

**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.)

Civil Action No. 04-CV-262 (PLF)

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

**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**

PRELIMINARY STATEMENT

Plaintiffs have brought a facial challenge to a federal statute enacted pursuant to Congress' broad power under the Spending Clause. *See* U.S. Const., Art. I, § 8, cl. 1. Section 177 of the Consolidated Appropriations Act, 2004 ("Section 177") conditions federal grants to state and local government authorities under the federal transit program ("federal transit grantees") on the grantees' agreement not to use such funds for, or permit federally-funded transit assets to be used for, the purpose of promoting the legalization or medical use of illegal substances listed in Schedule I of the Controlled Substances Act, including marijuana. As is the

case with any enactment under the spending power, Section 177 presents potential grant recipients with a choice to reject the federal funds and avoid the condition attached to their receipt or to comply with the restriction in exchange for the receipt of federal funds. Plaintiffs in this case are not federal transit grantees or potential grant recipients, but rather, four nonprofit organizations seeking to advocate for the legalization of marijuana on federally-funded bus and railway systems, such as the Washington Metropolitan Area Transit Authority ("WMATA").

Plaintiffs can prevail only if they can demonstrate that Section 177 is incapable of being implemented in a constitutional manner. It is well established that transit systems retain considerable discretion to limit the type of advertising that may be displayed on their vehicles. Transit systems are not traditional public fora. Congress, therefore, may impose such a limitation on federally-funded transit systems as a condition to the receipt of federal funds, pursuant to its broad spending power.

The Supreme Court consistently has validated funding restrictions designed to limit a federal program to its intended purpose. The federal transit program was not designed to facilitate private speech. By electing to fund mass transportation, Congress is not constitutionally required to facilitate or promote plaintiffs' message. Moreover, there is no requirement, as plaintiffs contend, that a condition on funds be directly related to the purpose of the expenditure to which it is attached. Section 177 is sufficiently related to Congress' undeniable interest in ensuring that no federal funds are used to facilitate activity Congress does not wish to promote.

Section 177 is not a direct restraint on plaintiffs' speech. Rather, the provision simply denies to plaintiffs the right to use a federally-subsidized bus, railway car, or station as a platform

for carrying their message. Plaintiffs, of course, have a First Amendment right to seek legalization of marijuana; however, they have no First Amendment right to use federally-funded equipment and facilities as the means for getting their message out to the public. Plaintiffs remain free to advocate their message for the legalization of marijuana – indeed, they have available numerous others means and places to do so – but the federal government is not required to facilitate their doing so.

Because Section 177 is a valid exercise of Congress' spending power, the United States and Secretary of Transportation ("federal defendants") are entitled to summary judgment.

PROCEDURAL BACKGROUND

Plaintiffs initiated this action against WMATA and the federal defendants by filing a complaint and a motion for preliminary injunction seeking to preliminarily enjoin the federal government from enforcing Section 177 and ordering WMATA to accept plaintiffs' advertisements for display on WMATA's property. With the consent of all parties, the Court consolidated the issue of a preliminary injunction with the merits and issued a Scheduling Order for resolution of this case on cross-motions for summary judgment. Plaintiffs filed their motion for summary judgment on March 5, 2004. The parties jointly submitted a Stipulation of Material Facts, which the federal defendants incorporate in this memorandum by reference. On March 22, 2004, the parties stipulated to the dismissal of WMATA as a defendant in this action. Plaintiffs have initiated a separate related action against WMATA's General Manager. *See ACLU, et al. v. White*, Civil Action No. 04-467 (PLF).

Plaintiffs allege in their complaint that Section 177 facially violates the First and Fifth Amendments to the United States Constitution because "it conditions access to funding on

acceptance of content and viewpoint restrictions on otherwise available, constitutionally protected speech," and "burdens the rights of plaintiffs and their members to communicate protected expression." First Amended Complaint ("Am. Compl.") ¶ 27. Plaintiffs assert that Section 177 directly violates plaintiffs' First Amendment right to free speech and that it exceeds Congress' Article I power under the Spending Clause. *See id.* at ¶¶ 28-30. Plaintiffs further contend that Section 177 is impermissibly vague and overbroad. *Id.* at ¶ 33.

STATUTORY BACKGROUND

Section 177, a provision of Division F of the Consolidated Appropriations Act, 2004, Pub. L. 108-199, January 23, 2004, 118 Stat 3, places a condition on the expenditure of federal funds under the federal government's transit program. The federal transit program, codified at 49 U.S.C. Chapter 53, was established by Congress to "encourage and promote the development of transportation systems that embrace various modes of transportation and efficiently maximize mobility of individuals and goods in and through urbanized areas and minimize transportation-related fuel consumption and air pollution." 49 U.S.C. § 5301(a). The program operates by issuance of capital and formula grants through the United States Department of Transportation ("DOT") to state and local authorities in order to assist in the planning, construction, and operation of mass transportation systems. *See* 49 U.S.C. § 5301(f) (statement of "General Purposes" of Chapter 53). The Federal Transit Administration ("FTA") is the component within the DOT authorized to administer the program. *See* 49 C.F.R. § 1.45, 1.51. Division F of the Consolidated Appropriations Act of 2004 appropriates funds for use in programs administered by the FTA for the fiscal year ending September 30, 2004.

