IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

BLAINE COLEMAN,

Plaintiff,

Case No. 11-cv-15207

vs.

Hon. Mark A. Goldsmith

ANN ARBOR TRANSPORTATION AUTHORITY, et al.,

Defendants.
_____/

PLAINTIFF'S SUPPLEMENTAL BRIEF
ON INJUNCTIVE RELIEF AND FURTHER PROCEEDINGS

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Statute

Rules

Other Authorities

I. Injunctive Relief: Defendants should be ordered to display Plaintiff's ad.

As the Court has recognized, a preliminary injunction is a form of equitable relief based on the balancing of four factors: (A) the merits; (B) irreparable harm; (C) harm to others; and (D) the public interest. These factors may also be considered in shaping the injunctive relief, as the order requested by the movant should be entered if the four factors weigh in favor of the relief sought. Therefore, building on the analysis already conducted by the Court in its recent opinion, Plaintiff will address each factor below and explain why they weigh in favor of the relief he seeks in this case: an order requiring Defendants to display his ad.

A. The merits factor weighs in Plaintiff's favor because this is a prior restraint on core political speech.

The Court has already analyzed the first factor—likelihood of success on the merits—and has concluded that it "weighs strongly in favor of awarding preliminary injunctive relief." (Dkt. # 50, Dist. Ct. Op. at 36.) It also weighs in favor of ordering Defendants to display Plaintiff's ad.

This is a case involving a prior restraint on core political speech, the most disfavored type of constitutional violation known to First Amendment law. *See N.Y. Magazine v. Metro. Transp. Auth.*, 136 F.3d 123, 131 (2d Cir. 1998) (transit authority's refusal to display anti-Giuliani ad on buses was a prior restraint, which is "particularly abhorrent to the First Amendment"); *Lebron v. Wash. Metro. Area Trans. Auth.*, 749 F.2d 893, 896 (D.C. Cir. 1984) (transit authority's refusal to display anti-Reagan ad in subway stations was a "clearcut" and impermissible prior restraint). The Supreme Court has held that "[t]he presumption against prior restraints is heavier—and the degree of protection broader—than that against limits on expression imposed by criminal penalties." *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558-59 (1975). It has also held that "communication concerning political change" is "core political speech," "an area in which the importance of First Amendment protections is at its zenith." *Meyer v. Grant*, 486 U.S.

414, 422, 425 (1988); *see also Texas v. Johnson*, 491 U.S. 397, 411 (1989) ("[E]xpression of dissatisfaction with the policies of this country . . . [is] expression situated at the core of our First Amendment values."); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 907-12 (1982) (discussing First Amendment political tradition of advocating a boycott).

Where, as here, the constitutional violation is "particularly abhorrent" and constitutional protections are "at their zenith," the corresponding relief should be swift and complete. Accordingly, courts have recognized that the appropriate relief from a prior restraint on political speech is an order that the government immediately allow the censored speech to be heard. The district court in *United Food* ordered the transit agency to display the plaintiffs' controversial pro-union ad, and the Sixth Circuit affirmed. *United Food & Commercial Workers Union, Local 1099 v. Sw. Ohio Reg'l Transit Auth.*, 163 F.3d 341, 346-47, 364 (6th Cir. 1998). Similarly, in *New York Magazine*, *supra*, the district court ordered the transit agency to display the plaintiff's anti-Giuliani ad "forthwith," and the Second Circuit affirmed. *N.Y. Magazine v. Metro. Transp. Auth.*, 987 F. Supp. 254, 270 (S.D.N.Y. 1997), *aff'd*, 136 F.3d 123, 131 (2d Cir. 1998). And just a few days ago, a federal district court in Washington, D.C. ordered the transit authority to display a highly controversial pro-Israel/"defeat Jihad" ad by October 8 at 5:00 p.m. **Exhibit A**, *Am. Freedom Defense Initiative v. Wash. Metro. Area Trans. Auth.*, No. 12-1564 (D.D.C. Oct. 5, 2012).[1] In all three of these cases, the defendant transit agencies refused to display controversial political-speech ads in a designated public forum; the district courts ordered that the ads go up. The same immediate relief should be ordered here.[2]

[1] In order to provide context to the federal court's order, Exhibit A includes the briefs of the parties on the plaintiffs' motion for a preliminary injunction.

