IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

AMERICAN FREEDOM DEFENSE INITIATIVE; *et al*.,

Plaintiffs,

-v.-

METROPOLITAN TRANSPORTATION AUTHORITY ("MTA"); *et al*.,

Defendants.

Case No. 1:14-cv-07928-JGK

PLAINTIFFS' REPLY BRIEF IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

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ARGUMENT IN REPLY

The MTA's opposition to Plaintiffs' motion for preliminary injunction (Doc. No. 19) is internally inconsistent, misapplies the relevant case law, and urges a conclusion that undermines our fundamental First Amendment freedoms. Indeed, the MTA invites this court to disregard the overwhelming public interest in protecting core First Amendment principles—bedrock principles which separate our free and civilized society from all others, specifically including those political cultures that use violence or the threat of violence to destroy freedom.

In the final analysis, Plaintiffs' advertisement is neither "fighting words" nor "incitement" speech. Rather, it is public-issue speech which is accorded the greatest protection under the First Amendment. And the MTA's content-based, prior restraint on Plaintiffs' speech cannot survive strict scrutiny. Therefore, a preliminary injunction should issue.

To begin, the MTA's claim that it "has allowed AFDI to display *numerous* other advertisements—*including advertisements directly critical of Hamas*—even though they have indisputably offended many of its customers and employees and members of the public and many public officials and others have harshly criticized MTA for doing so" (Defs.' Opp'n at 17-18 [emphasis added]), is somewhat disingenuous, but significant nonetheless. It is disingenuous because the MTA has displayed "numerous other advertisements" submitted by Plaintiffs because Plaintiffs *sued* the MTA for attempting to censor their speech and won. *See Am. Freedom Def. Initiative v. Metro. Transp. Auth.*, 880 F. Supp. 2d 456 (S.D.N.Y. 2012). Thus, Defendants do not post these advertisements out of some altruistic generosity afforded Plaintiffs and their message.[1]

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[1] The MTA asserts that Plaintiffs' claim that the MTA opposes their view on Islam is "baseless rhetoric and demonstrably false." (Defs.' Opp'n at 18). However, Plaintiffs' claim is supported

Rather, they are posted precisely because the MTA has created a public forum for Plaintiffs' speech, and the First Amendment *requires* the MTA to display the advertisements, similar to the situation presented by this case.[2]

Moreover, the MTA's concession that it has displayed "numerous" other controversial advertisements submitted by Plaintiffs, "including advertisements directly critical of Hamas," undermines the MTA's arguments presented here. For example, the MTA claims that "[f]ew, if any, New Yorkers, recognize AFDI's name," and thus would not understand any context associated with the "Killing Jews" advertisement. (Defs.' Opp'n at 10-11). Yet, as the MTA's concession makes clear, its ridership has already seen "***numerous***" AFDI advertisements, specifically those "directly critical of Hamas."

But the inconsistency between the facts and the MTA's arguments does not end there. The MTA's argument is predicated upon its demonstrably false claim that New Yorkers would believe

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by the MTA's opposition. Throughout, the MTA pejoratively describes Plaintiffs' message as an "outdated parody," "ineptly misleading," and "obscure." (Defs.' Opp'n at 21, 22, 23). Not only are these critical assertions of Plaintiffs' viewpoint, they are assertions that undermine the MTA's claim that the advertisement's message is a clear and unequivocal incitement to violence.

[2] The MTA states that it is "unlikely to persuade this Court to overturn *New York Magazine*." (Defs.' Opp'n at 12 n.2 [referring to *N.Y. Magazine v. Metro. Transp. Auth.*, 136 F.3d 123 (2d Cir. 1998)]). This is true for at least two reasons. First, this court cannot overturn a Second Circuit decision. And second, the facts demonstrate without exception that the MTA has created and continues to maintain a public forum for Plaintiffs' speech. (*See* Pls.' Br. in Supp. of Mot. for Prelim. Inj. at 12-15 [Doc. No. 13]).