Section 177 states that "[n]one 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." As explained in the Conference Report accompanying the Act, Section 177 was enacted to ensure that federally-funded buses, railways, and station platforms are not used to promote marijuana use. *See* Conference Report No. 108-401 to accompany H.R. 2673, attached to Memorandum of Plaintiffs in Support of their Motion for Preliminary Injunction ("P.'s Mem.") as Exhibit H. (noting that 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," and, in particular, "ads that promote marijuana use").

The Controlled Substances Act ("CSA"), 21 U.S.C. § 801, *et seq.*, which Section 177 incorporates by reference, sets forth Congressional policy regarding the use of controlled substances. The CSA makes it unlawful to "manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense" any controlled substance, "[e]xcept as authorized by [the Act]." 21 U.S.C. § 841(a)(1). Congress enacted the CSA in 1970 as part of the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236.¹ While recognizing that many controlled substances "have a useful and legitimate medical purpose and are necessary to maintain the health and general welfare of the American people," 21

¹Congress established a comprehensive regulatory scheme in which controlled substances are placed in one of five "schedules" depending on their potential for abuse, the extent to which they may lead to psychological or physical dependence, and whether they have a currently accepted medical use in treatment in the United States. *See* 21 U.S.C. § 812(b). A drug is included in Schedule I, the most restrictive Schedule, if it "has a high potential for abuse," "has no currently accepted medical use in treatment in the United States," and has "a lack of accepted safety for use * * * under medical supervision." 21 U.S.C. §§ 812(b)(1)(A)-(C). Given these characteristics, Congress mandated that substances in Schedule I be subject to the most stringent regulation. Marijuana is one of a number of illegal substances listed under Schedule I.

U.S.C. § 801(1), Congress found that "[t]he illegal importation, manufacture, distribution, and possession and improper use of controlled substances have a substantial and detrimental effect on the health and general welfare of the American people." 21 U.S.C. § 801(2). Congress more recently confirmed its policy with respect to the use of controlled substances listed in Schedule I, particularly marijuana, in a statutory provision entitled "Not Legalizing Marijuana for Medical Use." Pub. L. No. 105-277, Div. F, 112 Stat. 2681-761. *See also United States v. Oakland Cannabis Buyers' Cooperative*, 532 U.S. 483, 492 (2001) (the CSA does not include an implied medical necessity exception for marijuana).

ARGUMENT

I. SECTION 177 IS A FACIALLY VALID EXERCISE OF CONGRESS' SPENDING POWER

Plaintiffs treat Section 177 as if it were a direct regulation of plaintiffs' speech. *See* P.'s Mem. at 8-14. Section 177 imposes no direct restriction on plaintiffs' speech; nor does it chill plaintiffs' right to convey or receive material that is constitutionally protected. Section 177 was enacted pursuant to Congress' broad spending power, U.S. Const., Art. I, § 8, cl. 1. Like other conditions on federal funding aimed at local government partners, its conditions recognize the federal transit program's intended purpose and preclude from the program's scope activities that Congress does not wish to promote through federal dollars. The appropriate test for judging such congressional enactments is the one set forth in *South Dakota v. Dole*, 483 U.S. 203 (1987), and its progeny. *See United States, et al. v. American Library Ass'n, et al.*, 123 S.Ct. 2297, 2303 n.2 (noting that where a statute "does not directly regulate private conduct," but rather is an exercise of Congress' spending power, [*South Dakota v. Dole*] provides the appropriate framework for assessing the statute's constitutionality).

