UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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

Plaintiffs,

v.

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.

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

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT PURSUANT TO Fed.R.Civ.P. 56

Robert J. Muise (P62849)
David Yerushalmi, Esq. (Arz. 009616; DC 978179, Cal. 132011; NY 4632568)
Counsel for Plaintiffs
3000 Green Rd., #131098
Ann Arbor, MI 48113
(855) 835-2352
rmuise@americanfreedomlawcenter.org
dyerushalmi@americanfreedomlawcenter.org

Erin Elizabeth Mersino (P70886)
Co-Counsel for Plaintiffs
24 Frank Lloyd Wright Drive
P.O. Box 393
Ann Arbor, MI 48106
(734) 827-2001 emersino@thomasmore.org

Avery E. Gordon (P41194)
Anthony Chubb (P72608)
Co-Counsel for Defendants SMART, Hertel and Gibbons
535 Griswold Street, Suite 600
Detroit, MI 48226
(313) 223-2100
agordon@smartbus.org
achubb@smartbus.org

John J. Lynch (P16887)
Christian E. Hildebrandt (P46989)
Co-Counsel for Defendants SMART, Hertel and Gibbons
1450 W. Long Lake Road, Suite 100
Troy, MI 48098
(248) 312-2800
jlynch@vgpclaw.com
childebrandt@vgpclaw.com

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

NOW COME Defendants, SUBURBAN MOBILITY AUTHORITY FOR REGIONAL TRANSPORTATION, JOHN HERTEL and BETH GIBBONS, by and through their attorneys, Vandeveer Garzia, P.C., and in reliance upon the arguments set forth in the attached Brief in Support of Motion for Summary Judgment, Defendants hereby request Summary Judgment pursuant to FRCP Rule 56 in that no genuine issue of material fact exists to preclude judgment in favor of Defendants on all of Plaintiffs' claims.

Pursuant to USDC ED Rule 7.1, Defendants specifically state that they have sought concurrence in this Motion, but concurrence was denied pursuant to an email message from Robert Muise dated July 29, 2013.

WHEREFORE, these Defendants, SUBURBAN MOBILITY AUTHORITY FOR REGIONAL TRANSPORTATION, JOHN HERTEL and BETH GIBBONS, respectfully request that this Court grant their Motion for Summary Judgment, further dismiss Plaintiffs' Complaint in its entirety, and award it costs and attorneys' fees wrongfully incurred.

VANDEVEER GARZIA

By: /s/ Christian E. Hildebrandt
JOHN J. LYNCH P16887
CHRISTIAN E. HILDEBRANDT P46989
Attorneys for Plaintiffs
1450 W. Long Lake Rd., Ste. 100
Troy, MI 48098-6330
(248) 312-2800

By: /s/ Avery E. Gordon
SUBURBAN MOBILITY AUTHORITY FOR REGIONAL TRANSPORTATION
Avery E. Gordon (P41194)
Anthony Chubb (P72608)
Co-Counsel for Plaintiffs
535 Griswold Street, Suite 600
Detroit, MI 48226

Dated: August 15, 2013

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DEFENDANTS' BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT PURSUANT TO Fed.R.Civ.P. 56

Robert J. Muise (P62849)
David Yerushalmi, Esq. (Arz. 009616; DC 978179, Cal. 132011; NY 4632568)
Counsel for Plaintiffs
3000 Green Rd., #131098
Ann Arbor, MI 48113
(855) 835-2352
rmuise@americanfreedomlawcenter.org
dyerushalmi@americanfreedomlawcenter.org

Erin Elizabeth Mersino (P70886)
Co-Counsel for Plaintiffs
24 Frank Lloyd Wright Drive
P.O. Box 393
Ann Arbor, MI 48106
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Co-Counsel for Defendants SMART, Hertel and Gibbons
535 Griswold Street, Suite 600
Detroit, MI 48226
(313) 223-2100
agordon@smartbus.org
achubb@smartbus.org

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Christian E. Hildebrandt (P46989)
Co-Counsel for Defendants SMART, Hertel and Gibbons
1450 W. Long Lake Road, Suite 100
Troy, MI 48098
(248) 312-2800
jlynch@vgpclaw.com
childebrandt@vgpclaw.com

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STATEMENT OF ISSUES PRESENTED

1. Whether the SUBURBAN MOBILITY AUTHORITY FOR REGIONAL TRANSPORTATION, through its advertising content policy has created a non-public forum, enabling it to limit the types and content of speech displayed on and in its buses.

2. Whether Plaintiffs' advertisement represents political speech that is barred by SMART's constitutional advertising content policy.

3. Whether Plaintiffs' advertisement represents speech that is likely to hold a person or group of persons up to scorn or ridicule that is barred by SMART's constitutional advertising content policy.

4. Whether SMART's appropriately restricted Plaintiffs' advertisement under its viewpoint neutral advertising content policy.

STATEMENT OF MOST CONTROLLING AUTHORITY

Defendants hereby assert that the most controlling authority necessary for the resolution on this Motion for Summary Judgment pursuant to Fed. R. Civ. P. 56 is as follows:

Amer. Freedom Def. Init. v Suburban Mobility Auth. For Reg. Trans., 698 F.3d 885 (2012)

Lehman v City of Shaker Heights 418 U.S. 298 (1974)

Ridley v Mass. Bay Transp. Auth. 390 F.3d 65 78 (1st Cir 2004)

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STATEMENT OF FACTS AND STATEMENT OF THE CASE

The Suburban Mobility Authority for Regional Transportation ("SMART") is an instrumentality of the State of Michigan established by Michigan Public Act 204 of 1967. MCL §124.401, *et seq.*, at §124.403. Its mission critical purpose, pursuant to the Act, is to operate public mass transportation throughout the four southeastern-most counties in Michigan (Wayne, Oakland, Macomb and Monroe Counties).

Incidental to SMART's provision of public transportation, SMART sells advertising on the interior and exterior of its transit vehicles for the purpose of enhancing revenue and to further support its mission critical purpose. The sale of advertising is conducted by SMART's exclusive agent CBS Outdoor, Inc. ("CBS" or "Contractor"). This agreement was established in a contract executed in February of 2009. (**Exhibit A**).

The Contract includes a provision at Section 5.07(B), "Restriction on Content", which prohibits certain advertising as follows:

> In order to minimize chances of abuse, the appearance of favoritism, and the risk of imposing upon a captive audience, Offeror shall not allow the following content:
>
> **1. Political or political campaign advertising.**
>
> 2. Advertising promoting the sale of alcohol or tobacco.
>
> 3. Advertising that is false, misleading, or deceptive.

> **4. Advertising that is clearly defamatory or likely to hold up to scorn or ridicule any person or group of persons.**
>
> 5. Advertising that is obscene or pornographic; or in advocacy of imminent lawlessness or unlawful violent action.

(**Exhibit A**) (emphasis added). The Contract further sets forth, in Section 5.07(C), "REVIEW OF ADVERTISING CONTENT," the process followed by the Contractor for the review of advertising material to determine violations of the Restriction on Content, as follows:

> Before displaying any advertising, exhibit material, or announcement which Contractor [CBS] believes may be in violation of Section 5.07.B, "Restriction on Content," Contractor shall first submit the material to SMART for review. SMART shall make the final determination as to all violations of Section 5.07.B.

