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

AMERICAN FREEDOM DEFENSE INITIATIVE; *et al.*,

Plaintiffs,

v.

SUBURBAN MOBILITY AUTHORITY for REGIONAL TRANSPORTATION ("SMART"), *et al.*,

Defendants.

No. 2:10-cv-12134-DPH-MJH

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Hon. Denise Page Hood

Magistrate Judge Hluchaniuk

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Plaintiffs American Freedom Defense Initiative, Pamela Geller, and Robert Spencer (collectively referred to as "Plaintiffs"), by and through their undersigned counsel, hereby move this court pursuant to Rule 56 of the Federal Rules of Civil Procedure for summary judgment because there is no genuine issue of material fact and they are entitled to judgment on all claims as a matter of law.

In support of this motion, Plaintiffs rely upon the pleadings and papers of record, as well as their brief accompanying this motion and the declarations and exhibits attached thereto.

Pursuant to E.D. Mich. LR 7.1, on August 12, 2013, a conference was held between the attorneys to be heard on the motion in which Plaintiffs' counsel explained the nature of the motion and its legal basis and requested but did not obtain concurrence in the relief sought.

For the reasons set forth more fully in the accompanying brief, Plaintiffs hereby request that this court grant this motion and enter judgment in their favor on all claims as a matter of law.

WHEREFORE, Plaintiffs hereby request that the court grant this motion.

Respectfully submitted,

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No. 2:10-cv-12134-DPH-MJH

PLAINTIFFS' BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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ISSUES PRESENTED

I. Whether Defendants created a public forum for the expression of a wide variety of commercial, noncommercial, public-service, and public-issue advertisements, including advertisements on controversial subjects, such that their content-based restriction on Plaintiffs' message violates the First and Fourteenth Amendments.

II. Whether, regardless of the nature of the forum, Defendants' content-based advertising guidelines facially and as applied to Plaintiffs' advertisement provide no objective guide for distinguishing between permissible and impermissible advertisements in a non-arbitrary, viewpoint-neutral fashion as required by the U.S. Constitution.

III. Whether Defendants' advertising guidelines facially and as applied to Plaintiffs' advertisement are viewpoint based in violation of the First and Fourteenth Amendments.

IV. Whether Defendants' advertising guidelines facially and as applied to Plaintiffs' advertisement violate the equal protection guarantee of the Fourteenth Amendment.

CONTROLLING AND MOST APPROPRIATE AUTHORITY

United Food & Commercial Workers Union, Local 1099 v. Sw. Ohio Reg'l Transit Auth., 163 F.3d 341 (6th Cir. 1998)

Police Dep't of the City of Chicago v. Mosley, 408 U.S. 92 (1972)

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BRIEF IN SUPPORT OF MOTION

This case challenges Defendants' refusal to display Plaintiffs' "*Leaving Islam*" advertisement on SMART buses pursuant to SMART's content-based advertising guidelines. As the factual record developed through the course of discovery reveals, SMART has created a forum for the expression of a wide variety of commercial, noncommercial, public-service, and public-issue advertisements, including advertisements on exceedingly controversial subjects, such that its content-based restriction on Plaintiffs' message violates the First and Fourteenth Amendments. Additionally, regardless of the nature of the forum, the actual application of the guidelines demonstrates that Defendants employ them in an arbitrary, capricious, and subjective manner such that they provide no objective guide for distinguishing between permissible and impermissible advertisements in a non-arbitrary, viewpoint-neutral fashion as required by the U.S. Constitution.

STANDARD OF REVIEW

A. The Sixth Circuit's Ruling Is Not "Law of the Case."

The Sixth Circuit's reversal of this court's order granting Plaintiffs' request for a preliminary injunction, *see Am. Freedom Def. Initiative v. Suburban Mobility Auth. for Reg'l Transp*., 698 F.3d 885 (6th Cir. 2012), is a preliminary decision that is *not* binding at a trial on the merits or when deciding this motion for summary judgment, and thus does *not* constitute the "law of the case." *Univ. of Tx.*

v. Camenisch, 451 U.S. 390, 395 (1981) ("[T]he findings of fact and conclusions of law made by a court granting a preliminary injunction are not binding at trial on the merits."); *Wilcox v. United States*, 888 F.2d 1111, 1114 (6th Cir. 1989) (holding that the trial court's denial of a preliminary injunction did not establish the law of the case with respect to the court's subsequent summary judgment determination); *Tech. Publ'g Co. v. Lebhar-Friedman, Inc.*, 729 F.2d 1136, 1139 (7th Cir. 1984) ("A factual finding made in connection with a preliminary injunction is not binding" on a motion for summary judgment); *City of Angoon v. Hodel*, 803 F.2d 1016, 1024 n.4 (9th Cir. 1986) (determinations corresponding to a preliminary injunction do not constitute law of the case); *see also Satawa v. Bd. of Cnty. Rd. Comm'rs*, 788 F. Supp. 2d 579, 593-94 (E.D. Mich. 2011), *rev'd in part on other grounds*, 689 F.3d 506 (6th Cir. 2012) ("Defendants' contention that the findings of fact and conclusions of law made by the Court in denying Plaintiff's Motion for a Preliminary Injunction are 'fatal' to Plaintiff's Free Speech and Establishment Clause claims lacks legal merit. The Court, therefore, will proceed to consider de novo the pertinent facts—as more fully developed through discovery—and the applicable law in deciding the instant summary judgment motions.").

