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' RESPONSE TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT [D# 58]

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)
Co-Counsel for Defendants SMART, Hertel and Gibbons
535 Griswold Street, Suite 600
Detroit, MI 48226
(313) 223-2100
agordon@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' RESPONSE TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT [DOCKET NO. 58]

TABLE OF CONTENTS

COUNTER-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.

COUNTER-STATEMENT OF MOST CONTROLLING AND APPROPRIATE AUTHORITY

Defendants hereby assert that the most controlling and appropriate authority necessary for the resolution of Plaintiffs' Motion for Summary Judgment 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)

TABLE OF AUTHORITIES

Cases

COUNTER-STATEMENT OF FACTS

Defendants hereby rely on their brief in support of Motion for Summary Disposition [Docket No. 57] previously filed in this matter as though fully set forth herein. Defendants' motion and brief sets forth a full Statement of Facts and addresses in large part the legal arguments made by Plaintiffs in their motion.

There are some misstatements of fact made by Plaintiffs in their brief that require further addressing. While none of these misstatements is dispositive of this matter, Plaintiffs' attempt to characterize them as "Uncontested Facts" is troublesome and does not characterize an effort to be neutral and candid with this Court on these points.

First and foremost, Plaintiffs identify Beth Gibbons as employed by SMART as Marketing Program Manager "during all relevant times." Plaintiffs appear to argue from this that Ms. Gibbons had decision-making authority during the time periods of (1) the decision on the advertisement; and (2) the time of her testimony for the Preliminary Injunction hearing. Plaintiffs know this to be untrue, as the depositions on Ms. Gibbons and Ms. Dryden, *her direct supervisor at the time the advertisement was presented*, made clear to the parties.

At both of these relevant times, Ms. Gibbons was *not* vested with decision-making authority on advertisements. This is an important distinction with regard to Plaintiffs' footnote 10 in their brief wherein Plaintiffs attempt to ascribe the

personal opinions of the witness to SMART by labeling the opinions as "admissions of a party opponent." As the Sixth Circuit recognized, Ms. Gibbons' *personal opinions were hers* and were not binding on SMART, despite her initial designation as a Fed. R. Civ. P. 30(b)(6) witness in this case. [Docket No. 57, **Exhibit K**, *Amer. Freedom Def. Init. v Suburban Mobility Auth. for Reg. Trans.*, 698 F.3d 885, 896 (2012)]. That Plaintiffs also characterize the Court's decision in this regard as *sua sponte* is also interesting since it was a primary argument of the Defendants on appeal.

Plaintiffs also mischaracterize their relationship with CBS Detroit with respect to this *Leaving Islam* ad. Plaintiffs assert that they "entered into a contract through SMART's advertising agent to run the advertisement." The Plaintiffs here, as before, are intentionally misleading the Court in this regard. Plaintiffs entered into a contract to run their advertisement with **the Detroit Department of Transportation** (DDOT), an entirely separate entity, and a department of the City of Detroit. When Plaintiffs were refused access to DDOT buses, they asked to enter into a contract with SMART, but no contract ever materialized. This fact has been demonstrated to Plaintiffs time and time again, but Plaintiffs continue to mislead the Court in these proceedings.

Defendants further object to Plaintiffs' attempt to argue extra-judicially as to the tenets and beliefs associated with Islam, especially with respect to Mr.

Spencer's Declaration concerning the death penalty. Even Mr. Spencer would admit that his Declaration and the attached article are anything but "Undisputed Facts." The Court can take judicial notice that his views are widely disputed, and that dispute, by large factions of society on both sides, is part and parcel of what makes Plaintiffs' message "political," and not, as Mr. Spencer concludes, a "public service message." Interestingly, the death penalty issue is also "political." *See, Depew v Anderson*, 311 F.3d 742, 751 (6th Cir. 2002); *Slagle v Bagley*, 474 F.3d 923, 926 (6th Cir. 2007).

There are other, minor, misrepresentations in Plaintiffs' brief that will be dealt with further below as necessary.

ARGUMENT

1. While the *Amer. Freedom Def. Init.* opinion from the United States Court of Appeals for the Sixth Circuit may not be *binding* on this Court as "law of the case," the reasoning and findings of the Sixth Circuit are persuasive on the issues presented in the counter-motions for summary judgment.

