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' REPLY IN SUPPORT OF MOTION TO EXCLUDE EXPERT TESTIMONY

This case arises out of the government's censorship of a private citizen's speech on a public issue—speech which "occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." *Connick v. Myers*, 461 U.S. 138, 145 (1983) (internal quotations and citations omitted). This is the law, and Defendants cannot change it by way of "expert" opinion. Moreover, SEPTA's "refusal to accept [Plaintiffs' advertisement] for display because of [its] content is a clearcut prior restraint." *Lebron v. Wash. Metro. Area Transit Auth.*, 749 F.2d 893, 896 (D.C. Cir. 1984) (Bork, J.) (emphasis added). Therefore, SEPTA "carries a heavy burden of showing justification" for its censorship. *Id.*

In an effort to avoid the straightforward analysis presented by Plaintiffs' First Amendment challenge, Defendants seek to obfuscate the matter by presenting erroneous legal arguments and irrelevant factual assertions in the form of "expert" testimony proffered by Dr. Jamal Elias,[1] a university professor who had no role in SEPTA's decision to reject Plaintiffs' advertisement in the first instance. Indeed, through a process of legal alchemy, Defendants seek to transform Plaintiffs' motion to exclude this testimony into a motion to strike an affirmative defense in an apparent effort to gain some sort of procedural advantage. (Defs.' Opp'n at 3-4). Plaintiffs' motion, however, is not a motion to strike. Defendants' argument is entirely misplaced.[2]

[1] Make no mistake, Dr. Elias's assertions are not "unrefuted," as Defendants contend. (Defs.' Opp'n at 1 [Doc. No. 24]). There is much about what he says that is clearly refutable, as Plaintiffs noted in their motion to exclude. (Pls.' Mot. to Exclude at 9-10 [Doc. No. 23]). Indeed, as discussed with this court during the most recent conference call, should Dr. Elias be permitted to testify at an evidentiary hearing on Plaintiffs' motion for preliminary injunction, Plaintiffs will present testimony to further refute Dr. Elias's assertions and opinions.

[2] Should Defendants' affirmative defense relating to the alleged "falsity" of Plaintiffs' speech become an issue at some future proceeding, a motion to strike (or a motion for summary judgment) might very well be the appropriate procedural tool. However, the question at hand in this motion is the "fit" of Defendants' "expert" testimony to the facts and law at issue, and the burden to establish this fit is on Defendants, the party offering the testimony. *In re Paoli R.R.*

We turn now to the more substantive arguments presented by Defendants, starting with their erroneous claim that public issue speech addressing matters of history and religion can *lose its First Amendment protection* based on the government's assertion of "falsity." To reach this conclusion, Defendants ignore context and sew together a patchwork of cases in an attempt to refute what <u>is</u> clear and unequivocal as a matter of fundamental First Amendment jurisprudence: "it is perilous to permit the state to be the arbiter of truth" "about philosophy, religion, history, the social sciences, the arts, and other matters of public concern." *United States v. Alvarez*, 132 S. Ct. 2537, 2564 (2012) (Alito, J., dissenting); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964) (same). Moreover, this is not a case involving libel, defamation,[3] false official statements, or commercial speech. Thus, Defendants' reliance on cases making assertions of law that are only relevant in these contexts is misplaced. (Defs.' Opp'n at 5-6). Recall that Defendants' legal premise is that because they, as government officials, are permitted to be the "arbiter of truth" for Plaintiffs' public-issue advertisement, they can deem Plaintiffs' speech outside the protection of the First Amendment and thus ban it without any further inquiry from this court. (*See*, Defs.'

Yard Pcb Litig., 35 F.3d 717, 745 (3d Cir. 1994) (noting that the burden is on the party offering the expert testimony and that "the standard is higher than bare relevance").

