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E-Filed on 1/29/02

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

CASSANDRA BROWN, and AMY
COURTNEY,

Plaintiffs,

v.

CALIFORNIA DEPARTMENT OF
TRANSPORTATION, et al.,

Defendants.

No. C-01-21200 RMW

ORDER GRANTING IN PART PLAINTIFFS'
MOTION FOR PRELIMINARY INJUNCTION

[Re Docket No. 6]

Plaintiffs' motion for preliminary injunction was heard on January 18, 2002. Defendants oppose the motion. Having considered the papers submitted by the parties, and for the reasons discussed below, plaintiffs' motion is granted in part.

FACTS

On September 11, 2001, two acts of terrorism occurred in the United States, unparalleled in our nation's history, when several hijacked commercial airplanes were crashed into the World Trade Center towers in New York City and the Pentagon, near Washington, D.C. The terrorists' plans involving a fourth hijacked plane were thwarted by the heroic actions of passengers who prevented the hijackers from carrying out their intended atrocity.

1 The aftermath of September 11 saw an upwelling of public displays of patriotism, nationalism, and
2 sympathy for the victims of the terrorists' acts. Seemingly overnight, flags sprouted from houses, stores and
3 office buildings, and appeared prominently displayed on windows, bumper stickers, and in some cases,
4 freeway overpasses. Banners also appeared, particularly on highway overpasses in the Bay Area,
5 expressing messages of unity and patriotism as well as sympathy and support for the victims of the terrorist
6 acts.

7 The present dispute arises out plaintiffs' attempt to hang banners on two highway overpasses, in one
8 case near an American flag which had already been affixed to the overpass by others and in another case
9 on an otherwise banner-less overpass. Unlike other banners which had been hung and which contained
10 messages in support of the nation and the actions it has taken in response to the September 11 attacks,
11 plaintiffs' banners bore messages of protest.

12 1. The November 27 Banner

13 Specifically, on November 27, 2001, plaintiffs Amy Courtney and Cassandra Brown hung a banner
14 on the chain link fence on the Granite Creek Road overpass over State Highway 17. Courtney Decl. ¶2.
15 The 7' by 5' white banner contained the message "At What Cost?" and was placed next to an American
16 flag of similar size. Id. at ¶3. Another banner was already hanging on the opposite side of the overpass,
17 bearing the message "SC [heart] NY."

18 Shortly thereafter, in response to a citizen complaint, Officer Miskewycz of the Scotts Valley
19 Police Department removed plaintiffs' banner. Officer Miskewycz did not, however, remove either the
20 flag or the other banner. Officer Miskewycz testified that he removed plaintiffs' banner because the banner
21 posed a safety threat: the banner was hung in a precarious manner, loosely hung on the outside of the fence,
22 positioned over the lanes of traffic, and attached to the fence by packing string. Miskewycz Decl. ¶¶8,
23 10-11. Officer Miskewycz testified further that he did not remove the banner because of the content of
24 the message displayed and was unaware of the banner's message until he returned to his vehicle and placed
25 the banner in the trunk of his car. Id. at ¶12. Officer Miskewycz did not remove the flag because the flag
26 appeared to be securely fastened with plastic ties, nor did he remove the other banner which was fastened
27 on the inside of the overpass fence. Id. ¶¶13-14. Neither the flag nor the other banner appeared to Officer
28 Miskewycz to pose a safety hazard. Id.

1 The evidence is in dispute as to whether or not the flag and the banners were securely fastened to
2 the chain link fence. Courtney testified that her banner was securely fastened to the fence and that "in order
3 to be careful not to endanger passing vehicles, I tied my banner tightly to the fence with three ties at each
4 side of the 4 sides of the banner." Courtney Decl. ¶4. Plaintiffs also contend that the flag was loosely
5 fastened, with the ties pulling away from the fence. Id. Officer Miskewycz, however, testified that the flag
6 was tightly secured to the fence with plastic zip ties and did not pose a safety threat. Miskewycz Decl.
7 ¶13. The photograph of the flag, attached as Exhibit B to the Courtney Declaration, appears to show that
8 the flag is securely fastened with plastic ties. Plaintiffs do not dispute that their banner was hung on the
9 outside of the fence, over traffic lanes, or that the other banner was hung on the inside of the fence.

