

EXHIBIT 1

In The Matter Of:
American Freedom Defense Initiative v.
SMART

Cross Motions for Summary Judgement
November 13, 2013

Cheryl E. Daniel, Official Federal Court Reporter
313.961.9082

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(APPEARANCES CONTINUED)

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CROSS MOTIONS FOR SUMMARY JUDGMENT

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1 Wednesday, November 13, 2013

2 Detroit, Michigan

3 At approximately 3:00 p.m.

4 THE CLERK: Calling civil case number.

5 10-12134, American Freedom versus SMART.

6 THE COURT: Put your appearances on, please.

7 MR. MUISE: Good afternoon, Your Honor.

8 Robert Muise on behalf of all the Plaintiffs.

9 MR. HILDEBRANDT: Your Honor, Christian
10 Hildebrandt on behalf of the Defendants with the
11 exception of Mr. Hendrickson.

12 MR. GORDON: Avery Gordon, Your Honor, for
13 Defendants SMART, Hertel and Gibbons.

14 THE COURT: I'm ready to proceed.
15 These are cross motions for summary judgment, right?

16 MR. MUISE: That's correct, Your Honor.

17 THE COURT: Who filed first?

18 MR. HILDEBRANDT: I'm not sure I remember.

19 THE COURT: You can go first then, Counsel.

20 MR. MUISE: Thank you, Your Honor.

21 This afternoon I want to cover what
22 essentially are the main issues that arise in these
23 cross motions for summary judgment. And particularly,
24 the forum at issue, which is an important for the First
25 Amendment analysis; SMART's advertising guideline at

1 issue; the application of the guidelines in general.
2 And then more specifically, a decision to reject
3 Plaintiff's "Leaving Islam" advertisement under those
4 guidelines. And all of those issues are somewhat
5 interrelated at some level.

6 Indeed, SMART's advertising guidelines, which
7 provide no objective guide whatsoever as required by the
8 Constitution, in fact forces the Defendants into making
9 what are essentially incoherent arguments and thus
10 incoherent decisions.

11 After going through discovery, we learned
12 that "political", which was a primary basis for
13 rejecting my client's advertisement, does not refer to
14 some objective category of subject matter but political
15 campaign, ballot initiatives, even matters dealing with
16 government.

17 In fact, if you look up the definition of
18 political, it says all related to government, a
19 government or a covenant of government.

20 That is not how SMART applies that term
21 "political".

22 In fact, through the course of the
23 depositions and the discovery taken in this case, we
24 have learned that "political" means, and this is a quote
25 from SMART, any advocacy or the position of any

1 politicized issue, end quote.

2 Now to explain this obvious tautology, they
3 tell us that politicized means this, quote, if society
4 is fractured on an issue and factions of society have
5 taken up positions on it that are not in agreement, it's
6 politicized.

7 And this is based on some hypothetical
8 spectrum of whether something is sufficiently
9 politicized to be rejected.

10 So that is what we learned during the course
11 of discovery how SMART defines for itself the term
12 "political" as it applies to the advertisements.

13 Another important fact that we learned
14 through the course of discovery is that there are three
15 Departments that independently have authority on behalf
16 of SMART to decide whether an advertisement should be
17 accepted or rejected, and those are the Marketing
18 Department, the Office of General Counsel and the
19 General Manager's Office. And each Department can act
20 unilaterally or they can collaborate on a
21 decision-making process.

22 And this is important because Defendant
23 Gibbons, who was one of the decision-makers in the
24 Marketing Department whose testimony at the Sixth
25 Circuit in the appeal in this case essentially ignored,

1 even though she was SMART's designated Rule 30(b)(6)
2 witness at the preliminary injunction hearing, as all of
3 us in this courtroom understood, is, as we learned
4 through discovery, as I stated, one of the
5 decision-makers with regard to the application of the
6 guidelines.

7 Consequently, while her testimony may be
8 ignored as a 30(b)(6) witness, it cannot be ignored by
9 the fact that she is a decision-maker and her statements
10 are now admission by a party opponent.

11 So as this Court knows that when she
12 testified during the preliminary injunction hearing she
13 candidly admitted that there was nothing about the ad
14 itself that was political. And that is at page 10 of
15 the transcript, document number 18.

16 She testified that she read about a
17 controversy in Miami as to whether the ad should be
18 posted, and because there was a controversy on whether
19 the ad should go up or not go up, that made it
20 political.

21 And interestingly enough, her testimony in
22 that regard was in response to questions by her very own
23 counsel. And that was Mr. Avery Gordon at the time.
24 And that is at the transcript at page 19.

25 But continuing further, during deposition,

1 she testified that she understood the term "political"
2 for the purposes of applying the advertising guidelines
3 was, quote, when somebody advocates for a particular
4 side, end quote.

