ACLU
AMERICAN CIVIL LIBERTIES UNION of NORTH CAROLINA FOUNDATION

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September 28, 2012

Via Email and U.S. Mail

Ralph Karpinos
Town Attorney, Chapel Hill
405 Martin Luther King Blvd.
Chapel Hill, NC 27514

RE: Efforts to Bar Political Advertisement from Chapel Hill Buses

Dear Mr. Karpinos:

Our office has recently received several complaints relating to Chapel Hill's consideration of removing a particular political advertisement from its buses through its current advertising policy or the adoption of a new policy. I write to encourage Chapel Hill to safeguard cherished First Amendment rights and its reputation as a community welcoming of dialogue by allowing this advertisement to stay on Town buses as well as keeping this public forum open to all constitutionally protected speech.

The Facts

Chapel Hill has a long tradition of accepting a broad array of advertisements on its buses. Effective July 1, 2005, the Town of Chapel Hill adopted a policy that allowed public service, political, and non-political advertisements on its buses subject to very limited restrictions.[1] In July 2011, Chapel Hill adopted a more expansive policy that continued that town's tradition of allowing public service, political, and non-political advertisements on its buses, again subject to very limited restrictions.[2] This policy adopted specific rules for "political, religious, or 'issues' advertising" noting these categories must "bear conspicuously a paid advertising disclaimer" as

[1] *Town of Chapel Hill Transportation Department*, effective July 1, 2005. This policy barred "liquor..., cigarette, and massage parlor advertising." It stated that "advertising should be of a reputable nature, should conform to recognized business standards, and must not conflict with any federal, state, or local laws, or regulations." While references to an advertisement's "reputable nature" and "recognized business standards" raise constitutional vagueness concerns, *see, e.g., Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) ("We insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that we may act accordingly."), the key point here is that this policy freely allowed political and public service advertising.

[2] *Transit Advertising Fee Schedule and Policy* (hereinafter "*2011 Transit Policy*"). This policy again barred some product advertising, namely those promoting alcohol, tobacco, and adult entertainment. *Id.* at Sections 2.01(a)-(b), 3.01(f). The policy also barred advertisements for obscene materials, unlawful goods or services and unlawful conduct, as well as "advertising that incorporates or displays any rotating, revolving, or flashing devices or other moving parts or any word, phrase, symbol or character" that "distract traffic." *Id.* at Sections 3.01(c)-(e), (j). More problematically, though not necessarily relevant to the current inquiry as the policy explicitly allows for political advertising, the policy again excludes some materials on unconstitutionally vague and/or viewpoint-based grounds. *See, e.g., Grayned*, 408 U.S. at 108. For example, the policy bars ads that are "disrespectful," "offensive," or might "threaten or adversely affect... the public imagine of Chapel Hill Transit." *Id.* at Sections 3.01(a), (c), 2.01(c).

well as "the permanent address, telephone number, or worldwide web address of the person who paid for the communication."[3]
The 2011 policy claims that "Chapel Hill does not intend to create a public forum for public discourse or expressive activity."[4] However, Chapel Hill's long-standing policy and practice of accepting public service, political, and non-political advertisements belie this assertion.[5] The Town has accepted every advertisement proposed for its buses throughout the years.[6] In fact, the current episode is the first controversy surrounding its policies and practices.[7]

The current controversy surrounds an advertisement paid for by The Church of Reconciliation featuring a Palestinian and an Israeli man holding their grandchildren with text reading, "Join with us. Build peace with justice and equality. End U.S. military aid to Israel." The original advertisement began running on Chapel Hill buses on August 13, 2012. They briefly came down on August 23, 2012, "after an outpouring of anger from Jewish leaders and community members."[8] The Town cited the advertisement's failure to include contact information for The Church of Reconciliation as the basis for removing the signs.[9] Once the Church's contact information was added, the signs were put back up on the buses. Chapel Hill has not lost any advertising revenue as a result of the advertisement running on its buses.[10]

Discussion now centers on whether Chapel Hill can remove this political advertisement pursuant to its current policy or adopt a new policy that would have the effect of barring it. Individuals seeking to remove these advertisements have made their motivation plain: they do not approve of their subject matter depicted or the viewpoint expressed. In the opinion of Chapel Hill Town Councilmember Penny Rich, a leading proponent of removing these advertisements, the town should reject all "political ads that will offend our Jewish citizens."[11] She further objects to the advertisement as a "manipulative way to essentially call for the destruction of Israel."[12] Neither Councilwoman Rich nor any others calling for the ban[13] have articulated any subject matter- or viewpoint-neutral objections to the advertisement.