Although the Plaintiffs argue extensively that the opinion of the Sixth Circuit relative to this matter is not "law of the case" and not "binding" on this Court, Plaintiffs ignore the holdings in that opinion at their peril. The facts underlying these counter-motions have not changed in any significant manner since the Court's opinion. As demonstrated in the Defendants' Motion for Summary Judgment, this Court's ruling on the facts, even after the extensive

discovery, should be largely controlled by the manner in which the Sixth Circuit decided the issues of this case.

Plaintiffs' attempt to simply sweep the opinion under the rug, and their failure to address the opinion or the United States Supreme Court's opinion in *Lehman v City of Shaker Heights*, 418 U.S. 298 (1974), upon which it was largely based, shows the disingenuousness of Plaintiff's motion itself. Plaintiffs do not address or attempt to distinguish these controlling and most appropriate authorities in their brief whatsoever.

This is significant in light of the fact that a judge in this very District has already applied the *Amer. Freedom Def. Init.* case to decide whether a preliminary injunction should be continued. In *Coleman v Ann Arbor Trans. Auth.*, E.D. Mich. Civil Action No. 11-CV-15207, in an order dated June 4, 2013, Judge Goldsmith, relied on the *Amer. Freedom Def. Init.*, case to hold, among other holdings, that:

> The SMART decision establishes that a transit-advertising forum, like the one re-formulated by AATA through the adoption of its revised policy, creates a nonpublic forum, where a viewpoint-neutral provision – such as the "no political ads" provision – is a constitutionally sound basis for rejecting an ad such as Plaintiff's.

(**Exhibit A**, Opinion of Judge Goldsmith, at p. 8). Further he ruled:

> In this case, however, AATA's second rejection of Plaintiff's ad was not standardless. It was premised on the "no political ads" provision, which the Sixth Circuit expressly found contained appropriately definitive standards. See, SMART, 698 F.3d at 893 (The prohibition against political ads "is not so vague or ambiguous that a person could not readily identify the applicable standard. . . . [T]here is no question

> that a person of ordinary intelligence can identify what is or is not political." (Citations and quotation marks omitted)).

(**Exhibit A**, at p. 14).

It is incongruous to suggest that while other judges of this very Court can rely on the Sixth Circuit's opinion in this matter, this Court, applying the same law to the same set of facts, may not. The conclusions of the Sixth Circuit are persuasive, especially here where Plaintiffs offer no credible reasons to depart from the reasoning. Their failure to address or distinguish the conclusions of the Sixth Circuit demonstrates the desperate nature of Plaintiffs positions in this matter. This is especially so where Plaintiffs fail to acknowledge that the Sixth Circuit has *decided* that SMART's guidelines are not vague or ambiguous, that Plaintiffs' advertisement addresses a political issue, and that the provisions employed by SMART are themselves viewpoint-neutral.

This Court should hold similarly.

2. The definition of "political," for purposes of SMART's policy is not dependent upon and does not equate, as Plaintiffs assume, with whether the proposed advertisement is "controversial" or "contentious."

The fatal flaw in Plaintiffs' motion and brief before this Court is the equating of their definition of "controversial" and/or "contentious" with SMART's definition of "political" under the policy. Plaintiffs provide no evidence that SMART has ever denied an ad that was controversial or contentious that would otherwise be allowable under its advertising content policy. In fact, most of the

ads that Plaintiffs argue were controversial were in fact posted (as discussed further below).

The definition of political, as provided in this matter by SMART's Rule 30(b)(6) witness, Anthony Chubb, is as follows:

> 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**.

(Docket No. 57, **Exhibit N,** Deposition of SMART 30(b)(6) witness, May 21, 2013, at p. 41). The definition, and indeed the content policy, encompasses not only "political campaign" and government-related advertisements, but public-issue advertisements as well. Although Plaintiffs' attorneys define "controversy" in the same way that SMART defines "political," (Docket No. 57, **Exhibit N,** at p. 106), they do so only to conflate the issues.

Discovery has shown, as Plaintiffs' own brief demonstrates, that SMART permitted the posting of the "atheist ad," an advertisement that not only Plaintiffs find controversial, but that SMART's ridership and drivers found controversial as

well. It is equally clear that SMART, even in the face of this clear controversy (**Exhibit B**; Further, Docket No. 57, **Exhibit G**, Deposition of Beth Gibbons, June 25, 2013, at p. 29), neither barred the ad, nor removed the ad when the controversy heightened.

