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' RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Hon. Denise Page Hood

Magistrate Judge Hluchaniuk

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 restriction on Plaintiffs' message violates the First and Fourteenth Amendments.

II. Whether, regardless of the nature of the forum, Defendants' 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)

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page**

Rules

INTRODUCTION

This case challenges Defendants' refusal to display Plaintiffs' "*Leaving Islam*" advertisement on SMART buses pursuant to SMART's "Advertising Guidelines," *which operate as a prior restraint on speech*. Both the factual record developed through discovery and Defendants' feckless attempt to justify their patently unconstitutional speech restriction through contorted and inconsistent arguments reveal that SMART has created a public 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 restriction on Plaintiffs' message violates the Constitution. Indeed, regardless of the forum, the actual application of the speech-restricting "guidelines"—as revealed through the factual record and Defendants' arguments—demonstrates that Defendants employ these "guidelines" 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 Constitution.

STANDARD OF REVIEW

A. Prior Rulings Are Not "Law of the Case."

As set forth more fully in Plaintiffs' motion for summary judgment (Pls.' Br. in Supp. of Mot. for Summ. J. at 1-3[Doc. 58]), the Sixth Circuit's reversal of this

court's order granting Plaintiffs' request for a preliminary injunction, *Am. Freedom Def. Initiative v. Suburban Mobility Auth. for Reg'l Transp.*, 698 F.3d 885 (6th Cir. 2012), as well as this court's prior ruling that the forum at issue is a nonpublic forum, *Am. Freedom Def. Initiative v. Suburban Mobility Auth. for Reg'l Transp.*, No. 10-12134, 2011 U.S. Dist. LEXIS 35083, at *9-*10 (E.D. Mich. Mar. 31, 2011), are preliminary decisions that are <u>not</u> binding on this court when deciding this motion (*i.e.*, they do <u>not</u> constitute the "law of the case"); *Univ. of Tx. v. Camenisch*, 451 U.S. 390, 395 (1981); *Wilcox v. United States*, 888 F.2d 1111, 1114 (6th Cir. 1989); *Tech. Publ'g Co. v. Lebhar-Friedman, Inc.*, 729 F.2d 1136, 1139 (7th Cir. 1984); *City of Angoon v. Hodel*, 803 F.2d 1016, 1024 n.4 (9th Cir. 1986); *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).

B. Summary Judgment Should Be Granted in Plaintiffs' Favor.

"The court shall grant summary judgment if . . . 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). When reviewing Defendants' motion, this court must view the evidence, all the facts, and the inferences that may be drawn from the facts in the light most favorable to Plaintiffs. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Additionally, while Plaintiffs have cross-moved for summary judgment (Doc. 58), this motion also exposes Defendants to summary

judgment. *See, e.g., Project Release v. Prevost*, 722 F.2d 960, 969 (2d Cir. 1983) ("[A] district judge may grant summary judgment to a non-moving party, if no genuine issues of material fact have been shown.").

MATERIAL FACTS[1]

A. The Parties.

Plaintiff American Freedom Defense Initiative ("AFDI") is a nonprofit organization that is incorporated under New Hampshire law. (Spencer Decl. at ¶ 3 [Doc. 58-2]). 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 [Doc. 58-8]).

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 [Doc. 58-2]; Geller Decl. at ¶¶ 2-4 [Doc. 58-3]).

[1] Except where noted, the evidence supporting Plaintiffs' factual assertions was previously filed in support of their motion for summary judgment. (Doc. 58). Additionally, as noted in the declaration filed in support of *this* opposition, there are facts unavailable to Plaintiffs that are essential to justify this opposition. *See* Fed. R. Civ. P. 56(d); (Muise Decl. at ¶¶ 2-4 at Ex. 1, attached to this brief).

Defendant SMART is a governmental agency. (*See* Defs.' Br. at 1). As a result, it must comply with the United States Constitution.[2] (SMART Dep. at 105 [Doc. 58-5]). 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."[3] (SMART Dep. at 105-06 [Doc. 58-5]; Dep. Ex. 6 [Doc. 58-6]).

During all relevant times, Defendant Gibbons was employed by SMART as the Marketing Program Manager in the Marketing Department, (Gibbons Dep. at 11 [Doc. 58-7]), 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 [Doc. 58-5]).

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 [Doc. 58-5]).

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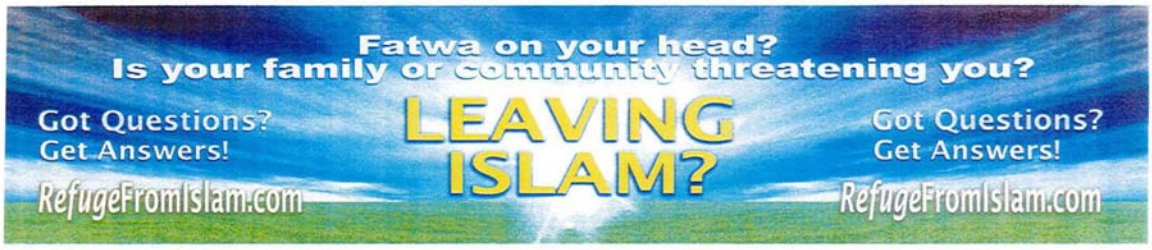
[2] Consequently, any comparisons between SMART and a private entity that might sell advertising, such as a restaurant or a newspaper, are inapt. Private companies need not comply with the requirements of the First Amendment.

