IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

AMERICAN FREEDOM DEFENSE INITIATIVE; PAMELA GELLER; and ROBERT SPENCER,

Plaintiffs,

v.

SUBURBAN MOBILITY AUTHORITY for REGIONAL TRANSPORTATION ("SMART"); GARY L. HENDRICKSON, individually and in his official capacity as Chief Executive of SMART; JOHN HERTEL, individually and in his official capacity as General Manager of SMART; and BETH GIBBONS, individually and in her official capacity as Marketing Program Manager of SMART,

Defendants.

2:10-cv-12134-DPH-MJH

PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER/PRELIMINARY INJUNCTION

Hon. Denise Page Hood

Magistrate Judge Hluchaniuk

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ISSUE PRESENTED

Whether denying Plaintiffs the right to express a religious freedom message in a public forum created by Defendants based on the content and viewpoint of the message causes irreparable harm to Plaintiffs sufficient to warrant preliminary injunctive relief.

CONTROLLING AND MOST APPROPRIATE AUTHORITY

Connection Distributing Co. v. Reno, 154 F.3d 281 (6th Cir. 1998)

Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788 (1985).

Elrod v. Burns, 427 U.S. 347 (1976)

United Food & Commercial Workers Union, Local 1099 v. Southwest Ohio Reg'l Transit Auth., 163 F.3d 341 (6th Cir. 1998)

Defendants' response to Plaintiffs' motion mischaracterizes facts and law in a feckless attempt to avoid the inevitable conclusion: Defendants' restriction on Plaintiffs' religious freedom message violates the First Amendment. Consequently, Plaintiffs are entitled to a preliminary injunction, which would promote the public interest by upholding fundamental constitutional rights. *Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms . . . unquestionably constitutes irreparable injury."); *Newsome v. Norris*, 888 F.2d 371, 378 (6th Cir. 1989) ("[E]ven minimal infringement upon First Amendment values constitutes irreparable injury sufficient to justify injunctive relief.") (citing *Elrod*)); *G & V Lounge, Inc. v. Michigan Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994) ("[I]t is always in the public interest to prevent the violation of a party's constitutional rights.").

Defendants seek to distance themselves from their own "equal access" speech policy, which was likely drafted to comport with the First Amendment,[1] so as to retain for themselves the unconstitutional power to censor messages they dislike. Consequently, Defendants' evidence

[1] According to SMART's "Advertising Guidelines," which are the only guidelines posted on their website, "First Amendment free speech rights require that SMART not censor free speech and because of that, *SMART is required to provide equal access to advertising on our vehicles*." (Geller Decl. at ¶ 14, Ex. H at Ex. 1) (emphasis added). This policy statement is unequivocal. In fact, nowhere on the SMART website does it seek to limit this broad speech policy. Indeed, Defendants now artificially and improperly seek refuge in purported "advertising guidelines" that are contained in contract documents between Defendant SMART and CBS Outdoor that are not available to the public, were not made available to Plaintiffs even after Plaintiff Geller requested an explanation for Defendants' rejection of Plaintiffs' advertising copy, and which themselves evidence the First Amendment violation in this case by suggesting Defendants may pick and choose between viewpoints and provide a heckler's veto based upon whether someone might feel disparaged even though there is no defamation involved or untrue statement of fact. *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134 (1992) (holding that a listener's reaction to speech is not a content-neutral basis for restriction); *Lewis v. Wilson*, 253 F.3d 1077, 1082 (8th Cir. 2001) ("The First Amendment knows no heckler's veto.").

and arguments demonstrate a fundamental misapprehension of the First Amendment and its limits on the power of government to suppress free expression.[2]

In fact, Defendants' evidence compels this court to grant Plaintiffs' request for injunctive relief. Indeed, Defendants admit that a controversial (and offensive), anti-God, atheist message is perfectly acceptable and compatible with the very advertising space to which Defendants are denying Plaintiffs access for their religious freedom message. Consequently, in Defendants' designated free speech forum, religious (and offensive anti-religious) messages are permissible *subject matter*. Defendants' effort to mischaracterize Plaintiffs' religious freedom message as "political or political campaign advertising" is patently incorrect if not frivolous. While religious speech is afforded the same protection as political speech (as compared with commercial speech, for example) as a *category* of speech protected by the First Amendment, *see Capitol Square Rev. & Adv. Bd. v. Pinette*, 515 U.S. 753, 760 (1995) ("[P]rivate religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression."), there is no dispute that as to *subject matter*, Plaintiffs' message is *religious*.[3]

[2] Equally troubling is the fact that Defendants are engaging in a cynical form of gamesmanship, which itself demonstrates bad faith. When Defendants rejected Plaintiffs' religious freedom message, Plaintiff Geller specifically requested of Defendant Gibbons an explanation for the basis of the denial. Defendant Gibbons fell silent, refusing to respond and thus prompting this legal action. (*See* Geller Decl. at ¶ 16 at Ex. 1).

[3] Defendants' argument that they can reject Plaintiffs' religious freedom message because they previously rejected an abortion-related advertisement is no defense here. (*See* Defs.' Br. at 14). First, it doesn't appear as if the Pinckney Pro-Life anti-abortion group sought to protect its constitutional rights in court. So the fact that Defendants may have violated another party's rights previously does not grant them license to violate Plaintiffs' rights here. Indeed, the rejection of speech advertising Christian-based post-abortion ***counseling*** as "political" and atheist-promoting speech as "religious" highlights the viewpoint-based restriction at work here. And second, unlike the rejected, politically-charged abortion-related message, Plaintiffs message is practically indistinguishable from the atheist message that Defendants accepted—a message expressing a particular viewpoint on the subject of religion.

