

1 includes hundreds of buses, thousands of bus shelters, and hundreds of benches (also known as
2 transit furniture) for users of the buses. (DSOF ¶ 4, 20)¹ The bus system generates revenues from
3 riders, and advertising on the buses and at bus shelters. (DSOF ¶ 4, 20) The bus system competes
4 with other forms of public and non-public transportation. (DSOF ¶ 4) The City has a long history
5 of limiting advertising on its buses and at its bus shelters to commercial transactions. (DSOF ¶
6 5) The City has adopted a written policy, Transit Advertising Standards, which limits advertising
7 on buses or at bus shelters to those “which propose a commercial transaction” or for “commercial
8 advertisements”. (DSOF ¶ 6-8) The contracts between the City and outside companies
9 responsible for securing advertising for the buses and shelters expressly provide that advertising
10 will be limited to those “which propose a commercial transaction”. (DSOF ¶ 12-13)

11 The City’s policy of commercial only advertising is intended to serve several purposes:

- 12 A. By avoiding the appearance that the City is favoring or disfavoring any particular
13 candidate, political view, or side in a debate over contentious issues of the day.
- 14 B. By avoiding the appearance that the City, advertisers or the forum (bus or shelter)
15 is associated with any particular social cause, political cause, or viewpoint. This is
16 done to maximize revenue to the City and to avoid intricate issues of fair balance
17 and equal time to opposing sides in a debate.
- 18 C. By reducing the risk of vandalism and/or potential injury to users of the system as
19 commercial speech does not arouse in people the same level of sentiment, emotion
20 and spontaneous reaction as do political or social issues.

21 (DSOF ¶ 11) Governmental bus and transit furniture advertising have sparked a number of
22 protests across the country. (DSOF ¶ 53)

23 The City has rejected proposed advertisements as non-compliant with its advertising
24 standards. In 2010-11, for example, the City rejected proposed advertising from Salt River Project
25 (“SRP”), which sought to advertise a reforestation project, after SRP decided not to make
26 modifications suggested by the City. (DSOF ¶ 21) During the same period of time, the City also

27
28 ¹ “DSOF” means the Statement of Facts in Support of Defendants’ Motion for Summary Judgment, filed contemporaneously with this motion.

1 rejected, without any suggestion of modification to make the proposed advertising compliant,
2 proposed advertising from Playboy, the Federal Housing Administration, Maracay Homes,
3 Building Arizona Families, SRP, WIC (Women Infants & Children), ASU Preparatory, and Dos
4 Equis. (DSOF ¶ 21) In this same period of time, the City was able to work out satisfactory
5 modification of proposed advertisements, so they were compliant and could be posted, from
6 Stingray Sushi, Veteran’s Administration, Fascinations, SRP, the Dental Association, UFC, and
7 Columbia Pictures. (DSOF ¶ 21)

8 Plaintiff TrainMeAZ, LLC (“Plaintiff Company”) is an Arizona limited liability company
9 formed in 2010. (DSOF ¶ 1) Plaintiff Alan Korwin (“Korwin”) is the manager for Plaintiff
10 Company. (DSOF ¶ 2) Plaintiff Company engages in a variety of advertising campaigns, such
11 as billboards and public relations. (DSOF ¶ 22-23, 49) On or about October 5, 2010, Company
12 entered into an agreement with CBS for advertising at the City’s bus shelters aka transit furniture.
13 (DSOF ¶ 25) The agreement provides:

14 **The character, design, text, and illustrations on advertising copy and the material**
15 **used shall be subject to approval by Company and by location owner, transit**
16 **company/authority or third party controlling location (“Owner”).** If copy is rejected,
Advertiser shall continue to be liable for the full term of the this Contract and Advertiser
shall be responsible for providing an acceptable replacement copy within ten days of
notification that a previous copy was rejected.

