IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

AMERICAN FREEDOM DEFENSE INITIATIVE; PAMELA GELLER; and ROBERT SPENCER, Plaintiffs, -v.- MASSACHUSETTS BAY TRANSPORTATION AUTHORITY ("MBTA"); and BEVERLY A. SCOTT, individually and in her official capacity as Chief Executive Officer / General Manager of the MBTA, Defendants.	Case No. 1:13-cv-12803-NMG **PLAINTIFFS' REPLY BRIEF IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER / PRELIMINARY INJUNCTION** [Fed. R. Civ. P. 65] **LEAVE TO FILE GRANTED ON NOVEMBER 27, 2013**

Plaintiffs American Freedom Defense Initiative ("AFDI"), Pamela Geller, and Robert Spencer (collectively referred to as "Plaintiffs"), by and through their undersigned counsel, hereby submit this reply brief in support of Plaintiffs' motion for a temporary restraining order and/or preliminary injunction (Doc. No. 16).

I. *Ridley* Does Not License Defendants' Viewpoint Discrimination.

Contrary to Defendants' position, *Ridley v. Mass. Bay Transp. Auth.*, 390 F.3d 65 (1st Cir. 2004), does not license the viewpoint discrimination at issue here. (*See generally* Defs.' Opp'n at 1 [Doc. No. 19]). Indeed, *Ridley* itself held that the MBTA engaged in viewpoint discrimination when it rejected certain advertisements, stating, "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). This is precisely the situation presented here.

Thus, the record demonstrates that the MBTA is hardly the careful, even-handed, and unbiased "market actor" that it claims to be in its opposition brief (Doc. No. 19) and in the litany of self-serving declarations filed in support (Doc. Nos. 19-1 to 19-5).

II. A Public Forum Was Created for Plaintiffs' Speech.

Regarding the forum issue, Defendants conspicuously ignore the Supreme Court's holding in *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974)—a holding that is repeated throughout the circuits.[1] In *Lehman*, the Court held that the government is acting in the role of a proprietor and not a speech regulator when it consistently limits its advertising space "to *innocuous* and *less controversial* commercial and service oriented advertising." *Id*. at 304 (emphasis added); *see also Ridley*, 390 F.3d at 80 (referring to *Lehman, et al.*, and stating that "[t]he Supreme Court opinions control this case"). Thus, when the government, as here, has opened its advertising space to exceedingly controversial messages on one of the most hotly contested political issues of our times (*i.e.*, the Israeli/Palestinian conflict), it has abdicated its role as a proprietor and has now become a regulator of a public debate.

Moreover, as the Supreme Court has made clear, a public form is "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 v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 802 (1985) (emphasis added). Here the government has designated its advertising space for use by *certain speakers*, including Plaintiffs,

[1] *See, e.g., United Food & Commercial Workers Union, Local 1099 v. Sw. Ohio Reg'l Transit Auth.*, 163 F.3d 341, 355 (6th Cir. 1998) ("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.") (emphasis added); *N.Y. Magazine v. Metro. Transp. Auth.*, 136 F.3d 123, 130 (2d Cir. 1998) ("Allowing political speech . . . 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*.") (emphasis added).

and for the *discussion of certain subjects*, including the Israeli/Palestinian conflict.[2] Thus, the forum is a public forum for Plaintiffs' advertisement, which addresses a subject permitted in the forum, and any restrictions on the content or viewpoint of Plaintiffs' speech must satisfy strict scrutiny. *Id.* at 800 ("[W]hen the government has intentionally designated a place or means of communication as a public forum speakers cannot be excluded without a compelling government interest."). Defendants cannot meet this standard.