As demonstrated further below, the Sixth Circuit's ruling was based on a woefully incomplete factual record. Indeed, on its face, the ruling lacked the

benefit of the factual record developed during the course of discovery—that is, while Defendants contend that they have a constitutionally valid "political" speech restriction, the undisputed facts demonstrate beyond cavil that there is no such coherent "guideline." Rather, this restriction is in effect and as applied an arbitrary, capricious, and subjective *ad hoc* decision—and to the extent it exists, it is not based on what the Sixth Circuit understood it to be—an objective, rationally applied distinction between impermissible "political" content versus permissible religious content. Instead, Defendants' speech restriction, as they define it, is based on whether the subject matter of the advertisement is ***contentious***. But, as demonstrated in the record, even that restriction is not applied coherently because it is not just contentiousness; it is any viewpoint-based contentiousness that Defendants do not like.

B. Plaintiffs Are Entitled to Summary Judgment.

"The court *shall* grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a) (emphasis added).

In short, the "[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed to secure the just, speedy and inexpensive

determination of every action." *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986) (internal quotations omitted).

Thus, consistent with the Federal Rules, the factual record before this court, and the controlling law, Plaintiffs are entitled to summary judgment.

UNDISPUTED MATERIAL FACTS

A. The Parties.

Plaintiff American Freedom Defense Initiative ("AFDI") is a nonprofit organization that is incorporated under the laws of the State of New Hampshire. (Spencer Decl. at ¶ 3 at Ex. 1). AFDI "is a human rights organization dedicated to freedom of speech, freedom of conscience, freedom of religion, freedom from religion, and individual rights." (Geller Dep. at 15-16 at Ex. 7).

Plaintiffs Pamela Geller and Robert Spencer co-founded AFDI. Plaintiff Geller is the Executive Director, and Plaintiff Spencer is the Associate Director. Plaintiffs Geller and Spencer engage in free speech activity through various projects of AFDI. One such project is the posting of advertisements on the advertising space of various government transportation agencies throughout the United States, including SMART, which operates buses in the Detroit, Michigan area. (Spencer Decl. at ¶¶ 2-4 at Ex. 1; Geller Decl. at ¶¶ 2-4 at Ex. 2).

Defendant SMART is a governmental agency. As a governmental agency, SMART is mandated to comply with federal and state laws, including the United

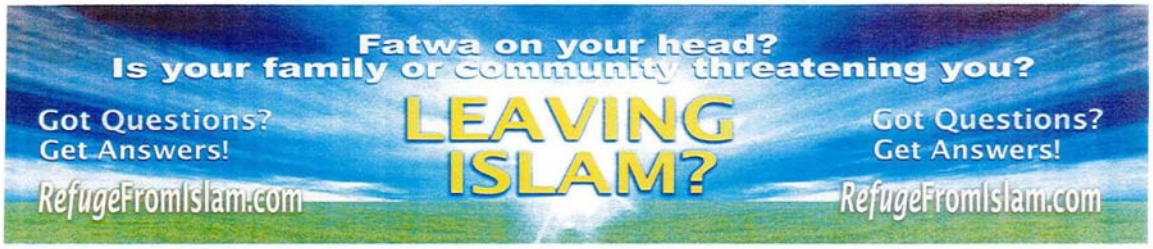
States Constitution. (*See* SMART Dep. at 105 at Ex. 4). As SMART admits, "First Amendment free speech rights require that SMART not censor free speech and because of that, SMART is required to provide equal access to advertising on our vehicles."[1] (SMART Dep. at 105-06 at Ex. 4; Dep. Ex. 6 at Ex. 5).

During all relevant times, Defendant Gibbons was employed by SMART as the Marketing Program Manager in the Marketing Department, (Gibbons Dep. at 11 at Ex. 6), and in that capacity she had decision-making authority to accept or reject proposed advertisements pursuant to SMART's advertising guidelines, (SMART Dep. at 16 at Ex. 4).

During all relevant times, Defendant Hertel was employed by SMART as its General Manager, and in that capacity he had decision-making authority to accept or reject proposed advertisements pursuant to SMART's advertising guidelines. (SMART Dep. at 27-28, 31 at Ex. 4).

B. Plaintiffs' "*Leaving Islam*" Advertisement.

On May 12, 2010, Plaintiffs submitted the below advertisement to SMART:



[1] This statement was added to SMART's website after the atheist advertisement controversy, (Gibbons Dep. at 29-32 at Ex. 6; Gibbons Decl. at ¶ 6 [Doc. No. 12-9]), which is discussed further above, (*see* Muise Decl. at ¶ 10, Ex. B, at Ex. 3).

