

August 12, 2011

Michael Ford, Chief Executive Officer
Jesse Bernstein, Chair of the Board of Directors
Ann Arbor Transportation Authority
2700 S. Industrial Hwy.
Ann Arbor, MI 48104

Re: AATA Advertising Policy

Dear Messrs. Ford and Bernstein:

We are writing because AATA's advertising policy is unconstitutional. As outlined below, it violates the First Amendment and is void for vagueness in violation of the Fourteenth Amendment. We write on behalf of Blaine Coleman, an Ann Arborite whose proposed ad was rejected by AATA. In the hope that this issue can be resolved amicably and without the need for litigation, we ask that you promptly reconsider your decision with regard to Mr. Coleman's ad and reform your advertising policy in accordance with constitutional standards.

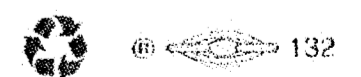
Background

Mr. Coleman is an Ann Arbor resident and activist. He wishes to run an advertisement on the side of a bus that reads "Boycott Israel, Boycott Apartheid." Earlier this year, the official in charge of AATA advertising informed Mr. Coleman that AATA would not run his ad because it is in violation of AATA's advertising policy. A copy of that policy is attached to this letter. Among other things, the policy states that all ads "must be considered in good taste and shall uphold the aesthetic standards as determined by AATA." It prohibits ads that are "likely to hold up to scorn or ridicule a person or group of persons."

The First Amendment Prohibits Censorship on Public Transportation.

AATA did not say which provision of the policy Mr. Coleman's ad violated, but rejecting the ad was likely unconstitutional regardless of AATA's precise justification for doing so. The constitutionality of your advertising policies and practices is largely governed by United Food & Commercial Workers Union, Local 1099 v. Southwest Ohio Regional Transit Authority, 163 F.3d 341 (6th Cir. 1998). In that case, the U.S. Court of Appeals for the Sixth Circuit held that the Southwest Ohio Regional Transit Authority ("SORTA") violated the First Amendment by rejecting a pro-union advertisement for being controversial and not aesthetically pleasing. The court determined that SORTA's advertising space was a public forum; SORTA therefore could not censor ads on the basis of their content. It further held that SORTA's advertising policy was facially unconstitutional because it was not viewpoint-neutral and was unconstitutionally vague.

AATA's advertising policy suffers from the same deficiencies that doomed SORTA in United Food.



AATA Is a Public Forum Where Content-Based Censorship Is Unconstitutional.

First, it is likely that AATA's advertising space is a public forum. Rejecting any ad from a public forum based on its content automatically triggers strict scrutiny, the most rigorous test known to constitutional law. See United Food, 163 F.3d at 355. Although AATA's written policy says that it does not intend to create a public forum, whether a public forum exists is determined by AATA's actual practice, not its written policy statements. Id. at 352-53. In United Food, the Sixth Circuit held that SORTA's advertising space was a public forum even though SORTA's written policy, like AATA's, claimed that it was not. The court determined that SORTA created a public forum by accepting nearly every advertisement that was submitted. Id. at 354.

According to your office's response to our request for public records, in the past few years AATA has rejected only one advertisement other than Mr. Coleman's. Meanwhile AATA has accepted a wide array of advertisements, including:

- "Every 9 ½ minutes someone in the U.S. is infected with HIV."
- "Two-Faced Landlords Can Be Stopped. Housing Discrimination Is Against the Law."
- "Domestic Violence. It happens here."
- "In Washtenaw County black babies are 3x more likely to die than white babies."
- "Breastfeeding makes babies smarter."
- "NorthRidge Church is For Hypocrites. NorthRidge Church is For Fakes. NorthRidge Church is For Liars. NorthRidge Church is For Losers."
- 2WordStory.com, a website featuring the stories of people who "experienced the life changing love and grace of Jesus Christ."
- Campaign ads supporting Joan Lowenstein and Margaret Connors for district judge.

Thus, it appears that AATA is willing to carry ads about virtually any subject matter—regardless of whether the ad is selling a commercial product, conveying information about important social issues, advocating the election of a candidate for public office, or spreading religious gospel. "Acceptance of a wide array of advertisements, including political and public-issue advertisements, is indicative of the government's intent to create an open forum." Id. at 355. And "[o]nce [AATA] permits messages of all sorts to grace its buses, it may not then select among the submitted messages based on their content." Id. Like SORTA, AATA has created a public forum and cannot now exclude Mr. Coleman's ad.

