NO. 19-1311

UNITED STATES COURT OF APPEALS
FOR THE
SIXTH CIRCUIT

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

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-APPELLEES,
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

APPELLANTS' PRINCIPAL BRIEF

ROBERT JOSEPH MUISE, ESQ.
AMERICAN FREEDOM LAW CENTER
P.O. BOX 131098
ANN ARBOR, MICHIGAN 48113
(734) 635-3756

Attorneys for Plaintiffs-Appellants

DAVID YERUSHALMI, ESQ.
AMERICAN FREEDOM LAW CENTER
2020 PENNSYLVANIA AVENUE NW
SUITE 189
WASHINGTON, D.C. 20006
(646) 262-0500

DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTERESTS

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and 6th Cir. R. 26.1, Plaintiffs-Appellants state the following:

Plaintiff-Appellant American Freedom Defense Initiative is a nonprofit corporation. It does not have a parent corporation and no publicly held company owns 10% of its stock.

Plaintiffs-Appellants Pamela Geller and Robert Spencer are individual, private parties.

No party is a subsidiary or affiliate of a publicly owned corporation. There are no publicly owned corporations, not a party to the appeal, that have a financial interest in the outcome.

AMERICAN FREEDOM LAW CENTER

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

REASONS WHY ORAL ARGUMENT SHOULD BE PERMITTED

Pursuant to Rule 34(a) of the Federal Rules of Appellate Procedure and 6th Cir. R. 34(a), Plaintiffs respectfully request that this Court hear oral argument. This case presents for review important legal issues regarding the right of a private citizen to engage in speech protected by the First Amendment in a forum created by a government transit authority and the ability of the transit authority to restrict that speech based on its content and viewpoint pursuant to advertising guidelines that do not provide any object standards to guide the discretion of the transit authority officials who seek to censor the speech.

Oral argument will assist this court in reaching a full understanding of the issues presented and the underlying facts. Moreover, oral argument will allow the attorneys for both sides to address any outstanding legal or factual issues that this Court deems relevant.

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PRELIMINARY STATEMENT

This case challenges Defendants' refusal to display Plaintiffs' "*Leaving Islam*" advertisement on SMART buses pursuant to SMART's content- and viewpoint-based advertising guidelines. As the factual record developed through the course of discovery reveals, SMART has created a forum for the expression of a wide variety of commercial, noncommercial, public-service, and public-issue advertisements, including advertisements on exceedingly controversial subjects. As a result, its "content" restrictions on Plaintiffs' message do not survive strict scrutiny and thus violate the First and Fourteenth Amendments.

Additionally, the actual application of the guidelines demonstrates that Defendants employ them 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 way as required by the First and Fourteenth Amendments.

At a minimum, two Supreme Court decisions compel reversal regardless of the nature of the forum. The first is *Minnesota Voters Alliance v. Mansky*, 138 S. Ct. 1876, 1891 (2018), in which the Court held that speech restrictions in nonpublic forums must be "guided by objective, workable standards," and the unqualified ban on "political" apparel was unreasonable in violation of the First Amendment because it

did not provide those standards.[1] Similarly here, SMART's ban on "political" speech—which SMART defines for purposes of its advertising guidelines as "any advocacy of a position of any politicized issue," with "politicized" meaning "if society is fractured on an issue and factions of society have taken up positions on it that are not in agreement"[2]—plainly fails this test.

The second case is *Matal v. Tam*, 137 S. Ct. 1744 (2017), in which the Court made clear that restrictions prohibiting demeaning or disparaging speech, such as SMART's restriction on ads that are "likely to hold up to scorn or ridicule any person or group of persons," are viewpoint based in violation of the First Amendment. *See id*. at 1763 ("Giving offense is a viewpoint.").

In sum, this Court should reverse the district court's grant of summary judgment in favor of Defendants and reverse its denial of Plaintiffs' motion for summary judgment, thereby entering judgment in Plaintiffs' favor. The First Amendment compels such a result.

STATEMENT OF JURISDICTION

On May 27, 2010, Plaintiffs filed this action, alleging violations arising under the First and Fourteenth Amendments to the United States Constitution and 42 U.S.C.

[1] Plaintiffs filed a notice of supplemental authority (R.77), bringing *Mansky* to the district court's attention. However, the district court expressly did not rely upon *Mansky* in reaching its decision in this case. (*See* Order at 1, n.1, R.83, Pg.ID1805 [stating that the court "did not rely on, nor find [*Mansky*] applicable to this case"]).
[2] (SMART Dep. at 41, Ex. 4, R.58-5, Pg. ID 1340).

§ 1983. (Compl., R.1, Pg. ID 1-8). The district court had jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343.

Following the close of discovery, the parties filed cross-motions for summary judgment.

On March 22, 2019, the district court entered an order granting Defendants' motion for summary judgment and denying Plaintiffs' motion for summary judgment. (Order, R.83, Pg. ID 1805-24). Judgment was entered in favor of Defendants and against Plaintiffs. (J., R.84, Pg. ID 1825-26).

That same day, March 22, 2019, Plaintiffs timely filed a notice of appeal, (Notice of Appeal, R.85, Pg. ID 1827-29), seeking review of the district court's Order.

This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES FOR REVIEW

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

II. Whether, regardless of the nature of the forum, Defendants' content-based 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 and in light of *Minnesota Voters Alliance v. Mansky*, 138 S. Ct. 1876 (2018).

III. Whether, regardless of the nature of the forum, Defendants' advertising guidelines facially and as applied to Plaintiffs' advertisement are viewpoint based in violation of the First and Fourteenth Amendments and in light of *Matal v. Tam*, 137 S. Ct. 1744, 1763 (2017).

IV. Whether Defendants' advertising guidelines facially and as applied to Plaintiffs' advertisement violate the equal protection guarantee of the Fourteenth Amendment.

STATEMENT OF THE CASE

I. Procedural Background.

In May 2010, Plaintiffs submitted a request to run their ad on the SMART buses operating in the Detroit, Michigan area. Defendants refused to run the ad, forcing Plaintiffs to file this civil rights action. (Compl., R.1, Pg. ID 1-8). Plaintiffs also filed a motion for a temporary restraining order ("TRO") / preliminary injunction because the unconstitutional speech restriction was causing irreparable harm as a matter of law. (Pls.' Mot. for Prelim. Inj. & TRO, R.8).