that the "Killing Jews" advertisement was sponsored and paid for by Hamas. (Defs.' Opp'n at 10 [claiming that the advertisement has nothing "to suggest that it is not sponsored by Hamas itself or a Hamas supporter"] at 14 [asserting that the "Killing Jews" advertisement "would have been read as a Hamas-sponsored advertisement"]). This is an impossible argument to make for at least five distinct reasons. *First*, as the MTA notes, its ridership is quite familiar with the American Freedom Defense Initiative (AFDI) and the controversial nature of its advertisements, including those "directly critical of Hamas." *Second*, the "Killing Jews" advertisement states on its face that it is "Paid for by the American Freedom Defense Initiative." *Third*, as the MTA notes (Defs.' Opp'n at 10), all displayed advertisements will contain the following, and clearly written and understandable, disclaimer: "This is a paid advertisement sponsored by American Freedom Defense Initiative. The display of this advertisement does not imply MTA's endorsement of any views expressed." *Fourth*, the MTA could exercise its own right as a government speaker to post an accompanying advertisement that states, "This advertisement is not sponsored by Hamas," or any number of succinct messages that would directly address the MTA's expressed concerns (*i.e.,* this is a "least restrictive means" available to the MTA, despite its overblown and exaggerated claim that "bus advertising space" is not "sufficiently capacious" to include such a disclaimer, [*see* Defs.' Opp'n at 23]).[3] And *fifth*, Defendants' assertion that New Yorkers would understand

[3] The government exercising its own right to use its property to speak is not the same as the government forcing a private citizen to modify his message to please the government censors. Contrary to the MTA's assertion, (*see* Defs.' Opp'n at 21 [attempting to dismiss a readily available "least restrictive" measure by incorrectly asserting that if the "MTA displayed some sort of 'accompanying statement' . . . we think it likely that AFDI . . . would have sued"), Plaintiffs

Plaintiffs' advertisement as a Hamas-sponsored call for the murder of Jews would require this Court to conclude that New Yorkers are ignorant simply and, more specifically, ignorant of the federal criminal law that makes it a felony to provide material support to Hamas, a designated foreign terrorist organization. That is, Defendants are asserting that it is reasonable to conclude that the MTA would accept money from a designated foreign terrorist organization to promote the murder of Jews, a proposition that itself is absurd, but one that becomes asinine in the context of the Anti-Terrorism Act. *See* 18 U.S.C. § 2339B (criminalizing material support of designated foreign terrorist organizations); *see also United States v. Shah*, 474 F. Supp. 2d 492, 499 (S.D.N.Y. 2007) (noting Hamas is a designated foreign terrorist organization).

Indeed, the MTA's position is wrong for additional reasons. The "Killing Jews" advertisement on its face is a quote from "Hamas MTV" that states, "Killing Jews is worship that draws us close to Allah," *adding* "That's #my Jihad. What's yours?" (Defs.' Opp'n at 4). This advertisement doesn't direct anyone to do anything, and it's preposterous to suggest that it does. (Defs.' Opp'n at 9 [incorrectly claiming that the advertisement "urges direct violence against Jews"]*; see also id*. at 17 [incorrectly claiming that the advertisement "advocates direct, violent attacks on Jews"]). In fact, in a sober moment, the MTA backs away from its assertion that the advertisement *directly* calls for killing Jews, claiming that the ad offers "at face value" a "stark

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understand this distinction long recognized under the First Amendment, *see Pleasant Grove City v. Summum*, 555 U.S. 460, 467 (2009) ("The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech."); (*see also* Geller Decl. ¶ 30 [explaining that the San Francisco transit authority ran its own counter statements adjacent to AFDI's advertisements] [Doc. No. 13-1]).

syllogism: Worship brings Muslims closer to Allah. Killing Jews is Worship. Thus, Muslims should kill Jews." (Defs.' Opp'n at 10 [emphasis added]). Consequently, the MTA unwittingly concedes here that the "Killing Jews" advertisement is not fighting words or incitement speech. *See infra*. In this respect, the "Killing Jews" ad is not unlike the advertisement stating, "Islamic Jew-Hatred: It's in the Quran," which the MTA agreed to run. (*See* Defs.' Opp'n at 3-4). Certainly, the "Islamic Jew-Hatred" advertisement doesn't direct anyone to commit "hate crimes" against Jews.

In addition to informing the reader that the advertisement was "Paid for by the American Freedom Defense Initiative," as noted above, the "Killing Jews" advertisement also states, "learn more at myjihad.us," which directs the reader to a website providing further context for the advertisement. *See* www.myjihad.us (last visited on Jan. 19, 2015) (stating, in part, that these advertisements are part of "[a] brand new ad campaign to fight the disinformation and propaganda campaigns of Islamic supremacists and Muslim Brotherhood groups in America. These new ads will counter the new deceptive MyJihad campaign by unindicted co-conspirator Hamas-CAIR").

