IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

AMERICAN FREEDOM DEFENSE INITIATIVE; *et al.*,

Plaintiffs,

-v.-

MASSACHUSETTS BAY TRANSPORTATION AUTHORITY ("MBTA"); *et al*.,

Defendants.

Case No. 1:13-cv-12803-NMG

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

[Fed. R. Civ. P. 65]

During the hearing on Plaintiffs' motion for temporary restraining order/preliminary injunction, the court invited the parties to further address the issue of whether Defendants have applied the MBTA's regulations in this case in a constitutional manner. Plaintiffs contend that Defendants have not in that their application of the regulations to reject Plaintiffs' advertisement constituted viewpoint discrimination and was unreasonable in violation of the First Amendment.[1] Indeed, Defendants' rejection of Plaintiffs' advertisement was manifestly based upon a shifting standard of civility, consciously lowered for the anti-Israel advertisement and then raised artificially for Plaintiffs' advertisement.

The High Burden Applied to Prior Restraints. As an initial matter and as Plaintiffs argued previously in their memorandum, Defendants' restriction on Plaintiffs' advertisement operates as a *prior restraint* on speech. As then-Circuit Judge Robert Bork held in *Lebron v. Wash. Metro. Area Transit Auth.*, 749 F.2d 893, 896 (D.C. Cir. 1984), a similar case involving a transit authority's rejection of a proposed advertisement: "Because WMATA, a government agency, tried to prevent Mr. Lebron from exhibiting his poster '*in advance of actual expression*,'

[1] For purposes of this supplemental brief only, Plaintiffs will assume that the advertising space at issue is a nonpublic forum.

. . . WMATA's action can be characterized as a 'prior restraint,'. . . which comes before us bearing a *presumption of unconstitutionality*." (internal citations omitted) (emphasis added).

The Shifting Standard. This constitutional burden imposed on prior restraints is important to bear in mind when considering how Defendants have applied their regulations in the context of this case and whether that application passes muster under the First Amendment. Here, it is undisputed that Defendants accepted for display an anti-Israel advertisement that effectively blames Israel for causing 4.5 million Palestinian "refugees"—an advertisement which prompted a firestorm of protests and complaints from a segment of the MBTA's ridership, thereby providing *actual evidence* that the advertisement was reasonably perceived, based upon "prevailing community standards," as "demeaning or disparaging." This reaction then prompted the *removal* of the controversial advertisement, only to be consciously and purposefully *reinstated* by Defendants a few days later. Thus, even when presented with *actual evidence* that this controversial advertisement was "demeaning or disparaging" to a segment of the MBTA's ridership (*i.e.*, Israelis and supporters of the State of Israel, and by extension, Jews), Defendants made the *considered decision* to reinstate it, either by raising the "demeaning or disparaging" bar or by ignoring the standard altogether.[2] At a minimum, *this conscious decision* to ignore the hue and cry arising from a breach of "prevailing community standards" implicitly acknowledges that this adverse reaction to an advertisement addressing the controversial political issue of the Israeli/Palestinian conflict is acceptable to Defendants, thus further demonstrating that such

[2] It should be noted that Defendants' considered decision to reinstate the anti-Israel advertisement in the wake of this protest cannot be passed off as an aberration or a mere instance of erratic enforcement of the MBTA's regulations, particularly in light of its timing in connection with the decision to reject Plaintiffs' advertisement. That is, Defendants' decision to reinstate the anti-Israel advertisement on the grounds that it did not violate the civility standard—the position Defendants argued at the hearing—was made contemporaneously with their rejection of Plaintiffs' advertisement—a rejection that was made by the very same government officials who found the anti-Israel advertisement acceptable.

advertisements are compatible with the forum and that Defendants' rejection of Plaintiffs' advertisement was "unreasonable."

Indeed, without *actual evidence* that the display of Plaintiffs' advertisement would cause a similar response (even though such a response was evidently acceptable to Defendants for the anti-Israel advertisement), Defendants rejected Plaintiffs' advertisement (*i.e.*, imposed a prior restraint on their speech). Consequently, for Plaintiffs' advertisement, the "demeaning or disparaging" threshold/standard was significantly lower, demonstrating the arbitrary and thus unreasonable nature in which the MBTA regulations were enforced in this case.[3] Thus, these facts alone demonstrate that Defendants have applied their regulations in an unconstitutional manner. *See Aids Action Comm. of Mass. v. Mass. Bay Transp. Auth.*, 42 F.3d 1 (1st Cir. 1994) ("The MBTA's decision not to run the AAC ads while running the 'Fatal Instinct' ads, like the City of St. Paul's decision to criminalize certain types of fighting words while leaving others legal, constitutes content discrimination which gives rise to an appearance of viewpoint discrimination."). Here, once again, *Ridley v. Mass. Bay Transp. Auth.*, 390 F.3d 65 (1st Cir. 2004), is instructive. In its decision to uphold the restrictions on Ridley's advertisements under

