

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

AMERICAN FREEDOM DEFENSE  
INITIATIVE, PAMELA GELLER, and  
ROBERT SPENCER,

Plaintiffs,

v.

Case 2:10-cv-12134  
HON. DENISE PAGE HOOD

SUBURBAN MOBILITY AUTHORITY  
FOR REGIONAL TRANSPORTATION  
("SMART"); GARY L. HENDRICKSON,  
Individually and in his official capacity as  
Chief Executive of SMART, JOHN HERTEL,  
Individually and in his official capacity as  
General Manager of SMART and BETH  
GIBBONS, individually and in her official  
Capacity as Marketing Program Manager  
Of SMART,

Defendants.

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**REPLY BRIEF IN SUPPORT OF  
DEFENDANTS' MOTION FOR STAY OF ORDER GRANTING PLAINTIFFS'  
PRELIMINARY INJUNCTION [Docket No. 24] PENDING APPEAL**

On May 3, 2011, Plaintiffs responded to Defendants' Motion for Stay Pending Appeal. This Reply Brief is being filed pursuant to E.D. Mich LR 7.1(d)(A).

To begin with, the Court must recognize a significant misrepresentation by the Plaintiffs in their brief: The Plaintiffs mislead by denying that the advertisement is political in nature. The parties agree in their writings that the context of the ad, if not the content, was clearly political. Plaintiffs themselves defined the issue as political speech in their own Complaint, and these statements operate as admissions for purposes of this motion and this action.

After Plaintiffs filed their Complaint in this matter, and only after SMART asserted the defense that the message was political and barred by their guidelines, Plaintiffs attempted to redefine the issue as one of "religious freedom" in an attempt to avoid the allowable constitutional restriction contained in SMART's advertising guidelines. Plaintiffs' attempt to do so is transparent. Further, it is ineffective because "**religious freedom**" is a **political issue**. That Plaintiffs now want to also define their advertisement as religious is irrelevant if the advertisement is *also* political.

The concept of "religious freedom" is not a religious concept. Counsel is aware of no religion that teaches religious freedom as a tenet. Instead, it is a *political* concept, embodied in a *political* document [the Constitution] that defines the *political* system of the United States. Religious freedom arises in this country from the Bill of Rights. It is one of the quintessential political issues contained in that document.

SMART may constitutionally limit political messages on its buses, as recognized by this Court. Where the parties agree that the message is political, and where the

message, even as defined subsequently by Plaintiffs' counsel, is quintessentially political, SMART may constitutionally bar its posting.

Contrast the "atheist advertisement" that Plaintiffs want to focus their efforts on. That message "Don't Believe in God? You are not alone." did not express a "religious freedom" message at all. It sought like-minded people to join together in a fashion not unlike a Roman Catholic parish inviting Roman Catholics to an Easter celebration. The message was purely religious in nature.<sup>1</sup>

Plaintiffs also err in defining how the decision was made relative to this advertisement, and in labeling the process as arbitrary and capricious. There was limited testimony about the process that was undertaken in determining that this ad was political, and Beth Gibbons testified that the decision was made based upon what had occurred involving the Miami-Dade Transit Authority. The questioning of Ms. Gibbons in this regard was incomplete, because Plaintiffs now assert that the *only* action taken by Ms. Gibbons was that she reviewed a newspaper article concerning the Miami-Dade Transit controversy.

This is not a valid conclusion based upon the content of the testimony provided. Further, it is not complete.

In SMART's original Response to Plaintiffs' Motion for a Preliminary Injunction, SMART set forth:

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<sup>1</sup> Notwithstanding the characterization of the "atheist advertisement" as anti-religious on the website of the Thomas More Law Center ([here](#)), the message is a simple message of atheism, which is a *-theism* in itself. "Atheism" is no more or less a religious concept than "monotheism" or "polytheism." It appears that it is just not *their* theism, and so it is labeled as anti-religion.