17 (DSOF ¶ 25)(bold added)

18 On October 11-12, 2010, CBS placed Company’s posters in City’s bus shelters without
19 submitting the contract and advertising copy to the City for review. (DSOF ¶ 27) The Company’s
20 advertisement contains: (1) a large red heart graphic; (2) within the red heart graphic in the largest,
21 all capital letters are the words “GUNS SAVE LIVES” in white lettering with black shadowing
22 of the letters; (3) in the smallest black print are several paragraphs of text (quoted below)
23 immediately to the side of the bottom portion of the red heart graphic; (4) in large, but not largest,
24 black printed all capital letters are words “ARIZONA SAYS:”; (5) immediately below ARIZONA
25 SAYS: in large, red printed all capital letters are the words “EDUCATE YOUR KIDS”; (6)
26 immediately below EDUCATE YOUR KIDS in large, black printed letters is “TrainMeAZ.com”
27 and (7) in the upper left hand corner of the ad is a QR code.

28 In the smallest print in the ad appears the following text on the left side of the heart:

1 In Arizona, marksmanship matters. “The Train-Me State” knows that a nation, trained to
2 arms, is an American linchpin of freedom, and is respected in Arizona like nowhere else.
3 The Arizona legislature has enacted vibrant protection of the Second Amendment right to
4 keep and bear arms. We in Arizona seem destined to set models for the nation – in this
5 case, a shining example of gun rights for all free peoples of the earth.

6 The Grand canyon State has Constitutional Carry. This frees any law-abiding adult here --
7 not just – residents – to discretely enjoy the right to bear arms envisioned in the
8 Constitution. WE have a super-strong Castle Doctrine, coupled with robust burden of
9 proof, a defensive-display statute, statewide preemption law restricting local fiefdoms from
10 gun-rights abuse, and a specious-lawsuit ban – a true milestone – protecting honest people
11 from false charges by criminals and their kin. We even have a High School Marksmanship
12 law on the books for one credit towards a diploma: now if we can just move the
13 obstructionists out of the way. Our Arizona Firearms Freedom Act joins a growing
14 nationwide movement to repel federal incursion on states’ rights, and end intolerable abuse
15 of the Interstate Commerce Clause. TrainMeAZ is a non-partisan, joint educational effort
16 of the firearms community.

17 The TrainMeAZ Campaign is designed to teach and bring gun safety and knowledge to
18 every Arizonan. In this state, we take it for granted that you know how to shoot, know
19 how to handle guns safely, how to use guns for self defense and all legal purposes, and that
20 you know and respect our laws. Criminals with guns receive harsh punishment, so be it.
21 Citizens with guns earn respect, and help keep Arizona a safe and wonderful place to live.
22 Robert Heinlein correctly noted that an armed society is a polite society, and in Arizona
23 this is truth personified and exercised. Come to an “Open Carry Banquet”, and see! Join
24 the Arizona Buy-cott. See how we do it at azcdl.org and asrpa.com and for our sisters in
25 arms, 2asisters.org. Go to TrainMeAZ.com, download this statement, learn how you can
26 participate and improve your skills.

27 In the smallest print in the ad appears the following text on the right side of the heart:

28 This is why the TrainMeAZ Campaign exists. Acting as one, the state rises up to
encourage and enable gun-safety training, fun shoots, special training days at the range, a
coordinating point for the state’s thousand-plus certified trainers – with a web-interactive
and printed map for the people. Soak up family days where the shooting sports are
honored and enjoyed, with that freedom smell of gunpowder and a good hot dog. Arizona
is an American protectorate of the culture of marksmanship, where the decent, honorable
and lawful pursuit of the shooting sports, and the precious right to keep and bear arms is
honored and enjoyed. How do you think so many trainers and shooting schools thrive
here? Should your state honor our rights this way?

Visit Arizona, and breath free air. Come experience “*The Litmus Test of Freedom*” the
right you have as an honest adult to enjoy your right to arms.

Use the TrainMeAZ.com website to find training opportunities, shooting ranges, and
classes for any level of skill – from your first-time shooting experience (a thrill you will
always remember, just like the rest of us do) to the kind of tactical training the world’s elite
special forces get – an experience few of us get to experience. In Arizona, marksmanship
matters. Learn to shoot straight. Teach your children well. Join us, a nation trained to
arms, confident in our exercise of the Second Amendment right of the people to keep and
bear arms, which shall not be infringed. Exercising liberty’s teeth has a positive impact
on the political environment.