5 And that is interesting because she also
6 said that she was now able to qualify the definition of
7 "political" with words only after having read the
8 deposition transcript of SMART's 30(b)(6) witness at the
9 deposition, Mr. Anthony Chubb, who at the time was one
10 of the counsel for SMART.

11 Elizabeth Dryden, her deposition was also
12 taken. During the relevant time she was the Director of
13 External Affairs, Marketing and Communications, and a
14 person who worked for SMART who was authorized to
15 enforce the advertising guidelines.

16 Now, she understood, commonsensically, that
17 "political" for purposes of the advertising guidelines
18 meant subject matter which was, quote, ballot proposals,
19 campaign initiatives or individuals if they're running
20 for office.

21 Now, despite this common sense understanding
22 of "political" which provides some measure of an
23 objective, definitive, articulated standard for what
24 subject matter might be political, we also learned
25 during the deposition that a get-out-the-vote drive,

1 which is obviously a message that's trying to urge
2 citizens to exercise their political franchise which is
3 quintessentially a political subject matter, is, in
4 fact, not political according to SMART.

5 Ms. Dryden also further explained, which
6 helps, I believe, to explain why Ms. Gibbons testified
7 the way she did at the preliminary injunction hearing,
8 that "political" also refers to, quote, hotly contended
9 in the media. So matters that are hotly contended in
10 the media are also, quote, unquote.

11 In sum, SMART's use of the standard
12 "political" is no different substantively than the
13 controversial standard that was found unconstitutional
14 in United Food by the Sixth Circuit. And that is 163
15 F.3d 341, a case decided in 1998.

16 In fact, "political", by SMART's own
17 definition in rendering equals contentiousness or
18 controversy. When you look at their specific definition
19 for it, there is no escaping that fact.

20 But United Food as well as Defendants'
21 application of their own guidelines creates a further
22 quandary for the Defendants because it forces them to
23 claim that they don't, in fact, reject controversial
24 advertisements in looking at, for example, the atheist
25 ad or the Status Sexy ad and others. So they admit, as

1 they must, based on the fact that despite their
2 definition of "political", they don't, in fact, reject
3 advertisements that are contentious or controversial,
4 contentious or controversial public issue advertisements
5 because those advertisements certainly address public
6 issues.

7 Now, continuing the logic further, they now
8 are on an impossible horns of a dilemma, and that is
9 because of this: Because accepting controversial in
10 noncommercial advertisements, these controversial
11 public-issue advertisements that they accept, in light
12 of not only United Food but also Lehman, demonstrates
13 that the forum itself is a designated public forum.

14 In fact, even the atheist advertisement,
15 which the Sixth Circuit was somewhat dismissive of as
16 sort of an abberent decision, which we know from
17 discovery is not the case. In fact, they steadfastly
18 defended the decision to put up the atheist
19 advertisement even though it caused vandalism to their
20 buses and bus drivers to refuse to drive their very own
21 buses.

22 So SMART acknowledges that they permit these
23 contentious, controversial, public-issue advertisements.

24 And because of that, the forum is a
25 designated public forum. And this point is underscored

1 by the very case that the Defendants claim is
2 controlling and that is the Lehman versus City of Shaker
3 Heights, the Supreme Court case at 418 U.S. 298.

4 In that court case, the Supreme Court found
5 that the 26 year consistently enforced ban on
6 noncommercial advertising was consistent with the
7 government's role as a proprietor precisely because the
8 government, and this is a quote right from the case,
9 limiting the car card space to innocuous and less
10 controversial commercial and service oriented
11 advertising, end quote.

12 So not only the Supreme Court and other
13 courts, including the Sixth Circuit, have followed that
14 lead. In fact, this is precisely what the Sixth
15 Circuit said in United Food:

16 "Acceptance of political and public-issue
17 advertisements, which by their very nature
18 generate conflict, signals a willingness on
19 the part of the government to open the
20 property to controversial speech, which the
21 Court in Lehman recognized as inconsistent
22 with operating the property solely as
23 a commercial venture."

24 The Ninth Circuit has said that when you have
25 policies that permit the noncommercial advertising, that

1 that is indicative of the government's intent to create
2 a designated public forum.

3 The New York Magazine case, Second Circuit,
4 said this, quote, disallowing political speech and
5 allowing commercial speech only indicates that may be
6 one of the main goals. Allowing political speech,
7 conversely, evidences a general intent to open a space
8 for discourse and a deliberate acceptance of the
9 possibility of clashes of opinion and controversy that
10 the Court in Lehman recognizes as inconsistent with
11 sound commercial practices.

12 If you look at those host of advertisements
13 that SMART has accepted from the atheist advertisement
14 to the statussexy.com advertisements to the
15 advertisement that advocates for the use and actually
16 the availability of contraception, I mean, these are
17 controversial, contentious public-issue advertisements
18 and they signal -- in fact, they demonstrate that the
19 true intent -- and practice speaks louder than words --
20 the true intent is to create a public forum.

