IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN FREEDOM DEFENSE INITIATIVE, et al., Plaintiffs, -v.- RICHARD SARLES, in his official capacity as General Manager and Chief Executive Officer for the Washington Metropolitan Area Transit Authority (WMATA), Defendant.	Case No. 1:12-cv-01564-RMC Hon. Rosemary M. Collyer

PLAINTIFFS' REPLY IN SUPPORT OF
MOTION FOR TEMPORARY RESTRAINING ORDER /
PRELIMINARY INJUNCTION

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INTRODUCTION

The Washington Metropolitan Area Transit Authority ("WMATA"),[1] *a government agency*, is asking this court to ratify an unprecedented, radical, and exceedingly troubling position: that a private citizen's *fundamental* First Amendment right to engage in *core political speech* in a public forum *in the United States of America* can and should be abridged because violent Muslim protestors *overseas* are engaging in "savage" behavior in response to a video that they deem to be anti-Islamic.[2] (*See* Def.'s Opp'n at 5-8 [Doc. No. 13]).

In sum, the WMATA's arguments are wrong as a matter of law and dangerous to our free Republic as a matter of principle.[3] Consequently, they must be summarily rejected.

[1] While the lawsuit names Richard Sarles, the General Manager and Chief Executive Officer for the WMATA, the fact remains that a claim against a government official in his or her official capacity is a claim against the governmental entity to which he or she is employed. *See Kentucky v. Graham*, 473 U.S. 159 (1985); *see also Brandon v. Holt*, 469 U.S. 464, 471-72 (1985) (holding that "a judgment against a public servant 'in his official capacity' imposes liability on the entity that he represents"). And such claims for prospective declaratory and injunctive relief are not barred by the Eleventh Amendment. *See, e.g., Ex Parte Young*, 209 U.S. 123 (1908) (holding that prospective injunctive relief provides an exception to Eleventh Amendment immunity).

[2] One would assume that even the WMATA would recognize that storming an American embassy, violently killing our ambassador and three other Americans, and destroying property are "barbaric and uncivilized" acts. (Def.' Opp'n at 7 [decrying the fact that the anti-Islam video depicts "Muslims as violent, barbaric and uncivilized, or in other words, as savages"] [Doc. No. 13]).

[3] If one pauses for a moment and seriously considers the WMATA's position, there is one inescapable conclusion: the WMATA apparently considers adherents to Islam to be violent and incapable of responding to critical, political speech in our country in a civilized manner. When the WMATA ran an advertisement critical of Israel, urging the United States to end its military aid to its long-time ally in the Middle East, there was no concern about violence and passenger safety. *What message is the WMATA sending about Islam by restricting Plaintiffs' core political speech? And what message will this court be sending if it affirms that position?* Indeed, whether intentionally or not, the WMATA is essentially siding with the Muslim Brotherhood leader of Egypt, Mohamed Morsi, who condemns speech critical of Islam. (*See* Def.'s Opp'n at 6 [quoting Morsi as stating "We will not allow anyone to [criticize Islam] by word or deed."] [Doc. No. 13]). However, Americans enjoy freedoms *in this country* that do not exist in the Middle East. And chief among those freedoms is the right to freedom of speech.

SUMMARY OF RELEVANT FACTS

There is no dispute as to these relevant, and dispositive, facts:[4]

- The WMATA accepts for display on its property a wide variety of commercial and political messages, including controversial messages. (Def.'s Opp'n at 3 [Doc. No. 13]; Murray Aff. at ¶ 5, Exs. B through G [Doc. Nos. 13-3, 13-6 through 13-11]; Geller Decl. at ¶ 4 [Doc. No. 2-1]).

- The WMATA has accepted controversial messages that convey an anti-Israel message. (*See* Def.'s Opp'n at 3 [Doc. No. 13]; Murray Aff. at ¶ 5, Exs. B, C [Doc. Nos. 13-6, 13-7]; Geller Decl. at ¶¶ 4-6 [Doc. No. 2-1]).

- The WMATA admits that it "*has run many controversial advertisements in spite of public protests*." (Def.'s Opp'n at 3 [Doc. No. 13]) (emphasis added).