[3] The arbitrary, and thus unreasonable, application of the MBTA's regulations here is further highlighted by the way in which Defendants ignore the plain meaning of the anti-Israel advertisement despite being informed that its message was demeaning and disparaging to Israelis (and Jews), but then purposefully misrepresent Plaintiffs' advertisement to conclude that it is disparaging to Palestinians and Muslims. As noted in prior filings and argued during the hearing, the only reasonable way to read Plaintiffs' advertisement based on its ***plain text*** and the common understanding of "jihad" in the context of "war" (and the community's understanding of "jihad" in light of the very recent Boston Marathon bombing—an understanding shared by the media and expressed in federal court decisions) is that "jihad" refers to terrorist acts directed toward innocent civilians, and it is Plaintiffs' view that those who engage in "jihad" against Israel in the context of the Israeli/Palestinian conflict are "savage." Would it be demeaning or disparaging to describe the Boston Marathon bombers as "savages"? Plaintiffs doubt that anyone in ***this*** community would consider such a description "demeaning or disparaging" to any group or individual. Indeed, quite the opposite would likely be true: it would be "demeaning or disparaging" to the victims of this heinous crime to describe the bombers as "freedom fighters" (or anything less than "savage") or to excuse their terrorists acts as an "exercise of religion."

the MBTA's "demeaning or disparaging" guideline, the court specifically noted that "there is no evidence in the record that other advertisements, religious or otherwise, were accepted despite containing demeaning or disparaging content." *Id*. at 92 (emphasis added). Here, we have indisputable evidence that another advertisement, namely, the anti-Israel advertisement, which addresses the same subject matter as Plaintiffs' advertisement, but from a different viewpoint, was "accepted despite containing demeaning or disparaging content." In short, *Ridley* compels this court to grant the requested injunction. *See id*. at 87 ("[W]here the government states that it rejects something because of a certain characteristic, but other things possessing the same characteristic are accepted, this sort of underinclusiveness raises a suspicion that the stated neutral ground for action is meant to shield an impermissible motive."); *see also Aids Action Comm. of Mass.*, 42 F.3d at 10-12 (finding an "unrebutted appearance of viewpoint discrimination" where the MBTA claimed to be excluding condom-promotion advertisements because they were sexually explicit and patently offensive, but yet allowed other sorts of sexually explicit advertisements, such as movie advertisements).

Indeed, as demonstrated above and set forth further below, Defendants' rejection of Plaintiffs' advertisement is not only viewpoint based, but it also fails to pass muster under the "reasonableness" analysis, "which requires that any restriction be reasonable in light of the purpose of the forum, because [Defendants' application of the MBTA's regulations to reject Plaintiffs' advertisement] is, *in context*, unreasonable." *Ridley*, 390 F.3d at 90 (emphasis added). In *Perry Educ. Ass'n v. Perry Local Educators*, 460 U.S. 37 (1983), the Court explained:

> Implicit in the concept of the nonpublic forum is the right to make *distinctions* in access on the basis of subject matter and speaker identity. These *distinctions* may be impermissible in a public forum but are inherent and inescapable in the process of limiting a nonpublic forum to activities compatible with the intended purpose of the property. *The touchstone for evaluating these distinctions is whether they are reasonable in light of the purpose which the forum at issue serves.*

Id. at 49 (emphasis added). And "[t]he reasonableness of the Government's restriction of access to a nonpublic forum must be assessed in the light of the purpose of the forum *and all the surrounding circumstances*." *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 809 (1985) (emphasis added). In light of the *context* of *this* case and *all the surrounding circumstances*, which include Defendants' acceptance of the anti-Israel advertisement (and, indeed, Defendants' reinstatement of the controversial advertisement *after* it had been removed due to a rash of complaints and protests from a segment of the MBTA's ridership), Defendants' rejection of Plaintiffs' advertisement was entirely unreasonable. That is, the *distinction* drawn by Defendants to permit the anti-Israel advertisement (which actually *caused* protests that Defendants were *willing* to accept) but yet reject Plaintiffs' advertisement (based on a *belief* that it *might* cause similar protests, which Defendants were *unwilling* to accept) is unreasonable and thus unconstitutional.[4] *See, e.g., 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").

CONCLUSION

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

[4] Defendants' reliance on dicta in the *MTA* and *WMATA* cases to demonstrate the "reasonableness" of the view that Plaintiffs' advertisement is demeaning to Palestinians or Muslims is misplaced. Even if we assume that this dicta establishes a theoretical reasonableness in the view that "jihad" and "savage" juxtaposed in the same advertisement demeans adherents of peaceful jihad, this theoretical reasonableness cannot be applied here precisely because Defendants raised the civility bar to allow the anti-Israel advertisement to run in the face of a massive public outcry. "Reasonableness" cannot be judged in a vacuum or laboratory test tube. An action or judgment is tested as reasonable or unreasonable in light of "*all the surrounding circumstances*."

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 6, 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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