No. _____

In the Supreme Court of the United States

AMERICAN FREEDOM DEFENSE INITIATIVE, *et al.*,
Petitioners,

v.

MASSACHUSETTS BAY TRANSPORTATION AUTHORITY, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

There is currently a split in the United States courts of appeals regarding the application of the First Amendment to the display of public-issue advertisements on government transit authority property.

1. Whether the Massachusetts Bay Transportation Authority (MBTA) created a public forum by accepting for display on its property a wide array of controversial political and public-issue ads, including ads that address the same controversial subject matter as Petitioners' pro-Israel ad, and thus violated the First Amendment by rejecting Petitioners' ad based on its content.

2. Regardless of the nature of the forum, whether the MBTA's rejection of Petitioners' advertisement based on an advertising guideline that prohibits ads considered by MBTA officials to be "demeaning and disparaging" was a viewpoint-based restriction of speech in violation of the First Amendment.

PARTIES TO THE PROCEEDING

The Petitioners are American Freedom Defense Initiative (AFDI), Pamela Geller, and Robert Spencer (collectively referred to as "Petitioners").

The Respondents are the Massachusetts Bay Transportation Authority (MBTA) and Beverly Scott, individually and in her official capacity as Chief Executive Officer / General Manager of the MBTA (collectively referred to as "Respondents").

RULE 29.6 STATEMENT

Petitioner AFDI is a non-stock, nonprofit corporation. Consequently, it has no parent or publicly held company owning 10% or more of the corporation's stock.

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The opinion of the court of appeals appears at App. 1 and is reported at 781 F.3d 571. The opinions of the district court appear at App. 58 and App. 66 and are reported at 2014 U.S. Dist. LEXIS 34428 and 989 F. Supp. 2d 182, respectively. The denial of the petition for rehearing en banc appears at App. 89.

JURISDICTION

The opinion of the court of appeals affirming the denials of Petitioners' requests for preliminary injunctions was entered on March 30, 2015. App. 1. A petition for rehearing was denied on April 29, 2015. App. 89. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Free Speech Clause of the First Amendment provides, "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I.

STATEMENT OF THE CASE

Petitioners filed two separate civil rights lawsuits against the MBTA, challenging the MBTA's rejection of their advertisements addressing the Israeli-Palestinian conflict—a permissible subject matter for the forum at issue. Both lawsuits challenged the MBTA's speech restrictions under the First and Fourteenth Amendments and sought declaratory and injunctive relief and nominal damages. In each case, Petitioners filed a motion for preliminary injunction, which the district court denied. Petitioners filed timely notices of appeal, and the First Circuit consolidated the appeals.

At issue in both cases is the application of the MBTA's advertising guidelines to restrict Petitioners' public-issue speech on the basis that Petitioners' anti-jihad viewpoint conveyed by their advertisements was "demeaning and disparaging." The district court denied the motions for preliminary injunctions, holding that the MBTA's advertising space is a limited public forum and that its restrictions on Petitioners' speech were reasonable and viewpoint neutral. App. 58-88. A divided panel of the First Circuit affirmed. App. 1-57. A petition for rehearing was denied, with Circuit Judge Torruella dissenting. App. 89-90.

STATEMENT OF FACTS

In September 2013, the MBTA accepted for display on its advertising space a controversial ad that addressed the Israeli-Palestinian conflict from a viewpoint that was critical of Israel. The advertisement, which appeared on numerous posters throughout the transit system, depicted four maps that purported to show the "Palestinian loss of land" to Israel between 1946 and 2010. Text accompanying the maps read: "4.7 million Palestinians are Classified by the UN as Refugees." *See* App. 4, 52 (Appendix—"Committee for Peace ad").

The pro-Palestinian ad began running in early October 2013, and after receiving a rash of complaints, the MBTA, acting through its advertising agent, ceased displaying the ad. However, shortly thereafter, the MBTA decided, without much of a public explanation, except to claim that it was a "miscommunication" between the MBTA and its advertising agent, to re-post the controversial ad. App. 4-5.

Soon after the MBTA announced that it would re-post the Committee for Peace ad, Petitioners submitted the first of the advertisements at issue here. The first ad read as follows: "In any war between the civilized man and the savage, support the civilized man. Support Israel. Defeat jihad" ("AFDI Ad I"). App. 5, 53 (Appendix—"AFDI's first submission").

