IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN FREEDOM DEFENSE INITIATIVE; PAMELA GELLER; and ROBERT SPENCER, Plaintiffs, -v.- WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY, Defendant.	Case No. **NOTICE OF MOTION AND MOTION FOR TEMPORARY RESTRAINING ORDER / PRELIMINARY INJUNCTION**

TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that Plaintiffs American Freedom Defense Initiative ("AFDI"), Pamela Geller, and Robert Spencer (collectively referred to as "Plaintiffs") hereby will and do move the court for the immediate entry of a temporary restraining order ("TRO") / preliminary injunction pursuant to Rule 65(b) of the Federal Rules of Civil Procedure to permit Plaintiffs to engage in their First Amendment free speech activity by displaying a pro-Israel/anti-jihad advertisement on dioramas of Defendant Washington Metropolitan Area Transit Authority ("WMATA"), beginning on September 24, 2012 and running through October 21, 2012 pursuant to the terms of the Advertiser Agreement entered into between CBS Outdoor, the advertising agency acting on behalf of Defendant Washington Metropolitan Area Transit Authority ("WMATA"), and Plaintiffs.

On September 18, 2012, the WMATA informed Plaintiffs that it was not going to run Plaintiffs' advertisement during the agreed upon time period due to "world events" and an unfounded "concern for the security of their passengers."

As set forth more fully in Plaintiffs' memorandum of points and authorities in support of this motion, by delaying Plaintiffs' speech "to a future date to be determined" on account of "world events," the WMATA is censoring Plaintiffs' core political speech on the basis of its content and viewpoint. That is, the WMATA does not want to display a message that it deems to be critical of Islam, critical of jihad, or supportive of Israel in light of these "world events." However, it is precisely because of the current political situation unfolding in Egypt, Libya, and elsewhere that Plaintiffs should be permitted to express their message, and any delay amounts to government censorship of core political speech.

Indeed, the WMATA's speech restriction is based on the perceived negative response that Plaintiffs' message might receive from certain viewers based on its content and viewpoint. However, a viewer's reaction to speech is not a content-neutral basis for regulation. This is known as a "heckler's veto," which is impermissible under the First Amendment.

Under the First Amendment, speech cannot be punished or banned simply because it might offend a hostile mob. By delaying the display of Plaintiffs' advertisement because of its message, the WMATA is punishing Plaintiffs' speech based on its content and viewpoint in violation of the First Amendment.

Pursuant to clearly established First Amendment jurisprudence, the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury sufficient to warrant this court granting the requested TRO.

RULE 65(b) NOTICE

As set forth in the declaration of Plaintiff Geller, which is filed as Exhibit 1 in support of Plaintiffs' motion, and as argued further in the accompanying memorandum, by delaying Plaintiffs' right to engage in core political speech that is timely and exceedingly relevant in light

of the current "world events," the WMATA is causing irreparable harm to Plaintiffs as a matter of law. *Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, *for even minimal periods of time*, unquestionably constitutes irreparable injury.") (emphasis added). Consequently, Plaintiffs will suffer "immediate and irreparable injury . . . before the adverse party can be heard in opposition." Fed. R. Civ. P. 65(b)(1)(A). Therefore, it would be appropriate for this court to issue the requested TRO without written or oral notice to the WMATA.

Nonetheless, Plaintiffs are attempting to immediately and personally serve this motion upon the WMATA, and if successful, Plaintiffs will promptly file the affidavit/certificate of service with the court.

WHEREFORE, Plaintiffs hereby request that the court grant their motion and issue the requested temporary restraining order / preliminary injunction.

Respectfully submitted,

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

Plaintiffs,

-v.-

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,

Defendant.

MEMORANDUM OF POINTS & AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER / PRELIMINARY INJUNCTION

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INTRODUCTION

This case challenges the WMATA's restriction on Plaintiffs' right to engage in protected speech in a public forum created by the WMATA based on the content and viewpoint of Plaintiffs' message (hereinafter "Free Speech Restriction").

The issue presented in this motion is whether delaying Plaintiffs' right to engage in political speech based on its content and viewpoint to an unknown "future date" that is acceptable to the WMATA causes irreparable harm to justify issuing a temporary restraining order. As demonstrated below, the relevant facts and law compel the granting of this motion.

