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

APPELLEES' BRIEF

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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-Appellees state the following:

Plaintiff-Appellee 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. Additionally, there are no publicly owned corporations, not a party to the appeal, that have a financial interest in the outcome.

REASONS WHY ORAL ARGUMENT SHOULD NOT BE PERMITTED

In this appeal, Defendants-Appellants (hereinafter "Defendants") are asking this court to review the district court's order granting a preliminary injunction that permits Plaintiffs-Appellees (hereinafter "Plaintiffs") to engage in speech protected by the First Amendment.

This court reviews the district court's order for an abuse of discretion. As demonstrated in this brief, there is no dispute as to any material fact and the district court properly applied controlling law. Therefore, based on the factual record, the controlling law, and the highly deferential standard of review, there is simply no basis for this court to reverse the district court. Indeed, any additional delay in enforcing the preliminary injunction will only cause further irreparable harm to Plaintiffs and to the public interest.[1]

In sum, oral argument is unnecessary and will merely cause further delay, resulting in additional harm.

[1] Plaintiffs will be filing concurrently a motion to expedite review of this case.

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STATEMENT OF JURISDICTION

This appeal is from an interlocutory order granting Plaintiffs' motion for a preliminary injunction. This court has jurisdiction pursuant to 28 U.S.C. § 1292.

PRELIMINARY STATEMENT

This appeal is without merit. Indeed, Defendants ask this court to ignore sworn testimony that is dispositive, to disregard the controlling case law, and to credit their utterly false contention that "the parties are in agreement that [Plaintiffs'] advertisements are political advertisements." (Defs.' Br. at 19). This last contention—somehow magically contrived out of the allegations in the complaint and refuted, no less, by the sworn testimony of Defendants' Rule 30(b)(6) witness and the advertisement itself—is a feckless attempt to create an issue where none exists.[2] In fact, it should not go unnoticed that Defendants refused to display Plaintiffs' advertisement prior to the filing of the complaint in this action. Consequently, whatever baseless reliance they now assert, it is undisputed that such reliance was not calculated in their decision to deny Plaintiffs' advertisement in the first instance.

Moreover, Plaintiffs' advertisement, which expresses a religious freedom

[2] As the undisputed *facts* in this case demonstrate, Plaintiffs' advertisement (*i.e.*, its content) contains a religious freedom message. It does not endorse a political candidate or a political party. Defendants' effort to substitute a *legal* claim asserted in the complaint (*i.e.*, that Plaintiffs' speech should be accorded the highest protection under the First Amendment) for uncontested and dispositive *facts* so as to avoid liability must be soundly rejected. *Indeed, Defendants' Rule 30(b)(6) witness testified at the preliminary injunction hearing that the content of Plaintiffs' advertisement was not political for purposes of applying Defendants' guidelines*.

message *on its face*, is substantively similar to the atheist message that was accepted by Defendants and maintained on Defendants' buses even after the atheist message subjected the buses to vandalism. Defendants continue to maintain their position that the atheist message was acceptable under the applicable policy (*see* R-27: Defs.' Emergency Mot. to Stay at 6-7, 9), which, as the district court properly concluded, is unconstitutional in that "*there 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").

In sum, Defendants cannot escape the facts of this case nor the controlling law, which compel this court to affirm the district court's Order granting Plaintiffs a preliminary injunction.

STATEMENT OF THE ISSUE FOR REVIEW

Whether the district court abused its discretion by preliminarily enjoining Defendants' arbitrary and capricious speech restriction, which prevented Plaintiffs from displaying their religious freedom advertisement on the buses operated by Defendant Suburban Mobility Authority for Regional Transportation ("SMART").

STATEMENT OF THE CASE

In May 2010, Plaintiffs submitted a request to run their religious freedom advertisement on the SMART buses operated in the Detroit, Michigan area.

Defendants refused to run the advertisement, forcing Plaintiffs to file this civil rights action. (R-1: Compl.). 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. (R-8: Pls.' Mot. for Prelim. Inj. & TRO).

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

During the hearing, the parties had a full and fair opportunity to present evidence to support their respective positions. As a result, Plaintiff Pamela Geller testified and Defendant Beth Gibbons testified on behalf of SMART pursuant to Rule 30(b)(6) of the Federal Rules of Civil Procedure (R-18: Tr. of Mot. Hr'g) and the stipulation of the parties (R-17: Stipulation). At the conclusion of the hearing, the district court indicated that it would issue its ruling that Friday, July 16, 2010. The court finally ruled on March 31, 2011, granting the preliminary injunction. (R-24: Order).

