NOS. 14-1018 & 14-1289

UNITED STATES COURT OF APPEALS
FOR THE
FIRST CIRCUIT

AMERICAN FREEDOM DEFENSE INITIATIVE; **PAMELA GELLER**; AND **ROBERT SPENCER**,

Plaintiffs-Appellants,

v.

MASSACHUSETTS BAY TRANSPORTATION AUTHORITY; AND **BEVERLY A. SCOTT**, INDIVIDUALLY AND IN HER OFFICIAL CAPACITY AS CHIEF EXECUTIVE OFFICER / GENERAL MANAGER OF THE MBTA,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
HONORABLE NATHANIEL M. GORTON
Case Nos. 13-cv-12803-NMG & 14-cv-10292-NMG

APPELLANTS' OPENING BRIEF

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

DAVID YERUSHALMI, ESQ.
AMERICAN FREEDOM LAW CENTER
1901 PENNSYLVANIA AVENUE NW
SUITE 201
WASHINGTON, D.C. 20006
(646) 262-0500

Counsel for Plaintiffs-Appellants

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Plaintiff-Appellant American Freedom Defense Initiative states the following:

The 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.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

STATEMENT IN SUPPORT OF ORAL ARGUMENT

Pursuant to Rule 34(a) of the Federal Rules of Appellate Procedure and 1st Cir. R. 34.0(a), Plaintiffs-Appellants respectfully request that this court hear oral argument. This case presents for review important constitutional questions regarding the right to freedom of speech and the limits on the power of government to restrict that speech in a forum it has created for advertising, including advertising on controversial political issues.

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.

STATEMENT OF JURISDICTION

A. Appeal No. 14-1018 (*MBTA I*).

On November 6, 2013, Plaintiffs-Appellants American Freedom Defense Initiative ("AFDI"), Pamela Geller, and Robert Spencer (collectively referred to as "Plaintiffs") filed a Complaint for nominal damages and declaratory and injunctive relief pursuant to 42 U.S.C. § 1983, challenging Defendant-Appellee Massachusetts Bay Transportation Authority's ("MBTA") speech restriction under the First and Fourteenth Amendments to the United States Constitutions. (Doc. 1). Plaintiffs filed an amended complaint on November 8, 2013, adding Beverly Scott as a defendant. (Doc. 10, JA 1-13).[1] The district court has jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343.

On November 12, 2013, Plaintiffs filed a motion for a temporary restraining order / preliminary injunction. (Doc. 16). Oral argument was held on December 4, 2013, and on December 20, 2013, the district court issued its order denying Plaintiffs' motion. (Doc. 32: Mem. & Order [*MBTA I*], ADD 25-31).[2]

On December 30, 2013, Plaintiffs filed a timely Notice of Appeal. (Doc. 33, JA 131-33). This court has jurisdiction over this preliminary injunction appeal pursuant to 28 U.S.C. § 1292.

[1] "JA" refers to the Joint Appendix filed in these consolidated appeals.
[2] "ADD" refers to the Addendum of this brief.

B. Appeal No. 14-1289 (*MBTA II*).

On February 7, 2014, Plaintiffs filed a Complaint for nominal damages and declaratory and injunctive relief pursuant to 42 U.S.C. § 1983, challenging Defendants-Appellees MBTA's and Beverly Scott's (collectively referred to as "MBTA" or "Defendants") speech restriction under the First and Fourteenth Amendments to the United States Constitutions. (Doc. 1, JA 134-47). The district court has jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343.

On February 10, 2014, Plaintiffs filed a motion for a preliminary injunction. (Doc. 8). On March 17, 2014, the district court issued its order denying Plaintiffs' motion without oral argument. (Doc. 20: Mem. & Order [*MBTA II*], ADD 25-31).

On March 17, 2014, Plaintiffs filed a timely Notice of Appeal. (Doc. 22, JA 225-27). This court has jurisdiction over this preliminary injunction appeal pursuant to 28 U.S.C. § 1292.

On March 27, 2014, this court consolidated the two appeals.

INTRODUCTION

Government censorship is repugnant to our Constitution, and for good reason. Indeed, "[i]f there is any fixed star in our constitutional constellation, it is that *no* official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (emphasis added). Permitting the government

to restrict political speech it deems "uncivil" and thus allowing it to take sides on a hotly debated issue such as the Middle East conflict between Israel and Palestine directly undermines our "profound national commitment" to uninhibited debate on public issues. *N.Y. Times v. Sullivan*, 376 U.S. 254, 270 (1964). Thus, when the government opens its property to debate on such a controversial subject, it is acting *not* as a proprietor but as a *regulator* of speech subject to the full weight of the First Amendment.

The two cases consolidated in this appeal individually and collectively demonstrate the absurdity (and thus unconstitutionality) of the MBTA's efforts to restrict speech addressing the hotly contested Israeli-Palestinian conflict under the guise of regulating "civility."

While Defendants will no doubt continue to argue (and this court, similar to the district court, might be tempted to accept such a facile argument) that *Ridley v. Mass. Bay Transp. Auth.*, 390 F.3d 65 (1st Cir. 2004), forecloses any meaningful factual and legal analysis in this case, Defendants and the district court were wrong. A careful application of *Ridley* and other controlling law to the facts of this case compels reversal and the granting of the requested injunctions. Indeed, in a First Amendment context, facts matter in a particularly important way. As the Supreme Court has made clear, when reviewing a case involving a claim arising under the First Amendment, the reviewing court must "conduct an independent

examination of the record as a whole . . . because the reaches of the First Amendment are ultimately defined by the facts it is held to embrace, and [this court] must thus decide for [itself] whether a given course of conduct falls on the near or far side of the line of constitutional protection." *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 567 (1995). The same is true, *a fortiori*, here. The facts of this case are not the facts of *Ridley*. And the differences in those facts compel a finding that Defendants violated the Constitution by rejecting Plaintiffs' advertisements. Indeed, insofar as *Ridley*'s holding cannot be distinguished in light of the facts of this case or limited such that it does not apply here, it was wrongly decided and should be reconsidered by the full court at the appropriate time. *See Ridley*, 390 F.3d at 100 (Torruella, J., dissenting) ("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.").

STATEMENT OF THE ISSUES

I. Whether the advertising space on the buses operated by the MBTA is a designated public forum for Plaintiffs' speech when the MBTA accepts for display a wide array of political and public-issue advertisements, including

controversial advertisements that address the same subject matter as Plaintiffs' advertisements.

II. Whether the MBTA's content- and viewpoint-based restrictions on Plaintiffs' speech violate the First and Fourteenth Amendments to the United States Constitution.