[3] This statement was added to SMART's website *after* the atheist advertisement controversy, (Gibbons Dep. at 29-32 [Doc. 58-7]; Gibbons Decl. at ¶ 6 [Doc. 12-9]), which is discussed further in the text above, (*see also* Muise Decl. at ¶ 10, Ex. B, [Doc. 58-4]).

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

On May 12, 2010, Plaintiffs submitted their "*Leaving Islam*" advertisement for display on SMART's buses.



(Geller Decl. at ¶ 7 [Doc. 58-3]; Dep. Ex. 2 [Doc. 58-6]; Dep. Ex. SS [Doc. 58-9]). Plaintiffs subsequently entered into a contract through SMART's advertising agent to run the advertisement. (Geller Decl. at ¶ 7 [Doc. 58-3]).

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.[4] (Geller Dep. at 177 [Doc. 58-8]; Geller Decl. at ¶ 5 [Doc. 58-3]; Spencer Decl. at ¶¶ 6-14 [Doc. 58-2]). It is a public service message that has

[4] It is absurd to argue in the first instance, as Defendants do here, that this advertisement takes a position on whether sharia law should be implemented in this country. (*See* Defs.' Br. at 16, 26-27). Indeed, the advertisement does not even mention the word "sharia." As Plaintiffs will demonstrate further in this brief, Defendants must twist themselves into a pretzel to justify their discriminatory enforcement of their "guidelines." Such contortions, however, are not permitted when the *government* is attempting to censor the speech of a private citizen, particularly when the censorship operates as a prior restraint, as in this case. The government must have clear, *objective criteria* to follow and cannot rest its decision to restrict speech on "*ambiguous and subjective reasons*"—which is precisely what Defendants have done here. *See United Food & Commercial Workers Union, Local 1099 v. Sw. Ohio Reg'l Transit Auth.*, 163 F.3d 341, 359 (6th Cir. 1998) (hereinafter "*United Food*").

nothing to do with politics or political campaigns. (Spencer Decl. at ¶¶ 6, 14 [Doc. 58-2]). 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 [Doc. 58-5] [admitting fact]). Furthermore, it is indisputable that the penalty for leaving Islam (apostasy) is severe, (Spencer Decl. at ¶¶ 9-13 [Doc. 58-2]), as the Sixth Circuit recently acknowledged 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) (acknowledging that "'[t]he penalty of leaving Islam according to Islamic books is death'").[5] Thus, it is indisputable that the subject matter of this advertisement is religion and *not* politics.[6]

[5] These are facts that are no different from the fact that "men who have sex with men" risk contracting the HIV virus or the fact that sexually active women who do not use contraception risk becoming pregnant. (*See* Material Facts, Sec. D, *infra*).

[6] Defendants claim the following: "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." (Defs.' Br. at 25). This claim is not only false factually, but it is nonsensical from a legal perspective. *The advertisement says what it says*. Yet, Defendants ignore the actual message and, instead, impugn the motives and purposes of the messenger to justify their restriction (Defs.' Br. at 25-26)—which is impermissible. Moreover, the subject matter of the message is *religion*, which includes the fact that the advertisement is offering support for those who want to exercise their *religious freedom* in this country. There is no "abandon[ing]" of anything. Additionally, Plaintiffs' message is precisely the same as the message conveyed by the atheist

On 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.[7] (Geller Decl. at ¶¶ 8, 9 [Doc. 58-3]).

C. SMART's "Advertising Guidelines."

SMART enforces what it presents as content-based advertising "guidelines" that prohibit certain advertisements on its buses and bus shelters. These "guidelines" were employed by Defendants to reject Plaintiffs' "*Leaving Islam*" advertisement. (SMART Dep. at 37 [Doc. 58-5]).

SMART's "Advertising Guidelines" state, in relevant part, as follows:

5.07 Advertising Guidelines

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advertisement. In the case of the atheist advertisement, the Detroit Coalition of Reason is informing viewers that if they don't believe in God, they are not alone and thus have "refuge" ("[s]helter from . . . distress or difficulty") with the coalition and its like-minded organizations. In short, it is a religious freedom message as well—except that the atheists are providing freedom from all religion, not just Islam. There is no principled distinction between the two messages.

[7] Not until this litigation commenced did SMART inform Plaintiffs that their "*Leaving Islam*" advertisement was rejected because it was "political," let alone "scornful"—a position that Defendant Gibbons admitted during the hearing on Plaintiffs' motion for preliminary injunction had no support and was thus fabricated out of whole cloth as Defendants' fallback position. (*See* Material Facts, Sec. C, *infra*).

* * * *

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.

(Dep. Ex. 3 [Doc. 58-4]) (emphasis added).

Aside from what is stated in the "Advertising 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 [Doc. 58-5]; Gibbons Dep. at 92 [Doc. 58-7]).