Despite the district court's ruling, Defendants refused to permit Plaintiffs' advertisement. Instead, on April 21, 2011, Defendants filed an emergency motion to stay the district court ruling pending appeal. (R-27: Defs.' Emergency Mot. to Stay). Defendants subsequently filed their notice of appeal on April 25, 2011. (R-29: Notice of Appeal). On May 3, 2011, Plaintiffs opposed the motion to stay. (R-32: Pls.' Resp.

to Defs.' Emergency Mot. to Stay).

The district court heard arguments on the motion to stay on Thursday, May 12, 2011. (*See* R-28: Notice of Hr'g on Defs.' Emergency Mot. to Stay). At the conclusion of the hearing, the court indicated that it would rule on the motion by that Friday, May 13, 2011, but, nonetheless, no later than the following Monday, May 16, 2011. The district court has yet to rule on the motion and thus has not stayed its ruling on the preliminary injunction. (*See* R-35: Pls.' Emergency Mot. Requesting Ruling on Pending Mot. to Stay).

It has been more than 16 months since Plaintiffs submitted their request to Defendants to run their bus advertisement, and it has been nearly 6 months since the district court granted Plaintiffs a preliminary injunction enjoining Defendants' speech restriction. Yet, Defendants continue to refuse to run Plaintiffs' advertisement.

STATEMENT OF FACTS

I. Defendants Created a Forum for Speech.

Plaintiff American Freedom Defense Initiative ("AFDI") is an organization that is incorporated under the laws of the State of New Hampshire. Plaintiffs Pamela Geller and Robert Spencer co-founded AFDI. Plaintiff Geller is the Executive Director, and Plaintiff Spencer is the Associate Director. Plaintiffs Geller and Spencer engage in speech through AFDI's activities, including AFDI's religious freedom bus and billboard campaigns. (R-8: Geller Decl. at ¶¶ 2-3 at Ex. 1).

Plaintiffs purchase advertising space on bus lines operated in cities throughout the United States to express a religious freedom message, which states as follows: "***Fatwa on your head? Is your family or community threatening you? Leaving Islam? Got questions? Get answers!***" The message also includes the following website address: RefugeFromIslam.com. (R-8:Geller Decl. at ¶¶ 4-11, Ex. B at Ex. 1).

Defendant SMART is a governmental agency. It was created under Michigan law, and it receives funding from the federal government, the State of Michigan, and the counties of Macomb, Oakland, and Wayne. (Defs.' Br. at 1; R-8: Geller Decl. at ¶ 14, Ex. H at Ex. 1).

As a governmental agency that receives state and federal funds, SMART is mandated to comply with federal and state laws, including the First and Fourteenth Amendments to the United States Constitution. (*See* R-8: Geller Decl. at ¶ 14, Ex. H at Ex. 1). According to SMART's "Advertising Guidelines," "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." (R-8: Geller Decl. at ¶ 14, Ex. H at Ex. 1). Consequently, as a matter of official policy, SMART has intentionally dedicated its advertising space on its vehicles to expressive conduct.

Pursuant to its express policy and its established practice, SMART permits a

wide variety of commercial, noncommercial, public-service, public-issue, and religious advertisements on the outside of its vehicles. For example, SMART permitted the Detroit Area Coalition of Reason, an atheist organization, to place an anti-religion advertisement on its vehicles. The atheist advertisement stated the following: "***Don't believe in God? You are not alone***." The advertisement also listed the website of the organization (DetroitCoR.org). (R-8: Geller Decl. at ¶ 14, Ex. G at Ex. 1).

On or about May 12, 2010, Plaintiffs submitted a request to display their religious freedom message on the SMART vehicles. Plaintiffs' request met the procedural requirements established by SMART. Plaintiffs subsequently entered into a contract through SMART's advertising agency and completed all of the requisite forms. (R-8: Geller Decl. at ¶ 15 at Ex. 1).

On or about May 24, 2010, Defendants denied Plaintiffs' request to display their message. 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' religious freedom message, (R-8: Geller Decl. at ¶ 16 at Ex. 1), necessitating the filing of this

civil rights action and request for preliminary injunction.[3]

II. Defendants' Testimony at the Preliminary Injunction Hearing Demonstrates that the Challenged Speech Restriction Was Unreasonable.

Defendant Gibbons, who was testifying on behalf of SMART pursuant to Rule 30(b)(6)[4] and the stipulation of the parties (*see* R-17: Stipulation), testified at the

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[3] Defendants assert that "it was found that the proposed advertisement was in violation of Contract Section 5.07(B)(1), as political advertising, and Section 5.07(B)(4), as likely to hold up to scorn and ridicule a group of persons. . . [and thus] *FDI was notified of the rejection*." (Defs.' Br. at 3) (emphasis added). However, as the record shows, Defendants refused to provide Plaintiff Geller with *any* explanation as to why her advertisement was rejected, providing additional evidence of the cynical form of gamesmanship that Defendants are engaged in here and the arbitrary and capricious way in which they make decisions regarding proposed advertisements.