- Plaintiffs' Pro-Israel Advertisement met the WMATA guidelines and was thus accepted for display on four WMATA dioramas. (Geller Decl. at ¶ 10 [Doc. No. 2-1]).

- The WMATA admits the following: "In spite of the incendiary language of the AFDI Ad, WMATA determined that *it complied with the Guidelines and was protected speech*." (Def.'s Opp'n at 5 [Doc. No. 13]) (emphasis added); *see also* Murray Aff. at ¶ 7 ["The Office of the General Counsel determined that (i) the AFDI Ad complied with WMATA's Guidelines Governing Commercial Advertising and (ii) was *protected speech under the First Amendment to the United States Constitution*." (emphasis added)] [Doc. No. 13-3]).

- Plaintiffs' advertisement was scheduled to run on *four* (4) WMATA dioramas beginning September 24, 2012 and ending October 21, 2012. (Def.'s Opp'n at 5 [Doc. No. 13]; Geller

[4] To avoid potential confusion, Plaintiffs have marked their exhibits consecutively. Thus, Plaintiff Geller's declaration [Doc. No. 2-1] filed in support of Plaintiffs' motion is marked as Exhibit 1. And Plaintiff Geller's supplemental declaration filed in support of this reply is marked as Exhibit 2.

Decl. at ¶ 11, Ex. B [Doc. No. 2-1]; Geller Supp. Decl. at ¶ 5, Ex. A [acknowledging that Plaintiffs' advertising campaign was "to start September 24th"], at Ex. 2).[5]

- The WMATA has *six hundred thirteen* (613) dioramas. (Murray Aff. at ¶ 2 [Doc. No. 13-3]).

- On September 18, 2012, the WMATA, through its advertising agent, informed Plaintiffs that the advertisements were not going to run on September 24, 2012 "due to the situations happening around the world at this time." (Geller Decl. at ¶ 14 [Doc. No. 2-1]; Geller Supp. Decl. at ¶5, Ex. A, at Ex. 2).

- Plaintiff Geller immediately informed the WMATA, through its advertising agent, that Plaintiffs objected to this restriction on their speech, stating, "*It is precisely because of the current political situation that it is important that I be able to express my message now* and that I consider any delay to be government censorship of my core political speech. I demand that the transit authority change [its] position." (Geller Decl. at ¶ 15 [Doc. No. 2-1]; Def.'s Ex. M. [Doc. No. 13-17]) (emphasis added).

- The WMATA, through its advertising agent, confirmed that the advertisements would not run "due to world events and a concern for the security of their passengers." (Geller Decl. at ¶ 16 [Doc. No. 2-1]; Def.'s Ex. M [Doc. No. 13-17]).

[5] The WMATA's assertion that Plaintiffs failed to provide CBS Outdoor or the WMATA with the display copies within the appropriate time period to run on September 24, 2012 is a red herring. (Def.'s Opp'n at 5 [Doc. No. 13]). Indeed, the WMATA itself treats this as a throwaway argument, not addressing why this should preclude issuing an injunction in this case. And the reason is simple: the WMATA knows that Plaintiffs were prepared to deliver the advertisements in a timely fashion pursuant to the practice of CBS Outdoor and pursuant to communications between Plaintiffs and the WMATA's advertising agent. Plaintiffs halted the printing and delivery to avoid incurring unnecessary costs precisely because of the WMATA's decision on September 18, 2012. Moreover, on September 25, 2012, the WMATA's advertising agent sent an email to Plaintiff Geller, requesting that she deliver the advertisements in anticipation of resolving this dispute. Plaintiff Geller promptly did so, and the advertisements were delivered to the WMATA on October 1, 2012. Therefore, the advertisements are ready to run immediately. (Geller Supp. Decl. at ¶¶ 2-8, Ex. B, at Ex. 2).

- The WMATA is restricting Plaintiffs' speech *because of the reaction to anti-Islam speech in the Middle East.* (*See* Def.'s Opp'n at 5-8 [Doc. No. 13]; Murray Aff. at ¶¶ 11-13 [Doc. No. 13-3]; Def.'s Ex. M [Doc. No. 13-17]).