10 After plaintiffs' banner was removed, plaintiffs contacted both the Scotts Valley Police Department
11 and CalTrans. The Scotts Valley Police Department informed plaintiffs that the officer removed their
12 banner in response to a citizen complaint. Courtney Decl. ¶7. Plaintiffs were also informed that CalTrans'
13 policy was to remove all non-permitted banners from highway overpasses, although securely fastened flags
14 would not be removed. Id. CalTrans similarly informed plaintiffs that in the aftermath of September 11,
15 CalTrans' policy was to allow American flags to remain on overpasses if securely fastened, but to take
16 down all written materials. Id. at ¶8.

17 2. December 4, 2001 Banners

18 On December 4, 2001, out of a concern that alternative views regarding national events were not
19 being allowed to be expressed, plaintiff Courtney again took action and hung two additional banners. Both
20 banners were fastened on the inside portion of the chain link fence of an overpass in order to prevent
21 danger to vehicles passing below. The first banner stated "Are you Buying this War?" and was hung on the
22 Mt. Hermon Road overpass over Highway 17. The second banner contained the message "At What
23 Cost?" and was again hung on the Granite Creek overpass, next to the American flag. Courtney Decl. ¶10.

24 Both banners were removed, although the flag was allowed to remain. Plaintiffs suggest that
25 CalTrans removed the banners, testifying that the local news media had reported that CalTrans personnel
26 had been observed in the area. Plaintiffs offer no direct evidence regarding the identity of the person who
27 removed the banners, and CalTrans denies removing them. CalTrans admits, however, that it had
28 dispatched a crew to remove the banners after obtaining information that the banners had been hung, but it

1 contends that the banners were gone by the time CalTrans personnel arrived. Lazarotti Decl. ¶¶6-7. If the
2 banners had been present when the crew arrived, the banners would have been removed by CalTrans,
3 along with the "SC [heart] NY" banner. Id. ¶7. The flag was not removed.

4 3. CalTrans' Policies

5 CalTrans is the entity responsible for maintaining the rights-of-way along California highways,
6 including Highway 17 in Scotts Valley. The Maintenance Division bears the responsibility for removing all
7 unauthorized encroachments in, under, and over, the State right-of-way. CalTrans' policy, with one
8 exception, is to remove all banners for which no permits have been obtained, regardless of content. The
9 one exception to CalTrans' policy is that American flags are allowed to be displayed within the State right-
10 of-way, as long as the flag is properly secured and along a sidewalk in a city. The Granite Creek overpass
11 is such a location. Lazarotti Decl. ¶5.

12 Loren Lazarotti is the CalTrans employee responsible for the general maintenance along the State's
13 right-of-way within Santa Cruz County. CalTrans' Highway Maintenance Manual, which is provided to
14 employees to guide them in their duties, contains a provision which states that it is unlawful for any "person
15 to place or display in, under, or over any State highway any kind of advertising sign or device." Lazarotti
16 Decl. ¶4. When Lazarotti learns of possible illegal encroachments in the right-of-way, such as unauthorized
17 signs or banners, he dispatches a crew to remove the encroachment. Lazarotti Decl. ¶4. Lazarotti does
18 not dispatch crews to remove American flags affixed to overpasses, however, because it is his
19 understanding that state law permits American flags to be affixed to overpasses such as Granite Creek
20 Road over State Highway 17. Id. ¶6.

21 CalTrans has offered the testimony of Nevin Sams, the Traffic Safety Engineer for the CalTrans
22 district which includes Santa Cruz County. Mr. Sams' declaration attests to the safety concerns presented
23 by allowing members of the public to hang banners from overpasses:

24 First and foremost, allowing members of the public to simply fasten and affix banners or
25 signs over the public roadway without any standards of sign attachment, or controls as to
26 size, location, illumination, and material requirements poses a variety of significant safety
27 risks. Foremost among these risks is that such signs or banners could easily become
28 dislodged by the elements of wind and rain or by acts of vandalism, causing such banners
or signs to plummet to the highway below. This could seriously jeopardize life and
property, especially along the State highway system where posted speed limits in limited
access State highways and freeways range from 50 to 70 mph. Moreover, any person
placing such signs and using tools to do so could endanger vehicles in the roadway below

1 the result of tools falling onto the highway.

