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' MEMORANDUM OF REASONS FOR GRANTING TEMPORARY RESTRAINING ORDER / PRELIMINARY INJUNCTION

[Fed. R. Civ. P. 65]

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INTRODUCTION

> "When a man's verses cannot be understood, nor a man's good wit seconded with the forward child understanding, it strikes a man more dead than a great reckoning in a little room."
>
> Shakespeare, *As You Like It*

Government censorship is repugnant to our Constitution, and for good reason. Indeed, "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). Permitting the government to take sides on a hotly debated issue such as the Middle East conflict between Israelis and Palestinians directly undermines our "profound national commitment" to uninhibited debate on public issues. *N.Y. Times v. Sullivan*, 376 U.S. 254, 270 (1964). Thus, when the government opens its property to debate on such a controversial subject, it is acting not as a proprietor but as a *regulator* of speech subject to the full weight of the First Amendment.

There is little doubt that Defendants will argue that *Ridley v. Mass. Bay Transp. Auth.*, 390 F.3d 65 (1st Cir. 2004), forecloses any meaningful factual and legal analysis in this case, and they would be wrong. In fact, a careful application of *Ridley* to the facts of this case, as discussed further below, compels granting the requested injunction. Indeed, in a First Amendment context, facts matter in a particularly important way. As the Supreme Court has made clear, when reviewing a case involving a claim arising under the First Amendment, the reviewing court must "conduct an independent examination of the record as a whole." *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 567 (1995). And this is so "because the reaches of the First Amendment are ultimately defined by the facts it is held to embrace, and [this court] must thus decide for [itself] whether a given course of conduct falls on the near or far side of the line of constitutional protection." *Id.* The same is true, *a fortiori*, here.

The facts of this case are not the facts of *Ridley*. And the differences in those facts compel a finding that Defendants violated the Constitution by rejecting Plaintiffs' advertisement.

STATEMENT OF FACTS

Plaintiff AFDI is an organization that is incorporated under the laws of the State of New Hampshire. AFDI is a human rights organization dedicated to freedom of speech, freedom of conscience, freedom of religion, freedom from religion, and individual rights. AFDI achieves its objective through a variety of lawful means, including through the exercise of its right to freedom of speech under the United States Constitution. (Geller Decl. at ¶¶ 3, 5, 6 at Ex. 1).

AFDI exercises its right to freedom of speech and promotes its objectives by, *inter alia*, purchasing advertising space on transit authority property in major cities throughout the United States, including Boston, Massachusetts. AFDI purchases these advertisements to express its message on current events and public issues, including the Israeli / Palestinian conflict (hereinafter referred to as "AFDI's advertising campaign"). (Geller Decl. at ¶ 7 at Ex. 1).

Plaintiff Geller is the president of AFDI, and Plaintiff Spencer is the vice president. Plaintiffs Geller and Spencer engage in protected speech through AFDI's activities, including AFDI's advertising campaign. (Geller Decl. at ¶¶ 2, 4 at Ex. 1).

The MBTA is a quasi-governmental organization which provides public transportation in the Commonwealth of Massachusetts. It operates bus routes, subway lines, a commuter rail network, and ferry service routes that provide transportation to millions of customers in the Greater Boston area. Defendant Scott is the CEO / General Manager of the MBTA and the final decision maker responsible for enforcing the MBTA Advertising Guidelines and for ultimately rejecting Plaintiffs' proposed advertisement (hereinafter referred to as the "AFDI Advertisement"). (Geller Decl. at ¶¶ 8, 28-30, Exs. D, E at Ex. 1).

The MBTA, through its advertising agent, Titan Outdoor LLC (a/k/a Titan360 and Titan) (hereinafter "Titan"), leases space on its vehicles and transportation stations for use as advertising space. (Geller Decl. at ¶ 9 at Ex. 1).

As a matter of policy and practice, the MBTA accepts commercial and noncommercial advertisements for display on its advertising space, including noncommercial public service, public issue, and political issue advertisements, including advertisements providing political and social commentary on controversial issues such as the Israeli / Palestinian conflict. (Geller Decl. at ¶¶ 10-12, 15-18, Ex. A at Ex. 1).

In September 2013, the MBTA issued a statement acknowledging that some of its advertisements would offend its customers, stating, *inter alia*, "we have every confidence that our customers will understand that in our enlightened civil democracy, the answer to distasteful and uncivil speech is more, and more civilized, speech." (Geller Decl. at ¶ 13 at Ex. 1).