The MBTA rejected AFDI Ad I because it allegedly violated the MBTA's prohibition on ads containing

demeaning or disparaging content.[1] App. 5-6. Petitioners promptly filed a civil rights lawsuit, *see Am. Freedom Def. Initiative v. Mass. Bay Transp. Auth.*, No. 1:13-cv-12803-NMG (D. Mass. filed Nov. 6, 2013) ("*MBTA I*"), and a motion for a preliminary injunction. The district court denied the motion, ruling that while the most reasonable interpretation of the word "jihad" in context was understood to implicate only violent terrorism, the MBTA's interpretation to include even peaceful or pietistic jihad and together with the word "savage" could be reasonably understood to disparage all Muslims and Palestinians. App. 6-7.

After a careful review of the district court's ruling in *MBTA I*, Petitioners submitted a new proposed ad to the MBTA. This second ad read: "In any war between the civilized man and those engaged in savage acts, support the civilized man. Defeat violent jihad. Support Israel" ("AFDI Ad II"). App. 7-8, 54 (Appendix—"AFDI's second submission"). The MBTA accepted this ad, but Petitioners chose not to run it and instead submitted a revised version. App. 8.

Petitioners' revised ad ("AFDI Ad III") read as follows: "In any war between the civilized man and the savage, support the civilized man. Defeat violent jihad. Support Israel." App. 8-9, 54 (Appendix—"AFDI's third submission").

The MBTA rejected this ad based on the same considerations as its rejection of AFDI Ad I. App. 9. As

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[1] The MBTA's advertising guidelines prohibit advertisements that "contain[] material that demeans or disparages an individual or group of individuals." App. 5-6.

a result, Petitioners filed a second lawsuit, *Am. Freedom Def. Initiative v. Mass. Bay Transp. Auth.*, No. 1:14-cv-10292-NMG (D. Mass. filed Feb. 7, 2014) ("*MBTA II*"), requesting, once again, a preliminary injunction.

In denying Petitioners' motion for a preliminary injunction in *MBTA II*, the district court stated that it was doing so "on the grounds previously set out in its opinion in" *MBTA I*. App. 9. The court further denied Petitioners equitable relief based on its erroneous conclusion that Petitioners acted in "bad faith" by submitting their third version of the ad instead of having the MBTA run the second one.[2] App. 9.

Petitioners timely appealed both rulings, which the First Circuit consolidated. A divided panel affirmed, and a petition for rehearing was denied with one circuit judge dissenting.

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[2] Both the majority and the dissent rejected the district court's "bad faith" conclusion, specifically noting that Petitioners were not acting in "bad faith" by using the MBTA's submission process "to probe the parameters of the government's speech restriction in order to vindicate its interest in running the most effective advertisement possible." App. 36 n.6; App. 50-51 n.9.

REASONS FOR GRANTING THE PETITION

A split among the United States courts of appeals is among the most important factors in determining whether certiorari should be granted. *See* Sup. Ct. R. 10(a). And this factor takes on added importance when, as here, the split involves the fundamental right to freedom of speech. *See generally NAACP v. Button*, 371 U.S. 415, 433 (1963) (observing that First Amendment "freedoms are delicate and vulnerable, as well as supremely precious in our society"). Additionally, the Court should grant review because this case presents important First Amendment issues that have not been, but should be, definitively settled by this Court. *See* Sup. Ct. R. 10(c).

I. The First Circuit's Forum Analysis Conflicts with the Authoritative Decisions of the Majority of Other United States Courts of Appeals.

At issue here is whether the MBTA's advertising space is a 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, 45 (1983), or a nonpublic forum. As this 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 v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 802 (1985) (emphasis added).

Under the facts of this case, the Second, Third, Sixth, and Seventh Circuits would hold that the forum

at issue is a designated public forum, thereby subjecting the government's content-based restrictions to strict scrutiny, whereas the First and Ninth Circuits would not.

While speech restrictions in traditional[3] and designated public forums are subject to the same heightened level of scrutiny,[4] it is a mistake to conflate the two forums. *See* App. 43-44 (dissent) ("Building a constitutional framework around a category as rigid as 'traditional public forum' leaves courts ill-equipped to protect First Amendment expression in times of fast-changing technology and increasing insularity."). Indeed, the First Circuit's approach to the forum analysis essentially does away with the designated public forum as a category and replaces it with the limited public forum, which is treated by the circuit the same as a nonpublic forum. *Ridley v. Mass. Bay Transp. Auth.*, 390 F.3d 65, 76 n.4 (1st Cir. 2004) ("We adopt the usage equating limited public forum with non-public forum and do not discuss the issue further.").