A. Plaintiffs Bear a Heavy Burden on Their Facial Challenge

Plaintiffs' challenge to the constitutionality of Section 177 asks the Court to "assume[] the gravest and most delicate duty this Court is called upon to perform." *Fullilove, et al. v. Klutznick*, 448 U.S. 448, 472 (1980) (internal quotation marks and citation omitted). The Court is required to accord "great weight to the decisions of Congress," even if the statute may implicate First Amendment rights. *Id.*; see also *Bowen v. Kendrick*, 487 U.S. 589, 617 (1988) (Acts of Congress are presumptively constitutional). Here, plaintiffs face a heightened burden because they seek a declaration that Section 177 is facially unconstitutional and a permanent injunction enjoining its enforcement. See P.'s Mem. at 14; Am. Compl. ¶ 27 (asserting a facial challenge to the statute). Facial invalidation of an Act of Congress "is, manifestly, strong medicine" that "has been employed by the Court sparingly and only as a last resort." *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 580 (1998) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973)). Indeed, the Supreme Court has described a facial challenge as "the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *Rust v. Sullivan*, 500 U.S. 173, 183 (1991) (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)); see also *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 223 (1990) (noting that "facial challenges to legislation are generally disfavored"). In order to prevail on such a challenge, plaintiffs must demonstrate "that a law's application to protected speech [is] substantial, not only in an absolute sense, but also relative to the scope of the law's plainly legitimate applications." *Virginia v. Hicks*, 123 S.Ct. 2191, 2197 (2003) (internal quotation marks and citation omitted). If the facially-challenged Act "contemplates a number of indisputably constitutional applications," *Finley*, 524 U.S. at 584, it must be upheld.

B. Congress' Spending Power Has Been Broadly Interpreted

It is well settled that “Congress has wide latitude to attach conditions to the receipt of federal assistance in order to further broad policy objectives.” *American Library Ass'n*, 123 S. Ct. at 2303 (citing *South Dakota v. Dole*, 483 U.S. at 206). The reach of Congress' spending power is broad, and it “is not limited by the direct grants of legislative power found in the Constitution.” *United States v. Butler*, 297 U.S. 1, 66 (1936). Instead, the constitutional limitations on Congress when it exercises its spending power “are less exacting than those on its authority to regulate directly.” *South Dakota v. Dole*, 483 U.S. at 209. Congress therefore is granted greater leeway under its spending power to encourage recipients to abide by its policy choices than it has when it seeks to regulate directly, and the Supreme Court has made clear that putative funding recipients who do not agree with Congress' policy choices when it places conditions on the availability of a federal subsidy are “free at pleasure to disregard or to fulfill” those conditions.” *Id.* at 210 (quoting *Charles C. Steward Machine Co. v. Davis*, 301 U.S. 548, 595 (1937)).

C. Section 177 Does Not Transgress Established Limits on the Spending Power

The Supreme Court has articulated only four general limitations on the federal spending power. *Dole*, 483 U.S. at 207. Plaintiffs do not dispute that Section 177 satisfies two of those four limitations – 1) that it was enacted in pursuit of the "general welfare" and 2) that it conditions the receipt of federal subsidies in an unambiguous manner. *Id.* Plaintiffs contend only that the statute exceeds Congress' spending authority: 1) because it would force local grant recipients to violate the First Amendment, an "independent constitutional bar" to the condition, *id.* at 210; and 2) because it is not directly related to the government's interest in mass

transportation. *Id.* at 207 (noting that "conditions on federal grants might be illegitimate if they are unrelated to the federal interest in particular national projects or programs") (internal quotation marks and citation omitted).

1. **Section 177 Does Not Compel Local Authorities to Violate First Amendment Rights**

Plaintiffs can prevail on their facial challenge only if they can demonstrate that Section 177 cannot be implemented by federal transit grantees in a constitutional manner. The "independent constitutional bar" prong of the *Dole* test requires that the spending power "not be used to induce the States [or local authorities] to engage in activities that would themselves be unconstitutional." *Dole*, 483 U.S. at 210. Section 177 does not violate this limitation, however, because the Supreme Court has recognized that mass transportation systems, predominantly buses and railways, are not First Amendment forums. *See Lehman v. City of Shaker Heights, et al.*, 418 U.S. 298 (1974). Because plaintiffs have no First Amendment right to advocate their message in this particular forum, Section 177 contains a valid funding restriction.

In *Lehman*, the Supreme Court held that a city which operates a public rapid transit system and sells advertising space on its vehicles is not required by the First Amendment to accept paid political advertising. "[A] city transit system has discretion to develop and make reasonable choices concerning the type of advertising that may be displayed on its vehicles." 418 U.S. at 303 (noting only that such choices must not be arbitrary, capricious, or invidious). Such discretion is warranted, at least in part, because advertising placards on buses or railways pose a unique "risk of imposing upon a captive audience." *Id.* at 304. As Justice Douglas noted in concurrence, "if we are to turn a bus or streetcar into either a newspaper or a park, we take great liberties with people who because of necessity become commuters and at the same time captive

viewers or listeners." *Id.* at 306-07. Although the plaintiff in *Lehman* seeking to place his advertisement had a right to express his views, he did not have a "right to force his message upon an audience incapable of declining to receive it." *Id.* at 307 (Douglas, J. concurring). Thus, the Court upheld the city's policy aimed at limiting its "car card space to innocuous and less controversial commercial and service oriented advertising." *Id.* at 304.