Similarly, Plaintiffs take issue with a number of other advertisements that SMART also posted, and that Plaintiffs find controversial. While Plaintiffs argue that the posting of these advertisements shows that SMART is inconsistent with the application of its policy, Plaintiffs fail to provide how these advertisements would be barred under the policy. It is important to note that in no case do Plaintiffs take the position that any of these advertisements were political, or were otherwise barred under the policy.

The evidence that has been discovered thus far shows that to the extent these ads are controversial, that was not a determining factor in SMART's decision-making process.

3. SMART's policy is facially valid and the *United Food* case is therefore not persuasive and is distinguishable.

Instead of addressing the *Amer. Freedom Def. Init.* and *Lehman* cases, Plaintiffs rely almost exclusively on the case of *United Food & Commercial Workers Union, Local 1099 v Sw. Ohio Reg'l Transit Authority*, 163 F.3d 341 (6th Cir. 1998), to argue both that SMART has created a public forum for its advertising space and to argue that SMART's guidelines permit arbitrary decision-

making. Defendants' Motion for Summary Judgment addresses the forum analysis in full and is adopted herein by reference.

Plaintiffs' arguments that the policy, unchanged in any way by discovery in this matter, is facially defective are frivolous in light of the Sixth Circuit's pronouncement in this case. The Sixth Circuit explicitly distinguished the *United Food* case on this issue.

The *United Food* case found that the SORTA buses at issue were a designated public forum, consistent with the fact that SORTA had actually accepted a wide array of *political* and *public-issue* advertisements. Plaintiffs cannot show that SMART has accepted any political or public-issue advertisements except through mischaracterizing advertisements that in no way represent positions on fractured societal issues.

Even a cursory reading of the *United Food* case shows its inapplicability to the facts at bar. In that case, the Court was faced with the following guidelines enacted by SORTA:

> It is SORTA's policy that it's buses, bus shelters and billboards are not public forums. All advertising materials on SORTA's buses, bus shelters and billboards are subject to approval by SORTA. To the fullest extent possible, such advertising materials must be *aesthetically pleasing* and enhance the environment for SORTA's riders and customers and SORTA's standing in the community.
>
> Examples of advertising material that will be refused under this Policy include, but are not limited to, the following:

> *****
> 6. Advertising of *controversial public issues* that may adversely affect SORTA's ability to attract and maintain ridership. . . .

(*United Food*, at 352). The Sixth Circuit in *United Food* found this policy to be facially vague solely based on the use of the adjectives "aesthetically pleasing" and "controversial," neither of which appear in SMART's policy. The *United Foods* court held that allowing advertising on public issues, but also allowing an official to decide on his own whether a particular public issue was controversial or not vested unbridled discretion in that official. The "partial ban" of public-issue advertising, while allowing other public-issue advertising, coupled with a vague dividing line, is what violated the Constitution.

SMART's policy in this case does not suffer from the same infirmity. SMART does not permit *some* political messages and restrict other political messages. SMART does not allow some scornful messages but restrict other scornful messages. SMART's policy is clear and restricts all such messages that address these issues. As the Sixth Circuit recognized:

> SMART's prohibition of political advertisements appears reasonable and constitutional on its face. The reasonableness of a given restriction "must be assessed in the light of the purpose of the forum and all surrounding circumstances." *Cornelius* [*v NAACP Legal Def. & Educ. Fund*,] 473 U.S. [788 (1985),] at 809. The reasonableness inquiry turns on "whether the proposed conduct would 'actually interfere' with the forum's stated purposes." *United Food*, 163 F3d at 358 (quoting *Air Line Pilots Ass'n v. Dep't of Aviation*, 45 F.3d 1144, 1159 (7th Cir. 1995)). As discussed above, the policy serves a viewpoint-neutral purpose as in *Lehman* and does not run afoul of the