Accordingly, the MBTA permits, as a matter of policy and practice, a wide variety of commercial, noncommercial, public-service, public-issue, and political-issue advertisements on its advertising space, including advertisements addressing the hotly debated Israeli / Palestinian conflict (hereinafter "Speech Policy"). Therefore, by policy and practice, the MBTA has created a designated public forum for the display of advertisements such as the AFDI Advertisement. (Geller Decl. at ¶¶ 14-27, 29, Exs. A, E at Ex. 1).

In October 2013 and pursuant to their Speech Policy, Defendants accepted for display on the MBTA advertising space a controversial advertisement that addresses the Israeli / Palestinian conflict from a viewpoint that criticizes Israel (hereinafter "Anti-Israel Advertisement"). (Geller Decl. at ¶¶ 15-18, Ex. A at Ex. 1).

The Anti-Israel Advertisement, which appeared on approximately 80 posters throughout the transit system, depicts four maps that purport to show the "***Palestinian loss of land***" to Israel between 1946 and 2010. Text accompanying the maps says: "***4.7 million Palestinians are Classified by the UN as Refugees***." (Geller Decl. at ¶¶ 16-18, Ex. A at Ex. 1).

After receiving a rash of complaints, on or about October 31, 2013, Defendants, acting through the MBTA's advertising agent, removed all of the Anti-Israel Advertisements from the MBTA's advertising space. (Geller Decl. at ¶ 19 at Ex. 1).

However, on or about November 1, 2013, Defendants decided, without much of a public explanation, except to claim that it was a "miscommunication" between the MBTA and its advertising agent, to repost the Anti-Israel Advertisement on the MBTA's advertising space.[1] (Geller Decl. at ¶ 20 at Ex. 1).

Pursuant to Defendants' Speech Policy and *in direct response to* the original posting of the Anti-Israel Advertisement, on or about October 26, 2013, Plaintiffs submitted to Titan for display on the MBTA's advertising space an advertisement that supported Israel in the debate over the Israeli / Palestinian conflict. More specifically, Plaintiff Geller sent an email to Scott

[1] The Anti-Israel Advertisement describes the Palestinians as "refugees," which, according to the United Nation's definition of "refugee," means, in the context of the advertisement, that the Israelis are *persecuting* the Palestinians on account of their "race, religion, nationality, membership of a particular social group or political opinion." *See* http://www.unhcr.org/pages/49c3646c125.html (providing U.N. definition of "refugee") (last visited on Nov. 8, 2013); *see also* 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"). This is not a "positive" message by any man's measure. Indeed, the Anti-Israel Advertisement created a firestorm of complaints, which then caused the MBTA (or its advertising agent) to take it down, only to be reposted again just recently. The MBTA apparently has no concern that its "ridership" is offended by the Anti-Israel Advertisement, demonstrating further the viewpoint-based nature of Defendants' speech restriction here. *See, e.g.*, *Ridley*, 390 F.3d at 87 (noting that impermissible discrimination is evidenced when the government "rejects something because of a certain characteristic, but other things possessing the same characteristics are accepted").

Goldsmith, the executive vice president and chief commercial officer of Titan, and requested to run AFDI's "pro-Israel ads in 10 of the Boston T stations where the anti-Israel campaign is running." (Geller Decl. at ¶ 21, Ex. B at Ex. 1).

AFDI's pro-Israel advertisement ("AFDI Advertisement") states, in relevant part, "***In any war between the civilized man and the savage, support the civilized man. Support Israel. Defeat jihad***." (Geller Decl. at ¶¶ 22, 23, Ex. C at Ex. 1).

The AFDI Advertisement discusses the same subject matter as the Anti-Israel Advertisement, except it does so from a viewpoint that favors Israel. And the advertisement's quote, "In any war between the civilized man and the savage, support the civilized man," is adapted from a quote by the famous Russian-born, American author of *Atlas Shrugged*, Ayn Rand.[2] (Geller Decl. at ¶¶ 23-25, Ex. C at Ex. 1).

The message of the AFDI Advertisement is very timely in light of the fact that the Anti-Israel Advertisement is now running (or will be running shortly) on the MBTA's advertising space. Moreover, acceptance of political- and public-issue advertisements, specifically including the MBTA's acceptance of the Anti-Israel Advertisement, demonstrates that the forum is suitable for Plaintiffs' advertisement. (Geller Decl. at ¶¶ 26, 27, Ex. C at Ex. 1).

