

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN CIVIL LIBERTIES UNION,
CHANGE THE CLIMATE, INC.,
THE DRUG POLICY ALLIANCE,
and MARIJUANA POLICY PROJECT

Plaintiffs,

v.

THE HONRABLE NORMAN Y. MINETA,
THE UNITED STATES OF AMERICA,
and WASHINGTON METROPOLITAN
AREA TRANSIT AUTHORITY,

Defendants.

Civil Action No. _____

**MEMORANDUM OF PLAINTIFFS IN SUPPORT OF THEIR
MOTION FOR PRELIMINARY INJUNCTION**

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*** Authorities upon which we chiefly rely are marked with an asterisk.**

GLOSSARY

The Act	Consolidated Appropriations Act of 2004, Pub. L. No. 108-199, 118 Stat. 3 (2004). Division F of the Act is also known as the Transportation, Treasury, and Independent Agencies Appropriations Act of 2004.
Mineta	The Honorable Norman Y. Mineta, United States Secretary of Transportation
Section 177	Consolidated Appropriations Act of 2004, Pub. L. No. 108-199, Div. F § 177, 118 Stat. 3 (2004)
WMATA	Washington Metropolitan Area Transit Authority

INTRODUCTION

On January 23, 2004, President Bush signed into law the Consolidated Appropriations Act of 2004, Pub. L. No. 108-199, 118 Stat. 3. Section 177 of Division F of that Act (“Section 177”) prohibits making any of the appropriated funds available “to any Federal transit grantee after February 1, 2004, involved directly or indirectly, in any activity that promotes the legalization or medical use of any substance listed in schedule I of section 202 of the Controlled Substances Act (21 U.S.C. 812 et seq.)” Division F § 177, Pub. L. No. 108-199, 118 Stat. 3, at 309 (attached in relevant part as Ex. A hereto).

Marijuana is one of the 81 substances listed in Schedule I, and defendant Washington Metropolitan Area Transit Authority (“WMATA”) is a federal transit grantee designated in the Act to receive funding of at least \$88 million.¹ Absent relief by the Court, WMATA would lose that funding if it accepts advertising that advocates the legalization or medical use of marijuana.

Section 177 was designed to restrain speech that advocates such legal reform. Congress has changed the law to prevent citizens from advocating changing the law. The drafters of this legislation were candid about their objectives. The House Conference Report “note[s] with displeasure that public service advertising space in Washington, DC’s Metropolitan Area Transit Authority [*sic*] rail stations and buses has been used to advocate changing the nation’s laws regarding marijuana usage,” and equates this

¹ Maryland, one of the signatories to the WMATA compact, has budgeted federal funds for WMATA’s capital programs totalling \$141.6 million for fiscal year 2004. *State Report on Transportation* at A28 n.D, available at http://www.mdot.state.md.us/State_Report_On_Transportation/Documents/CTP%2003-08/1Summary/A23_A28.pdf (last visited Feb. 16, 2004). Of that amount, approximately \$88 million identified specifically in the appropriations act. Pub. L. No. 108-199, 118 Stat. 3, at 113, 305.

political expression with “encourag[ing] the public to break the law.” But it is Congress that broke the supreme law of the land by enacting legislation for the purpose of suppressing the expression of opinions about marijuana policy.

Section 177 has already begun to have its intended effect. WMATA recently rejected the advertisement submitted by plaintiffs American Civil Liberties Union; Change the Climate, Inc.; Drug Policy Alliance; and Marijuana Policy Project (collectively “plaintiffs”) because that advertisement advocated changing the nation’s marijuana laws.

The message that plaintiffs seek to convey through their advertisement may be unpopular with some members of Congress and others. That message operates, however, to stimulate vigorous political debate on an important issue of public policy. The debate hinges on issues of penal codes and mandatory sentencing guidelines. It hinges on federal spending in an age of spiraling budget deficits. It hinges on the ability of doctors to prescribe what they believe is best for certain of their suffering patients.

One outcome of this debate has been the enactment in a number of states of legislation and initiative measures supporting the legalization of marijuana for medical use and the relaxation of criminal punishment for those convicted of personal possession or use of marijuana.² The governments of some of these states have been willing to

² Indeed, today approximately twenty percent of the nation’s population lives in states where patients may legally use medical marijuana under state law. Residents of Washington, Oregon, California, Nevada, Colorado, Alaska and Maine have voted in favor of allowing sick patients access to marijuana with a doctor’s recommendation. Residents of the District of Columbia approved such a measure by a landslide vote in 1998, although its implementation has been blocked by Congress. *See Turner v. District of Columbia Bd. of Elections and Ethics*, 354 F.3d 890, 893-94 (D.C. Cir. 2004). In 2000, Hawaii became the first state in which the legislature enacted medical marijuana legislation.

establish effective, well-regulated distribution systems to provide medical marijuana to qualified patients in their states. However, their efforts have been deterred or blocked by federal opposition, which has created a general climate of fear and vulnerability among patients and providers and has limited the ability of patients and physicians to take advantage of the state medical marijuana laws. *See, e.g., Conant v. Walters*, 309 F.3d 629 (9th Cir. 2002) (enjoining enforcement of federal government policy of threatening to punish physicians for communicating with their patients about the medical use of marijuana). Under the Constitution, Congress may not use its spending power to stifle debate over legislative change in a public forum.

STATEMENT OF FACTS

I. WMATA's Rejection of Plaintiffs' Advertisement

Defendant WMATA is an interstate compact agency created in 1967 as an instrumentality of the State of Maryland, the Commonwealth of Virginia, and the District of Columbia. *See, e.g., KiSKA Constr. Corp. v. WMATA*, 321 F.3d 1151, 1158 (D.C. Cir. 2003). WMATA is familiar to residents of the Washington, D.C., area by virtue of its Metrorail trains and Metrobus buses. Through an agent, WMATA sells advertising space on its buses and bus shelters, and in its buses, trains, and train stations. *See Advertising Opportunities with Metro*, at <http://www.wmata.com/bus2bus/adsonmetro.cfm> (attached hereto as Ex. B).

On January 23, 2004, plaintiffs sought to purchase advertising space in the Metrorail and Metrobus systems to advocate change in the nation's marijuana laws. One

of the plaintiffs had placed similar advertisements with WMATA in the past.' The specific advertisement at issue, attached hereto as Exhibit C, reads:

**MARIJUANA LAWS WASTE BILLIONS OF TAXPAYER DOLLARS
TO LOCK UP NON-VIOLENT AMERICANS.**

One in three adult Americans have tried marijuana and federal marijuana laws can imprison every one of them just for simple possession. These laws are unfair and abuse our criminal justice system. Prosecuting and jailing these Americans wastes valuable resources better spent keeping violent criminals off of our streets. As it is, hundreds of thousands of citizens have already been imprisoned – many of them non-violent, otherwise law-abiding and many of them stripped of their right to vote, their property, their jobs and their college grants. Let's adopt common sense and enact more realistic marijuana laws. And let's save the jails for real criminals. Get involved today.

Id. The advertisement includes a photograph of a crowd of people in business attire behind bars, and the logos of, and web addresses for, each of plaintiffs. *Id.*

On February 5, 2004, WMATA informed plaintiffs (through their respective advertising agencies) that it had rejected plaintiffs' advertisement. Email from Doreen J. Roberts to Howard Benenson (Feb. 5, 2004) (attached hereto as Ex. D). This litigation ensued.

II. The Origin of Section 177

Section 177 is the result of one Member of Congress' reaction to seeing plaintiff Change the Climate's advertisements on the Metro system which expressed a view with which he strongly disagreed.³ Shortly after the Change the Climate advertisements began

³ In the fall of 2003, plaintiff Change the Climate ran three public-service advertisements in the Metrorail and Metrobus systems, pursuant to WMATA's then-existing policies of setting aside advertising space for free use by nonprofit organizations among others. *See Marijuana Reform Ad Campaign in Washington D.C.*, at http://www.changetheclimate.com/campaigns/08_03_dc (last visited Feb. 4, 2004)

running, Representative Ernest Istook of Oklahoma complained about the advertisements in a letter to WMATA Board Chairman Jim Graham. Jim McElhatton, *Metro's Pro-Pot Ads Get Attention on Hill*, Wash. Times, Dec. 3, 2003, at B1 (attached hereto as Ex. E). Congressman Istook's letter expressed his "grave concern and displeasure" at the presence of the advertisements on the Metro system: "At a time when the nation and the Washington, D.C. area, in particular, suffer from chronic substance abuse . . . I find it shocking that [WMATA] provides this ad space." *Id.*

Additionally, Representative Istook drafted Section 177 of the appropriations bill, and the Conference Report accompanying Section 177 explains why:

The conferees are concerned that transit agencies accepting Federal grant funds may be providing their advertising space to organizations that encourage the public to break the law. For example, the conferees note with displeasure that public service advertising space in Washington, DC's Metropolitan Area Transit Authority [*sic*] rail stations and buses has been used to advocate changing the nation's laws regarding marijuana usage. WMATA has provided \$46,250 worth of space to these types of ads; therefore, as a warning to other transit agencies, the conferees have deleted funding totaling \$92,500 from projects and activities for WMATA in this bill.