21 In fact, again the Sixth Circuit said the
22 Courts will hold that, quote, that the government did
23 not create a public forum only when its standards for
24 inclusion or exclusion are clear and designed to
25 interfere with the forum's designated purposes.

1 Their definition of "political" is far from
2 clear and far from providing an objective standard for
3 restricting speech.

4 And, oh, by the way, if their concern is
5 that it's going to disrupt the workings of the transit
6 authority, by their very own testimony, the atheist
7 advertisements comply with the guidelines yet their
8 buses were vandalized as a result and drivers refused to
9 drive it. Yet again, even today they say that comports
10 with our advertising guidelines.

11 Here is what the Sixth Circuit said in the
12 appeal in this case with regard to the issue on the
13 forum. They said, quoting, outright ban on political
14 advertisement is permissible if it's a managerial
15 decision focused on increasing revenue, for limiting
16 advertising space, innocuous and less commercial and
17 less controversial commercial and service oriented
18 advertising, end quote.

19 Again, when you look at the litany of
20 advertisements that the Defendants claim satisfy their
21 advertising guidelines, there is no objective from the
22 guidelines from the "Don't believe in God", the atheist
23 advertisement, to the "Knowing your HIV status before
24 you get down, that's sexy" campaign, to "Put yourself
25 first, plan first, have a baby when the time is right

1 for you" free birth control advertisement, "Feeling
2 lost, find your path", Christian advertisement. These
3 are public service advertisements, they're not innocuous
4 commercial advertisements and they demonstrate that this
5 forum is, in fact, a designated public forum, and
6 therefore, they cannot make the content-based
7 restrictions, as they did here on my client's
8 advertisement.

9 So these advertising guidelines, they do two
10 things. One is you can see how their application of
11 them is absolutely inconsistent because the advertising
12 themselves prohibits ads that are controversial,
13 contentious, but yet they permit controversially
14 contentious advertisements, but yet they say we don't
15 have a public forum, but yet permitting these
16 controversial and contentious advertisements
17 demonstrates that they have, in fact, opened up the
18 forum.

19 And here is what the Sixth Circuit said about
20 the types of standards that the government is allowed to
21 have. They said this in United Food:

22 "The absence of clear standards guiding
23 the discretion of the public official
24 vested with the authority to enforce the
25 enactment invites abuse by enabling the

1 Official to administer the policy on the
2 basis of impermissible factors.

3 "Consequently, a speech restriction
4 'offends' the First Amendment when it grants
5 a public official 'unbridled discretion'
6 such that the official's decision to limit
7 speech is not constrained by objective
8 criteria, but may rest on 'ambiguous and
9 subjective reasons'."

10 Defendants' definition of "political" is
11 based on subjective and ambiguous reasons and not any
12 objective guidelines.

13 And in fact, the Sixth Circuit again in the
14 appeal in this case did not have the benefit of the --
15 who assumed that there was a presumed articulating
16 definitive standard for "political" in that case didn't
17 have the benefit from what we know now from discovery
18 how they defined "political". They even said this, we
19 find unbridled discretion having vested in the
20 decision-maker because there is no articulated
21 definitive speech in determining what was controversial.

22 In the United Food situation, the employees
23 would have to determine where on a hypothetical spectrum
24 of controversy an advertisement fit in.

25 They admitted in their testimony, and I

1 cited it in our brief, that to determine whether or not
2 something is sufficiently politicized, the government
3 official must make that determination on some
4 hypothetical spectrum of whether or not it is political
5 enough.

6 So while, as Ms. Dryden's testimony reveals,
7 "political" could have an objective meaning, it could
8 have -- be based on some objective subject matter, the
9 way in which the Defendants apply these guidelines is
10 entirely arbitrary and subjective and no different in
11 the way that the controversial public issue standard was
12 employed in United Food and found by the Sixth Circuit
13 as being unconstitutional.

14 And I want to just spend a moment on the
15 scornful speech issue, which really if you look at
16 Gibbons' testimony, there was no -- she even testified
17 right here in court that she didn't find anything
18 scornful about this.

19 There is nothing in the "Leaving Islam"
20 advertising that there is any scornful language. It
21 addresses a very serious and a very real issue. No
22 different than if somebody was running a battered
23 shelter advertisement and the advertisement says is your
24 spouse threatening you? Is there any scornful language
25 about that? Of course not.

1 And why isn't "Don't believe in God", why is
2 that not scornful? By Defendants' standards, if you
3 believe in God, you lack reason.

4 There is no language per se in the "Leaving
5 Islam" advertisement that Defendants would object to,
6 what they object to is the viewpoint that is being
7 expressed by it.