The district court denied the TRO, but set a hearing date on Plaintiffs' motion for July 13, 2010. (Order denying TRO & Notice of Hr'g, R.9).

During the hearing, Plaintiff Pamela Geller testified for Plaintiffs and Defendant Beth Gibbons testified on behalf of SMART pursuant to Rule 30(b)(6) of the Federal Rules of Civil Procedure (Tr. of Mot. Hr'g at 5, R.18, Pg. ID 191) and the stipulation of the parties (Stipulation, R.17, Pg. ID 184-86).

On March 31, 2011, the court granted the preliminary injunction. (Order Granting Prelim. Inj., R.24). Defendants appealed. (Notice of Appeal, R.29).

On October 25, 2012, this Court reversed. *See Am. Freedom Def. Initiative v. Suburban Mobility for Reg'l Transp.*, 698 F.3d 885 (6th Cir. 2012) (hereinafter "*AFDI v. SMART*").

Following remand, the parties engaged in extensive discovery to complete the factual record.

On August 15, 2013, the parties filed cross-motions for summary judgment. (Defs.' Mot. for Summ. J., R.57; Pls.' Mot. for Summ. J., R.58). The district court heard oral arguments on the motions on November 13, 2013, taking the matter "under advisement." (Minute Entry, 11/13/13).

On January 1, 2019, Plaintiffs filed a writ of mandamus with this Court, "request[ing] an order from this Court directing the District Court to exercise its authority and rule on the parties' cross-motions for summary judgment, which have been pending in the court since *November 13, 2013*." *In re Am. Freedom Def. Initiative*, No. 19-1052 (6th Cir. 2019).

On February 22, 2019, this Court issued an order "invit[ing]" the district court "to respond to the petition for a writ of mandamus within twenty-eight days, advising the court of the status of the pending motions, and of the time necessary for their disposition." *In re Am. Freedom Def. Initiative*, No. 19-1052, Order (Doc. 4-2).

As noted, on March 22, 2019, which was the twenty-eighth day following this Court's Order, the district court issued its ruling on the parties' cross-motions for summary judgment, granting Defendants' motion and denying Plaintiffs' motion. (Order, R.83, Pg. ID 1805-24).

After waiting for more than five years for a ruling, the district court's Order was cursory, it failed to address the record evidence developed during the course of discovery, it did not address recent case law (*see* n.1, supra), and it simply parroted this Court's ruling on the preliminary injunction, which necessarily lacked the context of the factual record developed during an extensive discovery process. (*See id*.).

Plaintiffs promptly filed a timely Notice of Appeal. (R.85, Pg. ID 1827-29). This appeal follows.

II. Statement of Facts.

A. The Parties.

Plaintiff American Freedom Defense Initiative ("AFDI") is a nonprofit organization that is incorporated under the laws of the State of New Hampshire. (Spencer Decl. at ¶ 3, Ex. 1, R.58-2, Pg. ID 1294). AFDI is an "organization

dedicated to freedom of speech, freedom of conscience, freedom of religion, freedom from religion, and individual rights." (Geller Dep. at 15-16, Ex. 7, R.58-8, Pg. ID 1455).

Plaintiffs Geller and 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 ads 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, Ex. 1, R.58-2, Pg. ID 1294; Geller Decl. at ¶¶ 2-4, Ex. 2, R.58-3, Pg. ID 1313).

Defendant SMART is a governmental agency. As a governmental agency, SMART is mandated to comply with federal and state laws, including the United States Constitution. (SMART Dep. at 105, Ex. 4, R.58-5, Pg. ID 1353). 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, Ex. 4, R.58-5, Pg. ID 1353; Dep. Ex. 6, Ex. 5, R.58-6, Pg. ID 1390).

During all relevant times, Defendant Gibbons was employed by SMART as the

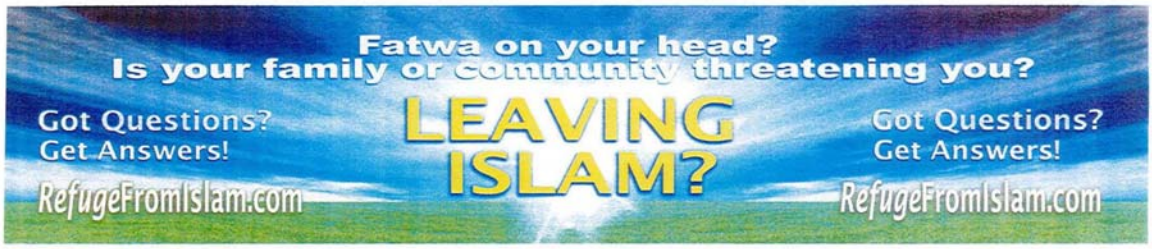
[3] This statement was added to SMART's website after the atheist advertisement controversy (Gibbons Dep. at 29-32, Ex. 6, R.58-7, Pg. ID 1445), which is discussed further in this brief. (*See* Section II.D., *infra*).

Marketing Program Manager in the Marketing Department, (Gibbons Dep. at 11, Ex. 6, R.58-7, Pg. ID 1440), and in that capacity she had decision-making authority to accept or reject proposed ads pursuant to SMART's advertising guidelines, (SMART Dep. at 16, Ex. 4, R.58-5, Pg. ID 1334).

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 ads pursuant to SMART's advertising guidelines. (SMART Dep. at 27-28, 31, Ex. 4, R.58-5, Pg. ID 1337-38).

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

On May 12, 2010, Plaintiffs submitted the below ad to SMART:



(Geller Decl. at ¶ 7, Ex. 2, R.58-3, Pg. ID 1314; SMART Dep. at 13-15, Ex. 4, R.58-5, Pg. ID 1334; Dep. Ex. 2, Ex. 5, R.58-6, Pg. ID 1379-80; Geller Dep. at 169, Ex. 7, R.58-8, Pg. ID 1456; Dep. Ex. SS, Ex. 8, R.58-9, Pg. ID 1461). Plaintiffs subsequently entered into a contract through SMART's advertising agent to run the ad. (Geller Decl. at ¶ 7, Ex. 2, R.58-3, Pg. ID 1314).