2 Sams Decl. ¶6. In addition, Mr. Sams testified that it is important to prevent saturation of messages at any
3 one location, and that allowing numerous banners of all sorts on overpasses in the direct view of drivers in
4 and of itself poses a potentially significant distraction to motorists on the highway below. Id. at ¶¶7-8.

5 Accordingly, the official policy of CalTrans is not to allow any banners, signs, or advertising devices
6 to be affixed to highway overpasses. The one exception is American flags, which CalTrans has declined to
7 remove from the overpasses on the basis that the persons responsible for enforcing CalTrans' policies
8 believe that state law authorizes the display of American flags on areas adjacent to public sidewalks within
9 city limits. CalTrans conceded at the hearing, however, that if the flag was displayed upside down, or with
10 an X or other message affixed to it, CalTrans would probably remove the flag.

11 Encroachment permits are required for any person who proposes to conduct any activity within,
12 under, or over the State right-of-way. Senet Decl. ¶3. CalTrans' Encroachment Permits Manual provides
13 that "Caltrans issues encroachment permits: for the care and protection of the state highway system, to
14 ensure the safety of both the highway users and the permittee, to ensure that the proposed encroachment is
15 compatible with the primary uses of the state highway system, to protect the state's investment in the
16 highway facility, and to document temporary uses of the highway Right of Way for special events, filming,
17 etc." Senet Decl. ¶8.

18 Signs or banners proposed to be placed on the State right-of-way require an encroachment permit
19 from CalTrans prior to the placing of the sign. Senet Decl. ¶9. The only encroachment permits which
20 CalTrans has issued for banners "are those issued to a local public agency or non-profit organization
21 sponsoring a special event. These special event banners are temporary in duration, made of cloth, affixed
22 to a structure provided by the permittee, and identify the specific duration location and time of the event and
23 directions to the event, all designed to provide directional assistance to the motoring public." Senet Decl.
24 ¶10. CalTrans' policy, however, does not allow such special event banners to be affixed to any permanent
25 highway structure such as an overpass. Id. Other than the special event banners and CalTrans-constructed
26 directional warning signs, no banners or signs of any kind are permitted within the State right-of-way. Id.
27 ¶11.

28 Nevertheless, at least since September 11, CalTrans has not required persons seeking to display an

1 American flag on an overpass to first apply for and obtain a permit. No evidence has been presented
2 regarding CalTrans' pre-September 11 practices, but in the aftermath of September 11, CalTrans' practice
3 has been to grant a permit exemption to anyone wishing to display an American Flag on an overpass.

4 In addition to monitoring the right-of-way for encroachments, CalTrans also is responsible for
5 enforcing the state's outdoor advertising laws, including the Outdoor Advertising Act, California Business
6 and Professions Code §5200 et seq. CalTrans' Outdoor Advertising Branch has the responsibility for the
7 enforcement and permitting of outdoor advertising signs along the highways and freeways of the state.
8 Holtom Decl. ¶2. The Outdoor Advertising Act and the regulations promulgated thereunder require
9 permits for outdoor advertising if the display is within 660 feet of the edge of the State right-of-way and is
10 visible to motorists on the main traveled way of the highway within an incorporated area. There is no
11 distance limitation in unincorporated areas, however, and a permit is required for displays which are visible
12 from the highway. Holtom Decl. ¶3.

13 In processing applications for permits, CalTrans does not review the substance of the message or
14 the content of the display copy. *Id.* ¶4. In reviewing the applications, CalTrans determines whether the
15 proposed sign complies with applicable rules and regulations regarding size, dimension, and location, which
16 are designed to minimize both visual clutter and unsafe distractions to the motoring public. *Id.* ¶4. If the
17 proposed display meets the requirements of the rules and regulations, the permit will issue regardless of the
18 content of the message, and the permittee is allowed to change the content of the display without CalTrans'
19 consent after the permit issues. *Id.*

20 It is undisputed that plaintiffs did not seek permits for their banners, either a temporary
21 encroachment from CalTrans' Division of Right of Way or a permit from the Outdoor Advertising
22 Branches.

