No. 556711-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

BETH SANDERS, an individual, and
WILLIAM DAUGAARD, an individual,

Appellants,

v.

THE CITY OF SEATTLE, a municipality, ROUSE SEATTLE, LLC, a limited liability company, and WESTLAKE CENTER ASSOCIATES LIMITED PARTNERSHIP, a Washington Partnership,

Respondents.

APPELLANTS' OPENING BRIEF

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2. The trial court erred in granting summary judgment to Defendant City of Seattle. (CP 1163)

3. The trial court erred in denying Plaintiffs' motion for summary judgment. (CP 1163)

4. The trial court erred in denying the Plaintiffs' motion for declaratory relief.[1] (CP 1163)

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II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether a public easement that runs through a large private downtown shopping center to provide access to public transportation is a public forum? (Assignment of Error 1, 2, 3, 4, 5)

2. Whether requiring persons using such an easement to lower protest signs while using the easement violates article 1, section 5 of the Washington Constitution, where there is no objective evidence the

[1] Presumably because it granted Defendants' summary judgment motions, and denied Plaintiffs' summary judgment motion, the court's order did not expressly address the motion for declaratory and injunctive relief Plaintiffs' filed with their summary judgment motion. (CP 521, 542-543)

requirement significantly advances a compelling governmental interest nor that it advances a significant governmental interest. (Assignment of Error 1, 2, 3, 4, 5)

3. Whether persons who were ordered to lower signs on sticks in such an easement may bring a facial challenge under article I, section 5 to the regulation pursuant to which the order was issued, where that regulation authorizes: 1) exclusion of expression disparaging or detrimental to the interests of the businesses housed therein, 2) exclusion of expression that attracts attention or creates a disturbance 3) exclusion of signs on sticks 4) banning persons from the easement and requiring advance permission for picketing and other expression. (Assignment of Error 1, 2, 3, 4, 5)

4. Whether some or all of the above cited provisions should be declared facially invalid under article 1, section 5. (Assignment of Error 1, 2, 3, 4)

5. Whether enforcement of some or all of all the above cited provisions should be enjoined. (Assignment of Error 1, 2, 3, 5)

III. STATEMENT OF THE CASE

A. Procedural History

Plaintiffs' complaint was filed on or about June 13, 2003 in King County Superior Court alleging violations of their rights to freedom of expression, to petition, to due process, to freedom of assembly, and to

equal treatment under the Washington Constitution, article 1, sections 3, 4, 5 and 12 by Defendants Westlake Center Associates Limited Partnership and Rouse-Seattle LLC (hereinafter "Rouse Defendants") and by Defendant City of Seattle.[2] (CP 1-11)

On December 16, 2004, the summary judgment motion of the Rouse Defendants was granted as was the summary judgment motion of Defendant City of Seattle. (CP 1163) Plaintiffs' cross-motion for summary judgment against all Defendants simultaneously was denied. (CP 1163)

Judgment was entered for all Defendants on January 13, 2005. (CP 1164-1167) Plaintiffs filed a timely notice of appeal on February 2, 2005. (CP 1170-1174)

B. Statement of Facts

Westlake Center is a large privately owned shopping center in the heart of downtown Seattle that is controlled by the Rouse Defendants. (CP 670) The Seattle Monorail is public transportation controlled by the City of Seattle that travels between the downtown Westlake Center and the Seattle Center, on Queen Anne Hill in Seattle. (CP 1108) More than 8

[2] Subsequent amendment of the complaint corrected errors in the identification of the appropriate Rouse defendants in the original complaint. (CP 51-52)

million persons visit Westlake Center annually, of which 2.4 million go through Westlake Center to use the Seattle Monorail. (CP 609, 1145)

The City of Seattle owns an easement through Westlake Center to guarantee access to the monorail for members of the public. (CP 671, 801-836) The terms of the easement are recited in the monorail easement operating agreement (hereinafter "easement agreement"). (CP 801-836)

The easement covers most of the first floor corridor of Westlake Center, some of the second floor of Westlake Center, and a portion of the corridor on the third floor of Westlake Center. (CP 715-717) The corridors are approximately 9 to 12 feet in width, and are wider than most sidewalks. (CP 666) The portion of the easement on the third floor runs into an outdoor platform, owned by the City of Seattle, from which persons board the Seattle monorail. (CP 717, 1145) The easement also includes escalators which connect the first floor of Westlake Center to the second floor of Westlake Center and the second floor of Westlake Center to the third floor of Westlake Center. (CP 715-717, 1145)

On February 15, 2003, a large planned demonstration against a U.S. War in Iraq took place in Seattle. (CP 1024, 1146) Large numbers of persons entered Westlake Center that day with signs on sticks in order to take the monorail from downtown Seattle to Seattle Center, to participate in the demonstration which commenced there. (CP 117, 1146)

On that day, Plaintiffs William Daugaard and Patricia Daugaard arrived at Westlake Center by public transportation to use the monorail to participate in the demonstration. (CP 583) They shared a sign stating "No War Around the World, No War in Iraq, Not In Our Name," which was mounted on a stick. (CP 583) After the Daugaards reached the third floor, they observed that the line to the monorail was extremely long. (CP 583)

As a result, they decided to leave Westlake Center, and travel to the demonstration by other means. (CP 583) As they descended the escalators on the inside of Westlake Center from the third floor to the first floor, they repeatedly were ordered to lower their sign by Westlake Center guards. (CP 583) Mr. Daugaard refused, and held the sign upright, so that its message could be read. (CP 583)

On that day, Plaintiff Sanders also arrived at Westlake Center to take the monorail to the demonstration at Seattle Center. (CP 585, 591-593, 673) Ms. Sanders held a sign saying "No Iraq War" mounted on a stick. (CP 585, 591, 673) Ms. Sanders was accompanied by her 10 year-old daughter, Ms. Sanders' friend, Daniel Turner, and Mr. Turner's 10 year-old daughter. (CP 585)

There was an extremely long line of persons waiting for the monorail and Ms. Sanders' group walked to the end of the line to wait

their turn to take the monorail. (CP 585, 594-595, 673) Ms. Sanders was holding her sign up so it could be read. (CP 585-586)

Shortly thereafter, a Westlake Center guard approached Ms. Sanders and ordered her to lower her sign. (CP 585-587, 598) Ms. Sanders declined lower the sign enough to satisfy the guard. (CP 585-587, 591)

Several additional Westlake security guards arrived. (CP 586-587, 599-601) One of the guards told Ms. Sanders that she that she was banned from Westlake Center and that she would be physically removed from Westlake Center if she declined to lower her sign. (CP 586-587, 601-603) Ms. Sanders' daughter began to cry and to hug her, and her daughter's 10 year-old friend became upset and pleaded to leave. (CP 587)

Ms. Sanders then lowered her sign; she subsequently boarded the monorail and participated in the protest. (CP 587)

IV. ARGUMENT

A. STANDARD OF REVIEW ON APPEAL

"An appellate court reviews de novo an order granting summary judgment and, thus, engages in the same inquiry as the trial court." *Piepkorn v. Adams*, 102 Wn.App. 673, 679, 680, 10 P.3d 428 (2000). "Summary judgment is proper if pleadings, depositions, affidavits, and admissions, viewed in a light most favorable to the nonmoving party,

show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Pulcino v. Federal Express Corp.*, 141 Wn.2d 629, 639, 9 P.3d 787 (2000).

B. REGULATION OF EXPRESSION IN THE EASEMENT IS CONSTRAINED BY THE CONSTITUTION, BECAUSE IT IS AN EXERCISE OF GOVERNMENTAL AUTHORITY

The easement agreement pursuant to which the Rouse Defendants limit expression in the easement reflects a delegation of governmental power by the City Of Seattle to Rouse.

Where a private party and a governmental entity act in concert, the conduct of the private party constitutes "state action," and accordingly is bound by the same constitutional limitations that apply to government action.[3] *See Sable Communications of California, Inc. v. Pacific Tel. & Tel. Co.,* 890 F.2d 184, 188-189 (9th Cir. 1989); *Venetian Casino Resort, LLC v. Local Joint Exec. Bd.*, 257 F.3d 938, 945-948 (9th Cir. 2001).

