



325 W. Main St.
Suite 2210
Louisville, KY 40202

(502) 581-9746
ACLU-KY.org
@ACLUofKY

Soha Saiyed
President

Michael Aldridge
Executive Director

Corey Shapiro
Legal Director

Heather Gatnarek
Staff Attorney

Tracy Martin-Wray
Legal Assistant

October 19, 2021

David S. Beck
President and CEO
Kentucky State Fair Board
937 Phillips Lane
Louisville, KY 40209

Via email at: david.beck@kyvenues.com, and david.beck@ky.gov

Re: Removal of KRCRC Billboard from Kentucky Fairgrounds

Dear Mr. Beck,

We are writing on behalf of Kentucky Religious Coalition for Reproductive Choice (KRCRC) to address the removal of a billboard message in support of abortion rights paid for by KRCRC. KRCRC is a group of people of faith—clergy, faith leaders, congregants, and people of conscience—all of whom believe that a person's right to make reproductive choices is sacred and fundamental to religious freedom. Through advocacy, education, and support, KRCRC seeks to give clear voice to the reproductive issues of all people in Kentucky, especially underserved populations. And central to the issue here, KRCRC works to counterbalance the anti-abortion message from various religious perspectives, and to make clear that people of faith can and do support access to abortion and reproductive choice, *because* of and not in spite of their faith. With this interest in mind, KRCRC created and sponsored a set of three pro-choice, pro-faith billboard messages (collectively, "the message") to be displayed on a prominently-located billboard along I-65 in Louisville.

KRCRC's billboard message was removed from the I-65 Digital Display at the Kentucky Exposition Center (KEC), a venue governed by the Kentucky State Fair Board (KSFB), reportedly at the direction of the KSFB. Local media have reported that the billboard message was removed because the billboard owner, KSFB, found the content "objectionable." Emma Austin, *Religious group says Louisville billboard owner removed its 'pro-choice, pro-faith'*



signs, THE COURIER JOURNAL, April 30, 2021. Because the billboard display is owned by KSFB, a state agency, any action restricting speech on that billboard display is subject to and governed by the First Amendment—this remains the case notwithstanding KSFB’s agreement with a private company, OutFront Media, to manage the day-to-day operations of the I-65 Digital Display. Notably, OutFront Media entered into a contract with KRCRC to display the billboard message at issue here, and the message was displayed for a short period of time until an individual from KSFB reportedly demanded that it be removed.

KSFB is violating the First Amendment both in enforcing an unconstitutional and vague policy regarding requesting removal of certain billboards, and in removing KRCRC’s billboard. The First Amendment significantly limits the government’s ability to restrict speech in certain forums like this, absent some compelling or reasonable justifications for its restriction on speech.

To determine the constitutionality of a government’s restriction on speech, courts will first look to what type of forum the speech is taking place in: traditional public, designated public, limited public, or nonpublic. Courts will infer an intent to designate the property a public forum where the government makes the property “‘generally available’ to a class of speakers,” *Arkansas Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 678 (1998). In contrast, the government indicates that the property is to remain a nonpublic forum “when it does no more than reserve eligibility for access to the forum to a particular class of speakers, whose members must then, as individuals, ‘obtain permission’ to use it.” *Id.* at 667.

With respect to designated public forums, “[I]f the government excludes a speaker who falls within the class to which a designated public forum is made generally available, its action is subject to strict scrutiny.” *Id.* at 677. “Speakers can be excluded from a public forum only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest.” *United Food & Commer. Workers Union, Local 1099 v. Sw. Ohio Reg’l Transit Auth.*, 163 F.3d 341, 355 (6th Cir. 1998) (quoting *Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985)) (holding that city agency’s decision to reject a



union’s ad based on “aesthetics and the limited possibility of controversy” failed the stringent test of strict scrutiny).

In a nonpublic forum, the government has the freedom to make content-based restrictions that would not be permitted in a public forum. *Am. Freedom Def. Initiative v. Suburban Mobility Auth. for Reg’l Transp.*, 978 F.3d 481, 491 (6th Cir. 2020). However, the government’s ability to restrict speech in a nonpublic forum is still limited in two ways: 1) the restriction must be “reasonable” and 2) the government may not engage in “viewpoint discrimination.” *Id.*

Irrespective of whether a court were to determine the I-65 Digital Display to be a designated public forum or a nonpublic forum, KSFB’s restrictions cannot satisfy the First Amendment. Assuming the display was a designated public forum, KSFB’s decision to remove the KRCRC billboard message would almost certainly not be upheld under strict scrutiny. If the removal was simply based on the possibility of controversy because the message was about abortion or specifically supporting abortion access, it does not serve a compelling state interest. Furthermore, a policy or practice that allows the KSFB to remove any billboard message it finds controversial or “inconsistent with [its] values”—as is seemingly the case given the sponsorship agreement KSFB signed with OutFront Media (discussed below)—would very likely be found to not be narrowly tailored enough under strict scrutiny.

Even if a court found the display to be a nonpublic forum, KSFB’s policy and actions violate the First Amendment because their restrictions are not reasonable and discriminate based on viewpoint. For a speech restriction to be reasonable, the state must articulate a sensible basis for distinguishing clearly what is and is not acceptable. *Minn. Voters All. v. Mansky*, 138 S. Ct. 1876, 1888 (2018). The Sixth Circuit has held that a policy that simply prohibits “controversial” advertisements and requires them to be “aesthetically pleasing” without any further guidance as to what that criterion means will be held to be unconstitutionally vague. *Miller v. City of Cincinnati*, 622 F.3d 524, 539-40 (6th Cir. 2010). “[A] statute or ordinance offends the First Amendment when it grants a public official ‘unbridled discretion’ such that the official’s decision to limit speech is not constrained by objective criteria, but



may rest on ‘ambiguous and subjective reasons.’” *United Food*, 163 F.3d at 359 (quoting *Desert Outdoor Advertising, Inc. v. City of Moreno Valley*, 103 F.3d 814, 818 (9th Cir. 1996)).

