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

SUR-REPLY BRIEF OF ANN ARBOR TRANSPORTATION AUTHORITY AND MICHAEL FORD ADDRESSING RECENT SIXTH CIRCUIT AUTHORITY

On October 25, 2012, the Sixth Circuit issued an opinion that vacated a preliminary injunction entered in favor of a plaintiff seeking to place an ad on a public bus ("Fatwa Ad"). *Amer. Freedom Def. Initiative v. SMART,* __ F.3d __ (Case No. 11-1528) (6th Cir. 2012). The transit authority rejected the Fatwa Ad because it violated two provisions of the authority's advertising policy, including a provision that barred ads that were, "clearly defamatory or likely to hold up to scorn or ridicule any person or group of persons." *See, SMART* at p. 3. The underlying case addressed the constitutionality of both the "defamation, scorn and ridicule" provision and the transit authority's ban on "political" ads. *AFDI v. SMART,* 2011 WL 1256918 (ED. Mich. 2011).

Mr. Coleman argues that once the *SMART* court determined that the ban on political ads was constitutional, it did not need to decide whether the "defamation, scorn or ridicule" provision also was constitutional. The argument would make sense if the Sixth Circuit found the ban on political speech to be ***unconstitutional,*** because then the question of whether the "defamation, scorn and ridicule" provision was also unconstitutional would be moot. The issue

arguably was not moot in *SMART,* however, because the Sixth Circuit could not allow a potentially unconstitutional restriction on speech to remain in effect.

Mr. Coleman next argues that *SMART* is inapposite to the instant case because the transit authority in *SMART* banned all political ads and did not exclude, "*only* those ads that express scorn or ridicule *about* a political issue." *See* Reply at p. 2 (emphasis in the original). This sophistry is an attempt to cloud the clarity *SMART* brought to this area of law. The *SMART* court deliberated over whether the Fatwa Ad was "political" or "religious" in response to the plaintiff's contention that Fatwa Ad should be allowed because the transit authority allowed a pro-atheist ad. The *SMART* court disposed of the argument by noting that the distinction did not matter because the Fatwa Ad was a political treatment of a religious issue; the ad "addresses ***a specific issue that has been politicized."*** *See SMART,* at p. 13 (emphases added).

Thus, the *SMART* court upheld the rejection of the Fatwa Ad because the issue of religion was politicized in the ad and therefore the ad itself was political. The *SMART* court did not get bogged down in the semantics of whether the term "political" as used in the advertising policy referred to an "topic" or to speech "about a topic" because the distinction is irrelevant when the advertising policy is sufficiently clear and viewpoint neutral, like a ban against "political" ads or ads that hold up a group of persons to scorn or ridicule.[1] As the *SMART* court noted, "Whenever a rule is applied by an official, a certain amount of discretion must necessarily be exercised." *SMART,* p. 10. In the *SMART* case, the transit authority validly exercised its judgment in deciding that the Fatwa Ad violated its policy, even though it had to draw "fine lines" in making that determination. *SMART,* p. 9. But because the advertising policy did not vest the transit authority with discretion to make highly subjective determinations about whether to run an ad,

[1] Ads that are defamatory fall outside of the First Amendment's protection entirely. *U.S. v. Stevens,* 130 S.Ct. 1577, 1584 (2010).

the advertising policy was constitutionally sound. This finding, and not a meaningless distinction between bans on speech "of an issue" versus bans on speech "about an issue," was the basis for the holding in *SMART*.

Finally, the Court asked the parties to brief the question of the form of injunctive relief to enter, not whether injunctive relief should be entered. The Court already decided that injunctive relief was warranted and the balancing of harms attendant to that analysis does not necessarily apply to the issue of the scope of the injunction the Court should enter. In other words, the harm to the AATA and public caused by the particular form of injunctive relief Mr. Coleman seeks is relevant to the Court's determination as to the breadth of the injunction, and is not "encompassed by the analysis of the movant's likelihood of success on the merits." *See* Coleman's Reply at p. 3. The *SMART* court recognized that messages that "have a strong potential to alienate people and decrease ridership" cause "substantial harm to others." This is a legitimate factor for the Court to consider in deciding whether the injunction it has already decided is warranted should include an order forcing the AATA to run such an ad.

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CERTIFICATE OF SERVICE

I hereby certify that on November 2, 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.

/s/ Kathleen H. Klaus

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