Throughout the term of the Contract, SMART has actively enforced the content policy and has rejected all advertising deemed to violate the Authority's content policy. For example, SMART has previously rejected proposed advertisements deemed to violate the policy which were deemed to be political, (**Exhibit B**, Pinckney Pro-Life advertisement), as well as advertisements deemed to be in advocacy of violence. (**Exhibit C**, "Red Dead Redemption" video game advertisement). In addition to these, Plaintiffs' two advertisements were rejected under the policy.

On May 12, 2010, Plaintiff Geller contacted the CBS Sales Manager, Robert Hawkins, requesting the posting of advertisements on SMART buses. The

advertisement proposed by Plaintiffs states "Fatwa on your head? Is your family or community threatening you? LEAVING ISLAM? Got Questions? Get Answers! *Refuge*FromIslam.com". (**Exhibit D**, Plaintiffs' proposed advertisement).

CBS initially determined that the ad might violate the content policy and contacted SMART requesting a final determination. (**Exhibit E**, Hawkins Affidavit). SMART's Marketing Manager, Beth Gibbons, reviewed the proposed advertisement and discussed it with staff and attorneys for SMART. The discussion was focused on the application of the content policy to the proposed advertisement. (**Exhibit F**, Gibbons Affidavit; **Exhibit G**, Deposition of Beth Gibbons, June 25, 2013, at pp. 52-54).

As part of this review, SMART personnel, consistent with how this policy is put into practice, reviewed the content of the website referred to as well. The website, *Refuge*fromIslam.com, demonstrated that Plaintiff, AFDI, was a quintessentially political organization. For instance, contained on the website was the following excerpt:

> Freedom of religion. **That is the American way.** You can leave Islam. We can help. **We fight the Sharia law.**
>
> All over the world, apostates from Islam are harassed, beaten, threatened with death, and killed outright. From Egypt to Iran, from Somalia to Indonesia, people who make the decision in conscience to leave Islam are denied their basic human rights while the world looks on with indifference.

> It's a matter of Islamic law. Muhammad, the prophet of Islam, called for apostates to be killed. All the schools of Islamic jurisprudence teach the same thing. The Muslim countries that implement Sharia fully today enforce that death penalty, and in other Muslim countries individual Muslims are often all too willing to take the law into their own hands and kill apostates if the governing authorities will not do the job.
>
> But America is different. America is the Land of the Free. In America, we respect the individual conscience. Now Islamic supremacists are trying to enforce Islamic law here. Apostates in America have gathered together only in the presence of armed guards. High-profile apostates have been threatened with death. One Islamic scholar who didn't even leave Islam but began to teach principles that Muslims consider heretical was murdered in Arizona. We are determined not to allow the Sharia death penalty for apostasy to spread to American soil. We are determined to protect the free conscience and the free soul. If you choose to leave Islam, we will do everything within our power to help you find safety and refuge from those who would threaten you and harm you.

(**Exhibit H -** *Refuge*FromIslam.com, post titled "THIS IS AMERICA, LAND OF THE FREE AND HOME OF THE APOSTATES," printed 10/12/2011, from *http://freedomdefense. typepad.com /leave-islam/*) (emphasis added). A general review of the website showed extensive political commentary and action throughout.

Following this extensive review, SMART's General Manager determined that the proposed advertisement violated at least two of the enumerated prohibitions within the content policy. Specifically, it was found that the proposed advertisement was in violation of Contract Section 5.07(B)(1), as political advertising, and Section 5.07(B)(4), as likely to hold up to scorn and ridicule a

group of persons. SMART therefore rejected the proposed advertisement. Plaintiffs were notified of the rejection.

Plaintiffs brought suit (**Exhibit I**), and sought a TRO, or in the alternative, a preliminary injunction, to compel SMART to post the ads. In their complaint, Plaintiffs described their action as one to allow the posting of "political speech" by stating:

> 1. This case seeks to protect and vindicate fundamental constitutional rights. It is a civil rights action brought under the First and Fourteenth Amendments to the United States Constitution and 42 USC §1983 challenge Plaintiffs' restriction on ***Plaintiffs' right to engage in political and religious speech*** in a public forum.
>
> * * * * *
>
> 8. FDI promotes its ***political objectives by, inter alia, sponsoring anti-Jihad bus and billboard campaigns, which includes seeking advertising space on SMART vehicles***.
>
> 9. Plaintiff Pamela Geller is the Executive Director of FDI ***and she engages in political and religious speech through FDI's activities***, ***including FDI's anti-Jihad bus and billboard campaigns***.
>
> * * * * *
>
> 21. On or about May 24, 2010, Defendants denied Plaintiffs' request and refused to display Plaintiffs' advertisement. Defendant[s] denied Plaintiffs' advertisement, and thus denied Plaintiffs access to a public forum ***to express their political and religious message***, based on the content and viewpoint expressed by Plaintiffs' message.
>
> * * * * *
>
> 23. By reason of the aforementioned Free Speech Restriction created, adopted, and enforced under color of state law, Plaintiffs have deprived Plaintiffs of their right ***to engage in political and religious speech*** in a public forum. . . .

(**Exhibit I**, Plaintiffs' Complaint, filed May 27, 2010) (emphasis added).

On March 31, 2011, the District Court entered an order granting Plaintiffs' Motion for Preliminary Injunction. (**Exhibit J**, Order). Defendants appealed the Preliminary Injunction to the Sixth Circuit Court of Appeals, which, ruled: (1) that SMART had created a non-public forum; (2) that SMART's content rules were resonble and viewpoint-neutral; and (3) affirmed SAMRT's view of the political nature of the advertisement. The Sixth Circuit reversed this Court's order and remanded the matter in a published opinion of the Court dated October 25, 2012. *Amer. Freedom Def. Init. v Suburban Mobility Auth. For Reg. Trans.,* 698 F.3d 885 (2012) (**Exhibit K**).

After remand, the matter proceeded through discovery in this Court. This motion for summary judgment is filed by Defendants to uphold the legal findings of the Sixth Circuit in that the facts and law applied by the Sixth Circuit in this matter have not changed since the opinion, and there is no genuine issue of material fact that would preclude summary judgment by this Court.

SUMMARY OF ARGUMENT

SMART, as a governmental agency, allows commercial advertising on the sides of and inside its coaches to generate revenue. This additional revenue allows it to perform its mission critical purpose of operating public mass transportation throughout the four southeastern-most counties in Michigan. SMART has created a

non-public forum for this advertising that is not traditionally held open for speech and discourse of unlimited nature.

In a non-public forum, a governmental agency such as SMART may constitutionally limit speech as long as it has a rational basis for doing so. SMART's content policy, which prohibits political speech and speech that would hold an individual or group of persons up to scorn or ridicule, is set forth "in order to minimize chances of abuse, the appearance of favoritism, and the risk of imposing upon a captive audience." This is a rational basis that has been upheld in other case law from the Sixth Circuit and the U.S. Supreme Court. SMART has other rational bases for its content policy as set forth in the following pages.

Plaintiffs' advertisement is in violation of both the restriction on political advertising and the 'scorn or ridicule' prohibition, and was constitutionally rejected by SMART pursuant to its content policy. SMART's actions were not based upon the particular viewpoint espoused by Plaintiffs but were rather based upon the previously promulgated policy and therefore it is viewpoint-neutral. Further, throughout the history of the current advertising policy, SMART has actively and consistently applied its policy to those ads that required additional review.