On November 4, 2013, Defendants made a formal determination and officially rejected the AFDI Advertisement because it allegedly "falls within the category (b)(i) 'Demeaning or

[2] "Savage" in the context of the advertisement, which juxtaposes the term with "civilized," means "uncivilized." *See, e.g.*, http://www.merriam-webster.com/dictionary/savage (defining "savage") (last visited on Nov. 8, 2013). However, using the term "savage" not only brings to mind the famous quote from Ayn Rand, but it *effectively* conveys Plaintiffs' viewpoint on the issue. Altering the message would alter its meaning, especially in context, and thus alter Plaintiffs' viewpoint.

disparaging,'"[3] thereby causing irreparable harm to Plaintiffs by depriving them of their right to freedom of speech. (Geller Decl. at ¶¶ 28, 30, 31, Ex. D at Ex. 1).

ARGUMENT

I. Standard for Issuing a TRO and Preliminary Injunction.

The standard for issuing a TRO is the same for issuing a preliminary injunction. *Largess v. Supreme Judicial Court for Mass.*, 317 F. Supp. 2d 77, 81 (D. Mass. 2004). "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). Plaintiffs satisfy this standard. Moreover, when, as here, "a party seeks a preliminary injunction on the basis of the potential violation of the First Amendment, the likelihood of success on the merits often will be the determinative factor." *Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998).

II. Plaintiffs Are Likely to Succeed on the Merits of Their First Amendment Claim.

Plaintiffs' First Amendment claim is reviewed in essentially three steps. First, the court must determine whether the speech in question—Plaintiffs' advertisement—is protected speech. Second, the court must conduct a forum analysis as to the forum in question to determine the proper constitutional standard to apply. And third, the court must then determine whether Defendants' 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"); *cf. Ridley*, 390 F.3d at 75 (conducting a forum analysis in a challenge to the MBTA's restrictions on several advertisements, but stating, "[p]ublic forum

[3] Attached to Defendants' email rejecting the AFDI Advertisement was a copy of the MBTA's Advertising Guidelines. (Geller Decl. at ¶ 29, Ex. E at Ex. 1).

analysis itself has been criticized as unhelpful in many contexts, and particularly this one where the government is operating a commercial enterprise earning income from permitting advertising").[4]

Moreover, Defendants' "refusal to accept [the AFDI 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.) (emphasis added). 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) (emphasis added).

A. Plaintiffs' Advertisement Is Protected Speech.

The first question is easily answered. Sign displays constitute protected speech under the First Amendment, *Hill v. Colo.*, 530 U.S. 703, 714-15 (2000) ("[S]ign displays . . . are protected by the First Amendment."), and this includes signs posted on transit advertising space, *see Ridley*, 390 F.3d at 65; *see also United Food & Commercial Workers Union, Local 1099 v. Sw. Ohio Reg'l Transit Auth.*, 163 F.3d 341 (6th Cir. 1998) (hereinafter "*United Food*").

B. Defendants 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

[4] The court's statement in *Ridley*, in our context and based on our facts, begs the fundamental question: how is the MBTA "operating a commercial enterprise" focused on providing safe transit when it opens its doors, literally, to controversial and highly adversarial political statements on one of the most hotly contested geopolitical battlegrounds in the world? As the record evidence presented here demonstrates, this case is not *Ridley* for the MBTA has intentionally opened its advertising space to the discussion of *hotly contested political issues*, specifically including the Israeli / Palestinian conflict. Such actions, as discussed further in this memorandum, demonstrate that the government is in fact *not* operating as a proprietor, but rather as a speech regulator. Consequently, this evidence compels a finding that a public forum has been created for Plaintiffs' advertisement and that Defendants' content- and viewpoint-based speech restriction is unconstitutional.

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. *Cornelius*, 473 U.S. at 800. Once the forum is identified, the court must then determine whether the speech restriction is justified by the requisite standard. *Id.*

On one end of the spectrum lies the traditional public forum. Traditional public forums, such as streets, sidewalks, and parks, are places that "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague v. CIO*, 307 U.S. 496, 515 (1939). This forum is not at issue here.

Next on the spectrum is the designated public forum, which exists when the government intentionally opens its property for expressive activity. *Perry Educ. Ass'n v. Perry Local Educators*, 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 (emphasis added).