STATEMENT OF FACTS

Plaintiffs Geller and Spencer are co-founders of Plaintiff American Freedom Defense Initiative ("AFDI"), which is incorporated under the laws of the State of New Hampshire. Plaintiff Geller is the Executive Director of AFDI, and Plaintiff Spencer is the Associate Director. Plaintiffs Geller and Spender engage in political speech through AFDI's activities, including AFDI's advertising campaign, as described below. (Geller Decl. at ¶ 2 at Ex. 1).

AFDI exercises its right to freedom of speech and promotes its objectives through an advertising campaign which involves purchasing advertising space on transit authority property in major cities throughout the United States, including Washington, D.C. AFDI purchases these advertisements to express its message on current events and public issues, particularly including issues involving Islam, sharia, Israel, and the Middle East. (Geller Decl. at ¶ 3 at Ex. 1).

The WMATA has leased its advertising space for political and social commentary advertisements covering a broad spectrum of political views and ideas. (Geller Decl. at ¶ 4 at Ex. 1).

For example, the WMATA has leased its advertising space for a political advertisement that was pro-Palestine and anti-Israel and which displayed the message: "End U.S. military aid to Israel" (hereinafter referred to as "Anti-Israel Advertisement"). (Geller Decl. at ¶ 5 at Ex. 1).

Pursuant to the WMATA's policy of permitting political and social commentary on its advertising space and particularly in light of the fact that the WMATA displayed the Anti-Israel Advertisement, AFDI submitted for approval an advertisement that stated, "In Any War Between the Civilized Man and the Savage, Support the Civilized Man. Support Israel. Defeat Jihad." (hereinafter referred to as "Pro-Israel Advertisement"). (Geller Decl. at ¶ 6, Ex. A, at Ex. 1).

AFDI's Pro-Israel Advertisement is political speech in direct response to the Anti-Israel Advertisement. The Anti-Israeli Advertisement suggests that Israel's military is the impediment to peace between the Israelis and Palestinians and that U.S. military aid to Israel also acts as an impediment to peace between the Israelis and Palestinians. In other words, the Anti-Israel Advertisement blames Israel, its military, and U.S. military aid to Israel as the cause of Palestinian terror directed against innocent civilians in Israel and abroad. (Geller Decl. at ¶ 7 at Ex. 1).

AFDI's Pro-Israel Advertisement presents the message that there is no comparison or equivalence between savage civilian-targeting violence and Israel's civilized struggle for survival in a part of the world where civilized behavior is overshadowed by terrorism and violence, as evidenced by the current world events playing out in Egypt, Libya, and elsewhere. (Geller Decl. at ¶ 8 at Ex. 1).

AFDI's Pro-Israel Advertisement is very timely in light of these current events in which Muslims are engaging in violent jihad in response to America's policy toward the Middle East and to allegedly protest speech deemed critical of Islam. (Geller Decl. at ¶ 9 at Ex. 1).

AFDI's Pro-Israel Advertisement was approved for display on the WMATA advertising space. The advertisement satisfied all of the WMATA's guidelines for acceptable advertising. (Geller Decl. at ¶ 10 at Ex. 1).

Accordingly, on September 6, 2012, AFDI entered into a contract with CBS Outdoor, which acts as the advertising agency for the WMATA, to place the Pro-Israel Advertisement on four dioramas. Pursuant to the contract, the "advertising period" for the display was to begin on September 24, 2012 and end on October 21, 2012. (Geller Decl. at ¶ 11, Ex. B, at Ex. 1).

Under the contract, the "period cost" for the display of AFDI's Pro-Israel Advertisement was $5,600, which AFDI promptly paid via credit card on September 10, 2012. (Geller Decl. at ¶ 12 at Ex. 1).

In reliance upon this contract, AFDI purchased and printed the advertisements. Consequently, prior to September 18, 2012, the advertisements were ready for display on the WMATA dioramas beginning September 24, 2012, pursuant to the terms of the contract. (Geller Decl. at ¶ 13 at Ex. 1).

On September 18, 2012, however, Plaintiff Geller received an email from Mr. Howard Marcus, the CBS Outdoor agent working on behalf of the WMATA. In this email, Mr. Marcus informed Plaintiff Geller of the following: "The DC Transit Authority has informed me today that due to the situations happening around the world at this time, we are postponing the start of this program to a future date to be determined." (Geller Decl. at ¶ 14 at Ex. 1).