TrainMeAZ is sponsored by:
**Arizona Citizens Defense League · Arizona State Rifle and Pistol Association ·
Caswells Crossroads of the West Gun Shows · Front Sight · GalleryOfGuns.com ·**

1 **GunLaws.com · Gunsite Second Amendment Sisters · Wide World of Maps**

2 (DSOF ¶ 28)

3 After someone questioned the Company’s advertising located at a bus shelter, the City
4 asked CBS to provide a copy of the advertisement for review. (DSOF ¶ 29-30) The City’s Public
5 Transit Department Director’s designee, Marie Chapple, reviewed the advertising poster and
6 determined that it violated the City’s advertising standards and the contract with CBS because the
7 advertisement was determined to not propose a commercial transaction. (DSOF ¶ 31)

8 The City was willing to accept a modified advertisement which stated: “EDUCATE
9 YOUR KIDS ON HOW, GUNS SAVE LIVES, GO TO TrainMeAZ.com”. The “GUNS SAVES
10 LIVES” would have been in the same red heart as the rejected advertisement. (DSOF ¶ 41, 43)
11 Plaintiff Company has used billboard advertising which omits the small printed text which the
12 City objected to and which was not part of a modified advertisement which the City was willing
13 to allow. (DSOF ¶ 43, 49)

14 **II. BECAUSE THE SHELTERS ARE NON-PUBLIC FORUMS,**
15 **THE CITY CAN CONSTITUTIONALLY LIMIT USE**
16 **TO COMMERCIAL ADVERTISING**

17 Plaintiff’s first challenge in Count One is that the City may not constitutionally limit
18 advertisements at its bus shelters to speech proposing a commercial transaction. This facial
19 challenge to the Transit Advertising Standards has been previously rejected as it applies to the
20 exterior advertising on the City’s buses, and there is no reason to come to a different result for the
21 City’s bus shelters. The City in non-public limited fora, such as bus shelter advertising, can
22 constitutionally exercise its proprietary powers and rights to limit the subject matter and identity
23 of speakers.

24 The Supreme Court “has adopted a forum analysis as a means of determining when the
25 Government’s interest in limiting the use of its property to its intended purpose outweighs the
26 interest of those wishing to use the property for other purposes.” *Cornelius v. NAACP Legal*
27 *Defense & Educ. Fund, Inc.*, 473 U.S. 788, 800, 105 S.Ct. 3439, 87 L.Ed.2d 567 (1985). The
28 Supreme Court’s forum analysis has defined three categories of public property in analyzing such
free speech cases.

- 1 • First, the traditional public forum are properties dedicated to assembly and debate by
2 tradition or government fiat. *Bennett v. Brownlow*, 208 Ariz. 79, 84, ¶ 17, 90 P.3d 1245,
3 1250 (App. 2004), *vacated on other grounds*, 211 Ariz. 193, 119 P.3d 460 (2005). These
4 would be places such as public streets and parks. *Id.*
- 5 • Second, the limited public forum, a place the government has designated as “a place or
6 channel of communication for use by the public at large ... [or] for use by certain speakers,
7 or for the discussion of certain subjects.” *Id.* The creation of a designated public forum
8 requires a decision “intentionally opening a nontraditional forum for public discourse.”
9 *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 802, 105 S.Ct.
10 3439, 87 L.Ed.2d 567 (1985). In determining whether property is a limited public forum
11 the Court has looked to the policy and practice of the government, the nature of the
12 property and its compatibility with expressive activity, and whether the forum was
13 designed and dedicated to expressive activities in determining if the government created
14 a designated public forum. *Id.* at 802-03.
- 15 • Third, the nonpublic forum, which is a facility or location that is not “by tradition or
16 designation a forum for public communication.” *Id.*

17 Limited public forums or nonpublic forums can be the subject of reasonable restrictions on
18 expression, so long as the regulations are not based on hostility to the speaker's views. *Id.* at ¶ 18;
19 *Children of the Rosary v. City of Phoenix*, 154 F.3d 972, 978 (9th Cir. 1998), *cert. denied*, 526
20 U.S. 1131 (1999).