In sum, the advertisement simply does not say what the MTA claims it does, and the absurdity of the MTA's argument is underscored by its claim that if CAIR ran its "My Jihad" advertisements a month earlier, then all of this safety concern is for not. (*See* Defs.' Opp'n at 4-5, 9 [arguing that "[w]ithout that crucial context"—*i.e.*, the CAIR "My Jihad" campaign—it was reasonable to conclude that Plaintiffs' ad was in fact a Hamas-sponsored ad "urging violent attacks on Jews by devout Muslims in New York City"]).

Finally, nowhere in its opposition does the MTA explain how or why it is that in light of its expressed fear of violent Muslims who would likely be incited to *imminent* violent action from the simple appearance of the "Killing Jews" advertisement on a bus (Muslims who, according to

the MTA's Director of Security, Raymond F. Diaz, are apparently easily excitable by virtually any posting, including "postings on the Internet, on social media, and other publications," *see* Diaz Decl. ¶ 11 [Doc. No. 20]), the MTA issued a press release *with a large image of the advertisement*. Despite its security assessment, the MTA apparently felt sufficiently confident that all of the New York press outlets (and jihadist websites, social media, and publications) that might respond to the press release and publish a story with a picture of the "Killing Jews" advertisement would do so with just the right amount of context to inhibit the jihadi impulses lurking in the City, lest the MTA and the press be guilty of the same incitement fabricated by the MTA's security assessment. (Geller Decl. ¶ 26, Ex. 5 [MTA Security Assessment] [Doc. No. 13-6]; ¶ 27, Ex. 6 [press release] [Doc. No. 13-7]). But the fact remains that the MTA cannot point to *any* evidence that running *this* advertisement on MTA buses will cause any disruption whatsoever. Generalized grievances and rank speculation do not cut it under strict scrutiny. Indeed, the *only* relevant evidence shows that *this* advertisement has run in other *major cities* without *any* issues. (Geller Decl. ¶ 20). Case closed.

In the final analysis, the MTA's asserted claim that its reading of the "Killing Jews" advertisement is "reasonable" is simply not so as a matter of fact.

We turn now to the MTA's faulty legal analysis. First, the MTA's claim that Plaintiffs cannot meet what it strangely calls "the multiply-heightened standard" for an injunction in this case is wrong. (*See* Defs.' Opp'n at 8). Plaintiffs' likelihood of success on its First Amendment claim is more than substantial—it is compelled by the facts and law. Consequently, Plaintiffs have suffered irreparable harm and the public interest favors granting the injunction *as a matter of law*. *N.Y. Magazine*, 136 F.3d at 127 ("As the district court correctly found that the facts presented constitute a violation of New York Magazine's First Amendment freedoms, New York Magazine

established *a fortiori* both irreparable injury <u>and</u> <u>*a substantial likelihood of success on the merits*</u>.") (emphasis added); *Am. Freedom Def. Initiative v. Metro. Transp. Auth.*, 889 F. Supp. 2d 606, 615 (S.D.N.Y. 2012) (entering a permanent injunction and noting that "the public as a whole has a significant interest in ensuring . . . protection of First Amendment liberties") (internal quotations and citation omitted).

Next, in what appears to be an effort to create a new category of speech that is not protected under the First Amendment, the MTA conflates various cases addressing true threats, incitement speech, and fighting words. To review, the MTA's advertising standard at issue here (*i.e.*, the *only* basis for rejecting Plaintiffs' advertisement) provides as follows: the MTA will not display an advertisement "which the MTA reasonably foresees would *imminently* incite or provoke violence or other *immediate* breach of the peace, and so harm, disrupt, or interfere with safe, efficient, and orderly transit operations." (Diaz Decl. Ex. 3 [Advertising Standards] [emphasis added]). This advertising standard is an obvious attempt to incorporate the familiar standard set forth in *Brandenburg v. Ohio*, 395 U.S. 444 (1969), which, of course, is required by the First Amendment if the government is seeking to restrict speech based on a claim that it will incite violence, as in this case. Thus, contrary to the MTA's suggestion (*see* Defs.' Opp'n at 13-14 [citing "true threats" cases]), this case does not involve "true threats." *See Virginia v. Black*, 538 U.S. 343, 359 (2003) ("'True threats' encompass those statements where <u>*the speaker*</u> means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals."); *United States v. Turner*, 720 F.3d 411 (2d Cir. 2013) (holding that the evidence was sufficient to show that the defendant threatened federal judges in violation of a federal criminal statute and that defendant's threatening statements were not protected by the First Amendment, concluding that the evidence was sufficient to prove that the defendant intended his website to

intimidate the judges and to impede them in the performance of their duties by putting them in fear for their lives). Here, the MTA's standard on its face does not address "true threats." And more important, the speakers are Plaintiffs, who are merely quoting from Hamas MTV and not expressing a direct threat toward anyone. This square peg does not fit the MTA's rather convoluted round hole.

