

**No. 12-56162**

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**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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**LESLIE DUTTON and AMERICAN ASSOCIATION  
OF WOMEN, INC.**

*Plaintiffs-Appellants,*

v.

**LEE SMALLEY EDMON, ANN I. JONES,  
and D. BRETT BIANCO,**

*Defendants-Appellees.*

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On Appeal From the United States District Court For  
The Central District of California, Los Angeles  
Case No. 2:12-cv-01888-R-JC  
The Honorable Manuel L. Real

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**APPELLANTS' OPENING BRIEF**

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## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to Rule 26.1(a) of the Federal Rules of Appellate Procedure, Plaintiff-Appellant the American Association of Women, Inc. (“AWA”) states that it is a corporation incorporated under the laws of the State of California. AWA operates as a not-for profit, educational organization under Section 501(c)(3) of the Internal Revenue Code and is dedicated to encouraging women and the general public to become knowledgeable about and engage in debates on public policy. AWA has no parent corporation, and no public corporation owns 10% or more of AWA.

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## INTRODUCTION

Emmy Award winning documentary producers Leslie Dutton and the Full Disclosure Network (“FDN”)<sup>1</sup> seek access to a limited purpose public forum – an empty courtroom of the Superior Court of California, County of Los Angeles (“LASC”) – for approximately thirty minutes to video record witness interviews for a documentary that Dutton and FDN are producing. The LASC has a longstanding practice of making court facilities, including courtrooms, available for use by the media and others when court is not in session and, in fact, allowed a CNN news reporter and camera crew to have access to the same courtroom to which Dutton and FDN seek access – Department 86 – to film a news segment on the same subject matter as the documentary being produced by Dutton and FDN – a high profile lawsuit that had taken place in the courtroom.

Dutton and FDN followed all of the procedures and satisfied all of the requirements for requesting the use of Department 86. They submitted all of the necessary paperwork, agreed to pay all costs, and further agreed to provide a certificate of insurance. Although CNN had been allowed to use the empty courtroom, Dutton’s and FDN’s request was denied repeatedly without explanation. Dutton and FDN challenge the denial of their request as being

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<sup>1</sup> FDN is a public affairs television program disseminated by AWA. Dutton is the producer and host of FDN as well as the President of AWA. ER 18. Unless otherwise indicated, AWA is referred to as FDN throughout this brief.

arbitrary and capricious and in violation of their rights under the First and Fourteenth Amendments. Dutton and FDN have also plausibly alleged that the denial was based on viewpoint discrimination. Because Dutton and FDN have amply stated a claim under 42 U.S.C. § 1983, the District Court's dismissal of their Complaint should be reversed and this matter should be remanded for further proceedings.

### **STATEMENT OF JURISDICTION**

Dutton and FDN bring this action pursuant to 42 U.S.C. § 1983. The District Court's jurisdiction was founded on 28 U.S.C. §§ 1331, 1343(3), and 2201.

The District Court entered a final judgment on June 20, 2012, which disposed of all of Dutton's and FDN's claims. (ER 6-7.) Dutton and FDN timely filed a Notice of Appeal on June 22, 2012. (ER 1-5.) Appellate jurisdiction exists under 28 U.S.C. § 1291.

### **STATEMENT OF ISSUE PRESENTED**

The issue presented for review is whether Dutton's and FDN's Complaint states a claim under 42 U.S.C. § 1983, and, in particular, whether the facts alleged in Dutton's and FDN's Complaint demonstrate an unconstitutional denial of access to a limited purpose public forum.

## **STATEMENT OF THE CASE**

### **A. Nature of the Case**

The LASC has a longstanding practice of allowing public access to courtrooms and court facilities when court is not in session. This longstanding practice includes an established application process by which media and non-media entities and individuals may request and obtain access to courtrooms and court facilities, including for filming purposes, when court is not in session.