III. Whether the MBTA's Advertising Policy, facially and as applied to restrict Plaintiffs' speech, is unreasonable and viewpoint based in violation of the First Amendment to the United States Constitution.

IV. Whether the MBTA's Advertising Policy, facially and as applied to restrict Plaintiffs' speech, grants MBTA officials unbridled discretion such that an official's decision to limit speech is not constrained by objective criteria, but may rest on ambiguous and subjective reasons in violation of the First and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE

Plaintiffs 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, Plaintiffs filed a motion for preliminary injunction, which the district

court denied. Plaintiffs filed timely notices of appeal, and this court consolidated the appeals.

At issue in both cases is the application of the MBTA's advertising guidelines to restrict Plaintiffs' political speech on the basis that Plaintiffs' pro-Israel / 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 Plaintiffs' speech were reasonable and viewpoint neutral. This consolidated appeal follows.

STATEMENT OF FACTS

AFDI is a human rights organization that is incorporated under the laws of the State of New Hampshire. AFDI is dedicated to freedom of speech, freedom of conscience, freedom of religion, freedom from religion, and individual rights. AFDI achieves its objective through a variety of lawful means, including through the exercise of its right to freedom of speech under the United States Constitution. (Docs.17-1, 9-1: Geller Decls., JA 15-16, 148-49).

AFDI exercises its right to freedom of speech and promotes its objectives by, *inter alia*, purchasing advertising space on transit authority property in major cities throughout the United States, including Boston, Massachusetts. AFDI purchases these advertisements to express its message on current events and public

issues, including the Israeli-Palestinian conflict (hereinafter referred to as "AFDI's advertising campaign"). (Docs.17-1, 9-1: Geller Decls., JA 16, 149).

Plaintiff Geller is the president of AFDI, and Plaintiff Spencer is the vice president. Plaintiffs Geller and Spencer engage in protected speech through AFDI's activities, including AFDI's advertising campaign. (Docs.17-1, 9-1: Geller Decls., JA 15, 148).

The MBTA is a quasi-governmental organization which provides public transportation in the Commonwealth of Massachusetts. It operates bus routes, subway lines, a commuter rail network, and ferry service routes that provide transportation to millions of customers in the Greater Boston area. Defendant Scott is the CEO / General Manager of the MBTA and the final decision maker responsible for enforcing the MBTA Advertising Guidelines and for ultimately rejecting Plaintiffs' proposed advertisements at issue in these consolidated appeals (*i.e.*, AFDI Advertisement I and AFDI Advertisement III). (Docs.17-1, 9-1: Geller Decls., JA 16-17, 19-20, 149-50, 153-56).

The MBTA, through its advertising agent, Titan Outdoor LLC (a/k/a Titan360 and Titan) (hereinafter "Titan"), leases space on its vehicles and transportation stations for use as advertising space. (Docs.17-1, 9-1: Geller Decls., JA 16, 149).

As a matter of policy and practice, the MBTA accepts a wide variety of

commercial, non-commercial, public-service, public-issue, and political-issue advertisements on its advertising space, including advertisements providing political and social commentary on exceedingly controversial and hotly-debated issues such as the Israeli-Palestinian conflict (hereinafter "Speech Policy"). (Docs.17-1, 9-1: Geller Decls., JA 16-18, 150-51, 154; *see also* Doc. 19-2, Moulton Decl., Exs. 4-7, JA 57, 80-94).

In October 2013 and pursuant to their Speech Policy, Defendants accepted for display on the MBTA advertising space a controversial advertisement that addresses the Israeli-Palestinian conflict from a viewpoint that criticizes Israel ("Anti-Israel Advertisement"). (Docs.17-1, 9-1: Geller Decls., JA 17-18, 150-51).

The Anti-Israel Advertisement, which appeared on approximately 80 posters throughout the transit system, depicts four maps that purport to show the "***Palestinian loss of land***" to Israel between 1946 and 2010. Text accompanying the maps says: "***4.7 million Palestinians are Classified by the UN as Refugees***." The advertisement appeared as follows:

(Docs.17-1, 9-1: Geller Decls., Exs. A, JA 22, 158).

After receiving a rash of complaints, on or about October 31, 2013, Defendants, acting through the MBTA's advertising agent, removed all of the Anti-Israel Advertisements from the MBTA's advertising space. (Docs.17-1, 9-1: Geller Decls., JA 18, 151).

However, on or about November 1, 2013, Defendants decided, without much of a public explanation, except to claim that it was a "miscommunication" between the MBTA and its advertising agent, to repost the Anti-Israel Advertisement on the MBTA's advertising space. (Docs.17-1, 9-1: Geller Decls., JA 18, 151).

As noted, the Anti-Israel Advertisement describes the Palestinians as "refugees," which, according to the United Nation's definition of "refugee," means, in the context of the advertisement, that the Israelis are *persecuting* the Palestinians on account of their "race, religion, nationality, membership of a particular social group or political opinion." *See* http://www.unhcr.org/pages/49c3646c125.html (providing U.N. definition of "refugee") (last visited on Mar. 14, 2014); *see also* 8 U.S.C. § 1101(a)(42) (defining "refugee" as unable to return to one's national homeland "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion"). This is

not a "positive" message about Israel by any man's measure. Indeed, as noted previously, the Anti-Israel Advertisement created a firestorm of complaints, which then caused the MBTA (or its advertising agent) to take it down, only to be reposted soon thereafter by the same MBTA officials who rejected Plaintiffs' advertisements at issue here.[3] (Docs.17-1, 9-1: Geller Decls., JA 18, 151).

Pursuant to Defendants' Speech Policy and *in direct response to* the original posting of the Anti-Israel Advertisement, on or about October 26, 2013, Plaintiffs submitted to Titan for display on the MBTA's advertising space an advertisement that supported Israel in the Israeli-Palestinian conflict debate. More specifically, Plaintiff Geller sent an email to Scott Goldsmith, the executive vice president and chief commercial officer of Titan, and requested to run AFDI's "pro-Israel ads in 10 of the Boston T stations where the anti-Israel campaign is running." (Docs.17-1, 9-1: Geller Decls., Exs. B, JA 18, 24, 152, 160).

AFDI's pro-Israel advertisement states, in relevant part: "***In any war between the civilized man and the savage, support the civilized man. Support Israel. Defeat jihad***" ("AFDI Advertisement I"). It appears as follows:

[3] The MBTA apparently has no concern that its "ridership" is offended by the Anti-Israel Advertisement, demonstrating further the viewpoint-based nature of Defendants' restriction on Plaintiffs' speech. *See, e.g., Ridley v. Mass. Bay Transp. Auth.*, 390 F.3d 65, 87 (1st Cir. 2004) (noting that impermissible discrimination is evidenced when the government "rejects something because of a certain characteristic, but other things possessing the same characteristics are accepted").