- The WMATA's restriction on Plaintiffs' speech is operating as a prior restraint. (Geller Decl. at ¶¶ 14-16 [Doc. No. 2-1]; Murray Aff. at ¶¶ 11-13 [Doc. No. 13-3]; Def.'s Ex. M [Doc. No. 13-17]).

- The WMATA's restriction on Plaintiffs' speech is based on the WMATA's perception that certain viewers will react adversely to Plaintiffs' message, and in particular, that certain viewers will react negatively *toward the viewpoint expressed by Plaintiffs' message*.[6] (Def.'s Opp'n at 5-8 [Doc. No. 13]; Taborn Aff. at ¶¶ 5-6 [Doc. No. 13-2]; Murray Aff. at ¶¶ 11-13 [Doc. No. 13-3]). Consequently, the WMATA's restriction on Plaintiffs' speech is *both* content- and viewpoint-based. (*See also* Def.'s Opp'n at 7 [Doc. No. 13] [stating that the WMATA made "a reassessment of the AFDI Ad's inflammatory language *in light of* the [anti-Islam video's] depiction of the prophet Mohammad and Muslims as violent, barbaric and uncivilized, or in other words, as savages." (emphasis added)]; Aff. of Taborn at ¶ 5 ["I determined that the AFDI Ad was highly incendiary, *particularly because it refers to both Middle-Easterners and Muslims as savages*." (emphasis added)] [Doc. No. 13-2]).

[6] There can be no serious dispute that the WMATA's speech restriction is viewpoint based in that the WMATA specifically referenced in the emails from its advertising agent to Plaintiff Geller that the restriction was based on "the situations happening around the world at this time" and "world events," and the WMATA has expressly confirmed in its opposition (Def.'s Opp'n at 5-8 [citing to Muslim violence toward anti-Islam speech during middle eastern events of September 11, 2012] [Doc. No. 13]) that the WMATA's concern is based on *Muslim reaction to speech that is considered anti-Islamic*. There is *not a shred* of evidence before this court—or elsewhere for that matter—of violence erupting over a message that is considered pro-Israel or pro-Islam. While perhaps it is a politically correct argument to claim that the WMATA's concern is not viewpoint based (*i.e.,* that it would have similar concerns over an anti-Israel/pro-Islam message, [*see* Def.'s Opp'n at 22] [Doc. No. 13]), it is nonetheless a patently false and self-serving argument because it can only be made in the face of overwhelming, contradictory, and undisputed evidence.

- In its opposition, the WMATA indicates, for the first time, that "it is prepared to run the advertisement beginning November 1," (Def.'s Opp'n at 11, n.15), which means that the WMATA *is imposing an arbitrary, 38-day suspension and censorship of Plaintiffs' political speech*. (Taborn Aff. at ¶ 11 [Doc. No. 13-2]).

- The very same advertisement at issue here is *currently* on display on Metropolitan Transportation Authority ("MTA") property in New York City. And while there have been some isolated incidents of vandalism, which is not uncommon for a major transit authority when a controversial advertisement runs,[7] there have been no outbreaks of terrorism or other such violence that would create any serious safety concerns or a "dangerous environment" for passengers. (Geller Supp. Decl. at ¶ 10 at Ex. 2). Consequently, the WMATA's safety concerns are not only speculative, they are unfounded as a matter of fact.

ARGUMENT

I. THE WMATA'S IRREPARABLE HARM ARGUMENT IS WRONG AS A MATTER OF LAW.

The WMATA's dismissive treatment of the longstanding proposition in First Amendment jurisprudence that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury," *Elrod v. Burns*, 427 U.S. 347, 373 (1976), as applied in this case is wrong as a matter of law.[8] (Def.'s Opp'n at 8-10).

Indeed, the WMATA's reliance on *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290 (D.C. Cir. 2006), is misplaced. (*See* Def.'s Opp'n at 9-10 [Doc. No. 13]). As an initial

[7] The WMATA admits that it "has run many controversial advertisements in spite of public protest." (Def.'s Opp'n at 3 [Doc. No. 13]).