21 In *Children of the Rosary v. City of Phoenix*, 154 F.3d 972 (9th Cir. 1998), *cert. denied*,
22 526 U.S. 1131 (1999), a challenge was presented to the City of Phoenix’s then recently adopted
23 1996 advertising standards for the exterior panels of city buses, which limited such advertising
24 to that “which proposes a commercial transaction.” *Id.* at 975. Because of past and then current
25 practice of limiting advertising to commercial speech, the Ninth Circuit held the City’s exterior
26 bus advertisements were a non-public limited forum, where the government can constitutionally
27 make distinctions based upon subject matter and identity of the speaker, but not on the speaker’s
28 viewpoint. *Id.* at 978; *see also Lehman v. Shaker Heights*, 418 U.S. 298 (1974) (plurality holding

1 that city could, under the First Amendment, ban political advertising on city buses since it was
2 non-public forum and city was acting in its proprietary capacity). When acting in its proprietary
3 capacity, such as operation of the bus system, the government action need only be reasonable and
4 not even the most or only reasonable limitation. *Children of the Rosary v. City of Phoenix*, 154
5 F.3d 972, 978-79 (9th Cir. 1998), *cert. denied*, 526 U.S. 1131 (need only be reasonable and are
6 subject only to a challenge of being arbitrary or capricious). The Ninth Circuit, relying upon
7 Supreme Court precedent, held there was no First Amendment violation in the City limiting
8 advertisements on its buses to those proposing a commercial transaction. *Id.* at 980-81.

9 Other courts have come to the same conclusion in similar situations, that a governmental
10 entity acting in its proprietary capacity can limit advertising or speech to commercial
11 advertisements. *E.g., Lebron v. National Railroad Passenger Corp (AMTRACK)*, 69 F.3d 650,
12 655-58 (2d Cir. 1995) (government, when acting as proprietor, could reasonably ban political ads
13 on trains because it was a non-public limited forum and ban was not based upon viewpoint), *opin.*
14 *amended*, 89 F.3d 39, *cert. denied*, 517 U.S. 1188 (1996).

15 The City here has a long history of limiting advertising on its buses and bus shelters to
16 commercial advertising. This is reflected in its standards adopted as far back as 1996 and
17 referenced in *Children of the Rosary v. City of Phoenix*, 154 F.3d 972, 976 (9th Cir. 1998), *cert.*
18 *denied*, 526 U.S. 1131 (1999). (DSOF ¶ 5) This is a reasonable limitation to avoid objections,
19 protests, and violent reactions which could effect the City's revenues. There is no viewpoint
20 distinction here, but only a distinction as to whether the primary understanding of an
21 advertisement will or will not be understood as proposing a commercial transaction. There are
22 alternative venues for non-commercial messages and the only effect of the limitation is to prevent
23 advertisements which could be construed as being supported by the City. Merely because
24 somewhere in the proposed advertisement is a reference to a commercial transaction (selling a
25 bumper sticker with an ideological message) is not sufficient. The test is whether the primary
26 purpose understood by the reader is as commercial as opposed to non-commercial speech. Here,
27 while the website is mentioned, the overriding message was Guns Saves Lives - taking up nearly
28 40% of the space of the advertisement with the words and the red heart which draws more

1 attention to the words - and tangentially that Arizona Says Educate Your Kids and a reference to
2 a website. The small print reflects a political message about the right to bear arms. All of this
3 non-commercial speech is why the City suggested it would accept an ad which made clear that the
4 website offered a place to go to get training for firearms. The City had accepted ads on its transit
5 furniture for gun shows (DSOF ¶ 52), so the City has no policy against guns being mentioned in
6 ads.² But it is the context of a primarily ideological, non-commercial message which made this
7 ad in violation of the Transit Advertising Standards. This commercial restriction passes muster
8 just as was true in *Children of the Rosary*.