23 DISCUSSION

24 In order to obtain a preliminary injunction, plaintiffs must establish either a combination of probable
25 success on the merits and the possibility of irreparable injury or that serious questions are raised and that
26 the balance of hardships tips sharply in plaintiffs' favor. William Inglis & Sons Baking Co. v. ITT
27 Continental Baking Co., 526 F.2d 86, 88 (9th Cir. 1975); Children of the Rosary v. City of Phoenix, 154
28 F.3d 972, 975 (9th Cir. 1998). To prevail on their claim under 42 U.S.C. §1983, plaintiffs must establish

1 that the defendants acted under color of state law and deprived them of a right secured by the Constitution
2 or laws of the United States. Children of the Rosary, 154 F.3d at 976. In the present action, plaintiffs
3 contend that their free speech rights under the First Amendment have been violated by the defendants'
4 removal of plaintiffs' protest banners from highway overpasses while permitting the display of American
5 flags and supportive banners.

6 There are two sets of defendants who have engaged in different challenged conduct. The Scotts
7 Valley defendants (the Scotts Valley Police Department and Chief Tom Bush) are allegedly liable for the
8 actions of Officer Miskewycz who removed plaintiffs' first banner from the Granite Creek overpass. The
9 CalTrans defendants (the California Department of Transportation and its Director, Jeff Morales) are
10 alleged to be liable for the acts of CalTrans in allegedly removing banners while allowing the display of
11 American flags on overpasses. Each group of defendants will be addressed in turn.

12 1. The CalTrans Defendants

13 Determining whether the defendants' practices violate the First Amendment requires the court to
14 conduct a three-step analysis. The court must first classify the overpass fences under the Supreme Court's
15 "forum approach" for assessing the validity of restrictions on the use of government property. After the type
16 of forum is determined, the court must then ascertain the relevant level of scrutiny for the forum. Finally, the
17 court must determine whether the government's conduct withstands the scrutiny. Children of the Rosary,
18 154 F.3d at 976.

19 The court is to employ a forum analysis to evaluate the nature of the property and the
20 corresponding permissible government limitations on expressive activity. DiLoreto v. Downey Unified Sch.
21 Dist. Bd. of Educ., 196 F.3d 958, 964 (9th Cir. 1999), cert. denied 529 U.S. 1067 (2000). Forum
22 analysis divides government property into three categories: public fora, designated public fora, and
23 nonpublic fora. Id., quoting Children of the Rosary, 154 F.3d at 976.

24 A traditional public forum, such as a public park or sidewalk, is a place "that has
25 traditionally been available for public expression." Regulation of speech in a traditional
26 public forum is permissible "only if . . . narrowly drawn to achieve a compelling state
27 interest." When the government intentionally opens a nontraditional forum for public
28 discourse it creates a designated public forum. Restrictions on expressive activity in
designated public fora are subject to the same limitations that govern a traditional public
forum.

All remaining property is classified as nonpublic fora. The government may limit expressive

1 activity in nonpublic fora if the limitation is reasonable and not based on the speaker's
2 viewpoint. The Supreme Court recently has used the term "limited public forum" to refer to
3 a type of nonpublic forum that the government has intentionally opened to certain groups or
to certain topics. In a limited public forum, restrictions that are viewpoint neutral and
reasonable in light of the purpose served by the forum are permissible.

4 DiLoreto, 196 F.3d at 964-65 (citations and footnote omitted). The relevant forum is defined by the
5 access sought by the speaker. Id., 196 F.3d at 965; Cornelius v. NAACP Legal Defense & Educ. Fund.,
6 473 U.S. 788, 801, 105 S. Ct. 3439 (1985).

7 In this case, the forum is the fence along highway overpasses. There is no evidence that the
8 overpass fences have traditionally been used for public expression and plaintiffs concede that the overpass
9 fences are not traditional public fora.