[8] Indeed, many of the cases cited by the WMATA, such as *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) (addressing the pleading standard required to survive a motion to dismiss under Rule 12(b)(6)), and those dealing with injuries unrelated to the suppression of free speech or with speculative injuries that are neither immediate or concrete—which is to say virtually all of the cases cited by the WMATA in this section—are simply not relevant here. (*See* Def.'s Opp'n at 8-13 [Doc. No. 13]).

matter, the WMATA creates a straw man, arguing that Plaintiff's position is that "irreparable harm need not be shown." (Def.'s Opp'n at 10 [Doc. No. 13]). That is not Plaintiff's position. Plaintiff's position is precisely the position that *Chaplaincy of Full Gospel Churches* reaffirmed: when a moving party shows that a rule or regulation *directly limits speech*, then the party has established irreparable harm as a matter of law. *See id*. at 301-02 (requiring "individuals seeking a preliminary injunction on First Amendment grounds to demonstrate a likelihood that they are engaging or would engage in the protected activity the government action is purportedly infringing"). The point the court was making in *Chaplaincy of Full Gospel Churches* was simply that for an Establishment Clause violation, all that is required of the moving party is to *allege a violation* in order to show irreparable harm since there is no affirmative action (*i.e*. actually engaging in free speech) required on the part of the grieving party: the "harm . . . occurs merely by virtue of the government's purportedly unconstitutional policy or practice establishing a religion, without any concomitant protected conduct on the movants' part." *Id*. at 302 (internal citation omitted); *see also id*. at 303 (concluding "that where a movant alleges a violation of the Establishment Clause, this is sufficient, without more, to satisfy the irreparable harm prong for purposes of the preliminary injunction determination").

Indeed, the court cited with approval a case from the Second Circuit, noting that the Second Circuit has adopted the same approach as the D.C. Circuit:

> Where a plaintiff alleges injury from a rule or regulation that ***directly limits speech***, the irreparable nature of the harm ***may be presumed***. . . . In contrast, in instances where a plaintiff alleges injury from a rule or regulation that may only potentially affect speech, the plaintiff must establish the causal link between the injunction sought and the alleged injury, that is, the plaintiff must demonstrate that the injunction will prevent the feared deprivation of free speech rights.

Id. at 301 (quoting *Bronx Household of Faith v. Bd. of Educ.*, 331 F.3d 342, 349-50 (2d Cir. 2003) (emphasis added).

Here, there is no dispute that Plaintiffs have demonstrated that they intend to engage in political speech protected by the First Amendment and that the challenged restriction *directly limits* their speech. Consequently, this restriction on Plaintiffs' right to freedom of speech constitutes irreparable harm as a matter of law. And this harm began the moment the WMATA's restriction limited Plaintiffs' speech (September 24, 2012), and it is continuing to this day.

Moreover, there can be no serious dispute that restricting core political speech for 38 days *to specifically prevent it from being expressed when it is most timely* is censorship of speech that causes irreparable harm. Imagine the government telling the *Washington Post* that it could write a story critical of presidential candidate Mitt Romney based on comments he made at a fundraising event, but that the newspaper couldn't run the story until *after* the election in November for fear that it might upset TEA Party supporters. Would anyone seriously dispute that this government censorship of speech is causing irreparable injury? Of course not. Indeed, as the U.S. Supreme Court acknowledged in *Elrod*, "*The timeliness of political speech is particularly important*." *Elrod*, 427 U.S. at 374, n.29 (emphasis added).

In sum, Plaintiffs have established irreparable injury as a matter of undisputed fact and law. *Playboy Enterprises, Inc. v. Meese*, 639 F. Supp. 581, 586 (D.D.C. 1986) ("A deprivation of a First Amendment right, that is a prior restraint on speech, a right so precious in this nation, constitutes irreparable injury.").

II. PLAINTIFFS' PRO-ISRAEL ADVERTISEMENT IS NOT "FIGHTING WORDS," IT IS CORE POLITICAL SPEECH ENTITLED TO SPECIAL PROTECTION.