8 And as we know through all the briefing
9 throughout here that viewpoint consideration is the most
10 egregious form of content discrimination and is
11 prohibited in any form.

12 One last comment on the advertising
13 guidelines. They also tell us that while every ad that
14 comes before us, we're going to look at the web site
15 that is listed on the advertisement, and if the web site
16 contains information that is political by their
17 definition of "political" then that is a basis for
18 rejecting the advertisement.

19 Well, if you go look at the atheist
20 advertisement and you look at the web site that is cited
21 on the atheist advertisement, in that very own web site
22 they talk about advocating for civil rights and
23 advocating for the position of the separation of church
24 and state. And so when I asked the three 30(b)(6)
25 witnesses of SMART is issues addressing the separation

1 of church and state politicized? Of course they're
2 politicized.

3 So based on their very own ambiguous
4 standards they're trying to apply to my client's
5 advertisement, the atheist advertisement, again, should
6 have been rejected.

7 And in looking at that statussexy.com
8 advertising, if you look at that web site, it makes very
9 plain the articles of the test that web site that that
10 advertisement advocates that men who have sex with men
11 should get HIV tested. You tell me that the Status Sexy
12 advertisement is not politicized by their definition of
13 political speech? Of course they are.

14 In sum, discovery has revealed the fig leaf
15 that SMART's policy -- advertising policy restricting
16 political advertisement. It is a purely arbitrary and
17 subjective guideline and allows government officials to
18 pick and choose which advertisement messages they favor
19 and which ones they don't.

20 Discovery revealed that the decision to
21 accept the highly controversial atheist advertisement
22 was not, in fact, an aberration, and that SMART, indeed,
23 accepts a wide array of highly controversial
24 public-issue advertisements. They don't limit their
25 space to innocuous and less controversial commercial and

1 service oriented advertisements, and thus, evidencing an
2 intent to create a designated public forum.

3 In short, the factual record in view of the
4 controlling law compels one conclusion and that is that
5 SMART's restriction on my client's advertising violates
6 the U.S. Constitution.

7 THE COURT: Okay, thank you, Counsel.

8 MR. HILDEBRANDT: Good afternoon, Your Honor.
9 How are you today?

10 THE COURT: I'm fine, thank you.

11 MR. HILDEBRANDT: Just terrific, thank you.

12 THE COURT: Do you think that at the time of
13 the testimony at the preliminary injunction hearing that
14 SMART had the definition of "political" that apparently
15 they have at this time?

16 MR. HILDEBRANDT: Your Honor, there was no
17 written definition of "political" in place at the time
18 of the preliminary motion, the preliminary injunction
19 motion such that is the same as was disclosed in the
20 testimony in this case.

21 THE COURT: So I want to just understand this,
22 and maybe it doesn't really have anything to do with
23 your motion, but it is important to me to understand it.

24 MR. HILDEBRANDT: I understand.

25 THE COURT: For my own benefit.

1 At the time of the preliminary injunction,
2 there wasn't any written definition of "political"; is
3 that right?

4 MR. HILDEBRANDT: Your Honor, at the time of
5 the preliminary injunction, there was no separate
6 written definition of "political".

7 THE COURT: You put "separate" before it.
8 Was there any written definition of "political" at that
9 time?

10 MR. HILDEBRANDT: Well, in the guidelines,
11 "political" is expressed there, but there is no separate
12 definition beyond the use of that word "political" --

13 THE COURT: And you would agree that the
14 witness that appeared did not give any particular --
15 point to any particular thing that informed her about
16 what was political?

17 MR. HILDEBRANDT: I would agree that the
18 witness that was provided as the 30(b) witness did not,
19 but she was not part of the decision-making process at
20 the time. She was not an individual who was a
21 decision-maker at the time. She had a direct supervisor
22 in the Marketing Department who was unavailable at the
23 time. And that person was the decision-maker in the
24 Marketing Department, in the General Counsel's
25 Department and in the General Manager's office.

1 There were decisions, there were different
2 decision-makers, but Beth Gibbons has never been a
3 decision-maker at any time relevant to this ad.

4 She was presented as the 30(b)(6) witness
5 and provided testimony --

6 THE COURT: When she gave her deposition,
7 would she have been considered a decision-maker at that
8 time?

9 MR. HILDEBRANDT: When she gave her
10 deposition post-Sixth Circuit decision in the discovery
11 of this case?

12 THE COURT: Well, that is when she gave it.

13 MR. HILDEBRANDT: All right, that's fine.
14 Yes, at that time she was --

15 THE COURT: Excuse me, Counsel, I want to be
16 really clear so I understand this.

17 She testified as a 30(b)(6) witness, but she
18 was not a decision-maker at that time; that is your
19 position, right?

