IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

AMERICAN FREEDOM DEFENSE INITIATIVE; *et al.*, Plaintiffs, -v.- SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY ("SEPTA"); *et al.*, Defendants.	Case No. 2:14-cv-05335

PLAINTIFFS' POST-HEARING BRIEF IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

This case arises out of the *government*'s censorship of private citizens' speech on a *public issue*—speech which "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) (internal quotations and citations omitted); Mem. Op.' at 4 (Doc. 28). Moreover, SEPTA's "refusal to accept [Plaintiffs' advertisement] for display because of [its] content is a clearcut prior restraint." *Lebron v. Wash. Metro. Area Transit Auth.*, 749 F.2d 893, 896 (D.C. Cir. 1984) (Bork, J.). Therefore, SEPTA "carries a *heavy burden* of showing justification" for its censorship—a burden that it cannot carry here. *See id*.

And while the *proper* application of a forum analysis demonstrates that SEPTA created a *public forum* for Plaintiffs' ad such that its content-based restriction on Plaintiffs' speech violates the First Amendment, this court need not tackle the forum issue because SEPTA's speech restriction is *viewpoint-based as a matter of law* under *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), and thus unconstitutional regardless of the nature of the forum.[1]

In sum, because Plaintiffs can demonstrate a substantial likelihood of success on their First Amendment claim and have suffered irreparable harm as a result, *Elrod v. Burns*, 427 U.S. 347, 373 (1976), the balance of equities tips sharply in their favor and the public interest favors granting the requested injunction, *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.").

[1] *See Pitt. League of Young Voters Educ. Fund v. Port Auth. of Allegheny Cnty.*, 653 F.3d 290, 296 (3d Cir. 2011) ("Although the parties have briefed and argued the issue, we need not tackle the forum-selection question. Regardless of whether the advertising space is a public or nonpublic forum, the coalition is entitled to relief because it has established viewpoint discrimination.").

STATEMENT OF RELEVANT FACTS

I. Plaintiffs' Public Issue Speech.

Plaintiff AFDI is a nonprofit 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, and individual rights. It achieves its objectives through a variety of lawful means, including through the exercise of its right to freedom of speech under the U.S. Constitution. (Hr'g Ex. 1, Tab 2, Geller Decl. ¶ 5).

AFDI engages in free speech and promotes its objectives by, *inter alia*, purchasing advertising space on transit authority property in major cities throughout the United States, including Philadelphia. AFDI purchases these advertisements to express its message on current events and public issues, including issues such as Islam's hatred of Jews (hereinafter referred to as "AFDI's advertising campaign"). (Hr'g Ex. 1, Tab 2, Geller Decl. ¶ 6).

Plaintiffs Geller and Spencer are AFDI's president and vice president, respectively, and they engage in protected speech through AFDI's activities, including AFDI's advertising campaign. (Hr'g Ex. 1, Tab 2, Geller Decl. ¶¶ 1, 2, 7).

On or about May 27, 2014, Plaintiffs submitted an advertisement ("AFDI Advertisement") to Scott E. Goldsmith, EVP & Chief Commercial Officer for Titan, for display on SEPTA's advertising space. Shortly after receiving the request, Goldsmith confirmed with Plaintiff Geller that the advertisement was "being reviewed by SEPTA." (Hr'g Ex. 1, Tabs 1, 2, Stip. ¶ 17, Geller Decl. ¶ 15, Ex. B).

The AFDI Advertisement states, in relevant part: "Islamic Jew-Hatred: It's in the Quran. Two Thirds of All US Aid Goes to Islamic Countries. Stop the Hate. End All Aid to Islamic Countries." (Hr'g Ex. 1, Tabs 1, 2, Stip. ¶ 17, Geller Decl. ¶ 16). And it appears as follows:

(Hr'g Ex. 1, Tabs 1, 2, Stip. ¶ 17, Geller Decl. ¶¶ 17, 18, Ex. C).

The message of the AFDI Advertisement is timely in light of the fact that many Jews (and Christians) are being persecuted in Islamic countries in the Middle East, and many of these countries receive aid from the United States. (Hr'g Ex. 1, Tab 2, Geller Decl. ¶ 19).

This very same advertisement (AFDI Advertisement) recently ran on public transit authority advertising space in Washington, D.C., and in New York City, without incident in either location. (Hr'g Ex. 1, Tab 2, Geller Decl. ¶ 20).

II. SEPTA's Creation of a Public Forum for Public Issue Speech.

SEPTA is the public transportation provider serving the five-county region of Southeastern Pennsylvania and is a government agency.[2] (Hr'g Ex. 1, Tab 1, Stip. ¶ 2). SEPTA leases space on its vehicles and transportation stations for use as advertising space. (Hr'g Ex. 1, Tabs 1, 2, Stip. ¶¶ 4-9, 13, 14, Geller Decl. ¶ 10). SEPTA has an exclusive contract with Titan to solicit and prepare advertising material for display in, about, and upon SEPTA's advertising space. This contract contains 13 advertising standards ("Advertising Standards"). (Hr'g Ex. 1, Tabs 1, 2, Stip. ¶¶ 4-9, 13, 14, Geller Decl. ¶ 10, Ex. G).