In a traditional or designated public forum, speech restrictions 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.*

At the opposite end of the spectrum is the nonpublic forum. The 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 because public officials oppose the speaker's view." *Id*. Thus, even in a nonpublic forum, a speech restriction must be reasonable and viewpoint neutral to pass constitutional muster. *Id*.

The First Circuit has "adopt[ed] the usage equating limited public forum with non-public forum." *Ridley*, 390 F.3d at 76 n.4. However, once the government "has opened a limited forum, [it] must respect the lawful boundaries it has itself set." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995). Accordingly, in a limited public forum, "[t]he State may not exclude speech where its distinction is not reasonable in light of the purpose served by the forum, nor may it discriminate against speech on the basis of its viewpoint." *Id.* at 829 (internal citations and quotations omitted). "Thus, in determining whether the State is acting to preserve the limits of the forum it has created so that the exclusion of a *class of speech* is legitimate, we have observed a distinction between, on the one hand, content discrimination, which may be permissible if it preserves the purposes of that limited forum, and, on the other hand, viewpoint discrimination, which is presumed impermissible *when directed against speech otherwise within the forum's limitations*." *Id*. at 829-30 (emphasis added).

To discern the government's intent as to the nature of the forum created, courts "look[] to the policy and practice of the government to ascertain whether it intended to designate a place not traditionally open to assembly and debate as a public forum," as well as "the nature of the property and its compatibility with expressive activity." *Cornelius*, 473 U.S. at 802. When conducting this analysis, "actual practice speaks louder than words." *Grace Bible Fellowship,*

Inc. v. Maine Sch. Admin. Dist. No. 5, 941 F.2d 45, 47 (1st Cir. 1991); *see also Hopper v. City of Pasco*, 241 F.3d 1067, 1076 (9th Cir. 2001) ("[C]onsistency in application is the hallmark of any policy designed to preserve the non-public status of a forum. A policy purporting to keep a forum closed (or open to expression only on certain subjects) is no policy at all for purposes of public forum analysis if, in practice, it is not enforced or if exceptions are haphazardly permitted."); *United Food*, 163 F.3d at 353 (stating that "we . . . must closely examine whether *in practice* [the transit authority] has consistently enforced its written policy in order to satisfy ourselves that [its] stated policy represents its actual policy") (emphasis added).

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." *Id.* at 351-52 (internal quotations and citation omitted); *see also Christ's Bride Ministries, Inc. v. Southeastern Pa. Transp. Auth.*, 148 F.3d 242, 253 (3d Cir. 1998) (holding that "the purpose of the forum does not suggest that it is closed, and the breadth of permitted speech points in the opposite direction").

In *Lehman v. City of Shaker Heights*, 418 U.S. 298, 304 (1974), for example, the Court found that the consistently enforced, twenty-six-year ban on noncommercial 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."[5] (emphasis added). Other courts have followed *Lehman* to hold that a total ban on noncommercial speech may be consistent with the government acting in a proprietary capacity and have thus found transportation advertising space to be a nonpublic forum when the

[5] "Commercial speech" is an "expression related *solely* to the economic interests of the speaker and its audience." *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 561 (1980) (emphasis added).

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); *N.Y. Magazine v. Metro. Transp. Auth.*, 136 F.3d 123, 130 (2d Cir. 1998) ("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* recognized as *inconsistent with sound commercial practice*.") (emphasis added); *see also Planned Parenthood Ass'n/Chicago Area v. Chicago 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 noncommercial advertising).

As the Sixth Circuit stated in *United Food*:

> In 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. 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*.

163 F.3d at 355 (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").

The forum at issue here is a designated public forum for Plaintiffs' speech. *Cornelius*, 473 U.S. at 802 (creating a designated public forum by "opening a nontraditional forum for public discourse"). Defendants opened the forum for "public discourse" on a very controversial and hotly debated issue (the Israeli / Palestinian conflict). Defendants accepted an advertisement on this subject that expressed the viewpoint that Israelis are the criminals in this conflict because

they are persecuting Palestinians and thus forcing them to become "refugees." Consequently, Defendants' acceptance of the Anti-Israel Advertisement—which created such a substantial public controversy and rash of complaints that it was briefly removed, only to be promptly reinstated—is "inconsistent with operating the property solely as a commercial venture" and thereby creates, *at a minimum*, a public forum for speech on this specific subject matter, such as Plaintiffs' advertisement.[6] Moreover, it is without question that the "nature of the property"—the MBTA's advertising space—is "compatible" with Plaintiffs' proposed expressive activity: displaying the AFDI Advertisement within the space. *See United Food*, 163 F.3d at 355 (stating that "acceptance of political and public-issue speech suggests that the forum is suitable for the speech at issue"—a pro-union message); *see also Ridley*, 390 F.3d at 76-77 (acknowledging that since "the MBTA does run advertisements," "there is nothing inherent in the property which precludes its use for some expressive activity"). Thus, because the forum is wholly suitable—and, indeed, open—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 designated public forum for the display of the AFDI Advertisement.