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 [Doc. 58-5]). Each department can act unilaterally, or the departments can collaborate in the decision-making process. (SMART Dep. at 27-28 [Doc. 58-5). As noted above, during the relevant time period, Defendant

Gibbons had the authority to accept or reject advertisements under the "guidelines" on behalf of SMART, (Gibbons Dep. at 23, *see also* 15-16 [Doc. 58-7]), and so too did Defendant Hertel (SMART Dep. at 27-28, 31 [Doc. 58-5]).

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 [Doc. 58-5]) (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 [Doc. 58-5]) (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 [Doc. 58-7]). 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 designated witness in preparation for her own deposition. (Gibbons Dep. at 9-11, 24-25 [Doc. 58-7]).

During her prior sworn testimony at the hearing on Plaintiffs' motion for a preliminary injunction, Defendant Gibbons testified as follows:

> 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]?[8]

A. Right.

(Tr. of Hr'g on Mot. for Prelim. Inj. at 15 [Doc. 18]) (hereinafter "Tr.").

Defendant Gibbons also stated during the hearing that when she examined the "*Leaving Islam*" advertisement (*i.e.*, its content), 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. 18]) (emphasis added). And <u>*in response to questions from SMART's counsel*</u>, Defendant Gibbons testified 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*.

(Tr. at 19 [Doc. 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—<u>not</u> whether the advertisement itself contained "political" <u>*content*</u>.

[8] The "atheist advertisement" is the Detroit Area Coalition of Reason's advertisement that ran on SMART's buses. (*See* Material Facts, Sec. D, *infra*).

With regard to whether Plaintiffs' "*Leaving Islam*" advertisement violated the prohibition on advertisements that were "clearly defamatory or likely to hold up to scorn or ridicule any person or group of persons," Defendant Gibbons testified as follows:

> Q: There is nothing in [Plaintiffs'] ad that disparages or scorns any particular people?
> 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. 18]) (emphasis added). Indeed, *everyone* at this hearing, including the court, which asked the follow-up question above, understood that Defendant Gibbons was testifying on behalf of SMART, *as the parties agreed by stipulation* and as Defendant Gibbons *admitted under oath*.[9]

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 [Doc. 58-10]), understood

[9] Per the agreement of the parties, Defendant Gibbons was designated by SMART pursuant to Rule 30(b)(6) to testify on its behalf during the hearing, and Defendant Gibbons 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. 18]). Despite these undisputed facts, the Sixth Circuit decided, *ipse dixit*, that Defendant Gibbons was testifying on her own behalf. *Am. Freedom Def. Initiative*, 698 F.3d at 896. Nonetheless, as we learned through discovery, Defendant Gibbons is a decisionmaker for SMART with regard to the application of the advertising "guidelines." Consequently, her testimony is binding on SMART as an admission by a party-opponent. *See* Fed. R. Evid. 801(d)(2).

(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."[10] (Dryden Dep. at 13 [Doc. 58-10]). 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 [Doc. 58-10]).

In summary, if an advertisement addresses a contentious issue—at least one that Defendants believe is contentious *based upon a hypothetical, sliding "spectrum" of contentiousness*—then it is rejected. (*See* SMART Dep. at 66-67 [Doc. 58-5] [acknowledging that there is a hypothetical "spectrum" of whether something is sufficiently "politicized" to be rejected]). As demonstrated further below, whether an advertisement addresses an issue that is sufficiently "politicized" or "scornful" and thus rejected is wholly arbitrary and subjective.

D. Application of SMART's "Advertising Guidelines."

There is no dispute that 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.

[10] 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 [Doc. 58-5]; Dep. Ex. 36 [Doc. 58-6]).

As noted previously, 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 [Doc.58-5]; Dep. Ex. 4 [Doc. 58-6]).

The Detroit Area Coalition of Reason's webpage (and its affiliated United Coalition of Reason) *as identified on the advertisement*[11] 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,

[11] Defendants claim that they review the websites referenced in every advertisement submitted for approval and consider the content of the website as part of the content of the advertisement itself. (Defs.' Br. at 19). This application of the "guidelines"—found nowhere in the "guidelines" themselves—is troubling because it effectively excludes any organization that might have "political" content on its website from running an advertisement identifying the organization and its website (which is the primary way in which organizations identify themselves today in light of the Internet), even though the advertisement, as in this case, is in no way political. But like every application of SMART's advertising "guidelines"—including this one—Defendants do so in an arbitrary, subjective, and discriminatory manner, picking and choosing which website content and links within that content to consider.