Dutton and FDN requested access to a particular courtroom – Department 86 – in order to to video record interviews with witnesses in a high profile lawsuit that was heard in Department 86 and to have those witnesses read from a transcript of the proceedings. Although Dutton and FDN followed all of the procedures and satisfied all of the requirements for requesting access to Department 86, the LASC, acting by and through Presiding Judge Lee Smally Edmon, Judge Ann I. Jones, and LASC Court Counsel D. Brett Bianco, repeatedly denied the request without explanation. Dutton and FDN allege that the denial was arbitrary and unlawful and violated their First and Fourteenth Amendment rights. They also plausibly allege that the denial was based on viewpoint discrimination.

### **B. Course of Proceedings**

Dutton and FDN filed their Complaint for declaratory and injunctive relief under 42 U.S.C. § 1983 on March 6, 2012. (ER 17-28.) On April 26, 2012, the

LASC filed a motion to dismiss the Complaint for failure to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure. (ER 31.) Dutton and FDN opposed the motion (ER 31), and, at a hearing on June 18, 2012, the District Court, Judge Manuel L. Real presiding, orally granted the motion. (ER 8-14.) On June 20, 2012, the District Court entered a written order in accordance with its June 18, 2012 ruling. (ER 6-7.) Dutton and FDN noticed this appeal on June 22, 2012. (ER 1-5.)

### **C. The District Court's Ruling**

The District Court's ruling is based on a faulty reading of Dutton's and FDN's Complaint. The District Court found that "there is no First Amendment right of access to an empty courtroom" and reasoned that, as a threshold matter, a plaintiff must allege the existence of a "causable fact protected right protected by the First Amendment." (ER 7 and 10.) The District Court found that, since there is no First Amendment right to access an empty courtroom, the complaint should be dismissed. (ER 11-13.) In so ruling, the District Court failed to consider, or simply disregarded, Dutton's and FDN's factual allegations about the LASC's longstanding practice of allowing public access to courtrooms and other court facilities when not in use for court purposes. Dutton and FDN did not seek access to non-public forum to which they had no right; they sought access to a limited

purpose public forum to which, by longstanding practice and procedure, they had a clear right.

The District Court also erroneously found that Dutton and FDN failed to allege that the LASC engaged in viewpoint discrimination. (ER 7.) The District Court rejected Dutton's and FDN's allegations to this effect because they were made "on information and belief." (ER 12-13.)

The District Court also erroneously found that Dutton's and FDN's allegations that the LASC repeatedly denied their request without explanation somehow confirmed that their allegations of viewpoint discrimination were merely speculative. (ER 13.) In so ruling, the District Court conflated two different concepts – the arbitrary and unreasonable denial of access to a limited purpose public forum and viewpoint discrimination. Regardless of whether Dutton's and FDN's allegations of viewpoint discrimination were made "on information and belief," the LASC's failure to provide Dutton and FDN with an explanation for the repeated denial of their request highlights the completely arbitrary and unreasonable nature of the denial, especially when another media entity had been allowed access to Department 86 to tape a similar program.

### **STATEMENT OF FACTS**

Dutton and FDN are Emmy Award-winning producers of FDN, a public affairs television program. (ER 18-19.) Dutton also is the host of FDN. (ER 18.)

AAW is the not-for-profit, tax-exempt educational organization that disseminates FDN's programming. (ER 18.)

FDN features videotaped interviews with government officials, community leaders, experts, and other persons of interest, as well as commentary by Dutton. (ER 19.) It also features video news blogs that are made available to the public on FDN's website. (ER 19.) FDN's programs and video news blogs cover a wide variety of subjects, including national issues, such as border security and terrorism, as well as state and local issues such as California Assembly proceedings, recall elections, local police practices, public corruption, gangs, and education. (ER 19.) The programs are available on public access cable television channels and streamed over the Internet via the program's website, [www.FullDisclosure.net](http://www.FullDisclosure.net). (ER 19.)

In 2009, Dutton and FDN began a series of programs and video news blogs concerning certain supplemental benefits paid by the County of Los Angeles to judges of the LASC. (ER 19-20.) These county-provided benefits were above and beyond the salary and benefits that the judges of the LASC receive from the State of California and had been declared unconstitutional by the California Court of Appeal in 2008. (ER 20.) The programs and video news blogs were featured prominently on FDN's website and have been the subject of numerous press releases and email updates issued by Dutton and FDN. (ER 20.) In their programs

and video news blogs about the county-provided benefits, Dutton and FDN have been very critical of the County of Los Angeles, the judges of the LASC, and the benefits. (ER 20.)

