# 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' REPLY BRIEF

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## INTRODUCTION

Defendants believe that *Ridley v. Mass. Bay Transp. Auth.*, 390 F.3d 65 (1st Cir. 2004), is the universal remedy that cures all First Amendment violations. According to Defendants' view, *Ridley* grants the MBTA unbridled discretion and license in perpetuity to restrict whatever speech or message it wants, so long as it is "reasonable"—a standard which Defendants construe in light of *Ridley* as an impenetrable wall in defense of their speech restrictions regardless of how objectively unreasonable they may be. That is, per Defendants rendering of *Ridley*, there is no speech restriction imposed by the MBTA that a court could ever construe as being "unreasonable," including a speech restriction that turns on whether a word, such as "savage," is used as a noun or an adjective. Thus, in light of Defendants' reasoning, *Ridley* prevents this or any other court in this circuit from seriously questioning whether the MBTA's restriction on a private citizen's speech violates the Constitution.

Of course, *Ridley* itself stands for no such broad proposition. And contrary to Defendants' argument (*see* Defs.' Br. at 10), the "law of the circuit" rule does not foreclose *this* court from deciding *this* case on the *actual facts* presented. Indeed, this court is required to take a fresh look at whether the MBTA has violated the First Amendment in *this* case, including whether Defendants' conscious decision to open its forum to debate on an exceedingly controversial

political topic such as the Israeli / Palestinian conflict changes the nature of the forum. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 567 (1995) (holding that 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"). In short, the facts of *this* case are not the facts of *Ridley*.

Indeed, it is telling that Defendants essentially "sweep under the carpet" a critically important fact in *this* case by relegating it to an innocuous footnote. (*See* Defs.' Br. at 3 n.1 ["In October 2013, the MBTA removed the Refugee Advertisement from its advertising space, but restored it after a brief period of time."]). It is critically important to remember that the "Refugee Advertisement"—the advertisement with the admittedly "anti-Israel" message (*see* Defs.' Br. at 19 ["The Refugee Advertisement can be read as critical of Israel, to be sure . . . ."]) that was conveyed within the context of the hotly contested political debate over the Israeli / Palestinian conflict—was approved for display and then removed after the MBTA received a firestorm of complaints from offended riders, (*see* Docs.17-1, 9-1: Geller Decls., JA 18, 151). Yet, despite these

complaints, which provided *actual* evidence that this "demeaning and disparaging" advertisement offended the MBTA's ridership (the justification for the restriction in the first instance, *see* Defs.' Br. at 4; JA 32), the MBTA *restored* it. And this offending advertisement is the very advertisement that Plaintiffs' speech sought to counter. (Docs.17-1, 9-1: Geller Decls., Exs. B, JA 18, 24, 152, 160).

Defendants describe Plaintiffs' view that the "Refugee Advertisement" was demeaning and disparaging as a "remarkable argument," stating further that "[c]ommon sense readily disposes of this theory." (Defs.' Br. at 20). Yet, Defendants' very own ridership—the alleged yardstick for measuring what is and what is not "demeaning and disparaging" under the MBTA's Advertising Guidelines[1]—concurs with Plaintiffs.

Consider further Defendants' justification for the disparate treatment between Plaintiffs' rejected advertisements (Advertisement I and Advertisement III) and the advertisement Defendants had no choice but to accept in light of the district court's first order (Advertisements II). The decision to accept or reject Plaintiffs' advertisements turned on the grammatical use of the term "savage." Per

[1] As set forth in Defendants' brief and in the Advertising Guidelines themselves:

> For purposes of determining whether an advertisement contains [demeaning or disparaging] 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 or stature of, an individual or group of individuals.

(Defs.' Br. at 4; JA 32) (emphasis added).

