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 HONORABLE NORMAN Y. MINETA and** **THE UNITED STATES OF AMERICA,** **Defendants.**	)	**Case No. 1:04-CV-00262-PLF**

REPLY BRIEF OF PLAINTIFFS IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANTS' CROSS MOTION FOR SUMMARY JUDGMENT

It is disappointing that the Government decided to attempt to defend the indefensible – a statute designed, and already operating, to restrain one side of an active political debate. Justice would better have been served had the Justice Department not imposed the entire burden of defending the Constitution on the plaintiffs and the Court.

The underlying premise of the Government's argument – that Section 177 is somehow about "ensuring that no federal funds are used to facilitate activity Congress does not wish to promote"[1] – is false. The acceptance of paid political advertising from plaintiffs and other citizens that support changing marijuana laws would not involve the

[1] The United States' and Secretary of Transportation's Memorandum in Opposition to Plaintiffs' Motions for Preliminary Injunction and for Summary Judgment and in Support of Cross-Motion for Summary Judgment at 2 (filed Apr. 2, 2004) ("Gov't Opp'n Mem."); *accord id.* at 16.

expenditure of federal funds or any other transit system funds; the acceptance of such advertising would *earn* money for WMATA and other transit agencies. This case is not about Congress exercising its spending power to support only the programs that Congress favors; it is about Congress using its spending power as a weapon to coerce viewpoint-based censorship.

The Government suggests that Section 177 is in "furtherance of the objective" of preventing "activity that is contrary to federal law or that may encourage, even in subtle ways, conduct that Congress has found poses a significant threat to the public welfare." Gov't Opp'n Mem. at 16. If that were the purpose or effect of Section 177, we would not be here. What Section 177 punishes is "activity that promotes the legalization or medical use of" marijuana. Consolidated Appropriations Act of 2004, Pub. L. No. 108-199, 118 Stat. 3, Division F § 177, at 309. While the vagueness of Section 177 makes it somewhat difficult to predict the statute's operation with certainty, it does not appear that illegal *sales* of marijuana (or the promotion of illegal sales) would be a violation. The statute is focused only on preventing the advocacy of legislative change – speech that lies at the very "core of the First Amendment." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 926-27 (1982).

Because of that statutory focus on preventing protected, lawful activity, the Government appears to concede that it would be unconstitutional for a transit system to follow Section 177 literally – that is, to ban only speech advocating relaxation of the nation's drug laws. Rather, the Government advances a novel constitutional test – that Section 177 is constitutional if a transit system *could* comply by engaging in broader viewpoint-neutral restraints (although the Government acknowledges in a footnote that WMATA and other transit systems cannot actually do this). Gov't Opp'n Mem. at 9-12

& 14 n.6. For example, a transit system could bar all advocacy statements relating to marijuana use from any point of view. Of course that would unconstitutionally discriminate against marijuana policy as a topic, so maybe the transit system could bar all advocacy of legal change, or maybe all advocacy altogether, or maybe all advertising altogether.

The Government might as well argue that a statute withholding federal funds from transit systems that permit black women to sit in the front of the bus would be constitutional because a transit system could comply in an even-handed manner by removing all seats.

The Government's new constitutional test is, not surprisingly, contrary to law. As the Supreme Court made clear in *South Dakota v. Dole*, 483 U.S. 203, 210 (1987), the Constitution forbids "a grant of federal funds conditioned on invidiously discriminatory state action." *Dole*, 483 U.S. at 210. And invidiously discriminatory state action is the whole point of Section 177.

As the Court will recall from the conference setting the briefing schedule, the filing of the opposition brief was delayed for some weeks to permit ample time for "coordination" among various unidentified organs of Government. In the brief's closing peroration, however, we see exactly what that coordination has yielded:

> An order enjoining enforcement of Section 177 would undermine Congress' legitimate interest in not promoting or providing the means for the expression of ideas that run contrary to and may serve to undermine federal policy adopted to protect the public's well-being.

Gov't Opp'n Mem. at 22. This passage is followed by a "*cf.*" site to two cases that do not support it, because the only direct support is to be found in the likes of *Brave New World* and *1984*.

