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12

13 **UNITED STATES DISTRICT COURT**
14 **CENTRAL DISTRICT OF CALIFORNIA**
15 **EASTERN DIVISION**
16

17 **FREEDOM FROM RELIGION**
FOUNDATION, INC.,

18 **Plaintiff,**

19 v.

20 **CITY OF RANCHO CUCAMONGA,**
21 **CALIFORNIA, and LINDA**
22 **DANIELS, Rancho Cucamonga**
Development Director,

23 **Defendants.**
24
25
26
27
28

CASE NO.: CV08-07833 PA (PJWx)

PLAINTIFF'S MEMORANDUM OF
POINTS AND AUTHORITIES IN
OPPOSITION TO
DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT

Hearing

Date: September 14, 2009

Time: 1:30 p.m.

Dept.: 15

Judge: Hon. Percy Anderson

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1 **I. INTRODUCTION AND SUMMARY OF ARGUMENT.**

2 The Plaintiff, Freedom From Religion Foundation, Inc., contracted to display a
3 thought-provoking billboard in the City of Rancho Cucamonga. The Plaintiff's
4 billboard proved controversial in causing people to contemplate a world without the
5 influence of religion. Some people were troubled by the thought. The City received
6 calls demanding that the billboard be removed. The City then contacted the billboard
7 operator, General Outdoor Advertising, to report that residents considered the
8 billboard offensive. The billboard operator was negotiating a lucrative deal with the
9 City at this time. The City expected the billboard operator to take action. The
10 billboard operator immediately took down FFRF's billboard after receiving the City's
11 complaint.

12 The City contends that the above facts do not rise to a First Amendment
13 violation as a matter of law. Unless the City explicitly censors protected speech, no
14 violation purportedly can occur. The City dismisses any possibility that calling a
15 regulated business to report complaints can have a chilling effect on speech.

16 The City misapprehends the scope of protection provided to speech by the First
17 Amendment. In the first place, a government policy that has the effect of objectively
18 chilling First Amendment rights is unconstitutional regardless whether the policy was
19 intended to restrain speech. If this were not the case, then any statute or policy that
20 chills the exercise of free speech rights would be immunized unless the legislative
21 body or policy makers were specifically motivated by a subjectively unconstitutional
22 agenda. That is not the law, however, as even statutes and policies with
23 constitutional applications can be invalidated if they are overbroad. *See Virginia v.*
24 *Hicks*, 539 U.S. 13, 118-19 (2003). Here, the City's admitted policy has the objective
25 effect of chilling speech when applied to billboard operators, as in this case.

26 The City also misunderstands a facial challenge to a government statute or
27 policy by claiming not to have been a moving force in causing FFRF's speech to have
28 been suppressed. The evidence suggests otherwise as to the facts, but the Defendants'

1 legal analysis is wrong in any event. In the First Amendment context, a speaker may
2 challenge the chilling effect of a government's policy or statute even without having
3 been deterred from speaking as a matter of fact. *Toler v. Paulson*, 551 F. Supp. 2d
4 1039, 1048 (E.D. Cal. 2008).

5 The City also ignores the reasonable inferences from the substantial evidence
6 indicating that the City's intent really was to interfere with the Plaintiff's speech, and
7 that the third party billboard operator, General Outdoor Advertising, acted in response
8 to the "hand-in-glove" persuasion of the City. The Defendant, Linda Daniels,
9 personally told a reporter that the reason the City contacted the Company was to see if
10 the FFRF billboard could be removed. (See Leung Declaration ¶ 5.) For its own part,
11 the Company independently knew about complaints regarding FFRF's billboard but
12 planned no action until immediately after the City called.

13 Finally, the City's policy, as applied to unpopular speech critical of religion,
14 does give the appearance of endorsing a hecklers' veto over the views of non-
15 believers. The City acted in response to the vitriol of callers expressing offense at
16 FFRF's unholy message, even though the City knows that it cannot directly regulate
17 or control speech, such as that propounded by FFRF. The City also knew that a call
18 from the employee then negotiating a lucrative business deal with General Outdoor
19 Advertising would likely elicit a response by the Company -- and in the case of an
20 unpopular expressive message such as that of FFRF, the response is likely to be
21 censorship. In these circumstances, the reasonable and objective observer would
22 perceive the City's action as one of religious endorsement. Even if the City did not
23 subjectively intend to endorse religion, the appearance of giving FFRF's critics an
24 insider's preference violates the Establishment Clause. *Lynch v. Donnelly*, 465 U.S.
25 668, 692 (1984) (O'Connor, J. concurring).