(Docs.17-1, 9-1: Geller Decls., Exs. C, JA 19, 26, 152, 162).

AFDI Advertisement I discusses the same subject matter as the Anti-Israel Advertisement, except it does so from a viewpoint that favors Israel. And the advertisement's quote, "In any war between the civilized man and the savage, support the civilized man," is adapted from a quote by the famous Russian-born, American author of *Atlas Shrugged*, Ayn Rand.[4] (Docs.17-1, 9-1: Geller Decls., Exs. C, JA 19, 26, 152-53, 162).

The message of AFDI Advertisement I was timely when it was submitted, and it remains so today in light of the fact that the Anti-Israel Advertisement received substantial publicity, and the issues addressed by the two competing

[4] "Savage" in the context of the advertisement, which juxtaposes the term with "civilized," means "uncivilized." *See, e.g.*, http://www.merriam-webster.com/dictionary/savage (defining "savage") (last visited on Feb. 5, 2013). However, using the term "savage" not only brings to mind the famous quote from Ayn Rand, but it *effectively* conveys Plaintiffs' viewpoint on the issue. Altering the message would alter its meaning, especially in context, and thus alter Plaintiffs' viewpoint. (*See infra* sec. II.C.2.).

advertisements remain current. Indeed, the President of the United States made special mention of the Israeli-Palestinian conflict during his 2014 State of the Union address. (Docs.17-1, 9-1: Geller Decls., JA 19, 26, 152-53, 162).

On November 4, 2013, Defendants made a formal determination and officially rejected AFDI Advertisement I because it allegedly "falls within the category (b)(i) 'Demeaning or disparaging.'"[5] (Docs.17-1, 9-1: Geller Decls., Exs. D, JA 19-20, 28, 153, 164).

As a result of Defendants' restriction on Plaintiffs' speech, Plaintiffs filed suit in the district court pursuant to 42 U.S.C. § 1983, alleging violations of the First Amendment (freedom of speech) and Fourteenth Amendment (equal protection and due process). (Doc. 9-1: Geller Decl., JA 153-54); *see Am. Freedom Def. Initiative v. Mass. Bay Transp. Auth.*, No. 1:13-cv-12803-NMG (D. Mass. filed Nov. 6, 2013) ("*MBTA I*").

In denying Plaintiffs' motion for preliminary injunction in *MBTA I*, the district court ruled 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

[5] Attached to Defendants' email rejecting AFDI Advertisement I was a copy of the MBTA's Advertising Guidelines. (Docs.17-1, 9-1: Geller Decls., Exs. E, JA 20, 31-37, 153, 167-73).

(*i.e.*, that those Muslims/Palestinians engaged in peaceful jihad were savages):

> The Court finds that the meaning of the AFDI Pro-Israel Advertisement is not as clear as plaintiffs assert. In fact, the advertisement is ambiguous in several respects. For instance, "war" could refer, as plaintiffs claim, to the violent acts committed against innocent Israeli citizens. But the term might also refer to the periodic conflicts between Israel and its majority-Muslim neighbors in Egypt, the Gaza Strip, the West Bank and Lebanon. Finally, the term could refer to the metaphysical or ideological struggle between Islam and the West.
>
> Similarly, "jihad" is susceptible to several interpretations. Plaintiffs are correct that it is commonly interpreted (by this judicial officer among others) as referring to the acts of radical Islamic terrorists. Jihad is also understood by many, however, to have a more nuanced meaning that emphasizes a duty of introspection and self-improvement over violence applicable to all Muslims. Dictionary definitions of the term do not resolve the ambiguity. *See* Oxford English Dictionary (2d ed. 2012) ("A religious war of Muslims against unbelievers in Islam, inculcated as a duty by the Koran and traditions"; "a war or crusade for or against some doctrine, opinion or principle"; "war to the death"); Webster's Third New International Dictionary (2002) ("a holy war waged on behalf of Islam as a religious duty"; "a bitter strife or crusade undertaken in the spirit of a holy war"); Webster's II New College Dictionary (3d ed. 2005) ("a Muslim holy war or spiritual struggle against infidels"; "a crusade"; "a struggle").
>
> Nevertheless, *the Court agrees with the plaintiffs that the most reasonable interpretation of their advertisement is that they oppose acts of Islamic terrorism directed at Israel*. *Thus, if the question before this Court were whether the MBTA adopted the best interpretation of an ambiguous advertisement, it would side with the plaintiffs*. But restrictions on speech in a non-public forum need only be reasonable and need not be the most reasonable. *See Ridley*, 390 F.3d at 90. In this case, the Court understands the inquiry to require only that the MBTA reasonably interpret the ambivalent advertisement. In light of the several divergent interpretations, it was plausible for the defendants to conclude that the AFDI Pro-Israel

Advertisement demeans or disparages Muslims or Palestinians.

(*MBTA I* Mem. & Order at 14-16, ADD 14-16) (emphasis added).

After a careful review of the district court's ruling in *MBTA I*, Plaintiffs submitted a new proposed advertisement to the MBTA, which states, in relevant part: "***In any war between the civilized man and those engaged in savage acts, support the civilized man. Defeat violent jihad. Support Israel***" ("AFDI Advertisement II"). The advertisement appears as follows:

(Doc. 9-1: Geller Decl., Ex. F, JA 154, 175).

On January 7, 2014, Defendants accepted AFDI Advertisement II. (Doc. 9-1: Geller Decl., Ex. G, JA 154, 177).

On January 8, 2014, Plaintiff Geller submitted a slightly revised version of AFDI Advertisement II to the MBTA for approval ("AFDI Advertisement III"). This advertisement states, in relevant part: "***In any war between the civilized man and the savage, support the civilized man. Defeat violent jihad. Support Israel.***" AFDI Advertisement III appears as follows:

(Doc. 9-1: Geller Decl., Ex. H, JA 154-55, 179). After the MBTA notified Plaintiffs of its initial rejection of AFDI Advertisement III, the MBTA provided its written Formal Determination on January 29, 2014, rejecting the advertisement "based on the same considerations as its rejection of [AFDI Advertisement I]." (Doc. 9-1: Geller Decl., Exs. I, J, K, JA 155-56, 180-87).