> problems with the partial bans on political advertisements in *United Food* and *New York Magazine.* **An outright ban on political advertisements is permissible if it is a "managerial decision" focused on increasing revenue** to limit advertising "space to innocuous and less controversial commercial and service oriented advertising." *Lehman*, 418 U.S. at 304. It was reasonable for SMART to focus on longer-term commercial advertising in an effort to boost revenue instead of short-term political advertisements that might alienate riders. SMART reasonably concluded that permitting any political advertisement could interfere with the forum's revenue-generating purpose. **It was generally permissible, in other words, for SMART to permit commercial and public service ads, but to turn down political ads.**

Amer. Freedom Def. Init., at 892-93 (emphasis added). The Sixth Circuit continued:

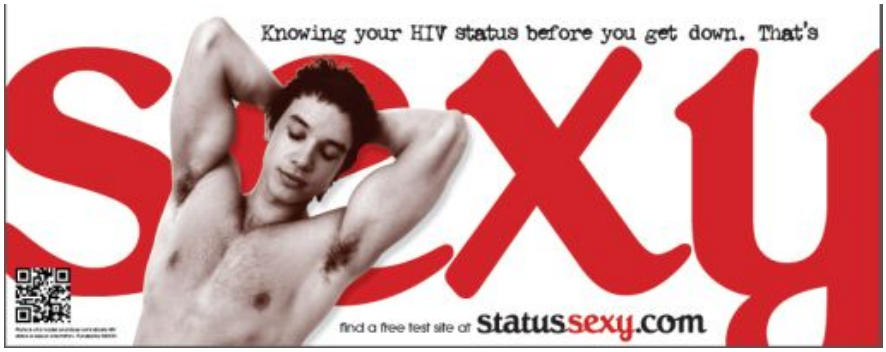
> Our Court's decision in *United Food* does not compel a different conclusion. The transit authority in *United Food* sold bus advertising space, but disallowed advertising that was either aesthetically displeasing or that addressed "controversial public issues." *Id.* We found unbridled discretion had been vested in the decisionmakers because there was no articulated definitive standard to determine what was "controversial." This discretion allowed for the arbitrary rejection of advertisements based on viewpoint. By contrast, SMART's policy did not vest similar wide-ranging discretion in its employees. By adopting a blanket prohibition on political advertisements, SMART avoided the pitfalls of employee discretion presented by the policy in *United Food*. A SMART employee must determine whether or not something is political—a reasonably objective exercise.

Amer. Freedom Def. Init., at 894.

The *United Foods* case is inapplicable to this matter, and Plaintiffs' reliance on the case, in light of the Sixth Circuit's pronouncements, fails to recognize that facial validity is a *fait accompli*.

4. The ads criticized by Plaintiffs as being ”controversial” or “contentious” are not “political” or “scornful,” and are not otherwise barred by SMART’s advertising content policy.

Plaintiffs take great pains, after assuming that “controversial” and “political” are the same, to point that other ads that have been posted on SMART’s coaches were similarly “controversial.”[1] Among these, and where Plaintiffs center the most focus, is the following statussexy.com advertisement:



Plaintiffs then similarly take great pains to argue that this advertisement, sponsored by the Michigan Department of Community Health, addresses a controversial subject matter and “promote[s], and indeed advocate[s] for, sexual relations between men.” (Plaintiffs’ Brief at p. 13). Plaintiffs make some unfounded, and unsupported, assumptions about the advertisement, not the least of which is that it encourages or advocates sex at all, let alone between men. What Plaintiffs fail to tell this Court is that the message in the lower left hand corner of the advertisement, which is repeated on the website referred to, reads: “Photos are

[1] At least in Plaintiffs’ minds. Plaintiffs’ distinctions in this regard however are stretched and tenuous.

for illustrative purposes and do not indicate anyone's HIV status or sexual orientation."

The advertisement, and indeed, the advertising campaign, does not in any way encourage anything more than knowing one's HIV status before having sex. It was not targeted particularly to the gay community, or indeed any community narrower than the general public. There is no indication in the ad or the website that the model is a gay man, or that he has sex with men, or that the campaign is addressed to gay men.