In this case, a court would likely find KSFB’s removal policy too vague to be “reasonable.” Based on KSFB’s response to our July 21, 2021, Open Records Request, KSFB has acknowledged it has no documented policy for when billboard messages or advertisements should be removed. The only applicable “policy” is found in the sponsorship agreement entered into by KSFB and OutFront Media regarding three digital displays, including the I-65 Digital Display at issue here, owned by KSFB and managed by OutFront (“Agreement”). Section 4.1.1 of the Agreement gives KSFB the right to request the removal of “any advertising” posted on the digital billboard if such removal is requested by a current lessee or sponsor of KSFB properties or any KSFB event “because the content of [the] advertising is reasonably perceived to be offensive to or inconsistent with the values held by that lessee or sponsor.” It is unlikely any ordinary person could readily identify a standard for what advertisements are acceptable. They would have to know all possible lessees, sponsors, and events related to KSFB properties, and then they would have to be able to know all issues which could potentially be “reasonably perceived to be offensive to or inconsistent with the values held” by the relevant groups.

Although a government may reserve a nonpublic forum for speech on certain subjects, it may not prohibit specific viewpoints on the topics it allows. *Am. Freedom*, 978 F.3d at 498. Viewpoint discrimination can exist even if the government targets a larger category of speech such as all “offensive” or “religious” speech. *Id.* at 499. The Sixth Circuit has held that an agency “policy’s broad prohibition against controversial advertisements that may adversely affect [the agency’s business] threatens to chill protected expressive activity.” *United Food*, 163 F.3d at 363.

The Sixth Circuit has also held that a “restriction necessarily discriminates between viewpoints,” when “[f]or any group, the restriction facially distinguishes between two opposed sets of ideas: those that promote the group and those that disparage it.” *Am. Freedom*, 978 F.3d at 500 (quoting *Iancu v. Brunetti*, 139 S. Ct. 2294,



2300 (2019)) (internal quotations omitted). The court has held that a ban on offensive speech discriminates based on viewpoint because the ban would permit positive discussion of a group but not the negative discussion of the same group. *Id.*

In this case, tying what is and is not acceptable speech to the viewpoints of lessees or sponsors (pursuant to § 4.1.1 of the Agreement) will inevitably result in viewpoint discrimination. This viewpoint discrimination is clearly demonstrated by the example in the Agreement itself: “OutFront shall entertain the reasonable request to discontinue advertising for name-brand rum for the two-day duration of a religious convention where the sponsoring religious organization does not favor the social drinking of alcoholic beverages.” In this example, during the religious convention, advertising would seemingly be allowed if it *disfavored* social drinking. Thus, advertisements in support of social drinking, a particular viewpoint, could be removed pursuant to the Agreement even though not only would such viewpoints be allowed at other times but advertisements supporting the viewpoint of opposition to social drinking would be allowed during such a convention.

Furthermore, a court would likely find the removal of KRCRC’s billboard message to be viewpoint discrimination as applied because the KSFB appears to be prohibiting a viewpoint on a topic that it otherwise allows. In doing so, KSFB is engaging in viewpoint discrimination because it is “facially distinguish[ing] between two opposed sets of ideas” by removing a billboard that may be offensive or inconsistent with their values on the subject of abortion. *Am. Freedom*, 978 F.3d at 500 (quoting *Iancu*, 139 S. Ct. at 2300) (internal quotations omitted). And, even if KSFB does *not* allow *any* advertisements on any viewpoint of abortion (which does not appear to be a documented policy in the records available for review), it is then very likely targeting all speech about abortion as controversial or offensive—an unconstitutionally vague and unreasonable prohibition in either a designated public or nonpublic forum.

We therefore call on KSFB to promptly undergo the required administrative procedures to revise its Sponsorship Agreement with OutFront and any similar contracts or agreements to ensure that government actors will not unreasonably restrict speech in a



discriminatory way. We further call on KSFB to institute a policy providing clear guidelines for what restrictions, if any, it will impose on advertisements placed on the I-65 Digital Display at KEC, and ensure that all relevant KSFB personnel and employees are properly trained in this policy, to avoid future unconstitutional actions such as occurred here.

Additionally, on behalf of KRCRC we are requesting any specific information, whether documented or otherwise, that indicates the process by which their billboard message was removed, including information regarding who specifically called for its removal and upon what basis. And finally, we are requesting that the billboard message paid for by KRCRC and displayed on the I-65 Digital Display for a short time before its removal be reinstated in that location, and displayed for the duration of time originally agreed to by KRCRC and OutFront, without any further payment required from KRCRC.

Please contact us by November 1, 2021, to confirm that the above asks will be promptly considered and addressed without the need for court intervention. I may be reached by email at corey@aclu-ky.org or by mail at 325 W. Main Street, Suite 2210, Louisville, KY 40202. We look forward to hearing from you regarding this important matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Corey Shapiro", written over a horizontal line.

Corey Shapiro

CC: Carrie Bauer, General Counsel, Kentucky Venues
Via email at: carrie.bauer@kyvenues.com