Plaintiffs' "*Leaving Islam*" ad is "a call to girls who need help," much like an

ad for a battered women's shelter for victims of domestic violence. (Geller Dep. at 177, Ex. 7, R.58-8, Pg. ID 1457; Geller Decl. at ¶ 5, Ex. 2, R.58-3, Pg. ID 1313-14; Spencer Decl. at ¶¶ 6-14, Ex. 1, R.58-2, Pg. ID 1294-98). It is a public service message that has nothing to do with politics or political campaigns, (Spencer Decl. at ¶¶ 6, 14, Ex. 1, R.58-2, Pg. ID 1294-95, 1298; *see also* Geller Dep. at 169, Ex. 7, R.58-8, Pg. ID 1456 [testifying that the ad does not convey a political message]), as those terms are commonly (and commonsensically) understood, (*see* n.16, *infra*).

Furthermore, 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, Ex. 4, R.58-5, Pg. ID 1342), and that the penalty for leaving Islam under extant Islamic law is severe, (Spencer Decl. at ¶¶ 9-13, Ex. 1, R.58-2, Pg. ID 1296-98). This Court acknowledged this reality 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) ("Saieg also faces a more basic problem with booth-based evangelism: '[t]he penalty of leaving Islam according to Islamic books is death,' which makes Muslims reluctant to approach a booth that is publicly 'labeled as . . . Christian.'").

On or about May 24, 2010, Defendants denied Plaintiffs' request to display the "*Leaving Islam*" ad. 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. (Geller Decl. at ¶¶ 8, 9, Ex. 2, R.58-3, Pg. ID 1314).

C. SMART's Advertising Guidelines.

SMART enforces advertising guidelines that prohibit certain ads on its buses and bus shelters. These guidelines were employed by Defendants to reject Plaintiffs' "*Leaving Islam*" ad. (SMART Dep. at 37, Ex. 4, R.58-5, Pg. ID 1339).

SMART's advertising guidelines state, in relevant part, as follows:

5.07 Advertising Guidelines

* * * *

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.

(SMART Dep. at 19-24, Ex. 4, R.58-5, Pg. ID 1335-36; Dep. Ex. 3, Ex. 5, R.58-6, Pg. ID 1383) (emphasis added).

Plaintiffs' ad was rejected under sections B.1. ("political") *and* B.4. ("scornful"). (SMART Dep. at 37:17-21, Ex. 4, R.58-5, Pg. ID 1339 [testifying that Plaintiffs' ad was rejected under "5.07 B 1" and "5.07 B 4"]).

Aside from what is stated in the guidelines above, there are no additional manuals, guides, or other documents or references, *including a definitional section within the guidelines*, to assist SMART officials to determine whether the content of an ad is permissible. (SMART Dep. at 21-24, 38-40, Ex. 4, R.58-5, Pg. ID 1336, 1339; Gibbons Dep. at 92, Ex. 6, R.58-7, Pg. ID 1450).

There are three departments that have ***independent*** authority to make decisions on behalf of SMART regarding whether an ad 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, Ex. 4, R.58-5, Pg. ID 1337). Each department can act unilaterally, or the departments can collaborate in the decision-making process. (SMART Dep. at 27-28, Ex. 4, R.58-5, Pg. ID 1337). As noted above, during the relevant time period, Defendant Gibbons, who was the Marketing Program Manager in the marketing department, had the authority to accept or reject ads under the advertising guidelines on behalf of SMART,[4] (Gibbons Dep. at

[4] This is likely the reason why she was designated as the witness to testify on behalf of SMART during the hearing on Plaintiffs' motion for preliminary injunction. (*See* Tr. of Mot. Hr'g at 5, R.18, Pg. ID 191; Stipulation ¶ 2, R.17, Pg. ID 185). For its deposition, SMART designated one of its attorneys, Anthony Chubb, to testify on its behalf. (*See* SMART Dep. at 6, 12, Ex. 4, R.58-5, Pg. ID 1332-33).

23, *see also* 15-16, Ex. 6, R.58-7, Pg. ID 1443, 1441), and so too did Defendant Hertel, the General Manager and CEO for SMART during the relevant time period, (SMART Dep. at 27-28, 31, Ex. 4, R.58-5, Pg. ID 1337).

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, Ex. 4, R.58-5, Pg. ID 1340) (emphasis added). In an effort to explain the tautology (*i.e.*, "political" = politicized issue), SMART defines "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, Ex. 4, R.58-5, Pg. ID 1340) (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, Ex. 6, R.58-7, Pg. ID 1443). 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 Rule 30(b)(6) witness, (Gibbons Dep. at 24-25, Ex. 6, R.58-7, Pg. ID 1443-44)—testimony she reviewed to prepare for her deposition, (Gibbons Dep. at 9-11, Ex. 6, R.58-7, Pg. ID 1440).

During her prior sworn testimony at the hearing on Plaintiffs' motion for a preliminary injunction,[5] Defendant Gibbons testified as follows with regard to the application of SMART's advertising guidelines to Plaintiffs' ad:

> Q: So in fact, there is no policy or guideline or training manual or anything else that would set out why [Plaintiffs' ad] is political [and thus impermissible] and the Atheist Ad is not political [and thus permitted]?[6]
> A. Right.

(Tr. of Mot. Hr'g at 15, R.18, Pg. ID 201).

Defendant Gibbons also stated during the hearing that when she examined the "*Leaving Islam*" ad (*i.e.*, its "four corners"), she found nothing about the ad 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. of Mot. Hr'g at 10, R.18, Pg. ID 196) (emphasis added). Contrary to the district

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[5] Defendant Gibbons was designated by SMART pursuant to Rule 30(b)(6) to testify on its behalf during the hearing and, indeed, testified under oath that she was doing so. (*See* Tr. of Mot. Hr'g at 5 ["Q: Ms. Gibbons, you understand you're testifying here on behalf of SMART, correct? A: Yes."], R.18, Pg. ID 191; Stipulation ¶ 2, R.17, Pg. ID 185). Despite this undisputed fact, this Court decided, *sua sponte*, that Defendant Gibbons was testifying on her own behalf. *AFDI v. SMART*, 698 F.3d at 896. Nonetheless, as we learned through discovery, Defendant Gibbons is in fact a decisionmaker for SMART with regard to the application of the advertising guidelines. Consequently, her testimony regarding their application is binding on SMART as an admission by a party-opponent. *See* Fed. R. Evid. 801(d)(2).