In accordance with the Supreme Court's ruling in *Lehman*,² state or local authorities who choose to accept federal transit funding may adopt policies, particularly with respect to advertising, that implement Section 177's restriction in a constitutional manner. Federal spending programs typically give grant recipients considerable latitude in deciding how to meet federal conditions. *See Harris v. McRae, et al.*, 448 U.S. 297, 309-10 (1980). *Lehman* provides but one example of a constitutional policy on advertising that would conform with the restriction imposed by the statute.

Although plaintiffs appear to be challenging WMATA's policy on advertising in a separate action, this action against the federal defendants involves only a facial challenge to the statute. To prevail, plaintiffs must establish that "no set of circumstances exists under which the Act would be valid." *Rust*, 500 U.S. at 183. Because local authorities have "discretion to develop and make reasonable choices concerning the type of advertising that may be displayed" on their property, *Lehman*, 418 U.S. at 303, including the option to preclude all political and

²The Supreme Court has consistently recognized and recently endorsed its ruling in *Lehman*. *See, e.g., International Society for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992).

issue advertising, Section 177 does not require transit grantees to violate the constitution.³ In this action, the Court must presume that federal transit grantees will exercise their discretion in implementing the statute in a constitutional manner. *See Bowen v. Kendrick*, 487 U.S. 589, 612 (1988); *see also Veterans and Reservists For Peace in Vietnam v. Regional Comm'r of Customs*, 459 F.2d 676, 682 (3d Cir. 1972) ("we must assume that responsible officials will carry out their duties in accordance with constitutionally acceptable standards").

Nor may a state or local transit agency that chooses to accept federal funds limit Congress' spending power by electing to open itself up as a public, or limited public forum by adopting less restrictive policies regarding access to its property.⁴ The Supreme Court has consistently validated funding restrictions designed to limit a federal program to its intended purpose. The federal transit program was not designed to facilitate private speech. By electing

³The Court need not consider on a facial challenge whether all local transit systems that may choose to accept federal funds are nonpublic fora; it is sufficient to find that mass transportation systems are not *necessarily* public fora. *Mehdi v. United States Postal Svc.*, 988 F. Supp. 721, 726 (S.D.N.Y. 1997) (rejecting First Amendment challenge to restrictions on access to postal facility); *see also American Library Ass'n*, 123 S. Ct. at 2303-07 (discussing the nature of public libraries, in general, on a facial challenge to a spending restriction).

⁴While in *Lebron v. Washington Metropolitan Area Transit Authority, et al.*, 749 F.2d 893, 896 n.6 (D.C. Cir. 1984), the D.C. Circuit found that "WMATA has converted its subway stations into public fora by accepting other political advertising," 749 F.2d. at 896, n.6 (distinguishing *Lehman* on that ground), the Court declined to rule "as to whether WMATA was obliged" to do so, noting that there are "valid reasons to doubt whether such enterprises should be considered mandatory public forums." *Id.* at 899 n.11, 899 n.10. Discussing the Supreme Court's holding in *Lehman*, the D.C. Circuit on another occasion recognized the unique nature of mass transportation systems warranting reasonable restrictions on expressive activity. *See U.S. Southwest Africa/Namibia Trade & Cultural Council v. United States, et al.*, 708 F.2d 760, 764, 766-67 (D.C. Cir. 1983) (distinguishing public places in airports, which are "far more akin to such public forums as streets and common areas," from bus and railway placards).

to fund mass transportation, Congress is not constitutionally required to promote or facilitate the delivery of plaintiffs' message. Because transit authorities retain discretion to limit expressive activity on their vehicles, Congress may impose such a limitation as a condition to the receipt of federal funds.

In its most recent decision addressing Congress' spending power, *United States, et al. v. American Library Ass'n, et al.*, 123 S.Ct. 2297 (2003), the Supreme Court validated a similar exercise of Congress' spending power. There the Court upheld the Children's Internet Protection Act (CIPA), which required public libraries to use Internet filters barring access to obscenity and child pornography as a condition for receipt of federal subsidies. Like the Court in *Lehman*, the plurality for the Court began its spending clause analysis by recognizing that libraries must necessarily be permitted to make value-based judgments when deciding what materials to make available to the public. 123 S.Ct. at 2304. The library Internet program, in particular, was not established "in order to create a public forum for Web publishers to express themselves." *Id.* at 2305. Nor was facilitating Web publishers' speech the purpose of the federal government's program that subsidizes Internet access in public libraries. *Id.* at 2301 (discussing two related federal programs designed to assist public libraries to provide Internet access).