The WMATA's position that Plaintiffs' advertisement may be proscribed as "fighting words" (Def.'s Opp'n at 14-22) [Doc. No. 13]) is baseless and, if accepted, an exceedingly dangerous threat to our First Amendment freedoms. The WMATA's argument essentially

renders the First Amendment a nullity for any speech that the government deems to be offensive to a certain listener or viewer, thereby turning the First Amendment on its head. *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118 (1991) ("The fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection.") (citations omitted); *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 135 (1992) (holding that speech cannot be "punished or banned, simply because it might offend a hostile mob"); *Hill v. Colo.*, 530 U.S. 703, 715 & 710, n.7 (2000) ("The fact that the messages conveyed by [the signs] may be offensive to their recipients does not deprive them of constitutional protection.").

In fact, the WMATA's position is confused and entirely inconsistent. As the WMATA admits, it accepted Plaintiffs' advertisement for display because "it complied with the Guidelines and was *protected speech*." (Def.'s Opp'n at 5 [Doc. No. 13]) (emphasis added). Now, because of events occurring *in the Middle East*, the WMATA argues that it can censor Plaintiffs' speech because the speech constitutes "fighting words." Yet, the WMATA further claims that the speech will apparently lose its "fighting words" status after the arbitrary date of November 1, when the WMATA will apparently allow it to run once again. (Def.'s Opp'n at 11, n.15 [claiming that the WMATA "is prepared to run the advertisement beginning on November 1"] [Doc. No. 13]).

Nonetheless, leaving aside the internal inconsistency of its position, the WMATA's claim that Plaintiffs' advertisement constitutes "fighting words" is incorrect as a matter of law. As *Chaplinsky v. N.H.*, 315 U.S. 568, 573 (1942), makes clear, "fighting words" is a very narrow and limited category of speech, and it only encompasses "*face-to-face* words plainly likely to

cause a breach of the peace by the addressee." (emphasis added); *Cohen v. Cal*., 403 U.S. 15, 20 (1971) (describing "fighting words" as "*personally abusive epithets* which, when *addressed to the ordinary citizen*, are, as a matter of common knowledge, inherently likely to provoke violent reaction") (emphasis added).

Moreover, in *Terminiello v. City of Chicago*, 337 U.S. 1 (1949), the Supreme Court did not allow convictions to stand because the trial judge charged that the defendants' speech could be punished as a breach of the peace "if it stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance, or if it molests the inhabitants in the enjoyment of peace and quiet by arousing alarm." *Id.* at 3. In finding such a position unconstitutional, the Supreme Court stated,

> [A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech . . . is . . . protected against censorship or punishment. . . . *There is no room under our Constitution for a more restrictive view*.

Id. at 4 (emphasis added); *see also NAACP v. Claiborne Hardware, Co.*, 458 U.S. 886, 928 (1982) ("The emotionally charged rhetoric of Charles Evers' speeches did not transcend the bounds of protected speech. . . ."); *Tx. v. Johnson*, 491 U.S. 397 (1989) (reversing the conviction of a protestor who burned an American flag while fellow protestors shouted, "America, the red, white, and blue, we spit on you").[9]

Thus, contrary to the WMATA's feckless claim, Plaintiffs' speech is core political speech that is "*entitled to special protection*," not less. *Connick v. Myers*, 461 U.S. 138, 145 (1983)

[9] Accepting the WMATA's position would permit the burning of the American flag by Muslim protestors in the Middle East and here in the United States, but prohibit a private, patriotic citizen from objecting to such behavior and denouncing it as "savage" for fear of offending the flag-burners.

(observing that "speech on public issues occupies the 'highest rung of the hierarchy of First Amendment values,' and is entitled to special protection") (quoting *Claiborne Hardware Co.*, 458 U.S. at 913 & *Carey v. Brown*, 447 U.S. 455, 467 (1980)). Further, as the United States District Court for the Southern District of New York held in a case involving *the very same advertisement*, Plaintiffs' speech "is not only protected speech—it is core political speech." *Am. Freedom Def. Initiative v. Metro. Transp. Auth.*, No. 11 Civ. 6774 (PAE), 2012 U.S. Dist. LEXIS 101274, at *21 (S.D.N.Y. July 20, 2012).