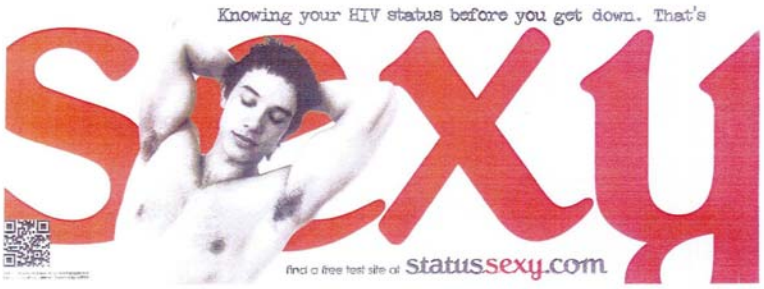
rational and freethought presentations and discussions, to networking and camaraderie, Detroit CoR Member Groups have so much to offer." *See* http://unitedcor.org/detroit/page/about-us.[12] (emphasis added). (Muise Decl. at ¶ 11, Exs. A-C, [Doc.58-4]; SMART Dep. at 84, 87 [Doc. 58-5]). The Detroit Area 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 (and based on its website, the role of religion in politics).[13] As Defendant Gibbons affirmed in her deposition, the issue presented by this advertisement is so *politicized* that bus drivers for SMART <u>*refused*</u> to drive the buses displaying the advertisement because the message "went against their belief." (Gibbons Dep. at 29 [Doc. 58-7]).

SMART also accepted under its "guidelines" advertisements that promote

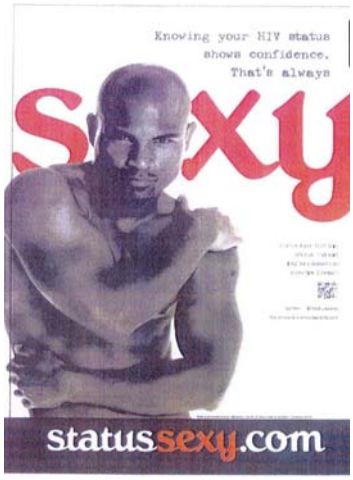
[12] The acceptance of the atheist advertisement was not an instance of "erratic enforcement of a policy," *compare Ridley v. Mass. Bay Transp. Auth.*, 390 F.3d 65, 78 (1st Cir. 2004), nor a "purported aberration," *see Am. Freedom Def. Initiative*, 698 F.3d at 892. To this day, SMART defends its decision to run the controversial advertisement (SMART Dep. at 94 [Doc. 58-5]), even though SMART admits that "the separation of church and state . . . is certainly a politicized issue," (SMART Dep. at 84-85 [Doc. 58-5]). And Plaintiffs' position is further supported by the fact that Defendants accepted (albeit without the website citation), Plaintiffs' "*Don't believe in Muhammad?*" advertisement, which mirrored the atheist advertisement. (*See* Defs.' Br. at 35-36).

[13] 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. Remarkably, SMART testified under oath that the issue of the belief in God is <u>*not*</u> 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 [Doc. 58-5]).

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



Another advertisement SMART accepted from this campaign is as follows:



(SMART Dep. at 135 [Doc. 58-5]; Dep. Exs. 13-19 [Doc. 58-6]). According to an article linked on the statussexy.com website—*which is listed on the advertisement* and thus considered part of its content according to SMART's testimony—"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.'"[14]

[14] 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 and its content would *not* cause

(SMART Dep. at 138-43 [Doc. 58-5]; Dep. Exs. 19, 20 [Doc. 58-6]) (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,[15] including children, seeing this controversial, highly sexualized (lewd and obscene), and polarizing advertisement campaign.

Defendants 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 [Doc. 58-5]; Dep. Ex. 22 [Doc. 58-6]).

Defendants approved the display of a stop-smoking campaign that employs

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SMART to disapprove the advertisement under the "guidelines" at issue. (SMART Dep. at 138-43 [Doc. 58-5]). 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 (*i.e.*, get tested "before you get down").

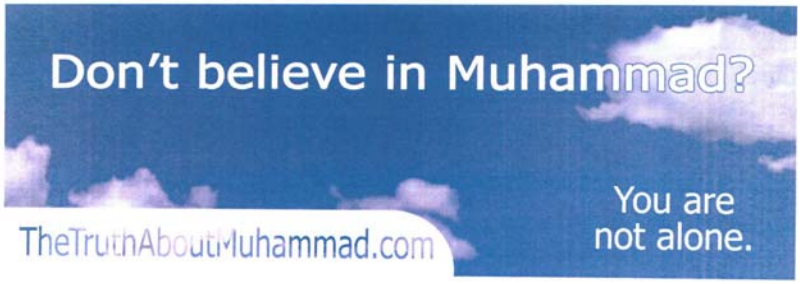
[15] This campaign ran on advertising space <u>within</u> SMART buses as well as on the outside of the buses and at bus shelters. (Dep. Exs. 13-18 [Doc. 58-6]).

graphic and controversial images to advocate for a position against smoking. (SMART Dep. at 164-65 [Doc. 58-5]; Dep. Exs. 30-31 [Doc. 58-6]).

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 [Doc. 58-5]; Dep. Ex. 26 [Doc. 58-6]).

Defendants approved stop-drunk-driving campaigns, AIDS/HIV awareness campaigns, and stop-hunger campaigns, among others, (*see* Dep. Exs. 23-25, 27-28 [Doc. 58-6]), 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 [Doc. 58-5])—*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 design of the atheist advertisement that said, "***Don't believe in Muhammad? You are not alone***." (SMART Dep. at 124-26, *see also* 116-17 [Doc. 58-5]; Dep. Ex. TT [Doc. 58-9]). A copy of the "*Don't believe in Muhammad?*" advertisement is as follows:



However, Defendants ultimately <u>*accepted*</u> this advertisement so long as the website (TheTruthAboutMuhammad.com) was removed. (Defs.' Br. at 36).