In this case the easement agreement between the City of Seattle and the Rouse company authorizes the Rouse Company (and thereby the Rouse Defendants acting on its behalf) to police conduct by members of the public using the public easement. (CP 652-653, 670) Therefore, the

[3] The trial court presumed that regulation of expression in the easement must comply with article 1, section 5. (CP 1148-1149)

Rouse Defendants are bound to respect constitutional norms in policing that conduct.[4]

C. THE EASEMENT IS A PUBLIC FORUM BECAUSE IT IS A PUBLIC THOROUGHFARE AT THE CORE OF A MAJOR METROPOLITAN TRANSPORTATION GRID AND COMMERCIAL CENTER

Westlake Center is a large private shopping center located in the center of Seattle's downtown. (CP 670, 1145) The City of Seattle owns an easement on the property guaranteeing public access to the Seattle's public monorail. (CP 671, 1145) 8,400,000 people use Westlake Center annually; 2,400,000 of those people use Westlake Center for ingress to or egress from Seattle's Monorail, and a large sign is posted in front of Westlake Center, pointing to Westlake Center and stating "To Seattle Center via the Monorail." (CP 608, 614, 662, 1145)

The City is contractually obligated to Rouse to operate the monorail, and Rouse contributes to the maintenance, security and insurance of the City's monorail platform to which the public easement leads. (CP 655-662)

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[4] Conversely, Defendant City is liable for constitutional violations by the Rouse defendants in policing the easement, since they do so pursuant to government authority granted to them through the easement agreement. *See First Unitarian Church v. Salt Lake City Corp.*, 308 F.3d 1114, 1119-1124 (10th Cir. 2002).

Freedom of expression is guaranteed by article 1, section 5 of the Washington Constitution, whose scope is at least a broad, and in some cases broader than that of the First Amendment to the U.S. Constitution. *See O'Day v. King County,* 109 Wn.2d 796, 803, 749 P.2d 142 (1988).

The extent to which expression is protected by guarantees of the U.S. and Washington Constitutions generally is determined by the forum in which the expression takes place[5]; the highest level of protection is afforded to expression in a traditional public forum. *See City of Seattle v. Mighty Movers, Inc.,* 152 Wn.2d 343, 349-350, 96 P.3d 979, 983 (2004). There are two other categories of forum, a designated public forum, in which expression is protected as in a traditional public forum, so long as the government intends the forum to be open to expression, and a non-public forum. *First Unitarian Church of Salt Lake City v. Salt Lake City Corp.*, 308 F.3d 1114, 1124 (10th Cir. 2002). Government discretion to regulate expression is greatest in a non-public forum. *See Mighty Movers,* 152 Wn.2d at 361.

It is well established that parks, streets, and sidewalks are traditional public forums. *See Hague v. Committee for Indus. Organization.,* 307 U.S. 496, 515, 59 S. Ct. 954, 83 L.Ed.2d 1423 (1939).

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[5] Washington has adopted federal public forum analysis. *Mighty Movers,*152 Wn.2d at 352-354.

A public theater is also a public forum. *See Southeastern Promotions Ltd., v. Conrad,* 420 U.S. 546, 95 S. Ct. 1239, 43 L.Ed.2d 448 (1975).

Lower courts have held that bus stations, train stations, and the concourse of a large office complex are public forums. *Moskowitz v. Cullman*, 432 F. Supp. 1263, 1265-1267 (D.N.J. 1977); *Local 328 v. Port Authority of New York and New Jersey*, 944 F. Supp. 208, 215 (S.D.N.Y. 1996); *Wolin v. Port of New York Authority*, 392 F.2d 83 (2nd Cir. 1968) *cert. denied*, 390 U.S. 940 (1968); *see* 16A Am. Jur. 2d. Constitutional Law, sec. 521 n. 97 (2004) (citing *Wolin v. Port of New York Authority*, 392 F.2d 83 (2nd Cir. 1968)). However, some courts express a considerably narrower view of the scope of public fora. *See Hotel Employees and Restaurant Employees Union v. City of New York, Dept. of Parks,* 311 F.3d 534, 551-552 (2nd Cir. 2002).

This disagreement reflects both the incompleteness of Supreme Court analysis of the concept of public forum, and limitations of the analytical adequacy of the concept itself– limitations the Supreme Court has expressly noted. *See ACLU of Nevada v. City of Las Vegas, Nevada,* 333 F.3d 1092, 1099 n. 6 (9th Cir. 2002); *City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 815 n. 32, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1984). Notwithstanding the continued uncertainty regarding the parameters of a public forum, the Ninth Circuit Court of Appeals has

observed that courts consistently focus on two concerns in public forum analysis:

> First, and most significantly, there is a common concern for the compatibility of the uses of the forum with expressive activity. As the Supreme Court has stated, 'The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time.' Secondly, the case law demonstrates a commitment by the courts to guarding speakers' reasonable expectations that their speech will be protected.

ACLU, 333 F.3d at 1100.

The Ninth Circuit concluded thereby that "[r]emaining focused upon these underlying concerns may enable us to avoid the accusation of applying forum analysis in a rigidly formulaic manner." *Id*.

The Second Circuit Court of Appeals, however, also places weight on the forum's "primary function and purpose." *See Hotel Employees*, 311 F.3d at 551-552. In so doing, the Second Circuit limits the scope of First Amendment protections. *See id*. (citing primary purpose and function as factor authorizing governmental exclusion of leafleting from public plaza).

Plaintiffs submit that the Ninth Circuit's approach is the more creditable one, and that its criticism of the "primary function and purpose" standard is compelling:

> First, we believe that this view elevates form over substance, engaging in precisely the type of rigid pigeonholing that is insufficiently protective both of the right to free speech and of the ability of the government to

> regulate property under its control. The fact that the *primary* use of the property is not as a park or public thoroughfare is *irrelevant* as long as there is no concrete evidence that use for expressive activity would significantly disrupt the principal uses.
>
> Strengthening our conviction is the fact that if this proposal were imposed uniformly, there would be *no* traditional public forums. It has frequently been observed that the 'notion that traditional public forums are properties that have public discourse as their principal purpose is a most doubtful fiction. *Lee*, 505 U.S. at 696, 112 S.Ct. 2701 (Kennedy, J. concurring)

ACLU, 333 F.3d at 1101-1102. (emphasis in original).

1. Unrestricted Public Access to the Easement for Use as a Thoroughfare at the Core of Seattle's Transportation Grid Indicates the Easement Is a Public Forum

To assess the compatibility of speech with the central purpose of a forum, as well as to safeguard the reasonable expectations of speakers, the Ninth Circuit has adduced three indicators for identifying a public forum:

> 1) the actual use and purposes of the property, particularly status as a public thoroughfare and availability of free public access to the area; 2) the area's physical characteristics, including its location and the existence of clear boundaries delimiting the area, and 3) traditional or historic use of both the property in question and other similar properties.
>
> *Id*. at 1100-1101.

In addressing the first factor, the actual use and purposes of the property the Ninth Circuit has explained:

> We consider the uses and purpose of a property because, by informing us of the compatibility of expressive activity with other uses of the property, they enable us to evaluate the societal costs of allowing versus restricting speech. Thus, ***when property is used for open public access or as a public thoroughfare, we need not expressly consider the compatibility of expressive activity, because these uses are inherently compatible with such activity***.

Id. at 1101 (emphasis added)

Indeed, the "use of property as a public thoroughfare is frequently dispositive" of whether it is a public forum. *ACLU,* 333 F.3d at 1101; *First Unitarian Church*, 308 F.3d at 1128 ("[e]xpressive activities have been historically compatible with, if not virtually inherent in, spaces dedicated to general pedestrian passage").

While the absence of state action generally precludes private property from being classified as a public forum, where public easements cross private property, a public forum may be created notwithstanding the private character of the property. *See id*. at 1122-1123.