[6] The "Atheist Ad" is the Detroit Area Coalition of Reason's ad that ran on SMART's buses. (SMART Dep. at 81-82, Ex. 4, R.58-5, Pg. ID 1347; Dep. Ex. 4, Ex. 5, R.58-6, Pg. ID 1388).

court's conclusion, having a political objective for posting an ad does not make the *content* of the ad "political."[7] (*See* Order at 15, R.83, Pg. ID 1819).

Defendant Gibbons testified on redirect examination 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 ad. 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. of Mot. Hr'g at 19, R.18, Pg. ID 205) (emphasis added). In other words, Defendant Gibbons reacted to a newspaper article's rendering of a question raised about whether the Miami Dade Transit authority would run the ad—not whether the ad itself—that is, its content—represented a "political" ad.

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, Ex. 9, R.58-10, Pg. ID 1466), understood (commonsensically) "political" for purposes of the advertising guidelines

[7] For example, in *Archdiocese of Washington v. Washington Metropolitan Area Transit Authority*, 897 F.3d 314 (D.C. Cir. 2018), the D.C. Circuit upheld WMATA's rejection of the Archdiocese's ad because of its religious content but had no issue with WMATA permitting an ad submitted by the Salvation Army, a religious organization. *See id.* at 329 ("WMATA accepted the ad of the Salvation Army, a religious organization whose ad exhorted giving to charity but contained only non-religious imagery."). No doubt both advertisers have "religious" objectives for placing their ads, but only the former ad had religious "content." It is the *content of the ad* that matters and not the objectives or motives of the advertiser.

to mean advertisements whose subject matter was "ballot proposals, . . . campaign initiatives, or individuals . . . if they're running for office."[8] (Dryden Dep. at 13, Ex. 9, R.58-10, Pg. ID 1467). 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, Ex. 9, R.58-10, Pg. ID 1467).

In summary, if an ad addresses a contentious issue—at least one that Defendants believe is contentious *based upon an amorphous sliding spectrum of contentiousness*—then it is rejected. (*See* SMART Dep. at 66-67, Ex. 4, [acknowledging that there is a hypothetical "spectrum" of whether something is sufficiently "politicized" to be rejected], R.58-5, Pg. ID 1346). As demonstrated further below, whether an ad addresses an issue that is sufficiently "politicized" or "scornful" and thus rejected by Defendants is wholly arbitrary and subjective.

D. Application of SMART's Advertising Guidelines.

As discovery demonstrated, SMART permits a *wide variety* of commercial, noncommercial, public-service, public-issue, and religious ads on its property, including ads promoting controversial and contentious issues. Thus, the record here is

[8] Despite this commonsense understanding of "political," we learned during the course of discovery that a "get-out-the-vote" message (*i.e.*, an ad urging citizens to exercise their political franchise—a subject that is quintessentially political) is, indeed, *not* "political" according to SMART. (SMART Dep. at 177, Ex. 4, R.58-5, Pg. ID 1370; Dep. Ex. 36, Ex. 5, R.58-6, Pg. ID 1428).

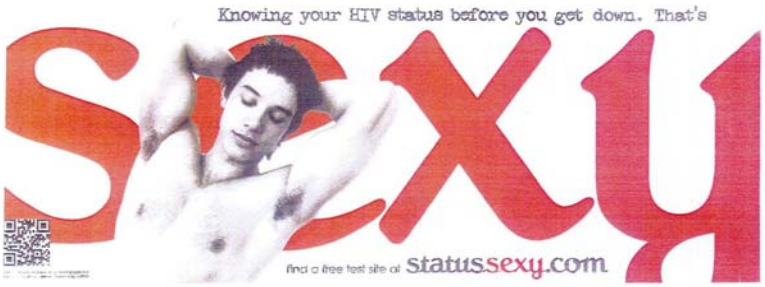
unlike the record previously before this Court on Plaintiffs' motion for preliminary injunction where the Court concluded that the forum was a nonpublic forum "[b]ecause SMART's policy and practice demonstrate an intent to create a nonpublic forum, [and] one purported aberration [the atheist ad] would not vitiate that intent." *AFDI v. SMART*, 698 F.3d at 892.

As noted, pursuant to its advertising guidelines, SMART permitted the Detroit Area Coalition of Reason to place an ad on its vehicles that stated the following: "***Don't believe in God? You are not alone***." The ad also listed the website of the organization (DetroitCoR.org). (SMART Dep. at 81-82, 84, Ex. 4, R.58-5, Pg. ID 1347; Dep. Ex. 4, Ex. 5, R.58-6, Pg. ID 1388). The Detroit Area Coalition of Reason's webpage (and its affiliated United Coalition of Reason) as identified on the ad reveals that this organization supports, *inter alia*, the views of secular humanists, atheists, and "freethinkers." *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 Member Groups have so much to offer." *See* http://unitedcor.org/detroit/page/about-us[9] (emphasis added); (Muise Decl. at ¶ 11,

[9] As the record demonstrates, the acceptance of the atheist ad 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 AFDI v. SMART*, 698 F.3d at 892. To this day, SMART defends its decision to run the controversial ad (SMART Dep. at 94, Ex. 4, R.58-5, Pg. ID 1350), even though SMART admits that

Exs. A-C, Ex. 3, R.58-4, Pg. ID 1319-20, 1321-29; SMART Dep. at 84, 87, Ex. 4, R.58-5, Pg. ID 1347-48). The Detroit Area Coalition of Reasoning's ad advocates a position on perhaps the most contentious (*i.e.*, "*politicized*" per SMART's rendering) of all issues—the existence of God.[10] As Defendant Gibbons noted in her deposition, the issue presented by this ad is so "*politicized*" that bus drivers for SMART *refused* to drive the buses displaying the ad because the message "went against their belief." (Gibbons Dep. at 29, Ex. 6, R.58-7, Pg. ID 1445).

But the atheist ad is not the only controversial (*i.e.*, "*political*" per SMART's rendering) ad that SMART accepted. SMART has also accepted ads that promote, and indeed advocate for, sexual relations between men. One of the *several* ads of the "Status Sexy" campaign accepted by SMART appeared as follows:



(SMART Dep. at 135, Ex. 4, R.58-5, Pg. ID 1359; Dep. Ex. 16, *see also* Dep. Exs. 13-

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"the separation of church and state . . . is certainly a politicized issue," (SMART Dep. at 84-85, Ex. 4, R.58-5, Pg. ID 1347-48).

