IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

AMERICAN FREEDOM DEFENSE INITIATIVE; *et al.*,

Plaintiffs,

-v.-

SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY ("SEPTA"); *et al.*,

Defendants.

Case No. 2:14-cv-05335

PLAINTIFFS' MOTION TO EXCLUDE EXPERT TESTIMONY

Plaintiffs American Freedom Defense Initiative ("AFDI"), Pamela Geller, and Robert Spencer (collectively referred to as "Plaintiffs"), by and through their undersigned counsel, hereby move this court to exclude the "expert" testimony of Dr. Jamal J. Elias[1] offered by Defendants Southeastern Pennsylvania Transportation Authority ("SEPTA") and Joseph M. Casey, General Manager of SEPTA (collectively referred to as "Defendants" or "SEPTA"). Defendants proffer Dr. Elias's testimony in an effort to claim that Plaintiffs' public-issue advertisement is not theologically or historically accurate, which Defendants then argue removes Plaintiffs' advertisement from its status as protected speech under the First Amendment. (*See*, Defs.' Opp'n at 15-19 [Doc. No. 18]).

Such opinion evidence should be excluded for at least three reasons. First, it is not relevant as a matter of law under *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and *United States v. Alvarez*, 132 S. Ct. 2537 (2012), in that public-issue speech does not lose its First Amendment protection, and thus cannot be excluded, based on a claim of falsity. Second, it is not relevant as a matter of fact in that "falsity" was not the basis for rejecting Plaintiffs'

[1] The "Expert Report of Dr. Jamal J. Elias" was attached to Defendants' opposition to Plaintiffs' motion for preliminary injunction as Exhibit D (Doc. No. 18-2) (hereinafter "Elias Report").

advertisement. Indeed, "falsity" in this context is not even one of the stated bases for rejecting an advertisement under the extant Advertising Standards. And third, the proffered "expert" testimony must nonetheless be excluded because it does not satisfy the requirements of Rule 702 of the Federal Rules of Evidence.

ARGUMENT

I. Defendants' Claim that Plaintiffs' Public-Issue Advertisement Is Not Protected Speech Is Wrong as a Matter of Law.

In their opposition to Plaintiffs' motion for a preliminary injunction, Defendants assert that Plaintiffs' public-issue advertisement is false[2] because it is theologically and historically inaccurate and thus not protected speech under the First Amendment. (Defs' Opp'n at 15-19). To support this assertion, Defendants rely upon the proffered "expert" testimony of Dr. Jamal J. Elias.[3] Defendants are wrong as a matter of law. Indeed, Defendants' claim that *United States v. Alvarez*, 132 S. Ct. 2537 (2012), has "thrown into disarray . . . established jurisprudence" (Defs.' Opp'n at 16) that is applicable here is simply not true.

To begin with, the Supreme Court has long stated that "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion. . . ." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). Indeed, the Court has repeatedly emphasized the importance of "unfettered" speech on public issues, stating:

> The First Amendment "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth*

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[2] Defendants' claim of falsity is wrong as a matter of fact. However, as set forth in the text above, this court need not (and should not) entertain this dispute because it is not relevant.

[3] Defendants refer to the "Expert Report of Dr. Jamal J. Elias" (Defendants' Exhibit D) in their opposition as an "Affidavit." (Defs.' Opp'n at 17). However, this "expert report" is not proffered in the form of an affidavit or declaration in that it is not sworn in any way, whether by a notary or under the provisions of 28 U.S.C. § 1746.

> v. *United States*, 354 U.S. 476, 484 (1957); *New York Times Co*. v. *Sullivan*, 376 U.S. 254, 269 (1964). "[Speech] concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison* v. *Louisiana*, 379 U.S. 64, 74-75 (1964). Accordingly, the Court has frequently reaffirmed that speech on public issues occupies the "'highest rung of the hierarchy of First Amendment values,'" and is entitled to special protection. *NAACP* v. *Claiborne Hardware Co*., 458 U.S. 886, 913 (1982); *Carey* v. *Brown*, 447 U.S. 455, 467 (1980).