ARGUMENT

The seminal case concerning whether a bus authority, as a governmental agency, may constitutionally limit certain kinds of speech and certain speakers is

Lehman v City of Shaker Heights 418 U.S. 298 (1974). The plaintiff in *Lehman* was a political candidate for office who sought to p[lace advertisements for his candidacy on "car cards" on city buses. "Car cards" are interior advertisements that are frequently seen lining the space at the intersection of the sides of the bus with the interior ceiling.

The City of Shaker Heights refused the advertisements. Analyzing the type of forum at issue in the *Lehman* and the nature of the City's restrictions on political speech, The U. S. Supreme Court found that a bus authority who treats its advertising space as a non-public forum may constitutionally limit the types of speech displayed in the forum. **The Sixth Circuit in this case relied in large part on the *Lehman* decision to hold that SMART had also created a non-public forum**, *Amer. Freedom Def. Init.*, at 890-92, **and that SMART had a reasonable and viewpoint neutral "rational basis" for restricting the advertisement at issue here.** *Id.*, at 892-94.

The facts and law have not changed since the Sixth Circuit's opinion and summary judgment is therefore appropriate.

I. SMART's advertising space is a non-public forum, and not traditionally held open for speech and discourse of unlimited nature.

Plaintiffs have the burden of proof of establishing that SMART has impermissibly regulated Plaintiffs' speech or engaged in viewpoint discrimination. As both this Court and the Sixth Circuit have held, SMART has created a non-public forum wherein it permits limited advertisements on and inside its buses. It has consistently applied a pre-existing content policy, and appropriately excluded Plaintiffs' advertisement under that constitutionally sound policy.

Plaintiffs contend that their political advertisement is protected free speech. Plaintiffs then presumptively assert that they have an unlimited and absolute right to display any and all proposed, non-commercial advertisements regardless of SMART's content policy. Plaintiffs' analysis is too simplistic under the circumstances. Plaintiffs must also show that they have a right to display their speech *in this forum*.

In *Capital Square Review & Advisory Bd. v Pinette*, 515 U.S. 753 (1995), the U.S. Supreme Court recognized that "it is undeniable of course, that [even] speech which is constitutionally protected against state suppression *is not thereby accorded a guaranteed forum on all property owned by the state*." (Emphasis added).

Further, in *Cornelius v NAACP Legal Defense and Educational Fund*, 473 U.S. 788 (1985), the Supreme Court established that:

> Even protected speech is not equally permissible in all places and all times. Nothing in the constitution requires the Government freely to grant access to all who wish to exercise their right to free speech on every type of Government property without regard to the nature of the property or to the disruption that might be cause by the speakers' activities.

Id., at 799-800.

To appropriately balance the government's interest in regulating the use of its property and the public's interest in free speech, courts have adopted a forum analysis as a means of determining when the government's interest in limiting the use of property to its intended purpose outweighs the interest of those wishing to use the property for other purposes. Accordingly, the extent to which the government can control access depends on the nature of the relevant forum. *United States v Kokinda*, 497 U.S. 720 (1990). Established case law has set forth three distinct types of forums: traditional public forums, designated public forums, and non-public forums. *Cornelius v NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 800 (1985).

a. SMART's advertising space is a non-public forum

It is well established within the law that exterior panels on city buses are not considered traditional public forums. Traditional public forums are places that "by long tradition or by government fiat have [been] devoted to assembly and debate." *Perry Education Ass'n v Perry Local Educators' Ass'n*., 460 U.S. 37, 45 (1983). Traditional public forums include streets, sidewalks, and parks that "have been

immemorially held in trust for the use of the public . . . for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague v CIO*, 307 U.S. 496, 515 (1939). SMART has not created a traditional public forum. During its years of operation, SMART has not, by tradition or fiat, devoted its exterior advertising panels to unregulated debate. Certainly during the existence of this policy, SMART has demonstrated a clear intention of limiting access to its advertising space.

Despite two prior court rulings on the issue, Plaintiffs disingenuously assert that SMART has established a designated public forum. A designated public forum is the creation "by government designation of a place or channel of communication for use by certain speakers, or for the discussions of certain subjects." *Cornelius,* 473 U.S. at 802 (1985). In support of its position, Plaintiffs argue that SMART established this designated public forum through its express policy and practices.

Plaintiffs' argument with respect to SMART's policy relies in part upon a website page entitled "Advertising Guidelines." In actuality, this page only reinforces SMART's commitment to a fair and deliberate review of proposed advertising. **(Exhibit L**, web site page). The information on the website is primarily promotional in nature and is not, nor is it intended to be, a comprehensive content policy.

In fact, to the contrary, the page the Plaintiffs rely upon specifically informs all who review it that "SMART has in place advertising guidelines for which all advertisements are reviewed against. Any such advertising which does not violate the SMART advertising guidelines or the law must be posted." (**Exhibit L**). This document does not create a designated public forum. In fact, SMART, by government fiat, has specifically limited speech on its buses by reference to external advertising guidelines.

Plaintiffs also argue that SMART has created a designated public forum through its past practice. Plaintiffs refer to SMART's prior acceptance of an atheist awareness advertisement in support of their argument. (**Exhibit M**). The advertisement, like Plaintiffs' advertisement, was flagged by CBS Outdoor for review and was reviewed by SMART for a final determination as to whether it violated the content policy. In the case of the atheist awareness advertisement, SMART found it to be purely religious in nature, and therefore found that it did not violate the content policy. Past practice has always been to review and limit the discourse permitted on the buses, a fact that militates against the finding of a designated public forum.

Plaintiffs' advertisement was afforded the same type of review. After reviewing the advertisement, and the website referred to, it was determined that Plaintiff's advertisement was political in nature, and not purely religious. The

incendiary language also led SMART to decide it also held adherents to Islam, particularly in families and the community, up to scorn and ridicule.

Through the application of this policy in this manner, SMART has established a non-public forum. A non-public forum is "public property which is not by tradition or designation a forum for public communication." *Perry Educ. Ass'n*, at 46. Moreover, "[c]ontrol over access to a nonpublic forum can be based on subject matter and speaker identity so long as distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint-neutral. [Citation omitted]. That is, the government's decision to restrict access in a nonpublic forum 'need only be reasonable.'" *Helms v Zubaty*, 495 F.3d 252 (6th Cir. 2007).

As noted above, the *Lehman* case is controlling of the exact issue in the instant case. The Supreme Court found no constitutional violations, nor that any indicia of traditional or designated public forums were present, stating:

> Here, we have no open spaces, no meeting hall, park, street corner, or other public thoroughfare. Instead, the city is engaged in commerce. It must provide rapid, convenient, pleasant, and inexpensive service to the commuters of Shaker Heights. The car card space, although incidental to the provision of public transportation, is a part of the commercial venture. In much the same way that a newspaper or periodical, or even a radio or television station, need not accept every proffer of advertising from the general public, a city transit system has discretion to develop and make reasonable choices concerning the type of advertising that may be displayed in its vehicles. In making these choices, this Court has held that a public utility 'will be sustained in its protection of activities in public places when those activities do not interfere with the general public convenience, comfort and safety."

Lehman, 418 US at 303. The Court further reasoned that "a ban on political advertisements was a 'managerial decision to limit [advertising] space to innocuous and less controversial commercial and service-oriented advertising.'" *Lehman*, at 304, as cited in *Amer. Freedom Def. Init.*, at 890-91.