Plaintiff Geller promptly responded to Mr. Marcus' email the same day, advising him that she wanted to see the WMATA's refusal to run AFDI's advertisement during the contract period from the WMATA itself. Plaintiff Geller also made it very clear to Mr. Marcus that he needed to convey to the WMATA the importance of the timing of the advertisement, 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." Consequently, Plaintiff Geller demanded that the WMATA change its position. (Geller Decl. at ¶ 15 at Ex. 1).

Mr. Marcus responded that same day, confirming that the WMATA was not going to change its position, citing "world events and a concern for the security of their passengers" as the basis for "deferring" the display of AFDI's advertisement. Specifically, Mr. Marcus wrote in his email the following: "The DC Transit Authority has asked me to pass along the below: The advertiser should be assured that Metro is not refusing to run the ad, they are merely deferring it due to world events and a concern for the security of their passengers. The advertiser is welcome to appeal the decision in writing."[1] (Geller Decl. at ¶ 16 at Ex. 1).

AFDI objects to the WMATA's censorship, which is effectively suppressing the message AFDI is attempting to express based on a perceived negative response to its content and viewpoint by certain viewers. Consequently, AFDI objects to this content- and viewpoint-based restriction on its speech. (Geller Decl. at ¶ 17 at Ex. 1).

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[1] It is important to note, at least by way of a footnote, that Plaintiffs are not required to "appeal" the WMATA's adverse decision prior to seeking relief in this court. There is no requirement for Plaintiffs to exhaust administrative remedies prior to challenging a decision that inflicts an actual, concrete injury in violation of 42 U.S.C. § 1983. In *McNeese v. Bd. of Educ.*, 373 U.S. 668, 672 (1963), the Court emphasized that the congressional purpose in enacting § 1983 was "to provide a remedy in the federal courts supplementary to any remedy any State might have" and rejected the argument that failure to exhaust administrative remedies barred suit in federal court under § 1983. *See also Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 192-93 (1985) ("[T]he finality requirement is concerned with whether the initial decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury; the exhaustion requirement generally refers to administrative and judicial procedures by which an injured party may seek review of an adverse decision and obtain a remedy if the decision is found to be unlawful or otherwise inappropriate."). Here, it is evident that the WMATA has arrived at a "definitive position" that has "inflict[ed] an actual, concrete injury," such that an administrative appeal is not required. And notwithstanding the relevant law, *there is no such appeal process under the contract*.

ARGUMENT

I. PLAINTIFFS' POLITICAL SPEECH RESTS ON THE HIGHEST RUNG OF THE HIERARCHY OF FIRST AMENDMENT VALUES.

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. Plaintiffs' First Amendment right to freedom of speech is protected from infringement by States and their political subdivisions, such as the WMATA, by operation of the Fourteenth Amendment. *See Cantwell v. Conn.*, 310 U.S. 296, 303 (1940).

The U.S. Supreme Court has long recognized that the freedom of speech is a fundamental right that is essential to our republican form of government. As the Court noted, "[Speech] concerning public affairs is more than self-expression; it is the essence of self-government." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982) (citations omitted); *see also Stromberg v. Cal.,* 283 U.S. 359, 369 (1931) ("The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system.").

Here, Plaintiffs' speech in the form of advertisements directed at U.S. foreign policy is classic political speech, which is accorded the highest constitutional protection. In *Connick v. Myers*, 461 U.S. 138 (1983), the Court noted that "speech on public issues occupies the 'highest rung of the hierarchy of First Amendment values,' and is entitled to special protection." *Id.* at 145 (quoting *Claiborne Hardware Co.*, 458 U.S. at 913 (1982) & *Carey v. Brown*, 447 U.S. 455, 467 (1980)).

Because the WMATA censored Plaintiffs' core political speech, Plaintiffs are entitled to a TRO to prevent irreparable harm to their First Amendment freedoms.