[4] It is important to recognize the significance of testimony provided under Rule 30(b)(6). In *United States v. Taylor*, 166 F.R.D. 356 (M.D.N.C. 1996), the court provided the following 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,

preliminary injunction hearing 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.").

Defendant Gibbons also stated during her testimony that when she examined Plaintiffs' proposed advertisement (*i.e.*, its "four corners"), she found nothing about the ad itself that was political.[5] 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*.

(R-18: Tr. at 10) (emphasis added).

> 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 fingerpointing witnesses at the depositions. Truth would suffer.

Id. at 361 (internal quotations, punctuation, and citations omitted).

[5] Consequently, contrary to Defendants' naked assertion that "the parties are in agreement that Appellees' advertisements are political advertisements" (Defs.' Br. at 19), the irrefutable facts show that even Defendants understood that the ***content*** of Plaintiffs' advertisement was not and is not "political or political campaign advertising." (*See* Order at 3 (quoting "Restriction on Content"); *see also* 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")).

With regard to *how* Defendants decide whether or not an advertisement is permissible, Defendant Gibbons testified that she did not look to anything extrinsic to the atheist advertisement to determine whether it was permissible—she looked only at its "four corners." (R-18: Tr. at 6-7). However, she testified that she 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.[6] (R-18: Tr. at 10, 17, 19, 22).

The *Miami Herald* article referenced by Defendant Gibbons does not report on the political *content* of Plaintiffs' advertisement. And the only matter referenced by Defendant Gibbons in her direct testimony was not related to the advertisement's content, but the "controversy" over whether the Miami transit authority would run it, which they did and without incident. (*See* R-18: Tr. at 25). Defendant Gibbons testified on redirect examination by Defendants' own 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.*

(R-18: Tr. at 19) (emphasis added). In other words, Defendant Gibbons reacted to a

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

newspaper article's rendering of a question raised about whether the Miami transit authority would run the advertisement—not whether the advertisement itself represented a "political" advertisement.

Defendant Gibbons 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 any report of "adverse effects" arising from the running of the advertisement in Miami or anywhere else:

> 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.
> 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).

There is nothing in the news article itself to suggest that the content of Plaintiffs' advertisement was political.[7] The news article merely quotes a single Muslim organization objecting to the *viewpoint* of the advertisement. (R-18: Tr. at

[7] When denying Plaintiffs' advertisement, Defendants equated "political" with "controversial." (R-18: Tr. at 19) (answering the question as to whether she was "able to determine that [Plaintiffs' advertisement] was political" by stating, "I [Defendant Gibbons] 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, as argued further below, this is a restriction based on viewpoint, which is impermissible in any forum.

17-18, Ex. J).

Finally, there was no evidence presented in the record that violence, vandalism, or threats of violence or vandalism occurred as a result of Plaintiffs' advertisement in Florida, New York, or any other location. In all prior cities where the advertisement had run, there were no incidences of violence or even the threat of violence. (R-18:Tr. at 25). And there was no evidence presented that Plaintiffs' advertisement would subject SMART buses to violence or vandalism if they ran here in Michigan. The only evidence of violence and vandalism presented in this case related to the atheist advertisement, which SMART accepted and continued to run even *after* the violence and public controversy surrounding the advertisement came to light. (R-18: Tr. at 7-8, 11-12).

ARGUMENT

I. STANDARD OF REVIEW.

This court reviews the district court's Order granting a preliminary injunction for an abuse of discretion. As this court stated,

> This court reviews a challenge to the grant or denial of a preliminary injunction under an abuse of discretion standard and *accords great deference to the decision of the district court*. The district court's determination will be disturbed *only if* the district court relied upon clearly erroneous findings of fact, improperly applied the governing law, or used an erroneous legal standard.

Blue Cross & Blue Shield Mut. of Ohio v. Blue Cross & Blue Shield Ass'n, 110 F.3d 318, 322 (6th Cir. 1997) (emphasis added).

Based on this deferential standard of review and the uncontested facts and controlling law, this court should affirm the district court's Order.

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY GRANTING PLAINTIFFS A PRELIMINARY INJUNCTION.