The reasoning in *Lehman* is applicable in the instant issue. The *Lehman* court correctly recognized that the city's refusal of the advertising was consistent with its goal of providing rapid, convenient, pleasant service to commuters, and that the City of Shaker Heights had the discretion to develop and make reasonable choices concerning the types of advertising that may be displayed in its vehicles and that the city's refusal to accept political advertising was not a violation of the First or Fourteenth Amendment. *Id.* at 303.

The *Amer. Freedom Def. Init.* Court's reasoning is equally compelling. The Sixth Circuit held:

> We are guided not only by the government's explicit statements, policy, and practice, *United Food* [*& Commercial Workers Union v Sw. Ohio Reg'l Transit Authority*, 163 F.3d 341, 350 (6th Cir. 1998)], but also by the 'nature of the property and its compatibility with expressive activity to discern the government's intent." *Cornelius* [*v NAACP Legal Defense and Education Fund*, 473 U.S. 788, 802 (1985)].
>
> SMART's tight control over the advertising space and the multiple rules governing advertising content make the space incompatible with the public discourse, assembly and debate that characterizes a designated public forum. **Although SMART's written policy does not explicitly identify the buses as a nonpublic forum, SMART's**

> **policy restricts the content of that forum. SMART has banned political advertisements, speech that is the hallmark of a public forum.** Moreover, SMART has limited the forum by restricting the type of content that nonpolitical advertisers can display. While reasonable minds can disagree as to the extent of the restriction, — SMART has provided only three examples of excluded advertisements—**the policy of exclusion has been exercised in a manner consistent with the policy statement.**
>
> * * * * *
>
> SMART [] has completely banned political advertising, showing its intent to act as a commercial proprietor and to maintain its advertising space for purposes that indicate that the space is a nonpublic forum.
>
> The fact that SMART allowed the atheist advertisement does not, as AFDI contends, demonstrate that the forum was open to political advertisements. As the First Circuit has noted, "[o]ne or more instances of erratic enforcement of a policy does not itself defeat the government's intent not to create a public forum." *Ridley v Mass. Bay Transp. Auth.* 390 F.3d 65 78 (1st Cir 2004). Although SMART's practice of excluding advertisements is not as extensively documented as that in *Ridley*—there the transit authority had excluded seventeen advertisements—the reasoning is no less persuasive. Because SMART's policy and practice demonstrate an intent to create a nonpublic forum, one purported aberration would not vitiate that intent. In any event, the atheist advertisement could reasonably been allowed by SMART as consistent with SMART's policy. The advertisement could reasonably have been viewed as nonpolitical, as explained below.

Amer. Freedom Def. Init., at 890, 891-92 (emphasis added). As this Court previously found, and as the Sixth Circuit held, SMART has created a non-public forum with respect to its advertising space.

b. To restrict speech in a non-public forum, SMART needs only a reasonable basis for its policy and any restrictions that are supported by a rational basis must be upheld.

In a non-public forum, a rational basis test is applied to any content restrictions. Speech regulation in a non-public forum must be "reasonable in light of the purposes served by the forum." *Rosenberger v. Rector and Visitors of University of Virginia*, 115 S Ct 2510, 2517 (1995); see also*, Lamb's Chapel v. Center Moriches Union School Dist.*, 508 US 384, 392-93 (1993); *Cornelius*, 473 US at 806; *Perry*, 460 US at 49.

As noted before, SMART's principle function is to provide transportation throughout metropolitan Detroit to bus passengers. Thus, SMART's decision to deny this anti-Sharia ad requires SMART to merely show a reasonable basis between the restriction and purpose of the property.

Given the nature of transit in general and the non-public forum established, SMART's content policy is both reasonable and constitutional. The U.S. Supreme Court, in *Packer Corp. v Utah*, 285 US 105 (1932), has stated that restricted-advertising policies are reasonable because:

> Advertisements of this sort are constantly before the eyes of observers on the streets and in streetcars to be seen without the exercise of choice or volition on their part. Other forms of advertising are ordinarily seen as a matter of choice on the part of the observer. The young people as well as the adults have the message of the billboard thrust upon them by all the arts and devices that skill can produce. In the case of newspapers and magazines, there must be some seeking by the one who is to see and read the advertisement. The radio can be

> turned off, but not so the billboard or streetcar placard. These distinctions clearly place this kind of advertisement in a position to be classified so that regulations or prohibitions may be imposed upon all within the class.

Id., at 110. The U.S. Supreme Court has further stated that "the reasonableness of the Government's restriction [on speech in a non-public forum] must be assessed in light of the purpose of the forum and all the surrounding circumstances." *Cornelius*, 473 US at 809; see also, *Amer. Freedom Def. Init.*, at 892.

Section 5.07(B), SMART's content policy, was promulgated "in order to minimize chances of abuse, the appearance of favoritism, and the risk of imposing upon a captive audience." (**Exhibit A**). The Supreme Court has determined these goals to be reasonable in light of the purposes served by the forum. *Lehman*, at 303. By prohibiting political advertising, and advertising likely to hold persons up to ridicule or scorn, SMART furthers these goals, as well as its overall goal of providing public transportation services without jeopardizing fares or advertising as revenue sources. Courts have recognized the protection of a revenue source as a reasonable goal. *Christ's Bride Ministries, Inc. v SEPTA*, 148 F 3d 242 (1998) at 255. In this very case, the Sixth Circuit stated:

> The second part of the inquiry—the relationship between the restrictions and the purpose of the forum—also weighs in favor of finding that SMART created a nonpublic forum. SMART's advertisements are intended to boost revenue for the transit authority. SMART has stated that its policy of advertisement restrictions is intended to "minimize chance of abuse, the appearance of favoritism, and the risk of imposing upon a captive audience." Allowing the

> discussion of politics would likely decrease SMART's revenue. For example, if a fast food restaurant sold advertising space on the side of its store to a neo-Nazi political group for a campaign advertisement, the restaurant would be likely to lose business. Similarly, SMART's ridership likely would diminish were SMART to allow political advertisements. **The reason for the restrictions ties directly to the purpose of the forum—raising revenue—and therefore indicates that SMART wanted to establish a nonpublic forum** instead of opening the forum to the public. In short, though some municipal bus systems permit wide-ranging political advertisements, other bus systems need not.

Amer. Freedom Def. Init., at 892 (emphasis added).

SMART has clearly demonstrated a rational basis for its content policy, and demonstrated that it is constitutional.

II. Plaintiffs' speech, as political and/or scornful speech, was permissibly restricted in SMART's non-public advertising forum.

a. Political Speech.

SMART's content policy, as stated before, restricts, and indeed, bars, political messages and/or messages that are defamatory or "likely to hold up to scorn or ridicule any person or group of persons." To the extent that SMART has created a non-public forum, and to the extent it had a rational basis for doing so, Plaintiffs' message is restricted from appearing on the buses pursuant to the policy.

One of the bases that Defendant, SMART, relied upon to bar Plaintiffs advertisement was pursuant to Section 5.07(B)(1), restricting "political" advertising. For the Court's convenience, the prohibition is set forth again:

> In order to minimize chances of abuse, the appearance of favoritism, and the risk of imposing upon a captive audience, Offeror shall not allow the following content:
>
> 1. ***Political or political campaign advertising.***

(Emphasis added). SMART not only bars political campaign advertising, which the parties agree would be prohibited, but "political" advertising as well. SMART includes both categories because they are addressed differently under the policy. Because the language includes both, the word "political" itself must mean something more than campaign advertising, or the subparagraph could simply read "political campaign advertising." See, e.g., *Laurel Woods Apartments v Roumayah*, 274 Mich App 631 (2007) ("A court must give effect to every word, phrase, and clause in a contract and avoid an interpretation that would render any part of the contract surplusage or nugatory.").