While the conferees applaud the efforts of many transit agencies to prevent ads that promote marijuana use, the conferees remain concerned that the opportunity exists nationwide for transit properties to run similar advertising. Therefore, the conference agreement includes a provision

(attached hereto as Ex. F); *see also* Press Release, WMATA, Metro Board Alters Public Service Advertising Guidelines (Nov. 20, 2003), *available online at* http://wmata.com/about/met_news/dailyrelease.cfm (attached hereto as Ex. G). Those public-service policies, which have since been changed, *id.*, are not at issue in this case. Following enactment of Section 177, the plaintiffs sought to purchase advertising space on the Metrorail and Metrobus systems, as would other advertisers, but were unable to do so.

(Section 177) that prohibits Federal transit grantees from obligating or expending funds that would otherwise be available in the Act, if the grantee is involved directly or indirectly with any activity, including displaying or permitting to be displayed advertisements on its land, equipment, or in its facilities, that promote the legalization or medical use of substances listed in schedule I of section 202 of the Controlled Substance Act.

H.R. Conf. Rep. No. 108-401 (2003) (attached hereto as Ex. H). In an interview with the *Washington Post*, Jim Graham, then-Chairman of WMATA called Section 177 “petty and punitive”: “It’s a politically motivated micromanaging bolt from the blue. I suspect it would never have risen to this level if this was San Francisco or another city.” Lyndsey Layton, *Marijuana Ad on Metro Infuriates Lawmaker*, Wash. Post, Dec. 3, 2003, at B1 (attached hereto as Ex. I). Recognizing the provision’s constitutional infirmity, Graham – himself a former law professor – observed, “The congressman would rather have us slug this out in court at great expense than follow the judgment of our general counsel.” *Id.*

THE PRELIMINARY INJUNCTION STANDARD

The standard for granting preliminary relief is familiar to the Court. Preliminary relief is determined by considering four factors:

(1) whether the plaintiff has a substantial likelihood of success on the merits; (2) whether the plaintiff would suffer irreparable injury were an injunction not granted; (3) whether an injunction would substantially injure other interested parties; and (4) whether the grant of an injunction would further the public interest.

Al-Fayed v. CIA, 254 F.3d 300, 303 (D.C. Cir. 2001) (citing *Serono Labs, Inc. v. Shalala*, 158 F.3d 1313, 1317-18 (D.C. Cir. 1998)).

The preliminary injunction test is flexible, such that where there is no question about the irreparable harm suffered by plaintiffs, greater latitude is afforded to proving a likelihood of success on the merits. *See CityFed Fin. Corp. v. Office of Thrift Supervision*, 58 F.3d 738, 747 (D.C. Cir. 1995) (“If the arguments for one factor are particularly strong, an injunction may issue even if the arguments in other areas are rather weak.”).

The harm here is irreparable. The “loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” *Branch v. FCC*, 824 F.2d 37, 40 (D.C. Cir. 1987) (quoting *Elrod v. Burns*, 427 U.S. 347, 373-74 (1976)); accord *Whitaker v. Thompson*, 248 F. Supp. 2d 1, 15 (D.D.C. 2002); *People for the Ethical Treatment of Animals, Inc. v. Gittens*, 215 F. Supp. 2d 120, 134 (D.D.C. 2002). *See also Lakewood v. Plain Dealer Publ’g Co.*, 486 U.S. 750, 758 (1988) (“opportunities for speech,” if suppressed, “are irretrievably lost.”); *Washington Free Community, Inc. v. Wilson*, 426 F.2d 1213, 1218 (D.C. Cir. 1969) (“Any delay in the exercise of first amendment rights constitutes an irreparable injury to those seeking such exercise.”).

ARGUMENT

The material facts are not in dispute and the constitutional infirmities raised by Section 177 are neither complex nor subtle. Section 177 is unconstitutional, both on its face and as enforced by WMATA, a state actor.⁴ Both the equities and plaintiffs’

⁴ Plaintiffs’ constitutional claims are properly directed against the federal government, pursuant to the First and Fifth Amendments, and against WMATA, a state and federal entity, pursuant to the First, Fifth, and Fourteenth Amendments to the U.S. Constitution.

likelihood of success favor preliminary relief. Indeed, plaintiffs intend to move for summary judgment as soon as permitted by Rule 56 (a).⁵

I. Section 177 Is Unconstitutional

A. Section 177 Violates the First Amendment.

There are at least two independent reasons why Section 177 violates the First Amendment. First, it imposes impermissible content- and viewpoint-based restrictions on plaintiffs' speech. Second, it imposes restrictions that are unconstitutionally vague and overbroad.

A challenge to a government restriction of speech ordinarily begins with an analysis of whether the speech at issue would take place in a traditional public forum, a limited public forum, or a nonpublic forum. *See, e.g., Gittens*, 215 F. Supp. 2d at 128. The Court of Appeals for the District of Columbia Circuit has held that WMATA's advertising space is a limited public forum. *Lebron v. Washington Metro. Area Transit Auth.*, 749 F.2d 893, 896 (D.C. Cir. 1984) (“[N]or is there a question that WMATA has converted its subway stations into public fora by accepting other political advertising.”).⁶

⁵ For that reason, plaintiffs suggest that the Court may wish to consolidate its decision on the motion for a preliminary injunction with its decision on the merits, as permitted by Fed. R. Civ. P. 65(a)(2).

⁶ Court decisions analyzing other transit authorities have reached the same conclusion. *See, e.g., Christ's Bride Ministries, Inc. v. Southeastern Pa. Transp. Auth.*, 148 F.3d 242, 253-55 (3d Cir. 1998) (Philadelphia transit authority advertising space); *Planned Parenthood Ass'n/Chicago Area v. Chicago Transit Auth.*, 767 F.2d 1225, 1232-33 (7th Cir. 1985) (Chicago transit authority advertising space); *National Abortion Fed'n v. Metropolitan Atlanta Rapid Transit Auth.*, 112 F. Supp. 2d 1320, 1325-26 (N.D. Ga. 2000) (Atlanta transit authority advertising space).

However, forum analysis is unnecessary here, because “viewpoint discrimination is impermissible within any forum.” *Gittens*, 215 F. Supp. 2d at 129.

1. Section 177 Unlawfully Discriminates
Against a Particular Viewpoint

The “First Amendment generally prevents government from proscribing speech . . . because of disapproval of the ideas expressed.” *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992). For this reason, “[c]ontent-based regulations are presumptively invalid.” *Id.* Yet the plain language of Section 177 shows that the basis of proscription is the content of the speech, and the legislative history set out above states that disapproval of the idea of “changing the nation’s laws regarding marijuana usage,” H.R. Conf. Rep. No. 108-401 (2003), was the basis of the legislation.

While even “regulation of the subject matter of messages” is a presumptively unconstitutional restriction on speech, *United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803, 817 (2000), the presumption is virtually irrebuttable when discrimination based on viewpoint is involved. Viewpoint-based restrictions do not merely attack the content of the message expressed but do so in a way to suppress one viewpoint in the debate. The Supreme Court has characterized such viewpoint-based regulations as “obnoxious,” *id.*, and “egregious,” *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995). Viewpoint discrimination is an affront to the concept of a free marketplace of ideas. “The principle that has emerged from our cases is that the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.” *Lamb’s Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993) (quotation omitted). Thus, “the Government violates the First

Amendment when it denies access to a speaker solely to suppress the point of view he espouses.” *Id.* (quotation omitted).

Section 177 attempts to preclude, among other types of expression, advertising “that promotes the legalization or medical use of” marijuana, punishing any transit grantee that is involved “directly or indirectly” in such expression. Pub. L. No. 108-199, 118 Stat. 3, at 309. Section 177 does not prohibit other viewpoints, such as those that agree with current federal drug policy, or those that advocate more severe sentencing guidelines or more vigorous prosecution under existing laws. Section 177 is a paradigmatic regulation of the subject matter of messages, and, more obnoxiously, the regulation of a particular viewpoint.

Viewpoint-neutral content-based restrictions on speech will be struck down unless they pass strict scrutiny, requiring that the restrictions be narrowly tailored to serve a compelling state interest. *See, e.g., Hill v. Colorado*, 530 U.S. 703, 748 (2000). But viewpoint-based restrictions have never passed constitutional muster. As the Supreme Court explained in *Vincent*, “there are some purported interests – such as a desire to suppress support for a minority party or an unpopular cause, or to exclude the expression of certain points of view from the marketplace of ideas – that are so plainly illegitimate” that they would immediately invalidate a statute. *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984). *See also Arkansas Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 676 (1998) (stating that viewpoint discrimination is impermissible); *Rosenberger*, 515 U.S. at 828 (“In the realm of private speech or expression, government regulation may not favor one speaker over another.”); *Gittens*, 215 F. Supp. 2d at 129 (noting that “viewpoint discrimination is impermissible within

any forum”). There is no government rationale sufficient to support a statute that imposes viewpoint restrictions under these circumstances.