In sum, the WMATA's position runs contrary to, and indeed undermines, our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks . . . ." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

III. THE WMATA'S SPEECH RESTRICTION IS NOT A CONTENT-NEUTRAL, TIME, PLACE, AND MANNER RESTRICTION.

In a public forum,[10] the government may enforce reasonable, *content neutral* time, place, and manner regulations of speech if the regulations are narrowly tailored to serve a significant government interest and leave open ample alternative channels of communication. *Perry Educ.*

[10] There is no dispute that the WMATA permits a wide variety of political advertising, including "controversial advertisements." (Def.'s Opp'n at 3 [Doc. No. 13]). Consequently, as a matter of fact and law, the WMATA's advertising space is a designated public forum. *See Lebron v. Wash. Metro. Transit. Auth.*,749 F.2d 893, 896 (D.C. Cir. 1984) (holding that there is no "question that WMATA has converted its subway stations into public fora by accepting other political advertising"); *see also The Wash. Post. Co. v. Turner*, 708 F. Supp. 405, 410 (D.D.C. 1989) ("The Court finds that WMATA has converted its stations into public fora."); *N.Y. Magazine v. Metro. Transp. Auth.*, 136 F.3d 123, 130 (2d Cir. 1998) (concluding that the advertising space was a public forum where the transit authority permitted "political and other non-commercial advertising generally"); *United Food & Commercial Workers Union, Local 1099*, 163 F.3d at 355 (concluding that the transit 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) (concluding that the advertising space became a public forum where the transit authority permitted advertising on "a wide variety of commercial, public-service, public-issue, and political ads"). Consequently, the WMATA's content-based restrictions on Plaintiffs' speech must survive strict scrutiny, which it cannot do. *See infra*.

Ass'n v. Perry Local Educators, 460 U.S. 37, 45 (1983). However, *content-based* restrictions on speech—including those that make "time" restrictions—are subject to strict scrutiny. *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 800 (1985). That is, content restrictions on speech are only permissible when they are "necessary to serve a compelling state interest" and "narrowly drawn to achieve that interest." *Id*.

The WMATA argues against Plaintiffs' claim that its time restriction "is a content-based restriction on speech," by claiming that "[t]he facts . . . establish that the [time restriction] is *viewpoint neutral*." (Def.'s Opp'n at 23 [Doc. No. 13]) (emphasis added). As noted above, the WMATA's restriction on Plaintiffs' speech *is* viewpoint based,[11] which is the most egregious form of content discrimination. *See Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995). However, the WMATA never addresses the question of whether its restriction on Plaintiffs' speech is *content-neutral*. And the reason is simple: the WMATA cannot dispute the conclusion that its speech restriction is, at a minimum, content based.

A content-based restriction is one that "restrict(s) expression because of its message, its ideas, its subject matter, or its content." *Consolidated Edison Co. of N.Y. v. Public Serv. Comm. of N.Y.*, 447 U.S. 530, 537 (1980). Here, there is no dispute that the WMATA is restricting

[11] When speech "fall[s] within an acceptable subject matter otherwise included in the forum," as in this case, the WMATA "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, the WMATA admits that they restricted Plaintiffs' speech following "a reassessment of the AFDI Ad's inflammatory language *in light of* the [anti-Islam video's] depiction of the prophet Mohammad and Muslims as violent, barbaric and uncivilized, or in other words, *as savages*." (Def.'s Opp'n at 7 [Doc. No. 13]) (emphasis added); *see also Nieto v. Flatau*, 715 F. Supp. 2d 650 (E.D.N.C. 2010) (holding that a speech restriction on a military base, a nonpublic forum, was viewpoint based as applied to anti-Islam speech in violation of the First Amendment). There is no escaping the brute fact that the WMATA is restricting Plaintiffs' speech because the WMATA is concerned that Muslims will act violently toward the "savages" reference. Indeed, the WMATA admits as much. (*See* Aff. of Taborn at ¶ 5 ["I determined that the AFDI Ad was highly incendiary, particularly because it refers to both Middle-Easterners and Muslims as savages."] [Doc. No. 13-2]).