[6] In *Ridley*, which was decided in 2004, the court concluded—based on the record and arguments presented there—that "[t]he MBTA's policy clearly evidenced an intent to maintain control over the forum, and thus the MBTA did not create a designated public forum." *Ridley*, 390 F.3d at 82. However, a court's forum inquiry requires an examination of the policy in effect at the time of the challenge <u>*and*</u> the government's current practice in enforcing its policy. *See Cornelius*, 473 U.S. at 802. Thus, a forum analysis is not a static inquiry. As the facts change and develop, so too then does a court's forum analysis, which is based on the facts presented. Consequently, as demonstrated above, Defendants' practice of permitting *controversial*, political- and public-issue advertisements, particularly including Defendants' acceptance of the Anti-Israel Advertisement—which occurred well after the *Ridley* decision—evidences an intent to create a public forum for speech such as the AFDI Advertisement, which addresses the very same, hotly debated issue. Moreover, assuming, *arguendo*, that the forum at issue is a nonpublic / limited public forum, Defendants' restriction on Plaintiffs' speech was both unreasonable and viewpoint based in violation of the First Amendment. *See infra*.

Therefore, Defendants must demonstrate a *compelling* reason that is *narrowly tailored* to justify its prior restraint on Plaintiffs' speech—a burden that Defendants cannot meet.

C. Defendants' Prior Restraint Cannot Survive Constitutional Scrutiny.

1. Defendants' Speech Restriction Was Content Based.

Content-based restrictions on speech in a public forum are subject to strict scrutiny. *Cornelius*, 473 U.S. at 800. For "[i]t is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys." *Rosenberger*, 515 U.S. at 828; *R.A.V. v. St. Paul*, 505 U.S. 377, 386-92 (1992) (holding that the government may not "impose special prohibitions on those speakers who express views on disfavored subjects" or on the basis of "hostility—or favoritism—towards the underlying message expressed"). Thus, content-based restrictions "are presumptively unconstitutional." *S.O.C., Inc. v. Cnty. of Clark*, 152 F.3d 1136, 1145 (9th Cir. 1998). And 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. of N.Y.*, 447 U.S. 530, 537 (1980).

Here, Defendants rejected the AFDI Advertisement based on the content (and viewpoint) of its message (and its messenger) in violation of the First Amendment.

2. Defendants' Speech Restriction Was Viewpoint Based.

Viewpoint discrimination is an egregious form of content discrimination that is prohibited in <u>all</u> forums. *See Rosenberger*, 515 U.S. at 829. "The principle that has emerged from [Supreme Court] cases is that the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others." *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993) (internal quotations and citation omitted). "When the government targets *<u>not subject matter</u>*, but *<u>particular views taken by</u>*

speakers on a subject, the violation of the First Amendment is all the more blatant." *Rosenberger*, 515 U.S. at 829 (emphasis added). 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). 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. In other words, "[t]he government must abstain from regulating speech when the specific *motivating ideology* or the *opinion* or *perspective of the speaker* is the rationale for the restriction." *Rosenberger*, 515 U.S. at 829 (emphasis added); *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."). Indeed, as *Ridley* makes eminently clear:

> 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*.

Id. (emphasis added).[7] Which is precisely what occurred in this case.

Here, the content of Plaintiffs' message (and thus its subject matter) is permissible in this forum, as evidenced by the fact that Defendants had previously accepted the same message content that was submitted by a "speaker" that favors Palestinians and disfavors Israelis in the Israeli / Palestinian conflict. Consequently, it is not the (exceedingly controversial) subject matter that is being restricted, but Plaintiffs' viewpoint on the subject. This is a classic form of viewpoint discrimination that is prohibited in all forums. *See Cornelius*, 473 U.S. at 806.

[7] It bears emphasizing that in *Ridley*, the court was not dealing with a situation where there were contending viewpoints "on the same topic."