Accordingly, in recent years the Ninth and Tenth Circuits Courts of Appeal both have held that a public easement over private property that formed a pedestrian thoroughfare was a public forum. *See id.* at 1131; *Venetian*, 257 F.3d at 948.

Here, Westlake Center provides unrestricted access to the public to use the City's monorail. (CP 142-152, 671) Several million persons annually enter

for that purpose. (CP 609, 1145) Moreover, Westlake Center is located in the heart of Seattle's commercial center and at the center of its transportation grid. (CP 670, 759) It not only provides access to the monorail, but doors on the basement floor of Westlake Center open directly into Seattle's bus tunnel, and thereby provide direct access to the Westlake bus stop. (CP 665)

Moreover, the monorail easement is not simply a burden on the Westlake property; the easement agreement obligates the City to the Westlake Center to operate the monorail. (CP 654) Thus, the 2,400,000 people who enter Westlake Center to use the monorail are not simply permitted to enter; their presence is affirmatively cultivated by Westlake Center.

The extraordinary magnitude to which the easement is integrated into the City's transportation grid, used as an unrestricted public thoroughfare is strong -- and following the Ninth Circuit dispositive -- evidence that it is a public forum. *See ACLU,* 333 F.3d at 1101.

2. The Courts Consistently Have Recognized that Large Shopping Centers Are Physically Well Suited to Serve as Public Fora

The physical character and setting of the easement are well suited to serve as a public forum, because it is located in a large shopping center, and principally in its large corridors.

It is well established that large shopping centers are physically well suited to serve as public fora. *See Alderwood Associates v. Washington Environmental Council*, 96 Wn.2d 230, 243-246, 635 P.2d 108 (1981); *Robins v. Pruneyard Shopping Center,* 23 Cal.3d 899, 905-907, 592 P.2d 341 (1979). As Washington's Supreme Court explained:

> As property becomes the functional equivalent of a downtown area or other public forum, reasonable speech activities become less of an intrusion on the owner's autonomy interests. When property is open to the public, the owner has a reduced expectation of privacy and, as a corollary, any speech activity is less threatening to the property's value. . . . The shopping center now performs a traditional public function equivalent of a town center or community business block.

Alderwood, 96 Wn.2d at 244, 246; *see Waremart Inc. v. Progressive Campaigns, Inc.,* 139 Wn.2d 623, 632-634, 989 P.2d 524 (1999) (public has right to petition in large private shopping centers, because they have the earmarks of a downtown area or other public forum); *see Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 687-689, 112 S.Ct. 2711, 120 L.Ed.2d 541 (1992) (O'Connor, J., concurring) (that airport was operated not merely to provide transportation, but also a wide variety of shopping weighed against airport's prohibition of leafleting).

In fact, in *Amalgamated Food Emp. Union Local 590 v. Logan Valley Plaza, Inc.,* 391 U.S. 308, 319-325, 88 S.Ct. 1601, 20 L.Ed.2d 603 (1968) the U.S. Supreme Court held that a large privately owned shopping

center is a public forum, because such shopping centers had become functionally equivalent to a town square. The U.S. Supreme Court subsequently overruled this holding, because it decided that the functional similarity between a shopping center and a town square was insufficient to satisfy the state action requirement on which First Amendment protections are predicated. *See Lloyd Corp. Ltd. v. Tanner,* 407 U.S. 551, 568-570, 92 S.Ct. 2219, 33 L.Ed.2d 131 (1972). Washington's Supreme Court similarly has held that under article 1, section 5, the absence of state action precludes large private shopping centers from serving as public fora. *See Southcenter Joint Venture v. National Democratic Policy Committee,* 113 Wn.2d 413, 421-427, 780 P.2d 1282 (1989).

In this case, of course, the easement running through Westlake Center is public property. Thus, the sole factor that precluded finding shopping centers to be public fora in the *Lloyd Center* and *Southcenter* cases -- lack of state action – is absent. Instead, the court is confronted with a forum that both is well suited for expression ***and*** is subject to the Constitution's protection of expression. This concomitance of a centrally located, unrestricted access major thoroughfare and physical suitability for expression compellingly indicates the easement is a public forum:

> If the objective, physical characteristics of the property at issue and the actual public access and uses that have been permitted by the government indicate that expressive

> activity would be appropriate and compatible with those uses, the property is a public forum.

First Unitarian, 308 F.3d at 1125 (citing *Lee*, 505 U.S. at 698-699 [Kennedy, J., concurring]).

Moreover, the shopping mall does not merely permit public use of the easement, but affirmatively encourages public use of the easement by contractually obligating the City to operate the monorail. (CP 145) This encouragement underlines the compatibility of using the easement as a general pedestrian thoroughfare, and therefore for expression, and as a path from which to engage in commercial transactions --- ***just like any other downtown sidewalk***. *See Venetian*, 257 F.3d at 945 ("[t]he more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it. . .").

3. Westlake Center Has Served as a Center for Free Expression Since It Was Created

The historic uses of the easement area also indicates it is a public forum.

The Rouse Defendants expressly admit that Westlake Center has been a "pioneer" in providing expressive opportunities to the community.

(CP 696, 740) Thus, Rouse Defendants have published the "Westlake Center Free Speech and Public Safety Policy," which asserts:

> Since its establishment in 1984, Westlake Center has respected and celebrated the diverse viewpoints of its customers. Westlake Center was a pioneer in giving members of the public opportunities to express their opinions to retail customers, and it continues to make such opportunities available Westlake Center is also a shopping center that must look after the interests of merchants and protect members of the public that are drawn to Westlake Center. Public safety is of paramount concern. Set forth below is the free speech and public safety policy that Westlake Center has enforced since it opened to the public. Westlake Center enforces this policy without regard to viewpoint or ideology.
>
> **Public Expression Indoors**
>
> 1. Individuals who enter Westlake Center are welcome to wear clothing or accessories that express their viewpoints, but Westlake will ask individuals wearing obscene or vulgar messages to leave the premises.
> 2. Westlake Center posts Rules of Etiquette at each entrance. These Rules give fair notice of what is expected of persons entering Westlake Center.
> 3. Westlake Center prohibits signs that are affixed to poles or sticks and any other sign that poses a safety threat.

(CP 698)

Indeed, the Rouse Defendants' maintain that their restriction of expression in the easement area is so limited, it withstands scrutiny as a time, place and manner restriction in a public forum. (CP 103-106) The historic use of the easement for expression, therefore, is well established.

4. The Relevant Indicators Establish the Easement is a Public Forum

Each of the three indicators of public forum adduced by the Ninth Circuit, unrestricted public access and use, physical character and history of use, supports classification of the easement as a public forum. Still, as the trial court pointed out, this case does not neatly fall either into the public forum category or the non-public forum category. (CP 1156) This uncertainty, however, points to a further consideration weighing towards finding the easement to be a public forum.

The U.S. Supreme Court has noted the public forum concept is of diminished utility in cases in which the forum in issue does not neatly fit into one of the forum categories.[6] *Vincent*, 466 U.S. at 815 n. 32. Thus, in *City Council of L.A. v. Taxpayers for Vincent*, even though the court determined that public utility poles were not public fora, in affirming a restriction on the use of polls for expressive purposes, the Supreme Court applied the more demanding test used for regulation of expression in a

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[6] "It is ... of limited utility in the context of this case to focus on whether the tangible property itself should be deemed a public forum. Generally an analysis of whether property is a public forum provides a workable analytical tool. However, the analytical line between a regulation of the 'time, place, and manner' in which First Amendment rights may be exercised in a traditional public forum, and the question of whether a particular piece of personal or real property owned or controlled by the government is in fact a public forum may blur at the edges, and this is particularly true in cases falling between the paradigms of government property interests essentially mirroring analogous private interests and those clearly held in trust, either by tradition or recent convention, for the use of citizens at large."
Vincent, 466 U.S. at 815 n. 32. (citations and internal quotations omitted).

public forum. *Id*. at 808-810, 815. In so doing, the Court implicitly recognized that unreflective application of the public forum concept in cases where the forum definition was uncertain could result in the erroneous denial of First Amendment protection.