(Geller Decl. at ¶ 7 at Ex. 2; SMART Dep. at 13-15 at Ex. 4; Dep. Ex. 2 at Ex. 5; Geller Dep. at 169 at Ex. 7; Dep. Ex. SS at Ex. 8). Plaintiffs subsequently entered into a contract through SMART's advertising agent to run the advertisement. (Geller Decl. at ¶ 7 at Ex. 2).

Plaintiffs' "*Leaving Islam*" advertisement is "a call to girls who need help," much like an advertisement for a battered women's shelter for victims of domestic violence. (Geller Dep. at 177 at Ex. 7; Geller Decl. at ¶ 5 at Ex. 2; Spencer Decl. at ¶¶ 6-14 at Ex. 1). In short, it is a public service message that has nothing to do with politics or political campaigns, (Spencer Decl. at ¶¶ 6, 14 at Ex. 1), as those terms are commonly (and commonsensically) understood, (*see* n. 12, *infra*).

Furthermore, it is indisputable that a fatwa is a ***religious*** edict issued by a Muslim cleric addressing a point of Islamic religious law (*see* SMART Dep. at 52 at Ex. 4), and that the penalty for leaving Islam under extant Islamic law is severe, (Spencer Decl. at ¶¶ 9-13 at Ex. 1). The Sixth Circuit recently acknowledged this reality in a case involving a constitutional challenge by a Christian pastor to a restriction on his right to distribute religious literature to Muslims at an Arab festival. *Saieg v. City of Dearborn*, 641 F.3d 727, 732 (6th Cir. 2011) ("Saieg also faces a more basic problem with booth-based evangelism: '[t]he penalty of leaving Islam according to Islamic books is death,' which makes Muslims reluctant to approach a booth that is publicly 'labeled as . . . Christian.'").

On or about May 24, 2010, Defendants denied Plaintiffs' request to display the "*Leaving Islam*" advertisement. Plaintiff Geller immediately contacted Defendant Gibbons, the point of contact for SMART, and asked: "What was it about the ad that was 'not approved' and what would have to be changed? Please let me know so we can get this campaign on the road." No one from SMART, including Defendant Gibbons, responded to Plaintiffs' questions, nor has anyone approved the display of Plaintiffs' message. (Geller Decl. at ¶¶ 8, 9 at Ex. 2).

C. SMART's Content-Based Advertising Guidelines.

SMART enforces content-based advertising guidelines that prohibit certain advertisements on its buses and bus shelters. These advertising guidelines were employed by Defendants to reject Plaintiffs' "*Leaving Islam*" advertisement. (SMART Dep. at 37 at Ex. 4).

SMART's advertising guidelines state, in relevant part, as follows:

5.07 Advertising Guidelines

* * * *

B. Restriction on Content

> 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.

(SMART Dep. at 19-24 at Ex. 4; Dep. Ex. 3 at Ex. 5) (emphasis added).

Aside from what is stated in the guidelines above, there are no additional manuals, guides, or other documents or references, *including a definitional section within the guidelines*, to assist a SMART official to determine whether the content of an advertisement is permissible. (SMART Dep. at 21-24, 38-40 at Ex. 4; Gibbons Dep. at 92 at Ex. 6).

There are three departments that have *independent* authority to make decisions on behalf of SMART regarding whether an advertisement should be accepted or rejected under these guidelines: (1) the marketing department, (2) the office of the general counsel, and (3) the general manager's office. (SMART Dep. at 27-28 at Ex. 4). Each department can act unilaterally, or the departments can collaborate in the decision-making process. (SMART Dep. at 27-28 at Ex. 4). As noted above, during the relevant time period, Defendant Gibbons, who was the Marketing Program Manager in the marketing department, had the authority to accept or reject advertisements under the advertising guidelines on behalf of SMART, (Gibbons Dep. at 23, *see also* 15-16 at Ex. 6), and so too did Defendant Hertel, the General Manager and CEO for SMART during the relevant time period, (SMART Dep. at 27-28, 31 at Ex. 4).

According to SMART's designated witness under Rule 30(b)(6), the term "political" for purposes of its advertising guidelines means "*any advocacy of a position of any politicized issue*." (SMART Dep. at 41 at Ex. 4) (emphasis added). In an effort to explain this tautology (*i.e.*, "political" = politicized issue), SMART defined "politicized" as follows: "*if society is fractured on an issue and factions of society have taken up positions on it that are not in agreement, it's politicized*." (SMART Dep. at 41 at Ex. 4) (emphasis added).

During her deposition, Defendant Gibbons testified that she understood the term "political" for purposes of applying SMART's advertising guidelines as "*when somebody advocates for a particular side*." (Gibbons Dep. at 24 at Ex. 6). She also testified that she was now able to "qualify" the definition of "political" with words after having read the transcript of the deposition testimony of SMART's Rule 30(b)(6) witness, (Gibbons Dep. at 24-25 at Ex. 6)—testimony she reviewed to prepare for her deposition, (Gibbons Dep. at 9-11 at Ex. 6).