[10] The absurdity of Defendants' rejection of Plaintiffs' "*Leaving Islam*" ad and acceptance of the atheist ad is illustrated by the way in which SMART must contort itself to justify this inconsistency. SMART testified under oath that the issue of the belief in God is *not* politicized under its definition (*i.e.*, factions of society have taken up positions on it that are not in agreement). (SMART Dep. at 84, Ex. 4, R.58-5, Pg. ID 1347).

19, Ex. 5, R.58-6, Pg. ID 1398, 1394-1401). According to an article linked on the statussexy.com website—*which is listed on the ad*—"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.'"[11] (SMART Dep. at 138-43, Ex. 4, R.58-5, Pg. ID 1360-61; Dep. Exs. 19, 20, Ex. 5, R.58-6, Pg. ID 1401-02) (emphasis added). Moreover, the ad uses crude language suggestive of sexual acts (*i.e.*, "before you get down") that is, at the very least, factious. Further, Defendants apparently have no problem with a "captive" audience,[12] including children, seeing this controversial (and arguably lewd) ad campaign.

Defendants have also accepted an ad that encourages the use of "***Birth control, including: Pills, IUD's, Condoms and Diaphragms***." The ad 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, Ex. 4, R.58-5, Pg. ID 1362-63; Dep. Ex. 22, Ex. 5, R.58-6, Pg. ID 1405-06).

[11] 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 would *not* cause SMART to disapprove the ad under the guidelines at issue here. (SMART Dep. at 138-43, Ex. 4, R.58-5, Pg. ID 1360-61). Moreover, one need not have access to this article to understand that this ad campaign promotes, advocates for, and takes a position on sex between men (*see, e.g.*, get tested for HIV "before you get down").

[12] This ad campaign ran on advertising space *within* SMART buses as well as on the outside of the buses and at bus shelters. (Dep. Exs. 13-18, Ex. 5, R.58-6, Pg. ID 1394-1400).

Defendants approved the display of a stop smoking campaign that employs graphic and controversial images to advocate for a position against smoking. (SMART Dep. at 164-65, Ex. 4, R.58-5, Pg. ID 1366-67; Dep. Exs. 30-31, Ex. 5, R.58-6, Pg. ID 1420-21). Defendants approved an ad for a Christian organization, which asks, "***Feeling lost? Find your path***," with an image of the Latin cross. (SMART Dep. at 157, Ex. 4, R.58-5, Pg. ID 1365; Dep. Ex. 26, Ex. 5, R.58-6, Pg. ID 1414-15). Defendants approved stop-drunk-driving campaigns, AIDS/HIV awareness campaigns, and stop hunger campaigns, among others, (*see* Dep. Exs. 23-25, 27-28, Ex. 5, R.58-6, Pg. ID 1407-13, 1416-19), all of which advocate for a particular position on a public issue. Indeed, out of the "hundreds" of ads submitted for approval under the guidelines at issue (SMART Dep. at 126, Ex. 4, R.58-5, Pg. ID 1357)—*ads covering a wide array of public issues*—Defendants only ever rejected three ads with distinct ***viewpoints*** because they were allegedly "political": (1) Plaintiffs' "*Leaving Islam*" ad, (2) an ad for Rachel's Vineyard, which provides assistance for post-abortive women, and (3) an ad similar to the atheist ad that said, "***Don't believe in Muhammad? You are not alone***." (SMART Dep. at 124-26, *see also* 116-17, Ex. 4, R.58-5, Pg. ID 1356-57, 1354-55; Dep. Ex. TT, Ex. 8, R.58-9, Pg. ID 1462).

STANDARD OF REVIEW

This Court reviews *de novo* an appeal from a grant of summary judgment. *Bible Believers v. Wayne Cnty.*, 805 F.3d 228, 242 (6th Cir. 2015). Summary judgment is appropriate when there exists no genuine dispute with respect to the material facts and, in light of the facts presented, the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56. However, "[t]he facts must be viewed in the light most favorable to the non-moving party and the benefit of all reasonable inferences in favor of the non-movant must be afforded to those facts." *Bible Believers*, 805 F.3d at 242 (reversing the grant of summary judgment by the district court in favor of the defendants and remanding for entry of summary judgment in favor of the plaintiffs).

Because this case implicates First Amendment rights, this Court must closely scrutinize the record without *any* deference to the district court. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Bos.*, 515 U.S. 557, 567 (1995) (requiring courts to "conduct an independent examination of the record as a whole, without deference to the trial court" in cases involving the First Amendment); *see also Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 499 (1984) (same).

Additionally, this Court's reversal of the district court's order granting Plaintiffs' request for a preliminary injunction, *AFDI v. SMART*, 698 F.3d at 885, was a preliminary decision that is not binding at a trial on the merits or when deciding a

motion for summary judgment, and thus does *not* constitute the "law of the case." *Univ. of Tx. v. Camenisch*, 451 U.S. 390, 395 (1981) ("[T]he findings of fact and conclusions of law made by a court granting a preliminary injunction are not binding at trial on the merits."); *Wilcox v. United States*, 888 F.2d 1111, 1114 (6th Cir. 1989) (holding that the trial court's denial of a preliminary injunction did not establish the law of the case with respect to the court's subsequent summary judgment determination); *Tech. Publ'g Co. v. Lebhar-Friedman, Inc.*, 729 F.2d 1136, 1139 (7th Cir. 1984) ("A factual finding made in connection with a preliminary injunction is not binding" on a motion for summary judgment); *City of Angoon v. Hodel*, 803 F.2d 1016, 1024 n.4 (9th Cir. 1986) (determinations corresponding to a preliminary injunction do not constitute law of the case); *see also Satawa v. Bd. of Cnty. Rd. Comm'rs*, 788 F. Supp. 2d 579, 594 (E.D. Mich. 2011), *rev'd in part on other grounds*, 689 F.3d 506 (6th Cir. 2012) ("Defendants' contention that the findings of fact and conclusions of law made by the Court in denying Plaintiff's Motion for a Preliminary Injunction are 'fatal' to Plaintiff's Free Speech and Establishment Clause claims lacks legal merit. The Court, therefore, will proceed to consider *de novo* the pertinent facts—as more fully developed through discovery—and the applicable law in deciding the instant summary judgment motions.").