SEPTA does not limit the use of its advertising space to innocuous and less controversial commercial and service oriented advertising. Rather, SEPTA has displayed a wide array of

[2] As a government agency, SEPTA must comply with the U.S. Constitution and 42 U.S.C. § 1983. *See Christ's Bride Ministries, Inc. v. SEPTA*, 148 F.3d 242, 247 (3d Cir. 1998) (concluding that SEPTA "is a state actor" and its "actions are constrained by the First and Fourteenth Amendments"). For purposes of claims arising under § 1983, SEPTA is treated as a municipal agency when determining its liability. *Cooper v. SEPTA*, 548 F.3d 296, 311 (3d Cir. 2008) (concluding that "SEPTA is not entitled to Eleventh Amendment immunity").

commercial and noncommercial public-service, public-issue, political-issue, and religious-issue advertisements, including controversial advertisements addressing these issues. (Hr'g Ex. 1, Tab 1, Stip. ¶¶ 9, 13, Ex. A; Hr'g Tr. at 59, 61 [acknowledging the controversial nature of the ads]).[3]

For example, between January 1, 2011 and December 1, 2014, SEPTA displayed on its advertising space the following "*public issue* advertisements":[4]

- A religious message announcing the "Judgment Day," stating that "The Bible Guarantees It," and quoting scripture, "*Cry mightily unto God*" [Jonah 3:8];
- A political message addressing the controversial issue of "teacher seniority" submitted by the Commonwealth Foundation for Public Policy Alternatives, a "free-market think tank" that "crafts free-market policies, convinces Pennsylvanians of their benefits, and counters attacks on liberty." *See* http://www.commonwealthfoundation.org/about/;
- Advertisements submitted by Planned Parenthood expressing controversial messages such as, "Making you safe for romance. Affordable STD testing" and "Relationships require planning. Affordable birth control";
- An advertisement from the Traveling Animals Protection Society urging the "end" to "animal circuses";

[3] The transcript of the preliminary injunction hearing is filed as document number 35.

[4] SEPTA's argument that its advertising space is a nonpublic forum because its advertising agent, Titan, does not "solicit" public issue advertisements is meaningless. The only relevant question for this court is whether SEPTA in fact *displays* controversial, public issue advertisements, which it does—a practice which demonstrates that the forum is suitable for Plaintiffs' advertisement and thus a public forum for Plaintiffs' speech. *See infra*. Moreover, while Titan may not "solicit" such advertisements, SEPTA certainly does, boasting on its webpage titled "Advertising Opportunities" that "SEPTA offers various ways for advertisers to effectively communicate with the approximately 1 million commuters that ride SEPTA each day" and setting forth the various ways in which advertisers could make use of SEPTA's advertising space to effectively convey their message. SEPTA, therefore, "solicits" *all* advertisers without even suggesting that the forum is limited to only certain types of messages or subject matter. (Hr'g Ex. 5 [SEPTA's Advertising Opportunities webpage]).

- Advertisements addressing the controversial issue of "fracking," stating, "Mother said, 'Never play with fire,' What price are you willing to pay to secure our energy future? Keep our water safe from fracking. Act Now";

- Advertisements urging viewers to "Learn about shale," "A Community Conversation on Natural Gas"—*a message countering the anti-fracking lobby* (above);

- Advertisements from the Hope Pregnancy Center, stating, "Pregnant? You have options";

- An advertisement from Bethany Christian Services, stating, "Unplanned pregnancy? Need to talk?"; and

- Multiple advertisements on the issue of sexual harassment that are part of the "Hollaback" campaign, which uses offensive and provocative language to express its message, such as, "Nice a** is not a compliment," "Hey sexy," "What, you gay?," "Look at those legs," "You a dyke?," among others, including some that accuse men who merely stare at women as being guilty of "street harassment." (Hr'g Ex. 1, Tab 1, Stip. ¶ 13, Ex. A).

On October 29, 2014, *and in response to Plaintiffs' advertisement*,[5] SEPTA modified its contract with Titan with a "First Amendment" "to address advertisements with political content and/or that pertain to political activities." (Hr'g Ex. 2; Hr'g Tr. at 58:3-5 ["And we made that clearer *because of your ad* and that's what the amendment did, so you wouldn't have any mistake about it."] [emphasis added]). This amendment is *not* retroactive and thus does *not* apply to the AFDI Advertisement.[6] (Hr'g Tr. at 93-94).

[5] This lawsuit was filed on September 18, 2014. (Compl. [Doc. 1]).

[6] Moreover, the Supreme Court has long recognized that "voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case . . . ." *United States v. W. T. Grant Co.*, 345 U.S. 629, 632 (1953). As the Court noted, not only is a defendant "free to return to his old ways," but also the public has an interest "in having the legality of the practices settled." *Id.* at 632; *see also City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 n.10 (1982) ("Mere voluntary cessation of allegedly illegal conduct does not moot a case; if

III. SEPTA's Viewpoint-Based Rejection of the AFDI Advertisement.

On June 3, 2014, Defendants officially rejected the AFDI Advertisement. In an email from Goldsmith to Plaintiff Geller, he states:

> Pamela: The following *is the official response from SEPTA* in regard to your proposed advertisement:
>
> 1. SEPTA has reviewed your proposed ad and has determined that it does not comply with the advertising standards in Titan's agreement with SEPTA;
>
> 2. The ad does not comply with Section 9(b)(xi) which prohibits "*Advertising that tends to* ***disparage*** *or ridicule any person or group of persons* ***on the basis of race, religious belief, age, sex, alienage, national origin, sickness or disability****.*"
>
> 3. SEPTA and Titan would be happy to review another proposed advertisement or discuss the reasons for the denial.[7]

(Hr'g Ex. 1, Tab 2, Geller Decl. ¶ 21, Ex. D) (emphasis added). Thus, SEPTA rejected the AFDI Advertisement because it allegedly "disparaged a group based on religious belief." (Benedetti Decl. ¶¶ 4, 7 [Doc. 24-9]; *see also* Hr'g Tr. at 46:22-25 [stating that the AFDI Advertisement is "disparaging" because it "put every single Muslim in the same category as being a Jew hater, and it informed the reader that [al-Husseini] is the leader of the Muslim world"]).

IV. SEPTA's Ambiguous and Indefinite Advertising Standards.

Upon receiving SEPTA's rejection, on or about June 30, 2014, Plaintiffs' counsel requested from Goldsmith "the full text of SEPTA's advertising standards as set forth in Titan's agreement with SEPTA and any other advertising policies/procedures of SEPTA that may or may not be part of SEPTA-Titan agreement but that which are applicable when reviewing a

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it did, the courts would be compelled to leave the defendant free to return to his old ways.") (alterations and quotation marks omitted). Moreover, "[a]long with its power to hear the case, the court's power to grant injunctive relief survives discontinuance of the illegal conduct." *W. T. Grant Co.*, 345 U.S. at 633. Indeed, the Court warned the lower courts to be particularly vigilant in cases such as this, stating, "It is the duty of the courts to beware of efforts to defeat injunctive relief by protestations of repentance and reform, especially when abandonment seems timed to anticipate suit, and there is probability of resumption." *Id*. at 632 n.5.

[7] According to SEPTA's general counsel, this was an invitation to *revise* the rejected advertisement so as to make it acceptable to SEPTA and not simply an invitation to submit a new advertisement. (Hr'g Tr. at 37:21-24).

proposed ad such as [the AFDI Advertisement]." (Hr'g Ex. 1, Tab 2, Geller Decl. ¶ 22, Ex. E). On or about July 7, 2014, Goldsmith responded to the request, stating, in relevant part, "Attached please find Section 9 of Titan's contract with SEPTA. It details the advertising standards/prohibitions for SEPTA." Attached to this email was a copy of SEPTA's Advertising Standards. (Hr'g Ex. 1, Tab 2, Geller Decl. ¶ 23, Exs. F & G).

SEPTA does not maintain any advertising standards separate and apart from those contained within the Titan contract. (Hr'g Tr. at 23:1-3; Hr'g Ex. 1, Tab 2, Ex. G). Further, SEPTA's Advertising Standards contain no definitions or written provisions setting forth the procedures for accepting or rejecting an advertisement, nor do they contain any written standards or procedures for an aggrieved advertiser to appeal a decision made by SEPTA.[8] (Hr'g Ex. 1, Tab 2, Ex. G; Hr'g Tr. at 24-27, 30-35). Consequently, <u>*how*</u> SEPTA decides whether an advertisement is "disparaging" is based on a flexible, indefinite, and subjective standard. (Hr'g Tr. at 39:14-17 [rejecting the ad based upon how *he* "understood" the term "disparage"]; at 39:10-13 [admitting that there is no written definition of "disparage"]; at 39-40 [acknowledging that "disparage" could include, *inter alia*, "a wide range of possibilities," such as "disparagement only by implication or innuendo"] at 54:3-4 [admitting that the Hollaback ads could disparage "rude men"]; *see also* Hr'g Tr. at 42:5-7 [acknowledging that "the policies from SEPTA didn't include a definition of disparagement"]; at 42:22-43:4 [admitting that there is no "written definition for disparage" and claiming to rely on the very broad "Webster definition"]; Hr'g Ex. 3 [Merriam-Webster definition of "disparage"]). And the ambiguity, if not absurdity, of SEPTA's "disparaging" standard was on full display when SEPTA's general counsel suggested that an ad expressing the message that "Islam is a noble and peaceful religion" could be

[8] The only *written* procedures state that "[a]ll advertising shall be submitted to SEPTA for review and approval prior to display." (Hr'g Ex. 1, Tab 2, Ex. G, Advertising Standards at ¶ 9(a)). However, this procedure was seldom, if ever, followed. (Hr'g Tr. at 24:1-4 ["That's what this says, but that was not what was done in practice."]).

disparaging. [Hr'g Tr. at 62-65; *see also* Hr'g Tr. at 65 ["Well, if you're going to in your ad call every Muslim a Jew hater, then the opposite side of that is every Islam, Muslim person is for peace. I mean, I guess that could be disparaging to someone as well."]).

ARGUMENT

I. Standard for Issuing a Preliminary Injunction.

"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); *see also ACLU v. Black Horse Pike Reg'l Bd. of Educ.*, 84 F.3d 1471, 1477 n.2 (3d Cir. 1996) (en banc). Moreover, "[i]n the First Amendment context, the likelihood of success on the merits is the linchpin of the preliminary injunction analysis." *Sindicato Puertorriqueño de Trabajadores v. Fortuño*, 699 F.3d 1, 10 (1st Cir. 2012). Plaintiffs satisfy each factor.