Defendants: "Once 'savage' became an adjective – and an adjective used to describe acts rather than people – the ad changed dramatically." (Defs.' Br. at 25). Thus, according to Defendants' logic, it is demeaning and disparaging (and thus prohibited) to describe one's political opponent as a liar but not so if you say that he lies under oath. And it's apparently demeaning and disparaging to describe your opponent as immoral, but permissible to say that he engages in immoral acts. If this is not unreasonable, then the "reasonableness" standard is no standard at all; it is simply whatever the government regulators want it to be. So it is that Defendants had to engage in these linguistic contortions because Plaintiffs' subsequent advertisements exposed the absurdity of Defendants' rejection of Plaintiffs' first advertisement and thus the unreasonableness (and viewpoint-based nature) of Defendants' Advertising Guidelines, particularly as applied here. Consequently, as Plaintiffs argued in their opening brief, Plaintiffs' subsequent advertisements were not submitted to the MBTA as part of some sort of game, as the district court claimed (*see MBTA II* Mem. & Order at 7, ADD 31 [improperly accusing Plaintiffs of engaging in "blatant gamesmanship"]), but they were submitted to expose Defendants' decisions for what they were: unconstitutional, prior restraints on speech. *Lebron v. Wash. Metro. Area Transit Auth.*, 749 F.2d 893, 896 (D.C. Cir. 1984) (Bork, J.) (describing a transit authority's refusal to accept a proposed advertisement as "a clearcut prior restraint" on speech).

In the final analysis, the facts of *this* case compel the conclusion that the forum is a public forum. But regardless of the nature of the forum, the facts demonstrate that Defendants' speech restrictions are unreasonable and viewpoint based in violation of the First Amendment.

## ARGUMENT

### I. *Ridley* Does Not Foreclose a Forum Analysis.

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 v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 802 (1985). 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." *United Food & Commercial Workers Union, Local 1099 v. Sw. Ohio Reg'l Transit Auth.*, 163 F.3d 341, 351-52 (6th Cir. 1998) (hereinafter "*United Food*") (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").

"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." *Ridley*, 390 F.3d 76-77; *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 as this court stated in *Grace Bible Fellowship, Inc. v. Maine Sch. Admin. Dist. No. 5*, 941 F.2d 45, 47 (1st Cir. 1991), when conducting the policy/practice analysis, "actual practice speaks louder than words"—meaning, contrary to Defendants' argument, *practice* trumps "expressions of intent," (*see* Defs.' Br. at 11 [arguing that "Plaintiffs have not shown . . . that the MBTA has liberalized its expressions of intent regarding the forum"]). This is necessarily the case because if it were otherwise any government agency could defeat a constitutional challenge to its speech restriction by simply proclaiming its "intent" to keep the forum closed for speech it dislikes. This case is such an example.

Consequently, actual practice is the best measure of whether the government has in fact, as the Supreme Court stated, limited its advertising space "to *innocuous* and *less controversial* commercial and service oriented advertising," thereby acting as a proprietor of a commercial enterprise and thus not creating a public forum, *see Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974), or whether the government has created a public forum by intentionally opening its advertising space to *controversial political* issues (and perhaps none more controversial than

the Israeli / Palestinian conflict). *This* is the lesson (and holding) of *Lehman*, which *Ridley* described as "[t]he *only Supreme Court case directly on point*." *Ridley*, 390 F.3d at 78 (emphasis added). Indeed, this clear lesson of *Lehman* (a decision that *is* binding on this court) is affirmed by the many cases cited by Plaintiffs. *N.Y. Magazine v. Metro. Transp. Auth.*, 136 F.3d 123, 130 (2d Cir. 1998) ("Disallowing 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."); *United Food*, 163 F.3d at 355 ("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."); *Planned Parenthood Ass'n/Chicago Area v. Chicago Transit Auth.*, 767 F.2d 1225 (7th Cir. 1985) (distinguishing *Lehman* and 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); *DiLoreto v. Downey Unified Sch. Dist. Bd. of Educ.*, 196 F.3d 958, 965-66 (9th Cir. 1999) (observing that "[g]overnment 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*" and "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") (citing, *inter alia*, *Lehman*, 418 U.S. at 303-04) (emphasis added).