As demonstrated above and further below, this Court's ruling on the preliminary injunction was based on an incomplete factual record. On its face, the

ruling lacked the benefit of the factual record developed during the course of discovery—that is, while Defendants contend that they have a constitutionally valid "political" speech restriction, the undisputed facts demonstrate that there is no such coherent "guideline." Rather, this restriction is in effect and as applied an arbitrary, capricious, and subjective *ad hoc* decision—and to the extent any kind of guideline exists, it is not based on what this Court understood it to be—an objective, rationally applied distinction between impermissible "political" content versus permissible religious content. Instead, Defendants' "political" speech restriction, as they define it, is entirely and manifestly an impermissible viewpoint censorship based on whether the subject matter of the ad is *contentious*. But, as demonstrated in the record, even that restriction is not applied coherently because it is not just contentiousness, it is any viewpoint-based contentiousness that Defendants do not like (*i.e.*, ads that might appear critical of Islam and opposed to abortion). In short, this case is a prime example as to why a ruling on a preliminary injunction, which is often based on an incomplete factual record, is not binding on the final determination of a case.

We turn now to discuss the legal merits of our arguments.

SUMMARY OF THE ARGUMENT

Plaintiffs' "*Leaving Islam*" ad is protected speech under the First Amendment. As the developed record reveals, Defendants created a public forum for the expression of a wide variety of commercial, noncommercial, public-service, and public-issue ads,

including ads on controversial subjects, such that Defendants' content-based restriction on Plaintiffs' message cannot survive strict scrutiny and therefore violates the First and Fourteenth Amendments.

Regardless of the nature of the forum, SMART's ban on "political" speech—which SMART defines for purposes of its advertising guidelines as "any advocacy of a position of any politicized issue," with "politicized" meaning "if society is fractured on an issue and factions of society have taken up positions on it that are not in agreement"—fails to provide "objective, workable standards" in violation of the First Amendment.

Thus, even in a nonpublic forum, Defendants' advertising guidelines facially and as applied to restrict Plaintiffs' ad provide no objective, workable guide for distinguishing between permissible and impermissible ads in a non-arbitrary, viewpoint-neutral fashion as required by the First Amendment.

Moreover, SMART's restriction on ads that are "likely to hold up to scorn or ridicule any person or group of persons" facially and as applied to restrict Plaintiffs' ad is a viewpoint-based restriction that violates the First Amendment even in a nonpublic forum.

Finally, Defendants granted the use of a forum—its advertising space—to advertisers whose views Defendants find acceptable, but then denied use to Plaintiffs because they expressed less favored or more controversial views in violation of the

Equal Protection Clause of the Fourteenth Amendment (and the Free Speech Clause of the First Amendment).

ARGUMENT

I. Defendants' Speech Restrictions Violate the First Amendment.

Plaintiffs' First Amendment claim is reviewed in three steps. First, the Court must determine whether the speech in question—Plaintiffs' ad—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 restrictions comport with the applicable standard. *Saieg*, 641 F.3d at 734-35.

Moreover, SMART's "refusal to accept [Plaintiffs' ad] for display because of its content is a clearcut prior restraint." *Lebron v. Wash. Metro. Area Transit Auth.*, 749 F.2d 893, 896 (D.C. Cir. 1984) (Bork, J.). And "[a]ny system of prior restraints of expression 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).

A. Plaintiffs' Ad 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 government transit advertising space, *United Food & Commercial Workers Union, Local 1099 v. Sw. Ohio Reg'l Transit Auth.*, 163 F.3d 341 (6th Cir. 1998) (hereinafter "*United Food*"); *see also Am. Freedom Def. Initiative v. King Cnty.*, 904 F.3d 1126 (9th Cir. 2018) (holding that the transit authority's rejection of the plaintiff's ad violated the First Amendment).

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.[13] *Id*. at 800. Once the forum is identified, the Court must then determine whether the speech restriction is justified by the requisite standard. *Id.*

A designated public forum is created, as in this case, 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

[13] This Court 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).

expressive activity." *Id.*

As this Court 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) (citation omitted); *see also Planned Parenthood Ass'n/Chi. Area v. Chi. 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 non-commercial 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").

In its opinion reversing the grant of a preliminary injunction, this Court treated the forum at issue as a nonpublic forum. *AFDI v. SMART*, 698 F.3d at 892. However, that determination was based upon an incomplete record. As the record now makes clear, Defendants have accepted "a wide array of advertisements," including very controversial, public-issue ads (which include an ad [the atheist ad] that SMART's

own bus drivers protested by refusing to drive the buses that displayed it and ads that are "political" per Defendants' definition, such as ads promoting "Status Sexy," contraception, and others). Defendants' actions are thus "*inconsistent with operating the property solely as a commercial venture.*"[14] *United Food*, 163 F.3d at 355 (emphasis added); *see also AFDI v. SMART*, 698 F.3d at 891 ("The *New York Magazine* court reasoned that '[a]llowing political speech . . . 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.'") (quoting *N.Y. Magazine*, 136 F.3d at 130) (emphasis added). Here, Defendants deliberately accept "the possibility of clashes of opinion and controversy" by the very ads they allow.

Furthermore, it is without question that the "nature of the property"—the advertising space—is "compatible" with Plaintiffs' proposed expressive activity. *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). Indeed, Plaintiffs' "*Leaving Islam*" ad has run on similar buses in other major cities—Miami, New York, and San Francisco. (Geller Decl. at ¶ 6, Ex. 2, R.58-3, Pg. ID

[14] The revenue SMART receives from selling ads is a small fraction of its operating budget. SMART is guaranteed $500,000 in revenue from the sale of ads. However, its operating budget is approximately $130 million. (SMART Dep. at 174-76, Ex. 4, R.58-5, Pg. ID 1369).

1314).

In sum, SMART's advertising space is a public forum for Plaintiffs' speech, thereby subjecting SMART's restrictions to strict scrutiny.