Even if, contrary to consistent Supreme Court precedent, a viewpoint-based restriction could be justified by a sufficiently compelling state interest, Congress advanced no such compelling interest in support of Section 177.⁷ The case law holds that the compelling state interest lies in encouraging political debate. As the Supreme Court has stated:

The First Amendment “was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.” “[S]peech concerning public affairs is more than self-expression; it is the essence of self- government.” Accordingly, the Court has frequently reaffirmed that speech on public issues occupies the “highest rung of the hierarchy of First Amendment values,” and is entitled to special protection.

Connick v. Myers, 461 U.S. 138, 145 (1983) (internal citations omitted).

There is no “marijuana” exception to constitutional law. As the Court of Appeals for the Second Circuit observed, “criticism of the federal government’s national drug control policy – even to the extent of advocating the legalization of certain drugs –

⁷ Section 177 is not aimed at the prevention of lawlessness, or even at the prevention of the encouragement of lawlessness. And even if Congress sought to ban the advocacy of criminal acts – as opposed to the advocacy of legislative change – such a ban could be justified constitutionally only if necessary to address a “clear and present danger” of a harm that the state is empowered to avert. See, e.g., *City of Houston v. Hill*, 482 U.S. 451, 461 (1987). Here there is no such clear and present danger. See, e.g., *Texas v. Johnson*, 491 U.S. 397, 409 (1989) (holding that “[n]o reasonable onlooker would have regarded [the] generalized expression of dissatisfaction with the policies of the Federal Government” as an invitation or exhortation to lawless action); *National Abortion Fed’n v. Metropolitan Atlanta Rapid Transit Auth.*, 112 F. Supp. 2d at 1327 (holding that the transit authority’s “interest in protecting its employees and passengers from violence” could not justify its refusal to accept certain pro-choice advertising).

implicates matters of public concern.” *Blum v. Schlegel*, 18 F.3d 1005, 1012 (2d Cir. 1994).

2. Section 177 Is Unconstitutionally Vague and Overbroad

Section 177 also is unconstitutionally vague and overbroad. A statute is impermissibly vague if it fails to “provide[] fair notice that the defendant’s contemplated conduct [falls] within the legitimate scope of the prohibition.” *United States v. Thomas*, 864 F.2d 188, 194 (1988) (citing *Keeffe v. Library of Congress*, 772 F.2d 1573, 1582 (D.C. Cir. 1985)). A statute is unconstitutionally overbroad if “it reaches a substantial number of impermissible applications.” *Terry v. Reno*, 101 F.3d 1412, 1421 (D.C. Cir. 1996) (quoting *New York v. Ferber*, 458 U.S. 747, 771 (1982)). As the Court of Appeals in this Circuit has explained, these two conditions are “related but distinct”:

A vague law denies due process by imposing standards of conduct so indeterminate that it is impossible to ascertain just what will result in sanctions; in contrast, a law that is overbroad may be perfectly clear but impermissibly purport to penalize protected First Amendment activity.

Hastings v. Judicial Conference of United States, 829 F.2d 91, 105 (D.C. Cir. 1987).

These constitutional doctrines of vagueness and overbreadth are applied with special force when expression is the target of regulation. See *Smith v. Goguen*, 415 U.S. 566, 573 (1974); *Marks v. United States*, 430 U.S. 188, 196 (1977) (“We have taken special care to insist on fair warning when a statute regulates expression and implicates First Amendment values.”).

Section 177 is impermissibly vague. It prohibits a transit grantee from receiving funds if the grantee is “involved directly or indirectly, in any activity that promotes the legalization or medical use of” controlled substances. Pub. L. No. 108-199, 118 Stat. 3,

at 309. The statute is silent on what is meant by “activity,” on what is meant by “promotes,” on what is meant by “involved,” and on what is meant by “directly or indirectly.”

The effect of all of these vague terms is to make the limits of Section 177 impossible to ascertain. If plaintiffs’ employees and volunteers take Metrorail or Metrobus to work, are permitted to wear marijuana-policy-reform T-shirts and buttons and carry literature advocating medical use of marijuana, it could be argued that WMATA is “indirectly involved” in an “activity” that “promotes” the legalization or medical use of marijuana. Unless WMATA were vigilant in preventing any such activity, it would be at peril of losing millions of dollars of funding. The vagueness of the statute makes it especially likely that WMATA will chill protected speech even beyond advertising.

Some vague statutes might be salvaged by giving them narrow readings, but that is not possible with Section 177. By suppressing the acceptance of advertising supporting liberalized marijuana laws, Section 177 is an unconstitutional viewpoint-based restraint on political speech. Under even the narrowest construction, Section 177 would be fatally overbroad. *See National Abortion Fed’n v. Metropolitan Atlanta Rapid Transit Auth.*, 112 F. Supp. 2d at 1328 (holding that because challenged policy prohibiting “controvers[ial]” advertisements “can be interpreted to include a wide range of matters that go beyond what is needed to protect any possible interests of MARTA,” policy was unconstitutionally overbroad).

B. Section 177 Is an Unconstitutional Exercise of Congress' Spending Power.

By conditioning the receipt of federal funds on a transit system's denial of free speech, Section 177 is an *ultra vires* exercise of Congress' Article I spending power. *See South Dakota v. Dole*, 483 U.S. 203, 210-11 (1987). In *Dole*, the Supreme Court harmonized the case law on the limitations of Congress' spending power, identifying four "general restrictions" on that power. *Id.* at 207. Section 177 exceeds two of those limitations.

1. Section 177 is Prohibited by the Independent Constitutional Bar

As the *Dole* Court explained, the "independent constitutional bar" doctrine means that Congress' spending power "may not be used to induce the States to engage in activities that would themselves be unconstitutional. Thus, for example, a grant of federal funds conditioned on invidiously discriminatory state action or the infliction of cruel and unusual punishment would be an illegitimate exercise of the Congress' broad spending power." *Id.* at 210; *see also United States v. American Library Ass'n*, 539 U.S. 194, ---, 123 S. Ct. 2297, 2303 (2003).

Section 177 is designed to use federal control over transit system funds to force the transit systems to impose viewpoint-based censorship on private speakers. Because the spending power does not permit Congress to force state instrumentalities to deny First Amendment rights, Section 177 violates the "independent constitutional bar" doctrine.

2. Section 177 Is Unrelated to the Federal Interest in Supporting Mass Transit

Section 177 exceeds Congress' spending power for a second and independent reason. As the Supreme Court explained in *Dole*, conditions on federal grants may not be "unrelated to the federal interest in particular national projects or programs." *Dole*, 483 U.S. at 207. Justice O'Connor, writing separately in dissent, explained this limitation in detail:

When Congress appropriates money to build a highway, it is entitled to insist that the highway be a safe one. But it is not entitled to insist as a condition of the use of highway funds that the State impose or change regulations in other areas of the State's social and economic life because of an attenuated or tangential relationship to highway use or safety. Indeed, if the rule were otherwise, Congress could effectively regulate almost any area of a State's social, political, or economic life on the theory that the use of interstate transportation is somehow enhanced.

Dole, 483 U.S. at 215 (O'Connor, J., dissenting).

The majority in *Dole* concluded that there was a reasonable relationship between highway funding at risk and the minimum drinking age conditioned by the appropriation:

[T]he condition imposed by Congress is directly related to one of the main purposes for which highway funds are expended – safe interstate travel. *See* 23 U.S.C. § 101(b). This goal of the interstate highway system had been frustrated by varying drinking ages among the States. A Presidential commission appointed to study alcohol-related accidents and fatalities on the Nation's highways concluded that the lack of uniformity in the States' drinking ages created "an incentive to drink and drive" because "young persons commut[e] to border States where the drinking age is lower." Presidential Commission on Drunk Driving, Final Report 11 (1983). By enacting § 158, Congress conditioned the receipt of federal funds in a way reasonably calculated to address this particular impediment to a purpose for which the funds are expended.

Id. at 208-09.

Restricting the advocacy of marijuana reform, however, has nothing to do with funding mass transit. Neither Section 177 nor its legislative history supports any connection between the funding and the statutory condition. For example, the same appropriations act that contains Section 177 also earmarks \$65 million for the extension of the Blue Line Metrorail to Largo, Maryland, and another \$20 million for the Dulles Corridor Rapid Transit Project, which aims to relieve traffic in Fairfax and Loudon Counties, Virginia. *See Consolidated Appropriations Act of 2004*, Pub. L. No. 108-199, 118 Stat. 3, at 305; *see also Dulles Corridor Rapid Transit Project*, at http://www.wmata.com/about/expansion/dulles_home.cfm (last visited Feb. 16, 2004). Plainly there is no relationship between the federal interest in extending rapid mass transit and the viewpoint-based discrimination imposed by Section 177. Other congressional appropriations conditioned on Section 177's viewpoint-based discrimination are equally unrelated. *See, e.g., Consolidated Appropriations Act of 2004*, Pub. L. No. 108-199, 118 Stat. 3, at 304. (\$1.21 billion in capital funding for rail modernization, and \$607 million for the purchase and rehabilitation of buses, nationally). For this reason as well, Section 177 is unconstitutional.