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[3] Public streets, sidewalks, and parks are typical examples of traditional public forums. *See Hague v. CIO*, 307 U.S. 496, 515 (1939).

[4] *Cornelius*, 473 U.S. 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 government interest.").

In a nonpublic forum, speech restrictions need only be reasonable and viewpoint neutral, *Perry Educ. Ass'n*, 460 U.S. at 46, thereby granting the government "almost unlimited authority to restrict speech on its property." *See* App. 43 (dissent) (quoting *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 695 (1992) (Kennedy, J., concurring in the judgments)).

An additional problem with the First Circuit's approach—one that is inconsistent with the Second Circuit—is that even in a limited public forum, strict scrutiny applies "to restrictions on speech that falls within the designated category for which the forum has been opened." *Children First Found., Inc. v. Fiala*, No. 11-5199-cv, 2015 U.S. App. LEXIS 8485, at *17 (2d Cir. May 22, 2015) (internal quotations and citation omitted). Therefore, "in a limited public forum, government is free to impose a blanket exclusion on certain types of speech, but once it allows expressive activities of a certain genre, it may not selectively deny access for other activities of that genre." *Travis v. Owego-Apalachin Sch. Dist*., 927 F.2d 688, 692 (2d Cir. 1991). Consequently, even if the forum were a limited public forum, because it is open for the subject matter of Petitioners' advertisements (*i.e.*, the Israeli-Palestinian conflict), strict scrutiny should nonetheless apply to the MBTA's speech restrictions. Indeed, this also highlights the viewpoint-based problem with the MBTA's rejection of Petitioners' ads, a problem that we will discuss further in section II below.

We turn now to the relevant case law regarding the forum question, starting with *Lehman v. City of Shaker Heights,* 418 U.S. 298 (1974). *See Ridley*, 390 F.3d at 78 (describing *Lehman* as "[t]he only Supreme Court

case directly on point");[5] *but see* App. 41 (dissent) (observing that "*Ridley* also proclaimed that the MBTA's advertising program was 'indistinguishable' from the one described in *Lehman*, [*Ridley*, 390 F.3d at 78], apparently ignoring the fact that the Shaker Heights advertising program in *Lehman* had never accepted any political or public issue advertising").

In *Lehman*, this Court found that the consistently enforced, twenty-six-year ban on political advertising was consistent with the government's role as a proprietor precisely because the government "limit[ed] car card space to *innocuous* and *less controversial*

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[5] In *Ridley*, the case which decided the forum question for the First Circuit, the court also purported to rely upon this Court's decision in *Arkansas Educational Television Commission v. Forbes*, 523 U.S. 666 (1998) (hereinafter "*AETC*"), citing and quoting it for the following proposition: "For the government's policy and practice to create a designated public forum, 'the government must intend to make the property 'generally available' to *a class of speakers*.'" *Ridley*, 390 F.3d at 102 (emphasis added). In *AETC*, the petitioner, a state-owned public television broadcaster, denied the request of respondent Forbes, an independent candidate with very little support, for permission to participate in a sponsored debate between major party candidates. This Court upheld the exclusion, finding that it was reasonable and viewpoint-neutral in that it was based on Forbes' *status* as a speaker (*i.e.*, he was not a serious candidate) and not the message he sought to convey. *Id.* at 682 (finding no "objections or opposition to his views"). Here, Petitioners, as paid advertisers, are part of the "class of speakers" for which the MBTA's forum is open and available. And there is little doubt that had Forbes' status as a speaker made him eligible for the debate (*i.e.*, he was a serious candidate) but that he had been denied permission to participate because he held the view that jihadis who opposed Israel in the Israeli-Palestinian conflict (an acceptable subject of the debate) were "savages," the Court would have found a First Amendment violation.

commercial and service oriented advertising." *Id*. at 304 (emphasis added). A majority of the circuit courts have followed *Lehman* to conclude that transportation advertising space was a nonpublic forum when the government "consistently promulgates and enforces policies restricting advertising on its buses to commercial advertising." *Children of the Rosary v. City of Phoenix*, 154 F.3d 972, 978 (9th Cir. 1998).

As the Ninth Circuit observed in *DiLoreto v. Downey Unified School District Board of Education,* 196 F.3d 958 (9th Cir. 1999):

> Government policies and practices that historically have allowed commercial advertising, but have excluded political and religious expression, indicate an intent not to designate a public forum for all expressive activity, but to reserve it for commercial speech. . . . However, where the government historically has accepted a wide variety of advertising on commercial and non-commercial subjects, courts have found that advertising programs on public property were public fora.