Likewise, the federal transit program was established, *inter alia*, to assist in developing improved mass transportation equipment facilities, techniques, and methods with the cooperation of public and private mass transportation companies. *See* 49 U.S.C. § 5301 (f)(1). Public buses and railways are not provided as a means to facilitate the expression of ideas. *See Lehman*, 418 U.S. at 303 (recognizing the core purpose of mass transportation systems "to provide rapid, convenient, pleasant, and inexpensive service to commuters" of the city). The Supreme Court

and the D.C. Circuit have both recognized that allowing them to be used freely for expressive purposes poses significant concerns. *Lehman*, 418 U.S. at 304 (considering the commuter as a "captive audience."); *Namibia Trade & Cultural Council*, 708 F.2d at 766-67. Congress, therefore, is not required to permit the use of federally-funded transit equipment or facilities as a means for plaintiffs to deliver their message to the public.

The question in the Spending Clause context is *not* whether it is constitutional for Congress to "impose" a limitation on acceptable advertising on the local authorities; rather, the question is "whether the condition that Congress requires" can be constitutionally performed "by the [grantees] themselves." *Am. Library Ass'n*, 123 S.Ct. at 2302 n.2 (plurality opinion) (citing *Dole*, 483 U.S. at 210).⁵ Moreover, "a prohibition on a project grantee or its employees from engaging in activities outside of the project's scope," does not violate the First Amendment. *Rust*, 500 U.S. at 194. Nor does "a legislature's decision not to subsidize the exercise of a fundamental right . . . infringe the right." *Id.* at 193; *American Library Ass'n*, 123 S.Ct. at 2308 (quoting *Rust*). Under *Lehman* and more recent authority from this Circuit, federal transit

⁵Here, there are no grantees raising this claim and plaintiffs' lack standing to assert this claim on the grantees' behalf. The standing doctrine includes a prudential requirement that plaintiffs cannot base their claim to relief on the legal rights or interests of third parties. *See, e.g., Warth v. Seldin*, 422 U.S. 490, 499 (1975). In *Powers v. Ohio*, 499 U.S. 400 (1991), the Supreme Court stated that a litigant seeking to assert the rights of another party must satisfy three interrelated criteria: "The litigant must have suffered an injury in fact, thus giving him or her a sufficiently concrete interest in the outcome of the issue in dispute; the litigant must have a close relation to the third party; and there must exist some hindrance to the third party's ability to protect his or her own interests." *Id.* at 411 (internal quotation marks and citations omitted). Here, assuming that plaintiffs have suffered an injury in fact, they cannot satisfy the second and third criteria. Accordingly, the limited exception to the prudential bar against third-party standing has no application in this case. *See, e.g., American Immigration Lawyers' Ass'n v. Reno*, 199 F.3d 1352, 1362 n.15 (D.C. Cir. 2000) ("when the 'Powers test' is applied, all three requirements must be met").

grantees may implement Section 177 in a constitutional manner.⁶ Local recipients that prefer to maintain a less restrictive policy with respect to advertising, remain free to decline the federal funding. *See Am. Library Ass'n*, 123 S.Ct. at 2308 ("[t]o the extent that libraries wish to offer unfiltered access, they are free to do so without federal assistance").

Plaintiffs emphasize that WMATA, which declined to accept their ads, offers "a uniquely effective advertising medium." P.'s Mem. at 18. However, "[t]he First Amendment does not demand unrestricted access to a nonpublic forum merely because use of that forum may be the most efficient means of delivering the speaker's message." *Cornelius v. NAACP Legal Defense and Educational Fund, Inc., et al.*, 473 U.S. 788, 809 (1985) (upholding federal government's decision to limit participation in charity drive aimed at federal employees). *See also Greer, et al. v. Spock, et al.*, 424 U.S. 828, 836 (1976) ("The guarantees of the First Amendment have never meant that people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully

⁶ Therefore, even if WMATA were to have created a limited public forum, the Court should still find that the statute is constitutional on its face. WMATA is but one federal transit grantee, each of which could set different advertising policies. Surely a federal transit grantee could have permissibly rejected plaintiffs' advertisements on the basis that the grantee has not created a public forum, even absent the statutory provision at issue. Even where a local transit authority has, by its policies, created a public or limited public forum, it may still adopt a reasonable policy restricting expressive activity on its property. *See Lebron*, 749 F.2d at 898 (rejection of political messages on content-related basis other than substantive falsity – notably, obscenity – is permissible). *See also Community for Creative Non-Violence v. Turner*, 893 F.2d 1387 (D.C. Cir. 1990) (striking permit scheme as over broad, but remanding with respect to a number of other policy provisions and noting several valid grounds to limit access). "WMATA must be able to regulate to some extent the expressive activities that occur in and around its stations." *Id.* at 1393. *See also Washington Post Co. v. Turner*, 708 F. Supp. 405 (D.D.C. 1989) (denying request for preliminary injunction based on finding that WMATA's policy barring newspaper hawkers likely presented no First Amendment concern).

dedicated").

