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' RESPONSE TO DEFENDANTS' EMERGENCY MOTION FOR STAY OF ORDER GRANTING PLAINTIFFS' PRELIMINARY INJUNCTION [DOCKET NO. 24] PENDING APPEAL

Hon. Denise Page Hood

Magistrate Judge Hluchaniuk

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ISSUE PRESENTED

Whether this court should grant Defendants' request to stay enforcement of the preliminary injunction pending their interlocutory appeal to the United States Court of Appeals for the Sixth Circuit when Defendants have no chance of success on the merits of their appeal, when Plaintiffs have been and continue to be irreparably harmed by Defendants' unlawful restriction of their First Amendment rights, and when the public interest supports the enforcement of the injunction.

CONTROLLING AND MOST APPROPRIATE AUTHORITY

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

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

G & V Lounge, Inc. v. Michigan Liquor Control Comm'n, 23 F.3d 1071 (6th Cir. 1994)

Hilton v. Braunskill, 481 U.S. 770 (1987)

Perry Educ. Ass'n v. Perry Local Educators, 460 U.S. 37 (1983)

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

INTRODUCTION

Defendants' motion is without merit and should be summarily denied. Defendants are simply delaying the inevitable (and wasting valuable judicial resources and causing further irreparable harm in the process) by rehashing the same arguments that were previously rejected by this court. Defendants' latest motion asks this court to ignore sworn testimony that is dispositive, to disregard the controlling case law, and to credit their utterly false contention that "the parties are in agreement that Plaintiffs' advertisements are political advertisements." (Defs.' Mot. at 8). This last contention—refuted, no less, by the sworn testimony of Defendants' Fed. R. Civ. P. 30(b)(6) witness and the advertisement itself—is a feckless attempt to create an issue where none exists. Plaintiffs' advertisement, which expresses a religious freedom message on its face, is substantively similar to the atheist message that was accepted by Defendants and maintained on Defendants' buses even after the atheist message subjected the buses to vandalism. Defendants continue to maintain their position that the atheist message was acceptable under the applicable policy (*see* Defs.' Mot. at 6-7, 9), which, as this court properly concluded, is unconstitutional in that "there is nothing in the policy that can guide a government official to distinguish between permissible and impermissible advertisements in a non-arbitrary fashion." (Order Granting Pls.' Mot. for Prelim. Inj. at 8) (Doc. No. 24) (hereinafter "Order"). In sum, Defendants cannot escape the facts of this case nor the controlling law which compel this court to deny their motion.

ARGUMENT

I. DEFENDANTS CANNOT MEET THE HEAVY BURDEN REQUIRED FOR GRANTING A STAY PENDING APPEAL.

Defendants request a stay of this court's Order granting Plaintiffs' motion for a preliminary injunction pending appeal of that order to the United States Court of Appeals for the

Sixth Circuit. This court granted Plaintiffs' motion after both parties had an opportunity to present evidence and live testimony at the hearing held on July 13, 2010. Defendants carry a heavy burden in their effort to stay this court's ruling, particularly when such a stay will have the effect of causing further irreparable harm to Plaintiffs and is overwhelmingly contrary to the public interest.

This court's ruling, which is essentially "appeal proof" in that it relies on controlling law and undisputed facts—facts derived principally from Defendants' designated Rule 30(b)(6) witness—will be given great deference by the appellate court upon its review. As the Sixth Circuit stated,

> This court reviews a challenge to the grant or denial of a preliminary injunction under an abuse of discretion standard and accords great deference to the decision of the district court. The district court's determination will be disturbed only if the district court relied upon clearly erroneous findings of fact, improperly applied the governing law, or used an erroneous legal standard.

Blue Cross & Blue Shield Mut. of Ohio v. Blue Cross & Blue Shield Ass'n, 110 F.3d 318, 322 (6th Cir. 1997) (emphasis added).

In sum, Defendants' appeal is futile and thus a stay in this court would be improper. And this is particularly true in light of the important First Amendment interests at stake.