As a result of Defendants' rejection of AFDI Advertisement III, Plaintiffs filed suit in the district court pursuant to 42 U.S.C. § 1983, alleging violations of the First Amendment (freedom of speech) and Fourteenth Amendment (equal protection and due process). *See Am. Freedom Def. Initiative v. Mass. Bay Transp. Auth.*, No. 1:14-cv-10292-NMG (D. Mass. filed Feb. 7, 2014) ("*MBTA II*").[6]

In denying Plaintiffs' motion for 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*, stating further that "Plaintiffs have not made the requisite 'strong showing' that the MBTA acted unreasonably in rejecting an advertisement that was very similar to an advertisement it had previously found to be demeaning

[6] Pending appeal, the court stayed all discovery and other pretrial deadlines in *MBTA I* and *MBTA II*. (Docs. 37 & 27, respectively).

and disparaging in violation of its advertising Guidelines." (*MBTA II* Mem. & Order at 6-7, ADD 30-31). The district court stated further that it "declines to enter injunctive relief in any event," wrongly accusing Plaintiffs of "act[ing] in bad faith in submitting [AFDI Advertisement II] to the MBTA, waiting for that advertisement to be accepted and then using that acceptance as an excuse to file a second lawsuit against the MBTA rather than accepting its compromise offer to display [AFDI Advertisement II]." (*MBTA II* Mem. & Order at 7, ADD 31). The district court concluded its ruling by falsely accusing Plaintiffs of engaging in "blatant gamesmanship and deliberate confrontation," which "do[] not warrant the 'extraordinary and drastic remedy' of ordering the MBTA to display [AFDI Advertisement III]." (*MBTA II* Mem. & Order at 7, ADD 31). Plaintiffs contend, *without hesitation or apology*, that it is *never* "gamesmanship" or improper "confrontation" to challenge the government's censorship of political speech and find it troubling to believe otherwise.

SUMMARY OF THE ARGUMENT

By accepting for display a wide array of political and public-issue advertisements, including controversial advertisements that address the same hotly-debated subject matter as Plaintiffs' advertisement (*i.e.*, the Israeli-Palestinian conflict), the advertising space on the buses operated by the MBTA is a designated public forum for Plaintiffs' speech. Consequently, the MBTA's content- and

viewpoint-based restrictions on Plaintiffs' advertisements violate the First Amendment.

Additionally, regardless of the nature of the forum, the MBTA's rejection of Plaintiffs' advertisements violated the First Amendment in that the MBTA's advertising policy, facially and as applied to restrict Plaintiffs' speech, is unreasonable and viewpoint based in violation of the First Amendment. Moreover, the MBTA's advertising policy grants government officials unbridled discretion such that an official's decision to limit speech is not constrained by objective criteria, but may rest on ambiguous, arbitrary, and subjective reasons in violation of the First and Fourteenth Amendments.

Because the MBTA's restrictions on Plaintiffs' speech violated the First and Fourteenth Amendments, Plaintiffs have suffered irreparable harm sufficient to justify injunctive relief. Moreover, the balance of equities tips sharply in Plaintiffs' favor and granting the requested injunctions is in the public interest. Consequently, this court should reverse the district court and remand the cases with instructions to enter the requested injunctions, thereby ordering the MBTA to display Plaintiffs' advertisements (AFDI Advertisements I and III).

ARGUMENT

I. Standard of Review.

"A plaintiff seeking a preliminary injunction must establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *Ross-Simons of Warwick, Inc. v. Baccarat, Inc.*, 102 F.3d 12, 16 (1st Cir. 1996) (stating that the district court follows the four-part framework in determining whether to grant or deny a preliminary injunction).

The standard of review for an appellate court reviewing the grant or denial of a preliminary injunction is abuse of discretion. *Ross-Simons*, 102 F.3d at 16. This deferential standard, however, applies to "issues of judgment and balancing of conflicting factors."' *Cablevision of Boston, Inc. v. Public Improvement Comm'n of the City of Boston*, 184 F.3d 88, 96 (1st Cir. 1999) (quoting *Ocean Spray Cranberries, Inc. v. Pepsico, Inc.*, 160 F.3d 58, 61 n.1 (1st Cir. 1998)). The court reviews rulings on abstract legal issues *de novo* and findings of fact for clear error. *Id.*

Therefore, this court reviews "the district court's legal findings under the 'likelihood of success' prong *de novo*," while reviewing "the district court's judgment calls, applying appropriate standards, under the remaining three prongs

for abuse of discretion." *Water Keeper Alliance v. United States DOD*, 271 F.3d 21, 30-31 (1st Cir. 2001). "*De novo* review of a district court judgment requires that [the court] view the case from the same position as the district court." *Id.*; *see also Ridley*, 390 F.3d at 75 ("We engage in *de novo* review of ultimate conclusions of law and mixed questions of law and fact in First Amendment cases.") (citing *Hurley*, 515 U.S. at 567 (1995) & *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 501 (1984)).

Consequently, because this appeal involves requests for injunctions that seek to protect Plaintiffs' First Amendment right to freedom of speech, the crucial and often dispositive factor is whether Plaintiffs are likely to prevail on the merits. *Sindicato Puertorriqueño de Trabajadores v. Fortuño*, 699 F.3d 1, 10 (1st Cir. 2012) ("In the First Amendment context, the likelihood of success on the merits is the linchpin of the preliminary injunction analysis."). Thus, for all practical purposes, this court's review is *de novo*.

II. Plaintiffs Are Likely to Succeed on the Merits of Their First Amendment Challenges to the MBTA's Prior Restraints on Their Speech.

Plaintiffs' First Amendment claims are reviewed in essentially three steps. First, the court must determine whether the speech in question—Plaintiffs' advertisements—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. *Am. Freedom Def. Initiative v. Metro. Transp. Auth.*, 880 F. Supp. 2d 456, 466 (S.D.N.Y. 2012) (analyzing a free speech claim in "three parts"); *cf. Ridley*, 390 F.3d at 75 (conducting a forum analysis in a challenge to the MBTA's restrictions on several advertisements, but nonetheless stating in *dicta* that the "[p]ublic forum analysis itself has been criticized as unhelpful in many contexts, and particularly this one where the government is operating a commercial enterprise earning income from permitting advertising").

Moreover, Defendants' "refusal to accept [Plaintiffs' advertisements] for display because of [their] content is a clearcut *prior restraint*." *Lebron v. Wash. Metro. Area Transit Auth.*, 749 F.2d 893, 896 (D.C. Cir. 1984) (Bork, J.) (emphasis added). 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) (emphasis added); *see Lebron*, 749 F.2d at 896 (stating that the transit authority "carries a heavy burden of showing justification for the imposition of [a prior] restraint") (internal quotations and citation omitted).