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[3] *Id.* at Section 3.02, Attachment A, Section D(2).
[4] *Id.* at Section 1.01.
[5] *Town of Chapel Hill Transportation Department*, effective July 1, 2005; *2011 Transit Policy*; *Conversation with Ralph Karpinos.*
[6] *Conversation with Ralph Karpinos.*
[7] *Id.*
[8] *Chapel Hill Church Raises Hackles Over Ad on Public Buses; Free Speech an Issue*, Independent Weekly, September 5, 2012 (hereinafter "*Free Speech an Issue*").
[9] *Id.*; 2011 Transit Policy, Attachment A, Section D(2).
[10] *Conversation with Ralph Karpinos.*
[11] *Free Speech an Issue*, supra note 8. In an email Councilmember Rich expanded on her support for barring these advertisements and again underlined the subject- and viewpoint-basis for her concerns, writing, "Being the only Jewish person on the council I can tell you that Israel is a very emotional, complicated issue to discuss. I publicly do not take a stand on Israel, however, I do think we as a town have to understand the strong bond Jewish people have with Israel, therefore we need to extend our respect by not accepting ads that will offend our Jewish citizens."
[12] *Id.*
[13] The following are comments exemplifying the exclusively subject matter- and viewpoint-bases of those who support barring these advertisements:

- Israel Abitbol, UNC student: "It's not very comfortable for students like me to go on buses with these ads. The money that's going to Israel saved my family more than three times in the past week." *Town Responds to Controversial Bus Ads*, The Daily Tar Heel, September 20, 2012.

The Law

Political Speech is Entitled to Special Protection

Different speech is afforded different levels of protection pursuant to the First Amendment to the United States Constitution. "Speech on public issues occupies the highest rung of the hierarchy of First Amendment values and is entitled to special protection."[14] It receives such deference due to our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."[15] The United States Supreme Court has thus recognized a "distinction between commercial and noncommercial speech, indicating that the former could be forbidden and regulated in situations where the latter could not be."[16] At the bottom of the hierarchy are limited categories of unprotected speech, such as obscenity.[17]

Content-Based Speech Restrictions are Viewed with Skepticism

Courts employ different levels of scrutiny regarding government speech restrictions based on whether they are content-neutral or content-based. While suspicious of even content-neutral speech restrictions, courts are consistently hostile to content-based restrictions.[18] This hostility extends both to subject-based "prohibition[s] of public discussion of an entire topic"[19] and viewpoint-based restrictions targeting "particular views taken by speakers on a subject."[20]

- Lew Borman, former executive director of the Durham-Chapel Hill Jewish Federation: "These ads, however well meaning, are insulting. It is a sad unilateral expression." *Controversial Ads Back on Buses*, Carrboro Citizen, September 6, 2012.
- Adam Goldstein, Chapel Hill resident: "We're open to sincere efforts to bring people together rather than push them apart, discussion rather than political rhetoric." *Bus Ads Against Israeli Aid Draw Crowd in Chapel Hill*, News & Observer, September 13, 2012.
- Michael Ross, Voice 4 Israeli: "If the instigators of these ads cared more about the welfare of the Palestinian people and less about delegitimizing the Jewish homeland, we could find common ground." *Id.*
- Steven Schauder, executive director, Jewish Federal of Durham-Chapel Hill: "We also expressed our displeasure of how these ads single out Israel as the sole deterrent to peace between Israelis and Palestinians." *Chapel Hill, N.C., to Revisit Bus Ad Policy Over Anti-Israel Ad*, Jewish Telegraphic Agency, September 11, 2012, http://www.jta.org/news/article/2012/09/11/3106676/chapel-hill-nc-to-revisit-bus-ad-policy-over-anti-israel-ad.