II. THE RELEVANT FACTORS WEIGH STRONGLY AGAINST GRANTING THE REQUESTED STAY.

In deciding whether to issue the requested stay, this court considers the following:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Hilton v. Braunskill, 481 U.S. 770, 776 (1987).

Upon application of these factors, this court should deny Defendants' motion.

A. Defendants Cannot Make a "Strong Showing" of Success on the Merits.

In its Order, this court concluded that Plaintiffs demonstrated a "strong likelihood" of success on their First Amendment claim. (Order at 7-8) ("There is a strong likelihood that Plaintiffs could succeed in demonstrating that Defendant[s'] decision not to run the advertisement was not reasonable, but rather arbitrary and capricious."). Consequently, Defendants invite this court to completely reverse itself without presenting any new law or facts. Defendants' invitation should be rejected.

While Plaintiffs dispute the court's conclusion that the forum at issue is a "nonpublic forum,"[1] the analysis the court applied for speech restrictions in a nonpublic forum was correct. In order for a speech regulation in a nonpublic forum to withstand constitutional challenge it must be "reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." (Order at 5) (quoting *Perry Educ. Ass'n v. Perry Local Educators*, 460 U.S. 37, 46 (1983)). As a matter of law, a speech restriction that permits arbitrary and capricious application is not reasonable. As this court properly noted in its Order, "Under Sixth Circuit law, '[t]he absence of clear standards guiding the discretion of the public officials vested with the authority to enforce the enactment invites abuse by enabling the official to administer the policy on the basis of impermissible factors.'" (Order at 8) (quoting *United Food & Commercial Workers Union, Local 1099 v. Southwest Ohio Reg'l Transit Auth.*, 163 F.3d 341,

[1] Plaintiffs argued that the forum is a designated public forum because Defendants willingly accepted an atheist advertisement that was controversial and generated conflict in the community. *See United Food & Commercial Workers Union, Local 1099 v. Southwest Ohio Reg'l Transit Auth.*, 163 F.3d 341, 355 (6th Cir. 1998) (concluding that the bus advertising space was a public forum and stating that the acceptance of advertisements "which by their very nature generate conflict, signals a willingness on the part of the government to open the property to controversial speech"). As the Supreme Court explained, "[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, 802 (1985) (emphasis added).

359 (6th Cir. 1998)); *see also Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 130 (1992) ("A government regulation that allows arbitrary application . . . has the potential for becoming a means of suppressing a particular point of view."). Thus, Defendants cannot refute the conclusion that this court properly applied the governing law.

Turning now to the undisputed facts of this case, it is evident that Defendants' decision to reject Plaintiffs' advertisement was arbitrary and capricious and simply an effort to suppress Plaintiffs' view. Indeed, there were no objective standards applied by Defendants to deny Plaintiffs' advertisement. Defendant Gibbons, who was testifying on behalf of SMART pursuant to Rule 30(b)(6),[2] testified at the hearing as follows:

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[2] It is important to recognize the significance of testimony provided under Fed. R. Civ. P. 30(b)(6). In *United States v. Taylor*, 166 F.R.D. 356 (M.D.N.C. 1996), the court provided the following comprehensive explanation regarding the testimony of a Rule 30(b)(6) witness:

> The testimony elicited at the Rule 30(b)(6) deposition represents the knowledge of the corporation, not of the individual deponents. The designated witness is "speaking for the corporation," and this testimony must be distinguished from that of a "mere corporate employee" whose deposition is not considered that of the corporation and whose presence must be obtained by subpoena. Obviously it is not literally possible to take the deposition of a corporation; instead, when a corporation is involved, the information sought must be obtained from natural persons who can speak for the corporation. The corporation appears vicariously through its designee. If the persons designated by the corporation do not possess personal knowledge of the matters set out in the deposition notice, the corporation is obligated to prepare the designees so that they may give knowledgeable and binding answers for the corporation. Thus, the duty to present and prepare a Rule 30(b)(6) designee goes beyond matters personally known to that designee or to matters in which that designee was personally involved.
>
> The Rule 30(b)(6) designee does not give his personal opinions. Rather, he presents the corporation's "position" on the topic. Moreover, the designee must not only testify about facts within the corporation's knowledge, but also its subjective beliefs and opinions. The corporation must provide its interpretation of documents and events. The designee, in essence, represents the corporation just as an individual represents him or herself at a deposition. Were it otherwise, a corporation would be able to deceitfully select at trial the most convenient answer presented by a number of fingerpointing witnesses at the depositions. Truth would suffer.

