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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).