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

AMERICAN FREEDOM DEFENSE INITIATIVE; PAMELA GELLER; and ROBERT SPENCER,

Plaintiffs,

v.

METROPOLITAN TRANSPORTATION AUTHORITY ("MTA"); and JAY H. WALDER, in his official capacity as Chairman and Chief Executive Officer of MTA,

Defendants.

Case No. 11-civ-6774-PAE-THK

ECF CASE

Hon. Paul A. Engelmayer

Magistrate Judge Katz

PLAINTIFFS' REPLY IN SUPPORT OF
MOTION FOR PRELIMINARY INJUNCTION

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTRODUCTION 1

SUMMARY OF RELEVANT FACTS NOT IN DISPUTE 1

ARGUMENT 3

I. DEFENDANTS CANNOT DISTINGUISH *NEW YORK MAGAZINE,* WHICH COMPELS THE CONCLUSION THAT THE FORUM AT ISSUE IS A DESIGNATED PUBLIC FORUM 3

II. DEFENDANTS' SPEECH RESTRICTION CANNOT WITHSTAND STRICT SCRUTINY 5

III. DEFENDANTS' SPEECH RESTRICTION PERMITS ARBITRARY AND CAPRICIOUS APPLICATION IN VIOLATION OF THE FIRST AMENDMENT 9

CONCLUSION 10

CERTIFICATE OF SERVICE 12

TABLE OF AUTHORITIES

Cases **Page**

Adderley v. State of Fla.,
385 U.S. 39 (1966)....................1

Brandenburg v. Ohio,
395 U.S. 444 (1969)....................2

Chaplinsky v. N.H.,
315 U.S. 568 (1942)....................2

Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,
508 U.S. 520 (1993)....................7

City of Lakewood v. Plain Dealer Publ'g Co.,
486 U.S. 750 (1988)....................9

Cogswell v. City of Seattle,
347 F.3d 809 (9th Cir. 2003) 7

Cohen v. Cal.,
403 U.S. 15 (1971) 6

Congregation Lubavitch v. City of Cincinnati,
997 F.2d 1160 (6th Cir. 1993) 7

Consol. Edison Co. of N.Y. v. Pub. Serv. Comm. of N.Y.,
477 U.S. 530 (1980) 6

Cornelius v. NAACP Legal Def. & Educ. Fund,
473 U.S. 788 (1985) 4, 5, 8

Erznoznik v. City of Jacksonville,
422 U.S. 205 (1975) 6

Forsyth Cnty. v. Nationalist Movement,
505 U.S. 123 (1992) 7, 9, 10

Greer v. Spock,
424 U.S. 828 (1976)....................1

Hotel Employees & Restaurant Employees Union, Local 100 of N.Y. v. City of N.Y. Dep't of Parks & Recreation,
311 F.3d 534 (2d Cir. 2002)....................3, 4, 5

Lehman v. City of Shaker Heights,
418 U.S. 298 (1974)....................3

NAACP v. Button,
371 U.S. 415 (1963)....................10

NAACP v. Claiborne Hardware Co.,
458 U.S. 886 (1982) 2

N.Y. Magazine v. Metro. Transp. Auth.,
136 F.3d 123 (2d Cir. 1998) 3, 4

N.Y. Times Co. v. Sullivan,
376 U.S. 254 (1964)....................2

Nieto v. Flatau,
715 F. Supp. 2d 650 (E.D.N.C. 2010)....................8

Planned Parenthood Ass'n/Chicago Area v. Chicago Transit Auth.,
767 F.2d 1225 (7th Cir. 1985) 4

R.A.V. v. City of St. Paul,
505 U.S. 377 (1992) 8

Regan v. Time, Inc.,
468 U.S. 641 (1984)....................6

Ridley v. Mass. Bay Transit. Auth.,
390 F.3d 65 (1st Cir. 2004)....................8