Plaintiffs submit that application of article 1, section 5, which, as noted, is at least as protective of expression as the First Amendment, requires no less prudence. Indeed, here, where a private entity has limited free expression in a venue well suited for expression, it is particularly important this Court not erroneously fail to protect that expression as a result of excessive reliance on a problematic concept:

> [a]lthough governmental attempts to control speech are far from novel, they have new potency in light of societal changes and trends towards privatization. See *Chicago Acorn v. Metropolitan Pier & Exposition Auth.*, 150 F.3d 695, 704 (7th Cir. 1998) (expressing concern regarding 'what is now a nationwide trend toward the privatization of public property'). . . . Like the Tenth Circuit, we recognize that '[a]s society becomes more insular in character, it becomes essential to protect public places where traditional modes of speech and forms of expression can take place.' *United States v. Kokinda*, 497 U.S. 720, 737, 110 S.Ct. 3115, 111 L.Ed.2d 571 (1990) (Kennedy, J., concurring in the judgment). We think this is particularly true with respect to downtown public places conducive to expressive activities. *First Unitarian Church of Salt Lake City v. Salt Lake City Corp.*, 308 F.3d 1114, 1131 (10th Cir. 2002) . . . Awareness of contemporary threats to speech must inform our jurisprudence regarding public forums.

ACLU, 333 F.3d at 1097.

In summary, the most creditable indicators show the easement in Westlake Center to be a public forum. Furthermore, in light of the limited analytical value of the public forum concept in cases such as this, and the considerable threat to freedom of expression posed by the growing privatization of fora suited for expression, Plaintiffs submit that any uncertainty must be resolved in favor of protecting expression.

5. The Trial Court's Holding that the Easement Is Not a Public Forum Misconstrues Controlling Authority and Misreads the Record

In holding the easement was not a public forum, the trial court placed itself at odds with the above cited authorities.

The trial court relied on the plurality opinion of the U.S. Supreme Court in *United States v. Kokinda*, 497 U.S. 720, 110 S.Ct. 3115, 111 L.Ed.2d 571 (1990) and the Washington Supreme Court's decision in *Mighty Movers*. Yet, these authorities do not support its decision.

In *Kokinda* a four member plurality, with Justice Kennedy concurring in the judgment, found that a prohibition of solicitation on a sidewalk linking a post office with a post office parking lot – and nothing else – did not violate the First Amendment. *Id*. at 725-730, 737-739. While the plurality found the sidewalk was not a public forum, the court's majority did not accept this analysis. Five justices, Justice Kennedy concurring in the judgment, and four justices dissenting, applied public

forum standards to evaluation of the constitutionality of the challenged regulation.[7] *Id.* at 737-749.

Moreover, the plurality's determination that the sidewalk was not a public forum turned on the fact that the physical setting of the sidewalk was such it was used for no purpose other than movement to and from the post office:

> The postal sidewalk at issue does not have the characteristics of public sidewalks traditionally open to expressive activity. The municipal sidewalk that runs parallel to the road in this case is a public passageway. The Postal Service's sidewalk is not such a thoroughfare. Rather, it leads only from the parking area to the front door of the post office.

Id. at 727.

As explained above, the easement, in contrast, runs through a large shopping center, thereby rendering the analysis of even the *Kokinda* plurality inapposite. *See First Unitarian*, 308 F.3d at 1127-1128 (distinguishing a walkway forming part of the transportation grid from the sidewalk in *Kokinda*). [8]

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[7] Justice Kennedy, in his concurrence, found the regulation satisfied the requirements for a time, place and manner restriction in a public forum, while the dissenters found the regulation failed that test. *Id.*

[8] The trial court's opinion states that the court "should consider the limited purpose for which the easement was granted: to provide ingress and egress for passengers of the Seattle Center monorail." (CP 1157) Yet, the *Kokinda* plurality did not rely on the

In *Mighty Movers* the Washington Supreme Court adopted the public forum analysis used by the U.S. Supreme Court and applied it to a ban on the use of utility poles as a public bulletin board, just as the U.S. Supreme Court had done 20 years earlier. *See Mighty Movers,* 152 Wn.2d at 352-360. The *Mighty Movers* court explained that utility polls do not qualify as a public forum, because they do not:

> have the characteristics of one . . . Utility poles are an essential part of the City's power system and they have not been a traditional public forum nor have they been historically held open to the general public.

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purpose for which the sidewalk was created, but rather on its objective characteristics, i.e. what it could be used for.

Thus, in her concurrence in *Lee*, years after *Kokinda*, Justice O'Connor stressed that in assessing the compatibility of an airport with expression, it was not the limited intent of the government, i.e. to provide access to airplanes, that was material, but to what in fact the airport provided access:

> Not only has the Port Authority chosen *not* to limit access to the airports under its control, it has created a huge complex open to travelers and non-travelers alike. The airports house restaurants, cafeterias, snack bars, coffee shops, cocktail lounges, post offices, banks …. We have said that a restriction on speech in a nonpublic forum is 'reasonable' when it is consistent with the government's legitimate interest in preserving the property … for the use to which it is lawfully dedicated . . . . The Port Authority urges that … it, too, has dedicated its airports to a single purpose-facilitating air travel-and that the speech it seeks to prohibit is not consistent with that purpose. But the wide range of activities promoted by the Port Authority is no more directly related to facilitating air travel than are the types of activities [e.g. leafleting] in which the International Society for Krishna Consciousness, Inc…, wishes to engage…. **In my view, the Port Authority is operating a shopping mall as well as an airport. The reasonableness inquiry, therefore, is not whether the restrictions on speech are consistent with preserving the property for air travel …, but whether they are reasonably related to maintaining the multipurpose environment that the Port Authority has deliberately created.** *Lee*, 505 U.S. at 687-689 (O Connor, J., concurring) (bold added).

Id. at 360.

In so doing, the *Mighty Movers* court's public forum analysis spoke to substantially the same concerns the Ninth Circuit outlined, compatibility of the principal uses of the forum with expression, and the reasonable expectations of speakers. Thus, *Mighty Movers* cited legislative findings showing use of the utility polls for public expression was posing a safety hazard, and could interfere with their use and preservation as an element of the power supply system. *Id*. at 346. Similarly, since use of the utility polls for public expression was not a common practice, and indeed was prohibited, finding utility were not a public forum did not contradict the reasonable expectations of speakers. *See id*. at 357-358. As noted above, these concerns speak in favor of public forum status for the easement.

Yet, the trial court overlooked the court's holding in *Mighty Movers*. Rather, it relied on dicta in the opinion stating that a principal purpose of a public forum must be communication.[9] (CP 1156) As explained above, the Ninth Circuit cogently has rejected this language as a

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[9] In fact, the single reference in *Mighty Movers* to "principal purpose" appeared in the court's canvass of several U.S. Supreme Court decisions addressing the public forum concept. Thus, the *Mighty Movers* court observed:
"[t]he Court has provided additional guidance for determining what constitutes a traditional public forum, observing that 'a traditional public forum is property that has as a principal purpose … the free exchange of ideas.' *Krishna*, 505 U.S. at 679, 112 S.Ct. 2701." *Mighty Movers*, 152 Wn.2d at 351.

standard for delimiting public fora. Plaintiffs submit that it was error for the trial court to rely on *Mighty Movers*' dicta rather than its holding, which contradicted the dicta.

The court's opinion also cites the fact that the easement also covers escalators. (CP 1157) For several reasons, this is immaterial. First, public forums typically cover areas where expression must be limited for safety or other reasons. For example, while steps leading to government buildings typically are public fora, reasonable time, place and manner restrictions may exclude some forms of expression therefrom, e.g. soliciting. *See, e.g. Missionary Corps of City of Angeles Church, Inc. v. Louisiana Dep't of Transp.,* 1996 WL 655802 (E.D. La. 1996) (assuming area near ferry terminal stairway is public forum, prohibition on soliciting is constitutional time, place and manner regulation). Of course, these restrictions render such steps no less public fora.

