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

BLAINE COLEMAN,

Plaintiff,

v.

ANN ARBOR TRANSPORTATION AUTHORITY, et al,

Defendants.

Case No.: 11-15207
Hon. Mark A. Goldsmith

BRIEF OF ANN ARBOR TRANSPORTATION AUTHORITY AND MICHAEL FORD ON SCOPE AND FORM OF INJUNCTIVE RELIEF

The Court has asked the parties to brief the issue of the appropriate scope of injunctive relief in light of the findings made in the Court's September 28, 2012 Opinion and Order ("Opinion"). The Court's power to enter injunctive relief is broadly discretionary but the Court must tailor the relief to the particular facts of the case before it, keeping in mind that an injunction cannot be used to punish a defendant. *Hecht Co. v. Bowles,* 321 U.S. 321, 330 (1944). In light of these considerations and the specific facts presented in this case, defendants urge the Court to enter an injunction directing the Ann Arbor Transportation Authority ("AATA") to reconsider its Advertising Policy in light of the Court's determination that the "good taste" provision in that policy is unconstitutional.[1] This was the remedy ordered in recent, similar cases and is the only remedy that will protect Mr. Coleman's rights, the First Amendment and the AATA's right to lawfully control the advertisements displayed on its buses.

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[1] The AATA should also be afforded an opportunity to reconsider its Advertising Policy under *AFDI v. SMART,* __ F.3d ___, Case. No. 12-0368 (6th Cir. October 25, 2012), a recent decision that upheld a "defamation, scorn and ridicule" provision similar to that in the Advertising Policy and that provides considerable fresh guidance to transit authorities in how to fashion advertising policies that bar ads that "alienate people and decrease ridership," *i.e.* the concerns that motivated the AATA to enact the policy provisions that caused it to reject Mr. Coleman's ads. A copy of the *SMART* decision is attached as Exhibit A.

A. Court has broad discretion in fashioning an equitable remedy.

The authority to enter injunctive relief lies within this Court's traditional equity powers. *Mertens v. Hewitt Assoc.,* 508 U.S. 248, 255 (1993); *Meredith v. City of Winter Haven*, 320 U.S. 228 (1943). "The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. ***Flexibility rather than rigidity has distinguished it."*** *Hecht,* 321 U.S. at 330 (emphasis added). As such, federal courts have considerable discretion in fashioning the scope of injunctive relief when such relief is warranted.

However, the Court's discretion is not without limits and an injunction that barred the AATA from engaging in lawful conduct would be impermissibly overbroad. *Shakhnes v. Berlin,* 689 F.3d 244, 257 (2nd Cir. 2012*); e360 Insight v. The Spamhaus Project*, 500 F.3d 594, 605 (7th Cir. 2007). As a guard against overbroad injunctions, federal courts must "try to limit the solution to the problem" and enjoin only the unconstitutional applications of a statute "while leaving other applications in force." *Ayotte v. Planned Parenthood of Northern New Hampshire*, 546 U.S. 320, 328-29 (2006), *internal quotations and citations omitted.* Put another way:

> Precisely because equitable relief is an extraordinary remedy to be cautiously granted, it follows that the scope of relief should be ***strictly tailored to accomplish only that which the situation specifically requires*** and which cannot be attained through legal remedy.

Aluminum Workers International v. Consolidated Aluminum Corp., 696 F.2d 437, 446 (6th Cir. 1982) (emphasis added).

Another element of this restriction on the court's discretion is the principle that, if there is a constitutional basis for the government's decision, the plaintiff is not entitled to injunctive relief simply because an unconstitutional basis may also have been used in making the decision. *Mt. Healthy School Dist. v. Doyle,* 429 U.S. 274, 285 (1977). In these circumstances, a plaintiff

is afforded complete relief by an order that does not countenance unconstitutional government action, but that also does not put the plaintiff in a better position than he would be in if the government's action were based solely on a constitutional basis. *Mt. Healthy,* 429 U.S. at 285-86. This doctrine is applied in myriad of cases involving Constitutional issues. For example, in cases alleging Fourth Amendment violations, the exclusionary rule (discussed by Mr. Coleman at n. 6 of his brief) does not bar illegally obtained evidence if the state can show good faith, an independent source for the evidence or the inevitable discovery of the evidence. *See e.g. Davis v. US,* 131 S.Ct. 2419, 2426 - 29 (2011).

