



August 27, 2014

Via Electronic Mail and U.S. Mail

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Sacramento County Board of Supervisors
700 H Street, Suite 2450
Sacramento, CA 95814

Re: Sacramento International Airport censorship of California Endowment advertisements

Dear Supervisors:

I am writing on behalf of the California Endowment and the American Civil Liberties Union of Northern California. Over the last few months, the Sacramento airport has rejected two of the Endowment's paid advertisements on the grounds that they are political in nature. When we contacted the Airport Director, we learned that the rejection was based on his interpretation of Sacramento County Resolution 2011-0247, enacted on April 26, 2011. We are writing now because we believe that both the Resolution and the Director's interpretation of it are flawed, and we hope that you will act to remedy this situation so that the airport stops this unreasonable censorship.

As we understand it, the Sacramento International Airport is owned and operated by the County of Sacramento through the Sacramento County Airport System. The airport's terminals feature a wide range of amenities including restaurants and shops,¹ art displays,² and a massage bar.³ The airport also rents,

¹ http://www.sacramento.aero/smf/about/maps/#intmap_acc_shoppingservicesb

² <http://www.sacramento.aero/smf/about/art>

³ http://www.sacramento.aero/smf/dining_and_shopping/other_services



through a contractor, scores of display cases for advertising throughout the terminals, including both static and multi-media displays.

The California Endowment is a non-profit foundation that seeks to expand access to affordable, quality health care for underserved individuals and communities throughout California. In 2011 the Endowment signed a three-year contract to lease one of the airport's advertising display cases. The contract states that advertisements shall be non-political in nature and consistent with the goals of a commercial advertising program but it does not define these terms.

Earlier this year, the Airport System rejected an advertisement that the Endowment submitted. This advertisement contains a photograph of three people with their names and occupations, a list of "undocumented California facts," and the phrases "California Was Born in Me" and "health happens here as one nation," along with a request for people to visit the Endowment's website and follow the Endowment's Twitter feed, with "#Health4All" prominently displayed. The advertisement was rejected on the grounds that it was political. The space that the Endowment rents instead now displays a black banner with "#Health4All" written in the top right corner of it.

Even more recently, the Endowment submitted another advertisement that superimposes "Health4All" over a photograph that recalls Norman Rockwell's "The Peace Corps"; it also prominently displays the text "1.4 million undocumented tax-paying Californians lack health coverage," with "health happens here" in smaller letters in a corner. The airport also rejected this advertisement.

On July 14, we sent a letter to Sacramento County Airport System Director John Wheat, explaining to him the situation as we understood it, pointing out the constitutional issues that it raises, and asking that he allow the Endowment's ads to run and change the policy to avoid future censorship. The letter also included a request for records relating to the policy. A copy of our July 14 letter, including copies of the rejected advertisements, is attached.

In response to our letter, we received a number of records, including a copy of County Resolution No. 2011-0247, which authorizes the Director to enter into an agreement with a private contractor to operate an advertising concession at the Sacramento International Airport and, in an attachment, sets forth what the agreement must contain. The resolution includes two troubling provisions:

- "Under no circumstances shall Concessionaire use any space to display Advertising or Sponsorships that would involve the County or the

Airport in controversial, social, moral, political or ethical issues.”
§ 2.03.

- “The Director shall have the sole discretionary authority to prohibit any particular Advertiser, advertisement, Advertising Display, Sponsorship, or design.” § 2.04.

We are concerned that these provisions, the airport’s interpretation of them, and its refusal to run the Endowment’s proposed advertisements violate the protections for free speech found in the First Amendment and Article I § 2 of the California Constitution.

As an initial matter, it is hard to see why the airport rejected these advertisements as political. They do not mention any political candidate, officeholder, bill, or initiative. We also question whether running a paid advertisement of this sort will “involve” the airport or county in any sort of “controversial, social, moral, political or ethical” issue, any more than does running advertisements for any number of goods or services. An internet search for the word “controversy” alongside the names common goods or companies will nearly always turn up something in the news – an automaker’s failure to recall allegedly dangerous cars, the health effects of sugary drinks or foods, or a company’s position on any number of social issues such as contraception or marriage, just to cite a few from recent headlines. In fact, we understand that at least one purely commercial advertisement that doubtless raised no concerns when the airport screened it – it involved foam packaging – did generate a controversy leading to an investigation by the Sacramento District Attorney’s office.⁴ Yet as far as we know the airport has never rejected an advertisement for goods or services under § 2.03. It may well be that the Director understands that these advertisements will not “involve” the airport in any of the issues associated with their sponsors or subjects. But there is no more danger that members of the public would think that the Endowment’s advertisements represent the views of the airport or the County, than there is that they would think that the County is endorsing the products and services – or the companies that make them – featured in the airport’s other advertisements. And we can see nothing about the rejected advertisements that would make them