During her prior sworn testimony at the hearing on Plaintiffs' motion for a preliminary injunction,[2] Defendant Gibbons testified as follows with regard to the application of SMART's advertising guidelines to Plaintiffs' advertisement:

[2] Defendant Gibbons was designated by SMART pursuant to Rule 30(b)(6) to testify on its behalf during the hearing and, indeed, testified under oath that she was doing so. (*See* Tr. at 5 ["Q: Ms. Gibbons, you understand you're testifying here on behalf of SMART, correct? A: Yes."] [Doc. No. 18]). Despite this undisputed fact, the Sixth Circuit decided, *sua sponte*, that Defendant Gibbons was

Q: So in fact, there is no policy or guideline or training manual or anything else that would set out why [Plaintiffs' advertisement] is political [and thus impermissible] and the Atheist Ad is not political [and thus permitted]?[3]
A. Right.

(Tr. of Hr'g on Mot. for Prelim. Inj. at 15 [Doc. No. 18]) (hereinafter "Tr.").

Defendant Gibbons also stated during the hearing that when she examined the "*Leaving Islam*" advertisement (*i.e.*, its "four corners"), she found nothing about the advertisement itself that was political. She testified as follows:

Q: *So when you examined* [*Plaintiffs'*] *ad, there was* <u>*nothing*</u> *about the ad itself that was political*?
A: *Correct*.

(Tr. at 10 [Doc. No. 18]) (emphasis added).

Defendant Gibbons testified on redirect examination as follows:

Q: I would like to change topics now, Ms. Gibbons, and ask you one or two questions following up on a question that Mr. Yerushalmi asked you regarding the political content of the FDI [advertisement]. In both reading the controversy surrounding the Miami Dade Transit issue, can you tell us whether you were able to determine that the FDI ad was political?
A: I knew that it was of concern *in that there is controversy on both sides of the issue on whether they should be posted or shouldn't be posted*.

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testifying on her own behalf. *Am. Freedom Def. Initiative*, 698 F.3d at 896. Nonetheless, as we learned through discovery, Defendant Gibbons is in fact a decisionmaker for SMART with regard to the application of the advertising guidelines. Consequently, her testimony regarding their application is binding on SMART as an admission by a party-opponent. *See* Fed. R. Evid. 801(d)(2).

[3] The "Atheist Ad" is the Detroit Area Coalition of Reason's advertisement that ran on SMART's buses. (SMART Dep. at 81-82 at Ex. 4; Dep. Ex. 4 at Ex. 5).

(Tr. at 19 [Doc. No. 18]) (emphasis added). In other words, Defendant Gibbons reacted to a newspaper article's rendering of a question raised about whether the Miami transit authority would run the advertisement—not whether the advertisement itself represented a "political" advertisement.

Ms. Elizabeth Dryden, who was at all relevant times the Director of External Affairs, Marketing and Communications for SMART and a person authorized to enforce the advertising guidelines (Dryden Dep. at 12 at Ex. 9), understood (commonsensically) "political" for purposes of the advertising guidelines to mean advertisements whose subject matter was "ballot proposals, . . . campaign initiatives, or individuals . . . if they're running for office."[4] (Dryden Dep. at 13 at Ex. 9). However, Ms. Dryden further explained that matters "hotly contended, in the media" may also be considered "political" for purposes of SMART's advertising guidelines. (Dryden Dep. at 14-15 at Ex. 9).

In summary, if an advertisement addresses a contentious issue—at least one that Defendants believe is contentious *based upon a sliding spectrum of contentiousness*—then it is rejected. (*See* SMART Dep. at 66-67 at Ex. 4 [acknowledging that there is a hypothetical "spectrum" of whether something is

[4] Despite this commonsense understanding of "political," we learned during the course of discovery that a "get-out-the-vote" message (*i.e.*, an advertisement urging citizens to exercise their political franchise—a subject that is quintessentially political) is, indeed, *not* "political" according to SMART. (SMART Dep. at 177 at 4; Dep. Ex. 36 at Ex. 5).

sufficiently "politicized" to be rejected]). As demonstrated further below, whether an advertisement addresses an issue that is sufficiently "politicized" or "scornful" and thus rejected by Defendants is wholly arbitrary and subjective.

D. Application of SMART's Advertising Guidelines.

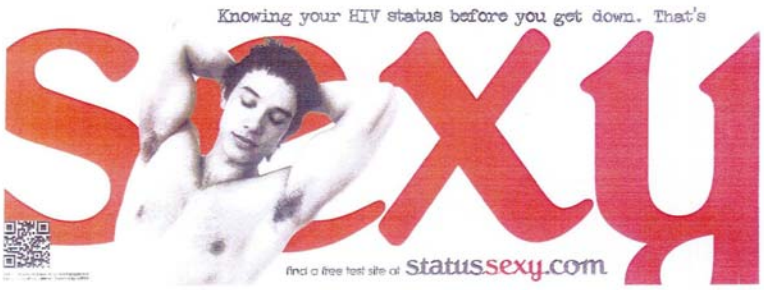
As discovery demonstrated, SMART permits a *wide variety* of commercial, noncommercial, public-service, public-issue, and religious advertisements on its property, including advertisements promoting controversial and contentious issues.