Finally, this discretion for determining appropriate injunctive relief is not restricted by the fact that a violation of the First Amendment is alleged. Although Mr. Coleman suggests otherwise, none of his cited authority holds that the First Amendment limits ***in any way*** this Court's discretion to fashion injunctive relief.[2] Rather, as demonstrated below, even in the First Amendment context, the Court has discretion to craft an appropriate remedy that is "strictly tailored" to address the particular circumstances of the case before it.

B. The Court should direct the AATA to reconsider its Advertising Policy in light of the Opinion and the recent *SMART* decision.

Mr. Coleman argues that the only appropriate injunctive remedy is an order directing the AATA to run the ad. This relief is not necessary to provide Mr. Coleman with a sufficient remedy and, more importantly, is not warranted in order to protect the First Amendment. Rather, under the specific facts of this case, the appropriate remedy would be to order the AATA to reconsider its Advertising Policy in light of the Opinion. This has been the remedy ordered in a

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[2] For example, Mr. Coleman disingenuously cites *Bigelow v. Virginia,* 421 U.S. 809, 816 (1975) for the proposition that "relief must be given even to persons whose own speech would be validly proscribed were the relevant policy more narrowly crafted." *See* Coleman Brief at p. 8. *Bigelow* dealt with the issue of ***standing.*** It did not even suggest that the only way to protect the First Amendment is to force the government to allow speech that could be constitutionally restricted.

plethora of similar cases and is a remedy that would be "strictly tailored" to address the constitutional violation found by the Court, without granting Mr. Coleman extraordinary relief.

In *American Freedom Def. Initiative v. Metropolitan Transportation Authority*, ___ F.Supp.2d ___ (S.D. N.Y. 2012) (2012 WL 2958178), the plaintiff wanted to run an ad that stated, in relevant part, "In any war between the civilized man and the savage, support the civilized man. Support Israel Defeat Jihad." *See AFDI I*, attached as Exhibit B. The Metropolitan Transportation Authority ("MTA") rejected the ad under a provision of its advertising policy that barred ads that "contain images or information that demean and individual or group of individual on account of race, color, religion, national origin, ancestry, gender, age, disability or sexual orientation." *AFDI,* 2012 WL 2958178 at * 2. The *AFDI* court found that this provision to be unconstitutional under *R.A.V. v. City of St. Paul,* 505 U.S. 377, 391 (1992) because it barred demeaning speech directed at certain personal attributes, "but permits all other demeaning ads." *AFDI,* 2012 WL 2958178 at *17.[3]

The *AFDI* court did not, however, direct the MTA to run the plaintiff's ad. Rather, the court, "***in the public interest***," granted the MTA 30 days in which to consider "alternatives to the current regulation." *AFDI,* 2012 WL 2958178 at * 19 (emphasis added). In explaining the basis for the remedy ordered, the *AFDI* court noted:

> Today's ruling does not disable city authorities from adopting rules that hold ads and commentary on the exteriors of buses to a standard of civility. *See, e.g., Ridley v. Mass. Bay Transp. Auth.*, 390 F.3d 65, 90 (1st Cir.2004) (upholding transit authority's regulation that prohibited, without further limitation, advertisements that demean or disparage an individual or group of individuals). [...] And in resolving this case on the narrow ground that the no-demeaning standard as currently drafted is impermissibly content-based, the Court pointedly does not reach any of

[3] In this case, the "defamation, scorn or ridicule" ban on ads is not limited to any class of people but applies to all persons or groups of persons, and therefore does not suffer from the infirmity noted in *R.A.V. See* Kagen, E., *"Private Speech, Public Purpose: The Role of Governmental Motive In First Amendment Doctrine."* 63 University of Chicago Law Review 413 (Spring 1996) at p. 417 - 418.