26 In the end, the City's intent is legally less important than the effect of its
27 actions, but the City's actions also are far less benign in motivation than the City
28 implies. According to Linda Daniels, the directive to contact General Outdoor

1 Advertising in this case came from an unprecedented source -- the City Attorney, Jim
2 Markman. Attorney Markman's subsequent explanation for his actions is dubious,
3 and denied by another City Official in a position to know the true facts.

4 The inference from the evidence is that Attorney Markman, who advises the
5 City on First Amendment issues, tried to stage the City's objection to FFRF's
6 controversial billboard in a way that would censor FFRF's message without the
7 appearance of direct City involvement. The inferences from the uncovered evidence,
8 however, make clear the City's involvement, intent, and motivation. These reasonable
9 inferences, at a minimum, preclude summary judgment in the City's favor.

10

11 **II. STATEMENT OF MATERIAL FACTS.**

12 **A. The City's Policy Applies to Billboard Operators.**

13 The City of Rancho Cucamonga admits to having a policy of contacting
14 businesses about complaints, even when the complaint relates to a matter that is not
15 within the authority of the City to regulate or control. The City applies this policy as
16 well to complaints about the substantive content of speech on public billboards
17 operated by companies doing business in the City. (Vega Dep., p. 9:4-22.) The City
18 knows that it cannot directly regulate or control the content of such speech, but the
19 City nevertheless follows a policy of contacting billboard operators regarding
20 complaints about the content of unpopular messages. (Markman Dep., p. 12:12-15
21 and p. 67:1-6.)

22 The City contacts billboard operators about complaints regarding unpopular
23 billboard content even if the operator presumably already knows about the
24 complaints. (Daniels Dep., p. 93:17 through 94:10.) According to Linda Daniels,
25 City Development Director, the important thing is to let the company know that "the
26 City" has received complaints. (Daniels Dep., p. 94:6-10.)

27 After being contacted by the City, the City knew from experience that a
28 business will look into a complaint, respond to the complaint, and report back to the

1 City. (Vega Dep., p. 22: 4-25.) That has been the City's experience. More
2 specifically, that has been the City's experience with regard to complaints conveyed
3 to billboard operators. (Vega Dep., p. 29:19 through p. 30:1 and p. 75:17 through
4 80:17.)

5 **B. The City Reports Offense Taken to FFRF Billboard.**

6 With respect to the present case, the defendant, Linda Daniels, instructed her
7 employee, Donna Vega, to contact General Outdoor Advertising regarding complaints
8 about a billboard being displayed in the City. (Vega Dep., p. 14:7-11.) Ms. Daniels
9 allegedly knew that the City had received complaints about the billboard in question,
10 which the Plaintiff, Freedom From Religion Foundation, contracted to display. (Vega
11 Dep., p. 10:14-16.)

12 Ms. Daniels also knew that the billboard by FFRF had already been in the
13 news. (Vega Dep., p. 11:13 through p. 13-20.) In fact, a televised story had
14 previously aired about the billboard. (Daniels Dep., p. 15:12-20.) Ms. Daniels also
15 knew that the City Manager's Office had received telephone complaints about the
16 billboard, after the news publicity, and the callers were referred to the City's Code
17 Enforcement Office. (Daniels Dep., p. 24:1-3.) The content of public billboards,
18 however, is not a matter of Code Enforcement, because the City cannot directly
19 control or regulate the content of billboard speech. (Daniels Dep., p. 24:4-10.)

20 The FFRF billboard included a stained glass motif with the phrase "Imagine No
21 Religion." (Vega Dep., p. 7:3-6.) The City understood that the billboard was
22 intended to cause people to contemplate the possibility of a world without religion.
23 (Vega Dep., p. 13:5-6.) The complaints that the City received about the "Imagine No
24 Religion" billboard, in fact, voiced opposition to the billboard message, expressed
25 offense, and wanted the billboard removed. (Vega Dep., p. 9:16 through p. 10:8;
26 Daniels Dep., p. 13:1-4.)

