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. 1:14-cv-10292-NMG **PLAINTIFFS' REPLY BRIEF IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION** [Fed. R. Civ. P. 65] **LEAVE TO FILE GRANTED ON FEBRUARY 28, 2014**

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 preliminary injunction (Doc. Nos. 8-9) (hereinafter "PI Motion").

I. Defendants Fail to Provide Any Reasonable Basis to Reject AFDI Advertisement III.

Every court, including this one, that has concluded that AFDI Advertisement I disparages peaceful, law-abiding Muslims and Palestinians who simply oppose Israel has done so predicated upon context. Specifically, the courts have reasoned that the unmodified word "jihad" might, despite the word "war" and the context of the famous Ayn Rand quote, allow a reader to believe that the advertisement is calling all Palestinian Muslims, who otherwise engage in ***peaceful*** "struggle" against Israel, savages. *See Am. Freedom Def. Initiative v. Mass. Bay Transp. Auth.*, No. 1:13-cv-12803-NMG, 2013 U.S. Dist. LEXIS 179729, at *16-*18 (D. Mass. filed Nov. 6, 2013) ("*MBTA I*") (citing two other cases involving AFDI Advertisement I based upon the unmodified, broad sweep of the word "jihad"); *see also Am. Freedom Def. Initiative v. King County*, No. 2:13-cv-01804-RAJ, 2014 U.S. Dist. LEXIS 11982, at *20, n. 6 (W.D. Wash. Jan.

30, 2014). Indeed, this court carefully applied a kind of literary construction following the commonsensical maxim of *noscitur a sociis* and determined that it was reasonable to understand "savage" in context as including all Muslims and Palestinians who oppose Israel because the word "jihad," which follows the savage quote, might be understood as peaceful struggle. *Id.*; *see Samantar v. Yousuf*, 560 U.S. 305, 317 (2010) (quoting *Russell Motor Car Co. v. United States*, 261 U.S. 514, 519 (1923) (citing the maxim and stating that "a word may be known by the company it keeps")). In other words, context matters. Moreover, it matters even when the word "jihad" and the phrase "support Israel" appear after the modified Ayn Rand quote about war between the civilized man and the savage.

Defendants, however, now want the court to ignore the very context that, in *MBTA I,* allowed the word "savage" to be "reasonably" understood to demean all Muslims and Palestinians by arguing that the now quite explicit phrase "violent jihad" will be missed by the reader. (*See* Defs.' Opp'n Br. at 7-8 [arguing that a reader would not understand "war" or "savage" to be modified and contextualized by "violent jihad" because a reader might not read "backwards" and contextualize the Ayn Rand quote with the phrase "violent jihad"]). But if "violent jihad," and presumably "support Israel," will be missed by the reader because it occurs ***after*** the savage quote, how will the reader know the quote refers to Muslims or Palestinians in the first instance?

Defendants of course are left to make this kind of silly argument because they find nothing demeaning about AFDI Advertisement II. But that means Defendants find a reasonable distinction between a "savage" and "those who engage in savage acts." Yet, Defendants do not explain that difference; all they do is claim that this court found that difference important. (Defs.' Opp'n Br. at 8 ["In pressing their argument, plaintiffs ignore the fact that this Court has already found that such a distinction does exist."]). But while this court in *MBTA I* did note the

difference between the use of the word "savage" as an adjective as opposed to a noun (*MBTA I*, 2013 U.S. Dist. LEXIS 179729, at *25 ["The quote plaintiffs selected to express their message does not criticize 'savage' acts but instead contrasts the state of Israel with the 'savages' who oppose or fight against it."]), the court's observation is only relevant because the court recognized that the reader would in fact read "backwards" to contextualize "savage" with the unmodified "jihad" and the phrase "support Israel," and by doing so, might reasonably understand the advertisement labels as savages all Muslims and Palestinians who engage in a peaceful jihad-like struggle in their opposition to Israel. But in that same contextualized environment, AFDI Advertisement III makes clear that a savage = the use of "violent jihad" as "war" by one who does not support Israel.

If we take Defendants seriously, it is reasonable to understand AFDI Advertisement III to suggest that the opposition to Israel by peaceful Muslim Palestinians is the equivalent of being a savage—ignoring "violent jihad" but paying special attention to, by reading "backwards," the phrase "support Israel." But if that were a reasonable reading of the advertisement, then calling peaceful Palestinian Muslims as "those who engage in savage acts," as in AFDI Advertisement II, would be no less demeaning. In other words, labeling peaceful opposition to Israel as a savage act has exactly the same meaning as using the noun savage to describe this group of opponents of Israel.

And this in turn points to the irrationality and unreasonable methodology employed by Defendants in applying their demeaning speech restriction in this case. They want to use a "backwards" reading to create context at the same time they do not wish to use a "backwards" reading to create context, all depending upon the result they wish to achieve.