20 MR. HILDEBRANDT: Well, that is correct, yes.

21 THE COURT: Okay. So now I'm asking at the
22 time of her deposition, which was subsequent to the
23 Sixth Circuit decision, she was then a decision-maker?

24 MR. HILDEBRANDT: At that time she was the
25 head of the Marketing Department, correct.

1 THE COURT: All right, okay, thank you.

2 MR. HILDEBRANDT: At the time of the
3 preliminary injunction hearing, Your Honor, she provided
4 in response to questions the position of SMART as she
5 was expected to do. And she also provided in response
6 to questions her own opinion when she was asked what do
7 you think, Beth Gibbons? And the Sixth Circuit
8 recognized that what she thought, based upon her own
9 analysis, was her personal opinion and not binding on
10 SMART.

11 She specifically indicated the position of
12 SMART at other parts of that testimony.

13 THE COURT: Okay, thank you.

14 MR. HILDEBRANDT: Now, Your Honor, the
15 primary question in this case, of course, I believe, is
16 whether this is a designated forum or a non-forum. And
17 I think that that has really already been decided for
18 this Court by the Sixth Circuit.

19 THE COURT: Okay, let me ask you that. Now
20 that we have discovery, do you think that the Court has
21 the authority to say here are items not before the Sixth
22 Circuit and so they go to whether or not it is a
23 designated public forum?

24 MR. HILDEBRANDT: I certainly believe that the
25 Court has that authority. I do not believe that the

1 Sixth Circuit rulings on the facts in this matter are
2 binding on this Court.

3 THE COURT: Okay.

4 MR. HILDEBRANDT: I do believe, however, that
5 the legal rulings that they made are certainly a great
6 indication of what should occur based upon this factual
7 record.

8 The factual record really hasn't changed in
9 this matter, Your Honor. That is, Plaintiff does not
10 come before this Court and demonstrate any political ad
11 ever having been posted by SMART. Plaintiff does not
12 come before this Court and demonstrate any scornful ad
13 that has ever been posted by SMART.

14 The fact of the matter is the Sixth Circuit
15 --

16 THE COURT: Is that a question of fact?

17 MR. HILDEBRANDT: Is what a question of fact?

18 THE COURT: Whether or not any of the ads
19 that SMART has allowed before were scornful?

20 MR. HILDEBRANDT: I think that is a question
21 of fact, but I don't think it is a material question of
22 fact.

23 I think that the -- I'm sorry?

24 THE COURT: Then if it is not material, he
25 doesn't need to demonstrate that?

1 MR. HILDEBRANDT: Let me say genuine issue.
2 I don't believe it is a genuine a issue, I misspoke,
3 pardon me.

4 The fact of the matter is the ads that he is
5 referring to, Your Honor, are not political ads. The
6 ads that he is referring to as having been posted are
7 not scornful ads.

8 In order for Mr. Muise to come before this
9 Court and say the definition is wrong, he has to change
10 what the guidelines are.

11 The guidelines are political and political
12 campaign speech, scornful and disparaging speech.

13 It is not contentious. It is not
14 controversial, that is not the test, A. B, he kind of
15 has a very amorphous definition of even what
16 controversial means.

17 It is true a lot of these ads may have shock
18 value. That is the purpose of advertising is to get
19 your attention. But there is nothing really contentious
20 in these ads. In any of these ads.

21 The Status Sexy ad is not a contentious ad.
22 All it is is indicating people should know their HIV
23 status before they have sex.

24 Who would object to that? Who would be
25 contending that that was incorrect?

1 It may be shock value based upon the picture
2 that is shown, but that doesn't make it political.

3 The same with the atheist ad, Your Honor.
4 The Sixth Circuit has already reviewed the atheist ad
5 and they have said that ad is a general outreach ad.

6 It is reasonable for SMART to have looked at
7 it that way and that it is not a violation of the
8 political ads guideline.

9 So each and every one of these ads that he
10 points to -- stopping smoking, Your Honor, how is that a
11 contentious issue? Who gets up and says you shouldn't
12 stop smoking on the other side? There is not a fractured
13 society on which side to take in factions.

14 Now, Mr. Muise indicated that he was going to
15 start with the primary reason why --

16 THE COURT: Have you had any complaints
17 about any of those ads he mentioned?

18 MR. HILDEBRANDT: Just the atheist ad is the
19 only one I'm aware of.

20 THE COURT: Would you think then that means
21 there is some fractured opinion out there?

22 MR. HILDEBRANDT: Your Honor, I don't believe
23 that the message of the ad or the web site it refers to
24 makes it political.

25 Now, does that mean --

1 THE COURT: That wasn't my question. If you
2 want to answer my question, I'm happy for you to do that
3 and then to argue, but that wasn't my question. My
4 question was different than that.