10 The overpass fences are also not designated public fora because they have not been opened by the
11 government for public discourse. Significantly, "[t]he government does not create a public forum by
12 inaction or by permitting a limited discourse, but only by intentionally opening a nontraditional forum for
13 public discourse." Cornelius, 473 U.S. at 802. In determining whether the government intended to create
14 a designated public forum, the court should consider the nature of the property and its compatibility with
15 expressive activity, as well as the policy and practices of the government. DiLoreto 196 F.3d at 965. The
16 nature of the property is an overpass over a freeway, under which traffic flows. Fences on highway
17 overpasses may be compatible with expressive activity and could be used for the posting of signs for
18 motorists. At the same time, however, fences on overpasses are also incompatible with expressive activity,
19 for each message displayed serves inevitably to distract drivers' attention from the road to some degree.
20 Sams Decl. ¶¶7-8. Turning to the practices and policies of the government, the evidence is uncontradicted
21 that CalTrans' official policy is to prohibit all signs, banners or other devices from being affixed to the fences
22 on overpasses (with the exception of American flags, discussed below). The government's practice is to
23 remove all such banners (other than American flags) which are placed on overpasses without permits. See
24 Cal. Streets and Highways Code §670(a)(3) (authorizes the summary removal, as a public nuisance, of any
25 advertising sign or device placed or displayed in the right-of-way without a permit). Thus, the government
26 has not generally opened freeway overpasses to public discourse, and accordingly, the overpasses are not
27 "designated public fora."

28 The question remains whether the government's tolerating the posting of American flags on freeway

1 overpasses has opened the forum to public discourse such that the overpasses have become "designated
2 public fora." The court finds that it has not. Even if it can be argued that the government has opened the
3 forum for some expressive activity, specifically the posting of American flags, it has not so opened the
4 overpass fences to expressive activity so as to create a designated public forum. See Children of the
5 Rosary, 154 F.3d at 976 (holding that the City's accepting of commercial advertising on the exterior panels
6 of its transit buses did not transform those panels into a designated public forum); DiLoreto, 196 F.3d at
7 966-67 (school did not transform its athletic field fence into a designated public forum by accepting limited
8 advertising). Just like the exterior bus panels in Children of the Rosary and the athletic fence in DiLoreto,
9 the freeway overpass fences have not been transformed into designated public fora by the government's
10 tolerance of flag displays.

11 Accordingly, the freeway overpasses fall within the third and final category, nonpublic fora, and the
12 government's restrictions on expressive activity will be upheld as long as the restrictions are reasonable in
13 light of the purpose served by the forum and are viewpoint neutral. DiLoreto, 196 F.3d at 965,
14 International Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 679, 112 S. Ct. 2701 (1992).
15 The reasonableness analysis focuses on whether the limitation is consistent with preserving property for the
16 purposes to which it is dedicated. DiLoreto, 196 F.3d at 967. But even if the government's policy is
17 reasonable in light of the purposes served by the forum, the policy may still violate the First Amendment if it
18 discriminates on the basis of viewpoint, rather than content. Cornelius, 473 U.S. at 811, DiLoreto, 196
19 F.3d at 969. "The distinction 'is not a precise one.' Permissible content-based restrictions exclude speech
20 based on topic, such as politics or religion, regardless of the particular stand the speaker takes on the topic.
21 In contrast, impermissible viewpoint discrimination is a form of content discrimination in which the
22 government 'targets not the subject matter, but the particular views taken by speakers on a subject.'"
23 DiLoreto, 196 F.3d at 969, quoting Rosenberger v. Rector & Visitors of the Univ. of VA, 515 U.S. 819,
24 829, 115 S. Ct. 2510 (1995) (other citations omitted). In the present case, CalTrans' practice of tolerating
25 American flags while removing all other signs, banners and devices, does not withstand scrutiny under either
26 the reasonableness or viewpoint-neutrality prongs.

27 The first question is whether the government's practice to tolerate the display of American flags
28 while prohibiting the display of any other banner or device is reasonable. CalTrans offers several

1 justifications for its refusal to permit signs and banners on the overpasses. Any such signs or banners
2 displayed over traffic may pose a safety hazard if not securely fastened. Persons using tools to hang the
3 banners may drop the tools, again posing a safety hazard to motorists below. Finally, the signs themselves
4 may pose a hazard because they may be distracting to motorists. Each of these justifications is reasonable.
5 Each of the justifications, however, applies equally well to American flags, as well as to other flags, banners
6 and signs.

7 CalTrans offers only one justification for treating American flags differently from all other displays:
8 the belief that state law authorizes the display of American flags along public sidewalks within cities,
9 including pedestrian walkways on highway overpasses. CalTrans relies on Streets and Highways Code
10 §670.5 which provides:

11 The Flag of the United States of America and the Flag of the State of California may be
12 displayed on a sidewalk located in or abutting on a state highway situated within a city, if
13 the type of flag-holder and the method of its installation and maintenance are not in violation
14 of the department's rules.