27 Donna Vega promptly contacted General Outdoor Advertising upon Ms.
28 Daniels' request; Ms. Vega contacted Billy Wynn at General Outdoor Advertising "to

1 inform him that we had received complaints about the billboard; that the City had
2 received complaints." (Vega Dep., p. 10:9-11.) Ms. Daniels had advised Ms. Vega
3 that the City was receiving complaints about the billboard from residents who were
4 offended by its content, and she asked Ms. Vega to "call General Outdoor to let them
5 know." (Daniels Dep., p. 12:2-16.)

6 When Ms. Vega contacted Mr. Wynn she "called to let him know that we had
7 received complaints from residents who were offended by the billboard." (Vega
8 Dep., p. 22:7-9.) Ms. Vega further stated that "the City had been receiving
9 complaints by residents who were offended by the billboard." (Vega Dep., p. 30:5-7.)
10 Ms. Vega had no other purpose for her call to the Company. (Wynn Dep., p. 6:19
11 through p. 7:1.) She simply called to say that the City received "a lot" of calls
12 objecting to the message of the FFRF billboard. (Wynn Dep., p. 11:17-19.)

13 **C. The City Contacts the Billboard Operator Through An Agency**
14 **Negotiating with the Company.**

15 Linda Daniels selected Donna Vega to contact General Outdoor because Ms.
16 Vega was working at that time with the Company. (Daniels Dep., p. 70:14-18.) Ms.
17 Vega explicitly referenced the business project in an email to General Outdoor in
18 which she also referenced complaints about the billboard. (Vega Dep., Ex. 2.)

19 When contacting the Company, Ms. Vega did not "remind" General Outdoor
20 Advertising that the content of the FFRF billboard was something over which the
21 City had no regulatory control; nor did she advise General Outdoor Advertising that
22 any response to the complaints was strictly a business decision between General
23 Outdoor Advertising and their client. (Vega Dep., p. 30:8 through p. 31:1.) While
24 directing Ms. Vega to contact General Outdoor Advertising, moreover, Linda Daniels
25 also did not tell her to advise General Outdoor Advertising that any response to
26 complaints was strictly a business decision to be made by General Outdoor
27 Advertising. (Daniels Dep., p. 71:24 through p. 72:25.)

28 Contacting General Outdoor Advertising through an employee working on a
lucrative business project is consistent with the City's past practices. For example, a

1 couple months before the situation arose involving the "Imagine No Religion"
2 billboard, the City contacted a different billboard operator regarding complaints about
3 its billboard. (Vega Dep., p. 75:17 through p. 80:17.) That billboard also involved
4 content which was considered offensive. (Vega Dep., p. 75:21-23.) The City
5 contacted Lamar Advertising through an employee, Flavio Nunez, who was also
6 working on a business project with Lamar at the time of reporting the complaint.
7 (Vega Dep., p. 76:5-16; p. 79:15 through p. 80:9.) As in this case, Lamar responded
8 to the City's complaint with immediate action. (Vega Dep., p. 80:16.)

9 **D. The City Admits Its Purpose.**

10 In the present case, the City acknowledges that its purpose in contacting
11 General Outdoor Advertising was to see if FFRF's billboard could be removed.
12 (Leung Declaration, ¶ 5.) Ms. Daniels told a reporter for the Inland Valley Daily
13 Bulletin, Wendy Leung, that the City "contacted the sign company and asked if there
14 was a way to get it [the billboard] removed." (Leung Declaration, ¶ 5.)

15 **E. The Billboard Operator Jumps When Called.**

16 General Outdoor Advertising responded almost immediately to the contact
17 from the City by removing the FFRF billboard from display. (Vega Dep., p. 7:7-16.)
18 Although General Outdoor now claims that its decision was uninfluenced by the
19 City's contact, the facts suggest otherwise. The Company received the City's
20 complaint after 4:00 p.m. on Wednesday, November 19, and then called the City back
21 early on the morning of November 20, to report that it was removing the "Imagine No
22 Religion" billboard. General Outdoor also concedes that a potentially lucrative
23 project was pending before the City at that time. (Wynn Dep., p. 34:3-8.) General
24 Outdoor further admits that maintaining good relations with the City is desirable and
25 advantageous for billboard operators. (Wynn Dep., p. 33:22 through p. 34-2; Lynch
26 Dep., p. 27:7-10.) General Outdoor also admits that prior to contact by the City, the
27 Company had not planned to take down the FFRF billboard. (Wynn Dep., p. 31:19
28 through p. 32:5.) Finally, although, General Outdoor claims to have known about

1 complaints prior to contact from the City, it only decided to take the billboard down
2 immediately after receiving the City's complaint. (Wynn Dep., p. 8:12-20.)