For example, SMART permitted the Detroit Area Coalition of Reason to place an advertisement on its vehicles that stated the following: "***Don't believe in God? You are not alone***." The advertisement also listed the website of the organization (DetroitCoR.org). (SMART Dep. at 81-82, 84 at Ex. 4; Dep. Ex. 4 at Ex. 5). The Detroit Area Coalition of Reason's webpage (and its affiliated United Coalition of Reason) as identified on the advertisement reveals that this organization supports the views of secular humanists, atheists, "freethinkers," etc. *See* http://unitedcor.org/detroit/page/home. It describes its mission as follows: "From civil rights and *separation of state and church activism*, to scientific, rational and freethought presentations and discussions, to networking and camaraderie, Detroit CoR Member Groups have so much to offer." *See* http://unitedcor.org/detroit/page/about-us.[5] (emphasis added). (Muise Decl. at ¶

[5] The acceptance of the atheist advertisement was not an instance of "erratic

11, Exs. A-C, at Ex. 3; SMART Dep. at 84, 87 at Ex. 4). The Detroit Area Coalition of Reasoning's advertisement advocates a position on perhaps the most contentious (*i.e., "politicized" per SMART's rendering*) of all issues—the existence of God.[6] As Defendant Gibbons noted in her deposition, the issue presented by this advertisement is so *politicized* that bus drivers for SMART *refused* to drive the buses displaying the advertisement because the message "went against their belief." (Gibbons Dep. at 29 at Ex. 6).

SMART has also accepted advertisements that promote, and indeed advocate for, sexual relations between men. One of the *several* advertisements of the "Status Sexy" campaign accepted by SMART is as follows:



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enforcement of a policy," *compare Ridley v. Mass. Bay Transp. Auth.*, 390 F.3d 65, 78 (1st Cir. 2004), nor a "purported aberration," *see Am. Freedom Def. Initiative*, 698 F.3d at 892. To this day, SMART defends its decision to run the controversial advertisement (SMART Dep. at 94 at Ex. 4), even though SMART admits that "the separation of church and state . . . is certainly a politicized issue," (SMART Dep. at 84-85 at Ex. 4).

[6] The absurdity of Defendants' rejection of Plaintiffs' "*Leaving Islam*" advertisement and acceptance of the atheist advertisement is illustrated by the way in which SMART must contort itself to justify this inconsistency. Indeed, SMART testified under oath that the issue of the belief in God is *not* politicized under SMART's definition (*i.e.*, factions of society have taken up positions on it that are not in agreement). (SMART Dep. at 84 at Ex. 4).

(SMART Dep. at 135 at Ex. 4; Dep. Exs. 16, *see also* Dep. Exs. 13-19 at Ex. 5). According to an article linked on the statussexy.com website—*which is listed on the advertisement*—"The 'Status Sexy' campaign uses images of attractive, shirtless men to convey its message encouraging ***men who have sex with men*** to be tested for HIV.'"[7] (SMART Dep. at 138-43 at Ex. 4; Dep. Exs. 19, 20 at Ex. 5) (emphasis added). Moreover, the advertisement uses crude language suggestive of sexual acts (*i.e.*, "before you get down") that is, at the very least, factious. Consequently, Defendants have no problem with a "captive" audience,[8] including children, seeing this controversial (and arguably lewd) advertisement campaign.

Defendants have also accepted an advertisement that encourages the use of "***Birth control, including: Pills, IUD's, Condoms and Diaphragms***." The advertisement promotes "Free Birth Control," and *takes a position in favor of the use of birth control* (a highly *politicized* issue), arguing that a woman should "***Put Yourself First . . . PLAN FIRST***," and "***Have a baby when the time is right for you***." (SMART Dep. at 146-47, 150 at Ex. 4; Dep. Ex. 22 at Ex. 5).

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[7] Regardless of whether this article was posted on the website at the time Defendants approved the "Status Sexy" campaign, SMART's Rule 30(b)(6) witness testified that the presence of this article would *not* cause SMART to disapprove the advertisement under the guidelines at issue here. (SMART Dep. at 138-43 at Ex. 4). Moreover, one need not have access to this article to understand that this advertisement campaign promotes, advocates for, and takes a position on sex between men (*see, e.g.*, get tested for HIV "before you get down").

[8] This advertisement campaign ran on advertising space *within* SMART buses as well as on the outside of the buses and at bus shelters. (Dep. Exs. 13-18 at Ex. 5).