Indeed, assuming *arguendo* escalators were not suited to be public forums, our Supreme Court has stated that the forum status of a venue in or adjacent to the forum in issue is not dispositive of whether the venue in issue is a public forum. *See Mighty Movers*, 152 Wn.2d at 359. Thus, the forum status of Westlake's escalators does not determine the forum status of its corridors.

Finally, Plaintiffs are aware of neither authority nor evidence that free expression and escalators are incompatible. Manifestly, using escalators is compatible with talking about virtually any subject, as well as with displays of buttons or symbolic clothing related to virtually any topic. Escalators are typically occupied by persons engaged in both forms of conduct. Presumably, they also are compatible with carrying raised signs on sticks, since Westlake Center sells and imposes no restrictions on the movement or position of brooms, walking sticks and long umbrellas—all of which undoubtedly could, if held at the wrong angle, inflict injury no less than a sign on a stick. (CP 664-666)

For each of these reasons, the trial court's public forum analysis was mistaken.

D. THE REQUIREMENT THAT SIGNS ON STICKS BE LOWERED WAS NOT NARROWLY TAILORED

The prohibition of raising signs on sticks is not narrowly tailored to advance a compelling government interest.

"When regulating First Amendment activity in a public forum the government has a difficult burden to carry." *Weinberg v. City of Chicago,* 310 F.3d 1029, 1035 (7th Cir. 2002) (citing *Perry Educ. Ass'n v. Perry Local Educators' Ass'n,* 460 U.S. 37, 45, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983)).

The government must demonstrate that such regulation is narrowly tailored to advance a compelling governmental interest, and that it leaves open ample alternate channels of communication. *Collier v. City of Tacoma*, 121 Wn.2d 737, 753, 854 P.2d 1046 (1993); *Bay Area Peace Navy v. U.S.*, 914 F.2d 1224, 1227 (9th Cir. 1990) (government bears burden of showing regulation is narrowly tailored).[10] The government fails to discharge this burden, where a regulation burdens substantially more speech than necessary. *See Weinberg*, 310 F.3d at 1040.

Protecting the use of picket signs for protest is a central premise of the constitutional guarantee of freedom of expression. *See Edwards v. City of Couer d'Alene*, 262 F.3d 856, 865-867 (9th Cir. 2001). Thus, the U.S. Supreme Court has stated that: "[p]ublic issue picketing, an exercise of basic constitutional rights in their most pristine and classic form, has always rested on the highest rung of the hierarchy of constitutional values." *Carey v. Brown,* 447 U.S. 455, 466-467, 100 S.Ct. 2286, 65 L.Ed.2d 264 (1980) (internal citation omitted); *Thornhill v. Alabama,* 310 U.S. 88, 91-92, 99-106, 60 S. Ct. 736, 84 L.Ed. 1093 (1940) (ban on picketing "for purpose of

[10] The First Amendment's requirement of time, place and manner regulation in a public forum is less demanding than that of article 1, section 5, since the First Amendment requires only that such restrictions advance a significant government interest. *See Weinberg*, 310 F.3d at 1036.

hindering, delaying, or interfering with or injuring any lawful business" facially invalid).

In assessing a municipal ordinance that banned the display of signs on pickets, the Ninth Circuit Court of Appeals explained:

> without access to sign handles, sign holders in parades and public assemblies[11] cannot hoist their signs in the air so that the messages are visible above a crowd . . . And . . . the classic image of a picketer – dating back to the early days of the labor protests – is of an individual ***holding aloft*** a sign-bearing standard. Because social, economic, and political protests are commonly associated with picket signs attached to handles, the ordinance's ban precludes an important communicative aspect of public protest.

Edwards, 262 F.3d at 865 (emphasis added).

The court held the ban of signs on sticks unconstitutional, notwithstanding the government's contention that the sticks posed a safety hazard. *Id.* The court explained that "while the City need not employ the least restrictive alternative in promoting its interest in public safety, 'if there are numerous and obvious less-burdensome alternatives to the restriction on [protected] speech, that is certainly a relevant consideration in determining whether the 'fit' between ends and means is reasonable.'" *Id*. (quoting *City of Cincinnati v. Discovery Network, Inc.,* 507 U.S. 410, 418 n. 13, 113 S.Ct. 1505, 123 L.Ed.2d 99 (1993).) The court also noted

[11] The ordinance in issue in *Edwards* banned signs on sticks only during a parade or public assembly. *Edwards,* 262 F.3d at 859, 860, 860 n. 6.

several other municipal ordinances that had achieved the same safety objective by limiting the dimensions, shape and or material from which such sticks were constructed.[12] *Id.* at 865-866.

In *Edwards*, the City did adduce evidence that demonstrators had, on one occasion, attempted to strike an officer with a picket to which a flag had been affixed, and the court noted the evidence arguably supported the City's contention that the ban on sign handles advanced its substantial interest in public safety. *Id*. at 863, 865 n. 16. Still the court held that amounted to "little factual support" to show the ban was necessary to protect safety. *Id.* at 864. The *Edwards* court explained:

> Ii]t is certainly true that the City is not required to wait until individuals are seriously injured by sign handles during a parade or public assembly before it may regulate how signs are constructed. But it is equally true that proof that the City's public safety interest is well-taken does not justify the enactment of a flat ban on all sign handles carried during parades and public assemblies, regardless of height, width, weight, and composition . . .

Id. at 865. n. 16.

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[12] Consistent with its analysis in *Edwards*, the Ninth Circuit subsequently affirmed a ***limitation on the thickness*** (not a ban) of the sticks used to support the signs. *See Vlasak v. Superior Court of California ex. Rel.,* 329 F.3d 683, 687-691 (9th Cir. 2003). That limitation was justified, the court noted, by specific evidence showing the regulation was tailored to enhance public safety: to wit: that police officers previously had been physically assaulted with sticks used to hold signs. *Id*. at 687-690.

This same failure to provide substantial evidence to justify a restriction on expression in a public forum resulted in the Seventh Circuit Court of Appeals striking down an ordinance banning book sales within 1,000 feet of a large stadium in *Weinberg v. City of Chicago,* 310 F.3d 1029, 1039-1040 (7th Cir. 2002). The *Weinberg* court conceded the substantiality of the interest the municipality cited as justifying the exclusion, eliminating traffic congestion and the public safety threat generated by such congestion. *Id*. at 1038. Nonetheless, the *Weinberg* court held that testimony of Defendants' police officers that peddling created congestion, and that the ban eliminated the problem, was insufficient to prove that the ban was narrowly tailored to advance its professed interests, because the testimony was arguably self serving. *Id.* at 1038-1040. In addition, the court cited the City's failure to provide "objective evidence . . . . empirical studies, no police records, no reported injuries, nor evidence of any lawsuits filed." *Id.* at 1038-1039.

The court also found the ordinance defective because it did not prohibit other activities that could create traffic problems, such as newspaper sales and street performances. *Id.* at 1039 ([t]he City's "inconsistent approach does not comport with its interests" in abating congestion).

Failure to adduce substantial evidence of narrow tailoring also resulted in the Ninth Circuit finding a government restriction on expression in a public forum invalid in *Bay Area Peace Navy v. U.S.*, 914 F.2d 1224 (9th Cir. 1990). In that case, the U.S. Navy sought to impose a 75-yard security zone between its ships and the "Bay Area Peace Navy" – a group protesting U.S. military policy during the government's "Fleet Week" celebration of the U.S. Navy. *Id*. at 1225-1226. The security zone was intended to advance the manifestly compelling interest of protecting the U.S. naval ships and the observing audience from terrorist attack. *Id.* at 1227.

To show the regulation was narrowly tailored, the government presented evidence that terrorism was a threat in the world, the opinions of several military officials that a zone of 75 to 100 yards was needed to protect against terrorist attacks, and that such a zone would facilitate access in case of a medical or law enforcement emergency. *Id*. However, there was no evidence of any terrorist threats in the San Francisco Area, nor in the U.S. for which the zone might be needed, and there was no history of safety or other problems during the preceding years in which the 75-yard zone had not been in force. *Id.* at 1228.