In fact, in order to say otherwise, Plaintiffs had to follow a link from the website that was referred to through to a different unreferenced website.[2] And only

[2] If SMART were to follow links within links when reviewing a website reference, it would likely have to review close to the entire internet before approving any advertisement. Further, if SMART had done so with *Refuge*FromIslam.com, the links to atlasshrugs.com, SIOAonline.com, and SHARIA IN AMERICA provide even more extensive evidence that Plaintiffs' message is political. In fact, a list of just some of the links from the referred website include:

> THE AFDI THREATS TO FREEDOM INDEX
> AL-AWDA, THE PALESTINE RIGHT TO RETURN
> CODE PINK: FAR-LEFT ORGANIZATION ALIGNED WITH COMMUNISTS AND ISLAMIC JIHADISTS
> CORDOBA INITIATIVE: STEALTH JIHAD ORGANIZATION
> COUNCIL ON AMERICAN-ISLAMIC RELATIONS (CAIR): MUSLIM BROTHERHOOD, HAMAS-LINKED ORGANIZATION
> FRIENDS OF SABEEL-NORTH AMERICA (FOSNA):
> INTERNATIONAL ANSWER
> INTERNATIONAL INSTITUTE OF ISLAMIC THOUGHT (IIIT)
> INTERNATIONAL SOLIDARITY MOVEMENT
> ISLAMIC CIRCLE OF NORTH AMERICA: MUSLIM BROTHERHOOD ORGANIZATION

then did Plaintiffs find a reference to gay men; a reference that didn't even exist when the advertising campaign was approved. (Docket No. 58, **Exhibit 5**, "Michigan, 'Status Sexy' Campaign Hits Bus Stops in Pontiac, Detroit, Washtenaw County," May 23, 2012).[3] The article referred to does not advocate for sex between men, but instead encourages men *who do* have sex with men *to be tested for HIV*. It is only Plaintiffs' prurient mischaracterization that says otherwise.

The advertisement is not "political" under SMART's policy. It cannot be reasonably said, and Plaintiffs do not attempt to say, that society is fractured on the issue of whether one should have a medical HIV test such that factions of that society advocate *against* HIV testing. In this regard, the ad is not political or public-issue advertising. Since no other content restriction prohibits the posting of the ad, notwithstanding any real or strained controversy, the advertisement campaign was allowed.

Plaintiffs also refer to a family planning advertisement that was posted by the Michigan Department of Community Health that provided information about services available from the State of Michigan to low income families:

ISLAMIC SOCIETY OF NORTH AMERICA: MUSLIM BROTHERHOOD ORGANIZATION
MUSLIM AMERICAN SOCIETY: CHIEF ARM OF THE MUSLIM BROTHERHOOD IN THE U.S.

[3] This date is long after the campaign was approved, posted and removed. It is later, in fact, than the submission of Plaintiffs advertisement at issue in this case.

The advertisement does, as Plaintiffs claim, refer to birth control and family planning, which are services that are legally provided in Michigan and in the nation. However, the advertisement in no way "advocates," either in its language or in the website referred to, for the use of these services. It is a commercial advertisement that offers, to those who would be interested, services and products. While some may be against the general use of birth control, this advertisement does not address those arguments, pro or con, and is similarly not political.

On page 15 of their brief, Plaintiffs list, without further exposition or argument, other advertisements that they have issues with and conclude, without support, that the advertisements were "public issue" advertisements. The first of these concerns a stop smoking campaign run by the Center for Disease Control (CDC). The advertisements complained about are:

These two advertisements are controversial, and seemingly were intended to have some shock value.[4] However, it cannot be reasonably said that society is fractured on the issue raised by the advertisements, such that a faction of society advocates *starting smoking.* In this regard, though controversial, the ads are not political or public-issue based.

Plaintiffs further complain about anti-drunk driving campaigns (Macomb County, Michigan), AIDS/HIV awareness campaigns (Oakland County, Michigan and CDC-sponsored) and stop hunger campaigns. For the same reason set forth above, particularly that these are not issues on which society is fractured, these campaigns were similarly not political, even if this court were to find them controversial.

Plaintiffs also complain about the Union Grace Church advertisement:

[4] Although approved under the content policy, the CDC never followed through with the posting of these ads on SMART coaches.

This advertisement, like the "atheist advertisement" addressed in great detail in the Defendants' Brief [Docket No. 57], invites the audience to participate in its services, as a general outreach. It does not "advocate" any position on any political or public issue.

Because none of these advertisements are political, Plaintiffs fail to show that SMART or its agents applied the content policy in an inconsistent manner. Every political ad that has been presented to SMART for review has been rejected, whether pro or con, and the policy has been consistently and appropriately applied.