Plaintiff's advertisement, as stated above, was reviewed not only for the content within its four corners, but also the content contained in the website referred to. This practice has been applied each of the four occasions that an advertisement has been reviewed under the policy. Courts have sanctioned the review of referred-to websites when reviewing the message against the purported policy. *Ridley*, 390 F.3d at 74; *Amer. Freedom Def. Init.*, at 894. The review of Plaintiff's advertisement incorporated a review of *Refuge*FromIslam.com.

SMART's 30(b)(6) witness, Anthony Chubb, when providing testimony in this matter on behalf of the Authority provided a working understanding of how SMART determines if a particular advertisement or the referred-to website represents a political message:

> Q. What is the standard or definition that SMART employs to determine whether an advertisement is political under its advertising guidelines?
>
> A. I would just—political is any—is any—I mean in the context of the advertising policy, **is any advocacy of a position of any politicized issue**.
>
> Q. How do you determine whether an issue has been politicized?
>
> A. I would say—I would say—within society if an issue—if there are—**if society is fractured on an issue and factions of society have taken up positions**.

(**Exhibit N,** Deposition of SMART 30(b)(6) witness, May 21, 2013, at p. 41) (emphasis added). Though this definition is not set forth in the contract itself, it is a reasonable definition that has been consistently and adequately applied in the four cases where advertisements were reviewed for this purpose.

In coming to its conclusion granting the preliminary injunction, this Court initially appears to have relied upon SMART's prior decision to allow the "atheist advertisement" that was previously determined to be a religious message under the guidelines and pursuant to the same type of review afforded the Plaintiffs' message. Religious messages are allowed by the policy whereas political messages

are not. As the Court is aware, the atheist advertisement was addressed directly by the Sixth Circuit Court of Appeals that reversed this Court's preliminary injunction. The Court specifically held that SMART was reasonable in its determination that the atheist advertisement was a religious message, and not political:

> AFDI contends that SMART's actions could not have been viewpoint neutral [discussed below] because SMART allowed the atheist advertisement but disallowed the fatwa advertisement. AFDI contends that because both advertisements discuss religion, SMART must have discriminated against the fatwa advertisement based on viewpoint. The analogy, however, does not hold. The atheist advertisement could be viewed as a general outreach to people who share the Detroit Coalition's beliefs, without setting out any position that could result in political action.

Amer. Freedom Def. Init., at 895. This is precisely the decision that SMART made, and therefore allowed the atheist advertisement. As a general outreach message, SMART did not determine that the content of the ad was political because it was not such that a fractured society had taken up opposite positions. The issue presented was not whether atheism was good or bad, but rather, the advertisement sought like-minded persons to assemble and join the advertised group. A concurrent review of the website, DetroitCOR.org, did not change the analysis.

SMART's determination regarding the political nature of the Pinckney Pro-Life advertisement was different, but also fits within the definition presented by SMART. The advertisement was brought by a pro-life organization named Project

LIFEBOARD and spoke to the issue of abortion in the context of a religious message. SMART, reviewing the advertisement and the referred-to website, determined that it was a religious, pro-life organization that advocated heavily against abortion, and that the organization focused on overturning *Roe v Wade* and *Doe v Bolton*, through protests and the political process. SMART determined, rightly, that the issue of "abortion" was itself a political issue and rejected the advertisement.

Courts have agreed with SMART that the issue of abortion is a "political" issue. For instance, in the context of the State of New York's refusal to issue license plates that read "Choose Life," the Northern District of New York held:

> Contrary to the blatantly religious symbols such as a crucifix or menorah, or to obviously religious messages, such as well-known passages cited from the Bible or Koran, the above described proposed picture plate with the phrase "Choose Life," while possibly evoking a pro-life versus pro-choice abortion debate, **is more aptly described as political, rather than religious, speech.** Significantly, the judicial opinions relied on by Judge Treece for his conclusion that "Choose Life" is "a pro-life affirming tenet, [which] in material respects, transmits a religious message[,]" MDO at 30, **more accurately support the premise that the phrase is associated with the abortion debate, which is political, not religious, in nature.**

Children First Foundation, Inc. v Martinez, 2007 WL 4618524, at *11 (N.D.N.Y. 2007) (emphasis added). See also, *Christian Coalition of Alabama v Cole*, 355 F.3d 1288 (11th Cir. 2004) ("The questionnaire [to all Alabama judicial candidates] originally consisted of thirty questions covering a number of social and political

issues such as abortion, gun control, and the role of a judge's religious beliefs in decision making."); *Wisconsin Right to Life, Inc. v Paradise*, 138 F.3d 1183 (7th Cir. 1998) ("**[A]lmost everything related to abortion has political implications**, and it is a challenge for any organization on any side of the abortion debate to carry out its principal activities without saying things about candidates for public office.") (emphasis added); *Eubanks v Schmidt*, 126 F. Supp. 2d 451 (W.D. Ky 2000) ("For ardent supporters on either side, the issue of abortion is a political, cultural, moral and legal war, whose various battles and scrimmages are no less a part of the war.").

Given the political nature of the abortion debate, and the obvious political nature of the referred-to website, SMART appropriately determined that the Pinckney Pro-Life advertisement was barred under the policy, even though the advertisement did not directly relate to government action or political campaigns.

Application of the policy to Plaintiff's "fatwa advertisement," as the Sixth Circuit referred to it, results in a similar conclusion. The Plaintiff's advertisement is political.

In the first right, the parties agree that Plaintiffs speech is political. Plaintiffs' own complaint specifically denotes its message and advertisement as political:

> 1. This case seeks to protect and vindicate fundamental constitutional rights. It is a civil rights action brought under the First

> and Fourteenth Amendments to the United States Constitution and 42 USC §1983 challenge Plaintiffs' restriction on ***Plaintiffs' right to engage in political and religious speech*** in a public forum.
>
> * * * * *
>
> 8. FDI promotes its ***political objectives by, inter alia, sponsoring anti-Jihad bus and billboard campaigns, which includes seeking advertising space on SMART vehicles***.
>
> 9. Plaintiff Pamela Geller is the Executive Director of FDI ***and she engages in political and religious speech through FDI's activities, including FDI's anti-Jihad bus and billboard campaigns***.
>
> * * * * *
>
> 21. On or about May 24, 2010, Defendants denied Plaintiffs' request and refused to display Plaintiffs' advertisement. Defendant[s] denied Plaintiffs' advertisement, and thus denied Plaintiffs access to a public forum ***to express their political and religious message***, based on the content and viewpoint expressed by Plaintiffs' message.
>
> * * * * *
>
> 23. By reason of the aforementioned Free Speech Restriction created, adopted, and enforced under color of state law, Plaintiffs have deprived Plaintiffs of their right ***to engage in political and religious speech*** in a public forum. . . .