9 Plaintiffs have made a companion claim under Arizona's Constitution, Art II, § 6's free
10 speech rights. But the Arizona Constitution provides no greater protection than the First
11 Amendment here. In *State ex rel. Napolitano v. Gravano*, 204 Ariz. 106, 60 P.3d 246 (App.
12 2002), *cert. denied*, *Gravano v. Arizona*, 540 U.S. 1161 (2004), the Court discussed the
13 differences between the First Amendment and the Arizona Constitution's free speech guarantee:

14 The Arizona Constitution provides greater speech rights than the United States
15 Constitution. *Mountain States Tel. & Tel. Co. v. Ariz. Corp. Comm'n*, 160 Ariz. 350, 354,
16 773 P.2d 455, 459 (1989). However, that greater protection "lies in the Arizona
17 Constitution's extension of free speech rights to cover not only speech limitations imposed
18 by the government, but also speech limitations emanating from other sources." *Evenson*,
19 201 Ariz. 209, 218 n. 15, ¶¶ 33, 33 P.3d 780, 789 n. 15. Accordingly, we believe our
20 analysis of the forfeiture laws under federal constitutional principles is equally applicable
21 to and adequately supports the constitutionality of these statutes under Article 2, Section
22 6, of the Arizona Constitution.

23 *Id.* at 115, ¶ 34, n. 7, 60 P.3d at 255; *see also State v Evenson*, 201 Ariz. 209, 218, ¶ 33, n. 15, 33
24 P.3d 780, 789 (App. 2001), *cert. denied*, 540 U.S. 874 (2003). This is consistent with other cases
25 where Arizona courts have applied the same analysis to free speech claims under the First
26 Amendment and the Arizona Constitution. *E.g., Yetman v. English*, 168 Ariz. 71, 82, 811 P.2d
27 323, 334 (1991) (defamation case). In *Bennett v. Brownlow*, 208 Ariz. 79, 83, n. 1, 90 P.3d 1245,
28 1249 (App. 2004), *vacated on other grounds*, 211 Ariz. 193, 119 P.3d 460 (2005), the Court of
Appeals, when analyzing the distinctions between public and non-public forums, expressly held
that the same analysis applied under both the Constitutions of Arizona and the United States.

² The City was willing to allow a modified advertisement which retained the Guns Save Lives in a red heart. (DSOF ¶ 41, 43)

1 Plaintiffs first claim that the City cannot prevent non-commercial speech at its bus shelters
2 should be rejected. Acting in its proprietary capacity, the City may constitutionally preclude
3 political and other non-commercial advertisements in the limited fora of bus shelters.

4 **III. THE TRANSIT ADVERTISING STANDARDS ARE CLEAR,
AND ARE NOT UNCONSTITUTIONALLY VAGUE**

5 Plaintiffs second challenge in Count Two is that the Transit Advertising Standards are
6 unconstitutionally vague because they do not define what is meant by “propose a commercial
7 transaction” and thereby allegedly empower the City with virtually unrestrained discretion. Courts
8 have rejected such arguments and have recognized as constitutionally clear distinctions between
9 commercial and non-commercial advertising, including the very language used here by the City
10 of Phoenix.

11 The Ninth Circuit in *Children of the Rosary v. City of Phoenix*, 154 F.3d 972 (9th Cir.
12 1998), *cert. denied*, 526 U.S. 1131 (1999), rejected a similar vagueness challenge to the very same
13 limitation to speech proposing a commercial transaction applicable to advertising on city buses:

14 Finally, appellants argue that the standard is unconstitutionally vague in reliance on a
15 concurring opinion in *Metromedia*, 453 U.S. at 53637, 101 S.Ct. 2882, and a citation to
16 that statement in *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 423 n. 19, 113 S.Ct.
17 1505, 123 L.Ed.2d 99 (1993). They claim that the standard presents a danger of
18 discrimination against disfavored subjects in the guise of determining what is commercial
19 speech. Their brief vagueness argument makes it difficult to determine if they claim that
20 the standard is vague because it presents a danger of viewpoint discrimination, or is vague
21 because it “contains no standard for guidance as to prohibited and allowable conduct.”
22 *Major Media of the Southeast, Inc. v. City of Raleigh*, 792 F.2d 1269, 1272 (4th Cir.1986).
23 **To the extent appellants claim the standard is unconstitutional because of the
24 discretion granted to the city, we reject this argument based on our discussion in
25 previous sections.**

26 **If appellants are simply asserting that we should hold the standard unconstitutional
27 because it is difficult to determine whether the “speech proposes a commercial
28 transaction,” we would reject the argument.** First, we note that there is no fine or other
penalty in this case if a person incorrectly classifies their advertisement: The city simply
rejects the advertisement. This claim is unlike the usual vagueness challenge involving a
fine or other sanction that has the potential to chill conduct. *Cf. Jews for Jesus*, 482 U.S.
at 576, 107 S.Ct. 2568 (unrestrained power to arrest). **Second, we agree with the Fourth
Circuit that the Supreme Court has provided sufficient guidance on the meaning of
the standard. See *Major Media*, 792 F.2d at 1272. The city’s standard goes beyond
stating that commercial speech is allowed; the city enacted the Court’s standard for
identifying commercial speech. “[T]he test for identifying commercial speech” is
whether the advertisement “propose[s] a commercial transaction.” *Fox*, 492 U.S. at
473-74, 109 S.Ct. 3028.** The Fourth Circuit was not persuaded that the possible difficulty
of applying the Court’s guidance in a marginal situation was sufficient to declare a policy
unconstitutionally vague:

1 Although an occasional marginal case might arise raising the question of whether
2 on the particular facts the definition of commercial speech would be correct, such
3 an infrequent possibility should not in itself justify a generalized charge that the
4 ordinance itself is vague, given the guidance afforded by court decisions in the area.

5 *Major Media*, 792 F.2d at 1272-73. We agree with the Fourth Circuit and reject appellants'
6 vagueness challenge.

7 *Id.* at 982-83 (bold added, footnote omitted).

8 In *National Advertising Co. v. City of Raleigh*, 947 F.2d 1158 (4th Cir. 1991), *cert. denied*,
9 504 U.S. 931 (1992), an advertising company, National, challenged a city ordinance's restrictions
10 on off-premises outdoor advertising. National contended that the 1983 ordinance on its face
11 violated the First Amendment because it: (i) restricted speech without promoting a legitimate
12 government interest, (ii) was overbroad, and (iii) was unconstitutionally vague. *Id.* at 1168. The
13 Fourth Circuit Court of Appeals rejected National's arguments, including those as to vagueness:

14 National's remaining First Amendment claim is that the ordinance is unconstitutionally
15 vague because in certain limited instances it requires city officials to determine whether
16 the contents of an advertisement are "commercial" or "non-commercial." **National**
17 **contends that since the ordinance contains no definition of "commercial" or**
18 **"non-commercial," insufficient guidance is given city officials. We rejected this**
19 **precise contention in *Major Media of the Southeast v. City of Raleigh*, 792 F.2d at 1272,**
20 **finding that the Supreme Court has already sufficiently defined these terms. See**
21 ***Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York*, 447 U.S.**
22 **557, 561, 100 S.Ct. 2343, 2348-49, 65 L.Ed.2d 341 (1980) (commercial speech is**
23 **"expression related solely to the economic interests of the speaker and its audience");**
24 ***Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748,**
25 **762, 96 S.Ct. 1817, 1825-26, 48 L.Ed.2d 346 (1976) (commercial speech "does 'no more**
26 **than propose a commercial transaction'"), quoting *Pittsburgh Press Co. v. Human***
27 ***Relations Comm'n*, 413 U.S. 376, 385, 93 S.Ct. 2553, 2558-59, 37 L.Ed.2d 669 (1973);**
28 ***Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469, 109 S.Ct.**
3028, 3031, 106 L.Ed.2d 388 (commercial speech "propose[s] a commercial
transaction"). We further observed in *Major Media* that:

29 **Although an occasional marginal case might arise raising the question of**
30 **whether on the particular facts the definition of commercial speech would be**
31 **correct, such an infrequent possibility should not itself justify a generalized**
32 **charge that the ordinance itself is vague, given the guidance afforded by the**
33 **court decisions in the area.**

34 *Id.* at 1272-73. We find no reason to depart from our previous holding. In sum, we reject
35 National's First Amendment claims on the merits.