The standard for issuing a preliminary injunction in this Circuit is well established. In *Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998), the court stated:

> In determining whether or not to grant a preliminary injunction, a district court considers four factors: (1) the plaintiff's likelihood of success on the merits; (2) whether the plaintiff could suffer irreparable harm without the injunction; (3) whether granting the injunction will cause substantial harm to others; and (4) the impact of the injunction on the public interest.

Id.; see also Hamilton's Bogarts, Inc. v. Mich., 501 F.3d 644, 649 (6th Cir. 2007).

Typically, the reviewing court will balance these factors, and no single factor will necessarily be determinative of whether or not to grant the injunction. *Connection Distrib. Co.*, 154 F.3d at 288. However, because this case deals with a violation of Plaintiffs' First Amendment right to freedom of speech, the crucial and often dispositive factor is whether Plaintiffs are likely to prevail on the merits. *Id.*

A. Plaintiffs' Likelihood of Success on the Merits.

The First Amendment provides in pertinent part that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. Plaintiffs' First Amendment right to freedom of speech is protected from infringement by States and their political subdivisions, such as Defendants, by operation of the Fourteenth

Amendment. *See Cantwell v. Conn.*, 310 U.S. 296, 303 (1940). Indeed, the freedom of speech is a fundamental right that is essential for the preservation of our republican form of government. As the Supreme Court has long recognized, "[Speech] concerning public affairs is more than self-expression; it is the essence of self-government." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982) (citations omitted). Moreover, Supreme Court precedent "establishes that private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression." *Capitol Square Rev. & Adv. Bd. v. Pinette*, 515 U.S. 753, 760 (1995).

The likelihood of success of Plaintiffs' free speech claim is examined in essentially three steps. First, the court must determine whether the speech in question—Plaintiffs' religious freedom bus advertisement—is protected speech. Second, the court must conduct a forum analysis as to the forum in question to determine the proper constitutional standard to apply. And third, the court must then determine whether Defendants' speech restriction comports with the applicable standard.

As demonstrated below, Defendants' refusal to display Plaintiffs' religious freedom bus advertisements on the sides of SMART buses—a forum created by Defendants—violated Plaintiffs' right to freedom of speech, warranting the injunctive relief.

1. Plaintiffs' Advertisement Is Protected Speech.

The first question is easily answered. Conveying a religious freedom message with signs constitutes protected speech under the First Amendment. *See Hill v. Colo.*, 530 U.S. 703, 714-15 (2000) ("[S]ign displays . . . are protected by the First Amendment."); *United States v. Grace*, 461 U.S. 171, 176-77 (1983) (demonstrating with signs constitutes speech under the First Amendment). This includes signs posted on bus advertising space. *See United Food & Commercial Workers Union, Local 1099 v. Southwest Ohio Reg'l Transit Auth.*, 163 F.3d 341 (6th Cir. 1998) (affirming a preliminary injunction on First Amendment grounds requiring a state agency to accept a union's proposed wrap-around bus advertisement).

2. Forum Analysis.

To determine the extent of Plaintiffs' free speech rights in this matter, the court must next engage in a First Amendment forum analysis. "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 categories: traditional public forums, designated public forums, and nonpublic forums. *Cornelius,* 473 U.S. at 800. Once the forum is identified, the court must then determine whether the speech restriction is

justified by the requisite standard. *Id.*

On one end of the spectrum lies the traditional public forum. Traditional public forums, such as streets, sidewalks, and parks, are places that "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague v. CIO*, 307 U.S. 496, 515 (1939).

Next on the spectrum is the designated public forum, which exists when the government intentionally opens its property for expressive activity. *Perry Educ. Ass'n v. Perry Local Educators*, 460 U.S. 37, 44 (1983). As the Supreme Court stated, "[A] public forum may be created by government designation of a place or channel of communication for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects." *Cornelius*, 473 U.S. at 802.

In a traditional or designated public forum, restrictions on speech are subject to strict scrutiny. *Id.* at 800 ("[S]peakers can be excluded from a public forum only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest. . . . Similarly, when the government has intentionally designated a place or means of communication as a public forum speakers cannot be excluded without a compelling governmental interest.").