Plaintiffs' speech based on its message, which alone demonstrates that the restriction is content based. And, there is no dispute that the WMATA is restricting Plaintiffs' speech based on the WMATA's belief that others might object and react adversely to Plaintiffs' message. This too is a content-based restriction. The Supreme Court has long held that "[l]isteners' [or, in this case, viewers'] reaction to speech is not a content-neutral basis for regulation."[12] *Forsyth Cnty.*, 505 U.S. at 134; *Boos v. Barry*, 485 U.S. 312, 321 (1988) (holding that a listener's reaction to speech is not a "secondary effect" that permits the government to regulate the speech under the First Amendment). Consequently, the WMATA's content-based restriction must survive strict scrutiny, which it cannot do.[13]

IV. THE WMATA'S PRIOR RESTRAINT ON PLAINTIFFS' POLITICAL SPEECH CANNOT SURVIVE STRICT SCRUTINY.

The WMATA's speech restriction is operating as a prior restraint on Plaintiffs' core political speech. *Lebron*, 749 F.2d at 896 (holding that the refusal to display the poster "because of its content is a clearcut prior restraint"). As a result, the "WMATA *carries a heavy burden* of showing justification for the imposition of such a restraint." *Id*. (internal quotations and citation omitted) (emphasis added).

As noted above, a viewer's reaction—violent or otherwise—to Plaintiffs' political message is not a "secondary effect" of speech that permits the government to regulate under the First Amendment. *Boos*, 485 U.S. at 321. In order for violence to ever be a basis for

[12] The WMATA's "fighting words" argument is based upon a false premise: that core political speech can somehow be converted to "fighting words" because the message may be offensive to some.

[13] The WMATA's reading of *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), is incorrect. The Court in *R.A.V.* was asked to review the constitutionality of an ordinance that prohibited "conduct that amounts to 'fighting words' i.e., 'conduct that itself inflicts injury or tends to incite immediate violence. . . ,'" so as to protect "the community against bias-motivated threats to public safety and order." *Id*. at 380-81. Even though "fighting words" are a category of speech that may be restricted under the First Amendment, *see Chaplinsky*, 315 U.S. at 572, the Court struck down the ordinance because it only applied to prohibit such conduct "on the basis of race, color, creed, religion or gender" and was therefore *content based*. *R.A.V.*, 505 U.S. at 391.

suppressing speech, the lawless action must be *directed* by the speaker, and it must be *imminent*. *See Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) ("[T]he constitutional guarantees of free speech and free press do not permit a State to 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*.") (emphasis added); *Claiborne Hardware Co.*, 458 U.S. at 927 ("It is clear that 'fighting words'—those that provoke *immediate* violence—are not protected by the First Amendment. Similarly, words that create an *immediate* panic are not entitled to constitutional protection.") (internal citations omitted) (emphasis added); *Feiner v. N.Y.*, 340 U.S. 315, 321 (1951) ("The findings of the state courts as to the existing situation and the *imminence* of greater disorder coupled with petitioner's deliberate defiance of the police officers convince us that we should not reverse this conviction in the name of free speech.") (emphasis added).

Violence occurring halfway around the world in response to an anti-Islam video[14] cannot serve as the *compelling* justification for censoring Plaintiffs' pro-Israel message here in the United States. Indeed, the evidence that the WMATA is asserting as justification for its prior restraint on Plaintiffs' political speech is entirely speculative and fails to provide a sufficient basis as a matter of law for restricting the speech. For example, the Chief of Police for the WMATA testified as follows: "*In my opinion*, a delay in posting through October 31, 2012, presents a reasonable amount of time for volatile sentiments *associated with the video* to die down. WMATA is prepared to run the advertisement beginning on November 1, unless the reassessment demonstrates *a verified likelihood* of an attack against United States transit systems

[14] It should not go without notice that Plaintiffs' advertisement does not mention Mohammed, nor does it mention Islam. Indeed, a careful reader will note that Plaintiffs' advertisement paraphrases a quote from the famous author, Ayn Rand. ("When you have civilized men fighting savages, you support the civilized men.") http://www.aynrand.org/site/PageServer?pagename=media_america_at_war_israeli_arab_conflict. (*See also* Geller Supp. Decl. at ¶ 9 at Ex. 2).