II. PLAINTIFFS ARE ENTITLED TO A TRO TO PREVENT IRREPARABLE HARM TO THEIR FIRST AMENDMENT RIGHTS.

When deciding this motion for a TRO, the court must consider whether Plaintiffs have met their burden of demonstrating that (1) they have "a substantial likelihood of succeeding on the merits" of their First Amendment claim; (2) they "will suffer irreparable harm if the [TRO] is not granted"; (3) "other interested parties will not suffer substantial harm if the [TRO] is granted"; and (4) "the public interest would be furthered by the [TRO]." *Elec. Privacy Info. Ctr. v. Fed. Trade Comm'n,* 844 F. Supp. 2d 98, 101 (D.D.C. 2012) (internal quotations and citation omitted). These are the same factors the court would consider when ruling on a motion for a preliminary injunction. *Id.* "The likelihood of success requirement is the most important of these factors." *Id.*

Whether a party is likely to succeed on the merits of a free speech claim is examined in essentially three steps. First, the court must determine whether the speech in question—Plaintiffs' Pro-Israel Advertisement—is protected speech. Second, the court must conduct an analysis as to the forum in question to determine the proper constitutional standard to apply. And third, the court must then determine whether the free speech restriction comports with the applicable standard.

Upon application of this analysis, the court should issue the requested TRO to preserve and protect Plaintiffs' fundamental right to freedom of speech and to prevent irreparable harm.

A. Likelihood of Success on the Merits.

1. Plaintiffs' Advertisement Is Protected Speech.

The first question is easily answered. Conveying a political or religious message with signs constitutes protected speech under the First Amendment. *See Hill v. Colo.*, 530 U.S. 703, 714-15 (2000) ("[S]ign displays . . . are protected by the First Amendment."); *United States v.*

Grace, 461 U.S. 171, 176-77 (1983) (demonstrating with signs constitutes speech under the First Amendment). This includes signs posted on the advertising space of city transit authorities such as the WMATA. *See Lebron v. Wash. Metro. Area Transit Auth.,* 749 F.2d 893*,* 896 (D.C. Cir. 1984); *N.Y. Magazine v. Metro. Transp. Auth.*, 136 F.3d 123, 130 (2d Cir. 1998); *United Food & Commercial Workers Union, Local 1099 v. Southwest Ohio Reg'l Transit Auth.*, 163 F.3d 341 (6th Cir. 1998); *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) (stating in case involving the same Pro-Israel Advertisement at issue here that "[a]s a threshold matter, the Court notes that the AFDI Ad is not only protected speech—it is core political speech").

One additional point to bear in mind is the fact that the WMATA's restriction here is operating as a *prior restraint*. *Lebron,* 749 F.2d at 896 (holding that the refusal to display the poster "bacause of its content is a clearcut prior restraint"). Consequently, the "WMATA *carries a heavy burden* of showing justification for the imposition of such a restraint." *Id.* (internal quotations and citation omitted) (emphasis added).

2. Forum Analysis.

To determine the extent of Plaintiffs' free speech rights in this matter, the court must next engage in a First Amendment forum analysis. "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 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 general 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 implicated 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.

A designated public forum is created when the government "intentionally open[s] a nontraditional forum for public discourse." *Cornelius*, 473 U.S. at 802. To discern the government's intent, 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." *Id.* In a traditional or designated public forum, restrictions on speech are subject to strict scrutiny. *Id.* at 800 ("[S]peakers can be excluded from a public forum only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest. . . . 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.").

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.*; *see Am. Freedom Def. Initiative v. Suburban Mobility Auth. for Reg'l Transp.*, No. 10-121342011 U.S. Dist. LEXIS 35083 (E.D. Mich. Mar. 31, 2011) (granting preliminary injunction and holding that while the bus advertising space was a limited public forum, the speech restriction was unreasonable); *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).

The D.C. Circuit has already determined that the forum at issue here (*i.e.*, the free-standing dioramas of the WMATA) is a designated public forum. *See Lebron,* 749 F.2d at 896 (holding that there is no "question that WMATA has converted its subway stations into public fora by accepting other political advertising"). Other circuits analyzing similar transit authority advertising policies and practices have also concluded that the advertising space at issue was a designated public forum subject to strict scrutiny. *See 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").