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.

Additionally, because SMART's refusal to display Plaintiffs' "*Leaving Islam*" advertisement "is a clearcut prior restraint," *Lebron v. Wash. Metro. Area*

Transit Auth., 749 F.2d 893, 896 (D.C. Cir. 1984) (Bork, J.) (reviewing rejection of an advertisement by the transit authority), it "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*, 163 F.3d at 355.

Additionally, it is important at this point to once and for all put to rest Defendants' repeated (and incorrect) assertion that Plaintiffs admit that their advertisement is "political" for purposes of applying Defendants' advertising "guidelines." ***Plaintiffs make no such admission***. In support of this assertion, Defendants cite to allegations in the Complaint (*see* Defs.' Br. at 23-24)—allegations which, by the way, Defendants denied in their Answer, (*see* Answer [Doc. 13]). But more important, Defendants incorrectly conflate "political" ***content***, which is a factual matter to be resolved ***by viewing the advertisement*** itself, and "political" speech, which is a ***legal category*** of speech that covers not just political ***content***, but content addressing ***public issues***, such as birth control, homosexuality, HIV/AIDS testing, drunk driving, domestic violence, smoking, and

a host of other subject matter that Defendants permit within the forum at issue. *Connick v. Myers*, 461 U.S. 138, 145 (1983) ("[S]peech on *public issues* occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.") (internal quotations and citations omitted) (emphasis added). Clearly, Plaintiffs' advertisement (and many others) cannot be categorized as "commercial" speech. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 561 (1980) (defining commercial speech as "expression related solely to the economic interests of the speaker and its audience"). And the fact that Plaintiffs' "*Leaving Islam*" advertisement addresses religion does not change this analysis. *Capitol Square Rev. & Adv. Bd. v. Pinette*, 515 U.S. 753, 760 (1995) (stating "that private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression"). In short, Defendants have conflated the use of the term "political speech" in the Complaint with Defendants' use of the word "political" in their "guidelines." This is not merely a definitional error, it is a logical, legal, and factual error.

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.[16] *Id*. at 800. Once the forum is identified, the court then determines whether the speech restriction is justified by the requisite standard. *Id.*

A designated public forum is created 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*. When conducting this analysis, "actual practice speaks louder than words." *Grace Bible Fellowship, Inc. v. Maine Sch. Admin. Dist. No. 5*, 941 F.2d 45, 47 (1st Cir. 1991); *see also Hopper v. City of Pasco*, 241 F.3d 1067, 1076 (9th Cir. 2001) ("[C]onsistency in application is the hallmark of any policy designed to preserve the non-public status of a forum. A policy purporting to keep a forum closed (or open to expression only on certain subjects) is no policy at all for purposes of public forum analysis if, in practice, it is not enforced or if exceptions are haphazardly permitted."); *United Food*, 163 F.3d at 353 (stating that "we . . . must closely examine whether in practice [the transit authority] has consistently enforced its written policy in order to satisfy ourselves that [its] stated policy

[16] 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).

represents its actual policy").

As the Sixth Circuit stated in *United Food*:

> 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 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 noncommercial 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 and that resulted in vandalism to some of the buses). Defendants'

actions are thus "*inconsistent with operating the property **solely** as a commercial venture*,"[17] which is required to keep the forum a closed, nonpublic forum.

Consider further the fact that Defendants accepted an advertisement that states, "*Don't believe in God? You are not alone.*" and an advertisement that states simply, "*Don't believe in Muhammad? You are not alone*." Consequently, there is little doubt that Defendants would accept advertisements that state, "*Don't believe in Jesus? You are not alone.*" or "*Don't believe in Buddha? You are not alone.*" Also, based on Defendants' application of their "guidelines," there would be no basis to reject an advertisement that stated, "*Don't believe in Obama? You are not alone.*" That advertisement does not contain content that is any more or less "political" (and it is certainly not a political campaign advertisement) than the "*Don't believe in Muhammad?*" advertisement that Defendants accepted (*sans* website), for it is widely understood that Muhammad was a *political* leader. (*See* Muise Decl. at ¶ 5, Ex. A, at Ex. 1, attached to this brief).

Thus, permitting messages on controversial *public issues*—speech that rests on the "highest rung of the hierarchy of First Amendment values" (including this public debate on "beliefs")—demonstrates that Defendants do not strictly limit advertisements to innocuous commercial and service oriented messages, thereby

[17] 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 [Doc. 58-5]).

creating a public forum for Plaintiffs' "*Leaving Islam*" advertisement.

Indeed, a careful reading of the Supreme Court's decision in *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974)—the case that Defendants contend is controlling on the forum issue (*see* Defs.' Br. at 13 [claiming that "the *Lehman* case is controlling of the exact issue in the instant case"])—demonstrates that SMART has in fact created a public forum for Plaintiffs' advertisement.

In *Lehman*, the Court found that the 26-year, *consistently enforced ban on noncommercial advertising* was consistent with the government's role as a proprietor. Here is what the Supreme Court said in *Lehman*:

> 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.