[2] *McCollum v. City of Powder Springs*, 720 F. Supp. 985 (N.D. Ga. 1989), which the Court cited on page 39 of its opinion (Dkt. # 50), is distinguishable because that case did not implicate First Amendment concerns in any way. There, the defendant city's liquor licensing

B. Plaintiff will be irreparably harmed if the Court does not order Defendants to display his ad.

As the Sixth Circuit explained in *United Food*, "even minimal infringement upon First Amendment values constitutes irreparable injury sufficient to justify injunctive relief." *United Food*, 163 F.3d at 363.[3] There are at least three reasons why the irreparable-harm factor weighs in favor of ordering Defendants to display Plaintiff's ad.

First, because irreparable harm has already occurred, the Court has "full equitable powers" to order injunctive relief consistent with the "make-whole" purpose and goal of § 1983. *Squires v. Bonser*, 54 F.3d 168, 172 (3d Cir. 1995); *see also Banks v. Burkich*, 788 F.2d 1161, 1163-64 (6th Cir. 1986) (injunctive "make-whole" relief in First Amendment case). An irreparable injury, by definition, cannot be fully compensated by money damages. Plaintiff therefore turns to equity, where the most equitable "make-whole" relief is to order Defendants to display the ad that they were constitutionally required to display over a year ago.

Second, the irreparable harm in this case is also ongoing. Defendants *continue* to display other ads while refusing to display Plaintiff's. This is not a case where the government intends only to violate the Constitution in the near future, with the plaintiff seeking an injunction to prevent that future violation from taking place. By way of illustration, suppose a city announces plans to adopt a policy in 2013 that will require permits for abortion protesters but not for labor picketers. In such a case, it might be appropriate for a court to enjoin implementation of the policy but give the city an opportunity to craft a content-neutral permitting scheme that would

---

scheme was unconstitutionally vague, but there was no prior restraint on speech. Unlike in this case, giving the city time to amend its ordinance did not affect the plaintiffs' ability to exercise a constitutionally protected fundamental right.

[3] Again, *McCollum v. City of Powder Springs*, *supra*, is distinguishable because no infringement upon First Amendment values was involved; the plaintiffs in that case suffered monetary loss, but not irreparable harm, from the delay in receiving their liquor license.

require permits for both abortion protesters and labor picketers. But if the policy were *already* in effect and the labor picketers were out in force, the only equitable remedy would be an order that the abortion protesters be allowed to march immediately without a permit on equal terms with their labor-activist counterparts. Here, too, the *ongoing* violation of Plaintiff's First Amendment rights requires that he be given the immediate opportunity to speak, not merely that Defendants be given an opportunity to adopt a new policy. Because "[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), equity demands immediate injunctive relief.

Third, absent an order requiring Defendants to display Plaintiff's ad, the irreparable harm is likely to continue. In granting Plaintiff's motion for a preliminary injunction, the Court found it unnecessary to reach the question of whether AATA's "scorn or ridicule" policy is facially unconstitutional because it allows for viewpoint discrimination. (Dkt. # 50, Dist. Ct. Op. at 29.) However, if AATA is merely told to amend its advertising policy, it may choose to excise the unconstitutionally vague "good taste" provision while leaving the "scorn or ridicule" provision in place. At that point, Plaintiff's ad will continue to be rejected, and the irreparable harm will continue unabated. Therefore, although it may have been unnecessary to decide the "scorn or ridicule" viewpoint issue in order to conclude that Plaintiff was likely to prevail on the merits under the current AATA policy, the prospect of AATA continuing to exclude Plaintiff's ad under the challenged "scorn or ridicule" provision counsels in favor of awarding preliminary injunctive relief against the enforcement of that provision even if the "good taste" provision is removed.

Similarly, irreparable harm will continue if Defendants' amendments to their policy are motivated chiefly by their desire to exclude Plaintiff's ad. Facially neutral policies can be a

pretext for unlawful viewpoint discrimination.[4] *See Pittsburgh League of Young Voters Educ. Fund v. Port Auth. of Allegheny County*, 653 F.3d 290, 297 (3d Cir. 2011). For that reason, "[t]he government may not 'create' a policy to implement its newly-discovered desire to suppress a particular message." *Air Line Pilots Ass'n Int'l v. Dep't of Aviation*, 45 F.3d 1144, 1153 (7th Cir. 1995). The First Amendment's chief protection against arbitrary and viewpoint-based decisionmaking is its requirement that clear standards be laid out *in advance*. "Without these guideposts, *post hoc* rationalizations by the licensing official and the use of shifting or illegitimate criteria are far too easy, making it difficult for courts to determine in any particular case whether the licensor is permitting favorable, and suppressing unfavorable, expression." *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 758 (1988). If the government is allowed to establish rules for the forum *in direct response* to a "particular case," the facially neutral policy can be little more than a device to mask viewpoint discrimination. Giving AATA the opportunity to do so in this case is likely to ratify, rather than prevent, irreparable harm.