At the opposite end of the spectrum is the nonpublic forum. The nonpublic forum is "[p]ublic property which is not by tradition or designation a forum for public

communication." *Perry Educ. Ass'n,* 460 U.S. at 46. In a nonpublic forum, the government "may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." *Id.* Thus, even in a nonpublic forum, a speech restriction must be reasonable and viewpoint neutral to pass constitutional muster. *Id.*

In this case, the district court concluded that the relevant forum was a nonpublic forum. (R-24: Order at 7). However, as Plaintiffs argued below and reassert here, the relevant forum is a designated public forum. A designated public forum is created when the government "intentionally open[s] a nontraditional forum for public discourse." *Cornelius*, 473 U.S. at 802. To discern the government's intent, courts "look[] to the policy and practice of the government to ascertain whether it intended to designate a place not traditionally open to assembly and debate as a public forum," as well as "the nature of the property and its compatibility with expressive activity." *Id.*

In this case, SMART has designated its advertising space as a public forum based on its express policy *and* its practice. According to SMART's "Advertising Guidelines," "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." (R-8: Geller Decl. at ¶ 14, Ex. H at Ex. 1). Additionally, SMART has permitted an atheist organization to display an anti-religious message on

its vehicles—a message that created significant conflict. Thus, Defendants have intentionally designated the advertising space on SMART buses as a public forum for a wide range of public-issue messages. *See United Food & Commercial Workers Union, Local 1099*, 163 F.3d at 355 (concluding that the advertising space on a bus system was a public forum and stating that "[a]cceptance 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"); *Planned Parenthood Ass'n/Chicago Area v. Chicago Transit Auth.*, 767 F.2d 1225 (7th Cir. 1985) (concluding that the advertising space on a bus system became a public forum where the transit authority permitted advertising on "a wide variety of commercial, public-service, public-issue, and political ads"); *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"). Furthermore, it is without question that the "nature of the property"—the advertising space—is "compatible" with Plaintiffs' proposed expressive activity. *See United Food & Commercial Workers Union, Local 1099*, 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). Consequently, as a matter of official policy and practice, SMART has

intentionally dedicated its advertising space on its vehicles to expressive conduct, thereby creating a public forum for Plaintiffs' speech.

As noted above, the district court concluded that the advertising space was a nonpublic forum. (R-24: Order at 7). While Plaintiffs contend that this conclusion is incorrect, it does not change the outcome. As demonstrated further below, Defendants' speech restriction was unreasonable and viewpoint based. Therefore, it was unconstitutional even in a nonpublic forum.

3. Application of the Appropriate Standard.

a. Defendants' Speech Restriction Was Content Based.

In a designated public forum, similar to a traditional public forum, the government's ability to restrict speech is sharply limited. The government may enforce reasonable, *content-neutral* time, place, and manner regulations of speech if the regulations are narrowly tailored to serve a significant government interest and leave open ample alternative channels of communication. *Perry Educ. Ass'n,* 460 U.S. at 45. However, *content-based* restrictions on speech, such as the restriction at issue here, are subject to strict scrutiny. *Cornelius*, 473 U.S. at 800. That is, "[s]peakers can be excluded from a public forum only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest." *Id.* For "[i]t is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys." *Rosenberger v. Rector &*

Visitors of the Univ. of Va., 515 U.S. 819, 828 (1995). 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." *R.A.V. v. St. Paul*, 505 U.S. 377, 386-92 (1992); *see Police Dept. of the City of Chicago v. Mosley*, 408 U.S. 92, 96 (1972) (holding that the government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express more controversial views). Thus, content-based restrictions "are presumptively unconstitutional." *S.O.C., Inc. v. Cnty. of Clark*, 152 F.3d 1136, 1145 (9th Cir. 1998).

In this case, Defendants' speech restriction was, at a minimum, content based. To determine whether a restriction is content-based, the courts look at whether it "restrict(s) expression because of its message, its ideas, its subject matter, or its content." *Consol. Edison Co. of N.Y. v. Pub. Serv. Comm. of N.Y.*, 447 U.S. 530, 537 (1980). Here, Defendants provided no content-neutral basis for denying Plaintiffs' request to display their religious freedom message. Indeed, Defendants rejected the message based on a newspaper article, which reported on how a single Muslim organization objected to its content and viewpoint. Beyond the single newspaper article, Defendants proffered no other rationale for its denial and thus failed to provide a compelling—let alone legitimate—reason for doing so.

b. Defendants' Speech Restriction Was Viewpoint Based.

As the record demonstrates, Defendants' speech restriction was also viewpoint based, which is an egregious form of content discrimination that is prohibited in all forums. *See Rosenberger*, 515 U.S. at 829. When speech "fall[s] within an acceptable subject matter otherwise included in the forum, the State may not legitimately exclude it from the forum based on the viewpoint of the speaker." *Cogswell v. City of Seattle*, 347 F.3d 809, 815 (9th Cir. 2003). Thus, viewpoint discrimination occurs when the government "denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject." *Cornelius*, 473 U.S. at 806.