3 Mr. Wynn did not know what could be done about the FFRF billboard, so he
4 asked the owner, Tim Lynch what could be done. (Wynn Dep., p. 7:11 through p.
5 8:8.) Before Mr. Wynn could even quantify the number of complaints, Mr. Lynch
6 told him to yank the billboard. (Wynn Dep., p. 12:2 through p. 14:4, and p. 19:6-18.)

7 General Outdoor Advertising assured the City of a response, as soon as it got
8 the City's complaint, which was Company standard practice. (Vega Dep., p. 29:19
9 through p. 30:1; Wynn Dep., p. 21:1-6; Lynch Dep., p. 29:12-21.) The Company,
10 moreover, did report back to the City, and Donna Vega in turn reported back to Linda
11 Daniels regarding everything she learned from General Outdoor Advertising about
12 the "Imagine No Religion" billboard. (Vega Dep., p. 31:3 through p. 32:7.) The
13 prompt and detailed response by Ms. Vega to Linda Daniels itself suggests that the
14 call to General Outdoor Advertising was more than just informational.

15 **F. The City Attorney Apparently Stages The Approach to the**
16 **Billboard Operator.**

16 Peculiarities characterize the City's contact with General Outdoor Advertising.
17 For example, Linda Daniels claims that long time City Attorney, Jim Markman,
18 actually called her into his office to suggest that her department should contact
19 General Outdoor Advertising about the "Imagine No Religion" billboard. (Daniels
20 Dep., p. 48:3-15.) Despite the City's claimed policy of conveying all complaints to
21 businesses as a matter of course, Ms. Daniels was unaware of any prior instance in
22 which Attorney Markman, from the Richards, Watson, and Gershon Law Firm, had
23 previously asked her to report a complaint. (Daniels Dep., p. 52:1-18)

24 Attorney Markman also apparently discussed First Amendment concerns with
25 Ms. Daniels relating to the "Imagine No Religion" billboard, but the City refuses to
26 disclose the content of that discussion. (Daniels Dep., p. 133:16 through p. 134:23.)
27 The City also claims privilege as to Attorney Markman's communications with the
28

1 City Manager, Jack Lam, yet Attorney Markman claims that he directed the approach
2 to General Outdoor Advertising. (Lam Dep., p. 19:6-13.)

3 **G. The City Attorney's Testimony Is Contradicted by A City**
4 **Employee.**

5 Attorney Markman also claims to have become aware of the FFRF billboard by
6 happenstance from the Head of Code Enforcement, Kurt Keating, although this claim
7 is apparently false. (Markman Dep., p. 7:6-14.). Attorney Markman says that
8 Keating showed him a picture of the billboard and noted the Beatles' "Imagine No
9 Religion" phrase. (Markman Dep., p. 7:6-14.). Keating, however, did not even
10 know that the phrase was from the Beatles, and he had no picture of the billboard to
11 show. (Keating Dep., p. 9:11 through p. 10:18, p. 20:12-21; p. 26:4-14; p. 34:16-23.)

12 Mr. Keating unequivocally denies knowing that Attorney Markman was a
13 Beatles fan, or that "Imagine No Religion" was a phrase from a Beatles song, and
14 Keating was unconcerned about the billboard. (Keating Dep., p. 34:16-23.) Attorney
15 Markman's contrary testimony is quite incredible in light of Keating's testimony.
16 Attorney Markman stated:

17 I was in my office on a Wednesday afternoon, let's say mid-
18 afternoon or so, having different appointments, and I had an
19 appointment with a code enforcement officer, I believe it was
20 Kurt Keating. And Kurt Keating, knowing me to be a famous
21 Beatles fan, as most of my clients know by now, brought me a
22 picture of this billboard that said "Imagine No Religion" and
23 showed it to me and said "We received a number of complaints
24 about this." (Markman Dep., p. 7:6-14.)