> the broader grounds for invalidation urged by AFDI under the First Amendment. Today's ruling instead leaves—and is intended to leave-MTA the latitude to investigate and experiment with alternative mechanisms for using ad space on the exteriors of city buses productively, profitably, and constitutionally, while ensuring that this space is not used as a tool for disparagement and division.

Id. at *19 (footnotes and internal quotations omitted). *See also, University of Cincinnati Chapter of Young Americans for Liberty v. Williams*, 2012 WL 2160969 (S.D. Ohio 2012) (university enjoined from enforcing unconstitutional restrictions on speech but not ordered to allow plaintiff's speech). The *AFDI* court afforded the MTA the opportunity to revise its policy, even though this process would require the plaintiff to resubmit its ad under the new policy.[4]

The Sixth Circuit has affirmed similar injunctions in cases alleging a violation of Constitutional rights. For example, in *Miller v. Cincinnati,* 622 F.3d 524 (6th Cir. 2010), the plaintiff challenged the constitutionality of a policy that restricted use of City Hall to only those groups that received permission from a department head and then only if the department head determined that the allowing the use of the facility was "in the public interest." *Miller,* 622 F.3d at 529. The plaintiff wanted to hold a press conference in city hall but was denied access.

In the resulting litigation, the plaintiff sought an injunction ordering the city to allow plaintiff to hold a press conference. *Miller,* 622 F.3d at 531. The district court found the policy to be unconstitutional under the First Amendment and granted the plaintiff a preliminary injunction. In upholding the district court's decision, the *Miller* court affirmed the issuance of an injunction to the extent the defendant was enjoined from enforcing the unconstitutional regulation. The *Miller* court did not order the city to allow plaintiff access to City Hall, although

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[4] This remedy was not ordered in a similar case pending in the District for the District of Columbia but the issue in that case concerned the transit authority's decision to delay the running of an otherwise permissible ad. *Amer. Freedom Def. Initiative v. Wash. Area Metro Trans. Auth.,* ___ F. Supp. 2d ___ (D. D.C. 2012)(2012 WL 4845643). The transit authority's decision to defer the placement of the ad was not based on a written policy so there was no basis for remanding the matter to the transit authority for reconsideration.

it recognized this was a possible remedy. *Miller,* 622 F.3d at 540. On remand, the city revised its policy to bar all press conferences in City Hall, a decision that rendered moot the plaintiff's claim for permanent injunctive relief. *Miller v. City of Cincinnati,* 2012 WL 3962787 (S.D. Ohio, 2012).

The Sixth Circuit also recently declined to enter a mandatory injunction in a case involving voting rights. In *Obama for America v. Husted,* __ F.3d ___, 2012 WL 4753397 (6th Cir. 2012), the Sixth Circuit considered the constitutionality of a statute that revoked early voting rights for all registered voters except those currently serving in the military. The statute did not make early voting mandatory, but left the decision of whether to offer early voting to local voting boards. The district court declared unconstitutional the statute's revocation of early voting rights for non-military registered voters and enjoined state election officials from enforcing that provision of the statute. The majority in *Husted* affirmed on the express understanding that it was not requiring any voting board to allow early voting. Rather, the effect of the injunction was that, if a voting board offered early voting, it had to offer it to all voters.

Federal courts clearly have the authority when faced with a violation of the Constitution to provide the state with an opportunity to remedy the violation and to grant an injunction like that sought by Mr. Coleman only if the state fails to act. The Sixth Circuit in *Miller* and *Husted* allowed for this limited injunctive relief as did the federal district courts in *AFDI, Williams* and *McCollum v. City of Powder Springs*, 720 F.Supp. 985, 990 (N.D. Ga. 1989). The scope of injunctive relief awarded in these cases reflects the need to "limit the solution to the problem" and to strictly tailor the relief to the particular facts presented. *Ayotte,* 546 U.S at 328. It is the

appropriate relief in this case.[5]

C. An order directing the AATA to run the ad is not warranted.

Mr. Coleman's argument in support of his proposed remedy is based on false assumptions and inapposite authority. The record developed through discovery and presented at the evidentiary hearing establishes conclusively that Mr. Coleman's rights and the public interest would be sufficiently vindicated if the AATA were given an opportunity to reconsider its Advertising Policy in light of the Opinion and the *SMART* case.