[14] *Snyder v. Phelps*, 131 S. Ct. 1207, 1215 (2011) (quoting *Connick v. Myers*, 461 U.S. 138, 145 (1983)); *Arlington Cnty. Repub. Comm. v. Arlington Cnty.*, 983 F.2d 587, 593 (4th Cir. 1993)

[15] *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964).

[16] *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 506 (1981).

[17] *See, e.g., United States v. Stevens*, 130 S. Ct. 1577, 1584 (2010).

[18] *Id.* ("[A]s a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.")

[19] *See, e.g., Metromedia,* 101 S.Ct. at 2896 (1981).

[20] *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995); *See also Covenant Media of S.C., L.L.C. v. City of N. Charleston*, 493 F.3d 421, 433 (4th Cir. 2007) (In determining whether a regulation is content-neutral, "First, we must examine the plain terms of the regulation to see whether on its face, the regulation confers benefits or imposes burdens based upon the content of the speech it regulates. If it does not, we then ask whether the regulation's manifest purpose is to regulate speech because of the message it conveys.")

Moreover, the government cannot evade judicial skepticism through facially neutral policies that serve as "a mere pretext" for discrimination against certain subjects or viewpoints.[21] The First Amendment "guards against the dangers of post-hoc policy formulation or the discretionary enforcement of an effectively inoperative policy."[22] Courts will thus review what animated policies as "motive [is] keenly relevant in cases that involve content discrimination."[23] In determining motive, courts will review "previous statements on record by [governmental] representatives"[24] as well as how the government has dealt with different categories of speech.[25]

Forum Analysis

Courts employ a "'forum based' approach for assessing [speech] restrictions that the government seeks to place on the use of its property."[26] There are three types of forums: the traditional public forum, the designated public forum, and the non-public forum.[27] Traditional public forums, including public streets and parks, "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."[28] Designated public forums exist wherever "government property that has not traditionally been regarded as a public forum is intentionally opened up as a place for expressive activity."[29] Public property that "is not by tradition or designation a forum for public communication" is a non-public forum.[30]

Advertising spaces on buses are not traditional public forums. In determining whether bus advertising space constitutes a designated public forum or a nonpublic forum, a court will focus on the government's intent.[31] While the government's stated purpose may be considered,

> [i]nquiry into intent . . . is not merely a matter of deference to a stated purpose. Instead, intent is gleaned from an examination of two factors. First, we must look to the policy and practice of the government with the respect to the underlying property. Second,

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[21] *Developing and Implementing a Transit Advertising Policy*, Transit Cooperative Research Program, August 2010, p. 5; *see also Christian Legal Soc'y Chapter of the Univ. of Cal. v. Martinez*, 130 S. Ct. 2971, 2995 (2010) (remanding to the Ninth Circuit to determine if the government had impermissibly used a facially viewpoint-neutral restriction on First Amendment rights as a mere pretext for viewpoint-based discrimination).

[22] *Airline Pilots Ass'n v. Dept. of Aviation*, 45 F.3d 1144, 1153 (7th Cir. 1995).

[23] *Grossbaum v. Indianapolis-Marion Cnty. Bldg. Auth.*, 100 F.3d 1287, 1298 (7th Cir. 1996).

[24] *Developing and Implementing a Transit Advertising Policy*, p. 5.

[25] *Pittsburgh League of Young Voters Educ. Fund v. Port Authority of Allegheny County*, 653 F.3d 290, 297-98 (3rd Cir. 2011) (hereinafter "PLYVTF") ("That the Port Authority accepted several noncommercial ads, but rejected the coalition's ad for the stated reason that it was noncommercial, was evidence that the District Court could properly consider as strongly suggesting viewpoint discrimination.").

[26] *International Soc'y for Krishna Consciousness v. Lee*, 505 U.S. 672, 678 (1992).

[27] *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-46 (1983).

[28] *Id.* at 45.

[29] *Pleasant Grove City v. Summum*, 555 U.S. 460, 469 (2009).