Here, the WMATA unquestionably accepts a wide variety of commercial, public-service, public-issue, and political advertisements. *See Lebron,* 749 F.2d at 894, n.2 (noting the district court's finding that the "WMATA has 'rented subway advertising space for political and social commentary advertisements covering a broad spectrum of political views and ideas'"). Clearly, as the evidence presented here demonstrates, the WMATA does not limit its advertising to purely commercial advertisements for revenue-generation purposes only, and it continues its practice of permitting political advertisements. Consequently, the forum at issue is a designated public forum, triggering the strict scrutiny standard for the WMATA's content- and viewpoint-based speech restriction.

3. Application of the Appropriate Standard.

In a designated public forum, similar to a traditional public forum, the government's ability to restrict speech is sharply limited. 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.[2] *Perry Educ. Ass'n,* 460 U.S. at 45. However, *content-based* restrictions on speech, such as the restriction at issue here, are subject to strict scrutiny. *Cornelius*, 473 U.S. at 800. That is, 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.* For "[i]t is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys." *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828 (1995). Content-based restrictions "are presumptively unconstitutional." *S.O.C., Inc. v. County of Clark*, 152 F.3d 1136, 1145 (9th Cir. 1998). Thus, 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." *R.A.V. v. St. Paul*, 505 U.S. 377, 386-92 (1992); *see Police Dept. of the City of Chicago v. Mosley*, 408 U.S. 92, 96 (1972) (holding that the government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express more controversial views).

To determine whether a restriction is content-based, the courts look at whether it "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, the restriction is content based because the WMATA restricted Plaintiffs' speech based on the subjective belief that others might object to Plaintiffs' message. Indeed, the Supreme Court has long held that a listener's (or, in this case, viewer's) reaction to speech is not a content-neutral basis for regulation. *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 134 (1992). "The First Amendment knows no heckler's veto." *Lewis v. Wilson,* 253 F.3d 1077, 1082 (8th Cir.

[2] Consequently, any argument that the WMATA is simply imposing a "time" restriction is unavailing because the restriction is nonetheless content-based and thus subject to strict scrutiny. Indeed, even a momentary loss of First Amendment freedoms constitutes irreparable harm sufficient to warrant injunctive relief. *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

2001). While restrictions on speech because of the "secondary effects" that the speech creates are sometimes permissible, an effect from speech is not secondary if it arises from the content of the speech or the viewpoint of the speaker. "The emotive impact of speech on its audience is not a 'secondary effect.'" *Boos v. Barry*, 485 U.S. 312, 321 (1988) (opinion of O'Connor, J.).

In *Terminiello v. City of Chicago*, 337 U.S. 1 (1949), the Supreme Court famously 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. Therefore, the fact that Plaintiffs' speech may actually offend some people does not lessen its constitutionally protected status; it enhances it. "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." *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118 (1991) (citations omitted); *Forsyth Cnty.,* 505 U.S. at 135 (noting that speech cannot be "punished or banned, simply because it might offend a hostile mob"); *Hill*, 530 U.S. at 715 & 710, n.7 ("The fact that the messages conveyed by [the signs] may be offensive to their recipients does not deprive them of constitutional protection.").

Indeed, "the Constitution does not permit government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer." *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 210 (1975). Rather than censoring the speaker, the burden rests with the viewer to "avoid further bombardment of [his] sensibilities simply by averting [his] eyes." *Cohen v. Cal.*, 403 U.S. 15, 21 (1971). As the *Cohen* Court

noted, "[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. In fact, First Amendment protection even extends to regulatory schemes that would allow a disapproving citizen to silence a disagreeable speaker by complaining on other, apparently neutral, grounds. *See Reno v. ACLU*, 521 U.S. 844, 880 (1997) (holding that the prohibition on knowingly communicating indecent material to minors in Internet forums was invalid because it conferred "broad powers of censorship, in the form of a 'heckler's veto,' upon any opponent of indecent speech who might simply log on and inform the would-be discoursers that his 17-year-old-child . . . would be present").

Thus, pursuant to the First Amendment, the government is not permitted to affirm the heckler; rather, it must protect the speaker and punish those who react lawlessly to a controversial message. As the Sixth Circuit observed, "[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." *Glasson v. Louisville*, 518 F.2d 899, 906 (6th Cir. 1975). In sum, the WMATA cannot, consistent with the Constitution, restrict Plaintiffs' message because it or other viewers might find it offensive. Otherwise, the government "would effectively empower a majority to silence dissidents simply as a matter of personal predilections." *Cohen*, 403 U.S. at 21.