There is no government interest, none at all, in suppressing ideas that run contrary to federal policy. There is rather an interest in robust free debate and expression, and in preventing government efforts to suppress ideas that run "contrary to federal policy." That is exactly why Section 177 should be enjoined without further delay.

ARGUMENT

I. Section 177 Is Facially Unconstitutional

Although the Government correctly notes that the "appropriate test" to apply in this case is the one set forth in *Dole*, 483 U.S. 203, the Government fails to apply that test. Gov't Opp'n Mem. at 6. As the Supreme Court explained in *Dole*, the spending power is subject to four "general restrictions." 483 U.S. at 207. As explained in our opening brief, two of these restrictions have been violated: the "independent bar" imposed by the First Amendment on "the conditional grant of federal funds," *id.* at 208, and the requirement that "conditions on federal grants" be related "to the federal interest in particular national projects or programs," *id.* at 207 (quotation omitted).[2] Memorandum of Plaintiffs in Support of Their Motion for Preliminary Injunction at 14-16 (filed Feb. 18, 2004) ("Pls.' P.I. Mem.").

A. The First Amendment Is an Independent Constitutional Bar to Section 177

In *Dole*, the Supreme Court explained that the "independent constitutional bar" limitation on the spending power "stands for the unexceptional proposition that the power

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[2] Based on the Government's interpretation of Section 177 as requiring, *sub silentio*, the elimination of non-commercial advertising on the systems of federal transit grantees, serious questions can be raised about whether it is in pursuit of the general welfare, *see Dole*, 483 U.S. at 207, and whether the statute provides sufficient guidance to "enable the" grantees "to exercise" – in a constitutional manner – "their choice knowingly, cognizant of the consequences of their participation," *id.*

may not be used to induce the States to engage in activities that would themselves be unconstitutional." 483 U.S. at 210. The Supreme Court's example of such a bar, which the Government's brief ignores, is directly on point: "Thus, for example, a grant of federal funds conditioned on invidiously discriminatory state action . . . would be an illegitimate exercise of the Congress' broad spending power." *Id.* at 210-11.

The Government advances one argument in response: that a facial challenge to Section 177 cannot succeed because Section 177 can be implemented in a viewpoint-neutral manner by a transit grantee limiting its advertising to commercial speech or eliminating advertising altogether. *See, e.g.*, Gov't Opp'n Mem. at 11 ("The federal transit program was not designed to facilitate private speech."); *id.* at 12 ("Public buses and railways are not provided as a means to facilitate the expression of ideas."). As discussed above, that is no response at all, because Section 177 is designed to be a viewpoint-based restraint. But even if a statute could be defended in this manner, the Government's argument here would fail, because transit systems are not legally permitted to simply ban speech.

1. WMATA and Other Federal Transit Grantees Cannot Be Forced to Close Public Fora to Political (or Some Other Category of) Advertising

The Court of Appeals has held that WMATA's advertising space is a public forum. *Lebron v. WMATA*, 749 F.2d 893, 896 (D.C. Cir. 1984) ("There is no doubt that the poster at issue here conveys a political message; nor is there a question that WMATA has converted its subway stations into public fora by accepting other political advertising."); *see also* Pls.' P.I. Mem. at 8. To the extent that the Government suggests otherwise, by burying discussion of *Lebron* and other dispositive authority in footnotes, Gov't Opp'n Mem. at 11 n.4, 14 n.6, the Government misrepresents the law of this and

other judicial circuits. And because the forum status of WMATA's advertising space is settled law, the Government's discussion of *United States v. American Library Association*, 539 U.S. 194 (2003), Gov't Opp'n Mem. at 11-12, is misplaced, at least until the Court of Appeals rules otherwise *en banc* or the Supreme Court overturns *Lebron*.[3]