Since approximately March 2009, Dutton and FDN also have been reporting on Mr. Richard I. Fine, a controversial, disbarred California attorney, as part of FDN's programs and video news blogs. (ER 20.) From approximately March 4, 2009 to September 17, 2010, Mr. Fine was incarcerated in the Men's Central Jail of the Los Angeles County Sheriff's Department pursuant to a civil contempt order entered by the Hon. David P. Yaffe, a judge of the LASC who presided in Department 86. (ER 20-22.) Mr. Fine's incarceration related, at least in part, to various legal challenges Mr. Fine had raised regarding the county-provided judicial benefits. (ER 21). Mr. Fine had initiated a host of legal actions challenging both his incarceration and the county-provided benefits. (ER 21.) Many of the proceedings in Mr. Fine's legal actions, including the hearing at which he was held in contempt, took place in Department 86. (ER 21.)

Dutton's and FDN's programs and video news blogs have been highly critical of both the lengthy incarceration of Mr. Fine and the county-provided benefits. (ER 21.) On information and belief, Presiding Judge Edmon, Judge Jones, and Court Counsel Bianco were aware of Dutton's and FDN's programs and video news blogs regarding the county-provided benefits and Mr. Fine's lengthy

incarceration. (ER 21.) On information and belief, Presiding Judge Edmon, Judge Jones, and Court Counsel Bianco also were aware of Plaintiffs' criticism of the county-provided benefits and the lengthy incarceration of Mr. Fine. (ER 21.)

LASC has a longstanding practice of making courtrooms and court facilities available to members of the media for filming, including filming news reports about cases of public interest, when they are not being used for judicial proceedings. (ER 22.) LASC also has a longstanding practice of making courtrooms and court facilities available to members of the public for non-court related meetings and events when they are not being used for judicial proceedings. (ER 22.) Dutton has personally attended non-court related meetings and events held in LASC courtrooms on multiple occasions. (ER 22.)

On or about March 4, 2009, Dutton and FDN made a request to video record the proceedings in the *Colony Marina Strand II v. County of Los Angeles* matter, which were being held in Department 86 of the LASC's Stanley Mosk Courthouse and at which Mr. Fine was found to be in civil contempt and subsequently incarcerated. (ER 22.) The request was denied by Judge Yaffe. (ER 22.) Mr. Fine's legal activities and lengthy incarceration for civil contempt garnered substantial local and national media attention, including coverage by the Los Angeles Times and CNN. (ER 21-22.)

In approximately May 2010, a CNN reporter, Abbie Boudreau, and film crew were granted access to Department 86 of the LASC's Stanley Mosk Courthouse to video record a news report about Mr. Fine and his then-continuing incarceration for civil contempt. (ER 22.) Ms. Boudreau and the CNN film crew subsequently video recorded their report when the courtroom was empty. (ER 22.) The report prominently featured the judge's bench and the seal of the State of California affixed to the wall behind the judge's bench. (ER 22.)

On or about November 15, 2011, Dutton and FDN sent a letter to Judge Jones, who at the time presided and currently presides in Department 86, requesting access to the courtroom:

[FDN] is an Emmy Award winning informational news program of the tax-exempt 501(c)(3) American Association of Women. The AAW is now involved in the production of a documentary program covering the above case. We need to record an account of what happened in the court room of Department 86 on March 4, 2009 for our documentary. . . .

We are writing to you as the Judge in Department 86, asking for your assistance with our media request and to obtain access to the court room and the corridor just outside the court room sometime in the next two weeks. We are looking to video record two witness accounts of the hearing that took place in 2009 and to read from the transcript of the proceedings. This will involve a total of three people. Two witnesses and one camera operator and will not involve any members of the public or court employees.

