UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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

Plaintiffs,

v.

Case 2:10-cv-12134
HON. DENISE PAGE HOOD

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.

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MOTION FOR LEAVE TO FILE RESPONSE TO PLAINTIFFS' SUPPLEMENTAL AUTHORITY ON SUMMARY JUDGMENT (DOCKET NO. 77)

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Defendants, Suburban Mobility Authority for Regional Transportation, John Hertel and Beth Gibbons, by and through their attorneys, Vandeveer Garzia, P.C. and Avery Gordon, pursuant to Federal Rule of Civil Procedure Rule 56 and Eastern District of Michigan Local Rule 7.1(c)(3), move this court for entry of an order granting leave to Defendants to respond to Plaintiff's Supplemental Brief/Authority on Summary Judgment (Docket No. 77).

Defendants object to Plaintiff's Supplemental Brief/Authority because, in contravention to E.D.Mich. LR 7.1(d)(1), Plaintiff did not seek leave of court to file the supplemental brief. There is no authority in the Federal Rules of Civil Procedure or the Eastern District of Michigan Local Rules for Plaintiff's filing without leave of court.

This Motion is supported by an accompanying brief.

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Dated: August 28, 2018

BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE RESPONSE TO PLAINTIFFS' SUPPLEMENTAL AUTHORITY ON SUMMARY JUDGMENT (DOCKET NO. 77)

On August 17, 2018, at the end of business, Plaintiffs filed what they purport to be "Plaintiffs' Notice of Supplemental Authority." Plaintiff filed its supplemental brief on its motion for summary judgment without leave of court and without any legal authority to do so. Eastern District of Michigan Local Rule 7.1, regarding motion practice, permits only one brief without seeking leave of court. Similarly, it permits only one response without leave. For this reason, Defendants request that this court strike Plaintiffs' offending brief, or in the alternative, allow Defendants to file a response to the supplemental brief.

The necessity of a response to Plaintiffs' filing arises because Plaintiffs misstate the holding of the Court in *Minnesota Voters Alliance v. Mansky*, 138 S. Ct. 1876 (2018). Contrary to Plaintiffs' improper argument, the Supreme Court did not hold that any definition of the term "political" was too broad. Instead, the Supreme Court held that *the manner in which Minnesota defined the term "political"* when coupled with *haphazard interpretations* was objectionable. In this regard, the Court stated:

> But the State must draw a reasonable line. Although there is no requirement of narrow tailoring in a nonpublic forum, the State must be able to articulate some sensible basis for distinguishing what may come in from what must stay out. See *Cornelius*, 473 U.S., at 808-809, 105 S.Ct. 3439. Here, the unmoored use of the term "political" in

the Minnesota law, combined with haphazard interpretations the State has provided in official guidance and representations to this Court, cause Minnesota's restriction to fail even this forgiving test.

Again, the statute prohibits wearing a "political badge, political button, or other political insignia." It does not define the term "political." And the word can be expansive. It can encompass anything "of or relating to government, a government, or the conduct of governmental affairs," Webster's Third New International Dictionary 1755 (2002), or anything "[o]f, relating to, or dealing with the structure or affairs of government, politics, or the state," AMERICAN HERITAGE DICTIONARY 1401 (3d ed. 1996). Under a literal reading of those definitions, a button or T-shirt merely imploring others to "Vote!" could qualify.

The State argues that the apparel ban should not be read so broadly. According to the State, the statute does not prohibit "any conceivably `political' message" or cover "all `political' speech, broadly construed." Instead, the State interprets the ban to proscribe "only words and symbols that an objectively reasonable observer would perceive as conveying a message about the electoral choices at issue in [the] polling place." Id., at 13; see id., at 19 (the ban "applies not to any message regarding government or its affairs, but to messages relating to questions of governmental affairs facing voters on a given election day").

At the same time, the State argues that the category of "political" apparel is not limited to campaign apparel. After all, the reference to "campaign material" in the first sentence of the statute — describing what one may not "display" in the buffer zone as well as inside the polling place — implies that the distinct term "political" should be understood to cover a broader class of items. As the State's counsel explained to the Court, Minnesota's law "expand[s] the scope of what is prohibited from campaign speech to additional political speech."

We consider a State's "authoritative constructions" in interpreting a state law. *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 131, 112 S.Ct. 2395, 120 L.Ed.2d 101 (1992). But far from clarifying the indeterminate scope of the political apparel provision, the State's "electoral choices" construction introduces confusing line-drawing

problems. Cf. *Jews for Jesus*, 482 U.S., at 575-576, 107 S.Ct. 2568 (a resolution banning all "First Amendment activities" in an airport could not be saved by a "murky" construction excluding "airport-related" activity).

For specific examples of what is banned under its standard, the State points to the 2010 Election Day Policy — which it continues to hold out as authoritative guidance regarding implementation of the statute. See Brief for Respondents 22-23. The first three examples in the Policy are clear enough: items displaying the name of a political party, items displaying the name of a candidate, and items demonstrating "support of or opposition to a ballot question."