The Government's argument that WMATA should curtail political speech from its advertising spaces cannot cure the infirmity of Section 177, for such curtailment would itself be unconstitutional. WMATA, having created a forum for private speech in its transit facilities, *see Lebron*, 749 F.2d at 896 n.6 (distinguishing *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974)), cannot close that forum only to political speech. Doing so would be contrary to the general rule that political speech stands on equal – if not greater – footing with other speech and that its curtailment is examined with strict scrutiny. *See, e.g.*, *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 513 (1981) ("Insofar as the city tolerates billboards at all, it cannot choose to limit their content to commercial messages."); *Café Erotica of Florida, Inc. v. St. Johns County*, 360 F.3d 1274, 1291 (11th Cir. 2004) (holding that when a county ordinance governing the display of signs "discriminates against political speech in favor of commercial speech, the County must provide compelling reasons for this disparate treatment that are narrowly tailored to further those interests").

In a limited public forum such as WMATA's advertising spaces, the ground rules defining *the limits* of a designated public forum – *i.e.,* which subjects may be discussed or

[3] Of course, there are additional reasons for distinguishing *American Library Association.* For example, that case dealt with Congress's attempt to prevent minors from having access to speech that was unprotected as to minors, rather than an attempt to restrain core political speech.

which category of groups may use the forum – need only be reasonable in light of the purpose served by the forum. But when a speaker who comes *within* those limits is excluded based on the content of his or her speech, the exclusion is unlawful unless it is narrowly tailored to serve a compelling government interest:

> In limited public fora, strict scrutiny is accorded only to restrictions on speech that falls within the designated category for which the forum has been opened. Thus, in a limited public forum, government is free to impose a blanket exclusion on certain types of speech, but once it allows expressive activities of a certain genre, it may not selectively deny access for other activities of that genre. As to expressive uses not falling within the limited category for which the forum has been opened, restrictions need only be viewpoint neutral and reasonable.

Hotel Employees & Restaurant Employees Union, Local 100 v. City of New York Dep't of Parks & Recreation, 311 F.3d 534, 545-46 (2d Cir. 2002) (quotations and citations omitted).

We suggest that the elimination from the WMATA public forum of advocacy speech, or political speech, or whatever content-based category of speech the Government next selects in its *post hoc* attempts to save Section 177, would be unreasonable. But it is unnecessary to decide that question, because even in a non-public forum, much less in a limited public forum, a restriction on subject matter is invalid where the Government's purpose is to suppress disfavored views. *See, e.g.*, *Perry Education Ass'n v Perry Local Educators Ass'n*, 460 U.S. 37, 49 (1983) ("Implicit in the concept of the nonpublic forum is the right to make distinctions in access on the basis of subject matter and speaker identity" but "not . . . to suppress expression merely because public officials oppose the speaker's view"); *Cornelius v. NAACP*, 473 U.S. 788, 811 (1985) (in a nonpublic forum restrictions still must be reasonable and may not be "a

facade for viewpoint-based discrimination"). The undisputed facts here establish that the purpose of the broadened limitation on speech suggested by the Government would be the exclusion of the viewpoint disfavored by the author of Section 177. As *Perry* and *Cornelius* teach, that contrivance is unconstitutional.

Although the Government makes much of *Lehman*, the Supreme Court has cautioned against undue reliance upon that plurality opinion, explaining that it represents a "narrow circumstance" in which "the government may ban from its facilities certain speech that would disrupt the legitimate governmental purpose for which the property had been dedicated." *Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. 530, 538 (1980). In light of the fact that WMATA had until recently allowed such advertisements without disrupting any legitimate purposes, it is difficult to see how WMATA could be permitted to refuse political, but not other, advertising.

Indeed, even if the refusal of political advertising could be justified on content-neutral grounds (such as those set forth in *Lehman* about upsetting riders), closing WMATA's advertising spaces on the basis of certain constitutionally-protected content is not permitted: "The government may close a public forum that it has created by designation . . . so long as the reasons for closure are not content-based." *Initiative and Referendum Institute v. U.S. Postal Service*, 116 F. Supp. 2d 65, 73 (D.D.C. 2000) (Roberts, J.) (*citing Police Dep't of the City of Chicago v. Mosley*, 408 U.S. 92, 96 (1972), *and Perry Educ. Ass'n*, 460 U.S. at 46). If WMATA did what the Government suggests and undertook to comply with Section 177 by banning all political advertising, the reason would have everything to do with content.