[30] *Perry*, 460 U.S. at 46.

[31] *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 802 (1985); *see also Developing and Implementing a Transit Advertising Policy*, p. 16 ("[A] court will focus on the intent of [the] agency to determine whether a designated forum has been created or not.")

> we must examine the nature of the property and its compatibility with expressive activity.[32]

A court will thus "look beyond mere labels"[33] to "reach its own decision on the classification of a forum, despite how the agency initially classifies the advertising space in its policy."[34]

Courts generally find that buses constitute a designated public forum when access to their advertising spaces is subject to only limited restrictions. For example, in *Planned Parenthood Association/Chicago Area v. Chicago Transit Authority*, the Seventh Circuit Court of Appeals held the Chicago Transit Authority (CTA) advertising system "has become a public forum" as:

> CTA maintains no system of control over advertisements it accepts for posting on its system other than [refusing] vulgar, immoral, or disreputable advertising. Access to CTA's advertising system, then, is virtually guaranteed to anyone willing to pay the fee. In accordance with this laissez-faire policy, CTA has allowed its advertising space to be used for a wide variety of commercial, public-service, public-issue, and political ads . . . Moreover, since CTA already permits its facilities to be used for public-issue and political advertising, it cannot argue that such use is incompatible with the primary use of its facilities.[35]

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[32] *Airline Pilots Ass'n*, 45 F.3d at 1152 (citing *Cornelius*, 473 U.S. at 802-03).

[33] *Madison City Attorney Report to Mayor and Common Council re Bus Advertising* (hereinafter "*Madison*"), January 16, 2008, p. 3.

[34] *Developing and Implementing a Transit Advertising Policy*, p. 16.

[35] 767 F.2d 1225, 1232 (7th Cir. 1985); *see also, e.g., N.Y. Magazine v. Metropolitan Transp. Auth.*, 136 F.3d 123, 130 (2nd Cir. 1998) (concluding "that the advertising space on the outside of MTA buses is a designated public forum . . . given that MTA's Standards allow both commercial and political speech"); *Paulsen v. Cty. of Nassau*, 925 F.2d 65, 70 (2nd Cir. 1991) (finding designated public forum where the government failed to demonstrate a consistent practice of limiting noncommercial, expressive activity); *Lebron v. Wash. Metro. Area Transit Auth. ("WMATA")*, 749 F.2d 893, 896 (D.C. Cir. 1984) ("There is no question . . . that WMATA has converted its subway stations into public fora by accepting . . . political advertising."), *Nat'l Abortion Fed'n v. Metro. Atlanta Rapid Transit Auth.*, 112 F. Supp. 2d 1320, 1326 (N.D. Ga. 2000) (finding designated public forum due to MARTA's permitting "various forms of public interest speech and speech by non-profit entities"); *Coal. for Abortion Rights v. Niagara Frontier Transp. Auth.*, 584 F. Supp. 985, 989 (W.D.N.Y. 1984) (holding public forum created for advertisements concerning abortion by permitting other political and public service advertisements); *Gay Activists Alliance of Wash., D.C., Inc. v. Wash. Metro. Area Transit Auth.*, No. 78-2217, slip op. (D.D.C. July 5, 1979) (interior of Washington, D.C. buses designated a public forum for message regarding homosexuality by transit authority's acceptance of other ads dealing with social and political issues), *Preterm, Inc. v. Mass. Bay Transp. Auth.*, No. 74-159-M, slip op. (D.Mass. May 13, 1974) (injunctive relief granted for plaintiff likely to be able to prevail at trial on merits of complaint that by offering space on its facilities for public advertising, transit authority could not constitutionally refuse to carry pro-abortion advertisement).