36 *Id.* at 1169 (bold added, footnotes omitted).

37 In *Lavey v. City of Two Rivers*, 171 F.3d 1110 (7th Cir. 1999), an outdoor advertising
38 company and its president challenged an outdoor advertising ordinance's restrictions. The
39 ordinance, in part, provided: "Notwithstanding any other provision contained herein to the

1 contrary, noncommercial messages may be contained on any authorized sign.” Although the
2 ordinance contained an extensive definitional section, it did not define the terms “commercial”
3 or “noncommercial.” *Id.* at 1112-13. The Court rejected the claim of vagueness of the ordinance:

4 We next address two closely related claims of Mr. Lavey. He contends that the ordinance
5 is vague and that, as a consequence of that vagueness, the enforcement administrator has
6 far too much latitude in determining whether a particular sign is in violation of the
7 ordinance. Indeed, he claims that the ordinance is so vague that the administrator based his
8 decisions on whether the advertisement is “generic,” a term not found or defined in the
9 ordinance. He also submits that the on/off-premises distinction is ambiguous and that,
10 although the statute exempts noncommercial speech from coverage, it does not define
11 noncommercial speech.

12 We cannot accept this argument. An examination of the ordinance makes it clear that it
13 provides sufficient notice as to its prohibitions. Administrators also are provided sufficient
14 guidance with respect to its meaning. The on- and off-premises distinction is well defined
15 by the ordinance. Additionally, the record indicates that the administrator's use of the term
16 “generic” was merely his short-hand way of referring to the commercial/noncommercial
17 distinction.

18 ***Discovery Network* counsels that, in some contexts, the failure to define the distinction**
19 **between commercial and noncommercial speech might result in an impermissible**
20 **delegation of authority. See *Discovery Network*, 507 U.S. at 423 & n. 19, 113 S.Ct.**
21 **1505. In the context of this case, however, we do not believe that such a danger exists.**
22 **Commercial advertising has long been well defined by Supreme Court commercial**
23 **speech doctrine. It “constitutes paradigmatic commercial speech ... because its**
24 **fundamental purpose is to propose an economic transaction.” See *Commodity Trend***
25 ***Serv., Inc. v. CFTC*, 149 F.3d 679, 684 (7th Cir.1998). The distinction between**
26 **commercial and noncommercial advertisements is therefore a great deal more**
27 **obvious than the distinction between newspapers and commercial handbills that was**
28 **at issue in *Discovery Network*.**

18 *Id.* at 1116 (bold added, footnote omitted). The Court, therefore, concluded that the ordinance
19 was not vague and did not place impermissible authority in the hands of those charged with its
20 administration. *Id.* at 1117.

21 Persons of ordinary intelligence understand what is or is not commercial speech, and what
22 does or does not propose a commercial transaction. The possibility of an infrequent marginal case
23 does not render the standards vague or unconstitutional. The City’s standard of limiting
24 advertising to that which proposes a commercial transaction is clear and its constitutionality has
25 been specifically upheld. Plaintiffs second claim should be dismissed.

26 **IV. THE CITY HAS NOT ARBITRARILY NOR IMPERMISSIBLY**
27 **ENFORCED THE TRANSIT ADVERTISING STANDARDS**

27 Plaintiffs third and final challenge in Count Three is that the City has arbitrarily enforced
28 the Transit Advertising Standards’ requirement that advertising on buses or bus shelters must

1 propose a commercial transaction. The record fails to reflect any viewpoint discrimination nor
2 that the City's decision here was arbitrary or capricious.