(**Exhibit I**) (emphasis added). Factual assertions in pleadings and pretrial orders are considered judicial admissions conclusively binding on the party who made them. *Barnes v Owens-Corning Fiberglas Corp.*, 201 F3d 815 (6th Cir. 2000). See also, 14 ALR 65-72 and cases cited therein; *Pennsylvania R. Co. v Girard*, 210 F2d 437, 440 (6th Cir. 1954). The Sixth Circuit, in this case, has held Plaintiffs to that admission:

> The complaint explains that AFDI "promotes its political objectives by, *inter alia*, sponsoring anti-jihad bus and billboard campaigns, which includes seeking advertising space on SMART vehicles." *Id.* ¶

> 8. By its own admission, therefore, AFDI sought to place advertisements on the SMART vehicle to "promote() its political objectives. Moreover, by denying the placement of the fatwa advertisement, AFDI alleges that SMART "denied Plaintiffs' advertisement, and thus denied Plaintiffs' access to a public forum to express their political and religious message. *Id.* ¶ 21. AFDI understood its own advertisement to contain a political message; therefore, it would be reasonable for SMART to read the same advertisement and reach the same conclusion.

Amer. Freedom Def. Init., at 895.

Early in this action, Plaintiffs attempted to re-characterize their message not as religious and not as political, but rather as a "religious freedom" message. The attempt to do so appears to have been due to the fact that the message is admittedly not entirely religious, as the atheist advertisement was, while the Plaintiffs wanted to deny it was a political message covered by the policy. Plaintiffs have abandoned that distinction.

Plaintiff, Geller, in her deposition of May 9, 2013, has now backed away from her original characterization previously made on the record. She now testifies that her message is <u>not</u> a "religious freedom" message, but rather just a religious message. (**Exhibit O**, Deposition of Pamela Geller, May 9, 2013, at pp. 178, 180). However, even a cursory review of Plaintiff's organization and message demonstrates that the advertisement is political, no matter what Ms. Geller asserts at this point.

The Plaintiff, AFDI, is a political organization. Its Articles of Agreement, on record with the State of New Hampshire Corporate Division, establishes the purpose of the organization:

> The object for which this corporation is established is:
>
> An educational organization designed to defend Constitutional principles against academic, cultural, sociological, and other attacks upon them, and to exposing [sic] media bias in reporting on such attacks.

(**Exhibit P**). Ms. Geller recognizes that both AFDI and its sister organization, SIOA (Stop the Islamization Of America), are political organizations, by describing them as "human rights organization[s] dedicated to freedom of speech, freedom of conscience, freedom of religion, freedom from religion, and individual rights." (**Exhibit O**, Deposition, at p. 16). She also testified that she focuses on but one religion: Islam. (**Exhibit O**, Deposition at p. 17).

She then denies this particular advertisement is political notwithstanding the admissions in her Complaint and her further admission that it addresses the issue of Sharia Law in America and fatwas. This was immediately after she had just previously testified that the same issues have "political aspects" in response to questions about a decidedly similar ad. (**Exhibit O**, Deposition, at pp. 168-169; **Exhibit Q**).

The Sixth Circuit specifically recognized that Plaintiffs' message, and indeed the issue of Sharia Law in America, is a political issue:

> Based on recent court cases, legislative actions, and political speeches, it was reasonable for SMART to conclude that the content of AFDI's advertisement—the purported threat of violence against nonconforming Muslims in America—is, in America today, decidedly political. **The very idea of having Islamic law apply in the United States has become one of political controversy.** In *Awad v Ziriax*, 670 F3d 1111 (10th Cir. 2012), the court struck down a voter-approved amendment to the Oklahoma Constitution that would have forbidden courts from considering or using Sharia law. The Oklahoma legislature put the amendment on the ballot, and over seventy percent of voters approved. *Id.* At 1118. Legislatures in our own circuit have similarly addressed Sharia law: a bill proposed last year in the Tennessee Senate would have made any adherence to Sharia law a felony, punishable by up to fifteen years in prison. S.B. 1028, 107th Gen. Assemb., Reg. Sess. (TN 2011). The politicization of the issue is not confined to state legislatures. During the 2012 presidential primary, former candidate Newt Gingrich suggested a federal ban on Sharia law, stating, "I believe Sharia{} is a mortal threat to the survival of freedom in the United States and in the world as we know it." Scott Shane, *In Islamic Law, Gingrich Sees a Mortal Threat to U.S.*, *N.Y. Times*, Dec. 21, 2011, at A22 [**Exhibit R**]. **The existence of these positions in the political sphere—whether on ballots, in state legislatures, or in presidential primaries—could lead a reasonable person to conclude that the enforcement of Islamic law in America has become a political issue.**

Amer. Freedom Def. Init., at 895 (emphasis added).

It is irrelevant whether the message is <u>both</u> political and religious because if it is political speech at all, it is prohibited by SMART's guidelines:

> Moreover, when SMART had been previously presented with advertisements that were both religious and political, it rejected them. The Pinckney Pro-Life organization approached SMART with a proposed advertisement that depicted Jesus and stated, "Hurting after Abortion? Jesus, I trust you." Following the same procedure applied to the fatwa advertisement, CBS referred the matter to SMART for a final determination. **SMART reasonably determined that the**

> **advertisement contained political speech regarding abortion, even though the advertisement also contained a religious message.**

Amer. Freedom Def. Init., at 896 (emphasis added). Through this paragraph, the Sixth Circuit put its imprimatur on SMART's ability to restrict even partly-political messages on its non-public-forum buses. SMART's actions in this regard were neither arbitrary nor capricious: By simple application of the policy barring political advertisements, Plaintiffs' advertisements are not permitted.

Once the political nature of Plaintiffs' message is understood, this case is directly on point with the U.S. Supreme Court's decision in *Lehman, supra*. The U.S. Supreme Court, after finding a non-public forum, noted that the bus system could constitutionally limit political speech:

> Here, the city has decided that 'purveyors of goods and services saleable in commerce may purchase advertising space on an equal basis, whether they be house builders or butchers.' 34 Ohio St.2d at 146, 296 N.E.2d at 685. This decision is little different from deciding to impose a 10-, 25-, or 35-cent fare, or from changing schedules or the location of bus stops. [Citation omitted]. Revenue earned from long-term commercial advertising could be jeopardized by a requirement that short-term candidacy or issue-oriented advertisements be displayed on car cards. Users would be subjected to the blare of political propaganda. There could be lurking doubts about favoritism, and sticky administrative problems might arise in parceling out limited space to eager politicians. In these circumstances, the managerial decision to limit car card space to innocuous and less controversial commercial and service-oriented advertising does not rise to the dignity of a First Amendment violation**.** Were we to hold to the contrary, display cases in public hospitals, libraries, office buildings, military compounds, and other public facilities immediately would become Hyde Parks open to every

> would-be pamphleteer and politician. This the Constitution does not require.
>
> No First Amendment forum is here to be found. The city consciously has limited access to its transit system advertising space in order to minimize chances of abuse, the appearance of favoritism, and the risk of imposing on a captive audience. **These are reasonable legislative objectives advanced by the city in a proprietary capacity. In these circumstances, there is no First Amendment violation.**

Lehman, 418 U.S. at 303-304 (emphasis added).

SMART may constitutionally limit political messages on its buses, as recognized by the U.S. Supreme Court. Where the parties agree that the message is political, and where the message content (even if characterized as "religious") is quintessentially political, SMART may constitutionally bar its posting. There is no First Amendment violation.

