No. 11-1538

UNITED STATES COURT OF APPEALS
FOR THE
SIXTH CIRCUIT

AMERICAN FREEDOM DEFENSE INITIATIVE; PAMELA GELLER; ROBERT SPENCER,
PLAINTIFFS-APPELLEES,

V.

SUBURBAN MOBILITY AUTHORITY FOR REGIONAL TRANSPORTATION (SMART); JOHN HERTEL, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS GENERAL MANAGER OF SMART; BETH GIBBONS, INDIVIDUALLY AND IN HER OFFICIAL CAPACITY AS MARKETING PROGRAM MANAGER OF SMART,
DEFENDANTS-APPELLANTS,
AND
GARY I. HENDRICKSON, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS CHIEF EXECUTIVE OF SMART,
DEFENDANT.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
HONORABLE DENISE PAGE HOOD
Civil Case No. 10-12134

PETITION FOR REHEARING AND REHEARING EN BANC

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REASONS FOR GRANTING THE PETITION

Plaintiffs-Appellees American Freedom Defense Initiative, Pamela Geller, and Robert Spencer (hereinafter "Plaintiffs"), through counsel, seek a rehearing and a rehearing *en banc* in this important First Amendment challenge to Defendants-Appellants Suburban Mobility Authority for Regional Transportation's (hereinafter "SMART") arbitrary and capricious restriction on Plaintiffs' speech. Review is necessary because this case involves questions of exceptional importance.

The panel's decision, which *reversed* the district court's grant of a preliminary injunction in Plaintiffs' favor, conflicts with decisions of the United States Supreme Court, including *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123 (1992), and *Shuttlesworth v. Birmingham,* 394 U.S. 147 (1969), and it conflicts with this Circuit's decision in *United Food & Commercial Workers Union, Local 1099 v. Sw. Ohio Reg'l Transit Auth.,* 163 F.3d 341 (6th Cir. 1998).

Indeed, review is necessary to remedy the following errors committed by the panel so as to secure and maintain uniformity of the court's decisions, particularly those decisions impacting important First Amendment rights, as in this case:

- The panel erroneously substituted its judgment as to how to apply SMART's speech restricting policy in a manner (a) that SMART does not employ (b) that SMART did not employ to reject Plaintiffs' advertisement in this case, and (c) that is, itself, subjective, malleable, and thus open to viewpoint discrimination, which is

impermissible even in a nonpublic forum. Consequently, the panel's own rendering of SMART's policy violates U.S. Supreme Court and Sixth Circuit precedent.

- The panel erroneously dismissed the dispositive testimony of the Rule 30(b)(6) witness *designated by* SMART[1] to testify as to (a) SMART's advertising policy, (b) how the policy is applied, and (c) how the policy was applied in this case when SMART rejected Plaintiffs' advertisement. By doing so, the panel engaged in clear error, its decision was contrary to Rule 30(b)(6) and thus undermines the importance of such testimony, and its decision contradicted the decision of the district court judge who observed the *in-court testimony* of the witness and based her decision to grant the preliminary injunction on this testimony. (The panel incorrectly stated that the testimony was given at a deposition).[2]

In the final analysis, review of the panel's decision is necessary to protect First Amendment freedoms, which "are delicate and vulnerable, as well as supremely precious in our society." *NAACP v. Button*, 371 U.S. 415, 433 (1963). And it is necessary because this case has exceptional public importance, and the panel's

[1] The parties stipulated that the witness would be testifying at the hearing on behalf of SMART pursuant to Rule 30(b)(6). (*See* R-17: Stipulation)

[2] (*See* Op. at 14) (acknowledging that Defendant Gibbons "was designated as a Rule 30(b)(6) witness," but incorrectly claiming that she was expressing her "*personal opinion*" after she was shown Plaintiffs' advertisement "at the deposition") (emphasis added). A review of the transcript of the preliminary injunction hearing at which Defendant Gibbons testified shows *without question* that she was not offering her personal opinion, but that she was testifying on behalf of SMART. (R-18: Tr. of Hr'g on Mot. for Prelim. Inj. at 15).

decision, when viewed in the proper factual context, conflicts with U.S. Supreme Court and Sixth Circuit precedent. *See* Fed. R. App. P. 35.

THE PANEL ERRED BY REVERSING THE INJUNCTION

The panel erroneously reversed a preliminary injunction that would have permitted Plaintiffs to display their *religious* message on SMART's vehicles in a manner similar to how SMART has permitted other *religious* messages. The panel exceeded its review authority by creating contradictory facts and then substituting its application of SMART's policy to those facts in a manner in which SMART did not employ and in a manner which itself violates the First Amendment.