Defendants approved the display of a stop smoking campaign that employs graphic and controversial images to advocate for a position against smoking. (SMART Dep. at 164-65 at Ex. 4; Dep. Exs. 30-31 at Ex. 5). Defendants approved an advertisement for a Christian organization, which asks, "***Feeling lost? Find your path***," with an image of the Latin cross. (SMART Dep. at 157 at Ex. 4; Dep. Ex. 26 at Ex. 5). Defendants approved stop drunk driving campaigns, AIDS/HIV awareness campaigns, and stop hunger campaigns, among others, (*see* Dep. Exs. 23-25, 27-28 at Ex. 5), all of which advocate for a particular position on a public issue. Indeed, out of the "hundreds" of advertisements submitted for approval under the guidelines at issue (SMART Dep. at 126 at Ex. 4)—*advertisements covering a wide array of public issues*—Defendants only ever rejected three because they were allegedly "political": (1) Plaintiffs' "*Leaving Islam*" advertisement, (2) an advertisement for Rachel's Vineyard, which provides assistance for post-abortive women, and (3) an advertisement similar to the atheist advertisement that said, "***Don't believe in Muhammad? You are not alone***." (SMART Dep. at 124-26, *see also* 116-17 at Ex. 4; Dep. Ex. TT at Ex. 8).

ARGUMENT

I. Defendants' Speech Restriction Violates the First Amendment.

Plaintiffs' First Amendment claim is reviewed in three steps. First, the court must determine whether the speech in question—Plaintiffs' advertisement—is

protected speech. Second, the court must conduct a forum analysis as to the forum in question to determine the proper constitutional standard to apply. And third, the court must then determine whether Defendants' speech restriction comports with the applicable standard. *Saieg*, 641 F.3d at 734-35.

Moreover, SMART's "refusal to accept [Plaintiffs' advertisement] for display because of its content is a clearcut *prior restraint*." *Lebron v. Wash. Metro. Area Transit Auth.*, 749 F.2d 893, 896 (D.C. Cir. 1984) (Bork, J.) (emphasis added). And "[a]ny system of prior restraints of expression comes to this Court bearing a *heavy presumption* against its constitutional validity." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963) (collecting cases) (emphasis added).

A. Plaintiffs' Advertisement Is Protected Speech.

The first question is easily answered. Sign displays constitute protected speech under the First Amendment, *Hill v. Colo.*, 530 U.S. 703, 714-15 (2000) ("[S]ign displays . . . are protected by the First Amendment."), and this includes signs posted on bus advertising space, *United Food & Commercial Workers Union, Local 1099 v. Sw. Ohio Reg'l Transit Auth.*, 163 F.3d 341 (6th Cir. 1998).

B. Defendants Created a Public Forum for Plaintiffs' Speech.

"The [Supreme] Court has adopted a forum analysis as a means of determining when the Government's interest in limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the property for

[expressive] purposes." *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 800 (1985). Forum analysis has traditionally divided government property into three general categories: traditional public forums, designated public forums, and nonpublic forums.[9] *Id*. at 800. Once the forum is identified, the court must then determine whether the speech restriction is justified by the requisite standard. *Id.*

A designated public forum is created, as in this case, when the government "intentionally open[s] a nontraditional forum for public discourse." *Id.* at 802. To discern the government's intent, courts "look[] to the policy and practice of the government" as well as "the nature of the property and its compatibility with expressive activity." *Id*.

As the Sixth Circuit stated in *United Food & Commercial Workers Union, Local 1099*:

> In accepting a wide array of political and public-issue speech, [the government] has demonstrated its intent to designate its advertising space a public forum. *Acceptance of a wide array of advertisements*, including political and public-issue advertisements, is indicative of the government's intent to create an open forum. Acceptance of political and public-issue advertisements, *which by their very nature generate conflict*, *signals a willingness on the part of the government to open the property to controversial speech*, which the Court in *Lehman* [*v. City of Shaker Heights*, 418 U.S. 298 (1974)] recognized as *inconsistent with operating the property solely as a commercial*

[9] The Sixth Circuit treats a nonpublic forum and a limited public forum the same for purposes of applying the appropriate level of scrutiny. *See Miller v. City of Cincinnati*, 622 F.3d 524, 535-36 (6th Cir. 2010).

venture.

163 F.3d at 355 (emphasis added); *see also Planned Parenthood Ass'n/Chicago Area v. Chicago Transit Auth.*, 767 F.2d 1225 (7th Cir. 1985) (concluding that the advertising space on a bus system became a public forum where the transit authority permitted "a wide variety" of commercial and non-commercial advertising); *N.Y. Magazine v. Metro. Transp. Auth.*, 136 F.3d 123, 129-30 (2d Cir. 1998) (concluding that the advertising space on the outside of buses was a public forum where the transit authority permitted "political and other non-commercial advertising generally").

