UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

DANIEL W. BURRITT, Plaintiff, vs. NEW YORK STATE DEPARTMENT OF TRANSPORTATION; ROBIN DISBRO, in her official capacity as Real Estate Specialist for the New York State Department of Transportation, Region Seven, Watertown, New York, Defendants.	Civil Action No.: _____ **MEMORANDUM IN SUPPORT OF PLAINTIFF'S SUBMITTED ORDER TO SHOW CAUSE FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION** **Oral Argument Requested**

Now comes Plaintiff Daniel W. Burritt and respectfully offers this memorandum in support of his submitted order to show cause why a temporary restraining order and preliminary injunction should not be entered against Defendants.

ISSUE PRESENTED

Whether Defendants can allow signs containing "on-premises" commercial content to be displayed without obtaining a NYSDOT permit, but deny the waiver of registration to similarly situated signs with noncommercial religious content, in light of the prohibition on such disparate treatment as communicated in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981), and its progeny.

I. INTRODUCTION AND FACTUAL SUMMARY[1]

Plaintiff Daniel W. Burritt is a devout Christian who owns property on U.S. Route 11 just west of Gouverneur, New York. *Compl.* ¶ 4. Mr. Burritt believes he has a religious duty to communicate the truth about Jesus Christ through all aspects of his life, including his work, and he actively and intentionally engages in such evangelization activities through his work. *Compl.* ¶ 8. From his property Mr. Burritt owns and operates a bridge-building business, which he has named "Acts II Construction, Inc.: Building Bridges for Jesus." *Compl.* ¶ 4.

Mr. Burritt owns a tractor trailer that he uses for storage for his business, and on the sides of which he has painted several sentences. *Compl.* ¶¶ 10–11. The left side of the tractor trailer reads: "Your Way or God's Way? Jesus Said '**I Am the Way** the Truth and the Life, No Man Comes to the Father Except by Me.' Will <u>You</u> Spend Eternity with Jesus? www.jsm.org". *Compl.* ¶ 11. The right side reads, "Sin Has Separated You From God. All Have Sinned and Fall Short of the Glory of God. The **Blood** of Jesus Cleanses Us from All Sin. Are <u>You</u> Washed in the **Blood**? www.jsm.org". *Compl.* ¶ 11. On the front side itself, Mr. Burritt has painted the picture of a cross, underneath which is written "It Is Finished." *Compl.* ¶ 11. In July of 2007,

[1] The facts alleged in the Verified Complaint ("Compl.") are herein incorporated into Plaintiffs' memorandum by specific reference.

Mr. Burritt placed the trailer on his property in the grass on the edge of Route 11, perpendicular to the road with the front facing the road. *Compl.* ¶ 12.

On May 16, 2008, Mr. Burritt received a letter from Defendant Robin Disbro, who is employed in the Real Estate Division of Defendant New York State Department of Transportation (hereinafter "DOT"), Region Seven in Watertown, New York. *Compl.* ¶ 13, Exh. A. Ms. Disbro informed Mr. Burritt that his tractor trailer was in violation of New York Highway Law Sections 86 and 88 and 17 NYCRR Part 150. *Compl.* ¶ 14. She identified three violations. First, she indicated that the tractor trailer encroached 12 feet onto the public right of way, which extends 60 feet from the center line of this two-lane road, and therefore extends well into the grass. *Compl.* ¶ 15. Second, and most important for the purposes of this injunction request, she declared that even if Mr. Burritt moves his tractor trailer 12 feet, the tractor trailer needed to be registered to obtain a permit under 17 NYCRR Part 150.15(a). *Compl.* ¶ 16. Third, she noted that only one sign can be visible from a given direction since the sides of the trailer exceeded 325 square feet, pursuant to 17 NYCRR Part 150.6(d). *Compl.* ¶ 17.

Ms. Disbro declared that until each of these violations was corrected, either by removing the trailer completely or by obtaining a permit and complying with the other directives before maintaining the trailer on his property visible from the road, DOT would classify his trailer a public nuisance that was subject to removal, and would refer the case to the New York Attorney General for legal action against Mr. Burritt. *Compl.* ¶ 18. Ms. Disbro gave Mr. Burritt 30 days to comply (until June 15, 2008). *Compl.* ¶ 19.