A. Plaintiffs' Advertisements Are Protected Speech.

The first question is easily answered. Sign displays constitute protected speech under the First Amendment. *Hill v. Colorado*, 530 U.S. 703, 714-15 (2000) ("[S]ign displays . . . are protected by the First Amendment."). And this includes signs posted on bus advertising space. *See, e.g., United Food & Commercial Workers Union, Local 1099 v. Sw. Ohio Reg'l Transit Auth.*, 163 F.3d 341 (6th Cir. 1998) (hereinafter "*United Food*"); *N.Y. Magazine v. Metro. Transp. Auth.*, 136 F.3d 123, 130 (2d Cir. 1998); *see also Ridley*, 390 F.3d at 90 (holding that the MBTA's rejection of certain advertisements "violated the First Amendment").

Moreover, "speech on public issues," such as Plaintiffs' advertisements addressing the Israeli-Palestinian conflict, "occupies the 'highest rung of the hierarchy of First Amendment values,' and is entitled to special protection." *Connick v. Myers*, 461 U.S. 138, 145 (1983) (quoting *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886. 913 (1982); *Carey v. Brown*, 447 U.S. 455, 467 (1980)).

Thus, there is no dispute that Plaintiffs' advertisements constitute speech that is protected by the First Amendment.

B. The MBTA 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 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). This forum is not at issue.

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 (emphasis added).

In a traditional or designated public forum, restrictions on speech are subject to strict scrutiny. *Id.* at 800. Thus, "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. . . . 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." *Id.*

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.*

This Circuit also recognizes a limited public forum and has "adopt[ed] the usage equating limited public forum with non-public forum." *Ridley*, 390 F.3d at 76 n.4; *see Flint v. Dennison*, 488 F.3d 816, 831 (9th Cir. 2007) (describing a "limited public forum" as "a type of nonpublic forum that the government has intentionally opened to certain groups or to certain topics"); *Hopper v. City of*

Pasco, 241 F.3d 1067, 1074 (9th Cir. 2001) (same). But even in a limited public forum, once the government has opened this forum for expressive purposes, it must respect the lawful boundaries it has itself set. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995). Accordingly, in a limited public forum "the government may not exclude speech where its distinction is not reasonable in light of the purpose served by the forum, nor may the government discriminate against speech on the basis of its viewpoint." *Flint*, 488 F.3d at 831 (citations and quotations omitted).

To resolve the forum question, courts "look[] to the policy and practice of the government" as well as "the nature of the property and its compatibility with expressive activity." *Cornelius*, 473 U.S. at 802. When conducting this analysis, "actual practice speaks louder than words." *Grace Bible Fellowship, Inc. v. Maine Sch. Admin. Dist. No. 5*, 941 F.2d 45, 47 (1st Cir. 1991); *see also Hopper*, 241 F.3d at 1076 ("[C]onsistency in application is the hallmark of any policy designed to preserve the non-public status of a forum. A policy purporting to keep a forum closed (or open to expression only on certain subjects) is no policy at all for purposes of public forum analysis if, in practice, it is not enforced or if exceptions are haphazardly permitted."); *United Food*, 163 F.3d at 353 (stating that "we . . . must closely examine whether in practice [the transit authority] has consistently

enforced its written policy in order to satisfy ourselves that [its] stated policy represents its actual policy").

Thus, a forum analysis "involve[s] a careful scrutiny of whether the government-imposed restriction on access to public property is truly part of the process of limiting a nonpublic forum to activities compatible with the intended purpose of the property." *Id.* at 351-52 (internal quotations and citation omitted); *see also Christ's Bride Ministries, Inc. v. Southeastern Pa. Transp. Auth.*, 148 F.3d 242, 253 (3d Cir. 1998) (holding that "the purpose of the forum does not suggest that it is closed, and the breadth of permitted speech points in the opposite direction").

Consequently, the forum question is not a static inquiry. Rather, it must be resolved in light of the facts presented. Thus, when the government opens a forum that was previously considered a nonpublic or limited public forum to a public debate on an issue as politicized and controversial as the Israeli-Palestinian conflict, as in this case, the conclusion is straightforward: the forum is a designated public forum for that speech. As such, the MBTA's restrictions on Plaintiffs' speech are unconstitutional, as discussed further below.

We turn now to the relevant case law regarding the forum question, starting, as this court did in *Ridley*, 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").[7] In *Lehman*, the 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* commercial and service oriented advertising." *Id*. at 304 (emphasis added). Other circuit courts have followed the holding in *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).

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[7] *Ridley* also relied upon the Supreme Court's decision in *Ark. Educ. Television Comm'n 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). A closer review of *AETC* highlights the MBTA's violation of Plaintiffs' First Amendment rights in this case. 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. The 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, there is no question that Plaintiffs, 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. And so should the court here (*n.b.* the word "savage" is not obscenity and thus not independently proscribable).

As the Ninth Circuit observed in *DiLoreto v. Downey Unified Sch. Dist. Bd. of Educ.*:

> 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.

DiLoreto, 196 F.3d at 965 (citing, *inter alia*, *Lehman*, 418 U.S. at 303-04).

Similarly, the Second Circuit has held 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) (emphasis added); *see also 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 "a wide variety" of commercial and non-commercial advertising).

And the Sixth Circuit correctly observed in *United Food* the following:

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

163 F.3d at 355 (emphasis added).

Consequently, consistent with *Lehman* and the majority of circuit courts that have analyzed and followed its holding, the forum at issue here is a designated public forum for Plaintiffs' speech. As the undisputed evidence demonstrates, the MBTA accepts advertisements on the hotly debated Israeli-Palestinian conflict—advertisements "which by their very nature generate conflict"[8]—thereby "signal[ing] 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." *See United Food*, 163 F.3d at 355.

Moreover, a forum analysis does not end simply because the MBTA has adopted some restrictions on speech or employed these restrictions to reject certain advertisements. And this is particularly the case when the government is

[8] As noted previously, the Anti-Israel Advertisement caused a firestorm of complaints, prompting the MBTA (or its advertising agent) to initially remove the advertisement only to reinstate it, citing "miscommunication" as the reason for the temporary censorship.

attempting to impose a "civility" restriction on what it knows is controversial political and public-issue speech—a fool's errand under the First Amendment. *See, e.g., N.Y. Times Co.*, 376 U.S. at 271 ("[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).