II. Plaintiffs Are Likely to Succeed on the Merits.

Plaintiffs' First Amendment claim is reviewed in essentially three steps. First, the court must determine whether the speech in question—the AFDI Advertisement—is protected speech. Second, the court must conduct a forum analysis to determine the proper constitutional standard to apply. And third, the court must then determine whether SEPTA's speech restriction comports 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"); *see also Christ's Bride Ministries, Inc. v. SEPTA*, 148 F.3d 242 (3d Cir. 1998) (conducting a forum analysis and applying the applicable standard).

Moreover, as noted, SEPTA's refusal to accept the AFDI Advertisement for display is a prior restraint on speech. *Lebron*, 749 F.2d at 896. 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); *see also Lebron*, 749 F.2d at 896 (noting the transit authority's "heavy burden" to justify its prior restraint on speech).

A. Plaintiffs' Advertisement Is Protected Speech.

The court has already answered the first question, stating that "the advertisement at issue here is exactly the sort of political expression that lies at the heart of the First Amendment." (Mem. Op.' at 6 [Doc. 28]). Thus, Plaintiffs' ad "come[s] within the ambit of speech fully protected by the First Amendment." *Christ's Bride Ministries, Inc.*, 148 F.3d at 247; *United Food & Commercial Workers Union, Local 1099 v. Sw. Ohio Reg'l Transit Auth.*, 163 F.3d 341 (6th Cir. 1998) ("*United Food*") (holding that bus advertisements were protected speech); *N.Y. Magazine v. Metro. Transp. Auth.*, 136 F.3d 123, 130 (2d Cir. 1998) (same). And as this court further acknowledged, "[s]peech concerning public issues," such as Plaintiffs' advertisement, "'has always rested on the highest rung of the hierarchy of First Amendment values.'" (Mem. Op. at 4 [Doc. 28] [quoting *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982)]).

B. SEPTA 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.[9] *Id.*; *Pitt. League of Young Voters Educ. Fund*, 653 F.3d at 295 ("There are three types of fora."). Once the forum is identified, the court must then determine whether the speech restriction is justified by the requisite standard. *Cornelius*, 473 U.S. at 800.

The forum issue presented here is whether SEPTA's advertising space is a public forum for Plaintiffs' speech such that SEPTA's content-based restriction is presumptively unconstitutional or whether the advertising space is a nonpublic forum such that SEPTA's speech restriction must be reasonable and viewpoint neutral.

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

In a 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.*

A 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

[9] The courts have also recognized a fourth category known as a "limited public forum." The Third Circuit previously considered this type of forum to be a subset of a designated public forum, but it has recently acknowledged the possibility that this view may have been superseded by Supreme Court case law. *See Galena v. Leone*, 638 F.3d 186, 197-98 nn.8 & 9 (3d Cir. 2011).

because public officials oppose the speaker's view." *Id.* Thus, in a nonpublic forum, a speech restriction must be reasonable and viewpoint neutral to pass constitutional muster. *Id.*; *see also Pitt. League of Young Voters Educ. Fund*, 653 F.3d at 296 ("Access to a nonpublic forum can be restricted so long as the restrictions are reasonable and viewpoint neutral.").

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; *Christ's Bride Ministries, Inc.*, 148 F.3d at 247-48 ("In order to decide whether a public forum is involved here, we must first determine the nature of the property and the extent of its use for speech.").

Moreover, as noted by the Third Circuit, "if the concept of a designated open forum is to retain any vitality whatever, the definition of the standards for inclusion and exclusion must be ***unambiguous*** and ***definite***." *Gregoire v. Centennial Sch. Dist.*, 907 F.2d 1366, 1375 (3d Cir. 1990) (emphasis added); *see also 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).

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." *United Food*, 163 F.3d at 351-52 (internal quotations and citation omitted).

In *Christ's Bride Ministries, Inc. v. Southeastern Pennsylvania Transportation Authority*, 148 F.3d 242, 252-53 (3d Cir. 1998), the court held that SEPTA's "advertising space" was a designated public forum, noting that "the purpose of the forum does not suggest that it is closed, and the breadth of permitted speech points in the opposite direction." The court concluded that

"based on SEPTA's written policies, which specifically provide for the exclusion of only a very narrow category of ads, based on SEPTA's goal of generating revenues through the sale of ad space, and based on SEPTA's practice of permitting virtually unlimited access to the forum, that SEPTA created a designated public forum." *Id*. at 252. Practically speaking, not much has changed since *Christ's Bride*, as evidenced most convincingly by SEPTA's *willingness* to accept admittedly controversial political and public-issue advertisements and by the fact that it has *not* expressly or otherwise limited its advertising space to innocuous and less controversial commercial and service oriented advertising.[10]