III. Defendants' Speech Restriction Is Viewpoint Based.

Regardless of the nature of the forum, the facts of this case compel the conclusion that Defendants' restriction is viewpoint based. Indeed, it is exceedingly important to bear in mind that *Ridley* did not address a factual situation involving competing *viewpoints* in a debate on a hotly contested political issue—*a debate that the MBTA itself invited*. In fact, the advertisement that fueled this debate (the anti-Israel advertisement) was removed from the MBTA's advertising space because it created a firestorm of protest and complaints, only to be reinstated by Defendants days later. (*See, e.g.*, Defs.' Ex. E [Doc. No. 19-5]). Consequently, Defendants' claim that they rejected Plaintiffs' advertisement because it might offend (*i.e.*, it is "demeaning or disparaging") a segment of the MBTA's ridership can only be viewed as a sham since it was more than willing to offend another segment of its ridership (Israelis, and by extension, Jews) by accepting the anti-Israel advertisement (which again points to the wisdom of the *Lehman* decision and those decisions that have followed *Lehman* that acceptance of controversial political advertisements such as the anti-Israel advertisement here is the *best* evidence indicating that the

[2] Accepting advertisements that discuss the Israeli/Palestinian conflict is hardly "[o]ne or more instances of erratic enforcement of a policy," as Defendants suggest. (*See* Defs.' Opp'n at 11 [quoting *Ridley*, 390 F.3d at 78]). Indeed, Defendants acknowledge that "[a] a few days" *after* rejecting Plaintiffs' advertisement, they accepted other advertisements addressing the Israeli/Palestinian conflict, but from the viewpoint of "an organization called StandWithUs.com"—advertisements that do not convey the same viewpoint as Plaintiffs' advertisement. (*See* Defs.' Opp'n at 4).

forum is a public forum). *See Grace Bible Fellowship, Inc. v. Maine Sch. Admin. Dist. No. 5*, 941 F.2d 45, 47 (1st Cir. 1991) ("[A]ctual practice speaks louder than words.").

It is quite evident now—and indeed, admitted by Defendants—that Defendants object to Plaintiffs' view that those who engage in the uncivilized and brutal "jihad" as "war" against Israel are "savages." (*See* Defs.' Opp'n at 12-13). In a feckless attempt to justify their restriction on Plaintiffs' viewpoint, however, Defendants must alter the *express* language of the advertisement and replace the word "*jihad*" with "Muslims and Palestinians" and replace "*war*" with mere opposition. (*See* Defs.' Opp'n at 13 ["By contrasting Israel (the 'civilized') with the 'savages' who ***oppose*** Israel, the AFDI Ad conveys to the 'reasonably prudent person knowledgeable of the MBTA's ridership and using prevailing community standards' the message that Muslims and Palestinians ***opposing*** Israel are 'savages.'"] [emphasis added]). Indeed, Defendants' decision to reject Plaintiffs' advertisement itself establishes a controversial political position (*i.e.*, that *all* Muslims and Palestinians who merely *oppose* Israel in this conflict are engaging in a "*war*" of "*jihad*" against Israel), which, in reality, is *Defendants forcefully imposing a viewpoint on Plaintiffs* in order to censure Plaintiffs' speech.

This is precisely the danger of government censorship in the name of civility. Hiding behind the fig leaf of the MBTA's advertising policy and its application, government censors focus on *some* aspects of an advertisement, including a single word, such as "savage,"[3] but then ignore altogether the *actual* message and context expressed in order to manipulate and fabricate the censor's own meaning to fit the advertisement within a prohibited category. Such an arbitrary application of a speech restriction is itself prohibited by the First Amendment. *United*

[3] *But see Cohen v. Calif.*, 403 U.S. 15, 26 (1971) ("[W]e cannot indulge the facile assumption that one can ***forbid particular words*** without also running a substantial risk of suppressing ideas in the process. Indeed, governments might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular ***views***.") (emphasis added),

Food, 163 F.3d at 359 ("[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.") (internal quotations and citation omitted); *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.").

Thus, contrary to Defendants' position, the terms "*war*" and "*jihad*" as used in Plaintiffs' advertisement have actual meaning, and they provide the context in which the *terrorist* acts committed against Israel in this violent conflict and the *terrorists* engaged in those murderous acts against innocent civilians are described as "savage."[4] Defendants thus contort the advertisement's message and falsely claim that it refers to *all* Muslims and *all* Palestinians as "savage" when it does no such thing.