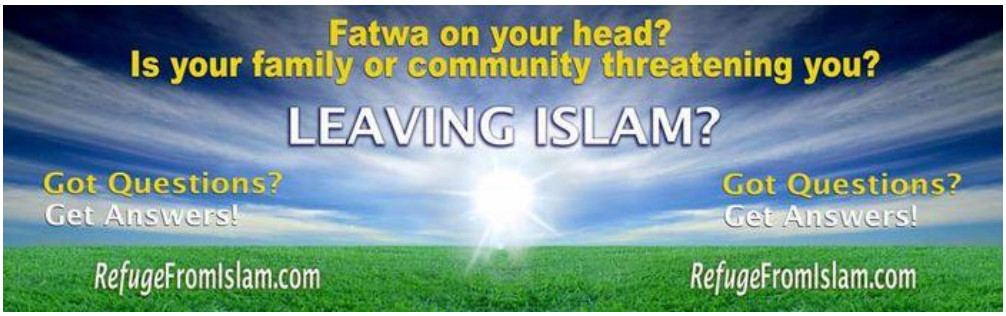
b. Speech that is Likely to Hold a Group of Persons up to Scorn or Ridicule.

Plaintiff's advertising was also barred by SMART's policy against scornful or defamatory advertising. This is a separate and distinct limitation of types of advertising allowed on SMART buses. A determination under this clause is not dependent and not reliant on whether the particular advertisement is "political" or otherwise barred under a different provision. It is a determination in its own right.

Again, for this Court's convenience, the applicable provision of the policy is as follows:

4. Advertising that is clearly defamatory or likely to hold up to scorn or ridicule any person or group of persons.

(Exhibit A, Contract, Section 5.07(B)(4)). The proposed advertisement submitted by Plaintiffs in this matter follows:



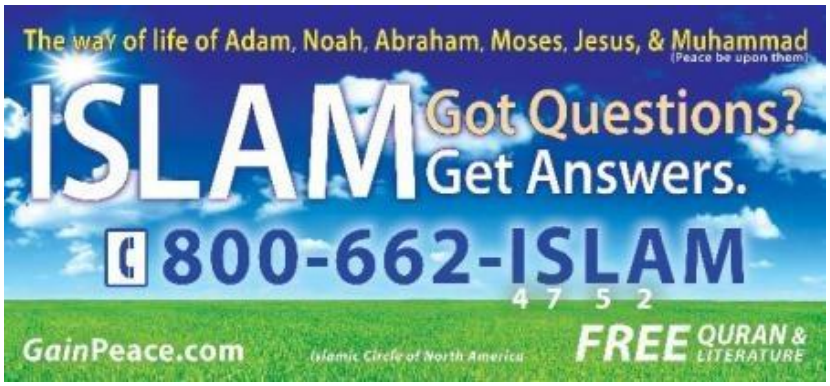
There are some obvious aspects of this advertisement which are "likely to hold up to scorn or ridicule [adherents to Islam]." For instance, the phrase "Is your family or community threatening you?" clearly proposes **that adherents to Islam are a violent or threatening people**, and that in fact this violence and threatening behavior occurs ***within families***. Also, the name of the website referred to in the ad, *Refuge*FromIslam.*com*, unabashedly states that "refuge" is required when leaving Islam. "Refuge" is defined as:

> *n.* **Shelter or protection from danger, distress or difficulty** || a place offering this || a person, thing, or course of action offering protection, *tears were her usual refuge;* **to take refuge** to put oneself in a place or state that affords protection [F.]

(WEBSTER'S DICTIONARY OF THE ENGLISH LANGUAGE, LEXICON PUBLICATIONS, INC., 1972, revised and updated 1987) (emphasis added). Plaintiffs' statement holds the entire Muslim faith up to scorn and ridicule by stating affirmatively that

those who are not adherents require protection or sanctuary as from danger, distress or difficulty.

The advertisement's very formatting was intended to parody and denigrate the format of an already-existing message proposed by the Islamic Circle of North America that appeared on several systems around the country. Pamela Geller herself described the below ad as "the impetus" for her ad. (**Exhibit O**, Deposition, at p. 171). The original message parodied follows:



It is important to note that this ICNA advertisement was never submitted to SMART and never appeared on any of its buses. SMART was never called upon to determine whether the ICNA advertisement was in compliance with its policy. Plaintiffs cannot claim any inconsistency in this regard.

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

III. Defendants did not engage in viewpoint discrimination

Neither decision to preclude Plaintiffs' advertisement was based on the viewpoint espoused by the Plaintiffs in their advertisement.

Courts have permitted authorities such as SMART to limit disparaging and scornful advertisements, even while allowing speech on the particular topic, without running afoul of being viewpoint neutral. In *Ridley*, *supra*, the First Circuit was faced with a regulation that was very much analogous to SMART's policy, in that it restricted any "advertisement that contains material that demeans or disparages an individual or group of individuals." *Id.*, at 75. In analyzing whether this regulation resulted in viewpoint discrimination, the Court said:

> [W]e conclude that the MBTA has not engaged in viewpoint discrimination in *Ridley*, either in the facial validity of its guidelines or the guidelines as applied to Ridley's advertisement. **The guidelines prohibiting demeaning or disparaging ads are themselves viewpoint neutral**. That is also true of the application of the guidelines to Ridley's ad on the facts here.
>
> As to the guideline itself, we note that the 2003 revisions of the guidelines continued to prohibit demeaning or disparaging ads, but did so in more general terms, not tied only to certain categories such as race, religion, and gender. Most likely that revision was made in light of *R.A.V.* [*v City of St. Paul, Minnesota*, 505 U.S. 377, 392; 120 L.Ed.2d 305; 112 S. Ct. 2538 (1992)], and later case law. The current regulation simply prohibits the use of advertisements that "demean[] or disparage[] an individual or group of individuals" without listing any particular protected groups. In this context, the guideline is just a ground rule: **there is no viewpoint discrimination in the guideline because the state is not attempting to give one group an advantage over another in the marketplace of ideas.** [Citation omitted].

> Similarly, under the MBTA's current guidelines, all advertisers on all sides of all questions are allowed to positively promote their own perspective and even to criticize other positions so long as they do not use demeaning speech in their attacks. No advertiser can use demeaning speech: atheists cannot use disparaging language to describe the beliefs of Christians, nor can Christians use disparaging language to describe the beliefs of atheists. Both sides, however, can use positive language to describe their own organizations, beliefs, and values.
>
> **Some kinds of content (demeaning and disparaging remarks) are being disfavored, but no viewpoint is being preferred over another.**

Ridley, at pp. 90-91 (emphasis added). SMART's scorn and ridicule policy meets this test: No person's speech is restricted based upon the viewpoint, but no speaker may use language that holds a person or group of persons up to scorn or ridicule. All speakers are treated equally, and therefore the provision is viewpoint neutral. SMART has established simple ground rules: No speaker may attack another with scornful or ridiculing speech. No participant or group obtains an advantage over another, regardless of which side of the debate they are on.

SMART has also been viewpoint neutral as to its political ads policy. As the Court is aware, SMART has previously been approached regarding political advertisements with incidental mention of religion, and also denied those advertisements. The Pinckney Pro-Life organization approached CBS Outdoor with a proposed advertisement that depicted Jesus Christ and stated, "Hurting after Abortion? Jesus, I trust in you." (**Exhibit B**). Following the same contract

procedure that was applied to the instant advertisement, CBS forwarded the proposed advertisement to SMART for a final determination as to whether it violated the content policy. After an appropriate review by SMART staff, the advertisement was rejected as prohibited political advertising.