SEPTA argues, in an apparent attempt to distinguish *Christ's Bride*, that since its advertising agent, Titan, does not actively *solicit* non-commercial advertisements the forum is therefore a nonpublic forum even though SEPTA nonetheless *displays* a wide-array of non-commercial and controversial public-issue advertisements. In *Christ's Bride*, there was evidence before the court that a "secondary goal in using the space"—the primary goal was "to earn a profit for SEPTA"—was to "promot[e] 'awareness' of social issues and [to] 'provid[e] a catalyst for change.'" *Id.* at 249. "These objectives [were] stated in the 'TDI Cares' brochure." *Id.* SEPTA objected to the court considering this evidence. And the court responded as follows: "the brochure plays little role in our decision. There is no evidence on the record of which ads actually ran in the campaigns described in the brochure or of how much advertising space SEPTA and/or TDI actually donated to those campaigns. Considered with the other evidence in the record, the brochure demonstrates, however, that the forum in question is suitable for speech concerning social problems and issues." *Id*. at 249 n.4. Similarly here, SEPTA's *actual practice*

[10] As the court noted, "SEPTA has accepted a broad range of advertisements for display. These include religious messages, such as 'Follow this bus to FREEDOM, Christian Bible Fellowship Church;' an ad criticizing a political candidate; and explicitly worded advertisements such as 'Safe Sex Isn't' and an advertisement reminding viewers that 'Virginity-It's cool to keep' and 'Don't give it up to shut 'em up.'" *Christ's Bride Ministries, Inc.*, 148 F.3d at 251.

(and its Advertising Standards which permit the practice) demonstrates "that the forum in question is suitable for speech concerning social problems and issues." *See also supra* n.4. That is, the forum is suitable for Plaintiffs' advertisement, which has already run without incident on transit authority advertising space in New York City and Washington, D.C.

The starting point for the court's forum analysis given the type of forum at issue (transit authority advertising space) is *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974). 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 transit authority 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) (emphasis added); *DiLoreto v. Downey Unified Sch. Dist. Bd. of Educ.*, 196 F.3d 958, 965 (9th Cir. 1999) (allowing commercial advertising but "exclud[ing] political and religious expression, indicate[s] an intent not to designate a public forum for all expressive activity, but to reserve it for commercial speech" and further noting that "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).

The Second Circuit concurs: "[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)[11] (emphasis added); *see also Planned Parenthood Ass'n/Chi. Area v. Chi. Transit Auth.*, 767 F.2d 1225 (7th Cir. 1985) (concluding that the advertising space on a bus system became a public forum where the transit authority permitted "a wide variety" of commercial and non-commercial advertising).

Perhaps the best explanation comes from the Sixth Circuit:

> [I]n 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. *Cf. Christ's Bride Ministries*, 148 F.3d at 252. Acceptance of political and public-issue advertisements, *which by their very nature generate conflict*, *signals a willingness on the part of the government to open the property to controversial speech*, which the Court in *Lehman* recognized as *inconsistent with operating the property solely as a commercial venture*.

United Food, 163 F.3d at 355 (citations omitted) (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 public forum for Plaintiffs' speech. SEPTA does *not*, whether by policy or practice, limit its advertising space "to innocuous and less controversial commercial and service oriented advertising." Rather, SEPTA accepts a wide array of controversial, political and public-issue advertisements (including competing ads debating the controversial issue of "fracking")—"which by their very nature generate conflict"—thereby "signal[ing] a willingness on the part of the government to open the property to

[11] *New York Magazine* was cited favorably by the Third Circuit in *Christ's Bride*. *Christ's Bride Ministries, Inc.*, 148 F.3d at 248 (citing *New York Magazine*'s "holding that because MTA allowed both commercial and political speech, the outside of the MTA buses is a designated public forum") (citing *N.Y. Magazine*, 136 F.3d at 130).

controversial speech, which *Lehman* recognized as inconsistent with operating the property solely as a commercial venture." *See United Food*, 163 F.3d at 355.

SEPTA's recent "First Amendment" to its Advertising Standards further demonstrates this point. No doubt realizing that under the standards applicable in this case the forum was open for Plaintiffs' message, SEPTA drafted a new standard designed to target the AFDI Advertisement.[12] (*See* Hr'g Tr. at 58:3-5). This is a tacit admission that the forum was a public forum for Plaintiffs' speech.

Moreover, a forum analysis does not end simply because SEPTA has adopted some restrictions on speech or employed these restrictions to reject certain advertisements. As the courts (including the Third Circuit) have noted, "it cannot be true that if the government excludes any category of speech from a forum through a rule or standard, that forum becomes *ipso facto* a non-public forum, such that we would examine the exclusion of the category only for reasonableness. This reasoning would allow every designated public forum to be converted into a non-public forum the moment the government did what is supposed to be impermissible in a designated public forum, which is to exclude speech based on content." *N.Y. Magazine*, 136 F.3d 129-30; *Christ's Bride Ministries, Inc.*, 148 F.3d at 249 ("Restrictions on the use of the forum, however, do not necessarily mean that SEPTA has not created a public forum.").