3 Any suggestion of hidden viewpoint discrimination is weakened because the City has
4 approved of gun advertising. (DSOF ¶ 52) Further, the argument is obliterated because the City
5 was willing to accept an ad which reflected that guns save lives when used in the context of an
6 actual proposal for a commercial transaction, the education/training of children as to the use of
7 guns. (DSOF ¶ 41, 43) There is no basis to support a claim of viewpoint discrimination.

8 The decision by the City was also not arbitrary or capricious, but within the reasonable
9 discretion afforded to any other proprietor. The fact that in a marginal case, an advertisement
10 might be erroneously rejected is insufficient to demonstrate a constitutional violation or arbitrary
11 action. *Children of the Rosary v. City of Phoenix*, 154 F.3d 972, 982-83 (9th Cir. 1998), *cert.*
12 *denied*, 526 U.S. 1131 (1999); *National Advertising Co. v. City of Raleigh*, 947 F.2d 1158, 1169
13 (4th Cir. 1991), *cert. denied*, 504 U.S. 931 (1992). Advertising by other for profit businesses have
14 been rejected as non-compliant - Playboy, Dos Equis, Maracay Homes, Stingray Sushi, etc.
15 (DSOF ¶)

16 Courts have rejected non-commercial speech dressed up to marginally make a commercial
17 offer. In *Children of the Rosary v. City of Phoenix*, 154 F.3d 972 (9th Cir. 1998), *cert. denied*,
18 526 U.S. 1131 (1999), the Court held that merely offering to put a political message on a bumper
19 sticker, which was for sale, did not transmute the proposed bus advertisement to one proposing
20 a commercial transaction under the City's standards. *Id.* at 981-82. The comments are applicable
21 here as well:

22 The district court did not err in finding that the proposed advertisements were
23 noncommercial and the city did not engage in impermissible viewpoint discrimination. The
24 Court has recognized that "there are commonsense differences between speech that does
25 no more than propose a commercial transaction and other varieties." *Virginia Bd. of*
26 *Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 n. 24, 96 S.Ct.
27 1817, 48 L.Ed.2d 346 (1976) (internal quotations omitted); *see Central Hudson Gas &*
28 *Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 562, 100 S.Ct. 2343, 65 L.Ed.2d
341 (1980). In this case, the advertisements are not "expression[s] related solely to the
economic interests of the speaker and its audience," *Central Hudson*, 447 U.S. at 561, 100
S.Ct. 2343, but instead seek to blur the distinction between types of speech by blending an
"ideological communication," *Virginia Bd. of Pharmacy*, 425 U.S. at 779, 96 S.Ct. 1817
(Stewart, J., concurring), with an offer to purchase the message. **When the government
is acting as a proprietor in this nonpublic forum, the government may regulate this
nonpublic forum by rejecting an advertisement combining political and religious**

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advertisements with a commercial offer. The city did not apply the standard in a viewpoint discriminatory manner by rejecting appellants' advertisements promoting their views on public issues.

Id. at 982 (bold added). Here, even if one believes there is a proposed commercial transaction referenced by the advertisement, it unquestionably impermissibly sought to combine political advertisement with any tangential, hidden commercial offer in the ad. By removing the small print text the political public service type message would be removed and Plaintiff Company could then focus on a permissible proposed commercial transaction.

The Transit Advertising Standards were not arbitrarily or capriciously applied by the City in this case in rejecting Plaintiff Company's advertisement, so the Plaintiffs' third claim fails and should be dismissed. The City's objection had nothing to do with viewpoint. The City could and did reasonably reject the use of political or public service type statements in an advertisement which must be limited to proposing a commercial transaction.

DATED: February 27, 2012.

UDALL, SHUMWAY & LYONS, P.L.C.

/s/ Bradley D. Gardner
Bradley D. Gardner
David R. Schwartz
30 West First Street
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CERTIFICATE OF SERVICE

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I hereby certify that on February 27, 2012, I electronically transmitted the attached document to the Clerk’s Office using Arizona Turbo Court for filing and transmitted the document as stated below:

via regular mail to:

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