II. The Equities Warrant Preliminary Relief

As demonstrated above, Section 177 is unconstitutional. Plaintiffs will therefore succeed on the merits. Because of the likelihood of success demonstrated above and the equitable factors discussed below, the Court should preliminarily enjoin Section 177's enforcement by Secretary Mineta and the United States.

Moreover, WMATA's refusal to accept plaintiffs' advertisement should also be enjoined, as that viewpoint-based action is the direct cause of plaintiffs' injury and of the violation of plaintiffs' First Amendment rights.⁸ To prevent this and further prior restraints on speech, *see Lebron*, 749 F.2d at 896, WMATA should be enjoined from rejecting plaintiffs' advertisement, as well as any other advertisement, on the basis that it promotes the legalization or medical use of any substance listed in Schedule I.

A. Plaintiffs Are Suffering Irreparable Injury

WMATA's refusal to permit plaintiffs' access to advertising space in the Metro system constitutes an irreparable injury sufficient to justify an injunction. It is well established that the "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Branch*, 824 F.2d at 40 (quoting *Elrod*, 427 U.S. at 373-74); *see also Lakewood*, 486 U.S. at 758 (explaining that "opportunities for speech," if suppressed, "are irretrievably lost"); *Wilson*, 426 F.2d at 1218 ("Any delay in the exercise of first amendment rights constitutes an irreparable injury to those seeking such exercise."); *Gittens*, 215 F. Supp. 2d at 134 (holding that loss of First Amendment freedoms constitutes irreparable injury where the injury "is 'both

⁸ The fact that WMATA acted under the *de facto* compulsion of Section 177 is neither an excuse nor a defense for WMATA's unconstitutional action. *See Turner v. District of Columbia Board of Elections and Ethics*, 77 F. Supp. 2d 25, 35 (D.D.C. 1999) (ordering Board of Elections to count and certify results of D.C. Medical Marijuana Initiative despite congressional budget rider prohibiting use of appropriated funds to conduct any initiative that would reduce penalties for possession, use or distribution of marijuana); *Turner*, 354 F.3d at 898 (explaining that "'mere' enforcers of unconstitutional laws may be held liable for attorney's fees even if their involvement in the litigation has been minor or they have argued that their enforcement actions are improper and lobbied for the underlying law to be changed").

threatened and occurring' at the time of plaintiff's motion for a preliminary injunction") (quoting *Elrod*, 427 U.S. at 374).

Plaintiffs' First Amendment injury is both threatened and occurring; WMATA has refused to run their advertisements as a result of Section 177. Moreover, as WMATA has made clear, it offers a uniquely effective advertising medium, the loss of which will adversely affect plaintiffs' ability to communicate their views effectively:

Metro provides a unique opportunity to reach the out-of-home market in the Washington metropolitan area. The Metrobus and Metrorail system covers all of the District of Columbia and the suburbs of Maryland and Northern Virginia. Exterior bus advertising penetrates 90% of the daily population and makes multiple impressions all over the region, throughout business districts, residential areas and tourist attractions. Advertising in the Metrorail system provides an opportunity to target business executives, federal employees, students and tourists.

Advertising Opportunities with Metro, at <http://www.wmata.com/bus2bus/adsonmetro.cfm> (last visited Feb. 5, 2004).

B. Injunctive Relief Will Not Burden Other Parties or Interests

No parties or legitimate interests will be burdened by the injunctive relief that plaintiffs request. WMATA will receive payment for the advertising at its usual rates. The federal government will receive full value for the use of its money to extend mass transit to Largo and Dulles. The only effect of an injunction will be to protect both WMATA's funding and plaintiffs' equal access to a public forum.

C. The Public Interest Favors Entry of an Injunction

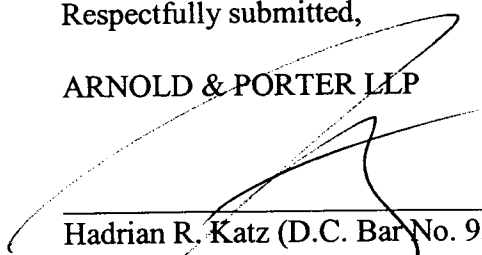
Section 177 is an ill-conceived effort to silence an identified group of speakers. The political speech in the crosshairs of Section 177 represents one side of a national public debate on important policy issues. The advertisement at issue expresses the views of plaintiffs, and their thousands of members, who seek to contribute their ideas to this public debate. The government cannot be permitted to silence political opponents by twisting policy preferences into unconstitutional speech restrictions. To preserve the integrity of the public discourse on such matters, the public interest demands the injunction of Section 177. *See, e.g., Gittens*, 215 F. Supp. 2d at 134 (“[T]he Court agrees . . . that the public interest favors a preliminary injunction whenever First Amendment rights have been violated.”).

CONCLUSION

For the foregoing reasons, plaintiffs’ Motion for Preliminary Injunction should be granted.

Respectfully submitted,

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Dated: February 18, 2004

A

One Hundred Eighth Congress
of the
United States of America

AT THE FIRST SESSION

*Begun and held at the City of Washington on Tuesday,
the seventh day of January, two thousand and three*

An Act

Making appropriations for Agriculture, Rural Development, Food and Drug Administration, and Related Agencies for the fiscal year ending September 30, 2004, and for other purposes.

*Be it enacted by the Senate and House of Representatives of
the United States of America in Congress assembled,*

SECTION 1. SHORT TITLE.

This Act may be cited as the "Consolidated Appropriations Act, 2004".

SEC. 2. TABLE OF CONTENTS.

The table of contents for this Act is as follows:

- Sec. 1. Short title.
- Sec. 2. Table of contents.
- Sec. 3. References.

DIVISION A—AGRICULTURE, RURAL DEVELOPMENT, FOOD AND DRUG ADMINISTRATION, AND RELATED AGENCIES PROGRAMS APPROPRIATIONS, 2004

- Title I—Agricultural Programs
- Title II—Conservation Programs
- Title III—Rural Development Programs
- Title IV—Domestic Food Programs
- Title V—Foreign Assistance and Related Programs
- Title VI—Related Agencies and Food and Drug Administration
- Title VII—General Provisions

DIVISION B—COMMERCE, JUSTICE, AND STATE, THE JUDICIARY, AND RELATED AGENCIES APPROPRIATIONS, 2004

- Title I—Department of Justice
- Title II—Department of Commerce and Related Agencies
- Title III—The Judiciary
- Title IV—Department of State and Related Agency
- Title V—Related Agencies
- Title VI—General Provisions
- Title VII—Rescissions
- Title VIII—Alaskan Fisheries

DIVISION C—DISTRICT OF COLUMBIA APPROPRIATIONS, 2004

- Title I—Federal Funds
- Title II—District of Columbia Funds
- Title III—DC School Choice Incentive Act of 2003
- Title IV—General Provisions

DIVISION D—FOREIGN OPERATIONS, EXPORT FINANCING, AND RELATED PROGRAMS APPROPRIATIONS, 2004

- Title I—Export and Investment Assistance
- Title II—Bilateral Economic Assistance
- Title III—Military Assistance
- Title IV—Multilateral Economic Assistance

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out 49 U.S.C. 5308 shall be transferred to and merged with funding provided for the replacement, rehabilitation, and purchase of buses and related equipment and the construction of bus-related facilities under "Federal Transit Administration, Capital investment grants".

UNIVERSITY TRANSPORTATION RESEARCH

For necessary expenses to carry out 49 U.S.C. 5505, \$1,200,000, to remain available until expended: *Provided*, That no more than \$6,000,000 of budget authority shall be available for these purposes.

TRANSIT PLANNING AND RESEARCH

For necessary expenses to carry out 49 U.S.C. 5303, 5304, 5305, 5311(b)(2), 5312, 5313(a), 5314, 5315, and 5322, \$25,200,000, to remain available until expended: *Provided*, That no more than \$126,000,000 of budget authority shall be available for these purposes: *Provided further*, That \$5,250,000 is available to provide rural transportation assistance (49 U.S.C. 5311(b)(2)), \$4,000,000 is available to carry out programs under the National Transit Institute (49 U.S.C. 5315), \$8,250,000 is available to carry out transit cooperative research programs (49 U.S.C. 5313(a)), \$60,385,600 is available for metropolitan planning (49 U.S.C. 5303, 5304, and 5305), \$12,614,400 is available for State planning (49 U.S.C. 5313(b)); and \$35,500,000 is available for the national planning and research program (49 U.S.C. 5314).