Id. at 304 (emphasis added). Other courts have followed *Lehman* to hold that a total ban on noncommercial speech may be consistent with the government acting in a proprietary capacity and have thus found transportation advertising space to be a nonpublic forum when the government "consistently promulgates and enforces policies restricting advertising . . . to commercial advertising." *Children of the Rosary v. City of Phoenix*, 154 F.3d 972, 978 (9th Cir. 1998); *see also N.Y.*

Magazine, 136 F.3d at 130 ("Disallowing political speech, and *allowing commercial speech only*, indicates that making money is the main goal. Allowing political speech, conversely, evidences a general intent to open a space for discourse, and a deliberate acceptance of the possibility of *clashes of opinion and controversy* that the Court in *Lehman* recognized as *inconsistent with sound commercial practice*.") (emphasis added).

Thus, a close reading of *Lehman* in light of the facts of this case demonstrates beyond cavil that SMART has not limited its advertising space to "innocuous and less controversial commercial and service oriented advertising" as required to close the forum for noncommercial speech such as Plaintiffs' "*Leaving Islam*" advertisement. Instead, SMART has created a public forum to address a host of public issues (and competing messages regarding those issues), thereby creating a public forum for Plaintiffs' speech.[18] Consequently, the facts of this case mirror precisely those facts at issue in *United Food*, which is controlling and which demonstrates that the forum at issue is a public forum for Plaintiffs' speech.

Finally, it is without question that the "nature of the property"—the advertising space—is "compatible" with Plaintiffs' proposed expressive activity.

[18] The fact that Defendants restrict some content from the forum (*e.g.*, advertisements regarding tobacco sales, *etc.*) does not preclude a finding that the forum at issue is a designated public forum for Plaintiffs' speech. *N.Y. Magazine*, 136 F.3d at 129-30 ("It cannot be true that if the government excludes any category of speech from a forum . . . that forum becomes ipso facto a non-public forum.").

See United Food, 163 F.3d at 355 (concluding that the advertising space on a bus system was a public forum and stating that "acceptance of political and public-issue speech suggests that the forum is suitable for the speech at issue"—a pro-union message). In fact, Plaintiffs' "*Leaving Islam*" advertisement has run on transit system buses (which also sell advertising space for revenue) in other major cities—Miami, New York, and San Francisco. (Geller Decl. at ¶ 6 [Doc. 58-3]).

In sum, a forum analysis "involve[s] a careful scrutiny of whether the government-imposed restriction on access to public property is truly part of the process of limiting a nonpublic forum to activities compatible with the intended purpose of the property." *United Food*, 163 F.3d at 351-52 (internal quotations and citation omitted). Courts will hold "that the government did not create a public forum *only* when its standards for inclusion and exclusion *are clear* and are *designed to prevent interference with the forum's designated purpose*." *Id.* at 352 (emphasis added).

Here, Defendants can hardly argue that SMART's advertising space is generally incompatible with expressive activity or that SMART's principal function of providing transportation would be disrupted by Plaintiffs' "*Leaving Islam*" advertisement. Defendants have routinely made SMART's advertising space available to noncommercial, public-issue advertising on a wide range of controversial issues without any disruption. And the one advertisement that *in fact*

caused disruption (*i.e.*, the atheist advertisement) because of its content *is permissible under the relevant "guidelines*."[19] Thus, it is clear that Defendants "created a forum that is suitable for the speech in question . . . ." *Christ's Bride Ministries, Inc.*, 148 F.3d at 252.

C. Defendants' Restriction Cannot Survive Constitutional Scrutiny.

1. Defendants' Speech Restriction Is 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

[19] As noted, the record reveals without exception that Defendants have posted a wide array of noncommercial, public issue advertisements, thereby undermining any argument that an advertisement like Plaintiffs' "*Leaving Islam*" advertisement could be excluded in the interests of protecting the revenue-generating capacity of SMART's advertising space. Thus, "the purpose of the forum does not suggest that it is closed, and the breadth of permitted speech points in the opposite direction." *Christ's Bride Ministries, Inc. v. Southeastern Pa. Transp. Auth.*, 148 F.3d 242, 253 (3d Cir. 1998).

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, there is no dispute that Defendants rejected Plaintiffs' "*Leaving Islam*" advertisement based on its content, (SMART Dep. at 18 [Doc. 58-5] [admitting fact]), in violation of the First Amendment.

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

"[T]he 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."[20] *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553 (1975). "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*, 163 F.3d at 359 (emphasis added); *see also Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 130 (1992) ("A government regulation that

[20] 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 throughout this response brief, Defendants' speech restriction fails to meet this standard.

allows arbitrary application . . . has the potential for becoming a means of suppressing a particular point of view."). Thus, 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*, 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.

In its opinion reversing the grant of a preliminary injunction, the Sixth Circuit—incorrectly assuming, based on the limited record before it, that SMART's "guidelines" provided an articulated definitive standard that could be applied objectively and consistently by Defendants as required by the Constitution—attempted to distinguish *United Food* by stating the following:

> We found unbridled discretion had been vested in the decisionmakers because there was *no articulated definitive standard* to determine what was "controversial." . . . In the *United Food* situation . . . the employee would have to determine where—*on a hypothetical spectrum of controversy*—an advertisement fell.