25 The most reasonable inference to be drawn from Attorney Markman's
26 testimony is that he is deliberately concealing the fact that the source of his
27 involvement in this controversy actually emanated from the City Manager, Jack Lam.
28 Attorney Markman, in fact, has admitted that Mr. Lam may have told him that
complaints about the "Imagine No Religion" billboard "were becoming a real huge
administrative burden by the people who had to respond. And it could have been
Jack who actually said that to me . . . could have been Jack Lam who said he was
getting so many of these things, he couldn't shoot the emails back as fast as they came

1 in or something like that." (Markman Dep., p. 63:10-18.). Attorney Markman,
2 however, later altered course by saying that Mr. Lam made such comments only after
3 Mr. Keating talked with Attorney Markman. (Markman Dep., p. 63:19-23.)

4 **H. The City Attorney Details the City's Policy to Achieve**
5 **Resolutions.**

6 In any event, Attorney Markman acknowledges that the reason to notify
7 businesses about complaints is to seek solutions. Attorney Markman stated just this,
8 as follows:

9 When the City gets complaints about any activity, business
10 activity in the city, normally speaking, rather than enforcing or
11 getting involved in some kind of formal adversarial process
12 with them, we always let them know that people are
13 complaining in the hope that the complaints will cease, or they
14 can react and call the people or complain or deal with it in
15 some way . . .
16 But the City is -- tries to pass along information that might
17 lead to solutions rather than having to take some kind of
18 formal action. (Markman Dep., p. 9:17 through p. 10:6.)

19 Attorney Markman later explained that "the City tries to be proactive and to
20 impart information [about complaints], again, with the hope that it will be resolved
21 without the City having to do anything formal." (Markman Dep., p. 49:1-4.)

22 According to Attorney Markman, the appropriate person to contact a business
23 about complaints is a person who has "a relationship with somebody at the company
24 that -- where he's working with them at the time." (Markman Dep., p. 20:17-19.) For
25 that reason, Attorney Markman believes he "picked the right person" in Linda Daniels
26 to contact General Outdoor Advertising "because we are negotiating contracts with
27 these people." (Markman Dep., p. 21:12-17.)

28 Attorney Markman further explained the rationale for contacting businesses
about complaints when there is a relationship with the City:

The business relationship is a reason -- the fact that we're in a
process of recommending approval of a project and the
applicant is perceived to be acting badly is a reason to tell him

1 he's perceived to be acting badly. (Markman Dep., p. 52:6-10.)

2 Finally, Attorney Markman explained that conveying information about
3 complaints may be useful to completing a business transaction with the City:
4

5 If you are doing a business transaction, then there are people
6 you're dealing with who you can say "here is a circumstance
7 that you need to know about because we are trying to process a
8 business transaction." . . .

9 You know, I don't know who they are. I've never talked to an
10 official at the advertising company. But -- or even their
11 lawyers. I just review drafts and talk with the staff and give
12 them my input. But Linda Daniels, to me, was in a business
13 relationship transaction with that particular company, so that's
14 why I contacted her. (Markman Dep., p. 53:1-13.)

15 In choosing Linda Daniels to contact General Outdoor Advertising, because of
16 her department's relationship with the Company, Attorney Markman also was well
17 aware that the City could not directly regulate the allegedly offensive billboard
18 content. "We all know there's no such thing as code enforcement on -- on billboard
19 content. I mean, that is just not something -- we're not allowed to do it so that wasn't
20 even the point." (Markman Dep., p. 12:12-15.) The recognition by Attorney
21 Markman of the protected status of billboard speech offers the most reasonable
22 explanation for why Linda Daniels directed her employee, Donna Vega, to contact
23 General Outdoor Advertising. Attorney Markman knew that the City Redevelopment
24 Agency was negotiating with General Outdoor Advertising, so the unstated
25 "suggestion" to do something about the billboard could be made without obvious
26 detection. In fact, Attorney Markman actually provides advice to the City regarding
27 First Amendment issues, although the City refuses to disclose any such advice
28 regarding the FFRF billboard. (Markman Dep., p. 24:17-23.)

29 **I. The Number of Hecklers Counts In the City's Assessment.**

30 Regardless, the City considers the volume of complaints received to be
31 significant in its reporting to businesses. (Daniels Dep., p. 75:6-21.) According to
32

1 Ms. Daniels, the volume of complaints about the speech at issue, in this case FFRF's
2 billboard, is important information. (Daniels Dep., p. 75:18-21.)