Indeed, it is patently incorrect to conclude that the MBTA's "civility" restriction is a restriction on an advertisement'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 and thus limited to less controversial and innocuous commercial advertisements such that the government's intent to operate as a proprietor and not a speech regulator is clear. Rather, as argued further below, the "civility" restriction, particularly in light of the facts before this court and as applied to restrict Plaintiffs' speech, is an ambiguous, arbitrary, and subjective restriction that permits viewpoint-discrimination. Consequently, this restriction does not justify concluding that the forum at issue is a limited public forum. Rather, the restriction compels the conclusion that regardless of the forum, the restriction is vague, unreasonable, and viewpoint-based in violation of the Constitution. (*See infra* sec. II.C. [discussing the constitutionality of the speech restriction]). At a minimum, the MBTA's subjective criteria certainly *allow for* viewpoint-based restrictions, as

evidenced here, and this alone is sufficient to render its advertising policy unconstitutional. *See United Food*, 163 F.3d at 359 (holding that a speech restriction violates the First Amendment when it permits government officials to limit speech based on "ambiguous and subjective reasons") (citation and internal quotation omitted).

Moreover, as stated by the Second Circuit, "[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 [or limited 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 [or limited 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." *N.Y. Magazine*, 136 F.3d 129-30.

And finally, to preserve the non-public status of a forum the government must apply its speech restrictions with consistency, *see Hopper*, 241 F.3d at 1076 (noting the importance of "consistency in application . . . of any policy designed to preserve the non-public status of a forum"), lest they operate as a fig leaf to cover up a government agency's arbitrary and subjective rejection of political and public-issue speech it deems outside some invisible boundaries, or worse, a pretense to

apply a viewpoint-based restriction. Indeed, the record in this case evidences both the fig leaf and the pretense, as discussed further below.

In the final analysis, it is without question that the nature of the property—the advertising space on the MBTA's buses—is compatible with Plaintiffs' proposed 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."); *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). And it is without question that the MBTA permits the display of advertisements expressing messages on exceedingly controversial political subject matter, including the very subject matter of Plaintiffs' advertisements that were rejected by the MBTA.[9] (*See MBTA I* Mem. & Order at 23 ["The Israeli-Palestinian conflict is a particularly sensitive topic that is likely to arouse strong feelings on both sides of the debate."], ADD 23). Indeed, it is without question that the MBTA is willing to accept *some* political viewpoints that generate conflict and complaints amongst its ridership (we refer here to the Anti-Islam Advertisement)—actions which speak louder than any written policy. *See Grace Bible Fellowship, Inc.*, 941 F.2d at 47.

[9] This also demonstrates that the rejection of Plaintiffs' advertisements was viewpoint-based as a matter of law. (*See infra* sec. II.C.2.).

Thus, because the forum is wholly suitable for Plaintiffs' speech, including its subject matter, *Christ's Bride Ministries, Inc.*, 148 F.3d at 252 (concluding that the transit authority had "created a forum that is suitable for the speech in question"), it is a designated public forum *for the display of Plaintiffs' advertisements*.[10] Therefore, the MBTA must demonstrate a *compelling* reason that is *narrowly tailored* to justify its prior restraints on Plaintiffs' speech—a burden that it cannot meet.

C. The MBTA's Prior Restraints on Plaintiffs' Speech Cannot Survive Constitutional Scrutiny.

1. The MBTA's 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, "[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*, 515 U.S. at 828; *see also R.A.V.*

[10] It's important to bear in mind that a conclusion that the forum is a designated public forum for Plaintiffs' speech does not mean that the MBTA is without any authority to make certain categorical restrictions, such as a restriction on advertisements for tobacco sales or political campaigns. *Cornelius*, 473 U.S. at 802 ("[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*.") (emphasis added).

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"). Consequently, courts "apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content." *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 642 (1994). 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 court looks 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, it is undisputed that the MBTA rejected Plaintiffs' advertisements based on the content (and viewpoint) of their message in clear violation of the First Amendment.[11]

Indeed, as noted previously and discussed further below, the MBTA's advertising policy, facially and as applied to restrict Plaintiffs' speech, cannot survive constitutional scrutiny regardless of the nature of the forum because it is

[11] Nothing makes this point clearer than the MBTA's rationale that Plaintiffs' advertisements were demeaning and disparaging because they described those who engage in jihad against Israel as "savages." The MBTA might disapprove of the content (and viewpoint) of that political message, but that content (and viewpoint) is no less demeaning and disparaging than the Anti-Israel Advertisement asserting that Israel, and thus Israelis, illegally discriminate against Palestinian "refugees."

viewpoint based, unreasonable, and it grants government officials unbridled and subjective discretion over the forum's use.[12]

2. The MBTA's 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). Thus, viewpoint discrimination occurs when the government "denies access to a speaker solely to suppress the point of view he

[12] Even in a nonpublic forum, a government speech regulation must be "reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." *Perry Educ. Ass'n*, 460 U.S. at 46. As demonstrated further in the text that follows, the MBTA's restrictions on Plaintiffs' speech fail this test as well.

espouses on an otherwise includible subject." *Cornelius*, 473 U.S. at 806.

Here, the content of Plaintiffs' message (and thus its subject matter) is permissible in this forum, as evidenced by the fact that the MBTA has willingly accepted controversial (and "demeaning and disparaging" anti-Israeli) advertisements that address the same subject matter: *the Israeli-Palestinian conflict*.[13] *See Ridley*, 390 F.3d at 87 ("[W]here the government states that it rejects something because of a certain characteristic, but other things possessing the same characteristic are accepted, this sort of underinclusiveness raises a suspicion that the stated neutral ground for action is meant to shield an impermissible motive."); *Aids Action Comm. of Mass. v. Mass. Bay Transp. Auth.*, 42 F.3d 1, 10-12 (1st Cir. 1994) (finding an "unrebutted appearance of viewpoint discrimination" where the MBTA claimed to be excluding condom-promotion advertisements because they were sexually explicit and patently offensive, but yet

[13] In this respect, *Ridley* is distinguishable in that in *Ridley*, the court specifically noted that "there is no evidence in the record that other advertisements, religious or otherwise, were accepted despite containing demeaning or disparaging content." *Ridley*, 390 F.3d at 92. Here, we have indisputable evidence that another advertisement, namely, the Anti-Israel Advertisement, which addresses the same subject matter as Plaintiffs' advertisements but from a different viewpoint, was "accepted despite containing demeaning or disparaging content." In fact, we have *actual evidence* that the MBTA's ridership found this advertisement objectionable, but only *mere speculation* on behalf of the MBTA that Plaintiffs' advertisements would receive a similar response, which highlights one of the problems with prior restraints on speech.

allowed other sorts of sexually explicit advertisements, such as movie advertisements).

Consequently, it is not the subject matter that is being restricted, but Plaintiffs' 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 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.").