[3] Even in the defamation context, it is not enough to simply assert that the defamatory statement of fact about a public official was false. The person asserting falsity must provide clear and convincing evidence that the statement was made with a reckless disregard for its truth or falsity—a near impossible standard to meet even in the defamation context. In *Gertz v. Welch*, 418 U.S. 323, 342 (1974), for example, the Court emphasized that the actual malice standard is satisfied "only on clear and convincing proof that the defamatory falsehood was made with knowledge of its falsity or with reckless disregard for the truth." As the Court noted, "This standard administers an extremely powerful antidote to the inducement to media self-censorship of the common-law rule of strict liability for libel and slander. And it exacts a correspondingly high price from the victims of defamatory falsehood. Plainly many deserving plaintiffs, including some intentionally subjected to injury, will be unable to surmount the barrier of the *New York Times* test." *Id*. Thus, the Court is not only concerned with laws that punish speech, but with "self-censorship" that occurs if the government is granted plenary authority to make the sort of "falsity" determination that Defendants urge here. Such power in the hands of government censors does in fact chill free speech, contrary to Defendants' assertion. (Defs.' Opp'n at 8-9).

Opp'n at 15-19 [asserting that "Plaintiffs' 'Islamic Jew-Hatred' Ad Is not Protected Free Speech"] [Doc. No. 18]).). That assertion is not only wrong, it is dangerously wrong. Pause for a moment and consider these examples: "President Obama is the leader of the free world" or "Pope Francis is the leader of the Christian world." Can the government claim that any of these statements are false and thus not protected by the First Amendment? Of course not. And Defendants' effort to parse the statement that Haj Amin al-Husseini is "the leader of the Muslim world" in order to rob it of First Amendment protection fairs no better.[4] (*See* Defs.' Resp. at 7-8). In sum, contrary to Defendants' best efforts to make this a complicated issue, it is not. Defendants cannot remove Plaintiffs' public-issue advertisement from the protection of the First Amendment based on a claim of "falsity." To allow them to do so would be serious error.[5]

The next errors advanced by Defendants are found in their discussion regarding "equity." (Defs.' Opp'n at 12-14). As an initial matter, Defendants' "unclean hands" argument is nothing more than a repackaging of their argument that they can censor Plaintiffs' speech based on a claim of falsity. (Defs.' Opp'n at 12-14 [stating that "Plaintiffs come to the Court with unclean hands arising out of their false statements"]). As noted, that argument is wrong as a matter of law and attempting to shoehorn it into an "unclean hands" argument doesn't change the outcome.

---

[4] Neither Defendants nor their "expert" can refute the historically accurate picture of al-Husseini having a *personal* meeting with Adolf Hitler, the most infamous and well-known "Jew-hater" of modern times, if not all time. In context, this picture alone refutes any claim of "falsity" as to the message conveyed by the advertisement.

[5] Defendants' newly-minted claim that Plaintiffs' advertisement can be banned as "a fraudulent charitable solicitation" warrants little more treatment than this footnote. Indeed, on its face the advertisement does not solicit donations. Thus any claims of "falsity" are not, in the first instance, related to the solicitation or use of donor funds. *Illinois ex rel. Madigan v. Telemarketing Assocs.*, 538 U.S. 600, 624 (2003) ("Consistent with our precedent and the First Amendment, States may maintain fraud actions when fundraisers make false or misleading representations designed to deceive donors about how their donations will be used."). Moreover, the allegedly false statements about al-Hussein's importance to the Muslim world has nothing to do with the *bona fides* of Plaintiff AFDI. Defendants' argument is misplaced, if not frivolous.

Similarly, Defendants' argument on irreparable harm is patently wrong. Indeed, their view of the law would literally cause a sea change in First Amendment jurisprudence.[6] *See, e.g.*, *Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."); *Swartzwelder v. McNeilly*, 297 F.3d 228, 241(3d Cir. 2002) (same); *Newsom v. Norris*, 888 F.2d 371, 378 (6th Cir. 1989) ("The Supreme Court has unequivocally admonished that even minimal infringement upon First Amendment values constitutes irreparable injury sufficient to justify injunctive relief.") (citing *Elrod*). The case Defendants cite for what they claim to be a Third Circuit "retreat" from long and well established law did no such thing. In *Condhatta, Inc. v Evanko*, 83 F. App'x 437 (3d Cir. 2003), the court stated:

> In the present case, the plaintiffs did not show that there was a real or immediate threat to their own First Amendment rights. As noted by the District Court, "so far as the record discloses, the plaintiffs have never been cited for violating the statute or regulations, and there is no imminent threat of such action." Dist. Ct. Op. at 7. The operator of Club Risque did not offer evidence that the enforcement of the challenged statute and regulation presented a threat of economic harm. . . .
>
> It is important to note that the plaintiffs have not made an as-applied argument on appeal, and accordingly they have not shown that the statute likely violates their own First Amendment rights by inhibiting their dancing in the ways noted above. In view of this fact, the fact that the only apparent effects on the dancers are self-imposed, the fact that the statute has not been enforced or threatened to be enforced against the plaintiffs, and the fact that no economic harm has been claimed, we cannot say that the District Court erred in concluding that irreparable harm was not established.