3 The City eventually undertook to tally opposition to FFRF's billboard.
4 (Daniels Dep., p. 75:22 through p. 76:5.) Opposition to the billboard, moreover, all
5 related to the content of FFRF's message. The City, nonetheless, was fully aware that
6 protected speech, such as on billboards, cannot be directly regulated. For that reason,
7 according to the City's Enforcement Head, Kurt Keating, contacting billboard
8 companies about the content of billboard speech is unprecedented in his experience,
9 which experience includes prior enforcement work with other cities. (Keating Dep.,
10 p. 21:7 through p. 23:11.)

11 For its part, FFRF remains reluctant to display another billboard in Rancho
12 Cucamonga because of the City's policy. (Annie Laurie Gaylor Declaration, ¶ 9.)

13

14 **III. SUMMARY JUDGMENT STANDARD.**

15 Summary judgment is proper only where there is no genuine issue as to any
16 material fact. All inferences that can be drawn from the supporting evidence must be
17 viewed in a light most favorable to the party opposing summary judgment. *Securities*
18 *and Exchange Commission v. The Seaboard Corporation*, 677 F.2d 1297, 1298 (9th
19 Cir. 1982).

20 Where intent is a primary issue, summary judgment is generally always
21 inappropriate. Drawing inferences favorable to the nonmoving party, summary
22 judgment may be granted only if all reasonable inferences defeat the plaintiff's claims.
23 *Id.* at 1298-99. The burden for summary judgment, therefore, is a heavy one.
24 Summary judgment should not be granted where contradictory inferences may be
25 drawn from the facts, even if undisputed. *Braxton-Secret v. A. H. Robins Company*,
26 769 F.2d 528, 531 (9th Cir. 1985).

27 The possibility that an inference favorable to the movant could be drawn does
28 not entitle a defendant to summary judgment. *United Steel Workers of American v.*

1 *Phelps Dodge Corp.*, 865 F.2d 1539, 1542 (9th Cir. 1989). Even circumstantial
2 evidence is wholly sufficient to withstand a summary judgment motion. *Id.* at 1543
3 and 1547 (Company's powerful position and close relationship with law enforcement,
4 as well as a meeting at which Company urged police to treat plaintiffs harshly,
5 followed by inequitable treatment of plaintiffs by police, and active cooperation
6 between Company and police during strike, was sufficient evidence of Company's
7 participation in conspiracy to withstand summary judgment).

8

9 **IV. THE FIRST AMENDMENT PROHIBITS GOVERNMENT**
10 **POLICIES AND PRACTICES THAT HAVE THE EFFECT OF**
11 **CHILLING PROTECTED SPEECH.**

12 This case involves a challenge to the City's policy of contacting local
13 businesses, with whom the City has a relationship, with the message that "we've had
14 complaints about you." As applied to billboard operators, this policy has the effect of
15 chilling protected speech in violation of the First Amendment. A government statute,
16 rule, or policy that chills protected speech is actionable with or without scienter, and
17 even without proof of a consummated restraint on speech. "It would be unjust to
18 allow a defendant to escape liability for a First Amendment violation merely because
19 an unusually determined plaintiff persists in his protected activity." *Toler v. Paulson*,
20 551 F. Supp. 2d 1039, 1048 (E.D. Cal. 2008), quoting *Medocino Env'tl. Ctr.*, 192 F.3d
21 1283, 1300 (9th Cir. 1999). In the case of First Amendment claims, therefore, the
22 Defendants' "moving force" argument is misplaced.

23 An intent to chill protected speech also is not a required element to prove a
24 government statute, rule, or policy violates the First Amendment -- in contrast to the
25 retaliation cases cited by the Defendants, which cases do not involve government
26 policies of general applicability. To conclude otherwise in the case of a government
27 policy would vitiate the recognized protections of the First Amendment as applied to
28 government rules, policies, or laws. No known court has held that a law, rule, or
policy that otherwise chills protected speech is beyond judicial remedy merely

1 because the rule was not specifically adopted for the purpose of interfering with or
2 chilling the exercise of First Amendment rights.

3 The recognized doctrine of constitutional overbreadth would be inconceivable
4 if scienter is deemed a required element. As a matter of law, however, a plaintiff
5 alleging overbreadth resulting in a chilling effect on speech has standing to complain
6 even if the law or policy is constitutional as applied to him. *Maldonado v. Morales*,
7 556 F.3d 1037, 1044 (9th Cir. 2009). In these First Amendment contexts, "the courts
8 are inclined to disregard the normal rule against permitting one whose conduct may
9 validly be prohibited to challenge the proscription as it applies to others because of
10 the possibility that protected speech or associative activities may be inhibited by the
11 overly broad reach of the statute." *Village of Schaumburg v. Citizens for a Better*
12 *Environment*, 444 U.S. 620, 634 (1980).