SMART's advertising policy permits *religious* messages to be displayed on its advertising space, but it prohibits messages deemed to be *political*. Per SMART's sworn testimony, Plaintiffs' advertisement was rejected as "political" not because of its *content* (*i.e.*, the four corners of the advertisement), but because *displaying* the message was "controversial" to some.

Pursuant to its advertising policy, SMART permitted the display of the following "*religious*" advertisement from the Detroit Coalition of Reason, a self-described secular humanist / atheist organization:[3]

[3] Contrary to the panel's assertion (Op. at 7, 9), this was not just an aberrant or erratic decision under SMART's policy. SMART strenuously defends its decision to permit the display of the atheist advertisement as a proper application of its advertising policy. (R-27: Defs.' Emergency Mot. to Stay at 6-7, 9) ("This Court appears to have relied upon SMART's prior decision to allow the 'atheist advertisement' that was

However, SMART rejected the following advertisement submitted by Plaintiffs, claiming that it was objectionable because it was "*political*" under SMART's policy:

As the district court properly concluded based on the live testimony presented during the preliminary injunction hearing, SMART's arbitrary decision to reject Plaintiffs' advertisement was unreasonable and thus unconstitutional. As the district court stated, "[T]here is nothing in the policy that can guide a government official to distinguish between permissible and impermissible advertisements in a non-arbitrary fashion." (R-24: Order Granting Pls.' Mot. for Prelim. Inj. at 8) (hereinafter "Order"). Consequently, the district court granted the preliminary injunction based on the record

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previously determined by SMART to be a religious message. *Religious messages are allowed by the policy whereas political messages are not*. . . . [T]he uncontested testimony in this matter by Beth Gibbons was that [the atheist] advertisement was determined to be religious in nature. . . .") (emphasis added).

and controlling case law, stating, "Under Sixth Circuit law, '[t]he 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.'" (R-24: Order at 8) (quoting *United Food & Commercial Workers Union, Local 1099,* 163 F.3d at 359).

THE PANEL ABUSED THE APPLICABLE STANDARD OF REVIEW

As an initial matter, while the panel should conduct a *de novo* review of the record when important First Amendment rights are at stake to ensure that those rights are not washed away, *Bose Corp. v. Consumers Union*, 466 U.S. 485, 499 (1984) (stating "that an appellate court has an obligation to make an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression"), it cannot create a contrary factual record and substitute its judgment for the judgment of the government officials that actually made the decision to restrict Plaintiffs' speech.[4] *See, e.g., Forsyth Cnty.*, 505 U.S. at 131 (stating that in evaluating the challenged speech restriction, "we must consider the county's authoritative constructions of the ordinance, including its own

[4] Remarkably, the panel opined that had Plaintiffs "changed [their] advertisement to read, without more: 'Thinking of Leaving Islam? Got Questions? Get Answers,' SMART presumably could not ban the advertisement." (Op. at 13). That is, deleting the expression: "Fatwa on your head?" somehow moves the advertisement from an impermissible political message to a permissible religious one. However, even this rendition of SMART's policy is highly malleable, subjective, and thus open to viewpoint discrimination in violation of the Constitution. *See infra*.

implementation and interpretation of it"). And this is particularly egregious when the panel, as here, dismissed clear and unequivocal testimony from a Rule 30(b) witness who (1) was *specifically designated by SMART* to testify on its behalf regarding SMART's speech restricting policy and its application to Plaintiffs' advertisement; (2) began her testimony acknowledging that she was testifying on behalf of SMART; (3) testified live in court (not in deposition) before the judge who granted the preliminary injunction *based on this testimony*; and (4) testified contrary to the panel's factual predicate that served as the basis for the panel's reversal of the preliminary injunction.

SMART'S POLICY AND ITS APPLICATION TO PLAINTIFFS' SPEECH

On May 12, 2010, Plaintiffs submitted a request to display their advertisement on SMART vehicles. Because Plaintiffs' request met the procedural requirements established by SMART, they subsequently entered into a contract through SMART's advertising agency to display the advertisement. (R-8: Geller Decl. at ¶ 15 at Ex. 1).

Less than two weeks later, SMART denied Plaintiffs' request. 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, (R-8: Geller Decl. at ¶ 16 at Ex. 1), forcing Plaintiffs to file this civil rights action.[5]

[5] Defendants refused to provide Plaintiff Geller with *any* explanation as to why her

At the preliminary injunction hearing, Defendant Gibbons was designated by SMART to testify on its behalf pursuant to Rule 30(b)(6) of the Federal Rules of Civil Procedure per the stipulation of the parties. (*See* R-17: Stipulation). Defendant Gibbons was testifying as to SMART's advertising policy and its application, and to the basis for rejecting Plaintiffs' advertisement based on this policy.