[12] While SEPTA's "First Amendment" to its Advertising Standards is not the subject of any claims advanced in this litigation, it should be noted that this half-hearted effort to close the forum is likely to add confusion and not clarity, as required by the First Amendment when attempting to restrict speech. *See Gregoire*, 907 F.2d at 1371 (stating that "the definition of the standards for inclusion and exclusion must be unambiguous and definite"); *United Food*, 163 F.3d at 359 (holding that a speech restriction must not permit government officials to limit speech based on "ambiguous and subjective reasons"). For example, under this revised standard, Plaintiffs' advertisement *without* the "end all aid to Islamic countries" language would be acceptable. The advertisement expresses a viewpoint on the religion of Islam (an acceptable subject matter), and Hitler and al-Husseini are currently historical, not political, figures. Would SEPTA ban an advertisement that displayed the image of Benjamin Franklin, for example, a historical figure and someone who was clearly, at one time, a political figure? We seriously doubt it. Consequently, the thrust of Plaintiffs' message is still permissible within this forum. In short, all of this points to the puzzling question as to why SEPTA doesn't clearly and unequivocally close the forum (if that is in fact its intent) by limiting its advertising space "to innocuous and less controversial commercial and service oriented advertising."

This is particularly the case when the government is attempting to impose an inherently viewpoint-based "civility" or "disparagement" restriction on what it knows is public-issue speech—an impermissible exercise under the First Amendment.[13] *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 271 (1964) ("[First Amendment] protection does not turn upon the truth, popularity, or social utility of the ideas and beliefs which are offered.") (internal quotations and citation omitted); *see also United States v. Alvarez*, 132 S. Ct. 2537, 2564 (2012) (Alito, J., dissenting) (stating that "it is perilous to permit the state to be the arbiter of truth" "about philosophy, religion, history, the social sciences, the arts, and other matters of public concern").

And it is patently incorrect to conclude that SEPTA's "civility" restriction is a restriction on an advertisement's *subject matter* (*e.g.*, a restriction on advertisements for alcohol, tobacco, or political candidates), such that it might reasonably lead a court to conclude that this forum is closed to controversial matters and therefore the government's intent to operate as a proprietor and not a speech regulator is clear. Rather, as argued further below, the "civility" restriction is an unconstitutional, viewpoint-based restriction. Consequently, this restriction does not justify concluding that the forum at issue is a nonpublic forum. Rather, it compels the conclusion that regardless of the forum, the restriction violates the Constitution. *See Ridley v. Mass. Bay Transp. Auth.*, 390 F.3d 65, 100 (1st Cir. 2004) (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.").

[13] This includes SEPTA's *view* that the AFDI Advertisement is "disparaging" because it expresses a *false view* of Islam. (Mem. Op. at 6 ["[T]he advertisement's statement 'Islamic Jew-Hatred: It's in the Quran. Two Thirds of All U.S. Aid Goes to Islamic Countries,' constitutes political expression and reflects Plaintiffs' *interpretation of a religious text*. This speech is thus entitled to even greater First Amendment protection than the speech at issue in *Alvarez*."] [Doc. 28] [emphasis added]).

In the final analysis, the nature of the property—SEPTA's advertising space—is compatible with Plaintiffs' expressive activity. *See Ridley*, 390 F.3d at 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 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 SEPTA does not limit its advertising space to innocuous commercial messages but rather permits advertisements expressing messages on controversial political and public-issue subject matter. Consequently, because the forum is wholly suitable for Plaintiffs' speech, *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 public forum for the display of Plaintiffs' ad. Therefore, SEPTA must demonstrate a *compelling* reason that is *narrowly tailored* to justify its prior restraint on Plaintiffs' speech—a burden that it cannot meet.

C. SEPTA's Speech Restriction Cannot Survive Constitutional Scrutiny.

1. SEPTA's Speech Restriction Is Content Based.

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). Accordingly, content-based restrictions in a public forum are subject to strict scrutiny, *Cornelius*, 473 U.S. at 800 (requiring exclusions to be "necessary to serve a compelling state interest and . . . narrowly drawn to achieve that interest"), and are thus "presumptively unconstitutional," *S.O.C., Inc. v. Cnty. of Clark*, 152 F.3d 1136, 1145 (9th Cir. 1998); *see also Christ's Bride Ministries, Inc.*, 148 F.3d at 255 ("Because we find that SEPTA

has created a designated public forum, content-based restrictions on speech that comes within the forum must pass strict scrutiny to comport with the First Amendment.").

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'n of N.Y.*, 447 U.S. 530, 537 (1980). Here, there is no dispute that, *at a minimum*, SEPTA rejected the AFDI Advertisement based on its content. And SEPTA has not argued (nor presented any evidence to support the argument) that its speech restriction survives strict scrutiny. *See Christ's Bride Ministries, Inc.*, 148 F.3d at 255 ("SEPTA has not argued that its actions survive strict scrutiny. Accordingly, we conclude that CBM's First Amendment rights were violated when SEPTA removed CBM's ads."). Therefore, SEPTA violated Plaintiffs' First Amendment rights.

2. SEPTA's Speech Restriction Is Viewpoint Based.

While the relevant facts and law demonstrate that the forum at issue is a public forum for Plaintiffs' speech, the court need not wrestle with this issue because SEPTA's speech restriction cannot survive constitutional scrutiny under the standard applicable in a nonpublic forum. That is, SEPTA's speech restriction is viewpoint-based as a matter of law.

Viewpoint discrimination is an egregious form of content discrimination that is prohibited in all forums. *See Rosenberger*, 515 U.S. at 829; *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); *Pitt. League of Young Voters Educ. Fund*, 653 F.3d at 296 ("Regardless of whether the advertising space is a public or nonpublic forum, the coalition is entitled to relief because it has established viewpoint discrimination."). "When the

government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant." *Rosenberger*, 515 U.S. at 829. Consequently, when speech "fall[s] within an acceptable subject matter otherwise included in the forum, the State may not legitimately exclude it from the forum based on the viewpoint of the speaker." *Cogswell v. City of Seattle*, 347 F.3d 809, 815 (9th Cir. 2003).

