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July 22, 2021

VIA EMAIL AND U.S. MAIL

Mr. William A. Thomas
Executive Director
Regional Transportation Commission Washoe
P.O. Box 30002
Reno, NV 89520
Email: bthomas@rtcwashoe.com

Re: Teamsters Free Speech Activity in the Transit Center in Downtown Reno

Dear Mr. Thomas:

Our office represents Teamsters Union Local 533 in the above-noted matter. The Regional Transportation Commission of Washoe County's (RTC) security guards ejected, threatened to issue citations, and threatened to cause the arrest of Gary Watson, President of Teamsters Local 533 for distributing handbills on July 9, 2021 at the Transit Center in a public location that does not obstruct vehicular or pedestrian traffic. As explained in this letter, the proposed actions by the RTC violate the Teamsters' well-established free speech rights protected by the United States and Nevada Constitutions. Thus, we are writing to request that your office take immediate action to prevent RTC from violating the Teamsters' well-established right to speak freely regarding a matter of public importance.

The Teamsters are engaged in a labor dispute with Keolis Transit America in the Reno-Sparks metropolitan area. As you know, Keolis is the contractor that runs RTC's bus system. Teamsters Local 533 has represented the employees of the contractors who have run the RTC system for the past 40 years. The Collective Bargaining Agreement between the Teamsters and Keolis expired on July 1, 2021. As you are also aware, Keolis' proposals to the Union constitute takeaways calculated to provoke strikes, would cause more than 20,000 additional car trips requiring operators to drive to newly formed routes in their personal vehicles, and would radically degrade the services that the RTC provides to the public. Of course, this would dramatically increase Keolis' profits. It is the Union's view that you and the RTC Board are working closely with Keolis to make sure this happens. As such, the Teamsters are engaged in an aggressive publicity campaign to bring RTC's misbehavior to the attention of the public. Attached is a copy of the leaflet that Mr. Watson distributed last week.

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On Friday, July 9, 2021, at approximately 3:00 p.m., Mr. Watson arrived at the Downtown Transit Center and began leafleting on the public walkways and sidewalks in and around the Transit Center. Also attached are photographs of the locations Mr. Watson was leafleting. When the security officials confronted Mr. Watson, he inquired of them whether there are any rules or guidelines regulating free speech. They replied that there are such rules and guidelines, but that they did not have a copy at the time and that Mr. Watson had to leave. Mr. Watson did not leave at that moment; although, upon further threats, Mr. Watson left prior to distributing all of his leaflets. Mr. Watson was on site for approximately two and a half to three hours.

The Teamsters' protest was peaceful, did not block traffic, did not interfere with ingress or egress, and did not obstruct any driver's line of sight for purposes of safe driving. Any future exercise of free speech rights will observe the same traditional time, place and manner considerations.

The RTC subsequently provided Mr. Watson the Guidelines for Public Forum Area (Attached). These guidelines do not apply in any way to the instant matter. The guidelines concern compliance with NRS 293.127565. A copy of this NRS section is attached for your convenience. In short, this statute provides that public entities must provide a reasonable location for gathering signatures on petitions for initiative, referendum, and recall, registering voters, advocating for candidates and causes, and other related partisan or non-partisan electioneering activity. Neither the statute nor the guidelines apply to Mr. Watson's leafleting or the kind of public protests involving banners, street theater, and other displays that are common in labor disputes. Instead Mr. Watson's activities were protected by the free speech and free press clauses of the United States and Nevada Constitutions. Apparently RTC believes that the statute and regulation supplant the Federal and State Constitutions. The RTC is wrong. The statute and the regulations are additional protections that allow members of the public to exercise their right to petition and speak freely when discussing election related matters in government buildings in Nevada. NRS 293.127565 is a shield that protects members of the public from government interference of their constitutionally protected right to speak and petition; it was not intended to be a sword used by the government to thwart constitutionally protected speech.

In the event that RTC continues to interpret its Guidelines for Public Forum Area to prohibit the Teamsters' leaflets or future banners, any such interpretation would violate the Teamsters' free speech rights protected by the Federal and State Constitutions as it is unconstitutionally overbroad. The RTC regulations are a flat ban on the distribution of literature. Ironically, the RTC claims the regulations constitute valid time, place, and manner restrictions; however, under the regulation, there is no time, no place, and no manner in which members of the public of can freely distribute literature on the public grounds of the RTC. The United States Supreme Court encountered a similar ordinance in *Lovell v. City of Griffin*, 303 U.S. 444 (1938). In that case, the City of Griffin had an ordinance that prohibited distributing leaflets within city limits without first obtaining written permission from the city manager. The Court struck down the ordinance as abridging the freedoms of speech and press. The RTC guidelines are arguably worse than the ordinance in the City of Griffin, as the RTC regulation does not even allow members of the public to request permission to distribute leaflets—it is simply a flat ban on distributing leaflets.