It is critically important to pause here, even if briefly, to recognize the significance of testimony provided under Rule 30(b)(6). *See* Fed. R. Civ. P. 30(b)(6). In *United States v. Taylor*, 166 F.R.D. 356 (M.D.N.C. 1996), the court provided a comprehensive explanation regarding the testimony of a Rule 30(b)(6) witness:

> The testimony elicited at the Rule 30(b)(6) deposition *represents the knowledge of the corporation, not of the individual deponents*. The designated witness is "speaking for the corporation," and this testimony must be distinguished from that of a "mere corporate employee" whose deposition is not considered that of the corporation and whose presence must be obtained by subpoena. Obviously it is not literally possible to take the deposition of a corporation; instead, when a corporation is involved, the information sought must be obtained from natural persons who can speak for the corporation. The corporation appears vicariously through its designee. If the persons designated by the corporation do not possess personal knowledge of the matters set out in the deposition notice, the corporation is obligated to prepare the designees so that they may give knowledgeable and binding answers for the corporation. Thus, the duty to present and prepare a Rule 30(b)(6) designee goes beyond matters personally known to that designee or to matters in which that designee was personally involved.
>
> *The Rule 30(b)(6) designee does not give his personal opinions*. Rather,

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advertisement was rejected, providing additional evidence of the cynical form of gamesmanship that SMART engaged in here and the arbitrary and capricious way in which it makes decisions regarding proposed advertisements.

> he presents the corporation's "position" on the topic. Moreover, the designee must not only testify about facts within the corporation's knowledge, *but also its subjective beliefs and opinions*. The corporation *must provide its interpretation of documents and events*. The designee, in essence, represents the corporation just as an individual represents him or herself at a deposition. *Were it otherwise, a corporation would be able to deceitfully select at trial the most convenient answer presented by a number of finger pointing witnesses at the depositions*. *Truth would suffer*.

Id. at 361 (internal quotations, punctuation, and citations omitted). Consequently, the panel's dismissive treatment of the dispositive, *in-court* testimony of Defendant Gibbons was clear error. (*See* Op. at 14) (acknowledging that Defendant Gibbons "was designated as a Rule 30(b)(6) witness" but incorrectly concluding that she was expressing her "personal opinion" during her testimony).

During the preliminary injunction hearing, SMART testified (through Defendant Gibbons) 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]?
> A. Right.

(R-18: Tr. of Hr'g on Mot. for Prelim. Inj. at 15) (hereinafter "Tr.").

SMART also stated during its testimony that when it examined Plaintiffs' proposed advertisement (*i.e.*, its "four corners"), SMART found nothing about the advertisement itself that was political.[6] SMART testified as follows:

[6] The irrefutable facts show that even Defendants understood that the *content* of

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

(R-18: Tr. at 10) (emphasis added). This testimony directly addresses SMART's decision-making process at the time it rejected the advertisement. The panel's characterization and treatment of this testimony as mere personal opinion is both factually and legally wrong. (*See* Op. at 14).

With regard to *how* SMART decides whether or not an advertisement is permissible, SMART testified that it did not look to anything extrinsic to the atheist advertisement to determine whether it was permissible—SMART looked only at its "four corners." (R-18: Tr. at 6-7). However, SMART testified that it denied Plaintiffs' advertisement based solely on a news story in the *Miami Herald*, indicating that when Plaintiffs ran a similar advertisement in Florida, it was controversial.[7] (R-18: Tr. at 10, 17, 19, 22).

The *Miami Herald* article referenced by SMART does not report on the political *content* of Plaintiffs' advertisement. And the only matter referenced by SMART in its direct testimony was not related to the advertisement's content, but the "controversy"

Plaintiffs' advertisement was not and is not "political or political campaign advertising." (*See* R-24: Order at 3) (quoting "Restriction on Content"); *see also* R-24: Order at 9 (noting that "the advertisement in *Lehman* [*v. City of Shaker Heights*, 418 U.S. 298 (1974)] was clearly political advertising, promoting a specific candidate for an upcoming election")).