5 MR. HILDEBRANDT: Was there a controversy
6 arising out of that ad? Yes, there was a controversy
7 arising out of that ad. Are there people who strongly
8 feel that their belief in God is important to their
9 life? Yes, there are.

10 THE COURT: And so the word you use was
11 "fractured", do you think that exists relative to that
12 ad?

13 MR. HILDEBRANDT: I don't think that that
14 applies to that ad.

15 I think, as the Sixth Circuit thought, is
16 the message of that ad was are you being forced to
17 recite under God in the Pledge of Allegiance, that that
18 would be more of a political issue. That would be a
19 fractured issue.

20 But all this ad does is invite people of a
21 common ilk to join together, much like the Union Grace
22 ad does. Much like an Easter celebration ad would do,
23 et cetera.

24 The message of the ad itself is not
25 political. Even if some aspect of the issue of the

1 belief in God may be, this particular ad doesn't touch
2 that particular issue.

3 Does that answer your question?

4 THE COURT: Yes, it does, thank you.

5 You may continue your argument.

6 MR. HILDEBRANDT: The Sixth Circuit
7 recognized that the word "political" is specific enough
8 that a reasonable person could determine if something
9 was political or not political. And they also
10 recognize, Your Honor, that it wasn't going to be an
11 exact science. That is, there may be situations where
12 this in a close call.

13 But they nevertheless indicated it was not
14 necessary that we had a specific definition written down
15 or that we had additional guidelines to guide the
16 governmental official because it, in and of itself, was
17 enough to do that.

18 And they recognized that setting forth those
19 particular guidelines made this a non-public forum.

20 Now, the question after it becomes a
21 non-public forum becomes whether SMART has improperly
22 applied those guidelines such that it is taken away that
23 -- and I have addressed that a little bit in these ads
24 -- and I don't believe any of these ads that are
25 referred to by the Plaintiffs are in any way political

1 or scornful. And I have explained that in great detail
2 in my briefs, and unless the Court has any questions
3 concerning any specific ad, I would like to kind of move
4 on beyond that.

5 THE COURT: You may.

6 MR. HILDEBRANDT: Now, if we're in a
7 non-public forum, we address whether our guidelines have
8 a rational basis. And we have addressed that in our
9 briefs because the mission critical purpose of SMART, of
10 course, is to provide transportation to the tri-county
11 area and we sell advertising to allow funding to be able
12 to do that. That certainly provides a reasonable basis
13 for the policies that we have in place.

14 Plaintiff's ad, although, "A" purpose or "A"
15 reason of why it was rejected was that it was political
16 was also rejected on the separate and distinct basis
17 that it disparaged Muslims as well. Those need to be
18 analyzed separately.

19 Plaintiff stands up here this morning and
20 says the primary reason why it was rejected was
21 political, but there are two separate and distinct
22 reasons why it was rejected.

23 The Sixth Circuit recognized this is a
24 politicized issue. In the context of this ad, this is a
25 politicized ad.

1 We believe that that really is binding on
2 this Court at least from the stand or, I'm sorry, not
3 binding, but certainly persuasive on this Court on the
4 issue of whether Plaintiff's ad is political.

5 Plaintiff admits it is political in their
6 pleadings and the Court recognized that it addresses
7 specifically the idea of the application of Sharia law
8 in America which is a politicized issue.

9 It is also a disparaging issue; that is,
10 this particular ad insults not only the Muslim community
11 but Muslim families by indicating that they are
12 threatening people that would want to leave Islam. It
13 is a direct slap in the face of the Muslim community.

14 Now, that is not viewpoint discrimination.
15 That is, we don't say because you're talking about
16 Islam. We don't say because you're talking about
17 leaving Islam you can't post this. We say you can't use
18 scornful language in any ad.

19 And that is a provision that is allowable
20 under the Ridley case that was cited by the Sixth
21 Circuit and cited in our brief which indicates that
22 because we don't allow any disparaging speech, it has
23 absolutely nothing to do with the viewpoint that is
24 being provided. That is, Christians can't use
25 disparaging speech, atheists can't use disparaging

1 speech, Muslims can't use disparaging speech, candidates
2 can't use disparaging speech. Nobody can. No one gets
3 an advantage one way or another over the other.

4 So it is not viewpoint discrimination and I
5 believe that the Sixth Circuit recognized that to be the
6 rule based upon the Ridley case and this case as well.

7 And there is really nothing that has been put
8 forward from discovery or in Plaintiff's briefs that
9 would belie what SMART's viewpoint is. There is nothing
10 in the testimony that indicated that SMART disagreed
11 with Plaintiff's message or agreed with Plaintiff's
12 message. There is nothing that indicates that SMART
13 took a position one way or the other. And that is
14 exactly what SMART intends to do is to be completely
15 neutral.