Id. at 965-66 (citing, *inter alia*, *Lehman*).

Despite this articulation of the law, the Ninth Circuit has recently joined the First Circuit in its approach to the forum question. In *Seattle Mideast Awareness Campaign v. King County*, 781 F.3d 489, 498 (9th Cir. 2015), *reh'g denied*, a divided panel held that the County's bus advertising space was a limited public forum even where the transit authority accepted controversial political and public-issue ads. In doing so, the Ninth Circuit acknowledged the circuit split.

See id. ("We recognize that other courts have held that similar transit advertising programs constitute designated public forums.").

The majority of the United States courts of appeals that have addressed this forum question, however, disagree with the First and Ninth Circuits.

The Second Circuit, for example, holds that "[d]isallowing political speech, and allowing commercial speech only, indicates that making money is the main goal. Allowing political speech, conversely, 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." *N.Y. Magazine v. Metro. Transp. Auth.*, 136 F.3d 123, 130 (2d Cir. 1998) (holding that the transit authority's advertising space was a designated public forum) (emphasis added).

In *Christ's Bride Ministries, Inc. v. Southeastern Pennsylvania Transportation Authority,* 148 F.3d 242, 253 (3d Cir. 1998), the Third Circuit concluded that the transit authority's advertising space was a designated public forum, noting that "the purpose of the forum does not suggest that it is closed, and the breadth of permitted speech points in the opposite direction."

In *Planned Parenthood Ass'n/Chicago Area v. Chicago Transit Authority*, 767 F.2d 1225 (7th Cir. 1985), the Seventh Circuit concluded that the transit authority's advertising space was a designated public forum because the transit authority permitted "a wide variety" of commercial and non-commercial advertising.

And the Sixth Circuit similarly concluded that a transit authority's property is a designated public forum when it is open to political and public-issue advertisements:

> 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* recognized as inconsistent with operating the property solely as a commercial venture.

United Food & Commercial Workers Union, Local 1099 v. Sw. Ohio Reg'l Transit Auth., 163 F.3d 341, 355 (6th Cir. 1998) (hereinafter "*United Food*").

Consequently, consistent with *Lehman* and the majority of federal appeals courts that have analyzed and followed its holding, the forum at issue here is a designated public forum for Petitioners' speech. *See* App. 41 (dissent) ("I am in disagreement with the *Ridley* decision, and would have held that the MBTA, by opening its advertising facilities to all forms of public discourse, created a designated public forum akin to the fora discussed in *United Food*, *Christ's Bride*, *New York Magazine*, and *Planned Parenthood Association/Chicago Area*, and distinguishable from the virtually commercial-only fora addressed in *Lehman*, *Children of the Rosary*, and *Lebron* [*v. Nat'l R.R. Passenger Corp.*, 69 F.3d 650, 656 (2d Cir. 1995) (holding that a large billboard in New York City's Pennsylvania Station constituted a nonpublic forum where Amtrak had 'never opened [the space] for anything except purely commercial advertising")]).

Here, the MBTA accepts advertisements on the hotly-debated Israeli-Palestinian conflict—advertisements "which by their very nature generate conflict"—thereby "signal[ing] a willingness on the part of the government to open the property to controversial speech, which [this] Court in *Lehman* recognized as inconsistent with operating the property solely as a commercial venture." *See United Food*, 163 F.3d at 355.

Moreover, a forum analysis does not end simply because the government transit authority has adopted some restrictions on speech or employed these restrictions to reject certain advertisements. *See N.Y. Magazine*, 136 F.3d 129-30 ("[I]t cannot be true that if the government excludes any category of speech from a forum through a rule or standard, that forum becomes *ipso facto* a non-public forum, such that we would examine the exclusion of the category only for reasonableness. This reasoning would allow every designated public forum to be converted into a non-public forum the moment the government did what is supposed to be impermissible in a designated public forum, which is to exclude speech based on content."). And this is particularly the case where, as here, the government is attempting to impose a "civility" restriction on what it knows is controversial political and public-issue speech—an impermissible task to begin with. *See, e.g., N.Y. Times v. Sullivan*, 376 U.S. 254, 271 (1964) ("[First Amendment] protection does not turn upon the truth, popularity, or social utility of the ideas and beliefs which are offered.") (internal quotations and citation omitted).