It is our understanding that the Department 86 court room is being used only in the mornings and that many times is completely empty. It is our hope that you will facilitate this request and provide us

confirmation and alternative days and times that the court room and the corridor would be available for this purpose.

(ER 22-23.) On or about November 16, 2011, Dutton and FDN sent a follow-up letter to Presiding Judge Edmon stating:

[FDN] is an Emmy Award winning informational program produced by the non-profit 501(c)(3) American Association of Women. The AAW is producing a documentary program covering the above case. We are now ready to finish this project.

We need to record eye witness accounts of what happened in Department 86 and the corridor outside on March 4, 2009.

. . . We are requesting your assistance with our media request to obtain access to the court room and the corridor just outside the court room sometime in the next two weeks.

We need to video record two historical witness accounts of the hearing and events that took place in these two locations back in 2009 and to read from the transcript of the proceedings. This will involve a total of three people. Two witnesses and one camera operator and will not involve any members of the public or court employees.

Because of the historical nature of this documentary, it is important that we get the shots in Department 86 and the corridor just outside. The witness interviews are expected to last for approximately one half hour inside the actual court room.

(ER 23-24.)

By order entered on or about November 18, 2011, Judge Jones denied Dutton's and FDN's request without explanation. (ER 24.)

Also on or about November 18, 2011, Dutton and FDN received a facsimile from the LASC notifying them that Presiding Judge Edmon had denied their

request to video record the corridor outside Department 86. (ER 24.) Again, no explanation was provided. (ER 24.)

In denying the request, however, LASC Acting Director of Public Information Mary Eckhard Hearn advised Dutton and FDN that, as an alternative, they could “follow the procedures for commercial requests to film in the courthouse, which entails submitting the required paperwork to the Administrative Office of the Courts, providing a certificate of insurance, and posting fees for any costs arising from the filming.” (ER 24.)

On or about December 7, 2011, Dutton and FDN fully and completely executed and filed an “Application for Revocable License for the Use of Real Property” with the Administrative Offices of the Courts, as advised by the LASC’s Acting Director of Public Information. (ER 24.) In their application, Dutton and FDN expressly stated that they sought access to Department 86 for approximately one half hour only “any day [the] courtroom is empty at any time” in order to video record interviews with two witnesses and read from the transcript of the original hearing. (ER 24-25.) Dutton and FDN also requested permission to video record a “hallway shot” and “agree[d] to pay the costs associated with this event as will be determined by the court and the [Administrative Offices of the Courts] and to provide any additional information and complete any necessary forms related to the issuance of a Revocable License for the Use of Real Property.” (ER 25.)

On or about December 13, 2011, Court Counsel Bianco, acting on information and belief at the direction of Presiding Judge Edmon, wrote to Dutton and FDN, notifying them that their application had been denied. (ER 25.) Again, no explanation was provided. (ER 25.)

On or about December 21, 2011, Dutton and FDN, by counsel, wrote a letter to Court Counsel Bianco requesting reconsideration of the December 13, 2011 denial of their application. (ER 25.) Court counsel Bianco failed to respond. (ER 25.)

When Dutton and FDN received no response to their December 21, 2011 letter to Court Counsel Bianco, they sent a follow-up letter, by counsel, to Presiding Judge Edmon on or about February 8, 2012. (ER 25.) On or about February 9, 2012, Court Counsel Bianco, acting on information and belief at the direction of Presiding Judge Edmon, wrote a letter to Dutton's and FDN's counsel notifying them that their request for reconsideration of the December 13, 2011 denial of their application had been denied. (ER 25.) Again, no explanation was provided. (ER 25.)

### **SUMMARY OF ARGUMENT**

Dutton's and FDN's Complaint amply alleges that the LASC has a longstanding practice of making courtrooms and court facilities available for public use when court is not in session. The Complaint also amply alleges that

Dutton and FDN were arbitrarily and unreasonably denied access to one such limited purpose public forum – Department 86 – without explanation. As set forth in the Complaint, not only did Dutton and FDN follow all of the procedures and satisfy all of the requirements for securing access to Department 86, but another media entity had been allowed access to the same courtroom to record a news program on the same subject matter. Under the circumstances, LASC’s failure to provide Dutton and FDN with any kind of explanation for the repeated denial of their request demonstrates the arbitrary and unreasonable nature of the denial. Dutton and FDN also presented plausible allegations that their request was denied because of viewpoint discrimination. The Complaint should not have been dismissed for failure to state a claim, and this matter must be remanded to the District Court for further proceedings.