Because Defendants restricted Plaintiffs' speech based on the viewpoint expressed, Defendants' speech restriction cannot survive constitutional scrutiny. *See also Rosenberger,* 515 U.S. at 819; *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist*., 508 U.S. 384 (1993). Here, Defendants allow messages on the subject of religion, as evidenced by the atheist message that was permitted. Yet, Defendants denied Plaintiffs the right to express their particular viewpoint on this permissible subject in the same forum. *See Cornelius*, 473 U.S. at 806. And, as noted above, Defendants' viewpoint objection was the reflection of the viewpoint objection of a single Muslim organization that was reported in a Miami newspaper article.

Defendants' claim of error regarding the "scornful speech" issue, (*see* Defs.' Br.

at 23-25), further demonstrates that their speech restriction was viewpoint based. During the motion hearing, Defendant Gibbons testified as follows:

> 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).

Thus, it is evident that the court was paying close attention to the "scornful speech" issue and properly concluded, *based on Defendants' very own testimony*, that this was not a relevant factor. Indeed, this testimony simply verifies the correctness of the court's ruling that Defendants' speech restriction was arbitrary and capricious and thus unconstitutional.

Moreover, the "scornful speech" policy itself is facially invalid in that it is a viewpoint-based restriction. *See, e.g., 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). As Defendants readily admit, "religion" constitutes an otherwise includable subject in the relevant forum. (R-27: Defs.' Emergency Mot. to Stay at 9). Thus, to disagree with the viewpoint on Islam expressed by Plaintiffs is a prototypical viewpoint-based restriction. Consequently, Defendants' argument does not help their cause; it only further strengthens the legitimacy of the court's Order and provides yet another reason

to affirm the preliminary injunction.

c. Defendants Had No Compelling Reason for Rejecting Plaintiffs' Religious Freedom Message.

It is evident that Defendants rejected Plaintiffs' message because they objected to its content and viewpoint. Defendants may have presumed that others might object to the content as well. However, a listener's (or, in this case, viewer's) reaction to speech is not a content-neutral basis for regulation. *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 134 (1992). "The First Amendment knows no heckler's veto." *See Lewis v. Wilson,* 253 F.3d 1077, 1082 (8th Cir. 2001).

While restrictions of speech because of the "secondary effects" that the speech creates are sometimes permissible, an effect from speech is not secondary if it arises from the content of the speech. "The emotive impact of speech on its audience is not a 'secondary effect.'" *Boos v. Barry*, 485 U.S. 312, 321 (1988) (O'Connor, J.).

In *Terminiello v. City of Chicago*, 337 U.S. 1 (1949), for example, the Supreme Court famously stated,

> [A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech . . . is . . . protected against censorship or punishment. . . . There is no room under our Constitution for a more restrictive view.

Id. at 4.

Therefore, the fact that Plaintiffs' speech may actually offend some persons does not lessen its constitutionally protected status; it enhances it. "The fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection." *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118 (1991) (citations omitted); *Forsyth Cnty.,* 505 U.S. at 135 (noting that speech cannot be "punished or banned, simply because it might offend a hostile mob"); *Hill*, 530 U.S. at 715 & 710, n.7 ("The fact that the messages conveyed by [the signs] may be offensive to their recipients does not deprive them of constitutional protection.").

"[T]he Constitution does not permit government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer." *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 210 (1975). Rather than censoring the speaker, the burden rests with the viewer to "avoid further bombardment of [his] sensibilities simply by averting [his] eyes." *Cohen v. Cal.*, 403 U.S. 15, 21 (1971). As the *Cohen* Court noted, "[W]e cannot indulge the facile assumption that one can forbid particular words [or messages, as in this case] without also running a substantial risk of suppressing ideas in the process. Indeed, governments might soon seize upon the censorship of particular words [or messages] as a convenient guise for banning the expression of unpopular views." *Id.* at 26.

In fact, First Amendment protection even extends to regulatory schemes that would allow a disapproving citizen to silence a disagreeable speaker by complaining on other, apparently neutral, grounds. In *Reno v. ACLU*, 521 U.S. 844, 880 (1997), the Supreme Court held that the prohibition on knowingly communicating indecent material to minors in Internet forums was invalid because it conferred "broad powers of censorship, in the form of a 'heckler's veto,' upon any opponent of indecent speech who might simply log on and inform the would-be discoursers that his 17-year-old-child . . . would be present."

Thus, pursuant to the First Amendment, the government is not permitted to affirm the heckler; rather, it must protect the speaker and punish those who react lawlessly to a controversial message. As this Circuit observed, "[The government] has the duty not to ratify and effectuate a heckler's veto nor may he join a moiling mob intent on suppressing ideas. Instead, he must take reasonable action to protect . . . persons exercising their constitutional rights." *Glasson v. Louisville*, 518 F.2d 899, 906 (6th Cir. 1975).