C. Defendants' Restrictions Cannot Survive Constitutional Scrutiny.

1. Defendants' Speech Restrictions Are Content Based.

Content-based restrictions on speech in a public forum are subject to strict scrutiny. *Cornelius*, 473 U.S. at 800. That is, "speakers 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 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). That is, "[a] rule is defined as a content-based restriction on speech when the regulating party must examine the speech to determine if it is acceptable." *Glendale Assocs. v. NLRB*, 347 F.3d 1145, 1155 (9th Cir. 2003).

Here, Defendants rejected Plaintiffs' ad based on the content of its message. (SMART Dep. at 18, Ex. 4, R.58-5, Pg. ID 1335 [admitting that Plaintiffs' ad was rejected based on its content]). Defendants have not satisfied strict scrutiny (nor have they attempted to do so). Therefore, their rejection of Plaintiffs' ad violates the First Amendment.

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

As noted by the Supreme Court, "the 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."[15] *Southeastern Promotions, Ltd. v. Conrad,* 420 U.S. 546, 553 (1975).

As this Court held in a similar case involving the government's regulation of bus advertising: "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*

[15] Indeed, 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 above, Defendants' speech restriction fails this test.

Food, 163 F.3d at 359; *see also Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 130 (1992) ("A government regulation that allows arbitrary application . . . has the potential for becoming a means of suppressing a particular point of view.").

Consequently, 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.

Through discovery, we have learned that Defendants' "political" restriction suffers from the very same defects found in the unconstitutional restriction at issue in *United Food*. Indeed, "political," as that term is *commonly* understood, could, when appropriately limited by an objective standard, provide a measure of guidance for a government administrator.[16] However, the way in which Defendants apply this "guideline" here is entirely arbitrary and subjective and, indeed, no different than the way in which the "controversial public issues" guideline was employed and thus

[16] As Ms. Dryden testified in her deposition, "political" ads reasonably include "ballot proposals, . . . campaign initiatives, or individuals . . . if they're running for office." (Dryden Dep. at 13, Ex. 9, R.58-10, Pg. ID 1467); *see generally* http://www.merriam-webster.com/dictionary/political (defining "political" as "of or relating to government, a government, or the conduct of government").

found unconstitutional in *United Food*.[17]

Recent Supreme Court precedent removes any doubt that SMART's "political" restriction is unlawful. In *Minnesota Voters Alliance v. Mansky*, 138 S. Ct. 1876 (2018), the Court analyzed a Minnesota statute banning voters from wearing a "political badge, political button, or other political insignia" at a polling place, a nonpublic forum. *Id*. at 1883. The Court held that portion of the statute unconstitutional because the State failed to draw "a reasonable line." *Id*. at 1888. The statute did not define the term "political," which in the Court's view was simply too broad. The State proffered as a limiting construction the idea that "political" meant "conveying a message about the electoral choices at issue in [the] polling place," but the Court noted this construction introduced line-drawing problems of its own. *Id.* at 1888-89. The crux of the Court's decision was that the State's discretion in enforcing the statute had to be "guided by objective, workable standards." *Id.* at 1891. Because the unqualified ban on "political" apparel did not provide those standards, it was unreasonable in violation of the First Amendment.

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[17] The "scornful" speech restriction suffers from the same arbitrary and subjective defects. 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. of Mot. Hr'g at 10-11, R.18, Pg. ID 196-97) (emphasis added).

The same is true here *a fortiori* with regard to SMART's restriction on "political" ads. As noted, 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 at Ex. 4) (emphasis added). In an effort to explain the 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*." By this definition, anything and everything could qualify as "political" if SMART so chose. Under the Court's ruling in *Mansky*, SMART's restriction violates the First Amendment. *See also Am. Freedom Def. Initiative v. Wash. Metro. Area Transit Auth.*, 901 F.3d 356, 372 (D.C. Cir. 2018) (reversing in part and remanding to determine whether the rejection of the ad was reasonable and stating, "WMATA's defense of the Guidelines against AFDI's unbridled discretion/vagueness challenge was that it banned AFDI's advertisements as 'political' speech, which is not unconstitutional. That argument might be unavailing in light of *Mansky*").

3. Defendants' Speech Restrictions Are Viewpoint Based.

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).

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) (emphasis added). 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, Ex. 4, R.58-5, Pg. ID 1343). Indeed, Defendants permitted ads 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, Ex. 4, R.58-5, Pg. ID 1350). 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).

This conclusion is further buttressed by Defendants' enforcement of a guideline that is itself viewpoint based on its face and 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 (*i.e.*, SMART's advertising space). 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, Ex. 4, R.58-5, Pg. ID 1373). 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, Ex. 4, R.58-5, Pg. ID 1373 ["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 (*see, e.g.*, SMART Dep. at 48, Ex. 4, R.58-5, Pg. ID 1341 [claiming that Plaintiffs' "website," which Defendants reviewed to make their decision to reject Plaintiffs' ad, "*is clearly anti-Islam*" (emphasis added)]), the ad 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).

The Supreme Court's decision in *Matal v. Tam*, 137 S. Ct. 1744, 1763 (2017), compels the conclusion that SMART's guidelines are viewpoint based and unlawful. *Matal* involved a challenge to a Lanham Act provision that prohibited the registration of trademarks that may "disparage . . . or bring . . . into contemp[t] or disrepute" any "person, living or dead." 15 U.S.C. § 1502(a). In striking down this provision because it was a viewpoint-based restriction on speech, the Court held "that this provision violates the Free Speech Clause of the First Amendment. It offends a bedrock First Amendment principle: Speech may not be banned on the ground that it expresses ideas that offend." *Id.* at 1751. As the Court affirmed, "Giving offense is a viewpoint." *Id*. at 1763.

As explained by the Court in *Matal*:

> Our cases use the term "viewpoint" discrimination in a broad sense, and in that sense, the disparagement clause discriminates on the bases of "viewpoint." To be sure, the clause even-handedly prohibits disparagement of all groups. It applies equally to marks that damn Democrats and Republicans, capitalists and socialists, and those arrayed on both sides of every possible issue. It denies registration to any mark

> that is offensive to a substantial percentage of the members of any group. But in the sense relevant here, *that is viewpoint discrimination*: *Giving offense is a viewpoint*.

Id. (emphasis added) (citation omitted).