> Q: So in fact, there is no policy or guideline or training manual or anything else that would set out why [Plaintiffs' advertisement] is political [and thus impermissible] and the Atheist Ad is not political [and thus permitted]?
> A. Right.

(Tr. of Hr'g on Mot. for Prelim. Inj. at 15) (Doc. No. 18) (hereinafter "Tr.").

Defendant Gibbons also admitted during her testimony that when she examined Plaintiffs' proposed advertisement (*i.e.*, its "four corners"), she found nothing about the ad itself that was political.[3] She testified as follows:

> Q: So when you examined [Plaintiffs'] ad, there was nothing about the ad itself that was political?
> A: Correct.

(Tr. at 10).

With regard to *how* Defendants decide whether or not an advertisement is permissible, Defendant Gibbons' testimony reveals that SMART's practices and procedures are haphazard and inconsistent. For example, Defendant Gibbons admitted that she did not look to anything extrinsic to the atheist advertisement to determine whether it was permissible—she looked only at its "four corners." (Tr. at 6-7). However, she denied Plaintiffs' advertisement based solely on a news story in the *Miami Herald,* indicating that when Plaintiffs ran a similar advertisement in Florida, it was controversial. (Tr. at 10, 17, 19, 22). Thus, Defendants did not use the same practice and procedure for Plaintiffs' advertisement as they used for the atheist advertisement.

Id. at 361 (internal quotations, punctuation, and citations omitted).

[3] Consequently, contrary to Defendants' naked and unsupported assertion that "the parties are in agreement that Plaintiffs' advertisements are political advertisements" (Defs.' Mot. at 8), the irrefutable facts evidence that even Defendants understood that the content of Plaintiffs' advertisement was not and is not "political or political campaign advertising." (*See* Order at 3 (quoting "Restriction on Content"); *see also* Order at 9 (noting that "the advertisement in *Lehman* [*v. City of Shaker Heights*, 418 U.S. 298 (1974)] was clearly political advertising, promoting a specific candidate for an upcoming election")).

As noted above, based on the "four corners" of Plaintiffs' advertisement, Defendants concluded that it was not political and, therefore, should have allowed it to run. (Tr. at 10).

Indeed, the *Miami Herald* article[4] referenced by Defendant Gibbons does not report on the political *content* of Plaintiffs' advertisement. And the only matter referenced by Defendant Gibbons in her direct testimony was not related to the advertisement's content, but the "controversy" over whether the Miami transit authority would run it, which they did and without incident. (*See* Tr. at 25). Defendant Gibbons testified as follows:

> Q: I would like to change topics now, Ms. Gibbons, and ask you one or two questions following up on a question that Mr. Yerushalmi asked you regarding the political content of the FDI ad. In both reading the controversy surrounding the Miami Dade Transit issue, can you tell us whether you were able to determine that the FDI ad was political?
> A: I knew that it was of concern in that there is controversy on both sides of the issue on whether they should be posted or shouldn't be posted.

(Tr. at 19). In other words, Defendant Gibbons reacted to a newspaper article's rendering of a question raised about whether the Miami transit authority would run the advertisement—not whether the advertisement itself represented a "political" advertisement.

Defendant Gibbons further testified that the only basis for rejecting Plaintiffs' advertisement was this single news article—literally nothing else—not the advertisement's subject matter, not its content, and not any report of "adverse effects" arising from the running of the advertisement in Miami or anywhere else:

> Q: You indicated that as a result of a newspaper article, you determined that [Plaintiffs'] ad was political?
> A: That it was a political issue, yes.
> Q: You had already testified earlier that the content was not political but that you looked at what occurred in Miami?
> A: Correct.