Here, there was nothing objectionable *per se* about the subject matter of Plaintiffs' message (*i.e.*, the conflict between Islam and Judaism, which is referenced in the Quran).[14] Consider, for example, a proposed advertisement that said "Islamic love of Jews . . . It's in the Quran." There is nothing in the Advertising Standards that would prohibit this message. Consequently, it is not the subject matter that is being restricted here, but Plaintiffs' viewpoint on the subject. This is a classic form of viewpoint discrimination, which is prohibited in all forums. *Cornelius*, 473 U.S. at 806; *see also NAACP v. City of Philadelphia*, No. 11-6533, 2014 U.S. Dist. LEXIS 105239, at *59-60 (E.D. Pa. Aug. 1, 2014) (holding that the Philadelphia International Airport's "unwritten policy" of rejecting advertisements that do not give visitors to Philadelphia "a positive image" of the region was viewpoint based in violation of the First Amendment and stating that the government "cannot create a forum for private speech and then exclude speakers they do not agree with"); *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).

Moreover, it is not acceptable to claim that SEPTA's restriction on Plaintiffs' speech was viewpoint neutral by arguing, for example, that Plaintiffs could run the advertisement if they "toned it down" or removed the picture of Hitler. Thus, SEPTA's concession that it would

[14] *See, e.g.*, Quran 5:51 ("O you who believe! do not take the Jews and the Christians for friends; they are friends of each other; and whoever amongst you takes them for a friend, then surely he is one of them; surely Allah does not guide the unjust people.").

consider a *revised* version of the AFDI Advertisement is further evidence that its restriction was viewpoint based. In *Ridley v. Massachusetts Bay Transportation Authority*, 390 F.3d 65 (1st Cir. 2004), the First Circuit addressed this issue in its holding 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,

> 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) (warning that "governments might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views"). Thus, attempting to reduce the effectiveness of a message by revising its content, even if the entire message itself is not prohibited, by way of SEPTA's "civility" standard is a form of viewpoint discrimination that is impermissible in every 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.").

Finally, but most important, the conclusion that SEPTA's speech restriction is viewpoint based is ***compelled*** by *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992). In *R.A.V.*, the Court was asked to review the constitutionality of an ordinance that prohibited "conduct that amounts to 'fighting words' *i.e.*, 'conduct that itself inflicts injury or tends to incite immediate violence,'" so as to protect "the community against bias-motivated threats to public safety and order." *Id.* at

380-81. Even though "fighting words" may be proscribed under the First Amendment, *see Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942), the Court struck down the ordinance because it only applied to prohibit such conduct "on the basis of race, color, creed, religion or gender." *R.A.V.*, 505 U.S. at 391. The Court concluded:

> In its practical operation, moreover, the ordinance goes even beyond mere content discrimination, to actual viewpoint discrimination. Displays containing some words—odious racial epithets, for example—would be prohibited to proponents of all views. But "fighting words" that do not themselves invoke race, color, creed, religion, or gender—aspersions upon a person's mother, for example—would seemingly be usable *ad libitum* in the placards of those arguing *in favor* of racial, color, etc., tolerance and equality, but could not be used by those speakers' opponents. One could hold up a sign saying, for example, that all "anti-Catholic bigots" are misbegotten; but not that all "papists" are, for that would insult and provoke violence "on the basis of religion." St. Paul has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules.

Id. at 391-92; *see also Ridley*, 390 F.3d 65-66 (noting "that the 2003 revision to the guidelines continued to prohibit demeaning or disparaging ads, but did so in more general terms, not tied only to certain categories such as race, religion, and gender," and further noting that this revision was "[m]ost likely . . . in light of *R.A.V.* . . . and later case law").

In sum, the advertising standard employed by SEPTA to restrict Plaintiffs' speech is viewpoint based and thus violates the First Amendment regardless of the nature of the forum.

3. SEPTA's Speech Restriction Is Unreasonable.

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) (granting a preliminarily injunction and finding that the "proffered justification" for the speech restriction was "patently unreasonable"). And 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." *Sammartano v. First Judicial Dist. Court*, 303 F.3d 959, 966-67 (9th Cir. 2002) (internal quotations and citations omitted) (emphasis added). As the Third Circuit observed: "Consideration of a forum's special attributes is relevant to the constitutionality of a regulation since the significance of the governmental interest must be assessed in light of the characteristic nature and function of the particular forum involved." *Christ's Bride Ministries, Inc.*, 148 F.3d at 255 (block quotation and citation omitted). Thus, "the reasonableness of the government's restriction on speech depends on the nature and purpose of the property for which it is barred." *Id.* For example, rules limiting disruptive behavior in a library are reasonable given the nature and purpose of a library. *See id.*

In *Christ's Bride*, the court concluded "that SEPTA's removal of the [anti-abortion] posters violated the First Amendment because the removal was not 'reasonable.'" *Id.* Despite the controversial nature of the abortion issue, the court concluded that "[t]he subject of the speech, and the manner in which it was presented, were compatible with the purposes of the forum," noting that "the government has offered no basis on which to conclude that the speech in question would interfere with the accepted purposes of the advertising space." *Id.* at 256.