The Ninth Circuit found the 75-yard exclusion zone substantially impaired the protestors' ability to make their message seen and heard by

the relevant audience, and limited the security zone to 25 yards, which avoided that impairment. *Id.* In so doing, the court explained: "[a]lthough the government legitimately asserts that it need not show an actual terrorist attack or serious accident to meet its burden, it is not free to foreclose expressive activity in public areas on mere speculation about danger." *Id.*

In the instant case, the Defendants' requiring that signs on sticks be lowered rendered the message the protestors wished to display invisible, thereby effectively barring their expressive activity. Yet, Defendants' evidence no more establishes the regulation was narrowly tailored than did the evidence in *Edwards, Weinberg or Bay Area Peace Navy*. Indeed, there is even less support for restriction of signs on sticks here than in *Edwards*. In *Edwards*, there was at least some evidence that a protestor had attempted to use a picket to strike an officer during a protest. There is no such evidence here.

Defendants did not even allege the potential use of the sticks as weapons justified the restriction. Rather, Defendants maintained that signs on sticks had to be lowered, because, held carelessly, they inadvertently could cause injury. (CP 118) Yet, Defendants failed to identify a single instance of even such inadvertent injury caused by a picket sign that was not lowered.

Instead, Defendants' security director attested to observing "near misses" involving picket signs. (CP 118) This cannot justify its lowered picket requirement for several reasons. First, the risk in *Edwards* – demonstrators actually attempting to strike police with sticks -- was much more serious, yet it did not suffice to authorize the exclusion of signs on sticks.

Second, there is no evidence that the risk of accidental injury caused by a sign raised on a stick in the easement is any higher than the risk of such injury occurring where the sign is raised on a stick on a sidewalk, park or other public forum. Yet, in such other public fora, such risk does not suffice to require that signs on sticks not be raised. *See Edwards*, 262 F.3d at 863-865, 867.

Third, Defendants' evidence for the restriction, the testimony of its security director, is as in *Weinberg*, "arguably self serving," and, as in *Weinberg*, their justification is unsupported by any "objective evidence . . . empirical studies, no police records, no reported injuries, nor evidence of any lawsuits filed." Such flimsy evidence did not satisfy the *Weinberg* court and there is no reason it should satisfy this Court.

The trial court, however, held that the requirement that signs be lowered satisfied the scrutiny applied to regulations of expression in

public fora. (CP 1159-1161) In so holding, the court overlooked the above-mentioned authorities.

Here too, the court relied on dicta, this time from the First Circuit case of *Jews for Jesus, Inc. v. Massachusetts Bay Transp. Auth.*, 984 F.2d 1319 (1st Cir. 1993). Indeed, it its holding, the *Jews for Jesus* court stated that, regardless of whether a subway station is a public forum or a nonpublic forum, a ban on leafleting in the station was unconstitutional, because the safety concerns allegedly protected by the ban ***were not substantiated by any evidence accidents had been caused by leaflets prior to the ban***. *Id*. at 1324-1326. Thus, its holding actually speaks against the trial court's decision.

The dicta cited by the trial court consisted of an observation that other subway station regulations – ***not in issue in the lawsuit –*** including an exclusion of expressive activity from areas less than 15 feet wide, were reasonable time place and manner restrictions. *Id*. at 1326. (CP 1159-1160) The *Jews for Jesus* court advanced that opinion in the course of demonstrating that the safety interests assertedly protected by the challenged ban on leafleting and soliciting were already safeguarded, *inter alia*, by the 15-foot rule. *Jews for Jesus,* 984 F.2d at 1326. There was no evidence prohibiting expression in an area less than 15 feet wide advanced

any public safety objective. Thus, the assertion was merely an assumption made by the court, while proving an entirely different point.

This casual dicta cannot justify Defendants' regulation – particularly not in light of the carefully reasoned holdings of the Ninth and Seventh Circuit Courts of Appeal cited above that compel the opposite result.

E. THE REQUIREMENT THAT SIGNS ON STICKS BE LOWERED WAS UNREASONABLE

There was no significant evidence lowering signs on sticks materially advanced public safety.

Restrictions on expression in a non-public forum must be "reasonable . . . in light of the purpose of the forum and all the surrounding circumstances." *Jacobsen v. City of Rapid City*, 128 F.3d 660, 662-663 (8th Cir. 1997) (citing *Cornelius v. NAACP Legal Defense & Educ. Fund,* 473 U.S. 788 (1985)). It is the government's burden to show its regulation satisfies this requirement. *Sefick v. Gardner* 990 F. Supp. 587, 594 (N.D. Ill 1998).

Courts repeatedly have found restrictions on expression in non-public fora to be unreasonable, where there was no evidence the restriction significantly advanced a government interest. As noted, in *Jews for Jesus*, 984 F.2d at 1324-1325 the First Circuit Court of Appeals held that even if

a subway station is a nonpublic forum, a ban on leafleting in the station was unconstitutional, because the safety concerns allegedly protected by the ban were not substantiated by any evidence accidents had been caused by leaflets prior to the ban.

Similarly, in *Jacobsen v. City of Rapid City*, 128 F.3d at 662-663 the Eighth Circuit held that a prohibition of commercial news racks in an airport was unconstitutional, notwithstanding the airport's contention that the news racks were unstable and could cause physical injury. *Id*. at 663. The Court rejected this justification on the grounds that no evidence of such injury had been adduced. *Id*. at 662-663 ([l]ooking at the issue more broadly, there is simply no evidence that placing Jacobsen's news racks in public portions of the terminal will interfere with the Airport's principal intended use, to facilitate air travel").

In *Springfield v. San Diego Unified Port Dist.*, 950 F. Supp. 1482, 1486, 1490 (S.D. Cal. 1996), the U.S. District Court for Southern California held an airport's ban on the display of signs and placards unconstitutional. The ban was putatively enacted to address congestion, over-crowding and safety concerns, while the airport was under reconstruction. *Id*. at 1484. In rejecting the government's position, the court explained that restrictions on expression in a non-public forum "will not necessarily be deemed reasonable simply upon the Port Authority's

assertion that a given restriction will mitigate congestion and assist in reconstruction efforts." *Id*. at 1487, 1490-1491.

In this case, as noted, there was no evidence anyone was ever hurt by a sign on a stick in Westlake Center that was not held down, nor was there any objective evidence to justify the rule. This regulation, therefore, fails even the less demanding scrutiny applied to the regulation of expression in a non-public forum.

The trial court maintained the restriction was reasonable because

> the easement was created and publicly dedicated for the limited purpose of access to the monorail station. The oral policy implemented on the day in issue was limited to prohibiting people from carrying mounted signs through a narrow corridor. The restriction was limited to potential safety concerns in a highly controlled and physically limited environment [and it] … was viewpoint neutral.

(CP 1158)

Here too, the trial court overlooked authority requiring that forum regulators adduce objective evidence to justify restrictions on protected expression, and simply credited the shopping center's subjective assertion. This was error. *See Jacobsen*, 128 F.3d at 662-665.

That the easement was created to secure public passage to the monorail is immaterial. As noted above, restrictions on speech are not measured against the purpose for which the forum manager represents the forum exists, but rather based on the purposes for which the forum

actually is used. *See Lee*, 505 U.S. at 687-689 (O'Connor, J., concurring); *Id*. at 700-701 (Kennedy, J., concurring); *Springfield*, 950 F. Supp. at 1486-1487.

Here, of course, the forum is not simply an easement providing access to a monorail, but also is a pathway to the scores of commercial establishments housed in Westlake shopping center. It is against these multiple uses, whose effect is to narrow governmental authority to limit expression in a forum, that the restriction must be measured.

For each of these reasons, the trial court's finding the restriction was constitutional in a non-public forum also was mistaken.[13]

[13] The court also characterized the corridor as "narrow," and the environment as "highly controlled and physically limited." (CP 1158) It is uncontroverted that the corridor was wider than most sidewalks, so the characterization of it as "narrow" is, at best, irrelevant. Furthermore, there is no evidence the corridor was "highly controlled." Assuming *arguendo* it was highly controlled, there no evidence such control rendered the prohibition of holding signs on sticks aloft material to public safety. For the same reasons, that the corridors are "physically limited" is also irrelevant.