### **STANDARD OF REVIEW**

This Court reviews *de novo* a district court’s decision granting a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure. *Gonzalez v. Metropolitan Transp. Auth.*, 174 F.3d 1016, 1018 (9th Cir. 1999). In reviewing the complaint, all factual allegations “are taken as true and construed in the light most favorable to [p]laintiffs.” *Epstein v. Wash. Energy Co.*, 83 F.3d 1136, 1140 (9th Cir. 1996).

## ARGUMENT

The District Court's decision should be reversed and this matter should be remanded for further proceedings because Dutton's and FDN's Complaint properly states a claim for violation of Dutton's and FDN's First and Fourteenth Amendment rights, specifically, their rights to freedom of speech and freedom of the press. The District Court misunderstood or misconstrued the well-established right invoked by Dutton and FDN, erroneously believing it to be the right of public access to a non-public forum – an empty courtroom. Contrary to the District Court's findings that “an interior courthouse space” is a “nonpublic forum” and “there is no First Amendment right of access to an empty courtroom” (ER 7 and 12), Dutton and FDN do not seek access to a nonpublic forum. Rather, they seek access to a limited purpose public forum, which, by longstanding practice and procedures, is what courtrooms and court facilities of the LASC have become. Access to limited purpose public fora cannot be arbitrarily or unreasonably denied. Nor can it be denied on the basis of viewpoint discrimination.

### **I. The LASC Courtroom to Which Dutton and FDN Seek Access Is a Limited Purpose Public Forum.**

Courthouses are public property, and even public property that is not by tradition or designation a forum for public expression may become a limited purpose public forum. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983). A limited purpose public forum is government property that

has been opened for use by certain groups or for certain purposes. *Id.*; *see also Alpha Delta Chi-Delta Chapter v. Reed*, 648 F.3d 790, 797 (9th Cir. 2011).

Dutton and FDN claim that they are being denied use of a limited purpose public forum – a courtroom – when the courtroom is not being used for judicial proceedings. Dutton and FDN wish to make use of this courtroom to video record interviews of witnesses in a prior judicial proceeding and have these same witnesses read from portions of the transcript of the proceeding. Dutton and FDN plan to use the recordings for a documentary that they are producing.

Dutton and FDN expressly and specifically allege that the LASC “has a longstanding practice of making courtrooms available to members of the media for filming news reports about cases of public interest, when the courtrooms are not being used for judicial proceedings.” (ER 22.) Dutton and FDN also expressly and specifically allege that the LASC “also has a longstanding practice of making courtrooms available to members of the public for non-court related meetings and events when courtrooms are not being used for judicial proceedings” and that Dutton “has personally attended such meetings and events on multiple occasions.” *Id.* Under such circumstances, LASC courtrooms have plainly become limited purpose public fora when they are not being used for judicial proceedings. *Rosenberger Rector & Visitors of the Univ. of Virginia*, 515 U.S. 819, 829; *Perry Educ. Ass’n*, 460 U.S. at 46; *Alpha Delta Chi-Delta Chapter*, 648 F.3d at 797.

LASC cannot claim that this longstanding practice of opening up courtrooms for use by the public does not include the use of courtrooms for media or recording purposes. The application submitted by Dutton and FDN makes express reference to film projects and lists several types of such projects. (ER 15-16 and 24-25).<sup>2</sup> It specifically asks, “Will this event involve filming?” and provides boxes for the applicant to check “yes” or “no.” *Id.* The application then asks for the name of the filming project and the “type of production.” *Id.* Applicants can check boxes for “Feature,” “Commercial,” “TV,” “Movie of the Week/Made for TV Movie,” “Reality TV,” “Music Video” or “Still.” *Id.* The application also asks whether the production is a “Student,” “Documentary,” “Educational,” “Public Awareness,” “Training,” or “Other” type of production. *Id.* The Complaint itself also expressly alleges that a CNN reporter and film crew were allowed access to Department 86 – when the the courtroom was empty – to video record a report about the same subject matter as their documentary. (ER 22.) Thus, Dutton and FDN have amply alleged that LASC courtrooms have become limited purpose public fora and have been used and are being used by the public and the media for the same purpose for which Dutton and FDN seek to use Department 86.