[4] A copy of this article was previously marked during the July 13, 2010, hearing as Defendants' Exhibit J. (*See* Tr. at 18). For ease of reference, it is attached to this response as Exhibit 1.

Q: And all you know about what occurred in Miami is the article that you looked at earlier that you referenced?
A: Yes.

(Tr. at 23).

The dilemma for Defendants' argument, of course, is that there is nothing in the news article itself—even assuming its content was legitimately and constitutionally relevant to Defendants' decision not to run Plaintiffs' advertisement—to suggest that the content of the advertisement was political. The news article merely quotes a single Muslim organization objecting to the ***viewpoint*** of the advertisement. (*Miami Herald* Article at Ex. 1). The First Amendment cannot wilt simply because a single voice in a news article takes issue with the viewpoint of another's protected speech.[5] It is precisely the speech/counter-speech dialogue the First Amendment seeks to promote. *See generally N.Y. Times v. Sullivan*, 376 U.S. 254, 270 (1964) (acknowledging "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open").

Finally, there was no evidence presented anywhere in the record that violence, vandalism, or threats of violence or vandalism occurred as a result of Plaintiffs' advertisement in Florida (or New York, for that matter). In fact, just the opposite. In all prior cities where the advertisement had run, there were zero incidences of violence or even the threat of violence. (Tr. at 25). And there was no evidence presented that Plaintiffs' advertisement would subject SMART buses to violence or vandalism if they ran here in Michigan. Indeed, the <u>only</u> evidence of violence and vandalism presented in this case related to the atheist advertisement, which SMART accepted

[5] Indeed, when denying Plaintiffs' advertisement, Defendants equated "political" with "controversial." (Tr. at 19) (answering the question as to whether she was "able to determine that [Plaintiffs' advertisement] was political" by stating, "I [Defendant Gibbons] knew that it was of concern in that there is controversy on both sides of the issue on whether they should be posted or shouldn't be posted"). Consequently, this is not a restriction based on content; it is a restriction based on viewpoint, which is impermissible in any forum.

and continued to run even *after* the violence and public controversy surrounding the advertisement came to light. (Tr. at 7-8, 11-12).

Defendants' claim of error regarding the "scornful speech" issue is similarly misplaced. (Defs.' Mot. at 9). Indeed, Defendants make the following verifiably false claim: "Although Plaintiffs' counsel questioned Ms. Gibbons about the political nature of the advertisement, ***there was no clear testimony whatsoever, by any witness***, as to whether the advertisement was considered scornful or disparaging to the adherents to Islam." (Defs.' Mot. at 10) (emphasis added). Contrary to Defendants' bold assertion, Defendant Gibbons testified as follows:

> Q: There is nothing in the ad that disparages or scorns any particular people?
> A: Correct, yes. I'm not sure.
> Court: ***You're not sure whether it scorns any particular people; is that your answer***?
> A: ***Right***.

(Tr. at 10-11) (emphasis added).

Thus, it is evident that the court was paying close attention to the "scornful speech" issue and properly concluded, ***based on Defendants' very own testimony***, that this was not a relevant factor. Indeed, this testimony simply verifies the correctness of the court's ruling that Defendants' speech restriction was arbitrary and capricious and thus unconstitutional.

In fact, Defendants' entire argument on this point amounts to little more than unsupported assertions putatively proffered in their motion as a kind of replacement testimony for the actual sworn testimony of Defendant Gibbons. This ploy is unavailing as a rudimentary matter of the Rules of Evidence. *See* Fed. R. Evid. 602 & 603.

Moreover, it is important to note that the "scornful speech" policy itself is facially invalid in that it is a viewpoint-based restriction. *See, e.g., Nieto v. Flatau*, 715 F. Supp. 2d 650 (E.D.N.C. 2010) (holding that a speech restriction on a military base, a nonpublic forum, was viewpoint based as applied to anti-Islam speech in violation of the First Amendment).