F. THE EASEMENT AGREEMENT IS FACIALLY OVERBROAD, BECAUSE IT IS VAGUE, A PRIOR RESTRAINT, IT REGULATES VIEWPOINTS AND EXCLUDES SIGNS ON STICKS

The Rouse Defendants' guards ordered Plaintiffs to lower their signs, and ostensibly banned Plaintiff Sanders from Westlake Center pursuant to authority granted to them by Defendant City of Seattle under the Easement Agreement.[14] (CP 653-655)

The Agreement authorizes Rouse Defendants, *inter alia*, to exclude persons from the easement who, without the permission of both Rouse and the City, "picket . . . attract attention or . . . . disparage . . . the interests of any of the retail or business establishments within the Improvements."[15] (CP 681)

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[14] Plaintiffs note that the trial court found their overbreadth claim under article 1, section 5 was not timely raised. (CP 1161-1162) Since the trial court nonetheless reached the merits of their overbreadth claim, Plaintiffs anticipate that the finding will be immaterial to this appeal. (CP 1162-1163)

Nonetheless, Plaintiffs note the trial Court was mistaken in finding the overbreadth claim untimely. Plaintiffs' complaint alleged that Defendants' obstruction of their display of antiwar signs violated their rights to freedom of expression under article 1, section 5, that it was executed pursuant to authority granted the Rouse Defendants by the City, and that such violations constituted defendants' ongoing practice towards demonstrators. (CP 51-61) *See Schoening v. Grays Harbor Community Hospital,* 40 Wn.App. 311, 337, 698 P.2d 593 (1985). Plaintiffs have discovered no case holding that in addition to pleading the conduct giving rise to a claim, and the legal authority for the claim, a plaintiff also must plead the reasons the cited authority is applicable. Moreover, any deficiency in the complaint was cured by Plaintiffs' Opposition to the Rouse Defendants' Motion for Summary Judgment, and Plaintiffs' subsequent cross-motion for summary judgment, both of which expressly stated overbreadth claims under article 1, section 5. *See State v. Adams*, 107 Wn.2d 611, 620, 732 P.2d 149 (1987).

[15] In pertinent part, the easement agreement states:

The First Amendment "overbreadth doctrine" stems from the U.S. Supreme Court's 1940 decision in *Thornhill v. Alabama* in which the court concluded that:

> 'the very existence of some broadly written statutes may have such a deterrent effect on free expression that they should be subject to challenge even by a party whose own conduct may be unprotected. . . . This exception from the general rule is predicated on 'a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression.'

Vincent, 466 U.S. at 798-799 (citations omitted). Accordingly, where a law creates a "realistic danger [that it] will significantly compromise recognized first amendment protections of parties not before the Court," it is vulnerable to facial challenge. *Id.* at 801.

Under article 1, section 5 of Washington's Constitution, a regulation of expression need not encroach upon a substantial amount of protected expression to be held facially invalid; a law is overbroad and thereby facially invalid simply if it restricts protected conduct that need not be restricted to achieve its purpose. *City of Seattle v. McConahy,* 86 Wn.App. 557, 569, 937

> Section 9 (a) Unless required by law, no person shall be permitted to do any of the following in or about any part of the Easement Areas without the consent of both of the parties:
>
> (i)(A) With respect to the Acessways, parade, rally, patrol, picket, demonstrate or engage in any conduct that might tend to interfere with or impede the use of the Accessways or Monorail Station Platform by persons entitled to use the same, create a disturbance, attract attention or harass, disparage or be detrimental to the interests of any of the retail or business establishments within the Improvements . . .

(CP 652-653)

P.2d 1133 (1997); *see O'Day v. King County*, 109 Wn.2d at 803-804. Accordingly a regulation that is overbroad under the First Amendment is necessarily overbroad under article 1, section 5.

The easement agreement is overbroad under the First Amendment and therefore article 1, section 5, because: 1) it is vague; 2) it is a prior restraint; 3) it regulates viewpoints, and 4) it authorizes the exclusion of signs on sticks.

1. The Easement Agreement Unconstitutionally Delegates Broad Discretion to Forum Managers

The easement agreement authorizes Rouse Defendants' guards and managers, and City officials, to exercise broad discretion in barring expressive conduct from the easement.

Making "the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official . . . is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms." *Shuttlesworth v. Birmingham,* 394 U.S. 147, 150-151, 89 S. Ct. 935, 22 L.Ed.2d 162 (1969). Accordingly, regulations of expression and of expressive conduct which lack "narrow, objective, definite standards" to constrain the judgment of government officials are unconstitutionally vague. *See id.* at 150-154. This is the case both in public fora and in non-public fora. *See Lewis v. Wilson,* 89 F. Supp.2d 1082, 1088-1091 (E.D. Mo. 2000).

Courts have consistently enjoined enforcement of laws regulating expressive conduct that lack such narrow, objective standards. For example, in *Beckerman v. City of Tupelo,* 664 F.2d 502, 508-511 (5th Cir. 1981) the Fifth Circuit Court of Appeals held each of the following conditions authorizing denial of a parade permit to be unconstitutionally vague: 1) the expectation that the parade would "provoke disorderly conduct," 2) that it would "probably cause injury to persons or property," or 3) that it would "create a disturbance." Similarly, a law authorizing denial of permission to solicit or distribute literature was held unconstitutionally vague because the denial was authorized where officials found "*good reason* to believe that the granting of the permit will result in a direct and immediate danger or hazard to the public security, health, safety or welfare." *Fernandes v. Limmer,* 663 F.2d 619, 631 (5th Cir. 1981).

The U.S. District Court for Eastern Wisconsin held an ordinance authorizing denial of access to parks for political protest unconstitutionally vague, both because the denial could be predicated on a determination the space requested "is not appropriate for the activity to be conducted," and because access was conditioned on the determination that "the activity will not unreasonably interfere with general public enjoyment or use and enjoyment by other permittees." *Milwaukee v. Milwaukee County Park Com'n,* 477 F. Supp. 1210, 1217-1218 (E.D. Wis. 1979).

In this case, the easement agreement is riven with precisely such unconstitutional vagaries. Thus, it authorizes the exclusion of protected speech and expressive conduct from the easement, if managers or guards believe it would "attract attention," "create a disturbance," "harass, disparage or be detrimental to the interests of any of retail or business establishments in Westlake Center," or if the conduct "*might tend* to interfere" with use of the easement or monorail platform. (CP 652-653) Each of these provisions, therefore, is unenforceable.

2. The Easement Agreement Regulates Viewpoints

The easement is facially invalid, because it excludes expression critical of or inconsistent with the interests of businesses in Westlake Center.

A law regulating the viewpoints permitted in a public forum or in a nonpublic forum is facially invalid. *See Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 788, 806, 105 S.Ct. 3439, 87 L.Ed.2d 567 (1985).

As noted, the easement agreement expressly prohibits conduct that "disparage[s] or [is] detrimental to the interests of any of the retail or business establishments within the improvements." (CP 652-653) This provision thereby regulates viewpoints, and therefore is facially invalid.[16]

[16] Such a restriction likely excludes an enormous range of opinion, since certain viewpoints on tax policy, unionization, trade, environmental regulation, products liability

3. The Easement Agreement Is Unconstitutional, Because It Requires Permission to Engage in Protected Expression, and Because It Authorizes Defendants to "Ban" Persons From the Easement

The easement agreement authorizes Rouse Defendants and city officials to license speech and expressive activity and to entirely exclude persons from the easement.

Both the Washington Constitution's prohibition on prior restraints, and the less demanding First Amendment limits on prior restraints prohibit government from banning persons from a public forum. *See Yeakle v. City of Portland,* 322 F. Supp. 2nd 1119, 1127-1131 (D. Or. 2004); *JJR Inc. v. City of Seattle*, 126 Wn.2d 1, 6-7, 891 P.2d 720 (1995); *see also Grossman v. City of Portland,* 33 F.3d 1200, 1204 (9th Cir. 1994). Yet, the easement agreement authorizes Defendants to ban persons from the easement entirely. (CP 652-653, 742, 747-748) *See Forsyth County v. Nationalist Movement*, 505 U.S. 123, 131-133, 112 S.Ct. 2395, 120 L.Ed.2d 101 (1992) (constitutionality of regulation considered in light of its implementation and interpretation by regulator).