C. Speculation that Plaintiff's message may harm AATA ridership and reputation does not justify a continuing prior restraint on speech.

The "substantial harm to others" factor should not be used to limit the relief to which Plaintiff is entitled for the violation of his First Amendment rights. In applying strict scrutiny, this Court already performed the balancing test that gives appropriate weight to potential harm incurred by AATA. Once the government fails to satisfy the strict-scrutiny standard, the balance-of-harms inquiry is complete; the government does not suffer "harm" in any legally relevant sense by including speech in a designated public forum as required by the First

[4] In this case, recall Jesse Bernstein's testimony that people who disagree with the United Nations should not do so on AATA buses. (Dkt. # 46-2 at Pg ID 580-582.) Or consider Dawn Gabay's testimony that Plaintiff's ad was rejected because its graphic was "scary and frightening," even though a haunted house ad with a "scary and frightening" monster was accepted. (Dkt. # 46-2 at Pg ID 551-553; Dkt. # 46-5 at Pg ID 590.)

Amendment. *See Tyson Foods v. McReynolds*, 865 F.2d 99, 103 (6th Cir. 1989) ("Holly Farms has suffered no injury as a result of the preliminary injunction [because it] has no right to the unconstitutional application of state laws."). If that were not the rule, the harm-balancing function of the preliminary-injunction inquiry would too easily swallow (and nullify) the demanding strict-scrutiny test. If Defendants' interests in ridership and reputation were not sufficiently compelling to exclude Plaintiff's speech yesterday, they are not suddenly more compelling today, and they will not become so overnight.

Regardless, evidence of "substantial harm" to AATA in this case is profoundly weak. Defendants' expert report (Dkt. #19-4) is not based on any empirical data or evidence regarding the effects of controversial ads on the ridership or reputation of public transit agencies. It consists primarily of speculation—based on general marketing principles that may not even apply to public transit—that a significant number of riders will be so offended by Plaintiff's ad that they will choose to secure private transport rather than use the public bus. Notably, the report does not suggest that Plaintiff or his ad will directly harm AATA, only that other people will have an adverse emotional reaction to the ad's message, and then perhaps choose not to support AATA based on that reaction. But that is not the kind of "harm" that can properly limit injunctive relief in a First Amendment case. *See Snyder v. Phelps*, 131 S. Ct. 1207, 1219 (2011) ("The record confirms that any distress occasioned by Westboro's picketing turned on the content and viewpoint of the message conveyed, rather than any interference with the funeral itself."); *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134 (1992) ("Listeners' reaction to speech is not a content-neutral basis for regulation."); *Texas v. Johnson*, *supra*, 491 U.S. at 414 ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea

itself offensive or disagreeable.").

The likelihood of substantial harm to AATA ridership is further diminished by the limited scope of relief Plaintiff seeks. He wishes to display his advertisement only on the outside of AATA buses, not the inside. (Dkt. # 1, Verified Compl. ¶¶ 32-37.) And he wants to advertise on just a few buses that travel through the University of Michigan's central campus, where students are likely to be inquisitive about international relations, human rights, and political activism. (*Id*.) Most AATA riders will see the ad only momentarily, if at all.

Also, there are measures Defendants can take to mitigate potential harm. In San Francisco, for example, a controversial pro-Israel group recently placed an ad on the outside of several public buses that reads, "In any war between the civilized man and the savage, support the civilized man. Support Israel, Defeat Jihad." In response, the public transit agency put up its own displays condemning "statements that describe any group as 'savages.'" **Exhibit B**, *Muni Puts Up Counter Ads to Controversial Pro-Israel Messages*, Aug. 20, 2012. AATA could consider a similar approach. The appropriate response to offensive speech is counter-speech.[5]

D. The public interest in deterring violations of the First Amendment would be undermined absent an order that Defendants display Plaintiff's ad.