Rosenberger v. Rector & Visitors of the Univ. of Va.,
515 U.S. 819 (1995) 7

Schacht v. *United States*,
398 U.S. 58 (1970)....................8

Sinai v. New Eng. Tel. & Tel. Co.,
3 F.3d 471 (1st Cir. 1993)....................10

United Food & Commercial Workers Union Local 1099 v. Southwest Ohio Reg'l Transit Auth.,
163 F.3d 341 (6th Cir. 1998) 3, 9

United States v. Abu-Jihaad,
630 F.3d 102 (2d Cir. 2010)....................2

United States v. Rahman,
189 F.3d 88 (2d Cir. 1999)....................2

Constitution

U.S. Const. amend. I .... *passim*

INTRODUCTION

Defendants' opposition is a transparent effort to have this court sanction its patently content- and viewpoint-based restriction on Plaintiffs' speech—a restriction made possible by a policy that permits government officials to make subjective, *ad hoc* determinations as to which messages are permissible and which are not, in violation of the First Amendment.

SUMMARY OF RELEVANT FACTS NOT IN DISPUTE

Defendants do not dispute that by policy and practice, the MTA has *intentionally* dedicated its advertising space on its vehicles, including its public buses, to *expressive conduct*. And pursuant to this policy and practice, the MTA permits *a wide variety* of commercial, noncommercial, public-service, public-issue, political, and religious advertisements on its property.[1] (Rosen Decl. at ¶ 11). Consequently, there is no dispute that *controversial* topics such as *politics* and *religion*, and more specifically, the *Palestinian-Israeli conflict*, are permissible subject matter in this forum. (Rosen Decl. at ¶¶ 11, 42-44). The MTA does not limit its advertising space to just commercial advertisements. (Rosen Decl. at ¶ 11).

Pursuant to this policy and practice, Plaintiffs submitted their advertisement, which addresses the longstanding and exceedingly violent conflict between Israel and Palestine—a highly controversial subject that, as noted, the MTA permits members of the public to discuss in the forum it created (*i.e.*, its advertising space).[2] (*See* Rosen Decl. at ¶¶ 42-44).

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[1] This is in sharp contrast with nonpublic forums such as military installations, *Greer v. Spock*, 424 U.S. 828, 838 (1976), prisons, *Adderley v. State of Fla.*, 385 U.S. 39, 45 (1966), or this courtroom.

[2] Defendants acknowledge that Plaintiffs' advertisement was responding to an advertisement that the MTA had previously accepted—an *anti-Israel* advertisement that received strong objections from the public, as the MTA "expected." Mr. Jeffrey Rosen testified as follows: "As *expected*, the MTA and NYCTA received a number of telephone calls, emails, and letters *objecting* to the *Be On Our Side* advertisement asserting that the MTA should refused (sic) to allow *anti-Israel* viewpoints to be expressed through advertising displayed on the MTA properties and facilities." (Rosen Decl. at ¶ 43) (emphasis added).

The MTA, through the decision of its Director of Real Estate, Mr. Jeffrey Rosen,[3] rejected Plaintiffs' advertisement based on Mr. Rosen's view that the *content* of the message was *demeaning* toward those who side with Palestine.[4] (Rosen Decl. at ¶¶ 53-55). That is, Mr. Rosen considered the *viewpoint* expressed by Plaintiffs' advertisement unacceptable. This conclusion is further evidenced by Mr. Rosen's admission that he did not look simply at the "four corners" of the advertisement to make his final decision, but he also considered the "content posted on the three websites promoted by it." (Rosen Decl. at ¶ 51).

If the MTA had accepted Plaintiffs' advertisement, it would have received approximately $25,000 in "much-needed revenue." (Rosen Decl. at ¶ 45; *see also* ¶ 11 (discussing the "much-needed revenue" of the MTA)).