In sum, Defendants cannot, consistent with the Constitution, prohibit Plaintiffs' religious freedom message because they or other viewers might find it offensive. Otherwise, the government "would effectively empower a majority to silence dissidents simply as a matter of personal predilections." *Cohen*, 403 U.S. at 21.

d. Defendants' Speech Restriction Was Unreasonable.

As the district court properly concluded, "There is a strong likelihood that Plaintiffs could succeed in demonstrating that Defendant[s'] decision not to run the advertisement was not reasonable, but rather arbitrary and capricious." (R-24: Order at 7-8).

While Plaintiffs dispute the court's conclusion that the forum at issue is a nonpublic forum, the analysis the court applied for speech restrictions in such a forum was correct. For a speech regulation in a nonpublic forum to withstand constitutional challenge it must be "reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." (R-24: Order at 5) (quoting *Perry Educ. Ass'n* , 460 U.S. at 46). As a matter of law, a speech restriction that permits arbitrary and capricious application is not reasonable. As the district court properly noted in its Order, "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.'" (Order at 8) (quoting *United Food & Commercial Workers Union, Local 1099 v. Southwest Ohio Reg'l Transit Auth.*, 163 F.3d 341, 359 (6th Cir. 1998)); *see also 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."). In sum, Defendants cannot refute the

conclusion that the district court properly applied the governing law and thus did not abuse its discretion.

Turning now to the undisputed facts of this case, it is evident that Defendants' decision to reject Plaintiffs' advertisement was arbitrary and capricious and simply an effort to suppress Plaintiffs' view. Indeed, there were no objective standards applied by Defendants to deny Plaintiffs' advertisement. Defendant Gibbons admitted during her testimony that there were no guidelines or anything else that would set forth why Plaintiffs' advertisement was considered political (and thus rejected) and the atheist advertisement was not political (and thus accepted). (R-18: Tr. at 15). Defendant Gibbons also admitted that when she examined the "four corners" of Plaintiffs' proposed advertisement, she found nothing about the ad itself that was political. (R-18: Tr. at 10).

With regard to *how* Defendants decide whether or not an advertisement is permissible, Defendant Gibbons' testimony reveals that SMART's practices and procedures are haphazard and inconsistent. For example, Defendant Gibbons admitted that she did not look to anything extrinsic to the atheist advertisement to determine whether it was permissible—she looked only at the advertisement itself. (R-18: Tr. at 6-7). However, she 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. (R-18: Tr. at 10, 17, 19, 22). Thus,

Defendants did not use the same practice and procedure for Plaintiffs' advertisement as they used for the atheist advertisement. As noted above, based on the "four corners" of Plaintiffs' advertisement, Defendants concluded that it was not political and, therefore, should have allowed it to run. (R-18: Tr. at 10).

Indeed, the *Miami Herald* article referenced by Defendant Gibbons does not report on the political *content* of Plaintiffs' advertisement. And the only matter referenced by Defendant Gibbons in her direct testimony was not related to the advertisement's content, but the "controversy" over whether the Miami transit authority would run it, which they did and without incident. (*See* R-18: Tr. at 19, 25). In other words, Defendant Gibbons reacted to a newspaper article's rendering of a question raised about whether the Miami transit authority would run the advertisement—not whether the advertisement itself represented a "political" advertisement.

Defendant Gibbons further testified that the only basis for rejecting Plaintiffs' advertisement was this single news article—literally nothing else—not the advertisement's subject matter, not its content, and not any report of "adverse effects" arising from the running of the advertisement in Miami or anywhere else. (R-18: Tr. at 23).

The dilemma for Defendants' argument, of course, is that there is nothing in the news article itself—even assuming its content was legitimately and constitutionally

relevant to Defendants' decision not to run Plaintiffs' advertisement—to suggest that the content of the advertisement was political. The news article merely quotes a single Muslim organization objecting to the *viewpoint* of the advertisement. (R-18: Tr. at 17-18, Ex. J). The First Amendment cannot wilt simply because a single voice in a news article takes issue with the viewpoint of another's protected speech. It is precisely the speech/counter-speech dialogue the First Amendment seeks to promote. *See N.Y. Times v. Sullivan*, 376 U.S. 254, 270 (1964) (acknowledging "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open").

Finally, there was no evidence presented anywhere in the record that violence, vandalism, or threats of violence or vandalism occurred as a result of Plaintiffs' advertisement in Florida, New York, or anywhere else for that matter. In fact, just the opposite is true. In all prior cities where the advertisement had run, there were zero incidences of violence or even the threat of violence. (R-18: Tr. at 25). And there was no evidence presented that Plaintiffs' advertisement would subject SMART buses to violence or vandalism if they ran here in Michigan. Indeed, the only evidence of violence and vandalism presented in this case related to the atheist advertisement, which SMART accepted and continued to run even *after* the violence and public controversy surrounding the advertisement came to light. (R-18: Tr. at 7-8, 11-12).