First, there is no basis in fact or law for assuming that the AATA cannot draft a constitutional Advertising Policy. The First Amendment is not violated by a transit authority's effort to set a "minimum level of discourse" in the advertisements displayed on its buses and in its terminals. *Ridley v. Mass. Bay Trans. Auth,* 390 F.3d 65, 90 (1st Cir. 2004); *AFDI,* 2012 WL 2958178 at *19. Indeed, the Sixth Circuit recently held that a transit authority has the right to ban ads that "have a strong potential to alienate people and decrease ridership" by defaming or holding up to scorn or ridicule a person or group of persons. *See SMART,* Exhibit A at pp. 15 – 16. The AATA contends that the "defamation, scorn and ridicule" provision in the Advertising Policy is such a valid restriction and the Court did not find otherwise. *See* Opinion at n. 15. As the Court noted, Mr. Coleman himself did not make a facial challenge to this provision, but merely argued (without any supporting evidence) that the provision was invalid as applied to his ad. *See* Opinion at p. 15. Thus, the record does not establish– or even suggest – that an Advertising Policy without the "good taste" provision violates the Constitution. There is no reason to assume that it would, in light of *Ridley, SMART* and similar cases.

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[5] Given the breadth of the Court's discretion, the Court could also order the AATA to reconsider Mr. Coleman's ad (either as is or in a revised form) in light of a revised Advertising Policy or order the AATA to strike the "good taste" language from its Advertising Policy. Any of these orders would reflect the "narrow tailoring" the Supreme Court had held is required in these types of cases.

Second, although Mr. Coleman argued vociferously that AATA's application of the Advertising Policy was "arbitrary" and that the AATA engaged in "view-point based decision making" and was likely to do so again, he presented no evidence to support his argument. In fact, the Court found that the AATA "created an orderly process" in which the final decision on whether to run an ad was made by "a committee of senior employees, rather than at the discretion of one individual . . .." *See,* Opinion at p. 25. In other words, on the specific facts of this case, there is no basis for assuming that the AATA will not give objective consideration of any ad submitted by Mr. Coleman under a revised, constitutional Advertising Policy. These circumstances distinguish this case from those relied on by Mr. Coleman, where the defendant transit authorities were found to have acted arbitrarily and to have engaged in view point discrimination. *United Food & Commercial Workers, v. Southwest Ohio Reg. Trans. Auth.,* 163 F.3d 341 (6th Cir. 1998); *Pittsburgh League of Young Voters Educ. Fund v. Port Authority of Allegheny County,* 653 F.3d 290, 297 (3rd Cir. 2011).

Further, Mr. Coleman unfairly downplays the harm the AATA would suffer if it were ordered to run the ad instead of being afforded an opportunity to reconsider its Advertising Policy in light of the Opinion. The only evidence presented in this case established conclusively that ridership and revenues would be impaired if the ad were run. [6] S*ee* Ahuvia Report, Dkt. #19-4 at ¶3C. Dr. Ahuvia's opinion, based on empirical research and expert analysis, was that running the ad would "significantly conflict" with the AATA's goals of "providing revenue,

[6] Although such contentions are subject to proofs, Mr. Coleman likewise offers no empirical support for his argument that citizens would stop filing suits to redress First Amendment violations if plaintiffs are not automatically awarded an injunction allowing their disputed speech. *See* Coleman Brief at pp. 7 - 9. Absent a shred of supporting evidence, Mr. Coleman's argument on "incentives" is no more than "sound and fury, signifying nothing." In any event, Mr. Coleman received considerable publicity by filing this suit, including the publication of his ad in Ann Arbor's on-line newspaper. *See* annarbor.com entry, attached as Exhibit C. This, along with the potential for damages under §1983, is certainly an incentive for a self-described "political activist" to file suit.