In *NAACP v. City of Philadelphia*, the court held that the prohibition on non-commercial ads at the Philadelphia International Airport—a nonpublic forum—was "unreasonable" in that displaying such ads was "perfectly compatible" with the forum, would not "diminish advertising revenue" or the airport's "efficacy," nor make the airport "a meaningfully less positive, family oriented place." 2014 U.S. Dist. LEXIS 105239, at *43-47. Similarly here, it is unreasonable to

argue that an ad displayed on the outside of a bus traveling through Philadelphia—a bustling city in which passengers and outside observers are besieged by a cacophony of expressive media—would somehow interfere with the operation of the city's bus system. *See Cohen*, 403 U.S. at 21 (noting that viewers "could effectively avoid further bombardment of their sensibilities simply by averting their eyes"). Indeed, similar to the situation in *Christ's Bride*, SEPTA does not prohibit public-issue advertisements, thus acknowledging that the display of these *types* of advertisements, which by their nature generate controversy, is "perfectly compatible" with the forum. The *manner* in which the speech is presented (bus advertisements) is also compatible with the purpose of the forum. And finally, Plaintiffs will pay the required fees to run their ad, thus *promoting* SEPTA's purpose of raising revenue. In short, regardless of the nature of the forum, the restriction on Plaintiffs' advertisement is simply unreasonable.

4. SEPTA's Advertising Standards Permit Subjective Application.

"[T]he danger of censorship and of abridgment of our precious First Amendment freedoms is too great where officials have unbridled discretion over a forum's use." *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553 (1975). Consequently, "the definition of the standards for inclusion and exclusion must be *unambiguous* and *definite*." *Gregoire*, 907 F.2d at 1375 (emphasis added). And the reason for this in the First Amendment context is evident: "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 (internal quotations and citation omitted) (emphasis added).

SEPTA restricted Plaintiffs' speech because it allegedly "tends to disparage . . . on the basis of . . . religious belief." The application of this standard, however, is entirely subjective, as evidenced by the testimony of SEPTA's general counsel and by the fact that the "Hollaback" ads, which "tend" to disparage men as a class, were accepted. Indeed, there are no "objective criteria"—let alone written definitions, guidelines, or procedures—for determining whether any particular advertisement "tends to disparage." In short, SEPTA's willy-nilly approach to rejecting ads offends the First Amendment.

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

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); *Swartzwelder v. McNeilly*, 297 F.3d 228, 241 (3d Cir. 2002) (same); *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*).

Defendants have previously argued that this is not the law in the Third Circuit. (Defs.' Opp'n to Mot. to Exclude at 14 [Doc. 24]). They are mistaken. Defendants cite *Conchatta, Inc. v Evanko*, 83 F. App'x 437 (3d Cir. 2003), for what they claim to be a Third Circuit "retreat" from this well established jurisprudence. But it did no such thing. Rather, *Conchatta, Inc.* presented a facial challenge to a statute that had not been applied, nor was there any credible threat to apply it, to restrict the plaintiffs' speech in any way. Because there was *no actual loss*

of free speech rights, there was no irreparable harm to warrant an injunction. Here, we do have an actual loss of rights: SEPTA's rejection of the AFDI Advertisement—an action which operates as a prior restraint on speech. *See Lebron*, 749 F.2d at 896. Consequently, Plaintiffs are suffering irreparable harm as a matter of law. *See B.H. v. Easton Area Sch. Dist.*, 725 F.3d 293, 323 (3d Cir. 2013) (en banc) ("The ban [on wearing bracelets that were part of a breast-cancer-awareness campaign] prevents B.H. and K.M. from exercising their right to freedom of speech, which 'unquestionably constitutes irreparable injury.'") (quoting *Elrod*).

IV. The Balance of Equities Favors Granting the Injunction.

The likelihood of harm to Plaintiffs without the injunction is substantial because the deprivation of First Amendment rights, even for minimal periods, constitutes irreparable injury. On the other hand, if SEPTA is enjoined from restricting Plaintiffs' speech, it will suffer no harm because the exercise of constitutional rights can never harm any of SEPTA's legitimate interests. Moreover, the fact that the AFDI Advertisement has run without incident in other major cities (New York and Washington, D.C.) demonstrates that any concerns of disruption are unfounded.

V. Granting the Injunction Is in the Public Interest.

The public interest is best served by upholding First Amendment freedoms. *Dayton Area Visually Impaired Persons, Inc. v. Fisher*, 70 F.3d 1474, 1490 (6th Cir. 1995) ("[T]he public as a whole has a significant interest in . . . protection of First Amendment liberties."); *G & V Lounge, Inc.*, 23 F.3d at 1079; *Sammartano*, 303 F.3d at 974 (recognizing "the significant public interest in upholding First Amendment principles"); *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.").

CONCLUSION

The court should grant Plaintiffs' motion and issue the requested injunction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 9, 2015, a copy of the foregoing was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system. Parties may access this filing through the Court's system. I further certify that a copy of the foregoing has been served by ordinary U.S. mail upon all parties for whom counsel has not yet entered an appearance electronically: none.

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