Additionally, it is incorrect to conclude that the MBTA's "civility" restriction is a restriction on an ad's subject matter (such as restrictions on advertisements for alcohol, tobacco, or political candidates) that might reasonably lead a court to conclude that this forum is closed to controversial matters. Rather, this restriction, particularly as applied in this case, is an impermissible viewpoint-based restriction on speech. At a minimum, it certainly *allows for* viewpoint discrimination, as evidenced here, and this alone is sufficient to render the advertising guideline unconstitutional. *See infra* sec. II.

In sum, it is without question that the nature of the property is compatible with Petitioners' expressive activity. *See Ridley*, 390 F.3d 76-77 ("As to the nature of the property, the MBTA does run advertisements and so there is nothing inherent in the property which precludes its use for some expressive activity."). And it is undisputed that the MBTA permits advertisements expressing messages on exceedingly controversial political subject matter, including the very subject matter of Petitioners' ads that were rejected by the MBTA. Indeed, the MBTA is willing to accept *some* political viewpoints that generate conflict and complaints amongst its ridership (we refer here to the Committee for Peace ad)—actions which speak louder than any written policy. *Grace Bible Fellowship, Inc. v. Maine Sch. Admin. Dist. No. 5,* 941 F.2d 45, 47 (1st Cir. 1991) (stating that when conducting a forum analysis, "actual practice speaks louder than words"). Therefore, because the forum is wholly suitable for Petitioners' speech, including its subject matter, it is a

designated public forum for Petitioners' ads.[6] Consequently, the MBTA must demonstrate a *compelling* reason that is *narrowly tailored* to justify its restraint on Petitioners' speech, *Cornelius*, 473 U.S. at 800—a burden it cannot meet.

Indeed, the First and the Ninth Circuits support their forum conclusion based upon a faulty rationale. As stated by the Ninth Circuit: "Municipalities faced with the prospect of having to accept virtually all political speech if they accept any—regardless of the level of disruption caused—will simply close the forum to political speech altogether. First Amendment interests would not be furthered by putting municipalities to that all-or-nothing choice. Doing so would 'result in less speech, not more'—exactly what the Court's public forum precedents seek to avoid." *Seattle Mideast Awareness Campaign*, 781 F.3d at 499 (citation omitted); *see also Ridley*, 390 F.3d at 81 (stating that "the MBTA is not to be put to an all-or-nothing choice") (internal quotations and citation omitted); App. 16. This reasoning is fundamentally flawed because it permits the government to pick and choose which "political speech" it deems acceptable, thereby doing more harm to the First Amendment,

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[6] Concluding that the forum is a designated public forum does not mean that the MBTA is without any authority to make certain categorical restrictions, such as restrictions on advertisements for tobacco sales, pornography, or political campaigns. *Cornelius*, 473 U.S. at 802 ("[A] public forum may be created . . . for use by certain speakers, or for the discussion of certain subjects."). However, "if the concept of a designated open forum is to retain any vitality whatever, the definition of the standards for inclusion and exclusion must be unambiguous and definite." *Gregoire v. Centennial Sch. Dist.*, 907 F.2d 1366, 1375 (3d Cir. 1990).

which is intended to operate as a brake on the government's power to censor speech, than closing the forum altogether. In short, the First Amendment is not concerned about the quantity of speech (*i.e.*, "result in less speech, not more"), but rather preventing government officials from being the arbiters of acceptable speech. The First and Ninth Circuits' reasoning thus opens a forum for certain political speech (and speakers) which the government favors by permitting government officials to make content-based restrictions based on nothing more than "reasonableness." Thus, rather than limiting government censorship of speech, the goal of the First Amendment, these decisions grant the government broader powers of censorship. *Southeastern Promotions, Ltd. v. Conrad,* 420 U.S. 546, 553 (1975) ("[T]he 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.").

In the final analysis, the United States courts of appeals are split on the question of whether a government transit authority creates a designated public forum for speech when it opens its advertising space to controversial political or public-issue advertisements. This Court should resolve this circuit split—a division that has serious implications for the First Amendment—by favoring free speech over government censorship.

II. The MBTA's "Demeaning and Disparaging" Restriction Is Inherently Viewpoint Based in Violation of the First Amendment.