2. Even if WMATA and Other Federal Transit Grantees Could Be Forced to Close Public Fora to Political Advertising, Section 177 Cannot Fairly Be Construed to Require That

Under these circumstances, the Government's argument is that the statute, as vague and overbroad as it is, *see* Pls.' P.I. Mem. at 12-13, should be construed even more vaguely and more broadly, to effectively prohibit any federal transit grantee from becoming "involved directly or indirectly, in any activity that promotes" *or opposes* "the legalization or medical use of any substance listed in schedule I of section 202 of the Controlled Substances Act," Consolidated Appropriations Act of 2004, Division F § 177, Pub. L. No. 108-199, 118 Stat. 3, at 309. *See* Gov't Opp'n Mem. at 14 n.6. In so rewriting the statute, the viewpoint discrimination (but not the other infirmities of content discrimination, vagueness and overbreadth, each of which serves as an independent constitutional bar to the application of Section 177) purportedly falls away. Likewise, to the extent that the Government suggests that some other (necessarily broader) swath of advertising should be banned, Gov't Opp'n Mem. at 11-12, viewpoint infirmities may disappear.

But there is no indication that this argument of counsel is what Congress intended. To the contrary, the plain words of the statute and its legislative history evidence an unmistakable purpose quite inconsistent with the construction that is now advocated by the Government, which would prohibit messages that support the Government's existing drug policies.[4] *See* Pls.' P.I. Mem. at 4-6. Section 177 cannot be construed "to the point of disingenuous evasion even to avoid a constitutional question." *Miller v. French*, 530

[4] Even the executive branch, in enforcing the Act, fails to adopt the Government's construction: The White House has not ordered transit agencies to cease running advertisements of the National Office of Drug Control Policy, and upon information and belief WMATA and other federal transit grantees continue to run such advertisements.

U.S. 327, 341 (2000) (quotations omitted). Although there are numerous cases discussing the "canon of constitutional doubt" at all levels of the federal courts, *Miller* is a recent and representative case in which the Supreme Court explained the limitations of the canon in detail:

> [C]onstitutionally doubtful constructions should be avoided where 'fairly possible.' *Communications Workers v. Beck*, 487 U.S. 735, 762, 108 S.Ct. 2641, 101 L.Ed.2d 634 (1988). But where Congress has made its intent clear, "we must give effect to that intent." *Sinclair Refining Co. v. Atkinson*, 370 U.S. 195, 215, 82 S.Ct. 1328, 8 L.Ed.2d 440 (1962).
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> . . . And while this construction raises constitutional questions, the canon of constitutional doubt permits us to avoid such questions only where the saving construction is not "plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council*, 485 U.S. 568, 575, 108 S.Ct. 1392, 99 L.Ed.2d 645 (1988). "We cannot press statutory construction 'to the point of disingenuous evasion' even to avoid a constitutional question." *United States v. Locke*, 471 U.S. 84, 96, 105 S.Ct. 1785, 85 L.Ed.2d 64 (1985) (quoting *George Moore Ice Cream Co. v. Rose*, 289 U.S. 373, 379, 53 S.Ct. 620, 77 L.Ed. 1265 (1933)); *see also Pennsylvania Dept. of Corrections v. Yeskey*, 524 U.S. 206, 212, 118 S.Ct. 1952, 141 L.Ed.2d 215 (1998) (constitutional doubt canon does not apply where the statute is unambiguous); *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 841, 106 S.Ct. 3245, 92 L.Ed.2d 675 (1986) (constitutional doubt canon "does not give a court the prerogative to ignore the legislative will"). Like the Court of Appeals, we find that § 3626(e)(2) is unambiguous, and accordingly, we cannot adopt Justice BREYER's "more flexible interpretation" of the statute. *Post,* at 2262.

Miller, 530 U.S. at 336, 341. The construction urged by the Government here is "plainly contrary to the intent of Congress," and in any event that construction would not avoid the need for constitutional adjudication, as already shown. Section 177 should therefore

be construed, in accordance with its plain meaning and its pellucid legislative history, as requiring WMATA and other transit agencies to engage in viewpoint-based discrimination on pain of losing all their federal funding.