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The RTC regulation (or the enforcement thereof) is also content-based and thus subject to strict scrutiny because it would allow tables, signs, leaflets, or banners concerning elections to be placed on RTC property while prohibiting leaflets, signs, or banners concerning the labor dispute to be placed on RTC property, depending on the content of the leaflets, signs, or banner. Worse yet, the RTC sells commercial banner advertising space on its busses. In fact, it has a rule permitting it to sell only commercial advertising. The RTC refuses to sell space for political or labor speech. Moreover, the Teamsters' leaflets and any future banners or other communication contain non-commercial speech, which is afforded greater protections than commercial speech. In addition to the commercial signs on the busses, the RTC also allows signs associated with directions, traffic rules, bus route information and electronic overhead messaging.

The RTC's rule regulates speech. The Nevada Constitution contains its own free speech protections, which in relevant part provides:

Every citizen may freely speak, write and publish his sentiments on all subjects being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press.

Nev. Const. art. I, § 9. The Nevada Supreme Court has held that the Nevada Constitution's protections are "coextensive to, but no greater than, that of the First Amendment to the United States Constitution." *SOC, Inc. v. Mirage Casino-Hotel*, 117 Nev. 403, 415, 23 P.3d 243, 251 (2001). Because Nevada's constitutional protections for free speech are coextensive with the First Amendment, Nevada courts look to federal First Amendment jurisprudence. *See id.*

In Nevada, labor unions have been afforded the full panoply of free speech protections. *See, e.g., City of Reno v. Second Jud. Dist. Ct.*, 59 Nev. 416, 95 P.2d 994, 1000 (1939) (striking down ordinance prohibiting picketing by labor union); *State ex rel. Culinary Workers, Local No. 226 v. Eighth Jud. Dist. Ct.*, 66 Nev. 166, 207 P.2d 990, 996, *affirmed on rehearing*, 66 Nev. 202, 210 P.2d 454 (1949) (peaceful labor union picketing is protected by the Nevada Constitution).

The First Amendment to the United States Constitution provides in relevant part that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. Amend. I. As applied to the states through the Fourteenth Amendment, it "is a guarantee . . . against abridgment [of the right of free speech] by government, federal or state." *Hudgens v. NLRB*, 424 U.S. 507, 513 (1976).

In determining the constitutionality of rules or actions that regulate or prohibit speech, courts begin by looking at the type of speech being regulated and where the speech is occurring. Governmental prohibition or regulation of speech related to matters of public concern is carefully scrutinized. It is a basic tenant of First Amendment jurisprudence that non-commercial speech receives greater protection than commercial speech. As stated by the United States Supreme Court, "our recent commercial speech cases have consistently accorded non-commercial speech a greater degree of protection than commercial speech." *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 513 (1981). Moreover, it is well settled that speech occurring during a labor dispute is non-commercial speech related to a matter of public concern, deserving of full protection under both the Federal and Nevada Constitutions. "The dissemination of

information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution.” *Thornhill v. Alabama*, 310 U.S. 88, 103 (1940).

Courts also look to see where the speech has occurred. Speech occurring in a traditional public forum, such as streets and sidewalks, “‘occupy a special position in terms of First Amendment protection’ . . . [in that] the government’s ability to restrict expressive activity ‘is very limited.’” *Boos v. Barry*, 485 U.S. 312, 318 (1988) (quoting *United States v. Grace*, 461 U.S. 171, 177, 180 (1988)). In this case, the Teamsters’ leafleting and eventual display is taking place on the public sidewalk, a quintessential public forum and, therefore, RTC’s ability to restrict it is severely limited.

Ordinances prohibiting or restricting speech may be either content-based or content-neutral. Ordinances will be found to be content-based if they “by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed.” *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 643 (1994). If an ordinance is content-based, strict scrutiny will be applied and the government must show that that the ordinance is “necessary to serve a compelling state interest and narrowly drawn to achieve that end.” *Arkansas Writers’ Project Inc. v. Ragland*, 481 U.S. 221, 231 (1987). If the ordinance is found to be content-neutral, intermediate scrutiny will be applied. Under this test, the court must determine if the ordinance is “(i) narrowly tailored, (ii) serves a significant government interest, and (iii) leaves open ample avenues of communication.” *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