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<sup>2</sup> The application was submitted as Exhibit A to Plaintiffs’ Memorandum of Points and Authorities in Opposition to Defendants’ Motion to Dismiss (Docket Entry No. 8, filed on May 23, 2012. (ER 31.)

Dutton and FDN do not simply claim that they are being denied access to an empty courtroom. They claim that they are arbitrarily and unreasonably being denied access to a limited purpose public forum and they pled ample facts establishing that LASC courtrooms have become limited purpose public fora. The District Court’s determination that “there is no First Amendment right of access to an empty courtroom” was beside the point. It oversimplified Dutton’s and FDN’s claim, and it was erroneous.

**II. Because LASC Courtrooms Are Limited Purpose Public Fora, Dutton and FDN Cannot Be Denied Access Arbitrarily or Unreasonably or Based On Viewpoint Discrimination.**

**A. LASC’s Denial of Dutton’s and FDN’s Request Was Arbitrary and Unreasonable.**

Once a limited purpose public forum has been established, “the government may impose restrictions that are ‘reasonable in light of the purpose served by the forum so long as the government does not discriminate against speech on the basis of its viewpoint.’” *Alpha Delta Chi-Delta Chapter*, 648 F.3d at 797, quoting *Rosenberger*, 515 U.S. at 829 (1995); see also *Perry Educ. Ass’n*, 460 U.S. at 46. Because LASC courtrooms are limited purpose public fora, the LASC “may not exclude speech where its distinction is not reasonable in light of the purpose served by the forum.” *Rosenberger*, 515 U.S. at 829; see also *Int’l Soc’y for Krishna Consciousness v. Lee*, 505 U.S. 672, 679 (1992); *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985); *Legal Aid Services of*

*Oregon v. Legal Services Corp.*, 608 F.3d 1084, 1094 (9th Cir. 2010); *Cogswell v. City of Seattle*, 347 F.3d 809, 814 (9th Cir. 2003).

Dutton's and FDN's Complaint plainly alleges that the LASC's repeated denial of their request for access to Department 86 was arbitrary and unreasonable. (ER 25-26.) In this regard, the Complaint alleges that Dutton and FDN directed their request to the appropriate persons and/or entities. (ER 22-24). The Complaint also alleges that Dutton and FDN "fully and completely executed and filed" the application they were directed to complete and file, agreed to pay the costs associated with the use as to be determined by the LASC and the Administrative Office of the Court, and agreed to provide any additional information and complete any necessary forms related to the use. (ER 24.) The Complaint also alleges that Dutton and FDN were as flexible and accommodating as they could be by requesting access to Department 86 "any day [the] courtroom is empty at any time" for a mere one half of an hour. *Id.*

Dutton's and FDN's proposed use of Department 86 also was completely consistent with a reasonable use of the courtroom, as not only is "Documentary" expressly included on the application form, but the documentary Dutton and FDN are producing is about a judicial proceeding that took place in Department 86, and Dutton and FDN sought to record interviews of witnesses and have witnesses read from transcripts of the proceeding. (ER 22-25.) The fact that CNN was allowed to

use the courtroom to record a news report about the very same proceeding further confirms that Dutton's and FDN's proposed use was a reasonable one. It certainly seems more reasonable than recording a reality TV show or music video, which also are allowed uses. (ER 16.) The fact that the LASC denied Dutton's and FDN's request repeatedly, without explanation, but granted CNN's request further demonstrates the arbitrary and unreasonable nature of the denial. (ER 22-26.) *See, e.g., People for the Ethical Treatment of Animals, Inc. v. Gittens*, 215 F. Supp. 2d 120, 122 (D.D.C. 2002) (noting that inconsistent treatment of similarly situated applicants is "inherently unreasonable and unacceptable discrimination under the First Amendment").