And finally, this in turn points to the more fundamental problem in this as-applied First Amendment challenge. The MBTA wishes to open its limited public forum to the most

controversial of political speech while, at the same time, applying some standard it somehow concludes is reasonable to determine when controversial political speech becomes demeaning. *MBTA I*, 2013 U.S. Dist. LEXIS 179729, at *26-*27 ("The MBTA, in deciding to open its advertising program to speech on controversial topics, has taken on the difficult task of determining whether speech on that topic crosses the line from being offensive or hurtful to being demeaning or disparaging such that it can be excluded from the forum."). The MBTA assures us that not only does it have the wherewithal to come up with some reasonable approach to accomplish this task, it has done so in this case. What we are left with, however, is the absurd result that you can label those who oppose Israel as "those who are engaging in savage acts," but you cannot label as savages those who oppose Israel with "violent jihad."

This leads to our final point regarding Defendants' unreasonable application of its speech restriction. Defendants refer to what they claim is a blog article authored by Plaintiff Pamela Geller, attached as Exhibit D to their memorandum (Doc. No. 16-4), to somehow demonstrate that Plaintiffs intend ADFI Advertisement III to be no less demeaning than AFDI Advertisement I. (Defs.' Opp'n Br. at 6-7 ["Lest there be any doubt about whether Ms. Geller intends the very same equation . . ."]). Aside from the evidentiary shortcomings of such a factual reference in a brief without any effort to authenticate the document with a declaration, the real failure is Defendants' logic. If this article somehow demonstrates something beyond "any doubt" about the meaning of AFDI Advertisement III, it should work the same magic on AFDI Advertisement II. But apparently, according to Defendants, it does not. Moreover, the article has nothing to do with the Israel-Palestinian conflict nor about peaceful Palestinian Muslims and their opposition to Israel. As such, Defendants' *post hoc* use of the article in its opposition brief when there is no reference in the factual record to Defendants' use of this article in the decision to reject AFDI

Advertisement III renders Defendants' effort to put this article before the court improper as neither relevant nor probative.

II. **Plaintiffs Are Irreparably Harmed as a Matter of Law.**

Defendants argue that even if Plaintiffs are likely to succeed on the merits, they could not suffer irreparable harm and gain the benefit of the balance of equities because Defendants have permitted Plaintiffs to run AFDI Advertisement II, which has the same meaning as AFDI Advertisement III. (Defs.' Opp'n Br. at 9-10). Defendants miss the point of the First Amendment. First and foremost, as a matter of law, if the MBTA's decision is unreasonable, it violates the First Amendment and AFDI Advertisement III must run. Second, while the two advertisements mean the same thing, the impact of the messaging is different, and it is the messaging of calling a spade a spade—*i.e.*, someone who uses violent jihad to oppose Israel is a savage—that is the political speech Plaintiffs wish to convey. Or, to put it in a more contemporary vernacular, Plaintiffs wish to convey not only the meaning of AFDI Advertisement III, but also the message that they have the courage to speak truth to power. It is not the government's job—or right—to change that messaging with its version of politically acceptable speech. Thus, while the phrase "all men are created equal" might mean the same thing as "government should not be permitted to pass laws that discriminate between two people based upon factors the law does not recognize as constitutionally permissible," the advertising message of the former has an impact the speaker wishes to create that the latter loses entirely. Advertising is as much about the impact of the messaging as it is the meaning of the text. *Ridley v. Mass. Bay Transp. Auth.*, 390 F.3d 65, 88 (1st Cir. 2004) ("[R]educing the effectiveness of a message, as opposed to repressing it entirely, thus may be an alternative form of viewpoint discrimination.") In short, it does not take any experience on Madison Avenue to recognize the

difference in the messaging impact between "savages" and "those who engage in savage acts," while recognizing that they have the exact same meaning.

WHEREFORE, Plaintiffs respectfully request that the court grant this unopposed motion and accept for filing the attached reply brief in support of Plaintiffs' PI Motion.

Respectfully submitted,

AMERICAN FREEDOM LAW CENTER

/s/ *David Yerushalmi*
David Yerushalmi, Esq.* (DC # 978179)
1901 Pennsylvania Avenue NW, Suite 201
Washington, D.C. 20006
dyerushalmi@americanfreedomlawcenter.org
Tel: (646) 262-0500; Fax: (801) 760-3901

/s/ *Robert J. Muise*
Robert J. Muise, Esq.* (MI P62849)
P.O. Box 131098
Ann Arbor, Michigan 48113
rmuise@americanfreedomlawcenter.org
Tel: (734) 635-3756; Fax: (801) 760-3901

* Admitted *pro hac vice*

/s/ *Robert Snider*
Robert Snider, Esq. (BBO#471000)
11 Cahill Park Drive
Framingham, Massachusetts 01702
robert.snider20@gmail.com
Tel/Fax: (508) 875-0003

CERTIFICATE OF SERVICE

I hereby certify that on February 28, 2014, a copy of the foregoing was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system. Parties may access this filing through the Court's system. I further certify that a copy of the foregoing has been served by ordinary U.S. mail upon all parties for whom counsel has not yet entered an appearance electronically: none.

AMERICAN FREEDOM LAW CENTER

/s/ *David Yerushalmi*
David Yerushalmi, Esq.