[7] A copy of this article was marked during the July 13, 2010, hearing as Defendants' Exhibit J. (*See* R-18:Tr. at 18).

over whether the Miami transit authority would run the advertisement, which it did and without incident. (*See* R-18: Tr. at 25). SMART testified on redirect examination by Defendants' counsel 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.*[8]

(R-18: Tr. at 19) (emphasis added). In other words, SMART reacted to a newspaper article's rendering of a question raised about whether the Miami transit authority would run the advertisement—not whether the advertisement itself was "political."

SMART further testified that the only basis for rejecting Plaintiffs' advertisement was this single news article—not the advertisement's subject matter, not its content, and not anything on any website cited on the advertisement:

> Q: You indicated that as a result of a newspaper article, you determined that [Plaintiffs'] ad was political?
> A: That it was a political issue, yes.

[8] The questioning by Defendants' counsel makes plain that Defendant Gibbons was testifying (appropriately so) on behalf of SMART as to SMART's decision to reject Plaintiffs' advertisement. Moreover, it should be noted that Defendants' counsel never once objected to any of Defendant Gibbons' testimony on the grounds that it was personal opinion. Consequently, it is only the panel (*i.e.*, not counsel nor the district court judge hearing the live testimony) that improperly considered this testimony to be "personal opinion" and not the testimony of SMART's designated Rule 30(b)(6) witness.

Q: *You had already testified earlier that the content was not political but that you looked at what occurred in Miami*?
A: *Correct*.
Q: And all you know about what occurred in Miami is the article that you looked at earlier that you referenced?
A: Yes.

(R-18: Tr. at 23) (emphasis added).

As noted previously, there is nothing in the news article itself to suggest that the content of Plaintiffs' advertisement was political.[9] It merely quotes a single Muslim organization objecting to the advertisement's *viewpoint*. (R-18: Tr. at 17-18, Ex. J).

Yet, despite this clear and unequivocal testimony regarding the application of SMART's policy and its decision to reject Plaintiffs' advertisement based on this policy, the panel, substituting its judgment for that of SMART, claimed that "[b]ased on recent court cases, legislative action, and political speeches it was reasonable for SMART to conclude that the content of [Plaintiffs'] advertisement—the purported threat of violence against nonconforming Muslims in America—is, in America today, decidedly political." (Op. at 11). But, as noted, this was not how SMART applied its policy to reject Plaintiffs' advertisement. And SMART certainly did not apply its

[9] When denying Plaintiffs' advertisement, SMART equated "political" with "controversial." (R-18: Tr. at 19) (answering the question as to whether SMART was "able to determine that [Plaintiffs' advertisement] was political" by stating, "[SMART] 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"). Consequently, in light of controlling Circuit precedent, this is a restriction based on viewpoint, which is impermissible in any forum. *United Food & Commercial Workers Union, Local 1099*, 163 F.3d at 361 (stating that "any prohibition against 'controversial' advertisements unquestionably allows for viewpoint discrimination").

policy in this manner when it accepted the atheist advertisement. Indeed, is not the role of God in politics—an issue that the Detroit Coalition of Reason champions (against)—"in America today, decidedly political"?[10] Consequently, the panel's own rendition of SMART's policy is malleable, subjective, open to viewpoint discrimination and thus unconstitutional.[11]

SMART'S REGULATION OF PLAINTIFFS' SPEECH WAS UNCONSTITUTIONAL

SMART's advertising policy permits "religious" messages, but it prohibits messages it deems to be "political." Pursuant to this policy, SMART accepted the atheist advertisement discussed previously, and this advertisement was plainly controversial and, in fact, resulted in vandalism to SMART's buses. But despite the vandalism, SMART continued to run the advertisement, and it continues to defend its

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[10] A simple review of the Detroit Coalition of Reason's webpage (and its affiliated United Coalition of Reason) as identified on the advertisement reveals that this is a political organization which supports the views of secular humanists, atheists, "freethinkers," etc. *See* http://unitedcor.org/detroit/page/home. It describes its mission as follows: "From civil rights and separation of state and church activism, to scientific, rational and freethought presentations and discussions, to networking and camaraderie, Detroit CoR Groups have so much to offer." *See* http://unitedcor.org/detroit/page/about-us.

[11] SMART testified as follows regarding the application of the "scornful" speech restriction to Plaintiffs' advertisement:

Q: There is nothing in the 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*.