Section 177 had its intended effect and induced WMATA to reject the plaintiffs' advertisement while still accepting, or being free to accept, other political advertisements including advertisements supporting the Government's current position in the "War on Drugs."[5] WMATA's viewpoint-discriminatory action was unconstitutional, *see* Pls' P.I. Mem. at 8-13, and plaintiffs seek appropriate relief against WMATA in the companion case, *ACLU v. White*, 1:04-CV-00467-PLF. Under *Dole*, however, because WMATA violated plaintiffs' constitutional rights under the coercion or inducement of Section 177, Section 177 itself is unconstitutional as well. *Dole*, 483 U.S. at 210-11; *American Library Ass'n*, 123 S. Ct. at 2303 n.2 ("we must ask whether the condition that Congress requires 'would be unconstitutional' if performed by the library itself") (*quoting Dole*,

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[5] This effect demonstrates plaintiffs' standing, contrary to the assertion in footnote 5 of the Government's brief. Plaintiffs have met the "case" or "controversy" requirement of Article III, which requires that a plaintiff suffer "injury in fact," that the injury is "fairly traceable" to the actions of the defendant, and that the injury will likely be redressed by a favorable decision. *McConnell v. FEC*, 124 S. Ct. 619, 707 (2003). Prudential requirements add that the plaintiff's grievance arguably fall within the zone of interests protected or regulated by the statutory provision or constitutional guarantee invoked in the suit – plaintiffs' interests as sponsors of a rejected advertisement plainly fall within the zone of interests protected by the First Amendment – and that the plaintiff "assert his own legal rights and interests" and not those of third parties – as plaintiffs do here. *See Devlin v. Scardelletti*, 536 U.S. 1, 7 (2002) (*quoting Allen v. Wright*, 468 U.S. 737, 751 (1984)).

Plaintiffs here have suffered an injury not merely fairly traceable to Section 177, but, according to the Stipulated Statement of Facts, directly attributable to it. This injury will be redressable by a favorable decision of this Court finding Section 177 unconstitutional. Moreover, the legislative history of Section 177 makes plain that Congress singled out one of the named plaintiffs in this lawsuit, who had advertised on WMATA space in the past, from doing so again. Pls.' P.I. Mem. at 1. Under these circumstances, the Government's decision not to question plaintiffs' standing above the margin is understandable.

483 U.S. at 210).

Although the Government argues otherwise, there is no doubt that inducement is present here. The passage in *Dole* that forbids "a grant of federal funds conditioned on invidiously discriminatory state action" does not require inducement to rise to the level of compulsion. *Dole*, 483 U.S. at 210. A federal statute that offered local governments only $100,000 on condition that they engage in viewpoint discriminatory censorship would be unconstitutional. This case is *a fortiori,* because the inducement – which amounts to approximately $88 million – plainly rose to the level of compulsion. *See* Stipulated Statement of Material Facts ¶ 11 ("WMATA rejected [plaintiffs'] advertisement due to concern about jeopardizing its federal funding."); *see also, e.g.*, Lyndsey Layton, *Metro Chief Predicts Transit 'Death Spiral' Without Extra Funds*, Wash. Post., Apr. 2, 2004, at B1 ("'We're talking about a systemic service meltdown condition as early as three years from now,' Metro Chief Executive Richard A. White told his board of directors.") (attached hereto as an exhibit).

3. The Government's Effort to Avoid Viewpoint Discrimination Renders Section 177 Fatally Overbroad

The Government's broadening construction of Section 177 – that what Section 177 *really* requires is for local transit agencies to stop accepting all non-commercial advertising or all advertising – while designed to prevent the statute from being viewpoint discriminatory, in fact causes the statute's unconstitutional overbreadth to be exacerbated. Congress has not offered a legitimate state interest to support Section 177. The statute does not seek to prevent drug use, or even to prevent advertising to prevent drug use. Instead, that section prohibits the advocacy of legislative change. In so doing, the section targets only political speech. But even if the state interest were hypothesized

to be the prevention of drug use, Section 177 remains substantially vague and overbroad. Pls.' P.I. Mem. at 12-13.