In sum, Plaintiffs' advertisement does *not* violate any "New York Penal Law," it does *not* contain obscenity, it does *not* contain "fighting words,"[5] it does *not* "incite an imminent act" of lawless action,[6] it is *not* libelous or slanderous,[7] it *will* generate revenue for the MTA, and it *plainly* states that it is "PAID FOR BY THE AMERICAN FREEDOM DEFENSE

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[3] Suffice to say, Mr. Rosen's description of Plaintiffs' legal claims and arguments in his declaration is far from the mark. (*See, e.g.,* Rosen Decl. at ¶ 50).

[4] Contrary to Defendants' repeated claim (*see* Defs.' Mem. at 6), Plaintiffs do not "concede" that its advertisement violates the MTA's "demeaning" speech prohibition—even if that restriction could be applied in an objective, even-handed manner, which it cannot. *See infra,* sec. III. As Defendants admit, Plaintiffs "borrowed the civilized man versus the savage from Ayn Rand," the famous author. (Sistrom Decl. at ¶ 2). Moreover, the term "jihad" is best understood by the public in the context of the Palestinian-Israeli conflict to mean violent war that includes suicide bombings and other brutal terrorist acts directed against the Jewish civilian population. (*See* Yerushalmi Decl. at ¶¶ 3-5 & accompanying exhibits); *see also United States v. Rahman*, 189 F.3d 88 (2d Cir. 1999) (describing "jihad" as acts of terrorism, including bombings, murders, and the taking of hostages, directed at those who, *inter alia*, support Israel); *United States v. Abu-Jihaad*, 630 F.3d 102 (2d Cir. 2010) (equating "jihad" with the execution of terrorists acts against "infidels"). How can it be "demeaning" to describe such brutal attacks as "savage" and not "civilized"?

[5] *Chaplinsky v. N.H.,* 315 U.S. 568, 572 (1942) (describing "fighting words" as those that "inflict injury or tend to incite an immediate breach of the peace"); *see also NAACP v. Claiborne Hardware*, 458 U.S. 886 (1982) (describing "fighting words" as "those that provoke immediate violence").

[6] *Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969) (holding that the government may not "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").

[7] *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964) ("The general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions.").

INITIATIVE," further directing the reader to three websites—none of which belongs to the MTA or any other governmental agency. (*See* Rosen Decl. at ¶¶ 45-46, Ex. M).

In the final analysis, the MTA decided, through Mr. Rosen, that it was acceptable to cause an "expected" public outrage by displaying an advertisement expressing an "anti-Israel" (*i.e.,* anti-Jew) viewpoint, but unacceptable to permit Plaintiffs' anti-jihad viewpoint. (*See* Rosen Decl. at ¶ 43; *see also* fn.2, *supra*).

ARGUMENT

I. DEFENDANTS CANNOT DISTINGUISH *NEW YORK MAGAZINE,* WHICH COMPELS THE CONCLUSION THAT THE FORUM AT ISSUE IS A DESIGNATED PUBLIC FORUM.

Contrary to Defendants' assertion, this case cannot be distinguished from *N.Y. Magazine v. Metro. Transp. Auth.*, 136 F.3d 123 (2d Cir. 1998), for purposes of this court's forum analysis. Moreover, a *careful* reading of *Hotel Employees & Restaurant Employees Union, Local 100 of N.Y. v. City of N.Y. Dep't of Parks & Recreation*, 311 F.3d 534 (2d Cir. 2002) (hereinafter "*Hotel Employees*"), confirms the conclusion that the forum at issue is a designated public forum.

In *N.Y. Magazine*, the Second Circuit held as follows:

> Disallowing political speech, and allowing commercial speech only, indicates that making money is the main goal. Allowing political speech, conversely, evidences a general intent to open a space for discourse, and a deliberate acceptance of the possibility of clashes of opinion and controversy that the Court in *Lehman* [*v. City of Shaker*, 418 U.S. 298 (1974)] recognized as inconsistent with sound commercial practice. *The district court thus correctly found that the advertising space on the outside of MTA buses is a designated public forum, because the MTA accepts both political and commercial advertising*.