This conclusion is further buttressed by the MBTA's enforcement of a policy that is itself viewpoint based in its application (we refer here to the restriction on "demeaning or disparaging" speech). *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 speech that the government deemed disparaging toward Islam in violation of the First Amendment).

Indeed, *Ridley* is dispositive on this point in light of the facts of this case. In *Ridley*, this court held that the transit authority's restriction on certain

advertisements that were critical of laws prohibiting drug use were viewpoint based in violation of the First Amendment. The MBTA attempted to avoid the fact that its restriction was viewpoint based by arguing that a similar message could run if a different manner of expression was used. The court rejected the argument, stating,

> The MBTA's concession means simply that it will run advertisements which do not attract attention but will exercise its veto power over advertisements which are designed to be effective in delivering a message. Viewpoint discrimination concerns arise when the government intentionally tilts the playing field for speech; *reducing the effectiveness of a message, as opposed to repressing it entirely, thus may be an alternative form of viewpoint discrimination*.

Id. at 88 (emphasis added); *see also Cohen v. California*, 403 U.S. 15, 26 (1971) ("[W]e cannot indulge the facile assumption that one can 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.").[14]

Thus, attempting to reduce the effectiveness of a message by changing the thrust of its meaning (*e.g.*, accepting a message referring to jihadis as "those engaged in savage acts" but prohibiting the speaker from describing those same

[14] This conclusion cannot be avoided by creating a straw man—that is, by incorrectly concluding that all viewpoints are binary (for example, either you support one side in the conflict between Israel and Palestine simply or you oppose one side simply). Thus, claiming that your restriction is viewpoint neutral because you accept *some* pro-Israel advertisements and *some* pro-Palestine advertisements is incorrect, as *Ridley* makes clear.

jihadis as "savages"), even if the entire message itself is not prohibited, by way of a "civility" standard is a form of viewpoint discrimination that is impermissible in every forum.[15]

In sum, the MBTA cannot escape this conclusion compelled by *Ridley*: the MBTA's restrictions on Plaintiffs' advertisements were viewpoint based and unconstitutional regardless of the nature of the forum. *See, e.g., Ridley*, 390 F.3d at 82 ("The bedrock principle of viewpoint neutrality demands that the state not suppress speech where the real rationale for the restriction is disagreement with the underlying ideology or perspective that the speech expresses.").

3. The MBTA's Advertising 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." *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553 (1975).

As the Sixth Circuit held in a case involving the government's regulation of

[15] 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. This is not only absurd (and thus unreasonable as a matter of law, *see infra* sec. II.C.4.), but is quintessentially "disagreement with the underlying ideology or perspective that the speech expresses," in violation of the First Amendment. *Ridley*, 390 F.3d at 82.

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 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).

Here, the MBTA's only proffered justification for restricting Plaintiffs' speech under its advertising guidelines is that the rejected advertisements "contain[] material that demeans or disparages an individual or group of individuals." (*MBTA I* Mem. & Order at 6-7, ADD 6-7; *MBTA II* Mem. & Order at 2-3, ADD 26-27). However, as demonstrated above and further below, the application of this guideline here was a subjective endeavor that was inherently viewpoint based and entirely unreasonable.

Indeed, the fact that "jihad" might also have a non-violent meaning does not render the public stupid. Thus, it is clear to any reasonable person that the use of the term "jihad" in the context of the "war" being waged in Israel does not disparage those Muslims (Palestinian or otherwise) engaging in a self-reflective internal struggle. And to further illustrate this point, federal court opinions in cases prosecuting terrorism (*i.e.*, savage acts) routinely utilize the term "jihad" to mean terrorism without disparagement because the use of the term to describe terrorists fighting in the name of Islam and committing terrorist acts in the name of Islam is ubiquitous, and the meaning of the term is again clear to any *reasonable* person (and, in particular, to the MBTA's ridership who just recently experienced a savage act of jihad at the Boson Marathon in 2013).[16]

Additionally, adding objective language to a wholly subjective endeavor

[16] See the following sample of such cases: *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2725 (2010) (referring to a scholarly article, the very title of which uses the word "jihad" to mean terrorism); *Hamdan v. Rumsfeld*, 548 U.S. 557, 600 n.31 (2006) ("Justice Thomas would treat Usama bin Laden's 1996 declaration of jihad against Americans as the inception of the war."); *United States v. Farhane*, 634 F.3d 127, 134 n.4 (2d Cir. 2011) ("Al Qaeda is the most notorious terrorist group presently pursuing jihad against the United States. In February 1998, its leaders, including Osama bin Laden and Ayman al Zawahiri, issued an infamous fatwa (religious decree) pronouncing it the individual duty of every Muslim to kill Americans and their allies—whether civilian or military—in any country where that could be done."); *United States v. Ghailani*, 733 F.3d 29 (2d Cir. 2013) (acknowledging that "Al Qaeda is the most notorious terrorist group presently pursuing jihad against the United States"); *United States v. Hayat*, 710 F.3d 875 (9th Cir. 2013) (using the words "jihad" and "jihadist" throughout the opinion to describe the defendants, who refer to themselves as such).

does not save the MBTA's restriction from its constitutional infirmities.[17] Consider, for example, the following hypothetical speech restriction: "The transit authority bans all advertisements that a reasonably prudent person, knowledgeable of the MBTA's ridership and using prevailing community standards, would find to be in poor taste or aesthetically displeasing." This hypothetical example, similar to the MBTA's "demeaning or disparaging" policy, is not based on any *objective criteria*, but, instead, allows for *ambiguous* and *subjective reasons* for restricting speech in violation of the First Amendment. *See, e.g., United Food*, 163 F.3d at 359. Indeed, in reality, the dressed-up disguise of objectivity merely hides a viewpoint-based censorship of speech with which the MBTA does not agree or simply does not like, in direct violation of the First and Fourteenth Amendments.

4. The MBTA's Speech Restrictions Are Not Reasonable.

Reasonableness is evaluated "in light of the purpose of the forum and *all the surrounding circumstances*." *Cornelius*, 473 U.S. at 809 (emphasis added); *see also Brown v. Cal. Dep't of Transp.*, 321 F.3d 1217, 1222-23 (9th Cir. 2003) (preliminarily enjoining the enforcement of the California Department of Transportation's policy of permitting the display of American flags, but prohibiting

[17] The MBTA's advertising guidelines state, "For the purposes of determining whether an advertisement contains such material, the MBTA will determine whether a reasonably prudent person, knowledgeable of the MBTA's ridership and using prevailing community standards, would believe that the advertisement contains material that ridicules or mocks, is abusive or hostile to, or debases the dignity and stature of, an individual or group of individuals."

the display of all other banners and signs on highway overpass fences, a nonpublic forum, concluding, *inter alia*, that the "proffered justification" for the restriction was "patently unreasonable"). And, contrary to the district court's conclusion, the "reasonableness" requirement for speech restrictions "requires more of a showing than does the traditional rational basis test; *i.e.*, it is not the same as establishing that the regulation is rationally related to a legitimate government objective, as might be the case for the typical exercise of the government's police power. There must be evidence in the record to support a determination that the restriction *is* reasonable. That is, there must be evidence *that the restriction reasonably fulfils a legitimate need*."[18] *Sammartano v. First Judicial Dist. Court*, 303 F.3d 959, 966-67 (9th Cir. 2002) (internal quotations and citations omitted).