The Sixth Circuit reviewed SMART's history in reviewing potentially political advertising, and found its policy to be viewpoint neutral both facially and as applied. In this regard, the Court stated:

> Not only was the designation of the advertisement reasonable, it was also viewpoint neutral. As noted above, the AFDI advertisement expresses a political message aimed at curbing the perceived threat of Islamic law enforcement in the United States. The opposing viewpoint to AFDI's position is not that Islam is good—as AFDI appeared to suggest at oral argument—but rather either that Islamic law should be enforced against Muslims in the United States or that concerns about the enforcement of Islamic law in America are overblown. Either of these opposing views would be comparably political. **The banned content here is the debate about enforcement of Islamic law in the United States, regardless of the viewpoint of the participants.** Either side of the debate would reasonably be labeled political and the content could be restricted under SMART's policy.
>
> AFDI contends that SMART's actions could not have been viewpoint neutral because SMART allowed the atheist advertisement but disallowed the fatwa advertisement. AFDI contends that because both advertisements discuss religion, SMART must have discriminated against the fatwa advertisement based on viewpoint. The analogy, however, does not hold. The atheist advertisement could be viewed as a general outreach to people who share the Detroit Coalition's beliefs, without setting out any position that could result in political action. The fatwa advertisement, however, addresses a specific issue that has been politicized. Two hypothetical changes to the advertisements demonstrate the difference. Had the atheist advertisement read, "Being forced to say the Pledge of Allegiance even though you don't

> believe in God? You are not alone. DetroitCOR.org," the advertisement would likely be political. The hypothetical advertisement would address an issue that has been politicized—requiring atheists to recite "under God," *see, e.g.*, *Myers v Loudon Cnty Pub. Schools*, 418 F.3d 395 (4th Cir. 2005)—and the advertisement would presumably not be permitted under SMART's policies. Similarly, had AFDI changed its advertisement to read, without more: "Thinking of Leaving Islam? Got Questions? Get Answers," SMART presumably could not ban the advertisement. These changes reflect differences in the two actual advertisements that a reasonable administrator, applying an objective standard, could identify.

Amer. Freedom Def. Init., at 895-96 (emphasis added).

SMART's further viewpoint neutrality is demonstrated by its determination on Plaintiffs' subsequent advertisement. After the Sixth Circuit ruled in this matter, Plaintiffs submitted the following advertisement for posting on SMART buses:

It should be clear to the Court that this ad, in its content and formatting, was intended to mirror and/or mock the "atheist advertisement previously referred to above.

The advertisement was reviewed against Section 5.07(B), just as Plaintiffs' original advertisement was. As part of that review, the website

TheTruthAboutMuhammad.com was also reviewed in detail. The website refers to Muhammad as "The Pedophile Prophet" and "Misogynist," and criticizes any adherent who follows Muhammad's example or teaching. (**Exhibit S**, *TheTruthAboutMuhammad.com*, printed 8/09/2013, from *http://freedomdefense.typepad.com/fdi/the-truth-about-muhammad.html*). SMART refused the advertisement because it held Muslims and adherents to Islam, and particularly Muhammad, up to scorn and ridicule.

Plaintiffs were specifically informed that it was the reference to the website that resulted in refusal, and in response, Plaintiffs offered the advertisement without the website reference. SMART reviewed the modified advertisement under its content policy and accepted it.[1], [2] Once again, Plaintiffs' viewpoint was never considered during the process of reviewing this new advertisement.

Plaintiffs have failed to develop a genuine issue of material fact that SMART has posted any advertisement of a political or scornful nature. It is not enough for Plaintiffs to say there was discrimination as to the content of the

[1] Plaintiffs have not re-submitted modified artwork or entered into a contract for the posting of this subsequent ad, and it has therefore never run.

[2] Although Ms. Geller testified that she intends at some point in the future to post the advertisement, her real motivation for submitting it has been revealed to be as a litigation trap. In this regard, she states "that [this] latest ad attempt was an effort to point out SMART's 'hypocrisy,' as the two parties are slated to head back to court." Detroit transit accepts "Don't believe in God?" ads, rejects "Don't believe in Muhammad?" ads, viewed 8/14/2013 at *http://nocompulsion.com/detroit-transit-accepts-dont-believe-in-god-ads-rejects-dont-believe-in-muhammad-ads/* .

message, but instead, there must be evidence of the discrimination. Nothing has been developed in discovery and nothing has been provided by Plaintiffs in this regard.

CONCLUSION AND RELIEF SOUGHT

AFDI's advertisement was in violation of several restrictions contained in SMART's constitutionally-sound content policy and, as political speech and speech that is likely to hold Muslims and adherents to Islam up to scorn or ridicule, it need not be accepted by SMART for display on or in its buses, because its buses are non-public forums and are not open for unregulated debate.

SMART has consistently and uniformly applied its policy throughout the existence of the advertising policy and its actions were neither arbitrary nor capricious. The Sixth Circuit recognized that SMART was reasonable in its determinations on this factual record.

SMART's decisions in this regard were Constitutional and there has been no First Amendment violation. As such, summary judgment is appropriate in favor of these Defendants.

VANDEVEER GARZIA

By: __/s/ Christian E. Hildebrandt_____
JOHN J. LYNCH P16887
CHRISTIAN E. HILDEBRANDT P46989
Attorneys for Plaintiffs
1450 W. Long Lake Rd., Ste. 100
Troy, MI 48098-6330
(248) 312-2800

By: ___/s/ Avery E. Gordon_____
SUBURBAN MOBILITY AUTHORITY FOR REGIONAL TRANSPORTATION
Avery E. Gordon (P41194)
Anthony Chubb (P72608)
Co-Counsel for Plaintiffs
535 Griswold Street, Suite 600
Detroit, MI 48226

Dated: August 15, 2013

CERTIFICATE OF SERVICE

I hereby certify that on August 15, 2013, I electronically filed the attached papers, Defendants' Motion for Summary Judgment and Brief in Support, with the Clerk of the Court using the Court's ECF system which will send notification of such filing to the following:

THOMAS MORE LAW CENTER
Robert J. Muise (P62849)
Richard Thompson (P21410)
Co-Counsel for Plaintiffs
24 Frank Lloyd Wright Drive
P.O. Box 393
Ann Arbor, MI 48106
rmuise@thomasmore.org

SUBURBAN MOBILITY AUTHORITY FOR REGIONAL TRANSPORTATION
Avery E. Gordon (P41194)
Anthony Chubb (P72608)
Co-Counsel for Plaintiffs
535 Griswold Street, Suite 600
Detroit, MI 48226
agordon@smartbus.org
achubb@smartbus.org

LAW OFFICES OF DAVID YERUSHALMI
David Yerushalmi, Esq.
Co-Counsel for Plaintiffs
P.O. Box 6358
Chandler, AZ 85246
David.yerushalmi@verizon.net

Erin Elizabeth Mersino (P70886)
Co-Counsel for Plaintiffs
24 Frank Lloyd Wright Drive
P.O. Box 393
Ann Arbor, MI 48106
(734) 827-2001
emersino@thomasmore.org

I declare under penalty of perjury that the foregoing is true and correct.

VANDEVEER GARZIA

By: /s/ Christian E. Hildebrandt
JOHN J. LYNCH P16887
CHRISTIAN E. HILDEBRANDT P46989
Attorneys for Plaintiffs
1450 W. Long Lake Rd., Ste. 100
Troy, MI 48098-6330
(248) 312-2800

Dated: August 15, 2013