⁴ See Californian’s Against Waste, *Foam Ban’s Opponents on Defensive* (June 7, 2011) (“Earlier this year, the Sacramento District Attorney investigated the company for false advertising claims about their product’s recyclability. The company had placed ads at the Sacramento International Airport showing an eps cup with the recycling logo, despite the absence of eps curbside recycling in Sacramento or any nearby areas.”), available at http://www.cawrecycles.org/whats_new/recycling_news/jun7_sb568_Dart.

unsuitable for display in an airport that features not only scores of commercial advertisements of every type, but also numerous pieces of art that are meant to engage travelers as they walk through the airport terminals, as well as shops and restaurants.⁵

More generally, we have two concerns about Resolution 2011-0247 itself. First, as the United States Court of Appeals has made clear in a case that also involved advertising in an airport terminal, government rules that allow commercial advertising but not advertising relating to public issues raise serious constitutional concerns.⁶ This is particularly true in California, where our state constitution provides even greater protection for speech than does the First Amendment. For example, the California Constitution requires that privately owned shopping malls allow speech – including political speech – on their premises, even when that speech is likely to harm the mall’s business interests because it urges a boycott of a tenant.⁷ And the California Supreme Court has overturned a rule, that, as it put it, “perversely g[ave] preference to commercial advertising over nonmercantile messages” inside public transit busses.⁸ Allowing all advertisements for goods and services but prohibiting issue-related messages that involve “controversial, social, moral, political or ethical issues” runs afoul of these fundamental constitutional principles.

Second, the Director’s “sole discretionary authority” to reject particular advertisements or advertisers and the vagueness of the prohibition against controversial and other ads also raise constitutional concerns. The First Amendment generally prohibits giving a government official broad discretionary

⁵ Compare *Robins v. Pruneyard Shopping Ctr.*, 23 Cal. 3d 899 (1979) (holding that California Constitution’s Liberty of Speech Clause “protect[s] speech and petitioning, reasonably exercised, in shopping centers”).

⁶ See *Air Line Pilots Ass’n, Int’l v. Dep’t of Aviation of City of Chicago*, 45 F.3d 1144 (7th Cir. 1995).

⁷ See *Fashion Valley Mall, LLC v. N.L.R.B.*, 42 Cal. 4th 850, 865-66 (2007) (speech advocating boycott); *Robins v. Pruneyard Shopping Ctr.*, 23 Cal. 3d 899 (1979) (political speech).

⁸ *Wirta v. Alameda-Contra Costa Transit Dist.*, 68 Cal. 2d 51, 57-58 (1967) (overturning transit agency rule that allowed commercial advertising but prohibited most political advertising). Although *Wirta*’s construction of federal law is no longer good, its analysis is still binding as a matter of state law. See *Women’s Internat. League etc. Freedom v. City of Fresno*, 186 Cal. App. 3d 30 (1986); cf. *Air Line Pilots Ass’n*, 45 F.3d at 1159 (distinguishing transit advertising from airport advertising); *Nat’l Adver. Co. v. City of Orange*, 861 F.2d 246, 248 (9th Cir. 1988) (“The first amendment affords greater protection to noncommercial than to commercial expression.”).

authority to allow or reject speech or speakers.⁹ And the rule that he not accept advertisements involving “controversial, social, moral, political or ethical issues” fails to narrow this discretion in any meaningful way. The Court of Appeals has made clear that allowing a government official to reject advertisements on government property as “controversial” vests the decision-maker with an impermissible degree of discretion” in violation of the First Amendment.¹⁰ And “social, moral, political or ethical issues” could include almost anything. Resolution 2011-0247’s combination of a vague standard and otherwise unlimited discretion “invites abuse by enabling the official to administer the policy on the basis of impermissible factors” and therefore violates the First Amendment.¹¹

We therefore ask that you allow the Endowment to display its proposed advertisements in the space it has rented at the Sacramento Airport, and, more generally, that you revise the rules for such advertising to ensure that they comply with the constitutional protections for free speech.

I would be happy to discuss this with you or your staff; please feel free to contact me at (415) 293-6373 or mrisher@aclunc.org.

Thank you for your time and attention to this matter.