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

Indeed, in *New York Times v. Sullivan*, the Court affirmed our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open" and thus made clear that First Amendment protection for public-issue speech (such as the speech at issue here) "does not turn upon the truth, popularity, or social utility of the ideas and beliefs which are offered." 376 U.S. at 270-71 (internal quotations and citation omitted); *see also id*. at 271 ("Authoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth—whether administered by judges, juries, or administrative officials—and especially one that puts the burden of proving truth on the speaker.").

And contrary to Defendants' assertion (*see* Defs.' Opp'n at 16-17), this fundamental principle of First Amendment jurisprudence (*i.e*., that speech on public issues does not lose its First Amendment protection upon a claim that it is false) was reaffirmed by the ***entire*** Court in *United States v. Alvarez*, 132 S. Ct. 2537 (2012). It is inconceivable how Defendants read *Alvarez* to suggest that Plaintiffs' advertisement is not protected speech. (*See, e.g*., Defs.' Opp'n at 16 ["A majority of the Justices seemed to reject the idea that false facts have no value, but a majority also appeared to agree that such speech is of reduced (the dissent said no) constitutional value. ***The decision does not provide a clear answer to the question: How should the First Amendment treat factual lies?***"] [citations omitted] [emphasis added]). The plain reality of

Alvarez exposes Defendants' position as not simply wrong, but dangerously so given the clarity with which all nine justices spoke.

While a 6-3 majority in *Alvarez* found that—outside of the traditional areas such as perjury and commercial fraud—it is unconstitutional to criminalize false speech because it is protected by the First Amendment and thus subject to heightened scrutiny, only a plurality of four justices found that such censorship would be subject to strict scrutiny. Specifically, Justice Kennedy, writing for the Court and joined by Chief Justice Roberts and Justices Ginsburg and Sotomayor, held that all such false statements were protected speech and subject to strict scrutiny. *Alvarez*, 132 S. Ct. at 2542-51. Justice Breyer, authoring the concurring opinion and joined by Justice Kagan, agreed that such easily discernible false speech remained protected under the First Amendment, but would apply a less exacting analysis than strict scrutiny—something akin to intermediate scrutiny. *Id*. at 2551-56. The dissent, however, authored by Justice Alito and joined by Justices Scalia and Thomas, would not protect false statements about such easily discernible facts at all. *Id*. at 2556-65.

Notwithstanding the Court's fractured view of the level of protection granted false speech about easily ascertainable facts, the Court was absolutely univocal on this point: speech dealing with topics such as religion and history (*i.e*., Plaintiffs' advertisement) was fully protected by the First Amendment and judicially guarded by strict scrutiny. Perhaps the best, and most succinct, way of demonstrating this point is to cite directly to the dissent, as did Justice Breyer in his concurring opinion (*id*. at 2552), which expressed the strongest view as to why *some* false speech should be accorded no constitutional value (including the speech restricted by the Stolen Valor Act). The dissent made the following relevant observation:

> [T]here are broad areas in which any attempt by the state to penalize purportedly false speech would present a grave and unacceptable danger of suppressing