AATA's Policy Is Facially Invalid Because It Allows for Viewpoint Discrimination.

Even if a court were to find that AATA's advertising space is not a public forum, AATA's advertising policy is nevertheless facially unconstitutional because it is not

viewpoint neutral. Even in nonpublic fora, where reasonable exclusions are permissible based on the subject matter of the speech or the identity of the speaker, discrimination based on the viewpoint expressed is absolutely forbidden. See Kincaid v. Gibson, 236 F.3d 342, 355-56 (6th Cir. 2001) (en banc). In United Food, the Sixth Circuit struck down SORTA's advertising policy because its "prohibition against 'controversial' advertisements unquestionably allow[ed] for viewpoint discrimination." United Food, 163 F.3d at 361. SORTA's policy excluded ads that expressed a controversial view about a subject while accepting ads that expressed a non-controversial view about the same subject. Impermissible viewpoint discrimination occurs where it is "the treatment of a subject, not the subject itself, that is disfavored." Id. at 362.

AATA's policy suffers from the same constitutional infirmity. It prohibits ads that are "likely to hold up to scorn or ridicule a person or group of persons," thereby favoring speech that expresses positive sentiments about a person or group over speech that expresses negative views. Mr. Coleman's ad, "Boycott Israel, Boycott Apartheid," arguably subjects Israel to scorn or ridicule. But an ad paid for by Israel's tourist bureau encouraging people to visit the country or purchase its products expresses the opposite view and would be accepted under AATA's policy. A distinction of this kind, based on the message expressed by the speaker, violates the First Amendment.

AATA's Policy is Unconstitutionally Vague.

AATA's policy is also void for vagueness. Restrictions on speech are impermissibly vague when they give public officials unbridled discretion to limit speech based on ambiguous and subjective reasons rather than clear and objective criteria. United Food, 163 F.3d at 359. The Sixth Circuit held that SORTA's policy, by requiring that ads be "aesthetically pleasing," was unconstitutionally vague on its face. Id. at 360.

AATA's similar policy, which requires that ads "be considered in good taste" and "uphold the aesthetic standards as determined by AATA," is also unconstitutionally vague. As the Sixth Circuit noted in United Food, "aesthetics is a vague term that invites subjective judgments." Id. Needless to say, "good taste" is also completely subjective. In Aubrey v. City of Cincinnati, 815 F. Supp. 2d 1100 (S.D. Ohio 1993), the court had "no hesitancy" in concluding that the Cincinnati Reds' ban on baseball park banners that are not in "good taste" was facially unconstitutional because it "leaves too much discretion in the decision maker without any standards for that decision maker to base his or her determination." Id. at 1104. By giving officials virtually unfettered discretion to reject ads based on poor taste and undefined aesthetic standards, AATA creates a "danger of arbitrary and discriminatory application that violates the basic principles of due process." United Food, 163 F.3d at 360.

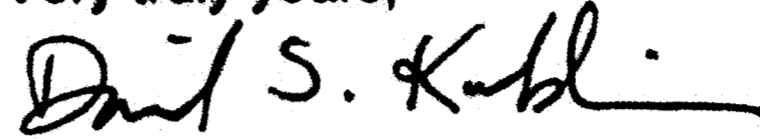
Relief Requested

Because AATA's advertising policy and practice is unconstitutional, we ask that you take the following steps:

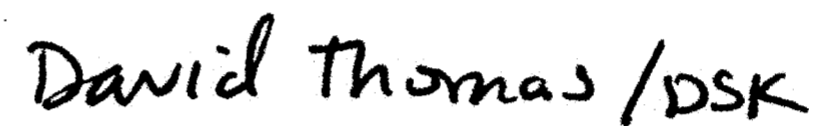
1. Accept Mr. Coleman's proposed advertisement on the same terms and conditions that you accept all other advertisements.
2. Reform AATA's advertising policy and practice to meet constitutional standards.

We are eager to discuss both these issues with you, as we sincerely hope that they can be resolved without the need for litigation. To that end, we ask that you respond to this letter by September 2, 2011.

Very truly yours,



Daniel S. Korobkin, Staff Attorney
Michael J. Steinberg, Legal Director
American Civil Liberties Union Fund
of Michigan
2966 Woodward Ave.
Detroit, MI 48201
(313) 578-6824
dkorobkin@aclumich.org
msteinberg@aclumich.org



David Thomas, President
Washtenaw Branch, American Civil
Liberties Union of Michigan

Cc: Blaine Coleman
AATA Board of Directors via email at board@theride.org