Supporters of restricting bus advertising often highlight *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974) (plurality), as it upheld a city's rejection of a bus advertisement on behalf of a political candidate. Subsequent case law, however, has repeatedly distinguished *Lehman* from, and refused to apply it to, factually distinct controversies. The Seventh Circuit, for example, has recognized the central importance of the fact that "Shaker Heights had a consistently-enforced written policy of rejecting all political and public-issue advertising, and in its twenty-six years of operation, the transit system had not permitted any political or public-issue advertising on its vehicles." *Planned Parenthood Association/Chicago Area*, 767 F.2d at 1233. Such a history makes the agency's intent to create a nonpublic forum clear. But, just as clearly, the case is "not controlling" absent a similar uniform

A forum's designation plays a role in determining the level of scrutiny applied to governmental speech regulations. If bus advertising space constitutes a designated public forum, then content-based speech restrictions are usually unconstitutional.[36] Content-based restrictions are only permissible in traditional and designated public forums if they are narrowly tailored to serve to a compelling governmental interest.[37] On the other hand, "access to a nonpublic forum can be restricted so long as the restrictions are reasonable."[38] Viewpoint-based restrictions, however, are impermissible regardless of the forum.[39]

Conclusions

Chapel Hill Cannot Constitutionally Bar the Advertisement in Question

A review of the nature of the speech in question, Chapel Hill's motivation for potentially barring this speech, and the forum through which the speech is delivered makes plain that Chapel Hill cannot constitutionally bar the advertisement in question.

First, the advertisement in question is political, and, as such, it "occupies the highest rung of the hierarchy of First Amendment values and is entitled to special protection."[40]

Second, objections to the advertisement have focused exclusively on its subject matter and, more particularly, the viewpoint it expresses.[41] Chapel Hill Town Councilwoman Penny Rich, for example, has characterized the ad as a "manipulative way to essentially call for the

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tradition of rejecting all political and public issue advertisements. *Id.* *Lehman* is thus limited and only "stands for the proposition that the interior of a transit system's cars and buses is not a *traditional* public forum, it does not stand for the proposition that such space may *never* become a public forum." *Id.* (emphasis added); *see also Airline Pilots Ass'n*, 45 F.3d at 1152 ("The fact that *Lehman* upheld a policy of excluding political advertisements in public buses hardly determines the reasonableness of such a restriction for all time."); *Penthouse Intern., Ltd. v. Koch*, 599 F.Supp. 1338, 1347 (S.D.N.Y. 1984) ("*Lehman* says only that the interiors of transit vehicles are not traditional First Amendment forums.")

Lehman is further distinguishable here as one of the key concerns justifying the Shaker Heights ban was to avoid "the appearance of favoritism." 418 U.S. at 304. Chapel Hill has addressed similar concerns by requiring "all political, religious, or 'issue related' advertising shall bear conspicuously a paid advertising disclaimer." *2011 Transit Policy*, Section 3.02.

[36] *Developing and Implementing a Transit Advertising Policy*, p. 4 ("Cases involving a mass transit agency deemed to have a designated public forum will more often than not result in a ruling against the agency for unfair content restrictions.")

[37] *Perry*, 460 U.S. at 46. The requirement that a restriction is narrowly tailored to serve a compelling governmental interest is called strict scrutiny. *Summum*, 555 U.S. at 469. This is the most demanding form of scrutiny known to constitutional law, described as "strict in theory, but fatal in fact." *Fullilove v. Klutznick*, 48 U.S. 448, 517 (1980) (Marshall, J., concurring). The standard is so difficult for the government to meet that there is only one still-valid Supreme Court opinion upholding a content-based restriction on protected speech, and that involved a federal statute prohibiting groups from giving material aid to terrorists. See Eugene Volokh, *Humanitarian Law Project and Strict Scrutiny*, THE VOLOKH CONSPIRACY (June 21, 2010), http://volokh.com/2010/06/21/humanitarian-law-project-and-strict-scrutiny/.

[38] *PLYVTF*, 653 F.3d at 296 (citing *Cornelius*, 473 U.S. at 799-800).

[39] *PLYVTF*, 653 F.3d at 296; *Madison* at p. 6.

[40] *Snyder v. Phelps*, 131 S. Ct. 1207, 1215 (2011) (quoting *Connick v. Myers*, 461 U.S. 138, 145 (1983)); *Arlington County Repub. Committee v. Arlington County*, 983 F.2d 587, 593 (4th Cir. 1993).