A regulation of speech that is content-based on its face must meet strict scrutiny regardless of the underlying purpose for the law. In *Reed v. Town of Gilbert*, the Supreme Court struck down a municipal ordinance that regulated the presence of outdoor signs, but that had 23 categories of exceptions. 576 U.S. 155, 135 S. Ct. 2218 (2015). For example, under the ordinance, political signs could be quite large and remain up throughout the election season, while signs giving directions to events had to be small and could be posted for only a short time. The Court unanimously declared this unconstitutional. The Court said that “[o]n its face, the Sign Code is a content-based regulation of speech. We thus have no need to consider the government’s justifications or purposes for enacting the Code to determine whether it is subject to strict scrutiny.” *Id.* at 164–66, 135 S. Ct. at 2227–28 (“[W]e have repeatedly considered whether a law is content neutral on its face *before* turning to the law’s justification or purpose.”). The Court explained: “Because strict scrutiny applies either when a law is content based on its face or when the purpose and justification for the law are content based, a court must evaluate each question before it concludes that the law is content neutral and thus subject to a lower level of scrutiny.” *Id.* at 166, 135 S. Ct. at 2228.

Interpreting RTC’s rule in a manner that prohibits the Teamsters’ leafleting or other signage would cause RTC’s rule to run directly in contravention of the Ninth Circuit’s jurisprudence on a local government’s use of sign ordinances and its police power to suppress unpopular speech. In *Foti v. City of Menlo Park*, 146 F.3d 629, 636 (9th Cir. 1998), the Court ruled that a city sign ordinance that bans all signs in public areas with exceptions for safety, traffic, and public informational signs causes a regulation to be content-based and subject to strict scrutiny. This is precisely what RTC’s rule does. The allowable speech in RTC’s rule are even more content

based than the type of safety, traffic, and informational sign exceptions addressed by the *Foti* Court when finding Menlo Park's ordinance unconstitutional. This actually makes the ordinance more offensive than the Menlo Park ordinance, as the ordinance allows some temporary signs, depending on the sign's message.

The vagueness of the rule also has the unconstitutional effect of favoring commercial speech over non-commercial speech. RTC permits commercial advertising on its busses in exactly the same location. Thus, it appears RTC is allowing commercial signs to be placed on its busses while prohibiting the Teamsters from distributing their non-commercial leaflet. Prohibiting the Teamsters' non-commercial leaflet on the public sidewalk while allowing commercial signs on the public busses adjacent to the sidewalk renders the RTC's rule to be content-based and subject to strict scrutiny. The RTC can establish no interest substantial enough to use its police power to silence the Teamsters.

Any RTC concern that the Teamsters' free speech activities may interfere with some hypothetical or future use of the sidewalk is insufficient to ban the protest. In *Norse v. City of Santa Cruz*, 629 F.3d 966 (9th Cir. 2010) (en banc), the Court ruled that the government needs to show actual harm or disruption, not merely potential harm or disruption, to silence speech. In *Norse*, a resident stood up in a city council meeting and gave the city council a Nazi salute because he was displeased with the council's treatment of another speaker. In the en banc decision, the Court rejected the city's disruption defense. However, most interesting is Chief Judge Kozinski's concurrence, in which Judge Reinhardt joined. Judge Kozinski opined that the salute caused no disruption whatsoever. He further argued

[The Nazi salute] would have remained entirely unnoticed, had a city councilman not interrupted the proceedings to take umbrage and insist that Norse be cast out of the meeting. Councilman Fitzmaurice clearly wants Norse expelled because the "Nazi salute" is "against the dignity of this body and decorum of this body" and not because of any disruption. But unlike der Führer, government officials in America must tolerate offensive or irritating speech.

Id. at 979 (citing *Cohen v. California*, 403 U.S. 15 (1971); *Duran v. City of Douglas, Ariz.*, 904 F.2d 1372, 1378 (9th Cir. 1990)).

In the instant case, the Teamsters are embroiled in a labor dispute with favored and politically powerful entities, RTC and Keolis. The Teamsters are therefore exercising their First Amendment right to petition the government for a redress of grievances. RTC officials may find this offensive or irritating, but like the Santa Cruz City Council, they must tolerate the Teamsters' complaints and First Amendment-protected activities.