The permit requirements that Ms. Disbro imposed are burdensome, which is understandable because they are intended to deter the erection of signs on controlled routes. Part 150.15, "Registration," of 17 NYCRR, requires an annual $100 fee to cover the two sides of the tractor trailer in Part 150.15(b)(1), and according to part 150.15(a)(4) those fees are

nonrefundable after an application for a permit has been filed. *Compl.* ¶ 20. Part 150.15(a)(5) requires an additional $50 fee for applying after the tractor trailer has been placed. *Compl.* ¶ 21. Part 150.15(b)(4) requires yet another nonrefundable $50 fee for inspection. *Compl.* ¶ 21. Part 150.15(a)(6) provides that if the sign is ever moved (as occasionally happens with tractor trailers), the permit is null and void; therefore, if Mr. Burritt were to haul the trailer anywhere, even within his own property, he would be required to submit new applications along with applicable fees before he could return it to the same location. *Compl.* ¶ 22. Ms. Disbro also added to the requirements of Part 150.15 by declaring that to apply Mr. Burritt must first obtain a permit from the local municipality and attach it to the DOT application. *Compl.* ¶ 23.

Mr. Burritt's attorney wrote to Ms. Disbro on May 22 to ask that as soon as possible she clarify precisely what part of the regulations required Mr. Burritt's sign to be registered, and why she was interpreting them to contain such a requirement. *Compl.* ¶ 24, Exh. B. She responded by mailing a three-sentence letter, which Mr. Burritt's attorney received on May 27, and which simply contained a print out of some thirty pages of the entire text of Highway Law Sections 86 and 88 and 17 NYCRR Part 150. *Compl.* ¶ 25, Exh. C.

Mr. Burritt's attorney wrote another letter to Ms. Disbro on May 29, stating that her previous letter failed to specify particular code language and the particular basis for her interpretation of it, and again asking that she do so promptly because of the 30-day deadline. *Compl.* ¶ 26, Exh. D. Ms. Disbro responded on June 4, 2008. *Compl.* ¶ 27, Exh. E. She clarified that Mr. Burritt could comply with Part 150.6(d)simply by moving the "It Is Finished" sign at the front of the trailer so that it is not visible from the road. *Compl.* ¶ 28. Regarding the registration/permit requirements, however, Ms. Disbro specified the following:

> certain signs along these controlled routes [including Route 11] are allowed without a permit (such as official signs, on-premise signs and for sale signs) while other signs are permitted subject to the controlling criteria set forth in the laws

> and regulations and while other signs are prohibited. An on-premise sign for purposes of the regulations is described in 17 NYCRR Part 150.1(dd) as "On-premises sign means . . . a sign advertising activities conducted on the property on which it is located, and which conforms to the provisions of section 150.13 of this Part."
>
> The sign located on Mr. Burritt's property does not meet the criteria of an on-premise sign . . . . The sign on Mr. Burritt's property is therefore subject to . . . the registration provisions of 17 NYCRR Part 150.15. . . . In the event that the sign is not removed or brought into compliance, the Department will forward this matter to the New York State Attorney General's Office and request that office to seek a court order for the removal of this sign.

Compl. ¶ 29. Part 150.1(b) further notes that "advertised activity," which defines the necessary content of an "on-premises" sign, "means the building, enclosure or area where the advertised product is being sold or used, or advertised service rendered, or advertised business is being conducted . . . ." *Compl.* ¶ 30.

Mr. Burritt has complied with Ms. Disbro's requirement number (1) by moving the tractor trailer back 12 feet off the public right of way, and he has complied with her requirement number (3) by removing the "It Is Finished" display from the front end of the trailer. *Compl.* ¶ 31. Mr. Burritt has not, however, initiated the costly and burdensome process of seeking DOT registration and sign permit pursuant to Part 150.15. *Compl.* ¶ 32.

Defendants are violating the clear constitutional edicts of the United States Supreme Court when they require DOT registration and a permit for Mr. Burritt's tractor trailer, while giving "on-premises" commercial signs the privilege of exemption from permitting or its associated fees. The Court in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 507-08 (1981), and the lower courts following that case, have stated unequivocally that the government must either give non-commercial messages more latitude than commercial messages, or at least place the two on equal footing. What the government cannot do, and what it is unabashedly doing here, is to treat commercial signs more favorably than non-commercial displays.