Am. Freedom Def. Initiative, 698 F.3d at 894. Through discovery, we now know that Defendants' speech restriction suffers from the very same defects. Indeed, "political," as that term is understood and applied by Defendants, 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.*

Here, Defendants consider any matter that is sufficiently *contentious* (*i.e.*, "factions of society have taken up positions on it that are not in agreement") based upon a *sliding, hypothetical "spectrum" of contentiousness*, (SMART Dep. at 66-67 [Doc. 58-5] [acknowledging that there is a hypothetical "spectrum" of whether something is sufficiently "politicized" to be rejected]), to be "political" pursuant to the "guidelines" and thus impermissible. This is precisely the reason why the restriction was struck down in *United Food*, as the Sixth Circuit acknowledged when ruling on the preliminary injunction in this case. *See also Planned Parenthood Ass'n/Chicago Area*, 767 F.2d at 1230 ("We question whether a regulation of speech that has as its touchstone a government official's subjective view that the speech is 'controversial' could ever pass constitutional muster.").

Consider further Defendants' application of their "guidelines." According to Defendants, an advertisement that provides services for post-abortive women is "political" because, broadly speaking, abortion is political, and so too is an advertisement offering assistance for those individuals (typically young women) who might be in an abusive situation due to their religious beliefs because, broadly speaking, there is a controversy over whether sharia law should be enforced in the United States. Yet, an advertisement that promotes "men having sex with men" is not "political," nor is an advertisement that encourages the use of "*Birth control,*

including: Pills, IUD's, Condoms and Diaphragms," nor is an advertisement that endorses the position that God does not exist ("*Don't believe in God? You are not alone*.").

Apparently, in the politically correct, contrived world in which Defendants abide, homosexuality, contraception, and the existence of God are not "political" issues as they define "political" [*i.e.*, contentious issues within society]). *But see United States v. Windsor*, 133 S. Ct. 2675, 2696 (2013) (striking down a provision of the Defense of Marriage Act that denied certain federal benefits for same-sex marriages); *Romer v. Evans*, 517 U.S. 620 (1996) (striking down a Colorado constitutional amendment dealing with discrimination based on sexual orientation); *Griswold v. Conn.*, 381 U.S. 479 (1965) (striking down a law that made the use of contraceptives a criminal offense); *Eden Foods, Inc. v. Sebelius*, No. 13-11229, 2013 U.S. Dist. LEXIS 40768 (E.D. Mich. Mar. 22, 2013) (Hood, J.) (denying a motion for a temporary restraining order seeking to enjoin enforcement of the contraception mandate of the Patient Protection and Affordable Care Act); *Newdow v. Lefevre*, 598 F.3d 638 (9th Cir. 2010) (holding that the national motto of the United States, "In God We Trust," and its inscription on the Nation's coins and currency do not violate the Establishment Clause or the Religious Freedom Restoration Act of 1993); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004) (dismissing constitutional challenge to the "under God" provision of the

Pledge of Allegiance).

Consider also Defendants' application of their "scornful" speech restriction. This restriction suffers from the same arbitrary and subjective defects as Defendants' "political" calculation, as illustrated by the sworn testimony of Defendant Gibbons. (Tr. at 10-11 [Doc. 18]) [testifying that she was unable to determine whether the advertisement was scornful]). Moreover, this restriction is patently viewpoint based.

Here, there is nothing in Plaintiffs' "*Leaving Islam*" advertisement that "scorns" or "ridicules." The advertisement addresses a serious issue—it does not mock or make fun of anyone. Does an advertisement for a battered women's shelter "scorn" or "ridicule" those who engage in domestic violence (or all people who are in domestic relationships, whether they engage in violence or not)? Does a stop-drunk-driving campaign "scorn" or "ridicule" those who drive under the influence (or all people who drive, whether they drive intoxicated or not)? Does a stop smoking campaign that uses inflammatory and graphic images "scorn" or "ridicule" smokers? And why doesn't the atheist advertisement—*which resulted in vandalism and SMART's own bus drivers refusing to drive the buses with this advertisement posted*—not "scorn" or "ridicule" people who believe in God?

In the final analysis, it is not possible for an objective and reasonable man or woman (or federal judge for that matter) to look at these facts and not conclude

that Defendants' arguments are, if not complete nonsense, entirely incoherent.[21] SMART's "guidelines," as applied by Defendants, are a quintessential example of a grant of power to government bureaucrats that permits them to make arbitrary and capricious decisions that ultimately restrict the right to freedom of speech in violation of the First Amendment.