15 Cal. Streets and Highways Code §670.5. Thus, the statute authorizes the display of American flags on a
16 sidewalk, provided that the type of flag holder and the method of installation and maintenance are not in
17 violation of the department's rules.

18 As an initial matter, it does not appear that the statute applies. Flags displayed on fences on
19 highway overpasses are not displayed "on a sidewalk" even if the fence is adjacent to a pedestrian walkway
20 on the overpass. Also, the final phrase of the statute demonstrates that flags may be displayed, but only if
21 such display does not violate CalTrans' rules regarding the type of flag-holder and the method of installation
22 and maintenance. CalTrans ignores this final phrase of the statute.

23 Moreover, CalTrans has not come forward with any evidence that it has adopted any rules
24 regarding the types of flag-holders and methods of installation and maintenance for flags displayed on a
25 sidewalk in, or abutting on, a state highway. The only evidence in the record establishes that CalTrans does
26 not allow anything to be displayed on the fences on overpasses, regardless of whether or not the overpass
27 includes a sidewalk and is located within a city. Lazarotti Decl. ¶4; Senet Decl. ¶¶10-11 (other than
28 CalTrans-constructed directional and warning signs and special event banners authorized by permit within
the right-of-way but not on overpasses, "no banners or signs of any kind whatsoever are permitted" within

1 the right-of-way). Accordingly, CalTrans' practice of tolerating American flags does not withstand the
2 reasonableness assessment as there is no meaningful way to distinguish the safety and other concerns with
3 banners from those that exist with flags.

4 In addition, CalTrans' "American flags only" practice also fails the viewpoint-neutrality requirement.
5 The American flag is a potent symbol of our nation and our national unity. Texas v. Johnson, 491 U.S.
6 397, 405 , 109 S. Ct. 2533 (1989). "Pregnant with expressive content, the flag as readily signifies this
7 Nation as does the combination of letters found in 'America.'" Id. As eloquently described by Justice
8 Stevens:

9 [The American flag] is more than a proud symbol of the courage, the determination, and the
10 gifts of nature that transformed 13 fledgling Colonies into a world power. It is a symbol of
11 freedom, of equal opportunity, of religious tolerance, and of good will for other peoples
12 who share our aspirations. The symbol carries its message to dissidents both at home and
13 abroad who may have no interest at all in our national unity or survival. [¶] The value of the
14 flag as a symbol cannot be measured.

15 Id. at 437 (Stevens, J., dissenting). So too now, in the aftermath of September 11, the American flag is a
16 poignant and powerful symbol: a symbol of national unity in the face of attack and of shared mourning and
17 national grief for those lost in the attacks and of sympathy for the victims' families.

18 In view of the outpouring of patriotism and the spontaneous appearance of American flags,
19 CalTrans' reluctance to remove such a potent symbol from highway overpasses is understandable. Yet
20 ironically, it is the very potency of the symbol that causes CalTrans' practice to run afoul of the Constitution.
21 Allowing the display of the American flag is acquiescing in expressive conduct, but acquiescing in
22 expressive conduct of only one particular viewpoint. CalTrans conceded as much at the hearing in admitting
23 that it would probably remove any flags displayed upside down, or with messages affixed to them. Thus,
24 the government's policy of exempting American flags from the permit requirement while prohibiting all other
25 banners, signs or devices on overpasses, is not viewpoint neutral.

26 CalTrans raises as a defense that plaintiffs have failed to come forward with evidence that it was
27 CalTrans who removed plaintiffs' banners. The evidentiary defect does not preclude an injunction,
28 however. In view of CalTrans' admissions that it does not allow banners to be displayed on overpasses,
that it had dispatched a crew to remove the banners, and that it removes unauthorized banners but allows
American flags to remain displayed, the issues presented are ripe. Plaintiffs have established a probable

1 success on the merits and the possibility of irreparable injury. Accordingly, a preliminary injunction against
2 the CalTrans defendants' continued implementation of its "American flags only" policy is appropriate.