So what explains Defendants' effort to manipulate Plaintiffs' message? Do Defendants deny that innocent Israeli civilians, including women and children, have been brutally murdered

[4] The use of the term "jihad"—especially in an advertisement that begins "[i]n any war," thereby placing its message in the context of war—to refer to murderous acts of terrorism is well understood. See, for example, the following sample of federal court opinions that use the term "jihad" to refer to terrorism: *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2725 (2010) (referring to a scholarly article, the very title of which uses the word "jihad" to mean terrorism); *Hamdan v. Rumsfeld*, 548 U.S. 557, 600 n.31 (2006) ("Justice Thomas would treat Usama bin Laden's 1996 declaration of jihad against Americans as the inception of the war."); *United States v. Farhane*, 634 F.3d 127, 134 n.4 (2d Cir. 2011) ("Al Qaeda is the most notorious terrorist group presently pursuing jihad against the United States. In February 1998, its leaders, including Osama bin Laden and Ayman al Zawahiri, issued an infamous fatwa (religious decree) pronouncing it the individual duty of every Muslim to kill Americans and their allies—whether civilian or military—in any country where that could be done."); *United States v. Ghailani*, No. 11-320-CR, 2013 U.S. App. LEXIS 21597, at *6-*7 (2d Cir. Oct. 24, 2013) (acknowledging that "Al Qaeda is the most notorious terrorist group presently pursuing jihad against the United States"); *United States v. Hayat*, 710 F.3d 875 (9th Cir. 2013) (using the words "jihad" and "jihadist" throughout the opinion to describe the criminal defendants, who refer to themselves as such).

by jihadis during the course of the Israeli/Palestinian conflict?[5] *That* is the plain implication of their speech restriction. Does not the term "savage" appropriately describe those who engage in such brutality? Would the terms "murderer" or "killer" or "those-who-take-the-lives-of-innocent-women-and-children" be less demeaning or disparaging? What Defendants appear to embrace is the viewpoint that there is no truth to the claim that jihadis engaged in war against Israel are savage murderers. Rather, there is a continuum of opinions, all relative and equal, including the view that these savages are "freedom fighters" or "persecuted minorities," and as such Plaintiffs should accept this morally mushy viewpoint and describe murderous jihadis slaughtering entire families in their sleep in less strident terms.

In short, the very use of the term "savage" expresses Plaintiffs' viewpoint on the grotesquely brutal and inhumane acts embraced by jihadis in Israel and around the globe. To enforce a speech restriction that would outlaw the use of the word "savage" in this context would be to demand that Plaintiffs use words that literally express a different viewpoint by toning down, and thus changing altogether, Plaintiffs' moral outrage in opposition to the brutal murder of innocents. But words have meaning and carry nuance and those meanings and nuances are the expressive tools of a speaker's viewpoint. In sum, Defendants' restriction is an effort to enforce their rejection of Plaintiffs' viewpoint under the pretext and guise of civility.

This point about Defendants' imposition of their viewpoint on Plaintiffs is equally expressed by comparison. In the anti-Israel advertisement, the speaker aims to disparage and demean *all* of Israel. Expressly, the advertisement claims that Israel, through its territorial expansion, is responsible for Palestinian "refugees." Thus, on its face (and by <u>*direct*</u>

[5] For example, it was widely reported that a Jewish family was brutally murdered in their sleep by jihadis. And this murderous act, which included the stabbing of a three-year-old and the slashing of the throat of a three-month-old infant, was appropriately described in the media as "savage" and by the authorities who were investigating this massacre as "a bestial act perpetrated by barbarians." (*See* Muise Decl. at ¶¶ 2, 3, Exs. A & B at Ex. 1).