Viewpoint discrimination is an egregious form of content discrimination that is prohibited in all forums. *See Rosenberger v. Rector & Visitors of Univ. of Va.,* 515 U.S. 819, 829 (1995). "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. 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). 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. As recently articulated by the Second Circuit:

> Two principles guide our evaluation of viewpoint neutrality within the context of a nonpublic forum. First, the government may permissibly restrict content by prohibiting *any* speech on a given topic or subject matter, as long as the restriction encompasses the entirety of the

> discrete subject. . . . Second, if the government has permitted *some* comment on a particular subject matter or topic, it may not then regulate speech in ways that favor some viewpoints or ideas at the expense of others. . . . Accordingly, the state must be careful *to excise the entire matter from the forum*, or else it will violate the First Amendment by denying access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject.

Children First Found., Inc., 2015 U.S. App. LEXIS 8485, at *40-41 (internal citations and quotations omitted) (emphasis added).

Here, the content of Petitioners' message (and thus its subject matter) is permissible in this forum, as evidenced by the fact that the MBTA has willingly accepted controversial advertisements that address the same subject matter: the Israeli-Palestinian conflict. *See* App. 4, 52 (Appendix—"Committee for Peace ad").

Consequently, it is not the subject matter that is being restricted, but Petitioners' viewpoint on the subject. This is a classic form of viewpoint discrimination that is prohibited in all forums. *See Cornelius*, 473 U.S. at 806; *see also R.A.V. v. St. Paul*, 505 U.S. 377, 389 (1992) (stating that "a State may not prohibit only that commercial advertising that depicts men in a demeaning fashion" without violating the First Amendment); *Good News Club v. Milford Cent. Sch. Dist.*, 533 U.S. 98, 112 (2001) ("[S]peech discussing otherwise permissible subjects cannot be excluded from a limited public forum on the ground that the subject is discussed from a religious viewpoint.").

As noted by the dissent:

> [T]he MBTA's incongruous decision to post the Committee for Peace ad, but reject AFDI's submissions, at the very least, raises the specter of viewpoint discrimination by the MBTA. As we have said in the past, "grave damage is done if the government, in regulating access to public property, even appears to be discriminating in an unconstitutional fashion."

App. 48-49 (dissent) (quoting *AIDS Action Comm. of Mass., Inc. v. Mass. Bay Transp. Auth.*, 42 F.3d 1, 12 (1st Cir. 1994)).

Moreover, attempting to reduce the effectiveness of a message by changing the thrust of its meaning, even if the entire message itself is not prohibited, by way of a "civility" standard (*i.e.* prohibiting the use of "savage" as a noun) is a form of viewpoint discrimination.[7] *See Cohen v. California*, 403 U.S. 15, 26 (1971) ("[W]e cannot indulge the facile assumption that one can

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[7] It is evident through the series of advertisements submitted to the MBTA that the word "savage" is not itself on a list of banned words, and it is apparently acceptable to the government when the word is used as an adjective describing some undefined "acts" but unacceptable when used as a noun to refer to the persons engaged in such acts (*e.g.*, you can say your political opponent lies, but you can't call him a liar). *Compare* AFDI Ad I and AFDI Ad III *with* AFDI Ad II. First Amendment freedoms should not rise or fall on such arbitrary distinctions. *See United Food*, 163 F.3d at 359 (stating that 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'") (citation omitted).

forbid particular words without also running a substantial risk of suppressing ideas in the process. Indeed, governments might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views.").

As stated by the dissent in *Ridley*, "The government cannot allow dissemination of one viewpoint that it finds inoffensive or bland, and prohibit the dissemination of another viewpoint that it finds offensive or 'demeaning,' . . . . Such distinctions are viewpoint based, not merely reasonable content restrictions."[8] *Ridley*, 390 at 100 (Torruella, J., dissenting).

CONCLUSION

The petition for a writ of certiorari should be granted.

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[8] The Ninth Circuit in *American Freedom Defense Initiative v. King County*, No. 14-35095 (9th Cir. docketed Feb. 10, 2014), is currently deciding whether the government transit authority in Seattle Washington may, consistent with the First Amendment, restrict advertisements based upon a similar "demeaning and disparaging" advertising standard that was applied to reject a public-issue ad submitted by the same petitioners in this case. *See Am. Freedom Def. Initiative v. King County*, No. 2:13-cv-01804-RAJ, 2014 U.S. Dist. LEXIS 11982 (W.D. Wash. Jan. 30, 2014) (denying preliminary injunction and ruling, *inter alia*, that the County's speech restriction was viewpoint neutral).

Respectfully submitted,

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