increasing ridership and assuring a safe and pleasant environment for passengers."[7] *See* Dkt. #19-4 at ¶2. Mr. Coleman offered no contrary evidence and failed to impeach this testimony. Thus, the only evidence presented is that the ad would actually interfere with the AATA's business, and not just upset some of its riders. Dr. Ahuvia's unrebutted conclusion also distinguishes the instant case from *United Food* where the court found on the evidence before it that running the proposed ad "would not adversely affect SORTA's image or ridership." *United Food,* 163 F.3d at 363. The specific facts of this case are different than those in *United Food* and a different remedy is warranted.

Moreover, Mr. Coleman's alleged harm is not "ongoing" simply because AATA allows other advertisers to place ads on its buses. Mr. Coleman has available to him the full range of public fora and is able to deliver his speech in these places freely and without restrictions. He can wear the sandwich board he often wears, bearing his proposed ad, and walk around the very areas covered by his preferred AATA bus routes. As a matter of law and common sense, he would not be "silenced" in anyway by the AATA's proposed relief.

Finally, Mr. Coleman's request for a mandatory injunction is premised on the mistaken assumption that the AATA rejected his ad because of Mr. Coleman's views of Middle East politics. The Court made no such finding and the evidence does not support any such finding. Therefore, Mr. Coleman's suggestion that any harm suffered by AATA in running the ad can be cured by ads expressing the "opposite" view (what ever that may be) is nonsensical and contrary to Supreme Court precedent. *Rosenberger v. Rector and Visitors of University of Virginia,* 515 U.S. 819, 831 (1995) ("The dissent's assertion . . . reflects an insupportable assumption that all debate is bipolar and that antireligious speech is the only response to religious speech.") The

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[7] The AATA was well within its rights to ban ads that impair these legitimate goals. *See, SMART,* Exhibit A at p. 14 – 15.

AATA rejected the ad because it was defamatory and held up a group of people to scorn and ridicule. The harm caused the AATA and its riders by the ad cannot be remedied by speech that defames of holds up a different type of person to scorn and ridicule. Mr. Coleman presents a false dichotomy and misstates the nature of the harm the AATA was legitimately attempting to guard against.

D. Next steps.

AATA and Mr. Ford agree with Mr. Coleman that the scope of the injunction dictates what additional actions are necessary in this case and that a post-injunction status conference is appropriate.[8] However, regardless of the form of the injunction, AATA and Mr. Ford have not taken discovery with regard to the claim against Mr. Ford or Mr. Coleman's (alleged) damages and request a reasonable time to conduct this discovery.

E. Conclusion.

Mr. Coleman's proposed order would strip the AATA of its right to enact and enforce a constitutionally valid Advertising Policy. The AATA therefore respectfully asks the Court to limit its injunction to an order directing the AATA to reconsider its Advertising Policy in light of the Opinion and the *SMART* case.

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[8] Mr. Coleman has refused to dismiss Michael Ford from this case, although there is no evidence that Mr. Ford took any action concerning Mr. Coleman's proposed ad. The record is unequivocal that Mr. Coleman's proposed ad was considered first by AATA staff and then the AATA Board. Therefore, there is no basis in law or fact that would support an injunction against Mr. Ford. *Ashcraft v. Iqbal,* 129 S.Ct. 1937, 1948 (2009) (plaintiff required to show that "each Government-official defendant, through the official's own individual actions, has violated the Constitution.") Mr. Ford should not be part of any order awarding injunctive relief.

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CERTIFICATE OF SERVICE

I hereby certify that on October 26, 2012 I electronically filed the above document(s) with the Clerk of the Court using the ECF system, which will send notification of such filing to the following: all counsel of record.

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