It is well-settled that for an overbreadth challenge to legislation, there is *no requirement* that "the challenger must establish that no set of circumstances exists under which the [law] would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987); *see also, e.g.*, *Virginia v. Hicks*, 123 S. Ct. 2191, 2196 (2003). Here, where plaintiffs have asserted that Section 177 threatens to chill free speech, plaintiffs need not show that every transit grantee seeking to comply with Section 177 will violate the First Amendment. *Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 798 (1984) (recognizing doctrine of overbreadth as an "exception" to the rules regarding facial challenges where statutes are "written so broadly that they may inhibit the constitutionally protected speech of third parties"). The overbreadth "suffices to invalidate *all* enforcement of [the] law, until and unless a limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression." *Hicks*, 123 S. Ct. at 2196 (emphasis in original; quotation omitted).

The Government argues that it is "highly unlikely" that anyone will be "directly chilled" by Section 177's proscriptions on speech. Gov't Opp'n Mem. at 17. But these quotations, including the adverbs, appear nowhere in constitutional jurisprudence. Plaintiffs' speech has already and actually been chilled. The Government also argues that the constitutional concerns are diminished because Section 177 "is neither a penal statute nor a direct regulation of plaintiffs' speech." *Id.* The Supreme Court, however, has never limited the overbreadth doctrine to penal statutes. *See. e.g.*, *Taxpayers for Vincent*, 466 U.S. 798-99; *Hicks*, 123 S. Ct. at 2196. And the Government's distinction between

direct and supposedly indirect regulation – relying on *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998) – misses the mark entirely. The Government is not subsidizing any speech. Rather, plaintiffs sought to purchase advertising. Stipulated Statement of Material Facts ¶ 10.[6]

B. Section 177 Is Unrelated to Capital Improvements of Mass Transit

The Government argues that the connection between Section 177 and the capital improvement projects on which it conditions funding is that "the use of controlled substances has a substantial detrimental effect on the health and general welfare of the American people." Gov't Opp'n Mem. at 16. This is no connection at all, and moreover is found nowhere in the statute or the legislative history. Even if there were some connection between mass transit and enforcement of the drug laws, there is no connection between mass transit and advocacy of legislative change. Although the Court in *Dole* refused to adopt a requirement of a ***direct*** relationship, the Court did not abandon the idea that there is some "germaneness" or "relatedness" required to support the exercise of the

[6] Even if this were a case – contrary to the Stipulated Statement of Facts – in which WMATA, but for Section 177, would have run the plaintiffs' advertisement for free, *Finley* still would not apply. *Finley* is a case in which the Government acted as a patron of the arts, choosing to subsidize particular messages. In *Finley*, the statute at issue required the National Endowment for the Arts to take into account "decency and respect for the diverse beliefs and values of the American public" in making funding awards. 524 U.S. at 572. The Court explained the unusual circumstances present in the case: "In the context of arts funding, in contrast to many other subsidies, the Government does not indiscriminately encourage a diversity of views from private speakers. The NEA's mandate is to make esthetic judgments, and the inherently content-based 'excellence' threshold for NEA support sets it apart from the subsidy at issue in" other cases. *Id.* at 586. It was this *competitive funding* aspect of *Finley* that was necessary to distinguish that case from the typical situations including *Rosenberger*, in which the religious student institutions were denied subsidies. The Court stated so expressly: "Finally, although the first Amendment certainly has application in the subsidy context, we note that the Government may allocate *competitive funding* according to criteria that would be impermissible were direct regulation of speech or a criminal penalty at stake." *Id.* at 587-88 (emphasis added). Of course, there is no competitive funding here.

Spending Power. *Dole*, 483 U.S. at 208 n.3. Here the Government nullifies the requirement of a "relationship" between the spending and the federal interest: *Any* interest favored by Congress in *any* statute, pursuant to the Government's analysis, can support *any* spending condition on *any* project.