Sincerely,



Michael T. Risher
Senior Staff Attorney

Encl.

cc: Elisia DeBord, Office of the Sacramento County Counsel
Debordel@saccounty.net

⁹ See *Child Evangelism Fellowship of MD, Inc. v. Montgomery Cnty. Pub. Sch.*, 457 F.3d 376, 387 (4th Cir. 2006) (“[E]ven in cases involving nonpublic or limited public forums, a policy (like the one at issue here) that permits officials to deny access for any reason, or that does not provide sufficient criteria to prevent viewpoint discrimination, generally will not survive constitutional scrutiny.”) (collecting cases); see *United Food & Commercial Workers Union, Local 1099 v. Sw. Ohio Reg'l Transit Auth.*, 163 F.3d 341, 359 (6th Cir. 1998).

¹⁰ *United Food & Commercial Workers Union, Local 1099 v. Sw. Ohio Reg'l Transit Auth.*, 163 F.3d 341, 359 (6th Cir. 1998) (striking down overly vague government rules for transit advertising).

¹¹ *Id.*



July 14, 2014

Via Electronic Mail and U.S. Mail

John Wheat, Director of Airports
Sacramento County Airport System
6900 Airport Boulevard
Sacramento, CA 95837

Elisia DeBord
Office of the Sacramento County Counsel
700 H Street, Suite 2650
Sacramento, CA 95814
Debordel@saccounty.net

Re: Public Records Act request regarding The California Endowment
advertisement

Dear Mr. Wheat:

I am writing on behalf of the California Endowment and the American Civil Liberties Union of Northern California. It has come to our attention that the Sacramento airport has rejected two of the Endowment's paid advertisements on the grounds that they are political in nature. From what we know of the situation, it appears that this refusal and the policy that underlies it violate the constitutional protections for free speech. We therefore ask that you allow the advertisements to run and change the airport's policy so that it does not act to censor this type of speech.

As we understand it, the Sacramento International Airport is owned and operated by the County of Sacramento through the Sacramento County Airport System. The airport's terminals feature a wide range of amenities including restaurants and shops,¹ art displays,² and a massage bar.³ The airport also rents,

¹ http://www.sacramento.aero/smf/about/maps/#intmap_acc_shoppingservicesb

² <http://www.sacramento.aero/smf/about/art>

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through a contractor, scores of display cases for advertising throughout the terminals, including both static and multi-media displays.

The California Endowment is a non-profit foundation that seeks to expand access to affordable, quality health care for underserved individuals and communities throughout California. In 2011 the Endowment signed a three-year contract to lease one of the airport's advertising display cases. The contract states that advertisements shall be non-political in nature and consistent with the goals of a commercial advertising program but it does not define these terms.

Earlier this year, the Airport System rejected an advertisement that the Endowment submitted. This advertisement contains a photograph of three people with their names and occupations, a list of "undocumented California facts," and the phrases "California Was Born in Me" and "health happens here as one nation," along with a request for people to visit the Endowment's website and follow the Endowment's Twitter feed, with "#Health4All" prominently displayed. The advertisement was rejected on the grounds that it was political. The space that the Endowment rents instead now displays a black banner with "#Health4All" written in the top right corner of it.

Even more recently, the Endowment submitted another advertisement that superimposes "Health4All" over a photograph of several people and prominently displays the text "1.4 million undocumented tax-paying Californians lack health coverage," with "health happens here" in smaller letters in a corner. Just last week the airport rejected this advertisement.

Copies of both of these rejected advertisements are attached to this letter.

We are concerned that the airport's refusal to run these proposed advertisements violate the protections for free speech found in the First Amendment and Article I § 2 of the California Constitution. As the United States Court of Appeals has made clear in a very similar case, government rules that allow commercial but not political advertising at airports raise serious constitutional concerns.⁴ This is particularly true in California, where our state constitution provides even greater protection for speech than does the First Amendment. For example, the California Constitution requires that privately owned shopping malls allow speech – including political speech – on their premises, even when that speech is likely to harm the mall's business interests because it urges a boycott of a

⁴ See *Air Line Pilots Ass'n, Int'l v. Dep't of Aviation of City of Chicago*, 45 F.3d 1144 (7th Cir. 1995).

tenant.⁵ And the California Supreme Court has overturned a rule, like this one, that, as it put it, “perversely g[ave] preference to commercial advertising over nonmercantile messages” inside public transit busses.⁶

Here, it is hard to see why the airport rejected these advertisements as political. They do not mention any political candidate, bill, or initiative. There is no more danger that members of the public would think that the Endowment’s advertisements represent the views of the airport or the County, than there is that they would think that the County is endorsing the products and services featured in the airport’s other advertisements. And we can see nothing about the rejected advertisements that would make them unsuitable for display in an airport that features not only scores of commercial advertisements of every type, but also numerous pieces of art that are meant to engage travelers as they walk through the airport terminals, as well as shops and restaurants.⁷

We therefore ask that you allow the Endowment to display its proposed advertisements in the space it has rented at the Sacramento Airport, and that you revise your rules to ensure that such advertisements will be accepted in the future.