N.Y. Magazine, 136 F.3d at 130. This holding is consistent among the circuit courts that have addressed this issue. *See, e.g., United Food & Commercial Workers Union, Local 1099 v. Southwest Ohio Reg'l Transit Auth.*, 163 F.3d 341, 355 (6th Cir. 1998) (concluding that the bus advertising space was a public forum and stating that "[a]cceptance 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"); *Planned Parenthood Ass'n/Chicago Area v. Chicago Transit Auth.*, 767 F.2d 1225 (7th Cir. 1985) (permitting advertising on "a wide variety of commercial, public-service, public-issue, and political ads" created a public forum).

Moreover, the Second Circuit unequivocally rejected the argument presented here by Defendants: the argument that restricting some access to this forum through the MTA's advertising standards (*e.g.,* restricting Plaintiffs' advertisement on the basis of its content) evidences an intent not to create a public forum. The court stated,

> [I]t 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 at 129-30 (emphasis added).

Moreover, Defendants' claim that the definition of a designated public forum has changed since *N.Y. Magazine* is simply not true. (Defs.' Mem. at 13) (citing *Hotel Employees,* 311 F.3d at 545). Defendants' reading of *Hotel Employees* is incorrect in this regard. In fact, the case cited by *Hotel Employees* for this allegedly "different definition" is *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 802 (1985), a case that predates (and which the Second Circuit cites to in) *New York Magazine*. *See Hotel Employees*, 311 F.3d at 545 (citing *Cornelius*, 473 U.S. at 802). In *Cornelius*, the U.S. Supreme Court described a designated public forum as follows: "[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 (emphasis added). In *Hotel Employees*, the court followed this description, noting, however, that a "limited" public forum was "[a] subset of the designated public forum." *Hotel Employees*, 311 F.3d at 545. And in this "subset" of the *designated public forum*, "restrictions on speech that falls *within the designated category* for which the forum has been opened" [*i.e.*, political, public-issue speech, and certainly speech that discusses the Palestinian-Israeli conflict in this case] are subject to "*strict scrutiny*." *Id.* (emphasis added). Thus, once the government "allows expressive activities of a certain genre, it may not selectively deny access for other activities of that genre." *Id.* at 546 (internal quotations and citation omitted). Accordingly, it is restrictions on speech that falls *outside of the acceptable subject matter for which the forum is open* that "need only be view-point neutral and reasonable." *Id.*

Here, Defendants concede, as they must, that they have opened the relevant forum (*i.e.,* MTA's advertising space) to the discussion of controversial, political subjects, and in particular, to the controversial subject of the Palestinian-Israeli conflict—an acceptable category of speech within which Plaintiffs' advertisement falls. (Rosen Decl. at ¶¶ 42-44). Consequently, controlling case law compels only one conclusion: the forum is a designated public forum for Plaintiffs' speech, and Defendants' speech restriction must survive strict scrutiny, which it cannot.

II. DEFENDANTS' SPEECH RESTRICTION CANNOT WITHSTAND STRICT SCRUTINY.

In a designated public forum, content-based restrictions on speech, such as the restriction at issue here, are subject to strict scrutiny. *Cornelius*, 473 U.S. at 800. That is, "[s]peakers 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." *Id.* To determine

whether a restriction is content-based, courts look 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. Public Serv. Comm. of N.Y.*, 447 U.S. 530, 537 (1980). In this case, Defendants prevented Plaintiffs from expressing their message based on its content, essentially claiming that the message was "demeaning" to those who engage in "jihad" (violent war) against Jews in the context of the Palestinian-Israeli conflict. *See Regan v. Time, Inc.*, 468 U.S. 641, 648-49 (1984) ("Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment.").