[http://www.thomasmore.org/qry/page.taf?id=19&function=detail&sbtblct\\_uid1=893&nc=ba455ed4516587f0608d56783071908b](http://www.thomasmore.org/qry/page.taf?id=19&function=detail&sbtblct_uid1=893&nc=ba455ed4516587f0608d56783071908b)

On or about May 12, 2010, Plaintiff Geller contacted CBS Sales Manager Robert Hawkins regarding the potential posting of advertisements on SMART buses. The advertisement proposed by Defendants states "Fatwa on your head? Is your family or community threatening you? LEAVING ISLAM? Got questions? Get answers! *RefugefromIslam.com*".

As set forth in the contract, having determined that the advertising was a likely violation of the contract's content policy, CBS contacted SMART requesting a final determination. SMART Marketing Manager Beth Gibbons reviewed the proposed advertisement and discussed it with staff giving a careful consideration. SMART determined that the proposed advertisement violated at least two enumerated prohibitions within the content policy...SMART therefore rejected the proposed advertisement.

(Defendants' Response to Plaintiffs' Motion for Preliminary Injunction, at pp. 6-7). This description is supported by the affidavits of Robert Hawkins and Beth Gibbons as attached to the Response.

When Beth Gibbons was notified by CBS of the potential violation of the policy, Ms. Gibbons was already familiar with the issue because of an industry-wide listserv that discussed the matter. The listserv messages and newspaper article had alerted her that a political campaign was being rolled out by Plaintiffs. In light of this, she contacted other staff at SMART for their input and review. These included individuals in SMART's General Counsel's office, as well as the General Manager, John Hertel. After a considered review, and after contacting the Miami-Dade Transit Authority as part of that review, SMART continued investigating the intent of the message through internet research. After this full investigation, the General Manager, John Hertel, decided that the ad was violative of the content restriction policy and would not be allowed.

The above shows a significantly detailed and considered review of Plaintiffs' proposed advertisement, and belies any argument that SMART's actions were in any way arbitrary or in any way capricious.

This Court criticized SMART by stating it had no written guidelines, policies or procedures for evaluating the political content of a proposed advertisement. While it is true that there are no written guidelines, no written policies and no written procedures, there is no reason why such policies or procedures would be required if SMART made their decisions in a considered fashion. It should be noted, however, that SMART only addresses this issue begrudgingly, since the analysis of the application of guidelines to this advertisement is of no moment in light of the fact that both parties have made **binding statements that the ad represents a political message.**

Defendants' decision was viewpoint-neutral. SMART does not agree or disagree with the Plaintiffs' message, and takes no position whatsoever on the viewpoint contained in the advertisement. If the advertisement was pro-Islam yet was political or scornful in nature, it would still be violative of the policy and barred. There is nothing about the Plaintiffs' viewpoint that formed a basis for SMART's decision, notwithstanding Plaintiffs' protestations.

The scornful nature of the advertisement is also apparent. Its very formatting is intended to parody and denigrate the format of an already-existing pro-Islamic message. The original message parodied follows:



Plaintiffs' message clearly mocks this prior message from ICNA and demonstrates exactly what they are trying to do with their message. Plaintiffs cannot escape the fact that they intend to mock and scorn Islam and Muslims.

Defendants have shown in their original motion that they would be irreparably harmed through the evisceration of their appeal rights if this Court moots the issues by failing to enter a stay, and have demonstrated to this Court why the availability of other means to convey the message precludes a finding of irreparable harm to the Plaintiffs. In addition, Defendants have also shown in their original motion that the public interest lies in staying the matter because of the potential of harm to SMART, its employees and equipment.

WHEREFORE, Defendants respectfully request that this Court grant their Motion to Stay the Injunction entered by this Court pending an appeal, together with costs and attorney's fees wrongfully incurred.

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Dated: May 10, 2011

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**PROOF OF SERVICE**

The undersigned certifies that a copy of **REPLY BRIEF IN SUPPORT OF DEFENDANTS' MOTION FOR STAY OF ORDER GRANTING PLAINTIFFS' PRELIMINARY INJUNCTION [Docket No. 24] PENDING APPEAL** was served upon the attorneys of record of all parties to the above cause by the method(s) indicated below on May 10, 2011.

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<input checked="" type="checkbox"/>	Electronic Notification Via the Court's CM/ECF System		

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