16 So to the extent that it violates that
17 second and separate provision, even if this is one of
18 those close calls on whether it's political or not, the
19 fact that it is scornful or disparaging or -- and I
20 don't have the language directly in front of me -- or
21 likely to hold up to scorn or ridicule any person or
22 group of persons is a separate and distinct reason why
23 this ad could not be posted.

24 And that applies equally to Plaintiff's
25 second ad that they also implicated.

1 I think I have addressed every one of the
2 other ads that they pointed to in some way or another
3 except for the family planning ad from the Michigan
4 Department of Community Health.

5 That is a commercial ad, Your Honor. It does
6 not advocate one way or the other for family planning or
7 birth control or abortion services or anything. All it
8 indicates is if you're interested in these services that
9 are available here.

10 That is a commercial ad, it is
11 non-controversial. It is not advocating it one way or
12 the other.

13 So, Plaintiff comes before this Court today
14 and says we have a distasteful message, and therefore,
15 the only reason it must have been rejected is because
16 they must have disagreed with it. That is not the case.

17 SMART did not disagree because it was
18 distasteful. SMART did not disagree because it was
19 controversial or contentious. SMART disagreed because
20 it scorned a group of persons, Muslims, Muslim families,
21 Muslim communities. And because it addressed an issue
22 that was specifically politicized. An issue that a
23 fractured society was divided in factions on. And in
24 large part because the Plaintiff herself created those
25 factions, but nevertheless because of people taking

1 strong arguments or taking strong positions on either
2 side of the application of Sharia law in America, we
3 determined it to be political. And --

4 THE COURT: I don't think you can point to
5 that the point. You might point to her as an advocate
6 for --

7 MR. HILDEBRANDT: Your Honor, may be I --

8 THE COURT: Excuse me, Counsel. You might
9 point to her as someone who advocates the position
10 relative to the ad, but it sounds like you were making
11 her the cause of the faction and I don't believe she is.
12 Probably the evidence wouldn't show that either.

13 MR. HILDEBRANDT: Maybe I overspoke, Your
14 Honor.

15 THE COURT: I think so, Counsel.

16 MR. HILDEBRANDT: But her blog is certainly
17 a large part of voicing her opinion on one side in a
18 fractured society, I would agree with that. And from
19 that standpoint it is certainly politicized and
20 certainly political.

21 THE COURT: Well, blog maybe; I don't know
22 about her ad.

23 MR. HILDEBRANDT: Well, Your Honor, the web
24 site referred to in the ad -- but I do know about the
25 ad. The ad is, as the Sixth Circuit specifically

1 indicated, directly impacts or directly addresses the
2 issue of Sharia law in America. I think that, Your
3 Honor, that is clearly a political issue and I think
4 that that makes that ad itself political. But then
5 going to refugefromislam.com strengthens that even more.

6 THE COURT: And so on the ad from the
7 Michigan families, does it go to a web site?

8 MR. HILDEBRANDT: It does, Your Honor. It
9 goes to the Michigan --

10 THE COURT: What is on that web site relative
11 to family planning?

12 MR. HILDEBRANDT: It is the Michigan
13 Department of Community Health web site.

14 THE COURT: Is there anything on it that
15 would be, for instance, objectionable, for instance, to
16 Roman Catholics?

17 MR. HILDEBRANDT: Well, I guess the question
18 is, Your Honor, objectionable in what sense? It does
19 say there are available family planning things. It does
20 not say we offer only the rhythm method. It does say
21 there are birth control services available. It does say
22 that there are abortion services available.

23 I imagine there are some Roman Catholics who
24 find the idea of abortion itself to be objectionable.
25 So I'm not certain that that web site itself -- that

1 web site itself does not advocate for somebody to get an
2 abortion.

3 THE COURT: But what about family planning?

4 MR. HILDEBRANDT: It does not advocate for
5 family planning, the ad does not.

6 THE COURT: I know I asked about the web
7 site, but that's okay, go to the rest of your argument.

8 MR. HILDEBRANDT: I'm looking at my notes
9 relative to Mr. Muise's argument.

10 Mr. Muise has referred to what he calls a
11 hypothetical spectrum based upon the testimony of Mr.
12 Chubb, and Mr. Chubb was asked two questions to set up
13 this argument for hypothetical spectrum, one of which
14 was, well, Mr. Chubb, I disagree with you, if the two of
15 use disagree, does that make it political. And Mr.
16 Chubb said I don't believe that that makes it political.
17 And then he was asked about large factions disagreeing
18 in which he said and that is the definition of
19 political. And so to the extent that two people
20 disagree versus large factions of society, Mr. Chubb
21 responded if you call that a spectrum, then so be it.
22 But he never indicated that there was a spectrum.

23 But the Sixth Circuit did recognize that
24 there is a spectrum of sorts by saying sometimes this is
25 going to be a close call. There is no bright line

1 where one side is going to be political and the other
2 side is not.