Defendants present no evidence to demonstrate a "compelling state interest" for their content-based speech restriction or that this restriction was "narrowly drawn to achieve that interest." At best, Defendants claim that the speech restriction promoted the MTA's "significant" (*i.e.*, not compelling) interests, which they claim to be: (1) ensuring that MTA's customers and employees, "when reading paid advertisements displayed on . . . MTA's properties and facilities not be subjected unwillingly" to speech that the MTA believes "demeans them"; and (2) ensuring that the MTA not be "wrongly associated with such demeaning speech." (Rosen Decl. at ¶ 53). These interests are insufficient as a matter of law. First, "the Constitution does not permit government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer." *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 210 (1975). Rather than censoring the speaker, the burden rests with the viewer to "avoid further bombardment of [his] sensibilities simply by averting [his] eyes." *Cohen v. Cal.*, 403 U.S. 15, 21 (1971). And second, Plaintiffs' advertisement clearly states that AFDI is responsible for the message. If more clarity was necessary, the MTA could post a sign stating that it does not endorse or support the advertising messages displayed on its properties.

Moreover, Defendants' "revenue raising" interests are insufficient to justify this content-based speech restriction. *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 135-36 (1992) (rejecting the county's revenue raising justification for the speech restriction and stating, "While this undoubtedly is an important government responsibility, it does not justify a content-based permit fee").

Furthermore, although Defendants "anticipated that some MTA customers and others might object strongly to" a proposed anti-Israel advertisement, Defendants allowed it to run even after they received, "[a]s expected, . . . a number of telephone calls, emails, and letters objecting to the" advertisement because it expressed an "anti-Israel" viewpoint. (Rosen Decl. at ¶ 43). Consequently, when the government restricts some speech protected by the First Amendment but fails to restrict other speech producing harm of the same sort alleged, the interest given for the restriction is not substantial or significant, let alone compelling. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546-47 (1993); *Congregation Lubavitch v. City of Cincinnati*, 997 F.2d 1160, 1166 (6th Cir. 1993) ("Because the City is so willing to disregard the traffic problems [by making exceptions], we cannot accept the contention that traffic control is a substantial interest."). In sum, Defendants' speech restriction cannot withstand constitutional scrutiny.

Additionally, Defendants' speech restriction was viewpoint based, which is an egregious form of content discrimination that is prohibited in all forums. *See Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995). When speech "fall[s] within an acceptable subject matter otherwise included in the forum," as in this case, the government "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). Thus, viewpoint discrimination occurs when

the government "denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject." *Cornelius*, 473 U.S. at 806. Here, Defendants admit that they denied Plaintiffs' advertisement because they objected to Plaintiffs' viewpoint that those who engage in "jihad" against Jews in the context of the Palestinian-Israeli conflict are engaged in "savage" behavior. Asserting that the advertisement would be acceptable if Plaintiffs watered-down their criticism of those engaged in jihad (*i.e.*, violence against innocent Jewish civilians) is an admission that the restriction is viewpoint based. Indeed, had Plaintiffs expressed a viewpoint casting jihad in a favorable light, Defendants would have accepted the advertisement. *See Nieto v. Flatau*, 715 F. Supp. 2d 650 (E.D.N.C. 2010) (holding that a speech restriction on a military base was viewpoint based as applied to anti-Islam speech). Consequently, there is no escaping the fact that this is viewpoint discrimination. In *Ridley v. Mass. Bay Transit. Auth.*, 390 F.3d 65 (1st Cir. 2004), for example, the court held that the MBTA's restriction on certain advertisements that were critical of laws prohibiting drug use were viewpoint based in violation of the First Amendment. Like the MTA here, the MBTA argued that the same message could run if a different manner of expression was used. The First Circuit rejected the argument, 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; *see also R.A.V. v. City of St. Paul*, 505 U.S. 377, 392 (1992); *Schacht* v. *United States*, 398 U.S. 58 (1970) (striking down a statute permitting actors to wear a military uniform in a theater or motion picture production only "if the portrayal does not tend to discredit that armed force," and noting that although a total prohibition would be valid, a prohibition sensitive to the viewpoint of speech could not stand).