TRUST FUND SHARE OF EXPENSES

(LIQUIDATION OF CONTRACT AUTHORIZATION)

(HIGHWAY TRUST FUND)

Notwithstanding any other provision of law, for payment of obligations incurred in carrying out 49 U.S.C. 5303-5308, 5310-5315, 5317(b), 5322, 5327, 5334, 5505, and sections 3037 and 3038 of Public Law 105-178, \$5,847,200,000, to remain available until expended, and to be derived from the Mass Transit Account of the Highway Trust Fund: *Provided*, That \$3,071,200,000 shall be paid to the Federal Transit Administration's formula grants account: *Provided further*, That \$100,800,000 shall be paid to the Federal Transit Administration's transit planning and research account: *Provided further*, That \$60,400,000 shall be paid to the Federal Transit Administration's administrative expenses account: *Provided further*, That \$4,800,000 shall be paid to the Federal Transit Administration's university transportation research account: *Provided further*, That \$100,000,000 shall be paid to the Federal Transit Administration's job access and reverse commute grants program: *Provided further*, That \$2,510,000,000 shall be paid to the Federal Transit Administration's capital investment grants account.

CAPITAL INVESTMENT GRANTS

(INCLUDING TRANSFERS OF FUNDS)

For necessary expenses to carry out 49 U.S.C. 5308, 5309, 5318, and 5327, \$627,500,000, to remain available until expended: *Provided*, That no more than \$3,137,500,000 of budget authority shall be available for these purposes: *Provided further*, That there

shall be available for fixed guideway modernization, \$1,206,506,000; there shall be available for the replacement, rehabilitation, and purchase of buses and related equipment and the construction of bus-related facilities, \$607,200,000, which shall include \$50,000,000 made available under 5309(m)(3)(C) of this title, plus \$50,000,000 transferred from "Federal Transit Administration, Formula Grants" and \$20,000,000 transferred from "Federal Transit Administration, Job Access and Reverse Commute Grants"; and there shall be available for new fixed guideway systems \$1,323,794,000, together with \$2,331,545 in unobligated balances made available in Public Law 106-69 and \$2,182,937 in unobligated balances made available in Public Law 106-346 to carry out section 3037 of Public Law 105-178, as amended, to be available as follows:

Atlanta, Georgia, Northwest Corridor BRT, \$2,149,413;
 Baltimore, Maryland, Central Light Rail Double Track Project, \$40,000,000;
 BART San Francisco Airport (SFO), California, Extension Project, \$100,000,000;
 Birmingham—Transit Corridor, Alabama, \$3,500,000;
 Boston, Massachusetts, Silver Line Phase III, \$2,000,000;
 Charlotte, North Carolina, South Corridor Light Rail Project, \$12,000,000;
 Chicago, Illinois, Metra Commuter Rail Expansions and Extensions, \$52,000,000;
 Chicago, Illinois, Ravenswood Reconstruction, \$10,000,000;
 Chicago, Illinois, Transit Authority, Douglas Branch Reconstruction, \$85,000,000;
 Dallas, Texas, North Central Light Rail Extension, \$30,161,283;
 Denver, Colorado, Southeast Corridor LRT (T-REX), \$80,000,000;
 East Side Access Project, New York, Phase I, \$75,000,000;
 Euclid Corridor Transportation Project, Ohio, \$11,000,000;
 Fort Lauderdale, Florida, Tri-Rail Commuter Project, \$18,410,000;
 Hawaii and Alaska Ferry Boats, \$10,296,000;
 Houston Advanced Metro Transit Plan, Texas, \$8,000,000;
 Integrated Intermodal project, Rhode Island, \$3,000,000;
 Kenosha-Racine-Milwaukee Commuter Rail Extension, Wisconsin, \$3,250,000;
 Las Vegas, Nevada, Resort Corridor Fixed Guideway, MOS, \$20,000,000;
 Little Rock, Arkansas, River Rail Streetcar Project, \$3,000,000;
 Maine Marine Highway, \$1,550,000;
 Memphis, Tennessee, Medical Center Rail Extension, \$9,247,588;
 Minneapolis, Minnesota, Hiawatha Corridor Light Rail Transit (LRT), \$74,980,000;
 Minneapolis, Minnesota, Northstar Corridor Rail Project, \$5,750,000;
 New Orleans, Louisiana, Canal Street Streetcar Project, \$23,291,373;
 New York, Second Avenue Subway, \$2,000,000;
 Newark, New Jersey, Rail Link (NERL) MOS1, \$22,566,022;

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Northern Oklahoma Regional Multimodal Transportation System, \$3,000,000;
Northern, New Jersey, Hudson-Bergen Light Rail (MOS2), \$100,000,000;
Phase II, LA to Pasadena Metro Gold Line Light Rail Project, \$4,000,000;
Philadelphia, Pennsylvania, Schuylkill Valley Metro, \$14,000,000;
Phoenix, Arizona, Central Phoenix/East Valley Light Rail Transit Project, \$13,000,000;
Pittsburgh, Pennsylvania, North Shore Connector, \$10,000,000;
Pittsburgh, Pennsylvania, Stage II Light Rail Transit Reconstruction, \$32,243,442;
Portland, Oregon, Interstate MAX Light Rail Extension, \$77,500,000;
Raleigh, North Carolina, Triangle Transit Authority Regional Rail Project, \$5,500,000;
Regional Commuter Rail (Weber County to Salt Lake City), Utah, \$9,000,000;
Salt Lake City, Utah, Medical Center LRT Extension, \$30,663,361;
San Diego, California, Mission Valley East Light Rail Transit Extension, \$65,000,000;
San Diego, California, Oceanside-Escondido Rail Project, \$48,000,000;
San Francisco, California Muni Third Street Light Rail Project, \$9,000,000;
San Jose, California, Silicon Valley Rapid Transit Corridor, \$2,000,000;
Scranton, Pennsylvania, NY City Rail Service, \$2,500,000;
Seattle, Washington, Sound Transit Central Link Initial Segment, \$75,000,000;
South Shore Commuter Rail Service capacity enhancement, \$1,000,000;
Stamford, Connecticut, Urban Transitway & Intermodal Transportation Center Improvements, \$4,000,000;
Tren Urbano Rapid Transit System, San Juan, PR, \$20,000,000;
VRE Parking Improvements, Virginia, \$3,000,000;
Washington, DC/VA Dulles Corridor Rapid Transit Project, \$20,000,000;
Washington, DC/MD, Largo Extension, \$65,000,000;
Western North Carolina Rail Passenger Service, \$1,000,000;
Wilmington, Delaware, Train Station Improvements, \$1,500,000;
Wilsonville to Beaverton, Oregon, Commuter Rail, \$3,250,000; and
Yarmouth to Auburn Line, Maine, \$1,000,000.

JOB ACCESS AND REVERSE COMMUTE GRANTS

(INCLUDING TRANSFERS OF FUNDS)

For necessary expenses to carry out section 3037 of the Federal Transit Act of 1998, \$25,000,000, to remain available until expended: *Provided*, That no more than \$125,000,000 of budget

authority shall be available for these purposes: *Provided further*, That up to \$300,000 of the funds provided under this heading may be used by the Federal Transit Administration for technical assistance and support and performance reviews of the Job Access and Reverse Commute Grants program: *Provided further*, That \$20,000,000 of the funds provided under this heading shall be transferred to and merged with funds for the replacement, rehabilitation, and purchase of buses and related equipment and the construction of bus-related facilities under “Federal Transit Administration, Capital Investment Grants”: *Provided further*, That \$2,331,545 in unobligated balances made available in Public Law 106–69 and \$2,182,937 in unobligated balances made available in Public Law 106–346 to carry out section 3037 of Public Law 105–178, as amended, shall be transferred to and merged with funds for new fixed guideway systems under “Federal Transit Administration, Capital Investment Grants”.

GENERAL PROVISIONS—FEDERAL TRANSIT ADMINISTRATION

SEC. 160. The limitations on obligations for the programs of the Federal Transit Administration shall not apply to any authority under 49 U.S.C. 5338, previously made available for obligation, or to any other authority previously made available for obligation.

SEC. 161. Notwithstanding any other provision of law, and except for fixed guideway modernization projects, funds made available by this Act under “Federal Transit Administration, Capital investment grants” for projects specified in this Act or identified in reports accompanying this Act not obligated by September 30, 2006, and other recoveries, shall be made available for other projects under 49 U.S.C. 5309.

SEC. 162. Notwithstanding any other provision of law, any funds appropriated before October 1, 2003, under any section of chapter 53 of title 49, United States Code, that remain available for expenditure may be transferred to and administered under the most recent appropriation heading for any such section.

SEC. 163. Funds made available for Alaska or Hawaii ferry boats or ferry terminal facilities pursuant to 49 U.S.C. 5309(m)(2)(B) may be used to construct new vessels and facilities, or to improve existing vessels and facilities, including both the passenger and vehicle-related elements of such vessels and facilities, and for repair facilities: *Provided*, That not more than \$3,000,000 of the funds made available pursuant to 49 U.S.C. 5309(m)(2)(B) may be used by the State of Hawaii to initiate and operate a passenger ferryboat services demonstration project to test the viability of different intra-island and inter-island ferry boat routes and technology: *Provided further*, That notwithstanding 49 U.S.C. 5302(a)(7), funds made available for Alaska or Hawaii ferry boats may be used to acquire passenger ferry boats and to provide passenger ferry transportation services within areas of the State of Hawaii under the control or use of the National Park Service.