The Union's leaflets, future signage, and related speech publicize the Teamsters' labor dispute with RTC over Keolis. This kind of speech enjoys the highest degree of protection. In the leading banner case, the Ninth Circuit held that Government interference with a union's banner on the public sidewalk "poses a 'significant risk' of infringing on First Amendment rights." *Overstreet v. United Bhd. of Carpenters & Joiners of Am. Local Union No. 1506*, 409 F.3d 1199,

1212 (9th Cir. 2005). In *Overstreet*, the Regional Director of the National Labor Relations Board sought an injunction under Section 10(l) of the National Labor Relations Act (“NLRA”), 29 U.S.C. 160(l), to restrain a Carpenters local from erecting a banner to publicize an area standards dispute. The NLRB claimed that the banner violated Section 8(b)(4) of the Act prohibiting secondary picketing, 29 U.S.C. § 158(b)(4). Applying the Supreme Court’s constitutional avoidance doctrine and the statutory standards under Section 10(l), the Ninth Circuit decided it did not need to decide whether the First Amendment barred the injunction which the NLRB sought—only that an injunction would pose a “significant risk” of violating the First Amendment. *Id.* at 1209–12 (citing *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 501, 502 (1979), and *Edward J. DeBartolo Corp. v. Florida Gulf & Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988)).

The Court analyzed the risk of violating the First Amendment that would occur if the Court prohibited the Carpenters’ banner. The Court started by distinguishing picketing from hand billing, citing *DeBartolo*. There, the Supreme Court found barring hand billers under Section 8(b)(4) of the NLRA would raise constitutional concerns. *Overstreet*, 409 F.3d. at 1211 (citing *DeBartolo*, 485 U.S. at 580). The Court then found that the Carpenters’ banner shares the same level of First Amendment protection as did the hand bills in *DeBartolo*.

The banners in this case, for example—as is true of signage, including billboards, generally—contain only catchy shorthand, not discursive speech. This pithiness, however, does not remove the banners from the scope of First Amendment protections, as cases regarding well known short slogans demonstrate. *See, e.g., Cohen v. California*, 403 U.S. 15, 25–26 (1971) (applying ordinary First Amendment principles to t-shirt slogan reading “Fuck the draft”). . . .

Id. at 1211.

The Court continued:

More generally, First Amendment jurisprudence establishes that individuals ordinarily have the constitutional right to communicate their views in the presence of individuals they believe are engaging in immoral or hurtful behavior. “[P]eaceful and truthful discussion” designed to convince others not to engage in behavior regarded as detrimental to one’s own interest, or to the public interest, is fully protected speech.

Id. at 1211–12 (citing *Thornhill v. Alabama*, 310 U.S. 88, (1940); *City of Houston v. Hill*, 482 U.S. 451, 461 (1987) (holding that “the First Amendment protects a significant amount of verbal criticism and challenge”).

Ultimately, the *Overstreet* Court concluded freedom of speech embraces the liberty to disseminate information concerning a labor dispute. The Court found that speech which urges people not to take a certain action, especially at the location of that action, is speech in the public interest and enjoys the full protection of the First Amendment.

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RTC's behavior at issue in this matter violates the First Amendment regardless of which level of scrutiny is applied. First, both strict and intermediate scrutiny requires that the rule and its enforcement be narrowly tailored. Not only does RTC fail to meet this standard, RTC's apparent selective enforcement policy prohibits all speech in which RTC disapproves on public sidewalks. The sidewalk prohibition is so over inclusive that it also violates First Amendment overbreadth doctrine. Under this doctrine "a statute is facially invalid if it prohibits a substantial amount of protected speech." *United States v. Williams*, 554 U.S. 285, 292 (2008). Further, it serves to protect no valid governmental interest to bar the Teamsters' speech.

In enforcing the rule, RTC has effectively foreclosed an entire means of expression the Union has to communicate with the public regarding the labor dispute. The Supreme Court of New Jersey, in *State v. DeAngelo*, 197 N.J. 478, 963 A.2d 2000 (2009), relying almost entirely on Supreme Court and Ninth Circuit authority, overturned the conviction of a union official for displaying a prop on a public sidewalk. As the Court stated:

The use of non-verbal, eye-catching symbolic speech represents a form of expression designed to reach a large number of people. . . . The Township's elimination of an entire medium of expression without a readily available alternative renders the ordinance overbroad.

963 A.2d at 1208; *see also City of Ladue v. Gilleo*, 512 U.S. 43, 54 (1994).

As set forth above, the threats and potential enforcement of the RTC's rule to prohibit the Teamsters from displaying any signage and distributing leaflets on the public sidewalk in the Transit Center violates the Teamsters' well-established rights to communicate their labor dispute to the public. If enforced as proposed by RTC officials, the rule impermissibly favors commercial speech over non-commercial speech and is unconstitutionally vague and overbroad, as it prohibits leafleting or all unfavorable non-commercial speech on public sidewalks other than electioneering. Accordingly, Teamsters Local 533 urges the RTC to refrain from interfering with these clearly established free speech rights.

If you have any questions, or would like to discuss this matter further, please contact me at (510) 410-0546.

Sincerely,



Sean W. McDonald

SWM:daj

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Attachments

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