The District Court does not appear to have considered Dutton's and FDN's argument that the LASC's repeated denial of their request was arbitrary and unreasonable. Instead, it appears to have conflated Dutton's and FDN's arguments about the arbitrary and unreasonable nature of the LASC's denial with Dutton's and FDN's arguments about viewpoint discrimination. They are separate arguments. They were raised separately by Dutton and FDN, and they should have been treated as such. Dutton's and FDN's Complaint amply states a claim for arbitrary and unreasonable denial of access to a limited purpose public forum, and it should not have been dismissed.

**B. Dutton’s and FDN’s Complaint “Plausibly” Alleges Viewpoint Discrimination.**

Access to a limited purpose public forum may not be denied on the basis of viewpoint. *Cornelius*, 473 U.S. at 806; *Perry Education Ass’n* 460 U.S. at 46; *Cogswell* 347 F. 3d at 814. The LASC cannot discriminate against “after hours” users of its courtrooms on the basis of users’ viewpoints. In order to plead viewpoint discrimination, Dutton and FDN need only allege facts showing that it is “plausible on its face” that the LASC denied their request for access to Department 86 because of Dutton’s and FDN’s prior reporting and criticisms. *Cook v. Brewer*, 637 F.3d 1002, 1004 (9th Cir. 2011), quoting *Ashcroft v. Iqbal*, 555 U.S. 622, 678 (2009). “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.*

Dutton and FDN satisfy this standard. The Complaint alleges that Dutton and FDN have been highly critical of the LASC and its judges over the issue of county-provided judicial benefits and the lengthy incarceration of Mr. Fine for civil contempt. (ER 21 and 26.) The Complaint also alleges that both issues garnered substantial local and media attention, including coverage by the Los Angeles Times and CNN, and, on information and belief, that Presiding Judge Edmons, Judge Jones, and Court Counsel Bianco were aware of their reporting and criticisms. (ER 21 and 26.)

As previously noted, Dutton and FDN also allege that they completed the requisite application, agreed to pay any costs associated with their use of the courtroom, and agreed to provide any additional information or forms that might be necessary. (ER 25.) Because these Emmy Award-winning producers satisfied everything that was asked of them and were seeking to make an entirely appropriate use of the courtroom for a very limited period of time – only approximately 30 minutes – whenever the courtroom was available (ER 24-25), it was reasonable to expect that their request would be granted. This is doubly the case given that CNN had been granted similar access. (ER 22.) Instead, Dutton’s and FDN’s request was repeatedly denied, without explanation. (ER 24-25.) Consequently, it is at least “plausible” on its face that the LASC denied Dutton’s and FDN’s request because of their prior reporting and criticisms of the LASC and its judges, which is all that Dutton and FDN are required to plead in order to state a claim for viewpoint discrimination. *Cook*, 637 F.3d at 1004. Indeed, it would be unreasonable to require plaintiffs in Dutton’s and FDN’s position to plead additional facts in order to allege viewpoint discrimination where the defendant has refused to identify any reason why access to a limited purpose public forum was denied.

The District Court’s ruling disregarded this “plausibility” standard. Consequently, it was erroneous for this reason as well.

## CONCLUSION

For the foregoing reasons, the District Court's dismissal of the Complaint was erroneous. The ruling must be reversed, and this matter must be remanded for further proceedings.

Dated: December 3, 2012

Respectfully submitted,

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### **STATEMENT OF RELATED CASES**

Under Circuit Rule 28-2.6, Plaintiffs-Appellants state that there are no known cases pending in this Court that are related to this action as defined under that Rule.

## CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 5,021 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010, namely, 14 point Times New Roman.

s/ Paul J. Orfanedes

*Attorney for Plaintiffs-Appellants*

Date: December 3, 2012

**CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the foregoing APPELLANTS' OPENING BRIEF with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on December 3, 2012.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Date: December 3, 2012

s/ Paul J. Orfanedes