In *Tucker v. Cal. Dep't of Educ.*, 97 F.3d 1204, 1215 (9th Cir. 1996), for example, the Ninth Circuit struck down a speech restriction in a nonpublic forum, holding that it was unreasonable and stating that there is "nothing in the record to indicate that religious materials are more likely to disrupt harmony in the workplace than any other materials on potentially controversial topics such as same-sex marriage, labor relations, and even in some instances sports. Thus, this

[18] Here, even the district court acknowledged that the MBTA's decision to censor Plaintiffs' speech was not entirely reasonable, stating that "the Court agrees with the plaintiffs that the ***most reasonable*** interpretation of their advertisement is that they oppose acts of Islamic terrorism directed at Israel." (*MBTA I* Mem. & Order at 15, ADD 15) (emphasis added).

case is unlike *Cornelius* where there was evidence in the record—thousands of letters complaining about the inclusion of advocacy groups in the fund drive—that supported the inference that the restriction in question would serve the government's legitimate concern about disruption in the workplace." The situation in *Tucker* is the same here. Indeed, the record demonstrates that the MBTA was willing to accept the "disharmony" that was actually caused by the Anti-Israel Advertisement, which a segment of the MBTA's ridership found offensive, but yet unwilling to run two of Plaintiffs' advertisements based upon some unsubstantiated, subjective fear that some of its ridership might find these advertisements offensive (*i.e.*, demeaning or disparaging toward Muslims and or Palestinians).[19] And, as noted previously, the MBTA is basing its claim on its conclusion that the word "savage" as an adjective defining "acts" is not demeaning or disparaging in the context of Plaintiffs' advertisements, but using "savage" as a noun to refer to those who engage in these savage acts (*i.e.*, violent jihad) *is* somehow demeaning or disparaging. This proffered justification is "patently unreasonable," *Brown*, 321 F.3d at 1223, particularly in light of "all the

[19] The proffered justification for the MBTA's speech restriction is that it will allegedly maintain ridership levels and provide a safe and welcoming environment for its riders, *see Ridley*, 390 F.3d at 93—goals that were undermined by the MBTA's acceptance of the Anti-Israel Advertisement. Thus, the district court's efforts to distinguish the Anti-Israel Advertisement are unavailing. (*See MBTA I* Mem. & Order at 21-23 [acknowledging, however, "the fact that the [Anti-Israel Advertisement] deeply offends plaintiffs and might offend other members of the community"], ADD 21-23).

surrounding circumstances," *Cornelius*, 473 U.S. at 809, including the MBTA's willingness to "demean and disparage" its Jewish ridership by displaying the Anti-Israel Advertisement, *see, e.g.*, *Ridley*, 390 F.3d at 87 (noting that such "underinclusiveness raises a suspicion" of "an impermissible motive").

In sum, regardless of the nature of the forum, the MBTA's prior restraints on Plaintiffs' speech are unreasonable and thus unconstitutional.

III. Plaintiffs Will Suffer Irreparable Harm in the Absence of Injunctive Relief.

The proof of irreparable harm suffered by Plaintiffs is clear and convincing. 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); *Newsom 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*).

IV. The Balance of Equities Tips Sharply in Favor of Granting the Injunctions.

The likelihood of harm to Plaintiffs without the injunctions is substantial because the deprivation of First Amendment rights, even for minimal periods, constitutes irreparable injury. (*See supra* sec. III). On the other hand, if the MBTA is enjoined from enforcing its prior restraints on Plaintiffs' speech, it will

suffer no harm because the exercise of constitutionally protected rights can never harm any of the MBTA's legitimate interests. (*See infra* sec. V).

V. Granting the Injunctions Is in the Public Interest.

Courts, including those in this Circuit, considering requests for preliminary injunctions have consistently recognized that the public interest is best served by upholding First Amendment freedoms. *See Westfield High Sch. L.I.F.E. Club v. City of Westfield*, 249 F. Supp. 2d 98, 128 (D. Mass. 2003) ("Protecting rights to free speech is *ipso facto* in the interest of the general public."); *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 . . . protection of First Amendment liberties"); *G & V Lounge, Inc. v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994) ("[I]t is always in the public interest to prevent the violation of a party's constitutional rights."); *Sammartano v. First Judicial Dist. Court*, 303 F.3d 959, 974 (9th Cir. 2002) (upholding the grant of a preliminary injunction because the "public interest favors protecting core First Amendment freedoms"); *Gordon v. Holder*, 721 F.3d 638, 653 (D.C. Cir. 2013) ("[E]nforcement of an unconstitutional law is always contrary to the public interest."). Thus, the public interest favors granting the requested injunctions.

CONCLUSION

For the foregoing reasons, this court should reverse the district court and remand with instructions to enter the requested injunctions.

Respectfully submitted,

AMERICAN FREEDOM LAW CENTER

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

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

Counsel for Plaintiffs-Appellants

CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P. 32(a)(7)(c), the foregoing Brief is proportionally spaced, has a typeface of 14 points Times New Roman, and contains 10,634 words, excluding those sections identified in Fed. R. App. P. 32(a)(7)(B)(iii).

AMERICAN FREEDOM LAW CENTER

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

Counsel for Plaintiffs-Appellants

CERTIFICATE OF SERVICE

I hereby certify that on June 16, 2014, I electronically filed the foregoing brief with the Clerk of the Court 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 also certify that all participants in this case are registered CM/ECF users.

I further certify that on June 16, 2014, I sent five copies of the Joint Appendix to the court and served one copy on the following counsel, by Federal Express:

PRINCE LOBEL TYE LLP
Joseph D. Steinfield
Jeffrey J. Pyle
100 Cambridge Street, Suite 2200
Boston, MA 02114

Counsel for Defendants-Appellees

AMERICAN FREEDOM LAW CENTER

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

Counsel for Plaintiffs-Appellants

ADDENDUM