implication), the anti-Israel advertisement conveys the message that Israelis are causing Palestinian "refugees," a term defined by the U.N. (as referenced in the advertisement) as "someone who 'owing to a *well-founded* fear of being *persecuted* for reasons of race, religion, nationality, membership of a particular social group or political opinion, is *outside the country of his nationality*, and is unable to, or owing to such fear, is unwilling to avail himself of the protection of that country.'" *See* http://www.unhcr.org/pages/49c3646c125.html (emphasis added) (last visited on Nov. 27, 2013). And this definition of "refugee" is also consistent with federal law. *See* 8 U.S.C. § 1101(a)(42) (defining "refugee" as unable to return to one's national homeland "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion"). Compare this literal and directly implied disparagement of Israelis, and Israel as a nation, with the meaning Defendants forcefully impose upon Plaintiffs' message—a fabricated meaning that must ignore the context of "war" and "jihadis"—and Defendants' viewpoint discrimination is all the more transparent.

Realizing the fatal position that they occupy,[6] Defendants take issue with Plaintiffs' "description of the Refugee Advertisement." (Defs.' Opp'n at 17 n.7). Yet, nowhere do Defendants refute—because they can't—the definition of the term "refugee"—which is at the heart of the advertisement's message. In fact, Defendants' own criticism of Plaintiffs' discussion of the meaning of the anti-Israel advertisement supports Plaintiffs' view. (*See* Defs.' Opp'n at

[6] *See Ridley*, 390 F.3d at 82 ("The essence of viewpoint discrimination is not that the government incidentally prevents certain viewpoints from being heard in the course of suppressing certain *general topics of speech*, rather, it is a governmental intent to intervene in a way that prefers one particular viewpoint in speech over other perspectives *on the same topic*."); *see also Aids Action Comm. of Mass. v. Mass. Bay Transp. Auth.*, 42 F.3d 1, 11 (1st Cir. 1994) ("The MBTA's decision not to run the AAC ads while running the 'Fatal Instinct' ads, like the City of St. Paul's decision to criminalize certain types of fighting words while leaving others legal, constitutes content discrimination which gives rise to an appearance of viewpoint discrimination.").

17 n.7 [claiming that the "refugees referred to in the Refugee Advertisement are covered by the [UNRWA], which states, 'We provide assistance *and protection* for some *5 million Palestinian Refugees* to help them achieve their *full potential in human development*'" and confirming that the UNRWA was established "'[f]ollowing the 1948 Arab-Israel conflict . . . to carry out direct relief and works programmes for *Palestine* refugees'" (emphasis added)]). Thus, the advertisement accepted by Defendants conveys the unmistakable message that Israelis are "*persecuting*" Palestinians, and as a result of this persecution, are forcing the Palestinians "*outside the country of* [*their*] *nationality*." In short, the advertisement conveys the unmistakable message that Israelis are war criminals (or violators of international law, at a minimum). But yet, according to the government censors at the MBTA, it is perfectly legitimate (and thus not "demeaning or disparaging") to brand all Israelis as unlawful "persecutors" of the (innocent and victimized) Palestinians.

In the final analysis, Defendants are willing to turn a blind eye to the *actual* message conveyed by the anti-Israel advertisement—a message that generated a firestorm of complaints from its ridership—while at the same time imputing a *false* meaning to Plaintiffs' advertisement in order to reject the viewpoint expressed by it. This form of censorship, as the *Ridley* court itself acknowledged, is impermissible in *any* forum, and for good reason. *See 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 . . . perspective that the speech expresses."); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) ("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). And this further illustrates the *unreasonableness* of Defendants' restriction on Plaintiffs' speech. *See*

Perry Educ. Ass'n v. Perry Local Educators, 460 U.S. 37, 46 (1983) (stating that even in a nonpublic forum, the government "may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view").

CONCLUSION

Plaintiffs respectfully request that the court preliminarily enjoin Defendants' prior restraint on their speech, thereby permitting the display of Plaintiffs' advertisement.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 27, 2013, 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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