Additionally, while "fighting words" are those words "which by their very utterance inflict injury or tend to incite an immediate breach of the peace," *Chaplinsky v. New Hampshire*, 315 U.S. 568, 573 (1942), this *narrow* category of speech is *strictly* limited to "*face-to-face* words plainly likely to cause a breach of the peace by the addressee," *id*. (emphasis added); *see also Cohen v. California,* 403 U.S. 15, 20 (1971) (describing "fighting words" as "those *personally* abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction") (emphasis added). Consequently, Plaintiffs' quotation from Hamas MTV appearing on the side of a bus does not remotely come close to falling within the definition of "fighting words."

This leaves us with "incitement" speech and *Brandenburg*, in which the Court stated that "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe *advocacy* of the use of force or of law violation except where such advocacy is *directed* to inciting or producing *imminent* lawless action *and* is likely to incite or produce such action." *Brandenburg*, 395 U.S. at 447 (emphasis added). Plaintiffs' advertisement is not incitement speech under *Brandenburg* for several reasons. First, by quoting Hamas MTV, Plaintiffs are not advocating "the use of force or of law violation" as a matter of fact. Second, as the MTA concedes by noting that the quote is a "*syllogism*," even if the speaker was Hamas MTV (or Hamas simply), this is not incitement speech. Indeed, as this "syllogism" argument makes clear, at best, the Hamas

MTV quote is an example of "the mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence," which "is *not the same as preparing a group for violent action and steeling it to such action*." *Brandenburg*, 395 U.S. at 448 (internal quotations and citation omitted) (emphasis added). Third, and related, there is nothing in the quote that is "directed to inciting or producing imminent lawless action." Indeed, there is no directive whatsoever, and there is certainly no call for imminent violence. And finally, the fact that this advertisement will appear on the side of a bus that will eventually depart the MTA's garage to travel its appointed route defeats any claim that this advertisement has any likelihood of producing *imminent* violence. In short, this is not a situation where a speaker is standing before an agitated and hostile mob poised to do violence and then directs and incites the mob to engage in lawless action. *Brandenburg*, 395 U.S. at 448 ("preparing a group for violent action and steeling it to such action") (internal quotations and citation omitted). That is the *Brandenburg* situation, which does not remotely resemble this situation factually or legally.

In the final analysis, Plaintiffs' timely advertisement addressing Hamas's jihad against Jews is 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) (quoting *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982)). Consequently, the MTA's content-based restriction must satisfy strict scrutiny. That is, the restriction must be "*necessary* to serve a compelling state interest" and "*narrowly drawn* to achieve that interest." *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 800 (1985) (emphasis added); *N.Y. Magazine,* 136 F.3d at 128 ("[C]ontent-based regulations survive only if narrowly drawn to achieve a compelling [governmental] interest.") (internal quotation marks omitted). The MTA cannot meet this burden.

Even should we blindly accept that the MTA's generalized safety concerns (*i.e.*, the notion that there are incredibly malleable and naïve jihadists in New York City who would otherwise not engage in any violence until reading Plaintiffs' advertisement posted on the side of an MTA bus and then believing that it is a message from Hamas leaders to launch a murder campaign against Jews—a message these potential jihadists could find throughout the internet and, of course, from the MTA's press release—would *immediately* launch into this murder spree) are so reasonable as to be compelling, a total ban on Plaintiffs' speech certainly does not satisfy the narrow tailoring requirement. As noted previously, there are countless "disclaimers" that the MTA could run as accompanying messages that would remove the very basis for their concern. *See Am. Freedom Def. Initiative v. Wash. Metro. Area Transit Auth.*, 898 F. Supp. 2d 73, 83 (D.D.C. 2012) (finding that "[a]lthough WMATA has provided the Court with a compelling interest in public safety under the circumstances, it has not used the least restrictive means of serving this interest" and noting that "WMATA could have decided to distance itself from Plaintiffs' sentiments with accompanying statements and/or advertisements which conveyed its disagreement and explained its constitutional obligations").

CONCLUSION

For the foregoing reasons, this court should grant the motion and issue the requested injunction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 22, 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.

AMERICAN FREEDOM LAW CENTER

/s/ David Yerushalmi
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