[41] As noted above, Chapel Hill has not lost any advertising business due to this advertisement so this cannot serve as an objection. *Conversation with Ralph Karpinos.*

destruction of Israel" and openly advocated for a subject matter- and viewpoint-based ban on any "political ads that will offend our Jewish citizens."[42] No one has offered any objection to the advertisement that is not based on its content and the viewpoint it reflects.[43]

Furthermore, Chapel Hill cannot sidestep judicial skepticism by barring the current advertisement via the adoption of a new "neutral" policy prohibiting all political advertisements. The First Amendment "guards against the dangers of post-hoc policy formulations" designed to mask content discrimination.[44] Here, "previous statements . . . by [governmental] representatives,"[45] as well as Chapel Hill's long-standing policy and practice of allowing public service and political advertisements on its buses, make clear that its concern relates not to political advertisements generally, but instead the subject and viewpoint of this particular political advertisement.[46] Any "neutral" policy would thus constitute a "mere pretext" for content-based discrimination and is every bit as unconstitutional as barring the advertisement pursuant to the current policy.[47]

Finally, advertising spaces on the Chapel Hill buses are now designated public forums. The long-standing Town policy and practice features only limited and (at least in this instance) laxly enforced restrictions and requirements; furthermore, Town policy explicitly allows for public service and political advertisements.[48] Chapel Hill has ***never*** rejected an advertisement proposed for its buses.[49] "This laissez-faire policy" virtually guaranteeing access "to anyone willing to pay the fee" testifies to the fact that the bus advertising space is compatible with expressive activity[50] and trumps Chapel Hill's unsupported designation of said property as nonpublic.[51]

To justify a subject matter based restriction in a designated public forum, Chapel Hill would have to prove its proposed restriction is narrowly tailored to serve a compelling governmental interest. As noted above, the only governmental interest anyone has offered is discomfort with the subject of the advertisement. But a bare desire to avoid controversial subject matters is anything but a compelling government interest; if anything, it is the exact motive the First Amendment guards against.[52] At the same time, any "neutral" effort to bar all political advertisements would restrict far more speech than is necessary to serve the interest of not

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[42] *Free Speech an Issue*, supra note 8.
[43] *See* footnotes 11-13.
[44] *Airline Pilots Ass'n*, 45 F.3d at 1153.
[45] *Developing and Implementing a Transit Advertising Policy*, p. 5.
[46] *Town of Chapel Hill Transportation Department*, effective July 1, 2005; *2011 Transit Policy*; *Conversation with Ralph Karpinos*; *PLYVTF*, 653 F.3d at 297-98.
[47] *Developing and Implementing a Transit Advertising Policy*, p. 5.
[48] *Town of Chapel Hill Transportation Department*, effective July 1, 2005; *2011 Transit Policy*; *Conversation with Ralph Karpinos*; *Free Speech an Issue*, supra note 8 (noting the town only enforced its contact information requirement for the advertisement after an outcry over the subject and viewpoint of the advertisement had begun).
[49] *Conversation with Ralph Karpinos.*
[50] *Planned Parenthood Association/Chicago Area*, 767 F.2d at 1232.
[51] *See, e.g., Developing and Implementing a Transit Advertising Policy*, p. 16 ("As the case law has shown, a court will reach its own decision on the classification of a forum, despite how the agency initially classifies the advertising space in its policy."); *2011 Transit Policy* at Section 1.01.
[52] *See, e.g., Texas v. Johnson*, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.").

offending anyone.[53] In short, subject matter restrictions in designated public forums rarely withstand judicial scrutiny,[54] Chapel Hill has identified no compelling government interest, and the proposed remedy greatly outstrips the supposed problem. Such a restriction cannot survive.

Even if a court found advertising space on Chapel Hill's buses a nonpublic forum, it would still strike down any speech restrictions put in place due to the current controversy. Viewpoint- based restrictions are constitutionally impermissible in *all* forums.[55] Public comments from Councilmember Rich and others make plain that they wish to remove these political advertisements because they are uncomfortable with their political content. Removing the advertisement under the laissez-faire current policy, at best, would represent the impermissible "discretionary enforcement of an effectively inoperative policy;"[56] at worst, it would directly embrace viewpoint discrimination. Removing the advertisement pursuant to a new "neutral" policy would represent a "post-hoc policy formulation"[57] unconstitutionally motivated by policy- makers' opposition to the message.[58]

Chapel Hill cannot constitutionally bar these political advertisements.