> truthful speech. Laws restricting false statements about *philosophy, religion, history, the social sciences, the arts, and other matters of public concern would present such a threat*. The point is not that there is no such thing as truth or falsity in these areas or that the truth is always impossible to ascertain, *but rather that it is perilous to permit the state to be the arbiter of truth*.
>
> Even where there is a wide scholarly consensus concerning a particular matter, the truth is served by allowing that consensus to be challenged without fear of reprisal. Today's accepted wisdom sometimes turns out to be mistaken. And in these contexts, "[e]ven a false statement may be deemed to make a valuable contribution to public debate, since it brings about 'the clearer perception and livelier impression of truth, produced by its collision with error.' *Sullivan*, *supra*, at 279, n. 19, 84 S. Ct. 710, 11 L. Ed. 2d 686 (quoting J. Mill, On Liberty 15 (R. McCallum ed. 1947)).
>
> Allowing the state to proscribe false statements in these areas also opens the door for the state to use its power for political ends. *Statements about history illustrate this point*. If some false statements about historical events may be banned, how certain must it be that a statement is false before the ban may be upheld? And who should make that calculation? While our cases prohibiting viewpoint discrimination would fetter the state's power to some degree, *see R. A. V. v. St. Paul*, 505 U.S. 377, 384-390, 112 S. Ct. 2538, 120 L. Ed. 2d 305 (1992) (explaining that the First Amendment does not permit the government to engage in viewpoint discrimination under the guise of regulating unprotected speech), *the potential for abuse of power in these areas is simply too great*.
>
> In stark contrast to hypothetical laws prohibiting false statements about history, science, and similar matters, the Stolen Valor Act presents no risk at all that valuable speech will be suppressed.

Id. at 2564 (Alito, J., dissenting) (emphasis added).

In sum, Defendants' argument that Plaintiffs' public-issue advertisement loses constitutional protection (and can thus be banned by the government)[4] based upon the conclusion by government officials that it is false is wrong as a matter of law. Therefore, it would be

[4] Defendants' assertion that "[n]either *Alvarez* nor any other case therefore holds that a government body acting in a proprietary capacity must enable dissemination of misinformation, albeit lies, using government facilities" (Defs.' Opp'n at 17) is merely an alternative way of arguing Defendants' erroneous position. Indeed, the First Amendment applies in this case. And pursuant to the First Amendment, the government cannot restrict public-issue speech based on a claim that it is false (any more than it can restrict such speech based on its viewpoint).

improper for this court to consider Defendants' argument and the evidence presented in support (*i.e.*, Dr. Elias's "expert" report) when resolving the First Amendment issues in this case.

II. Defendants' Proffered "Expert" Testimony Is Factually Irrelevant.

There is no dispute that the "official" basis for rejecting Plaintiffs' advertisement under the extant Advertising Standards was because the "ad does not comply with Section 9(b)(xi) which prohibits 'Advertising that tends to disparage or ridicule any person or group of persons on the basis of race, religious belief, age, sex, alienage, national origin, sickness or disability.'" (Kelly Aff. ¶¶ 22-23, Defs.' Ex. E [Doc. No. 18-3]). Defendants did not claim that the advertisement was rejected because it was "false" (nor could they consistent with the First Amendment as discussed above). Nor do Defendants offer any evidence that they consulted Dr. Elias when making this determination. (*See* Kelly Aff. ¶ 20 ["Upon review of the Ad, SEPTA considered it incompatible with the Advertising Standards."]). Indeed, the only Advertising Standard dealing with "falsity" is for "[a]dvertising concerning products or services that appear to be false, misleading [or] deceptive." (Kelly Aff. ¶ 9). On its face, this standard does not apply to Plaintiffs' public-issue advertisement.

In sum, Defendants' claim that Plaintiffs' advertisement could be rejected on the basis of "falsity" is not only incorrect as a matter of law, it does not comport with the facts nor the very standards that Defendants claim to have applied here. Indeed, Defendants' argument is nothing more than a *post-hoc* justification (albeit an illicit one) for their censorship of Plaintiffs' speech.

III. Defendants' Proffered "Expert" Testimony Does Not Satisfy Rule 702.

As noted above, Defendants have not proffered Dr. Elias's opinion evidence in the testimonial form of an affidavit or declaration.[5] Presumably, Defendants offer this "expert

[5] *See supra* note 3.

report" pursuant to Rule 26(a)(2)(B), which requires a written report of the proposed expert's future testimony, along with other disclosures. Fed. R. Civ. P. 26(a)(2)(B)(i)-(vi). However, on its face, the proffered "expert report" does not satisfy Rule 26(a)(2)(B).[6] While Plaintiffs reserve their objections on these grounds, we will focus our objections herein on the substantive deficiencies of this "expert report" and of the putative testimony this expert would provide to support Defendants' case at the hearing on the motion for preliminary injunction.