3 Similarly, it is no defense that plaintiffs have failed to seek permits for their banners. The
4 Declaration of Steven Senet, a CalTrans District Permit Engineer, strongly suggests that no permit would
5 have issued. Mr. Senet testified that other than special events banners and CalTrans-constructed
6 directional and warning signs, "no banners or signs of any kind whatsoever are permitted in the State Right
7 of Way." Senet Decl. ¶11. Moreover, with regard to special event banners, even with permits, CalTrans
8 does not permit the banners to be affixed to overpasses. *Id.* at ¶10. In any event, the permit issue is
9 unavailing. If CalTrans allows American flags to be displayed without permits, it cannot be allowed to
10 impose a permit requirement on other expressive conduct.

11 2. The Scotts Valley Defendants

12 Turning to the Scotts Valley defendants, however, an injunction is not appropriate. The evidence is
13 uncontroverted that a Scotts Valley Police Officer removed plaintiffs' initial protest banner while allowing an
14 American flag and a supportive banner to remain on the Granite Creek overpass. Plaintiffs, however, have
15 failed to satisfy their burden to obtain an injunction.

16 Officer Miskewycz testified that he removed plaintiffs' banner not because of the content of the
17 message displayed, but because of the public safety hazard the sign posed. There is some conflict in the
18 evidence as to how securely the banner was affixed to the fence and it is possible that the banner, while
19 initially secure, had become more loosely affixed by the time the officer arrived. The evidence is
20 uncontradicted that Officer Miskewycz removed the banner because it was billowing in the wind,
21 positioned over lanes of traffic, and he believed it to pose a safety hazard if it fell onto the passing traffic
22 below. The evidence is conflicting regarding how securely fastened the flag was, but there is no evidence to
23 contradict Officer Miskewycz's testimony that he did not remove the flag because he perceived the flag not
24 to pose a hazard because of the manner in which it was affixed and because the flag was not hanging above
25 the lanes of traffic. The evidence is also uncontradicted that Officer Miskewycz did not remove the other
26 banner because the banner was affixed to the inside of the fence and he did not perceive that it posed a
27 threat to the traffic below.

28 Plaintiffs' evidence is insufficient to create an inference that the Scotts Valley defendants, through

1 the actions of Officer Miskewycz, were engaged in a practice and policy of depriving citizens of their First
2 Amendment rights based upon the content of their speech by removing protest banners from overpasses
3 while allowing flags and supportive banners to remain. The single incident involving the removal of plaintiffs'
4 first banner is insufficient to establish either a combination of probable success on the merits and the
5 possibility of irreparable injury or to raise serious questions are raised and that the balance of hardships tips
6 sharply in plaintiffs' favor. Accordingly, based on the evidence submitted, there is no ground for issuing an
7 injunction against either the Scotts Valley Police Department or against Police Chief Tom Bush.

8 **ORDER**

9 For the foregoing reasons, plaintiffs' motion for preliminary injunction is granted in part with respect
10 to defendants California Department of Transportation and Director Jeff Morales and denied with regard to
11 defendants Scotts Valley Police Department and Chief Tom Bush.

12 Until trial of this matter or pending further order of this court, defendants California Department of
13 Transportation and Jeff Morales are hereby preliminarily enjoined from continuing CalTrans' practice of
14 granting an exemption from the permit requirements for the display of American flags on highway
15 overpasses but prohibiting or requiring permits for other flags or banners. CalTrans must enforce its
16 permitting rules and regulations on a content neutral and viewpoint neutral basis.

17 Nothing in this order shall preclude CalTrans from removing all signs, flags or banners on freeway
18 overpasses which are displayed without permits. Similarly, nothing in this order shall preclude CalTrans
19 from enforcing its policies regarding the removal or tolerance of permit-less displays on freeway overpasses
20 based solely on reasonable, viewpoint-neutral considerations unrelated to the content of the message
21 displayed, such as those relating to maintaining the safety of the motoring public by requiring all displays to
22 be securely fastened, or prohibiting all displays from being posted on the outside of fences or over lanes of
23 traffic.

24 **IT IS SO ORDERED.**

25
26 DATED: 1/29/02

/s/ Ronald M. Whyte
RONALD M. WHYTE
United States District Judge

1 **This is to certify that a copy of the foregoing order was served on the following persons in the**
2 **manner indicated:**

3 **Notice will be electronically mailed to:**

4 Nathan C. Benjamin nathan@surfcitylaw.com
5 Counsel for Plaintiffs

6 **Copy will be mailed to:**

7 Austin B. Comstock
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23 DATED: 1/29/02 _____

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