Barring the Advertisement in Question is Incompatible with Chapel Hill's Stated Respect for Open Dialogue and Could Have Unforeseen Consequences

"Chapel Hill is a community where a diversity of ideas, people and opportunities converge" and "the free exchange of ideas" flourishes, states the Town's website.[59] The Town could not make such claims if it responded to the first episode of controversy in a long-standing public forum by barring political speech.

Yet this is inconsequential compared to the unpredictable ripple effects such suppression could have on speech in Chapel Hill and throughout our state.

Adopting a policy that favors non-political over political speech not only turns the First Amendment on its head but also could produce absurd results. For example, an Exxon-Mobile advertisement arguing for the commercial benefits of the Keystone pipeline[60] is much more likely to comply with such a "neutral" policy than a political advertisement from an environmental group opposing the Keystone pipeline.[61]

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[53] For example, a World Wildlife Fund advertisement urging readers to "Save the Tigers Now" is political and noncommercial in nature and, thus, would be barred by a hypothetical "neutral" advertising policy despite the fact that it risked offending no one. Similarly, completely innocuous public health public service announcements would be barred by a noncommercial speech prohibition.

[54] *Developing and Implementing a Transit Advertising Policy*, p. 4.

[55] *Summum*, 555 U.S. at 469 ("[R]estrictions based on viewpoint are prohibited."); *see also PLYVTF*, 653 F.3d at 296; *Madison* at p. 6.

[56] *Airline Pilots Ass'n*, 45 F.3d at 1153.

[57] *Id.*

[58] *Developing and Implementing a Transit Advertising Policy*, p. 5.

[59] http://www.ci.chapel-hill.nc.us/index.aspx?page=45.

[60] For an example of such an advertisement visit http://www.youtube.com/watch?v=PObSVK8qyXc.

[61] For an example of such an advertisement visit http://dirtyoilsands.org/dirtyspots/category/keystone_xl/obamas_choice.

Closing a public forum to political speech not only engages in exactly the sort of subject- and viewpoint-discrimination rejected by the courts but also provides an unfortunate model for other communities seeking to bar "controversial" expression. A less gay-friendly community than Chapel Hill could employ the same "this offends members of our community" logic to cancel high school prom due to same-sex couples attending[62] or bar all student clubs to stymie gay-supportive student clubs.[63] Subjective logic is impossible to cabin and its results unpredictable.

We urge Chapel Hill to stand by its and our nation's commitment to robust discussion of public issues in its public forums. In so doing, the Town can serve as a model for other North Carolina communities by embracing the free exchange of ideas, even when controversial. As the Co-Presidents of J Street UNC, Jacob Pittman and Lauren Donoghue, eloquently noted in a recent letter to the editor in *The Daily Tar Heel* on this debate, "Every attempt to stifle voices is a missed opportunity to engage with the issues directly. One cannot engage with those whom you disagree by asserting that they have no right to speak."[64]

Thank you for speaking with me on this matter in recent days and for the opportunity to address this important free speech issue. Please do not hesitate to be in touch with any questions.

Regards,

Christopher A. Brook
Legal Director

cc: Mayor Mark Kleinschmidt
Mayor Pro Tem Ed Harrison
Council Member Donna Bell
Council Member Matt Czajkowski
Council Member Laurin Easthorn
Council Member Gene Pease
Council Member Penny Rich
Council Member Lee Storrow
Council Member Jim Ward

[62] *McMillen v. Itawamba Cnty. Sch. Dist.*, 702 F.Supp.2d 699 (2010).
[63] http://www.acluutah.org/pr100600.htm.
[64] Jacob Pitman & Lauren Donoghue, *Engage and Don't Eliminate the Bus Ads*, The Daily Tar Heel, September 12, 2012.