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August 14, 2012

The Honorable Paul A. Engelmayer
United States District Judge
U.S. District Court
500 Pearl Street, Room 670
New York, New York 10007

Re: *American Freedom Defense Initiative vs. Metropolitan Transit Authority*
Case No. 11 Civ. 6774 (PAE)

Dear Judge Engelmayer:

Pursuant to this Court's order of August 6, 2012 (Doc. No. 32), Plaintiffs submit the following with regard to the MTA's request for a stay of this Court's order granting Plaintiffs' motion for a preliminary injunction pending appeal. In sum, Plaintiffs agree with the "Court's present view that a stay pending appeal is not merited." (Doc. No. 32).

In deciding whether to issue the requested stay, this Court considers the following: "(1) whether the stay applicant has made a *strong showing* that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987) (emphasis added); *see Hirschfeld v. Bd. of Elections in City of N.Y.*, 984 F.2d 35, 39 (2d Cir. 1993) (describing the standard as "whether the movant has demonstrated 'a substantial possibility, although less than a likelihood, of success' on appeal"); *but see Mohammed v. Reno*, 309 F.3d 95, 100-02 (2d Cir. 2002) (reviewing cases and concluding that the level or degree of success that the movant is required to show will vary according to the court's assessment of the other stay factors, particularly the irreparable injury factor).

Upon consideration of these factors, the MTA cannot make the requisite showing for a stay, particularly in light of the significant First Amendment interests at issue. As this Court noted in its order, "as long as the no-demeaning standard continues to facially discriminate based on

content, including within the category of political speech" the MTA cannot "credibly claim a substantial possibility of success on appeal." (Doc. No. 32). Moreover, while the MTA *may* ultimately show that its "no-demeaning standard" is a legitimate basis for regulating political speech on its advertising space, an *unlikely probability* as noted, it is a factual and legal *certainty* that Plaintiffs will suffer irreparable harm if the stay issues. *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."); *N.Y. Magazine v. Metro. Transp. Auth.*, 136 F.3d 123, 127 (2d Cir. 1998) (same). And the public interest is best served if this Court <u>*denies*</u> the stay. *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."); *see also Dayton Area Visually Impaired Persons, Inc. v. Fisher*, 70 F.3d 1474, 1490 (6th Cir. 1995) (stating that "the public as a whole has a significant interest in ensuring equal protection of the laws and protection of First Amendment liberties").

In short, permitting Plaintiffs' political advertisement to run on the MTA buses pending the MTA's appeal of whether its "no-demeaning standard" is constitutional would not deprive the MTA of an ultimate ruling on its policy for future applications. And more important, denying the stay and permitting the advertisement to run would not only serve Plaintiffs' interests by allowing them to engage in their political speech, but it would be in the public interest as well to permit this political debate to continue. *See N.Y. Times v. Sullivan*, 376 U.S. 254, 270 (1964) (acknowledging "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open").

Based on the foregoing and for those reasons set forth in this Court's order of August 6, 2012 (Doc. No. 32) and its Opinion & Order of July 20, 2012 (Doc. No. 29), the Court should deny the MTA's request to stay the preliminary injunction issued in this case.

Respectfully submitted,

<u>/s/ Robert J. Muise</u>
Robert J. Muise, Esq.

<u>/s/ David Yerushalmi</u>
David Yerushalmi, Esq.

cc: Opposing counsel/counsel of record (via email)