Therefore, it must be accorded the same treatment by Defendants as the atheist, anti-religious message, even if the forum is non-public. *See, e.g., Nieto v. Flatau*, No. 7:08-cv-185H(2), 2010 U.S. Dist. Lexis 55938 (E.D.N.C. Mar. 31, 2010) (holding that a speech restriction on a military base, a non-public forum, was viewpoint based as applied to anti-Islam speech in violation of the First Amendment) (attached as Exhibit 1).

Defendants agree with Plaintiffs that this court must essentially engage in a three-step approach to resolve this matter. (Defs.' Br. at 8). However, Defendants incorrectly apply all three steps. First, the court must determine whether the speech in question—Plaintiffs' religious freedom message—is protected speech. The answer to that question is an unequivocal yes. *See Hill v. Colorado*, 530 U.S. 703, 714-15 (2000) ("[S]ign displays . . . are protected by the First Amendment."); *United Food & Commercial Workers Union, Local 1099 v. Southwest Ohio Reg'l Transit Auth.*, 163 F.3d 341 (6th Cir. 1998) (holding that a bus advertisement was protected speech). Defendants' claim to the contrary is frivolous. (*See* Defs.' Br. at 8-9).

Second, the court must conduct a forum analysis to determine the proper constitutional standard to apply to Defendants' speech restriction. There is little doubt that, at a minimum, the forum in question is a designated public forum for religious messages.[4] A designated public forum exists when the government intentionally opens its property for expressive activity, as in this case. *Perry Educ. Ass'n v. Perry Local Educators*, 460 U.S. 37, 44 (1983). And "a public forum may be created by government designation of a *place* or channel of communication for use by the public at large for assembly and speech, *for use by certain speakers*, or *for the discussion of certain subjects*." *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788,

[4] Plaintiffs have not argued—contrary to Defendants' suggestion (*see* Defs.' Br. at 11)—that the bus advertisement space is a traditional public forum. Defendants' argument is a red herring.

802 (1985) (emphasis added). Here, Defendants' acceptance of the atheist message "signals a willingness on the part of the government to open the property to controversial speech," thereby creating a public forum.[5] *United Food & Commercial Workers Union, Local 1099*, 163 F.3d at 355 (concluding that the advertising space on a bus system was a public forum in light of the "willingness on the part of the government to open the property to controversial speech"); *Planned Parenthood Ass'n/Chicago Area v. Chicago Transit Auth.*, 767 F.2d 1225 (7th Cir. 1985) (same); *New York Magazine v. Metropolitan Transp. Auth.*, 136 F.3d 123, 130 (2d Cir. 1998) (same). And having accepted an atheist (anti-religion) bus advertisement, Defendants can hardly argue that the nature of the property is not compatible with Plaintiffs' religious freedom message. *See United Food & Commercial Workers Union, Local 1099*, 163 F.3d at 355 ("[A]cceptance of political and public-issue speech suggests that the forum is suitable for the [pro-union message] at issue.").

Finally, the court must determine whether Defendants' restriction on Plaintiffs' religious freedom message comports with the applicable standard. Here, Defendants' content- and viewpoint-based restriction cannot withstand strict scrutiny, which is the proper standard to apply for a designated public forum. *Cornelius*, 473 U.S. at 800 (stating that a speaker cannot be excluded from a designated public forum "without a compelling government interest"); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828 (1995) ("It is axiomatic that the government may not regulate speech based on its substantive content or the message it

[5] If Defendants' sole purpose for opening their bus advertising space to speech activity was to generate revenue, as they fallaciously claim (*see* Defs.' Br. at 5, 13, 15), they would have limited the advertisements to commercial speech. But they didn't, demonstrating that their claimed purpose is a sham designed to mask their unconstitutional censorship of Plaintiffs' religious message.

conveys."). Indeed, even assuming, *arguendo*, that the bus advertisement space is a non-public forum—an assumption that is impossible to make in light of Defendants' acceptance of the atheist advertisement—Defendants' restriction cannot withstand constitutional scrutiny because it is viewpoint-based. *Perry Educ. Ass'n*, 460 U.S. at 46 (stating that in a non-public forum a government speech restriction must be reasonable and viewpoint neutral). Here, Defendants admit that religion (including a controversial anti-Christian, anti-Jewish, anti-religion atheist message)[6] constitutes a permissible subject matter. Consequently, when Defendants object to certain messages within a permissible subject matter, such as Plaintiffs' religious freedom message, Defendants are necessarily engaging in an unconstitutional, viewpoint-based restriction on speech. *See Cornelius*, 473 U.S. at 806 (stating that viewpoint discrimination occurs when the government "denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject"); *Cogswell v. City of Seattle*, 347 F.3d 809, 815 (9th Cir. 2003) ("[If speech] fall[s] within an acceptable subject matter otherwise included in the forum, the State may not legitimately exclude it from the forum based on the viewpoint of the speaker.").

CONCLUSION

Based on the foregoing, Plaintiffs respectfully request that this court grant this motion.

Respectfully submitted,

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[6] Defendants' assertion that they also rejected Plaintiffs' religious freedom message because it might "hold up to scorn or ridicule any person or group of persons," (Defs.' Br. at 7 & 13), is utterly disingenuous in light of their decision to permit the atheist message. (Not surprisingly Defendants cite no case law whatsoever for the proposition that limitations on "disparaging" speech survives a First Amendment analysis in this setting.) Indeed, this is further evidence that Defendants' speech restriction is viewpoint based.

CERTIFICATE OF SERVICE

I hereby certify that on July 9, 2010, a copy of the foregoing PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER / PRELIMINARY INJUNCTION was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the court's electronic filing system. Parties may access this filing through the court's system. I further certify that a copy of the foregoing has been served by ordinary U.S. mail upon all parties for whom counsel has not yet entered an appearance electronically: None.

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