In sum, as *Ridley* itself confirms, *Lehman* is controlling, and *Lehman* compels a finding that the forum at issue is a public forum for Plaintiffs' speech.[2]

Moreover, this is not a situation where, as discussed in *dicta* in *Ridley* and relied upon by Defendants, the MBTA "has opened up discussion on one particular 'topic' (say, religion)." (Defs.' Br. at 13 [quoting *Ridley*, 390 F.3d at 91]). That is too simplistic an explanation for the facts presented here because the suggested hypothetical "topic" is too broad. Indeed, the topic of "religion" could include

[2] Because it is a public forum, Defendants' speech restrictions violate the Constitution because they are, at a minimum and unquestionably, content based. *Consol. Edison Co. of N.Y. v. Pub. Serv. Comm. of N.Y.*, 447 U.S. 530, 537 (1980) (holding that a content-based restriction is one that "restrict(s) expression because of its message, its ideas, its subject matter, or its content"); *Cornelius*, 473 U.S. at 800 (stating that content-based restrictions are subject to strict scrutiny); *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 642 (1994) ("[Courts] apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content."); *S.O.C., Inc. v. Cnty. of Clark*, 152 F.3d 1136, 1145 (9th Cir. 1998) (stating that content-based restrictions "are presumptively unconstitutional").

messages ranging from an advertisement for a new church to an advertisement discussing the issue of whether Islam is a religion of peace—the latter being more closely akin to discussing the Israeli / Palestinian conflict, and more precisely, discussing whether Palestinians are "refugees," that is, persons persecuted and driven from their homeland by Israelis (the unmistakable message of the "Refugee Advertisement") or "savages" because they engage in violent jihad against innocent Israelis. If the government allowed the latter issue to be discussed, but prohibited a speaker from expressing the view that it is not a religion of peace, but a doctrine of violence, how is it that (1) in light of *Lehman*, the forum has not become a public forum, particularly for this issue, and (2) the restriction is not viewpoint based? By opening the forum to an exceedingly controversial and hotly-debated *issue* (not simply a general "topic"), Defendants have created a public forum for Plaintiffs' speech. And, as discussed further in Plaintiffs' opening brief (Pls.' Br. at 34-38) and in the following text, by restricting Plaintiffs' message, Defendants have engaged in viewpoint-based discrimination,[3] which is prohibited

[3] Contrary to Defendants' assertion (*see* Defs.' Br. at 19 [claiming that Plaintiffs' "attempt to raise viewpoint discrimination now as to Advertisement III is unavailing"]), Plaintiffs have not "waived" any argument regarding the viewpoint-based nature of Defendants' rejection of Advertisement III. As stated in Plaintiffs' memorandum in support of their motion for preliminary injunction with regard to Advertisement III:

> The MBTA apparently has no concern that its "ridership" is offended by the Anti-Israel Advertisement, *demonstrating further the viewpoint-based nature of Defendants' speech restriction here*. *See, e.g.*, *Ridley*, 390 F.3d at

in all forums. *See Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995).

## II. Controlling Law, including *Ridley*, and Common Sense Dictate that Defendants' Speech Restrictions Are Unreasonable and Viewpoint Based.

As noted previously, there is a fundamental problem in this First Amendment challenge. The MBTA wishes to open its forum to the most controversial of political speech (addressing one of the most controversial political issues) while, at the same time, applying some standard it somehow concludes is reasonable to determine when controversial political speech becomes demeaning. The MBTA assures us that not only does it have the wherewithal to come up with some reasonable approach to accomplish this task—an approach that *must* be *objectively* based, *see United Food*, 163 F.3d at 359 (holding 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

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87 (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").

(AFDI II, Pls.' Mem. in Supp. of Mot. for Prelim. Inj. at 4 n.2 [emphasis added] [Doc. 19]; *see also id*. at 5 n.3 ["[U]sing 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."]; *id*. at 10 [defining the legal standard as follows: "a speech restriction must be reasonable and viewpoint neutral to pass constitutional muster" (quoting *Perry Educ. Ass'n v. Perry Local Educators*, 460 U.S. 37, 46 (1983))]; *id*. 13-14, n.6 [discussing the viewpoint-based nature of Defendants' speech restriction]).

*objective criteria*, but may rest on 'ambiguous and subjective reasons'") (citation omitted) (emphasis added)—it has done so in this case. What we are left with, however, is the absurd result that you can label those who oppose Israel as "those who are engaging in savage acts," but you cannot label as "savages" those who oppose Israel with "violent jihad." Indeed, how is it demeaning or disparaging to describe those who engage in violent jihad—which every *reasonable* person, particularly the ridership of the MBTA who witnessed violent jihad firsthand at the Boston Marathon in 2013, understands is terrorism—as savages? Is it demeaning and disparaging to all Muslims to describe the Tsarnaev brothers (or Hamas) as "savages"? Of course not. *Cornelius*, 473 U.S. at 809 (stating that reasonableness is evaluated "in light of the purpose of the forum and all the surrounding circumstances"); *Sammartano v. First Judicial Dist. Court*, 303 F.3d 959, 966-67 (9th Cir. 2002) (observing that in the First Amendment context, the "reasonableness" requirement "requires more of a showing than does the traditional rational basis test").