Viewpoint discrimination is the most egregious form of content discrimination and is impermissible regardless of the nature of the forum. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995). 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." *Cornelius*, 473 U.S. at 806; *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."). As Defendants readily admit, "religion" constitutes an "otherwise includable subject" in the relevant forum. (Defs.' Mot. at 9). Thus, to disagree with the viewpoint on Islam expressed by Plaintiffs is a prototypical viewpoint-based restriction, which itself violates the First Amendment. Consequently, Defendants' argument does not help their cause; it only further strengthens the legitimacy of the court's Order granting the injunction and provides yet another reason for denying Defendants' motion for a stay.

B. Defendants Will Not Be Harmed by Denying the Requested Stay.

By denying the stay and enforcing this court's Order so as to allow Plaintiffs to run their requested advertisement, Defendants will suffer no harm because the exercise of constitutionally protected expression can never harm any of Defendants' or others' legitimate interests. *See Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998).

Moreover, it is incorrect to say that the court's preliminary injunction "provides full relief to Plaintiffs." (Defs.' Mot. at 11). While the preliminary injunction allows Plaintiffs to run the advertisement that they have been patiently waiting to run for over a year, in addition to nominal damages, the complaint also seeks a permanent injunction against Defendants' unconstitutional

speech restriction, which would permit Plaintiffs to run other advertisements in the future. (Compl. at "Prayer for Relief") (Doc. No. 1).

Finally, Defendants' speculative assertion that running Plaintiffs' advertisement will cause a "violent reaction . . . damage and vandalism" (Defs.' Mot. at 12) is patently unfounded and flatly contradicts the factual record. (*See* Tr. at 25). The only evidence before this court of any violent reaction, damage, or vandalism was to the *approved* atheist advertisement that Defendants continued to run even after these "adverse effects." (*See* Tr. at 7-8). There is no evidence whatsoever that Plaintiffs' advertisement has ever caused a reaction anything like the approved atheist advertisement. Moreover, Defendants' entire "violent reaction" argument is predicated upon Defendants' somewhat bigoted belief that Muslims will respond criminally to Plaintiffs' message. As noted, there is no evidence existing outside of Defendants' imagination of this happening. Indeed, Plaintiffs have a history of running this advertisement, and if there was any evidence of such "adverse effects," Defendants had ample opportunity to present this evidence to the court during the hearing on July 13, 2010. Defendants' speculation does not substitute for evidence in the record—evidence that does not exist.

C. Plaintiffs Will Be Irreparably Harmed by Granting the Requested Stay.

It is well established that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *see also Connection Distributing Co.*, 154 F.3d at 288; *Newsome v. Norris*, 888 F.2d 371, 378 (6th Cir. 1989) ("The Supreme Court has unequivocally admonished that even minimal infringement upon First Amendment values constitutes irreparable injury sufficient to justify injunctive relief." (citing *Elrod*)). The question of irreparable harm in this case is not even a close call.

Moreover, Defendants' argument that Plaintiffs should find some other place to express their message (*see* Defs.' Mot. at 14) has long been rejected by the U.S. Supreme Court, *see Schneider v. New Jersey*, 308 U.S. 147, 163 (1939) ("[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place."), as it should be rejected here.

D. The Public Interest Lies in Denying the Stay.

As the Sixth Circuit noted, "[I]t is always in the public interest to prevent the violation of a party's constitutional rights." *G & V Lounge, Inc. v. Michigan Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994); *see also Dayton Area Visually Impaired Persons, Inc. v. Fisher*, 70 F.3d 1474, 1490 (6th Cir. 1995) (stating that "the public as a whole has a significant interest in ensuring equal protection of the laws and protection of First Amendment liberties"). Consequently, the public interest lies in enforcing the preliminary injunction and denying Defendants' motion for a stay.

In the final analysis, as this court stated in its Order, "[T]he Plaintiffs' likelihood of success, the potential harm to Plaintiffs, and the potential harm to the public interest outweigh the speculative harm to SMART." (Order at 10). That conclusion holds true here, thereby compelling this court to deny the motion for a stay.

CONCLUSION

Based on the foregoing, this court should deny Defendants' motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 3, 2011, a copy of the foregoing 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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