

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

AMERICAN FREEDOM
DEFENSE INITIATIVE; *et al.*,

Plaintiffs,

v.

SUBURBAN MOBILITY
AUTHORITY for REGIONAL
TRANSPORTATION (“SMART”);
et al.,

Defendants.

No. 2:10-cv-12134-DPH-MJH

Hon. Denise Page Hood

Magistrate Judge Hluchaniuk

**PLAINTIFFS’ RESPONSE TO DEFENDANTS’ MOTION FOR LEAVE TO
FILE RESPONSE TO PLAINTIFFS’ SUPPLEMENTAL AUTHORITY ON
SUMMARY JUDGMENT**

ISSUE PRESENTED

I. Whether the Court should strike Plaintiffs' recently filed notice of supplemental authority (Doc. No. 77), which brings to the Court's attention a relevant U.S. Supreme Court decision that was issued following the close of the briefing on the parties' cross-motions for summary judgment.

Plaintiffs' Answer: No

Defendants' Answer: Yes, or in the alternative, permit them to file a response.

CONTROLLING AND MOST APPROPRIATE AUTHORITY

Minnesota Voters Alliance v. Mansky, 138 S. Ct. 1876 (2018)

Am. Freedom Def. Initiative v. Wash. Metro. Transit Auth., No. 17-7059, 2018

U.S. App. LEXIS 23203 (D.C. Cir. Aug. 17, 2018)

ARGUMENT

In their filing, “Defendants request that this court strike Plaintiffs’ offending brief, or in the alternative, allow Defendants to file a response to the supplemental brief.” (Defs.’ Mot. at 4 [Doc. No. 79]).

Defendants’ request to strike Plaintiffs’ notice of supplemental authority should be denied for at least two reasons. First, providing supplemental authority to a court after the briefing has closed is a common and important practice. Indeed, in the federal appellate courts there is a specific rule that sets forth the procedure for doing so. Rule 28(j) of the Federal Rules of Appellate Procedure states as follows:

(j) Citation of Supplemental Authorities. If pertinent and significant authorities come to a party’s attention after the party’s brief has been filed—or after oral argument but before decision—a party may promptly advise the circuit clerk by letter, with a copy to all other parties, setting forth the citations. The letter must state the reasons for the supplemental citations, referring either to the page of the brief or to a point argued orally. The body of the letter must not exceed 350 words. Any response must be made promptly and must be similarly limited.

This rule makes sense. If there is *subsequent* authority, as in this case, that may assist the court with rendering its decision, it is entirely appropriate to bring this authority to the court’s attention and to *briefly* explain why the party believes this authority is relevant, as Plaintiffs have done here.

Indeed, in a recent decision by the D.C. Circuit involving a challenge to the Washington Metropolitan Area Transit Authority's ("WMATA") advertising guidelines, the court reversed the trial court's grant of summary judgment in favor of WMATA and remanded the case to determine whether WMATA's ban on the plaintiffs' ad as being political was lawful in light of *Mansky*. *Am. Freedom Def. Initiative v. Wash. Metro. Area Transit Auth.*, No. 17-7059, 2018 U.S. App. LEXIS 23203, at *35 (D.C. Cir. Aug. 17, 2018) ("The parties' briefs predate the decision in *Mansky*. Yet *Mansky* invites arguments about whether Guideline 9 is capable of reasoned application. Moreover, WMATA's defense of the Guidelines against AFDI's unbridled discretion/vagueness challenge was that it banned AFDI's advertisements as 'political' speech, which is not unconstitutional. That argument might be unavailing in light of *Mansky*.") (emphasis added). Thus, *Mansky* is plainly relevant here.

And second, what exactly is it that Defendants seek to accomplish with their request to strike? Do they not want the Court to be informed of this subsequent decision? Is this subsequent decision now off limits for the Court's consideration? Practically, Defendants' request makes little sense. And more important, since the role of the Court is to pursue justice, Defendants' argument that the Court should not be informed of subsequent authority plainly undermines that goal. Defendants' request to strike should be denied. And if Defendants wish to briefly respond to

Plaintiffs' notice, which Plaintiffs purposefully kept brief with a simple explanation as to why *Mansky* should be considered by the Court, then Plaintiffs would have no objection.

CONCLUSION

Based on the foregoing, Plaintiffs respectfully request that the Court consider *Mansky* and reject Defendants' request to strike Plaintiffs' notice of this relevant authority.

Respectfully submitted,

/s/ Robert J. Muise

Robert J. Muise, Esq. (P62849)

David Yerushalmi, Esq.

Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on August 31, 2018, 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.

AMERICAN FREEDOM LAW CENTER

/s/ Robert J. Muise

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