Justice Kennedy's concurring opinion (joined by Justices Ginsburg, Sotomayor, and Kagan) is also instructive:

> The [challenged] law [prohibiting disparaging trademarks] thus reflects the Government's disapproval of a subset of messages it finds offensive. This is the essence of viewpoint discrimination. . . . *To prohibit all sides from criticizing their opponents makes a law more viewpoint based, not less so*. . . . By mandating positivity, the law here might silence dissent and distort the marketplace of ideas. . . . [T]he Court's cases have long prohibited the government from justifying a First Amendment burden by pointing to the offensiveness of the speech to be suppressed. . . .

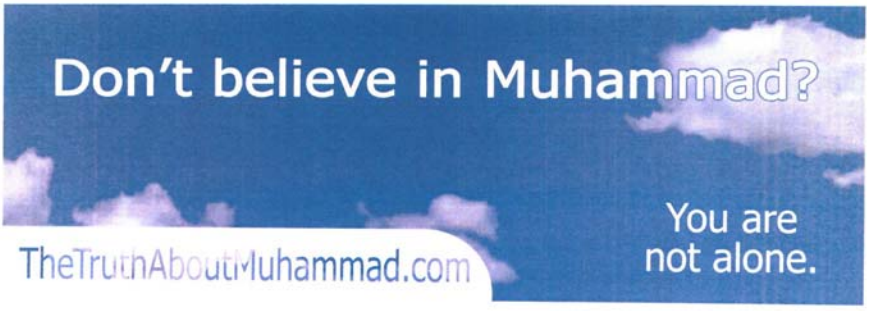
Id. at 1766-67 (Kennedy, J., concurring) (emphasis added).

American Freedom Defense Initiative v. King County, 904 F.3d 1126 (9th Cir. 2018), is further on point. In this case, the Ninth Circuit held that the County's refusal to display an ad on its transit advertising space based on a claim that the ad was demeaning and disparaging toward Muslims was a viewpoint-based restriction in violation of the First Amendment. The court rejected an argument advanced here, stating that the County "emphasizes that the disparagement clause applies equally to all proposed ads: none may give offense, regardless of its content. But the fact that no one may express a particular viewpoint—here, giving offense—does not alter the viewpoint-discriminatory nature of the regulation." *Id.* at 1131. The court specifically relied upon *Matal v. Tam* to reach its unanimous conclusion. *See id.* at

1131-32; *see also Wandering Dago, Inc. v. Destito*, 879 F.3d 20, 33 (2d Cir. 2018) (holding that "*Matal* compels the conclusion that defendants have unconstitutionally discriminated against WD's viewpoint by denying its Lunch Program application because WD branded itself and its products with ethnic slurs").

In the final analysis, it is not possible as a matter of fact and law for objective, viewpoint-neutral advertising guidelines to permit the atheist ad,

but then deny this ad,



as SMART has done here pursuant to its advertising guidelines. (SMART Dep. at 116-17, Ex. 4, R.58-5, Pg. ID 1354-55; Dep. Ex. TT, Ex. 8, R.58-9, Pg. ID 1462). SMART's guidelines, facially and as applied to reject Plaintiffs' "*Leaving Islam*" ad, violate the First Amendment regardless of the nature of the forum.

II. Defendants' Speech Restrictions Violate 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); *see also Ctr. for Bio-Ethical Reform, Inc. v. Napolitano*, 648 F.3d 365, 379 (6th Cir. 2011) ("To state an equal protection claim, a plaintiff must adequately plead that the government treated the plaintiff 'disparately as compared to similarly situated persons and that such disparate treatment either burdens a fundamental right, targets a suspect class, or has no rational basis.'") (internal citations omitted); *Bible Believers v. Wayne Cnty.*, 805 F.3d 228, 256 (6th Cir. 2015) (stating that to prove an equal protection claim, a plaintiff must demonstrate disparate treatment that burdens a fundamental right, such as freedom of speech).

Indeed, the applicable principle of law was articulated in *Police Department of the City of Chicago v. Mosley*, 408 U.S. 92 (1972), where 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' ad—an ad 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 guarantee of the Fourteenth Amendment. That is, Defendants "grant[ed] the use of a forum [SMART's advertising space] to people whose views [they] finds acceptable," but then denied use to Plaintiffs because they "express[ed] less favored or more controversial views" in violation of the Equal Protection Clause and the First Amendment. *Police Dep't of the City of Chi.*, 408 U.S. at 96.

CONCLUSION

Based on the foregoing, this Court should reverse the district court and grant summary judgment in Plaintiffs' favor on all claims.

Respectfully submitted,

AMERICAN FREEDOM LAW CENTER

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

/s/ *David Yerushalmi*
David Yerushalmi, Esq.

CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P. 32(a), the foregoing Brief is proportionally spaced, has a typeface of 14 points Times New Roman, and contains 9,524 words, excluding those sections identified in Fed. R. App. P. 32(f).

AMERICAN FREEDOM LAW CENTER

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

CERTIFICATE OF SERVICE

I hereby certify that on May 17, 2019, I electronically filed the foregoing brief 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.

AMERICAN FREEDOM LAW CENTER

/s/ *Robert J. Muise*
Robert J. Muise (P62849)

ADDENDUM: DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

No.	Page ID	Description
R.1	1-8	Complaint
R.17	184-186	Stipulation
R.18	187-221	Transcript of Hearing on Motion for Preliminary Injunction
R.58-2	1292-1310	Exhibit 1: Declaration of Robert Spencer
R.58-3	1311-1315	Exhibit 2: Declaration of Pamela Geller
R.58-4	1316-1329	Exhibit 3: Declaration of Robert J. Muise
R.58-5	1330-1373	Exhibit 4: Deposition of SMART (Anthony Chubb) (excerpts)
R.58-6	1374-1436	Exhibit 5: SMART Deposition Exhibits
R.58-7	1437-1451	Exhibit 6: Deposition of Beth Gibbons (excerpts)
R.58-8	1452-1459	Exhibit 7: Deposition of Pamela Geller (excerpts)
R.58-9	1460-1462	Exhibit 8: Pamela Geller Deposition Exhibits
R.58-10	1463-1469	Exhibit 9: Deposition of Elizabeth Dryden
R.83	1805-1824	Order Granting Defendants' Motion for Summary Judgment and Denying Plaintiffs' Motion for Summary Judgment
R.84	1825-1826	Judgment
R.85	1827-1829	Notice of Appeal