3 But Plaintiff's ad doesn't reach the line
4 itself. Plaintiff's ad is far into the political side,
5 and from that standpoint, this idea that it might be
6 unconstitutional as applied doesn't apply in the case of
7 this particular ad.

8 Your Honor, unless you have additional
9 questions, I think I could be done at this time.

10 THE COURT: All right, thank you very much.
11 I don't have any additional questions. Thank you for
12 answering the questions I posed.

13 Counsel, do you wish to reply?

14 MR. MUISE: Yes, Your Honor, briefly.

15 THE COURT: You may.

16 MR. MUISE: Your Honor, I will answer
17 directly the first question you asked about whether or
18 not the atheist advertisement addresses an issue that is
19 are there factions of society that have disagreement, I
20 can't think of an issue that is probably more fractious
21 using their definition of political.

22 Bear in mind, again, political isn't what
23 any average person would understand political to mean,
24 like political campaigns, political delegations dealing
25 with issues of government, ballot initiatives and so

1 forth. Their definition of "political" is essentially
2 controversial or contentious. And that atheist ad is an
3 advertisement that under their definition of "political"
4 is quintessentially political.

5 And oh, by the way, and I like how he
6 defines and describes these advertisements like this
7 Status Sexy, and I'm sure the Court has seen them.
8 "Know your HIV status before you get down", with this
9 shirtless male with his hands behind his back. Talk
10 about an issue that is a fractious and contentious
11 issue. Look at this advertisement.

12 Nobody is required to check their common
13 sense at the courtroom door and think this is just about
14 testing for HIV.

15 And if there is any question about that, one
16 of the articles attached to the web site says the Status
17 Sexy campaign uses images of attractive shirtless men to
18 convey the message to encourage men who have sex with me
19 to be tested for HIV.

20 Well, in the world apparently that
21 Defendants live in, that is not a contentious issue.
22 And I obviously have strong disagreement with that and I
23 think common sense would show it very much is political
24 pursuant to their definition.

25 And looking at the -- you asked questions

1 about the advertisement that he said was just a
2 commercial advertisement for family planning services.
3 Here is what it says in big bold up top: "Put yourself
4 first, plan first." How is that not advocating? "Free
5 birth control and related health care services. Have a
6 baby when the time is right for you. Plan for
7 responses, free family planning services including birth
8 control, including pills, IUDs, condoms and diaphragms."

9 Yes, this is a very contentious issue and
10 I'm sure this Court is aware having dealing with the
11 contraceptive services mandate.

12 To say that this or to argument that this
13 advertisement is not a political advertisement, again
14 based on their definition, is just absolutely absurd.

15 Looking at, and we cited to the comments in
16 Ridley, relying on Ridley that the scornful standard,
17 Ridley made the point in the guideline point of the use
18 of specific scornful words or scornful language.

19 There is no language you can point to in my
20 client's ad that is scornful. Again, change the
21 language so it is a battered women's shelter. Is your
22 spouse threatening you? Is somebody in your community
23 threatening you? You can find refuge at our battered
24 women's shelter.

25 There is not anything in the web site we

1 have seen that is considered scornful that they disagree
2 with such that change a few words around.

3 What they disagree with and what is clear
4 from the argument today is the viewpoint that is being
5 expressed by that advertisement and that is prohibited
6 in any forum.

7 And again Your Honor, if you look at the
8 Sixth Circuit decision, the Sixth Circuit did not have
9 the benefit of knowing what they assumed political is
10 what probably an average person would consider political
11 to be and not the definition now that they provided for
12 us which again provides in many respects it provides and
13 explanation why Beth Gibbons testified that it was
14 controversy over the advertisement and that is why they
15 determined to it to be political.

16 Thank you, Your Honor.

17 THE COURT: Okay. Do you have dates coming
18 up?

19 MR. HILDEBRANDT: Your Honor, we just passed
20 the time for the final pretrial schedule. It was either
21 last week or this week. I think we had a trial
22 scheduled, but --

23 MR. MUISE: With the dispositive motions
24 outstanding --

25 THE COURT: I know I do have an outstanding

1 motion to rule. I just wanted to know if you had any
2 dates coming up, but I'll address that in the order.

3 Court's in recess.

4 (Proceedings concluded)

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C E R T I F I C A T I O N

I, CHERYL E. DANIEL, Official Federal Court Reporter, after being first duly sworn, say that I stenographically reported for foregoing proceedings held on the day, date, time and mace indicated. That I caused those stenotype notes to be translated through Computer Assisted Transcription and that these pages constitute a true, full and complete transcription of those stenotype notes to the best of my knowledge and belief.

I further certify that I am not of counsel nor have any interest in the foregoing proceedings.

/S/

CHERYL E. DANIEL,
FEDERAL OFFICIAL COURT REPORTER

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