Section 177 is not a direct restraint on plaintiffs' speech.⁷ Plaintiffs, of course, have a First Amendment right to seek legalization of marijuana; however, they have no First Amendment right to use federally-funded transit facilities or equipment as the means to deliver their message to the public. Plaintiffs, or grant recipients alike, are free to advocate their message for the legalization of marijuana – indeed, they have available numerous other means and places to do so – but the federal government is not required to facilitate their doing so. Because local transportation authorities are permitted to regulate expressive activity on their property, Section 177 imposes a valid funding restriction. *Cf. Am. Library Ass'n*, 123 S.Ct. at 2308.

2. Section 177 is Sufficiently Related to a Federal Interest

Section 177 is also sufficiently related to "the federal interest in particular national projects or programs." *Dole*, 483 U.S. at 207. The Supreme Court has suggested that restrictions imposed as a condition of federal funding *might* be illegitimate if the condition has no relationship to the federal interest in particular national projects or programs. *Id.* at 207. This possible ground for invalidating a statutory condition on funding "is a far cry from imposing an exacting standard for relatedness." *Mayerweathers v. Newland*, 314 F.3d 1062, 1067 (9th Cir. 2002) (upholding the Religious Land Use and Institutionalized Persons Act of 2000 as a

⁷Nor is it, as plaintiffs contend, impermissible viewpoint discrimination. In *Rust*, Congress had appropriated federal funding for family planning services and forbidden the use of such funds in programs that provide abortion counseling. 500 U.S. at 178. Grant recipients challenged the restriction, arguing in part that it constituted impermissible viewpoint discrimination. *Id.* at 192. The Supreme Court rejected that claim, finding that Congress had not discriminated against viewpoints on abortion, but had "merely chosen to fund one activity to the exclusion of the other." *Id.* at 193.

constitutional exercise of Congress' spending power). The D.C. Circuit has rejected the idea that conditions must be aimed at serving "the same federal interest served by the funding program." *State of Oklahoma, et al. v. Schweiker*, 655 F.2d 401, 406 (D.C. Cir. 1981) (noting the breadth of the spending power). In *Dole*, the Supreme Court declined to adopt a requirement that an imposed condition on federal funds be directly related to the purpose of the expenditure to which it is attached. *See Dole*, 483 U.S. at 208 n.3.

Congress, of course, has an undeniable interest in ensuring that no federal funds are used, directly or indirectly, to facilitate activity that Congress does not wish to promote. Statutes such as Title VI and Title IX, which impose across-the-board prohibitions on discrimination by recipients of federal funding, have been consistently upheld, without any inquiry into whether the particular federal grant that triggered the statutes' conditions had any explicit relationship to combating discrimination. *See Lau v. Nichols*, 414 U.S. 563, 568 (1974) (holding that school districts accepting federal funds "contractually agreed to 'comply with Title VI of the Civil Rights Act of 1964'"); *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 640-42 (1999) (upholding Title IX's across-the-board prohibition on sex discrimination). So too, Congress may permissibly decide that federally-funded equipment or facilities may not be used to facilitate or promote 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. *See* 21 U.S.C. § 801(2) (finding that the use of controlled substances has a substantial detrimental effect on the health and general welfare of the American people). Section 177, enacted in furtherance of this objective, is a valid exercise of Congress' spending power.

III. SECTION 177 IS NOT UNCONSTITUTIONALLY VAGUE OR OVERBROAD

Plaintiffs' arguments about vagueness and overbreadth are largely misplaced in the context of this facial challenge to Section 177's condition on the receipt of federal funds.

As an initial matter, concerns of vagueness and overbreadth are significantly diminished because Section 177 is neither a penal statute nor a direct regulation of plaintiffs' speech. *National Endowment for the Arts, et al., v. Finley, et al.*, 524 U.S. 569, 588 (1998) ("the consequences of imprecision," in a conditional spending provision "are not constitutionally severe"); *id.* at 599 (Scalia, J. concurring) (suggesting that the vagueness doctrine, in fact, "has no application" to conditions on government grants).

It is highly unlikely that commuters or persons otherwise seeking access to a local transit authority's facilities will be directly chilled by Section 177's condition on the receipt of federal funds directed at state and municipal grant recipients. Plaintiffs' facial challenge does not require the Court to consider any particular implementation of the statute that may directly regulate expressive activity. Thus, the Court need not entertain plaintiffs' suggestion that local authorities implementing the provision will unnecessarily preclude commuters from wearing "marijuana-policy-reform T-shirts and buttons and carry[ing] literature advocating medical use of marijuana." P.'s Mem. at 13. No such application is before the Court. *See Rust*, 500 U.S. at 194 (declining to consider plaintiffs' hypothetical application of the challenged regulations in the context of a facial challenge).⁸

⁸There is obviously a significant difference between permitting plaintiffs' advertisements to be posted on federally-funded bus or railway placards and such direct regulation of commuters, over which Congress has not sought to proscribe expression or conduct. The legislative history to Section 177 makes clear that Congress was concerned only with the former and not the latter. *See* Conference Report to accompany H.R. 2673 (Ex. H attached to Am.