In addition, we ask that you send us the following records under the California Public Records Act so that we can better understand and evaluate the airport’s rules for determining what messages may be displayed in the terminal display cases:

1. Records that discuss or explain the Sacramento County Airport System’s rules governing the content of advertisements that may be displayed in its airport terminals, including but not limited to records relating to how the System, its employees, or its agents determine whether to reject an advertisement as political in nature, and the authority for rejecting advertisements based on their content.

⁵ See *Fashion Valley Mall, LLC v. N.L.R.B.*, 42 Cal. 4th 850, 865-66 (2007) (speech advocating boycott); *Robins v. Pruneyard Shopping Ctr.*, 23 Cal. 3d 899 (1979) (political speech).

⁶ *Wirta v. Alameda-Contra Costa Transit Dist.*, 68 Cal. 2d 51, 57-58 (1967) (overturning transit agency rule that allowed commercial advertising but prohibited most political advertising). Although *Wirta’s* construction of federal law is no longer good, its analysis is still binding as a matter of state law. See *Women’s Internat. League etc. Freedom v. City of Fresno*, 186 Cal. App. 3d 30 (1986); cf. *Air Line Pilots Ass’n*, 45 F.3d at 1159 (distinguishing transit advertising from airport advertising).

⁷ Compare *Robins v. Pruneyard Shopping Ctr.*, 23 Cal. 3d 899 (1979).

2. All records relating to the decision to reject the Endowment's two proposed advertisements discussed above, including internal emails, memoranda, or notes, but not including records that have already been provided to the Endowment.
3. Records showing whether the Sacramento County Airport System has rejected, or considered rejecting, any other proposed advertisements as political in nature from June 1, 2012, to the present; and, if so, records showing the proposed advertisement and why it was ultimately allowed or rejected.
4. Records showing whether the Sacramento County Airport System has allowed the display of other advertisements or materials that contained messages other than those devoted solely to the sale or promotion of goods and services, including copies of any such displays, from June 1, 2012, to the present.

This request includes all documents created, used, or maintained by the government, including records that were created by a member of another government agency, a contractor or a member of the public, as well as records that relate to government business but were sent or received using an employee's personal email or text account. If specific portions of any documents are exempt from disclosure, please provide the non-exempt portions.⁸ Also, please provide complete documents, even if some parts of them do not appear to be responsive to this request.

Please respond to this request within ten days, either by providing all the requested records or by providing a written response setting forth the legal authority on which you rely in withholding or redacting any document and stating when the documents will be made available.⁹

Because the ACLU-NC is a nonprofit civil-rights organization, I ask that you waive any fees. I also request that any records maintained in electronic format be provided in that same format, to avoid copying costs.¹⁰ However, should you be unable to do so, the ACLU-NC will reimburse your agency for the direct costs of copying these records (if your agency elects to charge for copying) plus postage.

If you have any questions about the scope of this request or anticipate that these costs will exceed \$50, or that the time needed to copy the records will delay

⁸ Gov't. Code § 6253 (a).

⁹ Gov't. Code §§ 6253(c), 6255.

¹⁰ Gov't. Code § 6253.9.

John Wheat, Director of Airports

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their release, please contact me so that I can arrange to inspect the document or decide which documents I wish to have copied.¹¹ Otherwise, please copy and send them as soon as possible, and we will promptly pay the required costs.

Thank you for your time and attention to this matter. I would be happy to discuss both the substantive issue and also the records request with you or your staff; please feel free to contact me at (415) 293-6373 or mrisher@aclunc.org.

Sincerely,



Michael T. Risher
Senior Staff Attorney

Encl.

cc: Amanda Thomas
Deputy Director of Finance & Administration

¹¹ See Gov't. Code § 6253.1.

Kimberlin Valencia
Student, Mechanical Engineering

Jose Antonio Flores
Documentation Chief

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Student, Pre-med



Undocumented Californian Facts

Number in CA: 2.6 million
Median age: 31

	Economic Value*
Working Households	92%
Taxes Paid	\$2.7 billion
Contribution to CA Economy	\$302 million

Attitudes

- Economists who argue they benefit the economy: 15%
- Californians who argue they benefit the economy: 76%

Preventive Health Care Benefit

From \$1 spent on preventive care: \$3 saved
From \$1 spent on acute care: \$16 saved
*Health Resources Research Institute, 2008

Undocumented Californians without access to basic preventive health care: 1 million

California Was Born In Me



Join Us

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#Health4All





1.4 million undocumented
tax-paying Californians
lack health coverage