Id. at 442-43. In other words, the case presented a facial challenge to a statute that had not been applied, nor was there any credible threat to apply it, to restrict the plaintiffs' speech in any way. Thus, because there was *no actual loss of First Amendment rights*, there was no irreparable harm sufficient to warrant injunctive relief. Here, we have *an actual loss of First Amendment rights*:

[6] Defendants' "public interest" argument (Defs.' Opp'n at 15) is also incorrect. *G & V Lounge, Inc. v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994) ("[I]t is always in the public interest to prevent the violation of a party's constitutional rights.").

SEPTA banned Plaintiffs' advertisement. Consequently, Plaintiffs are suffering irreparable harm as a matter of law. *See B.H. v. Easton Area Sch. Dist.*, 725 F.3d 293, 323 (3d Cir. 2013) (*en banc*) ("The ban prevents B.H. and K.M. from exercising their right to freedom of speech, which 'unquestionably constitutes irreparable injury.'") (quoting *Elrod*).

Defendants' defense of the relevance of Dr. Elias's testimony is both contrived and incorrect. As an initial matter, there is no advertising standard that prohibits allegedly false statements other than the one that prohibits "[a]dvertising concerning products or services that appear to be false, misleading [or] deceptive." (Kelly Aff. ¶ 9 [Doc. No. 18-3]). This is no small matter. When the government seeks to restrict speech, it must do so based on *clear* and *objective* guidelines, *see United Food & Commercial Workers Union, Local 1099 v. Sw. Ohio Reg'l Transit Auth.*, 163 F.3d 341, 359 (6th Cir. 1998) (stating in a case involving the rejection of a bus advertisement that a speech restriction "offends the First Amendment when it grants a public official unbridled discretion such that the official's decision to limit speech is not constrained by *objective criteria*, but may rest on ambiguous and subjective reasons") (internal quotations and citation omitted), and *not* on some "you-should-have-taken-us-up-on-our-invitation-to-discuss" nonsense that Defendants now assert. (Defs.' Opp'n at 15-16). This isn't a game of hide the ball. Additionally, whether al-Husseini is or is not considered "the leader of the Muslim world" is not disparaging to anyone. And Dr. Elias's opinion that disparaging remarks about Jews in the Quran[7] are something other than Jew hatred is patently unreliable and simply irrelevant.

CONCLUSION

The court should exclude Defendants' expert testimony.

[7] *See, e.g.*, Quran 5:51 ("O you who believe! do not take the Jews and the Christians for friends; they are friends of each other; and whoever amongst you takes them for a friend, then surely he is one of them; surely Allah does not guide the unjust people.").

Respectfully submitted,

AMERICAN FREEDOM LAW CENTER

/s/ *Robert J. Muise*
Robert Joseph Muise, Esq.* (MI P62849)
P.O. Box 131098
Ann Arbor, Michigan 48113
Tel: (734) 635-3756; Fax: (801) 760-3901

/s/ *David Yerushalmi*
David Yerushalmi, Esq.* (DC # 978179)
1901 Pennsylvania Avenue NW, Suite 201
Washington, D.C. 20006
Tel: (646) 262-0500; Fax: (801) 760-3901

*Admitted *pro hac vice*

DRINKER BIDDLE & REATH, LLP

/s/ *Jason P. Gosselin*
Jason P. Gosselin
PA Bar ID 73682
Jason.gosselin@dbr.com
Brynne S. Madway
PA Bar ID 316422
Brynne.madway@dbr.com
One Logan Square, Suite 2000
Philadelphia, Pennsylvania 19103-6996

CERTIFICATE OF SERVICE

I hereby certify that on November 13, 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.

AMERICAN FREEDOM LAW CENTER

/s/ Robert J. Muise
Robert J. Muise, Esq.