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' REPLY BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT [D# 57]

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DEFENDANTS' REPLY BRIEF IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT [DOCKET NO. 57]

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STATEMENT OF MOST CONTROLLING AND APPROPRIATE AUTHORITY

Defendants hereby assert that the most controlling and appropriate authority necessary for the resolution of Defendants' 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

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ARGUMENT

1. There is no genuine issue of material fact that Plaintiffs' message in their advertisement, in their website *Refuge*FromIslam.com, and in their mission is political, even if the topic is also related to religion.

It is astounding that, in its response, Plaintiffs still argue that their message, as embodied in the proposed advertisement, and in the website that the advertisement refers to, is not political. As Plaintiffs seek to put this issue "to rest," it is important to note that Plaintiffs and Plaintiffs' counsel regularly take the position in other forums that their entire mission, as an organization, is political.

Plaintiff, Pamela Geller acknowledged in her deposition that her initiative, Stop the Islamisation of America[1] ("SIOA"), is an "arm of AFDI," and that the transit ads run by the Plaintiffs are run "in tandem" as a joint initiative of AFDI and SIOA. (Docket No. 57, **Exhibit O**, Deposition of Pamela Geller, at pp. 44-45). The website, *Refuge*FromIslam.com, prominently features the SIOA logo, with an invitation to join SIOA, demonstrating that SIOA is behind the initiative. (**Exhibit A**).

Based upon this, Defendants assert that Plaintiffs are arguing this point in bad faith. Counsel for the Plaintiffs know and in fact have argued that SIOA exists

[1] Although counsel spells "Islamization" with a "z," the organizational name for SIOA spells the word, "Islamisation." It is presumed that this spelling was intended to mirror the more European spelling of the term in the name of the organization Stop the Islamisation of Nations ("SION"). Either way, Microsoft Word does not recognize the word in its spelling dictionaries.

to protect against the creep of Sharia Law in American society. In a webpage printed from the website of the American Freedom Law Center,[2] reporting on other issues faced by the Plaintiffs in other forums, counsel for the Plaintiffs discuss their appeal of a ruling from the Trademark Trial and Appeal Board ("TTAB"). That ruling disallowed trademark protection for SIOA. The original ruling was based on the finding that the name of the organization was disparaging to Muslims and linked Muslims to terrorism. In their appeal brief in that matter, as reported by Plaintiffs' counsel, Plaintiffs Geller and Spencer argued that "'Islamisation' is the process of implementing sharia into a society in order to convert that society to a sharia-compliant Islamic state." (**Exhibit B**).

Addressing sharia law in America is precisely what the Sixth Circuit held, in this case, was the nature and message of Plaintiffs' advertisement. *Amer. Freedom Def. Init. v Suburban Mobility Auth for Reg. Trans.*, 698 F.3d 885, 894-96 (2012). Further, it is what Plaintiffs' counsel recognizes to be the message conveyed by the putative trademark "SIOA." In this regard, commenting on the decision of the TTAB, Mr. Yerushalmi stated:

> The TTAB's opinion upholding the USPTO's rejection of the mark was forced to bend itself into a pretzel to get around the only evidence in the record. The term 'Islamisation' is a political movement—not religious conversion—and it can be traced to the Muslim Brotherhood, where it is found in their own documents advocating 'civilizational jihad.' Furthermore, the term is used frequently in

[2] The law firm representing Plaintiffs

> professional and academic contexts. Therefore, 'stopping Islamisation' and linking this doctrine to terrorism does implicate good, patriotic, loyal Muslims in America; instead, it is an important educational tool that raises awareness about those who seek the demise of our constitutional Republic through a sharia-based political process.

(**Exhibit B**, pp. 1-2). Robert Muise also commented as follows:

> It is crucial that Americans understand the threat that our Nation faces from sharia-adherent Islam, especially from stealth jihadists who covertly seek to perpetuate sharia into American society. This trademark does exactly that.

(**Exhibit B**, p. 2). The trademark, and mission of SIOA, an arm of the Plaintiffs, is to protect America's constitutional Republic from the creep of sharia-compliant law promoted by stealth jihadists. SIOA runs this ad in tandem with the Plaintiffs and is prominently featured on the referred-to website.

Aside from admissions in their Complaint and Declarations, Plaintiffs argue that their message is political to everyone but this Court; here, when they face a valid content restriction, they change their tune. Defendants' counsel asks: What could be more political than Plaintiffs' message?

2. Plaintiffs conflate issues and create facts that are not in the record to make their arguments; when these errors and misrepresentations are corrected, the arguments are shown to be without merit.

For all of Plaintiffs' argument about cavils and tautologies, it is the Plaintiffs who have manufactured facts and misstated the record to this Court, often talking out of both sides of their mouth, to argue their case. This section of the reply brief

will attempt to address some of these issues in a coherent manner to allow the Court to see them in the light of day.