We begin with the relevant legal standard for the admissibility of expert testimony. Pursuant to Rule 702 and the Supreme Court decisions in *Daubert v. Merrell Dow Pharmaceuticals, Inc*., 509 U.S. 579 (1993), and *Kumho Tire Co. v. Carmichael*, 119 S. Ct. 1167 (1999), while the trial court is vested with substantial discretion as the gatekeeper for the admission of expert testimony, there are boundaries that both guide and restrict the court's application of this discretion.[7] The Third Circuit has articulated Rule 702 in short form as a "trilogy of restrictions":

> Under *Daubert*, courts must address a "trilogy of restrictions" before permitting the admission of expert testimony: qualification, reliability and fit. *Schneider ex rel. Schneider v. Fried*, 320 F.3d 396, 404 (3d Cir. 2003). The party offering the expert must prove each of these requirements by a preponderance of the evidence. *In re TMI Litig*., 193 F.3d 613, 663 (3d Cir. 1999).

Mahmood v. Narciso, 549 F. App'x 99, 102 (3d Cir. 2013). The court in *Schneider* explained the trilogy of "qualification, reliability, and fit" as follows:

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[6] For example, Rule 26(a)(2)(B) requires, *inter alia*, the following disclosures: "(v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and (vi) a statement of the compensation to be paid for the study and testimony in the case." Fed. R. Civ. P. 26(a)(2)(B)(v)-(vi). The "expert report" provides no listing of Dr. Elias's prior history testifying as an expert nor does it include any statement about compensation.

[7] The current version of Rule 702 is the result of a substantive amendment to the rule in 2000 that was designed to incorporate the broad principles laid out in *Daubert* and *Kumho Tire Co*. *See* Fed. R. Evid. 702, advisory committee's note on 2000 amendments.

> Qualification refers to the requirement that the witness possess specialized expertise. We have interpreted this requirement liberally, holding that "a broad range of knowledge, skills, and training qualify an expert." Secondly, the testimony must be reliable; it "must be based on the 'methods and procedures of science' rather than on 'subjective belief or unsupported speculation'; the expert must have 'good grounds' for his or her belief. In sum, *Daubert* holds that an inquiry into the reliability of scientific evidence under Rule 702 requires a determination as to its scientific validity." Finally, Rule 702 requires that the expert testimony must fit the issues in the case. In other words, the expert's testimony must be relevant for the purposes of the case and must assist the trier of fact. The Supreme Court explained in *Daubert* that "Rule 702's 'helpfulness' standard requires a valid scientific connection to the pertinent inquiry as a precondition to admissibility."

Schneider v. Fried, 320 F.3d 396, 404 (3d Cir. 2003). In the first two sections of this brief, we have demonstrated that the proffered expert testimony of Dr. Elias fails the "fit" requirement in that the truth or falsity of Plaintiffs' historical, religious, or political claims set forth in their advertisement is not subject to government scrutiny and thus factually irrelevant. We treat now Dr. Elias's qualifications and methodology as it relates to his proffered testimony. Dr. Elias's "expert report" sets out in essence two opinions: (1) Haj Amin Al-Husseini was not the leader of the Muslim world at the time he collaborated with the Nazis; and (2) although the Quran says bad things about Jews, it is not Jew hatred but "othering," which is common to all religions.

There is no question that Dr. Elias is an expert on Islam generally and on aspects of Islamic culture and literature, and likely other related subjects. Plaintiffs concede that this expertise might cover the subject matter of his second opinion about Jew hatred in the Quran (although, as we explain below, the opinion proffered is not methodologically sound nor reliable). However, a careful reading of both Dr. Elias's qualifications and publications as set forth in his curriculum vitae evidence that he is not a historian, has published no historical research, has no subject matter expertise or qualifications relating to Middle East history generally or specifically during the World War II era, and has conducted no research or

published any works on the Palestine Mandate, the relationship between Muslim Arabs of the Middle East and Nazi Germany, or Haj Amin Al-Husseini. (Elias Report, Ex. 1 at ECF 7-25). Quite simply, Dr. Elias has no expertise upon which to base his opinion on what ranking Haj Amin Al-Husseini occupied in the Muslim world during World War II or its immediate aftermath.