Defendants' regulations, and their application of them to Mr. Burritt, constitute impermissible content-based censorship of religious speech, in violation of the free speech clause of the First Amendment of the United States Constitution.

Mr. Burritt fears the unconstitutional prosecution and confiscation that Ms. Disbro has threatened in her letters, and as a result he intends to remove his tractor trailer rather than face these threatened consequences. *Compl.* ¶ 34. Each day Defendants succeed in coercing Mr. Burritt to remove his trailer, they crush his freedom of speech anew. Because Defendants have given Mr. Burritt such a short deadline, they will trample upon his rights unless the Court acts quickly to enjoin Defendants' policy of disfavoring non-commercial speech while allowing commercial speech.

The need for relief is urgent. Mr. Burritt requests a temporary restraining order so as to avoid the impositions that Ms. Disbro said she will commence when the June 15, 2008 deadline expires. Mr. Burritt also seeks a preliminary injunction (which is governed by the same legal standard) to allow him to continue to maintain his tractor trailer on his own land without registration throughout this case just as Defendants admit they allow an exemption for on-premises commercial signs. Mr. Burritt's only chance now lies with this Court. Unless this Court issues temporary and preliminary injunctive relief, Mr. Burritt will suffer irreparable harm. Mr. Burritt respectfully requests that the Court issue a ruling before Friday, June 13, 2008.

II. ARGUMENT: A TRO AND INJUNCTION SHOULD IMMEDIATELY ISSUE.

Defendants are targeting noncommercial religious speech for special disfavor, while admitting that they allow commercial "on-premises" speech a waiver of their burdensome registration and permit requirements. Favoring commercial speech over noncommercial speech turns the First Amendment upside-down.

The standards for granting a temporary restraining order or preliminary injunction are

well established in this Circuit. A preliminary injunction may be issued provided that the moving party demonstrates "(a) irreparable harm and (b) either (1) likelihood of success on the merits or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief." *Gold v. Feinberg*, 101 F.3d 796, 800 (2d Cir. 1996) (internal quotations omitted).

A. PLAINIFF HAS SHOWN IRREPARABLE HARM.

The Supreme Court has declared that "the loss of First Amendment freedoms, for even minimal periods of time, constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *Anderson v. Mexico Academy and Central School*, 186 F. Supp. 2d 193 (N.D.N.Y. 2002). When an alleged deprivation of the First Amendment is involved, no further showing of irreparable injury is necessary, and the first preliminary injunction prong is satisfied. *Hoblock v. Albany County Bd. of Elections*, 341 F. Supp. 2d 169, 175 (N.D.N.Y. 2004); *Green Party of New York State v. New York State Bd. of Elections*, 267 F. Supp. 2d 342, 351 (E.D.N.Y. 2003) (*aff'd*, 389 F.3d 411, 418 (2d Cir. 2004); *Paulsen v. County of Nassau*, 925 F.2d 65, 68 (2d Cir. 1991). Defendants have imposed a countdown to directly deprive Mr. Burritt of his freedom of speech through messages on his tractor trailer. As shown below, Mr. Burritt can also demonstrate a likelihood of success on the merits, so he is entitled to injunctive relief.

B. MR. BURRITT HAS SHOWN A LIKELIHOOD OF SUCCESS ON THE MERITS.

By denying Mr. Burritt's noncommercial religious speech the privilege of registration waiver while affording that privilege to on-premises commercial speech, Defendants blatantly violate one of the core concepts of the free speech clause of the First Amendment. It is sufficient for Mr. Burritt here to emphasize the United States Constitution. Mr. Burritt has a high

probability of succeeding on his claims.