The Government's reliance on *Lau v. Nichols*, 414 U.S. 563, 568 (1974) and *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 640-42 (1999), is misplaced. Those cases held that the Government could require that federally funded programs at educational institutions comply with specified provisions of the civil rights laws. There is no corresponding linkage here between denying advertisements promoting legal change and funding capital improvements on transit systems.

II. **Preliminary and Permanent Relief is Warranted**

It is settled law that violation of First Amendment rights causes irreparable injury *per se*. Pls.' P.I. Mem. at 17-18. In response, the Government offers *National Treasury Employees Union v. United States*, 927 F.2d 1253, 1254 (D.C. Cir. 1991). Gov't Opp'n Mem. at 19. But that case involved no restraint on speech; only a ban on receiving honoraria for speech. *NTEU,* 927 F.2d at 1253. In *NTEU*, the plaintiffs' speech had not been restrained:

> [The appellants] correctly point out that "[t]he loss of First Amendment freedoms, for even minimal periods of time," may constitute irreparable injury. i 427 U.S. 347, 373, 96 S.Ct. 2673, 2690, 49 L.Ed.2d 547 (1976). A preliminary injunction is not appropriate, however, "unless the party seeking it can demonstrate that 'First Amendment interests [are] either threatened or in fact being impaired at the time relief [is] sought.'" *Wagner v. Taylor*, 836 F.2d 566, 577 n.76 (D.C. Cir. 1987) (quoting i, 427 U.S. at 373, 96 S.Ct. at 2690). The appellants have shown neither. Nothing in the record convinces us that the appellants will cease speaking or writing before the district court resolves their constitutional challenges.

Id. at 399-400. In contrast to NTEU, the plaintiffs here have already suffered injury because their speech has been suppressed – and continues to be suppressed – by WMATA's refusal to run their advertisements.

The Government's other support for the lack of irreparable harm purportedly comes from *Christian Knights of the Ku Klux Klan Invisible Empire, Inc. v. District of Columbia*, 919 F.2d 148 (D.C. Cir. 1990). In that case, the District government granted the Klan a permit for a march but the Klan disagreed with the District's limitation of the route. On an emergency motion, Judges Edwards and Randolph issued statements upholding the District's decision on public safety grounds, both observing that the Klan's speech had <u>*not*</u> been prohibited.[7] The decision is therefore inapposite.[8]

The Government's remaining arguments are that it is constitutionally harmless to deprive plaintiffs of one media outlet among many, Gov't Opp'n Mem. at 14, 19-20, and that all enactments of Congress should be immune from injunction, *id.* at 20-22. Those are not only misstatements of basic First Amendment doctrine, but contrary to the principle of judicial review, as well as to familiar practice, *see, e.g., American Civil*

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[7] *See id.* at 149 ("It should be noted at the outset that this case does not involve an effort by the District of Columbia to prohibit appellees' freedom of expression. Appellees have been given a permit to march and to demonstrate. Thus, the issue raised here is the extent to which the location of a demonstration can be regulated to deal with matters of public safety and other considerations.") (Edwards, J.); *id.* at 151 ("There will be no prohibition of speech. The Klan can make its point whether its members march one mile or two. But the Klan's members will not be able to take a single step without police protection. How many steps they should be permitted to take must depend on how many officers can reasonably be mustered. That is the reality, and the Supreme Court has long recognized that the place and manner of presenting speech can be regulated in light of the probability that it will provoke a violent response.") (Randolph, J.).

[8] In a subsequent non-emergency appeal, the same court ultimately agreed that the Klan had a First Amendment right to march on the route for which it had applied. *Christian Knights of the Ku Klux Klan v. District of Columbia,* 972 F.2d 365 (D.C. Cir. 1992) (Randolph, J.).

Liberties Union v. Reno, 929 F. Supp. 824 (E.D. Pa. 1996) (enjoining enforcement of Communications Decency Act of 1996), *aff'd,* 521 U.S. 844 (1997).

CONCLUSION

For the reasons set forth in detail above, plaintiffs' motion for summary judgment should be granted and defendants' cross motion for summary judgment should be denied.

Respectfully submitted,

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