As discussed above, plaintiffs may not assert a challenge on behalf of WMATA or any other grant recipients. *See supra* at 13 n.5. Local authorities seeking to implement the statute may request advance clarification from FTA, to the extent necessary. "Due process does not require 'impossible standards of clarity.'" *Kolender v. Lawson*, 461 U.S. 352, 361 (1983) (quoting in part *United States v. Perillo*, 321 U.S. 1, 7 (1947)); *Hutchins v. District of Columbia*, 188 F.3d 531, 546 (D.C. Cir. 1999) ("unattainable feats of statutory clarity" are not required). "It will always be true that the fertile legal 'imagination can conjure up hypothetical cases in which the meaning of (disputed) terms will be in nice question.'" *Grayned v. City of Rockford*, 408 U.S. 104, 110 n.15 (1972). But, "mere speculative musings about the possible meaning of a term do not render it unconstitutionally vague." *Hutchins v. District of Columbia*, 188 F.3d 531, 547 (D.C. Cir. 1999).

Accordingly, considering the appropriate standard and the posture of this case, the Court should disregard plaintiffs' arguments of vagueness and overbreadth.

IV. NEITHER PRELIMINARY NOR PERMANENT INJUNCTIVE RELIEF IS WARRANTED

Finally, plaintiffs are not entitled to either preliminary or permanent relief in the form of an order enjoining Section 177's enforcement. "The grant of a preliminary injunction is a drastic and unusual judicial measure," *Marine Transport Lines, Inc. v. Lehman*, 623 F. Supp. 330, 334 (D.D.C. 1985), and the power to issue such an injunction "should be 'sparingly exercised.'" *Dorfmann v. Boozer*, 414 F.2d 1168, 1173 (D.C. Cir. 1969) (quotation marks omitted). To

Compl.) (noting the conferees' concern "that transit agencies accepting Federal grant funds may be providing their advertising space to organizations that encourage the public to break the law . . . or promote marijuana use").

prevail in their request for a preliminary injunction, plaintiffs must demonstrate: "1) a substantial likelihood of success on the merits; 2) that [plaintiffs] would suffer irreparable injury if the injunction is not granted; 3) that an injunction would not substantially injure other interested parties; and 4) that the public interest would be furthered by the injunction." *Katz v. Georgetown Univ.*, 246 F.3d 685, 687-88 (D.C. Cir. 2001) (quoting *CityFed Financial Corp. v. Office of Thrift Supervision*, 58 F.3d 738, 746 (D.C. Cir.1995)). Even in a First Amendment case, "[a] significant failure of proof with respect to any element may warrant the refusal of *pendente lite* relief" *Time Warner Entertainment Co., L.P. v. FCC*, 810 F. Supp. 1302, 1304 (D.D.C. 1992). The proof required in the case of a permanent injunction is the same, except that the plaintiff must actually prevail on the underlying merits of the case. *See Amoco Production Co. v. Gambell*, 480 U.S. 531, 546 n.12 (1987).

Here, as discussed above, plaintiffs do not have substantial likelihood of success on the merits because Section 177 is a valid exercise of Congress' spending power. Plaintiffs, also, are not suffering and are not likely to suffer from any irreparable injury, and the balance of harms, as well as the public interest, weigh heavily in favor of the United States. Accordingly, the Court should deny plaintiffs' application for preliminary and permanent injunctive relief.

A. Plaintiffs Are Suffering No Irreparable Injury

For an alleged injury to constitute irreparable harm, "it must be both certain and great." *Wisc. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985). This requirement is not relaxed when a violation of the First Amendment is alleged. *See National Treasury Employees Union, et al. v. United States, et al.*, 927 F.2d 1253, 1254-55 (D.C. Cir. 1991) (denying preliminary relief in the absence of irreparable injury); *Christian Knights of the Ku Klux Klan Invisible Empire*,

Inc., et al. v. District of Columbia, et al., 919 F.2d 148 (D.C. Cir. 1990) (same).

Here, plaintiffs cannot demonstrate that the enforcement of Section 177's funding restriction will cause them to suffer irreparable injury because, as discussed, plaintiffs have no First Amendment right to deliver their message on federally-funded buses and railway cars. *See supra* at 9-11 (discussing *Lehman*, 418 U.S. 298 (1974) (mass transit systems are not First Amendment fora)). Section 177 is not a direct restraint on plaintiffs' speech. Rather, it is a permissible restriction on funds extended to federal transit grantees based on Congress' valid decision that it does not wish to promote, or provide a vehicle for the delivery of plaintiffs' message.