SEC. 164. Notwithstanding any other provision of law, funds made available to the Colorado Roaring Fork Transportation Authority under “Federal Transit Administration, Capital investment grants” in Public Laws 106–69 and 106–346 shall be available for expenditure on park and ride lots in Carbondale and Glenwood Springs, Colorado as part of the Roaring Fork Valley Bus Rapid Transit project.

SEC. 165. Notwithstanding any other provision of law, unobligated funds made available for a new fixed guideway systems projects under the heading "Federal Transit Administration, Capital Investment Grants" in any appropriations Act prior to this Act may be used during this fiscal year to satisfy expenses incurred for such projects.

SEC. 166. (a) IN GENERAL.—The Secretary shall establish a pilot program to determine the benefits of encouraging cooperative procurement of major capital equipment under sections 5307, 5309, and 5311. The program shall consist of three pilot projects. Cooperative procurements in these projects may be carried out by grantees, consortiums of grantees, or members of the private sector acting as agents of grantees.

(b) FEDERAL SHARE.—Notwithstanding any other provision of law, the Federal share for a grant under this pilot program shall be 90 percent of the net project cost.

(c) PERMISSIBLE ACTIVITIES.—

(1) DEVELOPING SPECIFICATIONS.—Cooperative specifications may be developed either by the grantees or their agents.

(2) REQUESTS FOR PROPOSALS.—To the extent permissible under State and local law, cooperative procurements under this section may be carried out, either by the grantees or their agents, by issuing one request for proposal for each cooperative procurement, covering all agencies that are participating in the procurement.

(3) BEST AND FINAL OFFERS.—The cost of evaluating best and final offers either by the grantees or their agents, is an eligible expense under this program.

(d) TECHNOLOGY.—To the extent feasible, cooperative procurements under this section shall maximize use of Internet-based software technology designed specifically for transit buses and other major capital equipment to develop specifications; aggregate equipment requirements with other transit agencies; generate cooperative request for proposal packages; create cooperative specifications; and automate the request for approved equals process.

(e) ELIGIBLE EXPENSES.—The cost of the permissible activities under (c) and procurement under (d) are eligible expenses under the pilot program.

(f) PROPORTIONATE CONTRIBUTIONS.—Cooperating agencies may contribute proportionately to the non-Federal share of any of the eligible expenses under (e).

(g) OUTREACH.—The Secretary shall conduct outreach on cooperative procurement. Under this program the Secretary shall: (1) offer technical assistance to transit agencies to facilitate the use of cooperative procurement of major capital equipment; and (2) conduct seminars and conferences for grantees, nationwide, on the concept of cooperative procurement of major capital equipment.

(h) REPORT.—Not later than 30 days after delivery of the base order under each of the pilot projects, the Secretary shall submit to the House and Senate Committees on Appropriations a report on the results of that pilot project. Each report shall evaluate any savings realized through the cooperative procurement and the benefits of incorporating cooperative procurement, as shown by that project, into the mass transit program as a whole.

SEC. 167. Notwithstanding any other provision of law, new fixed guideway system funds available for the Yosemite, California, area regional transportation system project, in the Department

of Transportation and Related Agencies Appropriations Act, 2002, Public Law 107-87, under "Capital Investment Grants", in the amount of \$400,000 shall be available for obligation for the replacement, rehabilitation, or purchase of buses or related equipment, or the construction of bus related facilities: *Provided*, That this amount shall be in addition to the amount available in fiscal year 2002 for these purposes.

SEC. 168. Notwithstanding any other provision of law, for the purpose of calculating the non-New Starts share of the total project cost of both phases of San Francisco Muni's Third Street Light Rail Transit project for fiscal year 2004, the Secretary of Transportation shall include all non-New Starts contributions made towards Phase 1 of the two-phase project for engineering, final design and construction, and also shall allow non-New Starts funds expended on one element or phase of the project to be used to meet the non-New Starts share requirement of any element or phase of the project: *Provided further*, That none of the funds provided in this Act for the San Francisco Muni Third Street Light Rail Transit Project shall be obligated if the Federal Transit Administration determines that the project is found to be "not recommended" after evaluation and computation of revised transportation system user benefit data.

SEC. 169. Notwithstanding any other provision of law, funds made available under "Federal Transit Administration, Capital Investment Grants" in Public Law 105-277 for the Cleveland Berea Red Line Extension to the Hopkins International Airport project may be used for the Euclid Corridor Transportation Project.

SEC. 170. Notwithstanding any other provision of law, funds designated to the Community Transportation Association of America (CTAA) on pages 1305 through 1307 of the Joint Explanatory Statement of the Committee of Conference for Public Law 108-7 may be available to CTAA for any project or activity authorized under section 3037 of Public Law 105-178 upon receipt of an application.

SEC. 171. After the last section of the Federal Transit Act, 49 U.S.C. chapter 53, add the following section:

"SEC. 3042. UTAH TRANSPORTATION PROJECTS.

"(a) COORDINATION.—FTA and FHWA are directed to work with the Utah Transit Authority and the Utah Department of Transportation to coordinate the development regional commuter rail and the northern segment of I-15 reconstruction located in the Wasatch Front corridor extending from Brigham City to Payson, Utah. Coordination includes integration of preliminary engineering and design, a simplified method for allocating project costs among eligible FTA and FHWA funding sources, and a unified accounting and audit process.

"(b) GOVERNMENTAL FUNDING.—For purposes of determining and allocating the nongovernmental and governmental share of costs, the following projects comprise a related program of projects: regional commuter rail, the TRAX light rail system, TRAX extensions to the Medical Center and to the Gateway Intermodal Center, and the northern segment of I-15 reconstruction. The governmental share of project costs appropriated from the section 5309 New Start program shall conform to the share specified in the extension or reauthorization of TEA21."

SEC. 172. Funds apportioned to the Charleston Area Regional Transportation Authority to carry out section 5307 of title 49,

United States Code, may be used to lease land, equipment, or facilities used in public transportation from another governmental authority in the same geographic area: *Provided*, That the non-Federal share under section 5307 may include revenues from the sale of advertising and concessions: *Provided further*, That this provision shall remain in effect until September 30, 2004, or until the Federal interest in the land, equipment or facilities leased reaches 80 percent of its fair market value at disposition, whichever occurs first.

SEC. 173. Notwithstanding any other provision of law, funds designated to the Pennsylvania Cumberland/Dauphin County Corridor I project in committee reports accompanying this Act may be available to the recipient for any project activities authorized under sections 5307 and 5309 of title 49, United States Code.

SEC. 174. To the extent that funds provided by the Congress for the Memphis Medical Center light rail extension project through the section 5309 "new fixed guideway systems" program remain available upon the closeout of the project, Federal Transit Administration is directed to permit the Memphis Area Transit Authority to use all of those funds for planning, engineering, design, construction or acquisition projects pertaining to the Memphis Regional Rail Plan. Such funds shall remain available until expended.

SEC. 175. Section 30303(d)(3) of the Transportation Equity Act for the 21st Century (Public Law 105-178) is amended by inserting at the end:

"(D) Memphis-Shelby International Airport intermodal facility."

SEC. 176. For fiscal year 2004, section 3027 of the Transportation Equity Act for the 21st Century (49 U.S.C. 5307 note; 112 Stat. 366), as amended, is amended by adding at the end the following:

"(3) SERVICES FOR ELDERLY AND PERSONS WITH DISABILITIES.—In addition to assistance made available under paragraph (1), the Secretary may provide assistance under section 5307 of title 49, United States Code, to a transit provider that operates 25 or fewer vehicles in an urbanized area with a population of at least 200,000 to finance the operating costs of equipment and facilities used by the transit provider in providing mass transportation services to elderly and persons with disabilities, provided that such assistance to all entities shall not exceed \$10,000,000 annually."

SEC. 177. None of the funds in this Act shall be available to any Federal transit grantee after February 1, 2004, involved directly or indirectly, in any activity that promotes the legalization or medical use of any substance listed in schedule I of section 202 of the Controlled Substances Act (21 U.S.C. 812 et seq.).

SAINT LAWRENCE SEAWAY DEVELOPMENT CORPORATION

The Saint Lawrence Seaway Development Corporation is hereby authorized to make such expenditures, within the limits of funds and borrowing authority available to the Corporation, and in accord with law, and to make such contracts and commitments without regard to fiscal year limitations as provided by section 104 of the Government Corporation Control Act, as amended, as may be necessary in carrying out the programs set forth in the Corporation's budget for the current fiscal year.