(R-18: Tr. at 10-11) (emphasis added). Consequently, there is no basis for denying the preliminary injunction under this provision of SMART's policy.

decision to accept this advertisement under its extant advertising policy. The panel, however, never acknowledges the fact that the policy at issue permits "religious" messages, and it never confronts the fact that SMART distinguished the atheist's "religious" message from Plaintiffs' "religious" message based on the fact that SMART concluded that Plaintiffs' message was too controversial (it certainly knew that the atheist message was controversial, but apparently not controversial enough to reject it). As this Circuit previously stated, "We believe *any* prohibition against 'controversial' advertisements unquestionably allows for viewpoint discrimination." *United Food & Commercial Workers Union, Local 1099*, 163 F.3d at 361. For this reason alone, the panel was wrong and should be reversed.[12]

Indeed, for a speech regulation in a nonpublic forum[13] to withstand

[12] The panel stated, "A SMART employee must determine whether or not something is political—a reasonably objective exercise. In the *United Foods* situation, however, the employee would have to determine where—on a hypothetical spectrum of controversy—an advertisement fell." (Op. at 11). However, as the facts in this case demonstrate, the very scenario that the panel acknowledged was unconstitutional in *United Foods* is precisely what we have in this case—a hypothetical spectrum of "controversy" to determine whether Plaintiffs advertisement was "religious" like the atheist advertisement (and thus acceptable) or "political" (and thus prohibited).

[13] Plaintiffs reject the claim that SMART's advertising space is a nonpublic form. The panel was factually incorrect when it concluded that SMART's advertising policy reflects a "'managerial decision' focused on increasing revenue to limit advertising 'space to *innocuous and less controversial* commercial and service oriented advertising.'" (Op. at 9) (quoting *Lehman*, 418 U.S. at 304) (emphasis added). As this Circuit previously stated, "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." *United Food & Commercial Workers Union, Local 1099*, 163 F.3d at 355. Accepting controversial

constitutional challenge it 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). Indeed, SMART's policy, as revealed by the record (and by the panel's own rendition of the policy), permits arbitrary application and is thus not "reasonable." Pursuant to this Circuit's precedent, "The absence of clear standards guiding the discretion of the public official vested with the authority to enforce the enactment invites abuse by enabling the official to administer the policy on the basis of impermissible factors." *United Food & Commercial Workers Union, Local 1099*, 163 F.3d at 359; *Forsyth Cnty.*, 505 U.S. at 130 ("A government regulation that allows arbitrary application . . . has the potential for becoming a means of suppressing a particular point of view.").

A government regulation that permits arbitrary application, such as SMART's speech regulation, "has the potential for becoming a means of suppressing a particular point of view." *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.,* 452 U.S. 640, 649 (1981). To avoid that risk, a law restricting the exercise of First Amendment freedoms must contain "narrow, objective, and definite standards to guide" the regulating authority. *Shuttlesworth v. Birmingham,* 394 U.S. 147, 150-51 (1969); *Niemotko v. Md.,* 340 U.S. 268, 271 (1951). The reasoning for this requirement is

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"religious" advertisements, such as the atheist advertisement, similarly "signals a willingness on the part of the government to open the property to controversial speech," thereby making the advertising space a designated public forum. *See id.*

straightforward: if a speech regulation "involves appraisal of facts, the exercise of judgment, and the formation of an opinion," *Cantwell v. Conn.,* 310 U.S. 296, 305 (1940), by the regulating government authority, "the danger of censorship and of abridgment of our precious First Amendment freedoms is too great" to be permitted, *Se. Promotions, Ltd. v. Conrad,* 420 U.S. 546, 553 (1975).

In the final analysis, the denial of liberty's most fundamental bulwark—the protection of free speech—has extended for more than two years in this case, causing not only irreparable harm to Plaintiffs, *see Newsome v. Norris*, 888 F.2d 371, 378 (6th Cir. 1989) ("The Supreme Court has unequivocally admonished that even minimal infringement upon First Amendment values constitutes irreparable injury sufficient to justify injunctive relief."), but injury to the public interest as well, *G & V Lounge, Inc. v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994) ("[I]t is always in the public interest to prevent the violation of a party's constitutional rights."); *Dayton Area Visually Impaired Persons, Inc. v. Fisher*, 70 F.3d 1474, 1490 (6th Cir. 1995) (stating that "the public as a whole has a significant interest in ensuring . . . protection of First Amendment liberties"). A full court hearing is necessary.

CONCLUSION

Plaintiffs request that the court grant this petition, vacate the panel's opinion, and affirm the district court's order granting a preliminary injunction in this important First Amendment case.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P. 35, the foregoing petition does not exceed 15 pages, excluding material not counted under Fed. R. App. P. 32.

AMERICAN FREEDOM LAW CENTER

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

CERTIFICATE OF SERVICE

I hereby certify that on November 7, 2012, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. I further certify that all of the participants in this case are registered CM/ECF users.

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