In addition, the easement agreement requires advanced permission -- issuance of which is entirely discretionary -- from Defendants for a broad range of protected expression, including leafleting and carrying a sign on a

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law, race, gender and sexual orientation discrimination, zoning – even war and peace – all can disparage and/or work to the detriment of certain commercial or business interests.

stick. (CP 652-653) For this reason also, the easement agreement is an unconstitutional prior restraint. *See Thomas v. Chicago Park Dist.*, 534 U.S. 316, 322-323, 122 S.Ct. 775, 151 L.Ed.2d 783 (2002); *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 770-771, 108 S.Ct. 2138, 100 L.Ed.2d 771 (1988).

4. The Prohibition of Signs on Sticks Is Not Narrowly Tailored to Protect Public Safety; Assuming Arguendo the Easement Is a Non-Public Forum, the Exclusion of Signs on Sticks Is Unreasonable

As explained above, Defendants' oral policy implemented on February 15, 2003, that persons with signs on sticks lower the signs, was unconstitutional. *Supra*, pp. 26-28. For these same reasons, the easement agreement's exclusion of signs on sticks (pickets), which Defendants admit is their general policy, is unconstitutional. (CP 652-653, 696)

The exclusion of pickets also is unconstitutional, because it is unreasonably under-inclusive, regardless of whether the easement is a public forum or a non-public forum. *See Jews for Jesus*, 984 F.2d at 1325 (allowance of numerous other nontransit activities in the subway station, including the selling of newspapers, food and drink, discredited government's safety justification for prohibiting distribution of leaflets in subway station); *Jacobsen*, 128 F.3d at 662-663 (exclusion of commercial news racks from airports on grounds they could be used to conceal bombs insufficient to justify rule, since waste containers and planters, in which a

bomb also could be concealed were not excluded); *Weinberg*, 310 F.3d at 1039 (allowing newspaper sellers, solicitors, street performers and leafletters discredited contention that exclusion of book sellers advanced the public interest in avoiding congestion near public stadium)

Here, no other potentially hazardous long object is excluded from Westlake Center -- brooms, walking sticks and long umbrellas are actually sold inside Westlake Center. (CP 664-666) Manifestly, members of the public entering Westlake Center cannot be protected from inadvertent injury from long objects, if signs on sticks are the only long objects excluded. Defendants' disregard for the plethora of other similar potential safety hazards further discredits the professed justification for the exclusion of signs on sticks. *See Jacobsen*, 128 F.3d at 662-663.

5. The Trial Court Overlooked the Apposite Authority in Holding the Easement Agreement Was Not Facially Overbroad

The trial court held that the easement agreement was not facially overbroad, because there were some cases in which the restrictions in the agreement would advance public safety, and therefore its overbreadth was not "substantial." (CP 1162-1163)

There are several defects in the court's holding. First, it disregards the above-mention controlling authority to the contrary. Second, it relies on the inapposite *City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789

case, which concerned a regulation that did not, as does the easement agreement, regulate viewpoints, grant broad discretion to forum regulators, constitute a prior restraint, nor did it regulate, as does the easement agreement, a public forum.

Third, it disregards the fact that overbreadth challenges under article 1, section 5 do not require substantial overbreadth. While the trial court cites a passage of the *Mighty Movers*, 152 Wn.2d 383 decision describing application of the substantial overbreadth standard to a First Amendment analysis, at no point did the *Mighty Movers* court assert that it was abandoning Washington's standard for overbreadth challenges under article 1, section 5 in favor of the less speech protective First Amendment standard.

For each of these reasons, the trial court's finding Plaintiffs lacked standing to challenge the easement agreement on its face was error.

G. PLAINTIFFS ARE ENTITLED TO DECLARATORY AND INJUNCTIVE RELIEF

Plaintiffs' conduct was constrained by Defendants' application of the authority granted by the easement agreement. (CP 140-156, 655)

Plaintiffs are entitled to declaratory and injunctive relief, where their conduct, whether or not it is protected, is limited by a regulation that is facially invalid under the First Amendment or under article 1, section 5. *See Clallam County Deputy Sheriff's Guild v. Board of Clallam County*

Com'rs, 92 Wn.2d 844, 848, 601 P.2d 943 (1979); *JJR Inc.*, 126 Wn.2d at 3-4, 10; *Virginia v. American Broadcasting Ass'n, Inc.*, 484 U.S. 383, 392-393, 108 S.Ct. 636, 98 L.Ed.2d 782 (1988).

In reviewing the denial of declaratory relief, the trial court's analysis of law is reviewed *de novo. In re Estate of Gardner,* 103 Wn.App. 557, 561, 13 P.3d 655 (2000).

Denial of a motion for injunctive relief is reviewed for abuse of discretion. *Kucera v. Department of Transp*., 140 Wn.2d 200, 209, 995 P.2d 63 (2000). However, "[a] trial court necessarily abuses its discretion if the decision is based upon untenable grounds, or the decision is manifestly unreasonable or arbitrary." *Id*.

Since each of the above-described conditions in the easement agreement are facially invalid, and those conditions were used, and in the future could be used by Defendants to obstruct Plaintiffs' conduct, Plaintiffs are entitled to a judgment declaring those conditions to be unconstitutional and enjoining their enforcement.

Assuming *arguendo* the easement agreement is unconstitutional only as applied to Plaintiffs, they are entitled to a declaratory judgment asserting that persons carrying signs on pickets have a constitutional right to hold the signs aloft, and to an injunction barring Defendants from ordering such signs be lowered.

H. ATTORNEY FEES AND COSTS ARE WARRANTED BOTH UNDER THE "COMMON FUND" RULE AND UNDER THE "PROTECTION OF CONSTITUTIONAL PRINCIPLES" RULE

Pursuant to RAP 18.1, appellants request an award of attorneys fees and costs for this appeal, because they are recovering public property that the City arbitrarily had surrendered to a private party.

Under the common fund doctrine, a prevailing party is entitled to an award of attorney fees where a party's litigation preserves a common fund for the benefit of a substantial class. *Miotke v. City of Spokane*, 101 Wn.2d 307, 339, 678 P.2d 803 (1984). Here, the Rouse Defendants were using the public's easement as their private property. In so doing, they were depriving the millions of annual easement users of their rights to free expression.

In vindicating rights attendant to public ownership of the easement, Plaintiffs therefore are recovering the value of that right for an enormous number of persons. The monetary value of that right can be roughly approximated, *inter alia*, by the market value of the easement – which undoubtedly is substantial -- since the cost of lawfully denying the public freedom of expression therein would be the cost of purchasing the easement from the City. *See Unitarian*, 308 F.3d at 1132 ("[i]f [the City] wants an easement, the City must permit speech on the easement.

Otherwise, it must relinquish the easement so the parcel becomes entirely private property").

Inasmuch as Defendant City of Seattle not only has refused to vindicate the public's rights in the easement, but actually has litigated on the side of the Rouse Defendants to perpetuate the denial of those rights, Plaintiffs also are entitled to attorney fees under the rule of protection of constitutional principles. *See Miotke*, 101 Wn.2d at 340.

V. CONCLUSION

For the reasons stated above, the order granting summary judgment to the Rouse Defendants and to Defendant City must be reversed. In addition, the order denying Plaintiffs motion for summary judgment against all Defendants also must be reversed.

The trial court also should be ordered to enter declaratory and injunctive relief concerning the facially invalid elements of the easement agreement, as well as Defendants' occasional policy of requiring the lowering of signs on sticks. Finally, this Court should order that Plaintiffs be awarded reasonable attorney fees and costs for litigation of this appeal.

DATED this _____ day of August, 2005.

_____
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Attorney for Plaintiffs and
Appellants