B



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Advertising on Metrobuses and in the Metro system

Metro provides a unique opportunity to reach the out-of-home market in the Washington metropolitan area. The Metrobus and Metrorail system covers all of the District of Columbia and the suburbs of Maryland and Northern Virginia. Exterior bus advertising penetrates 90% of the daily population and makes multiple impressions all over the region, throughout business districts, residential areas and tourist attractions. Advertising in the Metrorail system provides an opportunity to target business executives, federal employees, students and tourists.

Advertising displays are available on the sides, backs and interiors of Metrobuses. In the Metrorail system, backlighting advertising displays and two-sheet poster displays are available in Metro stations. Advertising space is also available inside Metrorail cars.

The sale of advertising on Metrobuses and in the Metrorail system is handled by Viacom Outdoor. For additional information on how to purchase advertising space, contact www.viacomoutdoor.com. Or contact Dan Langdon, Viacom's Vice President and Regional Manager at 202/ 775-9115 or Dan.Langdon@viacomoutdoor.com.

Ads on timetables farecards and brochures

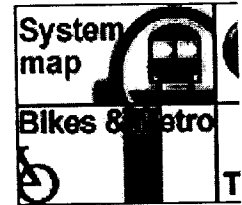
Target your promotional campaigns by advertising on Metrorail farecards, Metrobus timetables, schedules and brochures.

Every weekday, more than 893,000 trips are taken by people on Metrobus and Metrorail throughout the Washington metropolitan region. Also, more than 21 million tourists visit the nation's capital every year.

Annually we distribute 60 million farecards, 9 million Metrobus timetables and 8 million brochures. To place your promotional message or to find out more about advertising on Metro timetables and brochures, contact [David Haggins](#).

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C

D

From: "Roberts, Doreen J" <Doreen.Roberts@ViacomOutdoor.com>
Date: Thu, 5 Feb 2004 21:05:46 -0500
To: 'Howard Benenson' <howard@benensonjanson.com>
Cc: "Tennenbaum, Rebecca" <Rebecca.Tennenbaum@ViacomOutdoor.com>
Subject: RE: submission of DC Transit ad

Hi Howard,

My contact person in Washington DC has advised that the Transit Authority today, stated that they are not accepting the Ad. They would not give him their reason and they are telling him that they will give him the contract in their legal department should anyone want to discuss this. Apparently their attorneys have already had a discussions with attorneys from the ACLU.

Let me know if you want to discuss this matter more.

Thanks

Doreen

E

The Washington Times

www.washingtontimes.com

Metro's pro-pot ads get attention on Hill

By Jim McElhatton

THE WASHINGTON TIMES

Published December 3, 2003

Marijuana-legalization ads posted recently in Metro buses and subway stations have prompted an Oklahoma congressman to propose legislation making it illegal for transit agencies that accept federal dollars to give advertising space to groups that advocate breaking the law.

Rep. Ernest Istook, Republican, cited "grave concern and displeasure" at the public service announcements placed on Metro buses and throughout area subway stations during October by Change the Climate, a Massachusetts-based nonprofit group.

Mr. Istook took particular exception to a marijuana-legalization ad showing a young couple embracing, and the caption "Enjoy Better Sex!"

"At a time when the nation and the Washington D.C. area, in particular, suffer from chronic substance abuse ... I find it shocking that [the Washington Metropolitan Area Transit Authority] provides this ad space, and at no cost!" Mr. Istook wrote in a letter to Jim Graham, chairman of the Metro Board and a D.C. Council member..

The Metro ads prompted the congressman, who chairs the House Transportation and Infrastructure subcommittee, to add language to an appropriations bill prohibiting federally subsidized transit agencies from giving ad space to organizations that tout legalizing drugs.

"Since [Metro] has the resources to provide \$46,250 in free ad space for this very advertising," Mr. Istook wrote, "I have to wonder why [Metro] should expect to receive the \$67,050,000 in federal funding."

The new language Mr. Istook inserted into the transportation legislation states that federal funds will not be available if a transit agency "is involved directly or indirectly with any activity ... that promotes the legalization or medical use" of illegal drugs.

Mr. Istook wants to eliminate \$92,500 in federal funding to Metro "as a warning to other transit agencies," according to the legislation.

"I think it's a moot point," Mr. Graham said yesterday, referring to Mr. Istook's amendment. "As of Jan. 1, we will not be considering any more public-service announcements, except as the local jurisdictions sponsor them.

"In terms of losing the \$92,500, I think that is petty and punitive," he said. "I think there would have been a better appreciation of the dilemma we were in."

Metro recently reduced the space reserved for public service ads from 13 percent to 5 percent, with Maryland, the District and Virginia now handling their own public-service announcements.

Metro Board member Carlton Sickles, who represents Montgomery County, said the transit agency would abide by the new rules if federal lawmakers approve the legislation, which they will consider when the House reconvenes next week. However, Mr. Sickles said the board would not make any policy changes until that happens.

"It seems to me that this sort of legislation always gets very controversial and that it tends to get stuck in committee," he said. "I don't know where this is going at the moment, but we'll be watching it carefully."

Metro had rejected the ad campaign by Change the Climate two years ago, but reversed its position after the American Civil Liberties Union interceded on the group's behalf.

Both Mr. Graham and Mr. Sickles said Metro had accepted the recent ads from Change the Climate because Metro's attorneys said the transit agency likely would be sued if it refused.

"These nonprofits would have been very happy to have had a public controversy and to go to court," Mr. Graham said.

Mr. Sickles said, "You have to take what they give you. If you're going to accept the advertising, in terms of public-service ads, you've got take them all."

However, not all transit agencies agree. In Boston, Change the Climate lost in court when it sued the Massachusetts Bay Transportation Authority for the right to post its ads.

"We felt that it was promoting an illegal activity," said Joseph Pesaturo, spokesman for the Boston-based transit agency. "Since we have a very captive audience in our stations made up of a lot of young people, we weren't comfortable with that.

"The group sued claiming the usual violations of free speech. A U.S. District Court judge ruled in our favor."

Local education activists said they were concerned about the pro-marijuana ads because most D.C. school children use Metro to get to and from school, but they had mixed feelings about Mr. Istook's bid to make Metro to stop running them.


"I would rather see local authorities handling this issue, said Mary Levy, an analyst with Parents United, an advocacy organization that works to improve conditions in D.C. schools.

"When you try to regulate things by content, it is a very tricky business under the First Amendment," Miss Levy said. "At the same time, when I saw the huge [pro-marijuana] ad that said 'Have Better Sex', I had to wonder what we're saying to our children about drugs and about sex."

"Generally, I don't advocate censorship," said Iris Toyer, chairwoman of Parents United. "But I have son in the sixth grade, and when it comes to this issue, I have to approach things with my 'parent hat' on."

F

Enjoy Better Sex!
 Legalize and Tax Marijuana.
 details at www.changetheclimate.org



Support us with a gift of \$10, \$25, or more!

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Change the Climate, Inc.

time to tell the truth about marijuana

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Help Save Our Taxes, Protect Our Children, AND Enjoy Better Sex!

We are pleased to announce our fifth advertising campaign in Washington D.C. Beginning September 1, 2003 we will have two ads being displayed on buses and bus shelters throughout our nation's capitol! An additional ad is scheduled to go up in subway stations across D.C. beginning October 1. If you enjoy seeing these ads and would like to see more of them then support Change the Climate with a tax deductible gift.

Marijuana and Sex

First of all, we believe that sex and marijuana use exist completely in the private realm of consenting and responsible adults. We realize, unfortunately, that many politicians see the bedroom and other private, individual activities as important areas for government legislation. **We want to stress that sex and marijuana are for adults - or at least for individuals who have achieved a level of emotional & psychological maturity that is reflected in a balanced, productive life. . .**



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Marijuana Prohibition Wastes Taxes



It is common knowledge that U.S. taxpayers pay billions of dollars each year to fund the failed War on Drugs. A simple analysis of the War on Drugs shows that most of the costs

borne by taxpayers are for marijuana prohibition. With over 700,000 annual arrests, thousands of prisoners and hundreds of millions of dollars spent on anti-marijuana television ads, the War on Drugs is mostly a War on Marijuana. . .[read more >](#)

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[Change the Climate launches 5th advertising campaign in Washington D.C.](#)


[Report: The Budgetary Implications of Marijuana Legalization in Massachusetts](#)

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Email your elected officials to let them know how you feel about several marijuana-related issues.

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Suggestions? Email info@changetheclimate.org

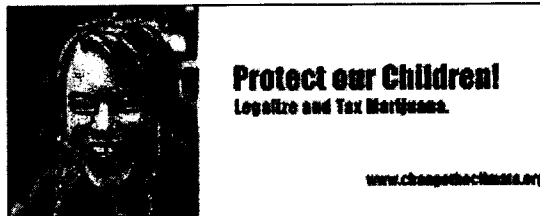
read our [privacy policy](#)
 © 2003 Change the Climate, Inc.