This conclusion is further buttressed by Defendants' enforcement of a policy that is itself viewpoint based *in its application* (*i.e.*, prohibiting the word "savage" in the context of this debate as "demeaning or disparaging" speech).[8] *See, e.g., R.A.V.*, 505 U.S. at 389 (stating that "a State may not prohibit only that commercial advertising that depicts men in a demeaning fashion" without violating the First Amendment); *Nieto v. Flatau*, 715 F. Supp. 2d 650 (E.D.N.C. 2010) (striking down a demeaning speech restriction on a military base, a nonpublic forum, that was viewpoint based). Here, again, *Ridley* is instructive. In *Ridley*, 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. 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 properly rejected the argument, stating,

> The 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*.

Ridley, 300 F.3d at 88 (emphasis added).

[8] While Plaintiffs contend that *Ridley* was wrongly decided as to its conclusion that the MBTA's "demeaning or disparaging" speech restriction facially and as applied in *that* case was permissible, *see, e.g.*, *Ridley*, 390 F.3d at 100 (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."), *Ridley* does not foreclose a finding that the application of the MBTA's "demeaning or disparaging" speech restriction to prohibit Plaintiffs' advertisement *in this case is impermissible*. Here we have two competing advertisements, with competing viewpoints, addressing the very same subject. In fact, we have a public debate (one the MBTA invited by its decision *to open its forum for this debate*) on a hotly contested, exceedingly controversial issue. And yet, the MBTA, as a government regulator of this debate, does not approve of Plaintiffs' viewpoint on this issue and is thus censoring Plaintiffs' speech (and Plaintiffs' use of a quote adapted from a famous quote by a famous author discussing this very same subject). Such speech regulations are impermissible in any forum.

It is therefore fatal enough that Defendants are attempting to "reduc[e] the effectiveness of [Plaintiffs'] message," which, even if the entire message itself is not prohibited, is a form of viewpoint discrimination, but what further makes this case egregious is that Defendants are plainly "regulating speech [based solely] on the specific *motivating ideology*[,] *opinion* or *perspective of the speaker*," which is classic viewpoint discrimination, in violation of the First Amendment.[9] As the Supreme Court warned in *Cohen v. Cal.*, 403 U.S. 15, 21 (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*." *Id.* at 26 (emphasis added). And, as Shakespeare so aptly noted, the censor's knife "strikes a man more dead than a great reckoning in a little room."

3. Defendants' Advertising Guidelines Permit Arbitrary, Capricious, and Subjective Application.

"[T]he danger of censorship and of abridgment of our precious First Amendment

[9] Pause for a moment to consider further the application of this restriction in the context of the violent clash that is the Israeli / Palestinian conflict. Would it be "demeaning or disparaging" to those who kill innocent civilians in this conflict to describe them as "murderers"? According to Defendants, that is the likely outcome, and they would thus censor such speech. But would it not be equally, *if not more*, "demeaning or disparaging" to those innocent civilians who were killed to call the killers "freedom fighters"? Yet, Defendants would likely say that this latter description would pass muster under the MBTA's Advertising Guidelines. How this is not a quintessential viewpoint-based restriction is beyond reasonable explanation (or application of First Amendment jurisprudence). And lest our meaning is unclear: to prohibit one side in this highly politicized yet real world debate from describing the actions of the other in the murder of innocents as "savage" while allowing the other side to describe the other as war criminals creating "refugees" from stolen lands is precisely why the First Amendment forbids Defendants' conduct here. And to be even more literal: a plain reading of the AFDI Advertisement demonstrates that its use of the term "savage" refers to those who engage in violent "jihad" against Israel in this conflict. Those "jihadis" (self-described, no less) are terrorists—no different than the "jihadis" who killed innocent civilians during the Boston Marathon this past April. Is this the class of "ridership" that Defendants are so concerned about offending? Otherwise, who precisely then is the individual or group engaging in jihad against Israel that is so "demeaned or disparaged" by Plaintiffs' advertisement?

freedoms is too great where officials have unbridled discretion over a forum's use." *Southeastern Promotions, Ltd. v. Conrad,* 420 U.S. 546, 553 (1975).

As the Sixth Circuit held in a case involving the regulation of bus advertising: "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; *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 (quoting *Desert Outdoor Adver., Inc. v. City of Moreno Valley*, 103 F.3d 814, 818 (9th Cir. 1996)) (emphasis added).