In sum, it was *not* an abuse of discretion for the district court to enjoin

Defendants' speech restriction upon a finding that it was unreasonable. Indeed, the evidence shows beyond any doubt that this is, in fact, the case.

B. Irreparable Harm to Plaintiffs.

The denial of liberty's most fundamental bulwark—the protection of free speech—has extended more than 16 months in this case because Defendants have ignored their own written free speech policy, the First Amendment, and, ultimately, the district court's injunction forbidding their behavior. It is well established that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *see also Connection Distrib. Co.*, 154 F.3d at 288; *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." (citing *Elrod*)). Consequently, Plaintiffs have been irreparably harmed, and that harm will continue until the preliminary injunction is enforced.

C. Affirming the Preliminary Injunction Will Not Cause Substantial Harm to Others.

In this case, the likelihood of harm to Plaintiffs is substantial because Plaintiffs intend only to peacefully exercise their First Amendment right to freedom of speech in a public forum, and the deprivation of this right, even for minimal periods, constitutes irreparable injury.

On the other hand, if Defendants are restrained from enforcing their free speech restriction against Plaintiffs, Defendants will suffer no harm because the exercise of constitutionally protected expression can never harm any of Defendants' or others' legitimate interests. *See Connection Distrib. Co.*, 154 F. 3d at 288.

In the final analysis, the question of harm to others as well as the impact on the public interest "generally cannot be addressed properly in the First Amendment context without first determining if there is a constitutional violation. . . ." *Connection Distrib. Co.*, 154 F.3d at 288. For if Plaintiffs show that their First Amendment right to freedom of speech has been violated, then the harm to others is inconsequential.

D. The Impact of the Preliminary Injunction on the Public Interest.

The impact of the preliminary injunction on the public interest turns in large part on whether Plaintiffs' constitutional rights are violated by Defendants' speech restriction. As this Circuit noted, "[I]t is always in the public interest to prevent the violation of a party's constitutional rights." *G & V Lounge, Inc. v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994); *see also 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 equal protection of the laws and protection of First Amendment liberties").

As noted previously, Defendants' speech restriction is a direct violation of Plaintiffs' fundamental rights protected by the First Amendment. Therefore, it is in

the public interest to affirm the preliminary injunction.

In the final analysis, Defendants' restriction on Plaintiffs' private speech in a public forum violates fundamental constitutional rights. Plaintiffs are presently and irreparably harmed by Defendants' speech restriction, and without enforcement of the preliminary injunction, this harm will continue.

CONCLUSION

Based on the foregoing, this court should affirm the district court's order granting Plaintiffs a preliminary injunction.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P. 32(a)(7), the foregoing Brief is proportionally spaced, has a typeface of 14 points Times New Roman, and contains 7,446 words, excluding those sections identified in Fed. R. App. P. 32(a)(7)(B)(iii).

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CERTIFICATE OF SERVICE

I hereby certify that on September 28, 2011, 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.

THOMAS MORE LAW CENTER

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

ADDENDUM: DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Record No.	Description
R-1	Complaint
R-8	Plaintiffs' Motion for Preliminary Injunction / TRO
	Exhibit 1: Declaration of Pamela Geller
	A: Certificate of Incorporation for AFDI
	B: AFDI Religious Freedom Message Bus Advertisement
	C: CBS-AFDI Agreement (Miami)
	D: CBS-AFDI Agreement (New York City)
	E: CBS-AFDI Agreement (Detroit)
	F: Email Exchange (DDOT Rejection)
	G: Atheist Bus Advertisement
	H: SMART "Advertising Guidelines" and "Policies and Regulations"
	I. Email Exchange (SMART Request)
	J. Email Exchange (SMART Rejection)
R-9	Order Denying Motion for TRO and Notice of Hearing on Motion for Preliminary Injunction
R-17	Stipulation
R-24	Order Granting Plaintiffs' Preliminary Injunction

R-27	Defendants' Emergency Motion to Stay Order Granting Preliminary Injunction
R-28	Notice of Hearing on Defendants' Emergency Motion to Stay Order Granting Preliminary Injunction
R-32	Plaintiffs' Response to Defendants' Emergency Motion to Stay Order Granting Preliminary Injunction
R-35	Plaintiffs' Emergency Motion Requesting Ruling on Pending Motion to Stay Order Granting Preliminary Injunction