13 In the context of a rule or policy that is overbroad, requiring an intent to
14 interfere with speech is practically inconceivable. The overbreadth doctrine
15 invalidates government laws, policies, or rules that permissively regulate some
16 conduct, but which are so broad that they have the effect of also chilling protected
17 speech. *See Virginia v. Hicks*, 539 U.S. 113, 118-19 (2003). Such challenges are
18 permitted because the threat of enforcement of an overbroad law may "chill"
19 protected speech. *Id.* at 119. A showing that a law or policy chills protected speech,
20 judged in relation to a legitimate sweep, suffices to invalidate the law or policy until
21 and unless a limiting construction or partial invalidation so narrows it as to "remove
22 the seeming threat or deterrence to constitutionally protected expression." *Id.*

23 Courts entertain overbreadth claims, in part, because they recognize that those
24 whose expression is chilled cannot be expected to adjudicate their rights, since by
25 definition they are unwilling to defy the constituted authority. *See* L. Tribe,
26 *American Constitutional Law* 720 (1978), cited in *NAACP v. City of Richmond*, 743
27 F.2d 1346, 1352 (9th Cir. 1984). *See also Washington Initiatives Now v. Rippie*, 213
28 F.3d 1132, 1134 (9th Cir. 2000)(required disclosure of persons paid to collect

1 signatures on initiative petitions "chill political speech protected by the First
2 Amendment and do not significantly advance any substantial state interest, and
3 accordingly, are unconstitutional-without regard to legislative intent).

4 Defendants' purported authority requiring an intent to chill speech is not
5 applicable to this case. Defendants cite cases involving alleged retaliatory actions or
6 actions that do not involve a policy, practice or custom. An alleged general rule or
7 policy was not at issue in these cases, so only the conduct of the individual defendant
8 was at issue, thereby implicating issues of intent and causation. That is not the case
9 here. *Cf. Toler v. Paulson*, 551 F. Supp. 2d 1039, 1047 (E.D. Cal. 2008).

10 Under applicable First Amendment standards, the Defendants are not entitled
11 to summary judgment. In the first place, the Defendants make no argument, and
12 present no facts, to establish that the City's policy does not have the effect of chilling
13 the exercise of First Amendment rights when applied to billboard operators. By
14 contrast, the facts of record support the conclusion that the government's policy as
15 applied to a billboard operator would have "chilled a person of ordinary firmness."
16 The City concedes that it cannot directly regulate billboard content, yet it
17 communicates complaints to such operators with a known expectation that the
18 company will respond to the City's approach. The City certainly expected a response
19 in the present case, where the billboard operator was in direct negotiations with the
20 City for approval of a lucrative business project; the City tailored its approach,
21 moreover, through the employee with whom General Outdoor Advertising was
22 negotiating. Regulated businesses, like billboard operators, also are dependant upon
23 the goodwill of the cities in which they operate, as General Outdoor Advertising
24 admits. In these circumstances, and without any contrary facts or arguments, the City
25 is clearly not entitled to summary judgment.

26 Finally, this case has prospective implications that should not be overlooked.
27 "What's done is done" is not a defense. As long as the City continues its policy, then
28

1 individuals, including FFRF, will remain reluctant to engage in future speech that
2 may be deemed unpopular. The chill persists. (Gaylor Declaration, ¶ 9.)

3
4 **V. THE EVIDENCE SUPPORTS THE CONCLUSION THAT THE DEFENDANTS INTENDED TO INTERFERE WITH FFRF'S PROTECTED SPEECH AND THAT THE CITY WAS A MOVING FORCE IN CAUSING FFRF'S BILLBOARD TO BE CENSORED.**

5
6 The Defendants are not be entitled to summary judgment even according to
7 their own misapprehension of applicable First Amendment standards because
8 disputed issues of material fact exist.