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Marijuana Legalization Protects Our Children - Simple Logic

Government funded studies show that over 50% of high school students will experiment with marijuana. Many parents who talk to their kids about marijuana

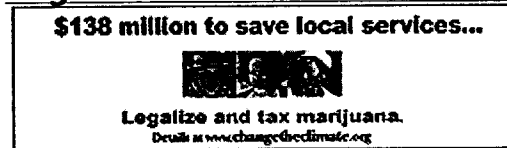


know that it is very easy for them to obtain, much easier than alcohol - a drug regulated by the government. . .[read more >](#)



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The Budgetary Implications of Marijuana Legalization in Massachusetts



The true cost of marijuana prohibition is difficult to obtain, and since the amount of money is staggering by any measure

the government is not interested in having this information widely available. Change the Climate has used the cost of marijuana prohibition as one of our main arguments for the need to change laws. Our advertising campaigns in Washington DC and Nevada highlight the costs associated with the war on marijuana.. .[read more >](#)



[Download and print this ad now!](#) (PDF, 479k)

G



Home Metrorail Metrobus Seniors/Disabled Fares Getting around Inside Metro

For immediate release:
November 20, 2003

Metro Board alters Public Service Advertising guidelines

Due to budgetary challenges and a desire to increase Metrorail and Metrobus ridership, the Washington Metropolitan Area Transit Authority (Metro) Board today agreed to reduce its public service advertising space and limit what remains for use by local jurisdictions and the Federal government. Access to the in-system advertising space will provide the Authority with an effective way to enhance marketing efforts without incurring additional expense.

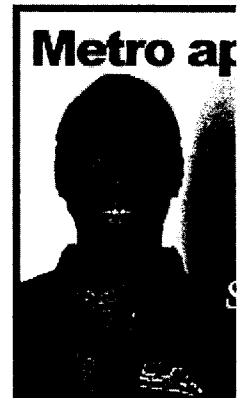
Under the previous public service advertising guidelines, approximately 13 percent of total advertising space on Metrobuses and in the Metrorail system had been set aside for free use by government agencies and nonprofit organizations. The new guidelines return 8 percent of that space to Metro to use to promote ridership growth. The remaining 5 percent will be used by the local jurisdictions served by Metro and the Federal government to promote their programs and/or events. Those ads will be non-commercial and politically non-partisan.

Metro officials will use the public service advertising space on the sides of buses, in railcars and in stations to promote the advantages and convenience of bus and rail in an effort to encourage people to use mass transit.

Local and federal governments and their agencies may use the space for free advertisements related to community, art, cultural, educational, health, and other governmental programs and messages.

Nonprofit organizations will no longer have access to free public service advertising in the Metrorail and Metrobus system, although they still may purchase advertising space within the system. Metro will also accept jointly-sponsored public service advertising if there is a partnership between the government entity and nonprofit organization(s) that are classified as 501(c)(3) tax exempt organizations, and must directly further the interests of the sponsoring government entity. Metro will not accept jointly-sponsored public service advertising where the government entity merely endorses a nonprofit organization.

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H

108TH CONGRESS }
1st Session

HOUSE OF REPRESENTATIVES

{ REPORT
108-401

MAKING APPROPRIATIONS FOR AGRICULTURE, RURAL DEVELOPMENT, FOOD AND DRUG ADMINISTRATION, AND RELATED AGENCIES FOR THE FISCAL YEAR ENDING SEPTEMBER 30, 2004, AND FOR OTHER PURPOSES

CONFERENCE REPORT

TO ACCOMPANY

H.R. 2673



NOVEMBER 25, 2003.—Ordered to be printed

U.S. GOVERNMENT PRINTING OFFICE

90-637

WASHINGTON : 2003

time, the conference agreement includes bill language that requires FTA to submit its annual new starts report with the initial submission of the President's budget request. An untimely submission of this crucial report will result in penalties to FTA's administrative expenses account.

Charter service activities.—The conferees direct FTA to revisit Part 604 of Title 49 of the United States Code to ensure that the statute continues to meet its purpose of ensuring that federally funded equipment and facilities should not be used to compete unfairly with private charter operators, as proposed by the House. A report shall be submitted to the House and Senate Committees on Appropriations no later than December 31, 2003, on FTA's efforts.

Buy America enforcement.—The conferees direct the Office of Inspector General to review FTA's most recent interpretations of manufactured components and subcomponents as well as the use of temporary exemptions regarding domestic content under the Buy America statute, as proposed by the Senate. A report shall be submitted to the House and Senate Committees on Appropriations no later than March 1, 2004.

Transit agency advertising.—The conferees are concerned that transit agencies accepting Federal grant funds may be providing their advertising space to organizations that encourage the public to break the law. For example, the conferees note with displeasure that public service advertising space in Washington, DC's Metropolitan Area Transit Authority rail stations and buses has been used to advocate changing the nation's laws regarding marijuana usage. WMATA has provided \$46,250 worth of space to these types of ads; therefore, as a warning to other transit agencies, the conferees have deleted funding totaling \$92,500 from projects and activities for WMATA in this bill.

While the conferees applaud the efforts of many transit agencies to prevent ads that promote marijuana use, the conferees remain concerned that the opportunity exists nationwide for transit properties to run similar advertising. Therefore, the conference agreement includes a provision (Section 177) that prohibits Federal transit grantees from obligating or expending funds that would otherwise be available in the Act, if the grantee is involved directly or indirectly with any activity, including displaying or permitting to be displayed advertisements on its land, equipment, or in its facilities, that promote the legalization or medical use of substances listed in schedule I of section 202 of the Controlled Substance Act.

FORMULA GRANTS

(INCLUDING TRANSFER OF FUNDS)

The conference agreement provides a total program level of \$3,839,000,000 for formula grants of the Federal Transit Administration, as proposed by both the House and Senate. Within this total, the conference agreement appropriates \$767,800,000 from the general fund. The general fund appropriation shall be available until expended. The FTA oversight takedown shall not exceed the amount authorized in current law.

The conference agreement provides that funding made available under the clean fuels formula grant program under this head-

I

Marijuana Ad On Metro Infuriates Lawmaker

By Lyndsey Layton
Washington Post Staff Writer
Wednesday, December 3, 2003; Page B01

An Oklahoma lawmaker is seeking to slice \$92,500 from the federal government's annual payment to Metro because he is angry that the transit agency accepted advertising from a nonprofit group that wants to decriminalize marijuana.

Change the Climate Inc. has been using public service advertising space on the Metro system since 2001, but it was the latest round of advertising, this fall, that drew the ire of Rep. Ernest J. Istook Jr. (R-Okla.).

The ad showed a man carrying a tanned blonde in a short white dress, the two of them set against the azure sky of some tropical retreat. Under the picture appeared the declaration: "Enjoy better sex! Legalize and Tax Marijuana."

In a Nov. 10 letter to Jim Graham, chairman of the Metro board, Istook called the ad "shocking" and said the board had "exercised the poorest possible judgment, so I must assure that [Metro] will learn the proper lessons from this experience and will only accept appropriate ads in the future."

This week, Istook inserted into a bill language that would cut Metro's funds by \$92,500 and prohibit any transit system that receives federal funds from running advertising from a group that wants to decriminalize marijuana. The money is just a fraction of the federal government's \$164 million subsidy to Metro for capital projects.

The language is part of an omnibus bill expected to come before Congress for a vote in late December or January.

"Metro is using taxpayer facilities to promote illegal activity," said Micah Swafford, Istook's press secretary. She said the congressman was unavailable for comment.

Graham sees things differently.

Marijuana Ad On Metro Infuriates Lawmaker

"This is petty and punitive," Graham said. "It's a politically motivated, micromanaging bolt from the blue. I suspect it would never have risen to this level if this was San Francisco or another city. Whatever they're running would never have come to the attention of Congressman Istook."

Metro officials initially refused the ads when Change the Climate approached them in 2001.

But when they were threatened with a First Amendment lawsuit backed by the American Civil Liberties Union, officials relented.

"The congressman would rather have us slug this out in court at great expense than follow the judgment of our general counsel," Graham said. "The expense that's going to be involved is considerable. And this group would like nothing more than to sue. It's better publicity than advertising."

Officials at the Boston subway system refused the same ad -- triggering a lawsuit that has continued for three years.

Change the Climate officials said they were trying to attract attention to certain issues. "Yes, we wanted to stimulate debate, but we didn't think a nutcase congressman would try to eliminate free speech," said Joseph White, founder of Change the Climate. "If they don't like what we're doing, they ought to read the Constitution and get a life."

Swafford said Istook was particularly irritated because Metro gave the advertising space to Change the Climate at no charge, as part of its policy of dedicating a percentage of ad space to nonprofit groups for public service announcements.

Metro officials recently voted to abolish that policy, in part because it attracted groups wanting to post controversial ads.

"We're not just talking about allowing them to use the space," Swafford said. "They gave them free ad space. The First Amendment does not require the government to give free space."

The space was worth \$46,250. Istook's proposal would cut twice that amount from Metro's budget "as a warning to other transit agencies."