbook.

Dated: March 20, 2018

s/ Eugene Volokh
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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Brief *Amicus Curiae* 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 March 20, 2018.

All participants in the case are registered CM/ECF users, and will be served by the appellate CM/ECF system.

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