Moreover, the First Amendment does not guarantee to plaintiffs the right to "propagandize protests or views . . . whenever and however and wherever they please." *Greer v. Spock, et al.*, 424 U.S. 828, 836 (1976). Plaintiffs have available numerous avenues to deliver their message for the legalization of marijuana to the public. Section 177 does not prohibit them from expressing their views.

B. The Remaining Equitable Factors Weigh Against Issuance of Preliminary or Permanent Injunctive Relief

Plaintiffs cannot credibly contend that "no parties or legitimate interests will be burdened by the injunctive relief that plaintiffs request" – an order enjoining enforcement of a federal statute duly enacted by Congress in furtherance of the general welfare. P.'s Mem. at 18. "[A] temporary injunction against enforcement is in reality a suspension of an act, delaying the date selected by Congress to put its chosen policies into effect. Thus judicial power to stay an act of Congress, like judicial power to hold that act unconstitutional, is an awesome responsibility calling for the utmost circumspection in its exercise." *Heart of Atlanta Motel, Inc. v. United*

States, 85 S. Ct. 1, 2 (1964) (Black, J., in chambers).

By enjoining the statute from taking effect, the Court inflicts “irreparable harm” on the public as well as the government. *See Valeria G. v. Wilson*, 12 F. Supp. 2d 1007, 1027 (N.D. Cal. 1998) (concluding that the government and public suffer “a form of irreparable injury” any time a statute “enacted by representative of [the] people” is “enjoined by a court” from taking effect) (quoting *New Motor Vehicle Bd. of California v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers); *cf. Flower Cab. Co. v. Petite*, 685 F.2d 192, 194 (7th Cir. 1982); *Lydo Enterprises v. City of Las Vegas*, 745 F.2d 1211, 1213 (9th Cir. 1984) (government is harmed if it is prevented from carrying out its laws). The Supreme Court has further held that, in considering the public interest, courts must defer to Congress’s considered judgment when that judgment is clearly reflected in enacted legislation. *See United States v. Oakland Cannabis Buyers’ Co-Op*, 532 U.S. 483, 496 (2001) (holding that “a court sitting in equity cannot ignore the judgment of Congress, deliberately expressed in legislation . . . as [to] what behavior should be prohibited.”) (internal quotations omitted).⁹

Here, Congress enacted Section 177 based on its valid concern that federally-funded transit equipment and facilities were being used beyond their intended purpose as a means "to encourage the public to break the law" or "promote marijuana use." Conf. Report No. 108-401 (attached to P.'s Mem. as Ex. H). Federal law precludes the use of controlled substances,

⁹ *See also Virginia Ry. Co. v. System Federation No. 40*, 300 U.S. 515 (1937), in which the Supreme Court stated that, “[i]n considering the propriety of the equitable relief granted here, we cannot ignore the judgment of Congress” which is “deliberately expressed in legislation,” because “[t]he fact that Congress has indicated its purpose [in a statute] is in itself a declaration of the public interest and policy which should be persuasive in inducing the courts to give relief.” *Id.* at 551-52.

including marijuana, based on Congress' consistent findings that such use has "a substantial and detrimental effect on the health and general welfare of the American people." 21 U.S.C. § 801(2); *see also* Pub. L. No. 105-277 ("Not Legalizing Marijuana for Medical Use"). 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. *Cf. Am. Library Ass'n*, 123 S.Ct. at 2308; *Rust v. Sullivan*, 500 U.S. at 193-94.

Accordingly, because Section 177 is a constitutional exercise of Congress' spending power and all equitable factors to be considered upon a request for injunctive relief weigh in favor of the government, plaintiffs are not entitled to the grant of either a preliminary or a permanent injunction.

CONCLUSION

For all of the reasons discussed above, the Court should grant the United States' and the Secretary of Transportation's motion for summary judgment. The Court should deny plaintiffs' requests for preliminary and permanent declaratory and injunctive relief.

Dated: April 2, 2004

Respectfully submitted,

PETER D. KEISLER
Assistant Attorney General

Roscoe C. Howard, Jr.
United States Attorney

/s/ Sara W. Clash-Drexler
SANDRA SCHRAIBMAN
DC Bar No.188599
SARA W. CLASH-DREXLER
PA Bar No. 86517
U.S. Department of Justice
Civil Division
20 Massachusetts Avenue, N.W., Room 6132
P.O. Box 883
Washington, D.C. 20044
(202) 514-3481

Attorneys for Federal Defendants