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

BLAINE COLEMAN,

Plaintiff,

Case No. 11-cv-15207

vs.

Hon. Mark A. Goldsmith

ANN ARBOR TRANSPORTATION AUTHORITY, et al.,

Defendants.
_____/

PLAINTIFF'S REPLY BRIEF
ADDRESSING NEW SIXTH CIRCUIT AUTHORITY

Plaintiff files this short reply brief to address the Sixth Circuit's recent decision in *American Freedom Defense Initiative v. Suburban Mobility Authority for Regional Transportation* ("*AFDI v. SMART*"), __ F.3d __, No. 11-1538 (Oct. 25, 2012) (Dkt. # 54-2).* Contrary to Defendants' argument, *AFDI v. SMART* does not undermine Plaintiff's case or support Defendants' continuing policy against "scorn and ridicule."

Defendants' brief states that the Sixth Circuit's decision in *AFDI v. SMART* "upheld a 'defamation, scorn and ridicule' provision similar to that in [AATA's] Advertising Policy." (Dkt. # 54 at Pg ID 896 n.1.) This is incorrect. Although the transit agency in that case had an advertising policy that prohibited defamation, scorn, and ridicule, the Sixth Circuit never reached the question of whether that provision of the policy was constitutional. Instead, the court held that SMART acted constitutionally when it excluded AFDI's ad on grounds that it was "political" and therefore violated SMART's policy against political advertising. Once it decided

* Defendants concur in Plaintiff's request to file this reply brief; a stipulated order was filed with the Court earlier today.

that the exclusion of the ad was permissible under the "political" provision, there was no need for the court to address whether a separate "scorn or ridicule" provision passed constitutional muster. And in fact, the court made no comment whatsoever regarding that issue.

Defendants' brief also states that *AFDI v. SMART* "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." (Dkt. # 54 at Pg ID 902.) This is also inaccurate. The court broke no new ground in its findings that (a) the purpose of SMART's advertising forum was to raise revenue and (b) a policy of excluding ads with "political" content was a reasonable restriction on the forum in light of that purpose. *AFDI v. SMART*, slip op. at 8-9. But excluding ads about political issues is different from excluding *only* those ads that express scorn or ridicule *about* a political issue. The court did not hold that when an ad discusses an issue that is otherwise includible under the policy, it can be accepted or rejected based on *how* the ad *treats* the issue—i.e., with adoration, respect, envy, indifference, pity, sarcasm, scorn, or ridicule. That would be viewpoint discrimination. *See United Food & Commercial Workers Union v. Sw. Ohio Reg'l Trans. Auth.*, 163 F.3d 341, 362 (6th Cir. 1998).

Lastly, Defendants' brief cites *AFDI v. SMART* for the proposition that "AATA was well within its rights to ban ads that impair [its] legitimate goals" of "providing revenue, increasing ridership and assuring a safe and pleasant environment for passengers." (Dkt. # 54 at Pg ID 903-904 & n.7.) This is an incomplete and misleading characterization of *AFDI v. SMART*'s holding because it begs the question of *how* the government goes about exercising "its rights to ban ads that impair [its] legitimate goals." If, as in *AFDI v. SMART*, the transit agency maintains a limited public forum and excludes an ad under an already-existing policy that is both reasonable

and viewpoint-neutral, then certainly a preliminary injunction should be denied due to the plaintiff's *un*likelihood of success on the merits and the substantial harm that would flow from a potential decrease in ridership. *AFDI v. SMART*, slip op. at 14-15. But this case is different. AATA, unlike SMART, operated a designated public forum, and its exclusion of Plaintiff's ad did not survive strict scrutiny; Plaintiff, unlike AFDI, thus demonstrated a likelihood of success on the merits. Therefore the same "substantial harm" and "public interest" factors that weighed so clearly in favor of SMART in the Sixth Circuit decision unquestionably weigh against AATA here. "[I]n the First Amendment context, [these] factors are essentially encompassed by the analysis of the movant's likelihood of success on the merits . . . ." *Id.*, slip op. at 4.

In sum, *AFDI v. SMART* should not be read as undermining Plaintiff's case or supporting the continuation of AATA's "scorn or ridicule" policy.

Respectfully submitted,

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Dated: October 30, 2012

Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on October 30, 2012, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system, which will send notification of such filing to:

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