Moreover, Dr. Elias's statement that Islam has no clerical hierarchy has no relevance to the statement in the advertisement that Haj Amin Al-Husseini was "the leader of the Muslim world." Dr. Elias has misinterpreted the plain language of the advertisement to relate to some clerical position when that is not what the advertisement states. Indeed, in context, the advertisement relates to a broader leadership role, one that Haj Amin Al-Husseini occupied as a political leader. Specifically, and according to sources actually cited by Dr. Elias in his "Principle References" (Elias Report, Ex. 2 at ECF 27-28), Haj Amin Al-Husseini was not just the British-appointed Grand Mufti, but, for a time, the leader of the entire pan-Arab movement and later the undisputed leader of the Palestinian national movement. Dr. Elias's lack of subject matter expertise and, as a result, his failure to set forth and apply any historically relevant scholarship methodology in arriving at his opinion about Haj Amin Al-Husseini's leadership position in the Muslim world falls far short of Rule 702's qualification restriction.

Dr. Elias's second opinion that the court should read the disparaging remarks about Jews in the Quran as something other than Jew-hatred is patently unreliable. He purportedly bases this opinion on the fact that scholars of religions have discovered a phenomenon they term "othering" as a way to set one religion apart from its theological competitors. On its face, however, Dr. Elias does not explain how his methodology or the methodology of other religious scholars has determined that disparaging remarks in the Quran about Jews—or about Christians and pagans

for that matter—is not an example of both "othering" and the promotion of Jew-hatred in the followers of the Quran. In fact, the one source that Dr. Elias expressly cites for this "othering" explanation is an article appearing in a non-peer-reviewed, non-academic, progressive online publication written by Rabbi Reuven Firestone. (Elias Report at 4 [ECF 5]). Yet, the very article cited by Dr. Elias for the proposition that the Quran does not promote Jew-hatred begins on its heels because it must deal with the prevalence of Jew hatred among Muslims:

> Anti-Semitism has become a frightening force in much of the Muslim world, and a recent Anti-Defamation League study has shown that anti-Semitism is more common in Muslim majority countries than in any other region identified by religion, culture or geography. Muslims need to address this problem for many reasons, not least of which is that anti-Semitism reflects deep ignorance and a willingness to be manipulated by simplistic propaganda that is harmful to Muslims as well as Jews.

(Elias Report, Ex. 3 at ECF 30). Moreover, the court may take judicial notice of the overwhelming scholarship that demonstrates an Islamic, theologically based Jew-hated existing throughout Islam's history. *See, e.g.*, A.G. Bostom, *The Legacy of Islamic Anti-Semitism* (Prometheus Books, 2008). In actuality, Dr. Elias has merely proposed a theory that Quranic statements evidencing Jew-hatred are not actually evidence of Jew-hatred and are not understood as Jew-hatred by Muslims. What the professor does not do is inform the court what methodology, if any, he or other scholars have used to test this theory to move it from a "religious studies" theory to a reliable fact to assist the court in rendering its ruling. In short, Dr. Elias's opinion that Islam does not promote Jew-hatred is a theory in search of a methodology to test the theory against the facts of a demonstrable Muslim hatred of Jews, which exists as a "frightening force in much of the Muslim world."

CONCLUSION

For the foregoing reasons, the court should exclude Defendants' expert testimony.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 28, 2014, a copy of the foregoing was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system. Parties may access this filing through the Court's system. I further certify that a copy of the foregoing has been served by ordinary U.S. mail upon all parties for whom counsel has not yet entered an appearance electronically: none.

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