Similarly, none of these advertisements "are likely to hold up to scorn or ridicule any person or group of persons," and do not use any scornful or disparaging language whatsoever. On this separate basis for excluding Plaintiffs' ad, Plaintiffs have presented no examples of any advertisement that has shown SMART to have applied Section 5.07(B)(4) in any inconsistent manner.

5. Plaintiffs present no evidence to this Court that the Defendants applied the policy in a biased or prejudiced fashion.

As shown extensively above, Plaintiffs have failed to come forward with any example that SMART has posted a political, public issue or scornful advertisement. This failure is fatal to Plaintiffs' argument that the application of the policy was not viewpoint neutral. As shown in the Defendants' Brief [Docket No. 57], the policy is unarguably facially viewpoint neutral. *Ridley v Mass. Bay Transp. Auth.*, 390 F.3d 65 (1st Cir. 2004).

Plaintiffs have no evidence that SMART has posted any Pro-Sharia Law advertisement, or indeed the pro or con side of any political or public issue. Plaintiffs have presented no evidence that SMART has allowed any scornful or disparaging advertisement by any advertiser.

Further, Plaintiffs bring forward no evidence that the Defendants *even considered* Plaintiffs' viewpoint when reviewing the advertisement. In fact, the only evidence elicited concerning Plaintiffs' viewpoint shows precisely the opposite. Plaintiffs' counsel explored this issue in the depositions of SMART's representatives, asking:

> Q. Have you heard anyone at SMART refer to my clients or my clients' advertisement as being either anti-Islam or Islamophobic?
>
> A. No.
>
> *****
>
> Q. Since you've been working at SMART, have you heard any SMART employee ever refer to any of my clients as being Islamophobes?
>
> A. No.
>
> Q. During any time that you've worked with SMART, have you heard any SMART employee ever refer to my clients' speech, or their speech activity, as Islamophobic or hate speech?
>
> A. No.

(Docket No. 57, **Exhibit G**, at pp. 54, 101). Similarly, Elizabeth Dryden testified:

Q. Ma'am, during the time that you worked with SMART, did you ever hear any SMART employee make any comments about any of my clients, referring to them as Islamophobes?

A. No.

MR. HILDEBRANDT: Remember who his clients are, Pamela Geller, Robert Spencer, American Freedom Defense Initiative; have you heard anybody refer to any of them as Islmaphobes or phobic?

A. No.

BY MR. MUISE:

Q. Have you ever heard any derogatory comments made about my clients by any employee at SMART?

A. No.

(**Exhibit C**, Deposition of Elizabeth Dryden, June 27, 2013, at p. 72).

Plaintiffs are reduced to second-guessing SMART's decision to exclude their advertisement and, lacking any evidence that the decision was improperly made, simply argue that because their viewpoint is unpopular, SMART must have, *ipso facto*, considered the viewpoint abhorrent. Plaintiffs have absolutely no indication or evidence that reveals or betrays SMART's viewpoint on these issues, which is how it should be. SMART remains neutral on all political and public issues, and the language and application of its policy is completely consistent with that neutrality.

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 not appropriate for the Plaintiffs; but rather is appropriate in favor of these Defendants as set forth fully in their Motion for Summary Judgment [Docket No. 57].

VANDEVEER GARZIA

By: __/s/ Christian E. Hildebrandt_____
JOHN J. LYNCH P16887
CHRISTIAN E. HILDEBRANDT P46989
Attorneys for Defendants
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)
Co-Counsel for Defendants
535 Griswold Street, Suite 600
Detroit, MI 48226

Dated: September 4, 2013

CERTIFICATE OF SERVICE

I hereby certify that on September 4, 2013, I electronically filed the attached papers, Defendants' Response to Plaintiffs' Motion for Summary Judgment, with the Clerk of the Court using the Court's ECF system which will send notification of such filing to the following:

Robert J. Muise (P62849)
David Yerushalmi, Esq.
Co-Counsel for Plaintiffs
3000 Green Rd., #131098
Ann Arbor, MI 48113
(855) 835-2352
rmuise@americanfreedomlawcenter.org
dyerushalmi@americanfreedomlawcenter.org

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

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: September 4, 2013