III. DEFENDANTS' SPEECH RESTRICTION PERMITS ARBITRARY AND CAPRICIOUS APPLICATION IN VIOLATION OF THE FIRST AMENDMENT.

A speech restriction that permits arbitrary and capricious application is not reasonable and thus unconstitutional in any forum. This is because "[t]he 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 & Commercial Workers Union, Local 1099,* 163 F.3d at 359. Consequently, "[a] government regulation that allows arbitrary application . . . has the potential for becoming a means of suppressing a particular point of view," as in this case. *Forsyth Cnty.*, 505 U.S. at 132-33 (noting that speech regulations must have "narrowly drawn, reasonable and definite standards") (quotations and citation omitted). And the danger of content and viewpoint censorship "is at its zenith when the determination of who may speak and who may not is left to the unbridled discretion of a government official . . . because without standards governing the exercise of discretion, a government official may decide who may speak and who may not based upon the content of the speech or viewpoint of the speaker." *City of Lakewood v. Plain Dealer Publ'g Co*., 486 U.S. 750, 763-64 (1988).

Here, there is no objective way to measure whether a particular advertisement is demeaning (or sufficiently demeaning) to warrant censorship. And that final determination is made by a single, government official—Mr. Jeffrey Rosen—based on his subjective judgment.[8] (Rosen Decl. at ¶ 51) ("[I]n the end, the decision not to approve AFDI's proposed advertisement was mine."). This is further evidenced by the way the ordinance was applied in this case.

[8] Indeed, even if Mr. Rosen "applied legitimate, content-neutral criteria" in his decision to deny Plaintiffs' advertisement, that fact is "irrelevant" to Plaintiffs' facial challenge to the MTA's regulations. "Facial attacks on the discretion granted a decisionmaker are not dependent on the facts surrounding any particular permit decision. . . . Accordingly, the success of a facial challenge on the grounds that an ordinance delegates overly broad discretion to the decisionmaker rests *not* on whether the administrator has exercised his discretion in a content-based manner, *but whether there is anything in the ordinance preventing him from doing so*." *Forsyth Cnty.,* 505 U.S. at 133, n.10 (emphasis added).

There is no question that Israel is a Jewish state—for it is one demographically and legally. *Sinai v. New Eng. Tel. & Tel. Co.*, 3 F.3d 471, 474 (1st Cir. 1993) (discriminating against Israel may be understood as discriminating against Jews since "Israel is a Jewish State"). Consequently, the MTA, by its own admission, accepts advertisements that they "expected" others to view as being anti-Israel (*i.e.*, anti-Jewish). Thus, applying Mr. Rosen's logic, (*see* Rosen Decl. at ¶ 55), "[t]aken as a whole," the *Be On Our Side* advertisement conveys the unmistakable message that if you support the Palestinians in the Palestinian-Israeli conflict by disarming the alleged aggressor (*i.e.*, Israeli Jews—a religious people that are identifiable by religion, national origin, and ancestry all in one), then you are on the side of peace and justice—meaning, Jews are violent and unjust. How is that not "demeaning" (however that term may be defined or used) toward Jews—an identifiable group—based on religion, national origin, or ancestry? At the end of the day, Defendants' speech restriction is based upon the subjective whims of a government official—Mr. Rosen—and not "narrowly drawn, reasonable and definite standards," as required by the First Amendment. (*See* Rosen Decl. at ¶ 55 (concluding that Plaintiffs' advertisement was demeaning "in my view")); *see Forsyth Cnty.*, 505 U.S. at 132-33; *NAACP v. Button*, 371 U.S. 415, 438 (1963) ("Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms."). Therefore, it is unconstitutional facially and as applied to Plaintiffs' advertisement.

CONCLUSION

Plaintiffs are entitled to a preliminary injunction enjoining Defendants' unconstitutional speech restriction, thereby allowing Plaintiffs to exercise their fundamental right to freedom of speech through the display of their pro-Israel advertisement.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 22, 2012, a copy of the foregoing and accompanying declaration with exhibits were 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.

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