The final factor is the public interest. Not only is it always in the public interest to prevent the violation of a single party's rights (Dkt. # 50, Dist. Ct. Op. at 38), it is also in the public interest to deter unconstitutional acts and policies overall. *See Dayton Area Visually Impaired Persons, Inc. v. Fisher*, 70 F.3d 1474, 1490 (6th Cir. 1995) ("the public as a whole has

[5] AATA can also reach out to community groups and solicit private counter-ads. "Two religious groups have produced pro-Muslim advertising campaigns to be unveiled in New York City's subway system. The ads are meant as a response to the controversial anti-Jihad posters recently introduced to the subway." **Exhibit C**, *Pro-Muslim Subway Ads In New York City Going Up Next To Anti-Jihad 'Savage' Ads*, Oct. 5, 2012. As in San Francisco, the public transit authority in New York is also planning to display its own disclaimers. *Id*.

a significant interest in ensuring equal protection of the laws and protection of First Amendment liberties"); *see also Score Board, Inc. v. Upper Deck Co.*, 959 F. Supp. 234, 240 (D.N.J. 1997) ("public interest" component of preliminary injunction standard advanced by "precedent that may deter similar interference in the future"). This is especially true in the First Amendment context, where courts recognize that in order to vindicate the "the transcendent value to all society of constitutionally protected expression," relief must be given even to persons whose own speech could be validly proscribed were the relevant policy more narrowly crafted. *Bigelow v. Virginia*, 421 U.S. 809, 816 (1975). This third-party doctrine is based on the recognition that First Amendment values are best served by maintaining appropriate incentives for speakers to challenge unconstitutional policies, thereby deterring the government from adopting them in the first place.[6] *See Sec'y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 956-57 (1984).

In this case, not ordering Defendants to run Plaintiff's ad would create intolerably perverse incentives. The take-away message for public agencies administering public forums would be: "We don't need to worry about having a clear policy that meets First Amendment standards. We can even use that policy to censor speech based on its content. And we can do so without having to worry that we will ever have to allow the unwanted speech into the forum. Why? Because if a would-be speaker files a lawsuit, *even if the speaker wins the case and obtains a ruling that the exclusion of his speech violates the First Amendment*, we still won't have to allow his speech into the forum. We can simply change the language of our policy and

[6] A similar recognition lies behind the Supreme Court's Fourth Amendment jurisprudence. The exclusionary rule requires courts to suppress evidence that reliably points to the guilt of the accused because it deters police misconduct and protects the rights of innocent third parties. *See Elkins v. United States*, 364 U.S. 206, 217 (1960). As to the deterrence purpose of 42 U.S.C. § 1983 generally, see *Wyatt v. Cole*, 504 U.S. 158, 161 (1992) ("The purpose of § 1983 is to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails.").

exclude the unwanted speech based on the new language." In other words, the government would have no incentive to create a forum with standards of inclusion and exclusion that are clear. Instead, the government would have a strong incentive to act unconstitutionally: to create a forum with unclear standards, leaving its decisionmakers with unbridled discretion to exclude unpopular speech while including uncontroversial speech. *See United Food*, 163 F.3d at 360 (striking down "aesthetically pleasing" standard because it "grants [public] officials the power to deny a proposed ad that offends the officials' subjective beliefs and values under the guise that the ad is aesthetically displeasing"). Such incentives encourage officials to discriminate on the basis of content *and* viewpoint, which does not advance the public interest.

Along the same lines, citizens whose speech is censored would be left with no incentive to *challenge* unconstitutional policies. Naturally, the speaker's interest is in having his voice heard. If a speaker knows that a court will only order the government to devise a new, facially neutral policy that can still be used to exclude his message, he is unlikely to challenge the existing policy in the first place. Unconstitutional prior restraints, with their chilling effect on protected speech, would go unabated. "Society as a whole then would be the loser." *Munson*, *supra*, 467 U.S. at 956. Again, this does not serve the public interest.

The public-interest implications for First Amendment values would be especially grave in this case, as "speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." *Snyder v. Phelps*, *supra*, 131 S. Ct. at 1215. The public interest in allowing such speech is not lessened when the speech is "offensive or disagreeable." *Id*. at 1219. "Indeed, the point of all speech protection is to shield just those choices of content that in someone's eyes are misguided, or even hurtful." *Id*. Thus, in *United Food*, the Sixth Circuit affirmed the district court's order that the plaintiffs' controversial ads be

displayed, holding that "failure to issue the injunction would harm the public's interest in protecting First Amendment rights *in order to allow the free flow of ideas.*" *United Food*, 163 F.3d at 363 (emphasis added). Here, as in *United Food*, the public's interest in the "free flow of ideas" in a designated public forum will not be served by a form of relief that allows the government to persist in excluding Plaintiff's speech. Rather, the public interest will be served by ordering Defendants to display Plaintiff's ad just like it has displayed (and continues to display) hundreds of other ads containing uncontroversial messages.[7]