Here, Defendants have accepted "a wide array of advertisements," including very controversial, public-issue advertisements (which included an advertisement that SMART's own bus drivers protested by refusing to drive the buses that displayed it). Defendants' actions are thus "*inconsistent with operating the property **solely** as a commercial venture.*"[10]

Furthermore, it is without question that the "nature of the property"—the advertising space—is "compatible" with Plaintiffs' proposed expressive activity. *See United Food & Commercial Workers Union, Local 1099*, 163 F.3d at 355 (concluding that the advertising space on a bus system was a public forum and

[10] The revenue SMART receives from selling advertisements is a small fraction of its operating budget. SMART is guaranteed $500,000 in revenue from the sale of advertisements. However, its operating budget is approximately $130 million. (SMART Dep. at 174-76 at Ex. 4).

stating that "acceptance of political and public-issue speech suggests that the forum is suitable for the speech at issue"—a pro-union message). Indeed, Plaintiffs' "*Leaving Islam*" advertisement has run on similar buses in other major cities—Miami, New York, and San Francisco. (Geller Decl. at ¶ 6 at Ex. 2).

C. Defendants' Restriction Cannot Survive Constitutional Scrutiny.

1. Defendants' Speech Restriction Was Content Based.

Content-based restrictions on speech in a public forum are subject to strict scrutiny. *Cornelius*, 473 U.S. at 800. That is, "[s]peakers can be excluded from a public forum only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest." *Id*. For "[i]t is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys." *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828 (1995); *see also R.A.V. v. St. Paul*, 505 U.S. 377, 386-92 (1992) (holding that the government may not "impose special prohibitions on those speakers who express views on disfavored subjects" or on the basis of "hostility—or favoritism—towards the underlying message expressed"). Thus, content-based restrictions "are presumptively unconstitutional." *S.O.C., Inc. v. Cnty. of Clark*, 152 F.3d 1136, 1145 (9th Cir. 1998).

To determine whether a restriction is content based, the courts look at whether it "restrict(s) expression because of its message, its ideas, its subject

matter, or its content." *Consol. Edison Co. of N.Y. v. Pub. Serv. Comm. of N.Y.*, 447 U.S. 530, 537 (1980). Here, Defendants rejected Plaintiffs' advertisement based on the content of its message. Indeed, *Defendants admit this fact*. (SMART Dep. at 18 at Ex. 4). Consequently, this restriction violates the First Amendment.

2. Defendants' "Guidelines" Permit Arbitrary, Capricious, and Subjective Application.

As noted by the Supreme Court, "the danger of censorship and of abridgment of our precious First Amendment freedoms is too great where officials have unbridled discretion over a forum's use."[11] *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553 (1975).

As the Sixth Circuit held in a similar case involving the government's regulation of bus advertising: "The absence of clear standards guiding the discretion of the public official vested with the authority to enforce the enactment invites abuse by enabling the official to administer the policy on the basis of impermissible factors." *United Food & Commercial Workers Union, Local 1099*, 163 F.3d at 359; *see also Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 130 (1992) ("A government regulation that allows arbitrary application . . . has the potential for becoming a means of suppressing a particular point of view.").

[11] Indeed, even in a nonpublic forum, government speech regulations must be "reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." *Perry Educ. Ass'n v. Perry Local Educators*, 460 U.S. 37, 46 (1983). As demonstrated above, Defendants' speech restriction fails this test as well.

Consequently, a speech restriction "offends the First Amendment when it grants a public official 'unbridled discretion' such that the official's decision to limit speech is not constrained by *objective criteria*, but may rest on 'ambiguous and subjective reasons,'" *United Food & Commercial Workers Union, Local 1099*, 163 F.3d at 359 (quoting *Desert Outdoor Adver., Inc. v. City of Moreno Valley*, 103 F.3d 814, 818 (9th Cir. 1996)) (emphasis added), as in this case.

Through discovery, we have learned that Defendants' "political" restriction suffers from the very same defects found in the unconstitutional restriction at issue in *United Food & Commercial Workers Union, Local 1099.* Indeed, "political," as that term is *commonly* understood, could, when appropriately limited, provide a measure of guidance for a government administrator.[12] However, the way in which Defendants apply this "guideline" here is entirely arbitrary and subjective and, indeed, no different than the way in which the "controversial public issues" guideline was employed and thus found unconstitutional in *United Food & Commercial Workers Union, Local 1099.*[13]

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[12] As Ms. Dryden testified in her deposition, "political" advertisements reasonably include "ballot proposals, . . . campaign initiatives, or individuals . . . if they're running for office." (Dryden Dep. at 13 at Ex. 9); *see generally* http://www.merriam-webster.com/dictionary/political (defining "political" as "of or relating to government, a government, or the conduct of government").

[13] The "scornful" speech restriction suffers from the same arbitrary and subjective defects. Indeed, Defendant Gibbons testified as follows:

> Q: There is nothing in [Plaintiffs'] ad that disparages or scorns any particular people?

3. Defendants' Speech Restriction Was Viewpoint Based.

Viewpoint discrimination is an egregious form of content discrimination that is prohibited in all forums. *See Rosenberger*, 515 U.S. at 829. "The principle that has emerged from [Supreme Court] cases is that the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others." *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993) (internal quotations and citation omitted). "When the government targets *not subject matter*, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant." *Rosenberger*, 515 U.S. at 829 (emphasis added).