Here, Defendants' proffered reason for restricting Plaintiffs' speech is based on a wholly arbitrary determination as to "whether a reasonably prudent person, knowledgeable of the MBTA's ridership and using prevailing community standards," would find the proposed advertisement "demeaning or disparaging." Indeed, attempting to add "objective" language to a wholly subjective endeavor does not save the MBTA's restriction from its constitutional infirmities, particularly in light of the facts of this case. Consider, for example, the following hypothetical speech restriction: "The transit authority bans all advertisements that a reasonably prudent person, knowledgeable of the MBTA's ridership and using prevailing community standards, would find to be in poor taste or aesthetically displeasing." This hypothetical example, similar to Defendants' Advertising Policy, is <u>not</u> based on any *objective criteria*, but,

instead, allows for *ambiguous* and *subjective reasons* for restricting speech in violation of the First Amendment. Indeed, in reality, the dressed-up disguise of objectivity merely hides a viewpoint-based censorship of speech (and speaker) with which Defendants do not agree or simply do not like. If the true objective is to limit speech that might be objectionable to the MBTA's "ridership," then why did Defendants reinstate an advertisement (*i.e.*, Anti-Israel Advertisement) that provoked a storm of complaints? In short, Defendants' rejection of Plaintiffs' advertisement was based on an improper motive, and this rejection was made possible by Defendants' constitutionally infirm regulations. *See Ridley*, 390 F.3d at 87.

4. Defendants' Speech Restriction Is Not Reasonable.

Reasonableness is evaluated "in light of the purpose of the forum and all the surrounding circumstances." *Cornelius*, 473 U.S. at 809; *see also Brown v. Cal. Dep't of Transp.*, 321 F.3d 1217, 1222-23 (9th Cir. 2003) (preliminarily enjoining the enforcement of the department of transportation's policy of permitting the display of American flags, but prohibiting the display of all other banners and signs on highway overpass fences, a nonpublic forum, concluding, *inter alia*, that the "proffered justification" for the restriction was "patently unreasonable").

Here, Defendants proffer one justifications for its prior restraint on Plaintiffs' speech: the advertisement is "demeaning or disparaging." Yet, Defendants' willingness to "offend" a segment of its "ridership" by displaying the Anti-Israel Advertisement demonstrates that the "proffered justification" is "patently unreasonable."

III. Plaintiffs Are Likely to Succeed on the Merits of Their Equal Protection Claim.

"[U]nder the Equal Protection Clause, . . . government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views." *Police Dep't of the City of Chicago v. Mosley*, 408 U.S. 92, 96

(1972); *see also Carey v. Brown*, 447 U.S. 455, 461-62 (1980) (discriminating among speech-related activities in a public forum violates the Equal Protection Clause). As discussed in greater detail above, this is precisely what happened in this case. Defendants accepted the Anti-Israel Advertisement, which sparked complaints and controversy, but yet rejected Plaintiffs' advertisement, which discussed the very same subject but from a differing viewpoint. This is a violation of the equal protection guarantee of the Fourteenth Amendment.

IV. Plaintiffs Will Suffer Irreparable Harm in the Absence of an Injunction.

It is well established that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury" sufficient to justify injunctive relief. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976); *Maceira v. Pagan*, 649 F.2d 8, 18 (1st Cir. 1981) (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*).

V. The Balance of Equities Tips Sharply in Favor of 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. *See* sec. IV. *supra*. On the other hand, if Defendants are enjoined from enforcing their prior restraint on Plaintiffs' speech, they will suffer no harm because the exercise of constitutionally protected rights can never harm any of Defendants' legitimate interests. *See* sec. VI. *infra.*

VI. Granting the Injunction Is in the Public Interest.

The public interest is best served by upholding First Amendment freedoms. *See 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. 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."); *Iowa Right to Life Comm., Inc. v. Williams*, 187 F.3d 963, 970 (8th Cir. 1999) ("[The] public interest favors protecting core First Amendment freedoms. . . ."); *Homans v. City of Albuquerque*, 264 F.3d 1240, 1244 (10th Cir. 2001) (same); *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."). Thus, the public interest favors granting the requested injunction.

REQUEST FOR ORAL ARGUMENT

Oral argument will assist this court in reaching a full understanding of the important constitutional issues presented and the underlying facts, and it will allow the attorneys for both sides to address any outstanding legal or factual issues that this court deems relevant.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 12, 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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