3. Defendants' Speech Restriction Is Viewpoint Based.

Defendants' position is intrinsically viewpoint oriented and based.[22]

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[21] In one breath Defendants argue that Plaintiffs' "*Don't believe in Muhammad?*" advertisement was intended to "mock" the atheist advertisement (thus, pursuant to Defendants' application of the "guidelines," it is "likely to hold up to scorn or ridicule" the atheists) (Defs.' Br. at 35). Yet, in the next breath, Defendants note that they accepted this advertisement without the referenced website (TheTruthAbout Muhammad.com), which they claim mocks Muslims. (Defs.' Br. at 36). These mental gymnastics are necessitated by the fact that Defendants accepted the atheist advertisement (which conveys a "political" message as Defendants have now defined that term and which mocks people who believe in God, as evidenced by the fact that Defendants' own bus drivers refused to drive the buses that had this advertisement posted) and are thus forced into a dilemma caused by the incoherent, vague, and subjective application of their "guidelines."

[22] Defendants rely on *Ridley v. Mass. Bay Transit. Auth*., 390 F.3d 65 (1st Cir. 2004), as support for their argument that their "scornful" speech restriction is not viewpoint based. (*See* Defs.' Br. at 32-33). Defendants are mistaken. As the court stated in *Ridley*, "[U]nder 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. . . . . Some kinds of *content* (demeaning and disparaging remarks) are being disfavored, *but no viewpoint is being preferred over another*." *Id*. at 91 (emphasis added). Here, Plaintiffs' "*Leaving Islam*" advertisement does not use any "disparaging [or scornful] language" in its content. Would language in a battered women's shelter

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).

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advertisement stating, "*Is your spouse threatening you?*" be considered "scornful"? Of course not. Consequently, Defendants are not objecting to the use of any "scornful" language in the advertisement. Rather, what Defendants object to here is the *viewpoint* expressed by the advertisement: that some Muslims are subject to threats for leaving Islam—a viewpoint, which, by the way, reflects a true statement of fact. Thus, an advertisement that stated, "*Come to Islam and join a religion that promotes peace and love*" would be accepted (*see, e.g.*, Dep. Ex. 26 [Doc. 58-6 [accepting a Christian advertisement stating, "*Feeling lost? Find your path.*"]), but a message that criticized this viewpoint would be rejected, regardless of its language. Moreover, Plaintiffs' "*Leaving Islam*" advertisement does not convey the message that all Muslims are violent or that all those seeking to leave Islam are subject to violence. (*Contra* Defs.' Br. at 30-31 [incorrectly asserting that "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."]). It simply states that if you are being threatened because you want to leave Islam (apostasy), then we can help. There is no language in the advertisement that is "scornful" or that "ridicules." Rather, it is the viewpoint expressed by the message that Defendants oppose, in violation of the First Amendment. *See Berner v. Delahanty*, 129 F3d. 20, 28 (1st Cir. 1997) ("[T]he essence of viewpoint-based discrimination is the state's decision to pick and choose among similarly situated speakers in order to advance or suppress a particular ideology or outlook.").

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. (SMART Dep. at 55 [Doc. 58-5]). 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 [Doc. 58-5]). 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); *Ridley*, 300 F.3d at 100 ("Religious belief is quintessentially a matter of viewpoint. The government cannot allow dissemination of one

viewpoint that it finds inoffensive or bland, and prohibit the dissemination of another viewpoint that it finds offensive or 'demeaning,' . . . . Such distinctions are viewpoint based, not merely reasonable content restrictions.") (dissent).

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. 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 [Doc. 58-5]). 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 [Doc. 58-5] ["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 expressed in the "*Leaving Islam*" advertisement (*see* SMART Dep. at 48 [Doc. 58-5] [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).

Finally, it is incorrect as a matter of law to conclude that because Defendants ultimately accepted the "*Don't believe in Muhammad?*" advertisement (which Defendants had no choice to do in light of their insistence that the "*Don't believe in God?*" advertisement was permissible), that their rejection of the "*Leaving Islam*" advertisement was therefore free of viewpoint discrimination. (*See* Defs.' Br. at 36). One does not follow from the other. In *Ridley*, for example, the court held that the MBTA's restriction on certain advertisements that were critical of laws prohibiting drug use were viewpoint based in violation of the First Amendment. The MBTA attempted to avoid the fact that its restriction was viewpoint based by arguing that a similar message could be run if a different manner of expression were used. The court rejected the argument, stating,

> The MBTA's concession means simply that it will run advertisements which do not attract attention but will exercise its veto power over advertisements which are designed to be effective in delivering a message. Viewpoint discrimination concerns arise when the

> government intentionally tilts the playing field for speech; reducing the effectiveness of a message, as opposed to repressing it entirely, thus may be an alternative form of viewpoint discrimination.

Ridley, 300 F.3d at 88.

Thus, attempting to reduce the effectiveness of a message or the thrust of its meaning—even if the entire message itself is not prohibited—is a form of viewpoint discrimination that is impermissible in every forum.

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 infringed 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

Plaintiffs respectfully request that this court deny Defendants' motion and enter judgment in Plaintiffs' favor on all claims as a matter of law.

Respectfully submitted,

AMERICAN FREEDOM LAW CENTER

/s/ Robert J. Muise
Robert J. Muise, Esq.

/s/ David Yerushalmi
David Yerushalmi, Esq.

THOMAS MORE LAW CENTER

/s/ Erin Mersino
Erin Mersino, Esq.

Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on September 4, 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.

AMERICAN FREEDOM LAW CENTER

/s/ Robert J. Muise
Robert J. Muise, Esq. (P62849)