Government practices that prefer commercial speech over noncommercial speech have been repeatedly stricken by courts, because the First Amendment affords more, not less, protection to noncommercial speech. In *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981), the Supreme struck down a scheme that banned noncommercial advertising but allowed commercial advertising. "Insofar as the city tolerates billboards at all, it cannot choose to limit their content to commercial messages; the city may not conclude that the communication of commercial information concerning goods and services connected with a particular site is of greater value than the communication of noncommercial messages." *Id.* at 508. *See also Desert Outdoor Adver., Inc. v. City of Moreno Valley*, 103 F.3d 814, 814 (9th Cir. 1996) (striking ordinance that restricted noncommercial speech more severely than commercial speech); *Matthews v. Town of Needham*, 764 F.2d 58 (1st Cir. 1985) (same).

Moreover, government actions "regulating the noncommercial speech 'of private citizens on private property . . . [are] presumptively impermissible, and this presumption is a very strong one." *People v. Weinkselbaum*, 753 N.Y.S. 2d 284, 287 (Sup. App. Term 2002) (declaring that disfavorable treatment of non-commercial speech was unconstitutional). The Supreme Court in *City of Ladue v. Gilleo*, 512 U.S. 43, 56 (1994), vindicated the right of a speaker to display a sign from his own property, especially because of the significance that the private property location has to the communication of the message.

The Second Circuit holds fast to the view espoused in *Metromedia*. The *Metromedia* opinion was penned by a plurality of four justices; two more concurred in the judgment, and in some respects took a view more accommodating of government restrictions on speech. *See Rappa v. New Castle County*, 18 F.3d 1043, 1063-65 (3d Cir. 1994) (also a fractured decision, adopting the view of the concurring justices in *Metromedia* that strict allowance of only onsite

signs can be considered content neutral and constitutional); *but cf. Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250, 1262 n.11 (11th Cir. 2005) ("We have found no cases applying the Rappa approach, and we are uncertain how it would work in practice"). Nevertheless, "[t]he Second Circuit has adopted the plurality decision in Metromedia concerning sign regulation." *Knoeffler v. Town of Mamakating*, 87 F. Supp. 2d 322, 331 (S.D.N.Y. 2000) (citing *National Advertising Co. v. Town of Niagara*, 942 F.2d 145, 147 (2d Cir. 1991). As stated in *Town of Niagara*, the Second Circuit specifically follows *Metromedia* on the issue that "it would be improper to prefer commercial speech over noncommercial speech [by] preferring onsite advertising, a type of commercial speech, over all other types of speech, including noncommercial speech." *Id.* at 147. *Town of Niagara* struck down the entire ordinance as a result. *Id.* at 151.

Other circuits agree. In *Southlake Property Associates, Ltd. v. City of Morrow, Ga.*, 112 F.3d 1114, 1117 (11th Cir. 1997), a city ordinance acted much like Defendants' scheme in this case, by allowing leeway to signs advertising on-premises activities but denying the same to signs advertising off-premises activities. The court noted that the constitution allows the government to distinguish between on-site and off-site commercial speech, *id.* at 1117-18, but "we may not do the same in the noncommercial speech arena," *id.* at 1118 n.8. The court noted that there are two ways to avoid the result prohibited by *Metromedia* but inflicted by Defendants in this case. The court could, if the definitions of the regulatory scheme permit it, consider noncommercial signs to be "on-premises" because they express the beliefs of the property owner.

> An idea, unlike a product, may be viewed as located wherever the idea is expressed, i.e., wherever the speaker is located. Under this alternative view, all noncommercial speech is onsite. A sign bearing a noncommercial message is onsite wherever the speaker places it.

Id. at 1118-19. In support of this approach, the court quoted the Supreme Court's emphasis on the importance of private property speech in *Gilleo*. *Id.* Alternatively, if noncommercial signs cannot be considered "on-premises" unless they relate to tangible and specific noncommercial activities that take place on the property, *Metromedia* is still violated and therefore the court must strike down the scheme as unconstitutional so as to allow the noncommercial speech, *Southlake*, 112 F.3d at 1118 n.8. Either way, the noncommercial speech must be allowed.