relating to the video." (Taborn Aff. at ¶ 11 [Doc. No. 13-2]) (emphasis added). Thus, as the WMATA tacitly admits through this testimony, there is no "verified likelihood" of any attack against the WMATA "relating to" Plaintiffs' advertisement. One email from a single person intent on silencing Plaintiffs' message does not provide a compelling reason for imposing a prior restraint on core political speech. (*See* Def.'s Ex. L). Indeed, all that the WMATA is doing by permitting the hecklers to silence speech is emboldening the hecklers. Our Constitution requires the government to be on the side of those who engage in protected speech, not on the side of the hecklers seeking to veto the speech, even if that veto comes in the form of a violent mob. *Forsyth Cnty.*, 505 U.S. at 135 (holding that speech cannot be "punished or banned, simply because it might offend a hostile mob"); *Glasson v. Louisville*, 518 F.2d 899, 906 (6th Cir. 1975) ("[The government] has the duty not to ratify and effectuate a heckler's veto nor may he join a moiling mob intent on suppressing ideas. Instead, he must take reasonable action to protect . . . persons exercising their constitutional rights."). Thus, the very basis for restricting Plaintiffs' speech that the WMATA claims is compelling evidence for doing so is, in fact, no basis whatsoever as a matter of law.

In sum, the WMATA has not, because it cannot, meet its "heavy burden" of justifying its content-based, prior restraint on Plaintiffs' core political speech. Indeed, the First Amendment protection afforded speech in our country is, in many respects, what separates our civil and free society from what we are witnessing in the Middle East. In short, American citizens should not have to surrender their right to freedom of speech in the United States because uncivilized and lawless individuals engage in violence overseas in protest of this right.

V. THE BALANCE OF HARM AND THE PUBLIC INTEREST FAVOR GRANTING THE INJUNCTION.

Having shown that the WMATA's content- and viewpoint-based, prior restraint on Plaintiffs' core political speech is unconstitutional as a matter of law, the remaining issues dealing with the balance of harms and the public interest are rather straightforward.

As demonstrated above, Plaintiffs have suffered and will continue to suffer irreparable harm if the requested injunction does not issue. In response, the WMATA offers rank speculation of harm based on violence occurring overseas in the Middle East that is purportedly related to a video that is critical of Mohammed and Islam.[15] As the WMATA's filings demonstrate, there are no reported acts of such violence in the United States as a result of this video. Indeed, the WMATA tacitly acknowledges in its filings that there is no "verified likelihood of an attack against United States transit systems relating to the video." (Taborn Aff. at ¶ 11 [Doc. No. 13-2]). Suffice to say, Plaintiffs' advertisement is not this video. Consequently, credible evidence of harm related to Plaintiffs' advertisement is non-existent. And this conclusion is buttressed by the fact that Plaintiffs' advertisement has been running on the New York MTA for more than a week without any reported acts of terrorism or similar violence. Consequently, the balance of harm weighs in favor of protecting Plaintiffs' fundamental right to freedom of speech.

And insofar as the public interest is concerned, it is well established that "it is in the public interest to uphold a constitutionally guaranteed right." *Playboy Enterprises, Inc. v. Meese*, 639 F. Supp. 581, 587 (D.D.C. 1986) ("[T]the Court notes that it is in the public interest to uphold a constitutionally guaranteed right."); *Freedberg v. United States Dep't of Justice*, 703

[15] Indeed, the court can take judicial notice of the fact that the Middle East violence that erupted in Libya on September 11, 2012 was a pre-planned terrorist attack and not a spontaneous protest to the anti-Islam video as originally reported. *See, e.g.*, http://www.foxnews.com/politics/2012/09/28/no-threat-assessment-in-benghazi-prior-to-ambassador-arrival-source-says/.

F. Supp. 107, 111 (D.D.C. 1988) (same); *see also 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.").

In the final analysis, the balance of harm and the public interest favor the exercise of Plaintiffs' First Amendment right to freedom of speech in this case.

CONCLUSION

Plaintiffs are entitled to a preliminary injunction enjoining the WMATA's speech restriction, thereby allowing Plaintiffs to exercise their fundamental right to freedom of speech through the display of their Pro-Israel Advertisement beginning immediately.

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CERTIFICATE OF SERVICE

I hereby certify that on October 1, 2012, 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.

Respectfully submitted,

AMERICAN FREEDOM LAW CENTER

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