Moreover, while the two advertisement's messages ("savage acts" of Advertisement II versus "savages" of Advertisements I and III) may have similar meaning, the impact of the messaging is quite different, and it is the messaging of calling a spade a spade—*i.e.*, someone who uses violent jihad to oppose Israel is a savage—that is the political speech (and viewpoint) Plaintiffs wish to convey. Or,

to put it in a more contemporary vernacular, Plaintiffs wish to convey not only the meaning of AFDI Advertisements I and III, but also the message that they have the courage to speak truth to power. It is not the government's job—or right—to change that messaging with its version of politically acceptable speech. Thus, while the phrase "all men are created equal" might mean the same thing as "government should not be permitted to pass laws that discriminate between two people based upon factors the law does not recognize as constitutionally permissible," the advertising message of the former has an impact the speaker wishes to create that the latter loses entirely. Advertising (and more important, political speech protected by the First Amendment) is as much about the impact of the messaging as it is the meaning of the text.[4] And this court understood—and underscored for purposes of the First Amendment—that principle in *Ridley*:

> 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*.

[4] Compare, as another example, one message that says "Dzhokhar Tsarnaev is guilty of using and conspiring to use with his brother a weapon of mass destruction resulting in death and with malicious destruction of property resulting in death" with a message stating, "The Tsarnaev brothers are ruthless killers." The messages may ultimately mean the same, but the impact (and, indeed, viewpoint) expressed by each is quite different.

*Ridley*, 390 F.3d at 88 (emphasis added). In short, it does not take any experience on Madison Avenue to recognize the difference in the messaging impact (and thus viewpoint expressed) between "savages" and "those who engage in savage acts," while recognizing that they have similar meaning. Consequently, not only is this form of messaging discrimination unreasonable, particularly in light of all the circumstances, it is inherently viewpoint based in violation of the First Amendment. *Rosenberger*, 515 U.S. at 829 ("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.") (emphasis added); *Cornelius*, 473 U.S. at 806 (stating that 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"); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993) ("[T]he First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.") (internal quotations and citation omitted).

In sum, Defendants' speech restrictions are unreasonable and viewpoint based in violation of the First Amendment.

## III. Plaintiffs Are Irreparably Harmed as a Matter of Law and the Public Interest Favors Granting the Injunctions.

Defendants argue that even if Plaintiffs are likely to succeed on the merits, they could not suffer irreparable harm and gain the benefit of the balance of

equities because Defendants have permitted Plaintiffs to run AFDI Advertisement II. (Defs.' Br. at 26-27). Defendants miss the point of the First Amendment. First and foremost, if Plaintiffs are likely to succeed on the merits of their free speech claims, they have suffered irreparable harm *as a matter of law*. *Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."). Moreover, the fact that Defendants restored (and thus permitted) the display of the Refugee Advertisement in the face of *evidence* that this advertisement actually offended the MBTA's ridership undermines any claim they have to justifying their restrictions based upon the "ridership-promoting purposes of the advertising program." *See generally Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993) ("[A]law cannot be regarded as protecting an interest of the highest order when it leaves appreciable damage to that supposedly vital interest unprohibited."). And finally, there is no question that "it is always in the public interest to prevent the violation of a party's constitutional rights." *G & V Lounge, Inc. v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994).

In sum, upon finding that Plaintiffs are likely to succeed on the merits of their constitutional claims, the injunctions should issue. *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.").

## CONCLUSION

For the foregoing reasons and for those set forth in Plaintiffs' opening brief, this court should reverse the district court and remand with instructions to enter the requested injunctions.

Respectfully submitted,

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## 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 3,628 words, excluding those sections identified in Fed. R. App. P. 32(a)(7)(B)(iii).

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## CERTIFICATE OF SERVICE

I hereby certify that on August 1, 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.

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## ADDENDUM