Multiple courts illustrate this second approach. In *Ackerley Comm., Inc. v. City of Cambridge*, 88 F.3d 33, 35-36, 38 (1st Cir.1996), the First Circuit considered an ordinance in the City of Cambridge that grandfathered on-site signs but subjected off-site signs to "restrictions on size, style and location." The Court interpreted that particular ordinance as allowing noncommercial on-site signs if they advertise actual activities on the premises, but not allowing other noncommercial signs. *Id.* at 37. As a result, the ordinance had to be struck down. *Id.* at 38. "This line has the effect of disadvantaging the category of noncommercial speech that is probably the most highly protected: the expression of ideas[,] . . . particularly when the speech disfavored includes some—like political speech—that is at the core of the First Amendment's value system." *Id.* at 37 (citing *Metromedia*, 453 U.S. at 514-15). *See also, e.g., National Advertising Co. v. City of Orange*, 861 F.2d 246, 247-49 (9th Cir. 1988) (adopting the *Metromedia* plurality approach and striking down sign ordinance that gave onsite commercial signs more privilege than noncommercial signs); *National Advertising Co. v. City and County of Denver*, 912 F.2d 405, 411 (10th Cir. 1990) (sign law was constitutional under *Metromedia* because it did *not* disfavor noncommercial signs less than onsite commercial signs, but instead specifically allowed the former alongside the latter).

Metromedia, *Town of Niagara*, and the other overwhelming caselaw cited above require invalidation of Defendants' regulation and their application thereof to Mr. Burritt. Defendants

admit they allow on-premises signs without their registration requirements. *Compl.* ¶ 29. Such signs they allow are primarily if not exclusively commercial, referencing a "product [] being sold or used," a "service rendered," or "business being conducted." *Compl.* ¶¶ 29–30. Defendants are burdening Mr. Burritt's speech because they have determined that his tractor trailer is not such an "on-premises" commercial sign. *Compl.* ¶ 29.

Defendants' policies and practices fall squarely in the scope of the above precedent. They "conclude that the communication of commercial information concerning goods and services connected with a particular site is of greater value" than noncommercial speech, thus violating *Metromedia*. They "prefer commercial speech over noncommercial speech [by] preferring onsite advertising," thereby violating *Town of Niagara*. They are strongly "presumptively impermissible" under *Weinkselbaum*, for regulating speech on private property. The list of applicable quotes from above could go on.

Whether the Court should consider Mr. Burritt's tractor trailer message "on-premises," or merely require that it be treated similarly, is somewhat academic. The Court has substantial grounds for following the *Southlake* line of reasoning by considering Mr. Burritt's trailer to be "on-premises," not only because his ideas are onsite by virtue of his property ownership, but more specifically because his penchant for evangelization is a "service" he actively offers onsite to every person he encounters. This is evidenced by, among other things, his active evangelization activities at work, the fact that he named his business after a Bible chapter, "Acts II," and calls it "Building Bridges for Jesus, and of course by the trailer itself. "Courts interpret statutes to avoid constitutional infirmities," *Blake v. Carbone*, 489 F.3d 88, 100 (2d Cir. 2007), and interpreting "service" to include Mr. Burritt's evangelization is a legitimate approach.

Alternatively, the Court could follow the cases that found that their relevant laws excluded non-commercial messages, and therefore enjoined those laws. Defendants' scheme in

this case, if "service" is not interpreted to include Mr. Burritt's evangelization, could be read as defining "on-premises" signs as exclusively commercial in nature, requiring that they target business, services, or products. Such an interpretation shows all the more clearly how Defendants' law impermissibly elevates commercial speech over noncommercial messages such as Mr. Burritt's trailer. What is certain is that under the governing precedent of *Metromedia* and *Town of Niagara*, Defendants' policies and practices turn the First Amendment on its head by favoring commercial speech over noncommercial speech, and therefore they must be enjoined.

III. CONCLUSION

For the reasons set forth above, Mr. Burritt respectfully requests this Court to grant the relief he has requested in the order to show cause, namely, a temporary restraining order and preliminary injunction operative before June 15, 2008, enjoining the operation of Defendants' policies and practices that deny Mr. Burritt the waiver of registration, that classify his tractor trailer as being in violation as a result, and that threaten to confiscate his tractor trailer and submit his alleged violation to the Attorney General for legal action against him.[2]

Respectfully submitted this 10th Day of June, 2008,

Daniel W. Burritt

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[2] Because the public interest in this case and all of the other factors that weigh in Plaintiff's favor, Plaintiff requests that the Court impose a bond of zero dollars in this instance.

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