9
10 The City's intent to interfere with FFRF's speech is supported by substantial
11 evidence, not the least being the published statement of Linda Daniels indicating that
12 the City called General outdoor Advertising to see if the FFRF billboard could be
13 removed. (Leung Declaration, ¶ 5.) The City's policy of reporting complaints to local
14 businesses, moreover, is predicated on the expectation that businesses will engage in
15 corrective behavior when informed that they have been "behaving badly," in the
16 words of City Attorney Markman. The City's policy of contacting businesses about
17 complaints is intended to and expected to provoke a response by the company, and in
18 the City's experience, companies that receive such complaints typically do respond
19 and report back to the City regarding their follow-through. The City also, in this case,
20 deliberately contacted the Company through an employee involved in active
21 negotiations regarding a lucrative business project. City Attorney Jim Markman
22 targeted this approach to the Company on the basis that the agency was then directly
23 involved in negotiations with the Company. In short, the City's intent is patently
24 discernable from the circumstances.

25 Similarly, compelling evidence indicates that General Outdoor Advertising
26 decided to remove the FFRF billboard because of the City's contact. The Company
27 knew about the controversial nature of the FFRF billboard before being advised by
28 the City that the billboard was perceived to be offensive. The Company, however,
took no action, and had no plan to take action, until Donna Vega contacted the

1 Company. The Company also admits that maintaining good relations with the City is
2 an absolutely critical business consideration, particularly at the time relevant to this
3 case because the Company was in active negotiations with the City about a
4 potentially lucrative business project. In these circumstances, the Company's
5 willingness to sacrifice FFRF's billboard without a squawk would be expected
6 precisely because almost "by definition they are unwilling" to defy the City, which
7 has all the leverage. *See NAACP*, 743 F.2d at 1352.

8 Given the reasonable inferences from the evidence, therefore, the City is not
9 entitled to summary judgment, even based on the intent and causation issues argued
10 by the City. The City's evidence certainly has not ruled out reasonable inferences that
11 support FFRF's case. On the contrary, in arguing for summary judgment, the City
12 simply ignores the evidence.

13
14 **VI. THE CITY'S RESPONSE TO COMPLAINTS ABOUT FFRF'S**
15 **BILLBOARD GIVE THE APPEARANCE OF RELIGIOUS**
16 **ENDORSEMENT.**

17 The City's argument for summary judgment on FFRF's Establishment Clause
18 claim also ignores the evidence and proceeds on an improper legal premise. In the
19 first place, the City implies that an Establishment Clause violation requires intent as a
20 necessary element. Actions which have the effect of communicating governmental
21 endorsement or disapproval, however, "whether intentionally or unintentionally,"
22 impermissibly make religion relevant, in reality or public perception, to one's status in
23 the political community. *Green v. Haskell County Board of Commissioners*, 568 F.3d
24 784, 787 (10th Cir. 2009), quoting *Lynch v. Donnelly*, 465 U.S. 668, 692 (1984)
(O'Connor, J., concurring).

25 In the present case, the City's intent to disapprove of FFRF's impudence is
26 actually quite discernable -- but not a necessary element of Plaintiff's claim. The
27 relevant question is whether it would be objectively reasonable for the City's action to
28 be construed as sending a message of religious endorsement. This inquiry is

1 conducted from the prospective of a reasonable observer who is both informed and
2 reasonable, and who is familiar with the history of the government practice at issue.
3 *American Family Association v. City and County of San Francisco*, 277 F.3d 1114,
4 1122 (9th Cir. 2002).

5 Here, the City's complaint to General Outdoor Advertising was done in direct
6 response to citizens complaining about the content of FFRF's billboard and who
7 wanted the billboard removed. The City's approach, moreover, was intended to elicit
8 a response from the Company, including removal of FFRF's billboard. In these
9 circumstances, the City's initiative would clearly be perceived as favoring religion
10 over non-religion.

11 The City argues incorrectly that the perception of endorsement is muted by the
12 City's policy of intervening in cases of non-religious dissent as well. Intervention in
13 cases not involving religion, however, is not prohibited by the Establishment Clause,
14 and the City's policy of favoring religion over non-religion is not sustainable merely
15 because the City also acts in other contexts.

16 In the circumstances of this particular case, the City's initiative plainly was
17 intended to get FFRF's billboard removed because it offended persons supportive of
18 religion. Intervening precisely because of the content of FFRF's billboard
19 quintessentially sends a message of endorsement, and it conveys the impression that
20 believers have more political pull than non-believers, which is apparently true in
21 Rancho Cucamonga. That is exactly what the Establishment Clause prohibits.

22

23 **VII. CONCLUSION.**

24 For all the above reasons, the Defendants' Motion for Summary Judgment
25 should be denied.

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Respectfully submitted,

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