Moreover, the WMATA has restricted Plaintiffs' advertisement not only on the basis of its content, which is impermissible in a designated public forum, but on the basis of the viewpoint expressed by Plaintiffs, which is fatal in <u>any</u> forum. 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, as in this case. Here, there is no question that the subject matter (U.S. foreign policy toward Israel) is permissible; however, the WMATA restricted Plaintiffs' speech because of its viewpoint toward that includable subject. *Nieto*, 715 F. Supp. 2d at 650 (holding that a speech restriction was viewpoint based as applied to anti-Islam speech in violation of the First Amendment). Therefore, the restriction is viewpoint based and unconstitutional.

In sum, Plaintiffs have met their burden of demonstrating a substantial likelihood of succeeding on the merits of their First Amendment claim.

B. Irreparable Harm to Plaintiffs without the TRO.

As the U.S. Supreme Court has long held, "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *see also N.Y. Magazine,* 136 F.3d at 127 (upon establishing a violation of the First Amendment, the plaintiff "established *a fortiori* . . . irreparable injury"); *Newsome 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*). Consequently, Plaintiffs have established that they will be irreparably harmed absent the requested TRO.

C. Harm to Others if the TRO Is Granted.

In this case, the likelihood of harm to Plaintiffs is substantial because Plaintiffs intend only to peacefully exercise their First Amendment right to freedom of speech in a public forum,

and the deprivation of this right, even for minimal periods, constitutes irreparable injury as a matter of law. *Elrod,* 427 U.S. at 373.

On the other hand, if the WMATA is restrained from enforcing their free speech restriction against Plaintiffs, it will suffer no harm because the exercise of constitutionally protected expression can never harm any of the WMATA's or others' legitimate interests. Indeed, the WMATA's speculative fear of causing offense to others in light of the "world events" unfolding overseas cannot overcome its "heavy burden" to justify the imposition of its prior restraint on Plaintiffs' speech. *Lebron,* 749 F.2d at 896. If safety concerns do rise to the level of a compelling interest, which is unlikely since this very advertisement has run, and will again soon be running, in other major U.S. cities, including New York, *see Am. Freedom Def. Initiative v. Metro. Transp. Auth.*, No. 11 Civ. 6774 (PAE), 2012 U.S. Dist. LEXIS 123112, at *2 (S.D.N.Y. Aug. 29, 2012) (enjoining speech restriction and ordering the display of AFDI's Pro-Israel Advertisement in New York City), the WMATA always has the option of taking down the advertisements.

In the final analysis, the question of harm to others as well as the impact on the public interest generally cannot be addressed properly in the First Amendment context without first determining if there is a constitutional violation. For if Plaintiffs show that their First Amendment right to freedom of speech has been violated, then the harm to others is inconsequential.

D. The Public Interest.

The impact of the TRO on the public interest turns in large part on whether Plaintiffs' constitutional rights are violated by the WMATA's speech restriction. As courts, including this one, have noted, "[I]t is always in the public interest to prevent the violation of a party's

constitutional rights." *G & V Lounge, Inc. v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994); *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."); *see also Dayton Area Visually Impaired Persons, Inc. v. Fisher*, 70 F.3d 1474, 1490 (6th Cir. 1995) (stating that "the public as a whole has a significant interest in ensuring equal protection of the laws and protection of First Amendment liberties").

Thus, because the WMATA's speech restriction violates Plaintiffs' fundamental right to freedom of speech, it is in the public interest to grant the TRO.

CONCLUSION

For the foregoing reasons, Plaintiffs are entitled to a TRO / preliminary injunction enjoining the WMTA's Free Speech Restriction, thereby allowing Plaintiffs to exercise their fundamental right to freedom of speech through the display of their Pro-Israel Advertisement beginning on September 24, 2012.

AMERICAN FREEDOM LAW CENTER

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CERTIFICATE OF SERVICE

I hereby certify that on September 20, 2012, a copy of the foregoing and accompanying exhibits were provided to a process server in Washington, D.C. for personal service upon Defendant. Upon actual service, a copy of the affidavit of service will be filed with the court forthwith.

Respectfully submitted,

AMERICAN FREEDOM LAW CENTER

Robert J. Muise, Esq.