Plaintiffs' argument	**Actual record facts**
1. Plaintiffs spend a considerable amount of time arguing that Ms. Gibbons was the decision-maker at SMART and applied the guidelines improperly.	Ms. Gibbons did not make the decision to reject Plaintiffs' advertising, as stated by the Defendants from the very beginning, before this Court, at the inception of this case, SMART informed the Court that it was the General Manager, John Hertel, who made the decision to reject the advertisement. Ms. Gibbons personal testimony about what she reviewed or considered is immaterial. Inexplicably, Plaintiffs never requested Mr. Hertel's deposition, and prefers instead to attempt to impute Ms. Gibbons' testimony to him vicariously.
2. In the same vein, Plaintiffs continue to argue that Ms. Gibbons previous personal testimony is binding on SMART despite the ruling of the Sixth Circuit that her personal observations and beliefs were not binding. Further, Plaintiffs argue that Ms. Gibbons was a director-level employee whose personal courtroom testimony was binding.	Ms. Gibbons was not, at the relevant times, a decision-maker relative to the advertising policy and instead answered to her supervisor, Elizabeth Dryden throughout the relevant times. In either case, however, it was John Hertel, General Manager of SMART, who made the decision to reject Plaintiffs' ad, and not Ms. Gibbons or Ms. Dryden. In fact, the decision to accept the atheist ad, which is not violative of SMART's content policy, was also made by the then-General Manager.
3. Plaintiffs argue that Ms. Gibbons relied on the Miami Dade article to reject the advertisement.	This is factually untrue. While Ms. Gibbons was aware of the Miami Dade article, she became aware of it some weeks before Plaintiffs even submitted the at-issue advertisement. She was aware of the controversy, but she never testified that it was the reason why the

	ad was rejected. This is important because while a controversy over an issue may trigger a review of the advertisement to determine if the ad touches a politicized issue, the existence of a controversy has no bearing on whether the advertisement is allowable under the policy. In this regard, see the extensive discussion on this point in Defendants' Response to Plaintiffs' Motion for Summary Judgment. In addition, Ms. Gibbons did not make the decision to reject the ad. This is just a red herring introduced by Plaintiff's counsel.
4. Plaintiffs argue in some places in their brief that the ad concerns religion and in others that it expresses concern for the safety of Muslim girls. Plaintiffs' deny that their advertisement is political or a public-issue ad seemingly because they believe it cannot be both.	This is an example of Plaintiffs talking out of both sides of their mouths. In order to avoid admitting the obvious—that the ad is political—Plaintiffs instead try to characterize it in several different ways. Then they argue it can't be these *and* political (see next note).
5. Plaintiffs repeatedly distinguish their ad as religious, and therefore not political. Plaintiffs appear to take the position that these are mutually exclusive categories and cannot overlap. (Interestingly, later in the brief and in exhibits, they also point out that Muhammad was a "political" figure in history.)	The Sixth Circuit recognized, in this case, that Plaintiff's message was both religion-based and *politicized*. 698 F.3d at 895. As a politicized public issue, regardless of whether it touches on religion or other issues, it is prohibited by SMART's policy.
6. Plaintiffs argue that "the advertisement says what it says" (Dkt. 63, p. 6, n. 6) but then ignore that the referred-to website also "says what it says."	The website, *Refuge*FromIslam.com, as shown in Argument 1 herein and in the Defendants' Motion for Summary Judgment, contains extensive political commentary and concerns, primarily,

	the politicized issue of the application of Sharia law in America. The Sixth Circuit recognized that SMART was entirely reasonable in its analysis of the issue and the ad and related website.
7. Plaintiffs argue in the same note 6 that there is no principled distinction between the atheist ad and the Leaving Islam ad.	To do this, Plaintiffs twist the atheist ad to *add* the comment that the ad offered *refuge* for those who did not believe in God. The atheist ad, which this Court has seen numerous times, does not offer or promise refuge at all, whereas the Leaving Islam ad expressly does so. Plaintiffs cannot change the text of the ads to say they are the same. It is a misrepresentation to this Court.
8. Plaintiffs argue that there is some hypothetical spectrum of political that SMART applies to its review, and that therefore SMART's application must be arbitrary.	Despite there being no evidence provided that SMART has allowed any political advertising of any kind, SMART's guidelines are not a spectrum. If an ad is political, it is barred by the guidelines. There is no discretion granted to any SMART employee, such as was the case in the *United Food* case where the regulation barred *controversial* ads, an entirely subjective test.
9. Plaintiffs conflate and argue that there is a distinction between ads that contain political content and ads that represent political speech. (Dkt. 63, p.19).	If such a distinction exists, it is a distinction without a difference in this case. SMART's content policy bars advertisements that are "political" *and* "political campaign" ads. It is not limited to ads that are political on their face (which Plaintiffs' ad is). Under either circumstance, the advertisement is political and barred by the policy. This conflation makes a point that is not at issue in this case. Despite what Plaintiffs want the policy to read, it does not bar only those ads with direct political content.

10. Plaintiffs argue that SMART has allowed public issue advertisements and attempts to list several examples throughout the brief.	As discussed in Defendants' response to Plaintiffs' Motion, none of these ads are "public issue" ads that would be barred and in fact are mischaracterized by Plaintiffs. SMART has never allowed the posting of any ad that *promoted* or *opposed* homosexuality, contraceptive use, or the existence or non-existence of God, or in fact, any public issue. SMART has never posted ads that expressed any view opposing Plaintiffs' ad or any competing message either. In this regard, there is no evidence of viewpoint discrimination.

3. Defendants' restrictions, for all of the reasons stated before, do not violate the Equal Protection Clause of the U.S. Constitution.

Plaintiff provides no evidence to this Court that any speaker has been treated differently than Plaintiffs with regard to this issue or any issue, and therefore, for the reasons stated throughout the extensive briefing provided by Defendants, there has been no violation of the Equal Protection Clause of the U.S. Constitution.

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CERTIFICATE OF SERVICE

I hereby certify that on September 18, 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:

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

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