Consequently, when speech "fall[s] within an *acceptable subject matter* otherwise included in the forum, the State may not legitimately exclude it from the forum based on the viewpoint of the speaker." *Cogswell v. City of Seattle*, 347 F.3d 809, 815 (9th Cir. 2003). Thus, viewpoint discrimination occurs when the government "denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject." *Cornelius*, 473 U.S. at 806.

Here, *religion* is an acceptable subject matter in the forum at issue.

A: Correct, yes. I'm not sure.
Court: *You're not sure whether it scorns any particular people; is that your answer*?
A: *Right*.
(Tr. at 10-11 [Doc. No. 18]) (emphasis added).

(SMART Dep. at 55 at Ex. 4). Indeed, Defendants permitted advertisements that addressed religion from the *viewpoint* that God does not exist (the Detroit Area Coalition of Reason advertisement) and from the *viewpoint* that Christianity is the "path" to salvation (Union Grace Church advertisement). Yet, Defendants object to the *viewpoint* expressed by Plaintiffs about Islam—an includable subject. (SMART Dep. at 95 at Ex. 4). This is a classic form of viewpoint discrimination that is prohibited in all forums. *See Cornelius*, 473 U.S. at 806; *see also Good News Club v. Milford Cent. Sch. Dist.*, 533 U.S. 98, 107-08 (2001) (finding that a public school's exclusion of a Christian club from meeting on its school grounds discriminated on the basis of viewpoint because the school permitted non-religious groups "pertaining to the welfare of the community" to meet at the school).

This conclusion is further buttressed by Defendants' enforcement of a guideline that is itself viewpoint based in its application (*i.e.*, the restriction on "scornful" speech). For example, as noted above, religion—and more specifically, the religion of Islam—is a subject matter that is permitted in the forum at issue (*i.e.*, SMART's advertising space). According to SMART, conveying a message that "Islam is a religion of violence" would be prohibited under the guideline that forbids conveying a message that is "clearly defamatory or likely to hold up to scorn or ridicule any person or group of persons." (SMART Dep. at 189 at Ex. 4). However, it is patently obvious (as SMART conceded during its deposition,

despite its best efforts to qualify the concession), that conveying a message that "Islam is a religion of peace" would be permissible under this guideline. (SMART Dep. at 189-90 at Ex. 4 ["It doesn't appear on its face that saying Islam is a religion of peace . . . would be clearly defamatory or likely to hold up to scorn or ridicule any person or group of persons . . . ."]). Because Defendants object to Plaintiffs' *viewpoint* on Islam (*see, e.g.*, SMART Dep. at 48 at Ex. 4 [claiming that Plaintiffs' "website," which Defendants reviewed to make their decision to reject Plaintiffs' advertisement, "*is clearly anti-Islam*" (emphasis added)]), the advertisement was rejected under this guideline in violation of the First Amendment. *See, e.g., R.A.V.*, 505 U.S. at 389 (stating that "a State may not prohibit only that commercial advertising that depicts men in a demeaning fashion" without violating the First Amendment); *see also Nieto v. Flatau*, 715 F. Supp. 2d 650 (E.D.N.C. 2010) (holding that a speech restriction on a military base, a nonpublic forum, was viewpoint based as applied to anti-Islam speech in violation of the First Amendment).

II. Defendants' Speech Restriction Violates the Equal Protection Clause.

"The Equal Protection Clause was intended as a restriction on [government] action inconsistent with elemental constitutional premises. Thus [the Court has] treated as presumptively invidious those classifications that disadvantage a 'suspect class,' *or* that *impinge upon the exercise of a 'fundamental right*.'" *Plyler*

v. Doe, 457 U.S. 202, 216-17 (1982) (emphasis added).

Indeed, in *Police Dep't of the City of Chicago v. Mosley*, 408 U.S. 92 (1972), the Court struck down a city ordinance that restricted speech and affirmed that "under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express *less favored* or *more controversial views*." *Id*. at 96 (emphasis added); *see also Carey v. Brown*, 447 U.S. 455, 461-62 (1980) (discriminating among speech-related activities in a forum violates the Equal Protection Clause); *Satawa v. Macomb Cnty. Road Comm'n*, 689 F.3d 506, 529 (6th Cir. 2012) (applying strict scrutiny under the Equal Protection Clause to a government decision that infringes upon speech).

Here, by banning Plaintiffs' advertisement—which addresses religion, a permissible and includable subject matter—because its message is "politicized" or its viewpoint "scornful" (*i.e.*, contentious or disfavored), Defendants have discriminated against Plaintiffs in a manner that impinges upon the exercise of a fundamental right in violation of the Equal Protection Clause.

CONCLUSION

Based on the foregoing, Plaintiffs respectfully request that this court grant this motion and enter judgment in Plaintiffs' favor on all claims as a matter of law.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 15, 2013, a copy of the foregoing was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the court's electronic filing system. Parties may access this filing through the court's system.

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