But the next example — "[i]ssue oriented material designed to influence or impact voting," — raises more questions than it answers. What qualifies as an "issue"? The answer, as far as we can tell from the State's briefing and argument, is any subject on which a political candidate or party has taken a stance. See Tr. of Oral Arg. 37 (explaining that the "electoral choices" test looks at the "issues that have been raised" in a campaign "that are relevant to the election"). For instance, the Election Day Policy specifically notes that the "Please I.D. Me" buttons are prohibited. But a voter identification requirement was not on the ballot in 2010, so a Minnesotan would have had no explicit "electoral choice" to make in that respect. The buttons were nonetheless covered, the State tells us, because the Republican candidates for Governor and Secretary of State had staked out positions on whether photo identification should be required.

A rule whose fair enforcement requires an election judge to maintain a mental index of the platforms and positions of every candidate and party on the ballot is not reasonable. Candidates for statewide and federal office and major political parties can be expected to take positions on a wide array of subjects of local and national import. See, e.g., Democratic Platform Committee, 2016 Democratic Party Platform (approved July 2016) (stating positions on over 90 issues); Republican Platform Committee, Republican Platform 2016 (approved July 2016) (similar). Would a "Support Our Troops" shirt be banned, if one of the candidates or parties had expressed a view on military funding or aid for veterans? What about a "#MeToo" shirt, referencing the movement to increase awareness of sexual harassment

> and assault? At oral argument, the State indicated that the ban would cover such an item if a candidate had "brought up" the topic.

Id., at 1888-1890. The Court felt that it was the limited manner in which Minnesota was applying the definition of "political" that was not reasonable. As defined, it failed to give notice to the electorate and to the election judges tasked with enforcing the statute of the speech limited by the statute.

Had the State used the dictionary definition of "political," without limitation, it is likely that the Supreme Court would have upheld the provision as "reasonable in light of the purpose served by the forum." *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 473 U.S. 788, 806-811, 105 S.Ct. 3439, 87 L.Ed.2d 567 (1985). In fact, the Supreme Court has repeatedly held the term "political" is not too vague or overbroad for First Amendment purposes. "*Civil Service Comm'n v. Letter Carriers*, 413 U.S. 548, 550-551, 93 S.Ct. 2880, 37 L.Ed.2d 796 (1973) (rejecting First Amendment overbreadth and vagueness challenge to § 9(a) of the Hatch Act, then codified at 5 U.S.C. § 7324(a)(2), which prohibited federal employees from taking "an active part in political management or in political campaigns"); *Broadrick v. Oklahoma*, 413 U.S. 601, 602, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973) (rejecting First Amendment overbreadth and vagueness challenge to a similar Oklahoma law that "restricts the political activities of the State's classified civil servants")." *Minn. Voters All. v. Mansky*, at p. 1896. More applicable to the case at

bar is *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974), where the Supreme Court upheld a limitation on "political" advertising on bus car cards.

There is also no evidence in the case at bar that SMART "haphazardly" interpreted or applied its content policy. In this regard, the *Minn. Voters All.* case is inapplicable to the motions before this court.

Further, as pointed out in Defendants' Brief in Support of their Motion for Summary Judgment, at pages 23 – 26, the parties to this action *agree that AFDI's message is political speech.* Plaintiffs cannot come forward, after having admitted in their pleadings that their speech is political, to complain that SMART's restriction on political speech does not apply to the proffered advertisement.

Finally, leave to respond to Plaintiffs' Supplemental Brief/Authority is necessary because Plaintiffs' representation to this court of subsequent and applicable authority is misleadingly selective. Plaintiffs bring but one questionably applicable case to this court's attention, seemingly arguing that it is the only subsequent authority that could assist the court in its decision-making role. What Plaintiffs ignore by this filing is that the Sixth Circuit opinion in this case, *Amer. Freedom Def. Init. v. Suburban Mobility Auth. for Reg'l Trans.*, 698 F. 3d 885 (2102), has been cited approvingly by at least nine federal courts in the First, Third, Sixth, Seventh and Ninth Circuits. In each of these cases, it was recognized that applying the definition of "political" as contained in SMART's content policy

was a "reasonably objective exercise" and that "there is no question that a person of ordinary intelligence can identify what is or is not political." *Amer. Freedom Def. Init. v. Suburban Mobility Auth. for Reg'l Trans.*, 698 F. 3d at 893-894.

For the reasons set forth above, Defendants respectfully request that this Court either strike Plaintiffs' Notice of Supplementary Authority (Docket No. 77), or in the alternative, grant Defendants leave of court to file a response to Plaintiffs' Supplemental Brief/Authority.

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Dated: August 28, 2018

CERTIFICATE OF SERVICE

The undersigned certifies that on August 28, 2018, a copy of the following:

1. Motion for Leave to File Response to Plaintiffs' Supplemental Authority on Summary Judgment (Docket No. 77);

2. Brief in Support of Motion for Leave to File Response to Plaintiffs' Supplemental Authority on Summary Judgment (Docket No. 77); and

3. Certificate of Service

were served upon the attorneys of record of all parties to the above by electronic filing with the Clerk of the Court using the E-Filing System. I declare under the penalty of perjury that the statement above is true to the best of my information knowledge and belief.

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