II. Further Proceedings: Plaintiff requests a status conference after relief is ordered.

As a practical matter, the scope of preliminary injunctive relief that the Court grants will greatly impact Plaintiff's view as to the additional proceedings that will be required in this case. If Plaintiff obtains the injunctive relief that he seeks, it may be that little or no additional discovery or contested motion practice will be required, with the case proceeding to final judgment under Rules 56, 57, and 65(a)(2) based on the current record or stipulations (unless Defendants need discovery). If such relief is not ordered, it is likely that Plaintiff will need to continue discovery on disputed issues such as as-applied viewpoint discrimination, vagueness, and substantial harm to AATA. Therefore, Plaintiff requests that the Court convene a status and/or scheduling conference for further discussion on these matters after it orders relief on Plaintiff's motion for preliminary injunction.

Respectfully submitted,

/s/ Daniel S. Korobkin
Daniel S. Korobkin (P72842)

[7] The public interest in the "free flow of ideas" and the "special protection" afforded to speech on public issues distinguishes this case from *McCollum v. City of Powder Springs, supra* notes 2 and 3. In that case the public interest in procedural due process was satisfied by giving the city an opportunity to fix its procedures, not by giving the plaintiffs a liquor license.

American Civil Liberties Union
Fund of Michigan
2966 Woodward Avenue
Detroit, Michigan 48201
(313) 578-6824
dkorobkin@aclumich.org

Dated: October 12, 2012

Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on October 12, 2012, I electronically filed the foregoing paper and attachments with the Clerk of the Court using the ECF system, which will send notification of such filing to:

James P. Allen	jamesallen@allenbrotherspllc.com vdurr@allenbrotherspllc.com
Rick A. Haberman	rhaberman@aclumich.org bbove@aclumich.org
Harvey R. Heller	hrh@maddinhauser.com pam@maddinhauser.com
Kathleen H. Klaus	khk@maddinhauser.com dxa@maddinhauser.com
Daniel S. Korobkin	dkorobkin@aclumich.org
Jerold Lax	jlax@psedlaw.com rhobbs@psedlaw.com dwaldenmayer@psedlaw.com
Michael J. Steinberg	msteinberg@aclumich.org bbove@aclumich.org
Rebecca L. Takacs	rtakacs@psedlaw.com rhobbs@psedlaw.com dwaldenmayer@psedlaw.com
Thomas W. Werner	tww@maddinhauser.com dxa@maddinhauser.com

/s/ Daniel S. Korobkin
Daniel S. Korobkin (P72842)

INDEX OF EXHIBITS

Exhibit A: *Am. Freedom Defense Initiative v. Wash. Metro. Area Trans. Auth.*, No. 12-1564 (D.D.C. Oct. 5, 2012):

1. Order
2. Plaintiffs' Motion for Temporary Restraining Order and Supporting Brief
3. Defendants' Opposition Brief
4. Plaintiffs' Reply Brief

Exhibit B: KQED, *Muni Puts Up Counter Ads to Controversial Pro-Israel Messages*, Aug. 20, 2012

Exhibit C: Huffington Post, *Pro-Muslim Subway Ads In New York City Going Up Next To Anti-Jihad 'Savage' Ads*, Oct. 5, 2012

Exhibit A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN FREEDOM DEFENSE INITIATIVE, *et al.*,	)	
Plaintiffs,	)	
v.	)	**Civil Action No. 12-1564 (RMC)**
WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY, *et al.*,	)	
Defendants.	)	

ORDER

It is hereby

ORDERED that Plaintiffs' Motion for Preliminary Injunction [Dkt. 2] is **GRANTED** under the First Amendment to the United States Constitution; and it is

FURTHER ORDERED that Washington Metropolitan Area Transit Authority display Plaintiffs' advertisement no later than 5 p.m. on October 8, 2012.

The Court issues its Order promptly and will issue an opinion hereafter.

SO ORDERED.

Date: October 5, 2012

/s/
ROSEMARY M. COLLYER
United States District Judge

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,

AMERICAN FREEDOM LAW CENTER

Robert J. Muise, Esq. (D.C. Court Bar No. MI 0052)
P.O. Box 131098
Ann Arbor, Michigan 48113
Tel: (734) 635-3756
rmuise@americanfreedomlawcenter.org

/s/ David Yerushalmi
David Yerushalmi, Esq. (DC Bar No. 978179)
1901 Pennsylvania Avenue NW, Suite 201
Washington, D.C. 20001
david.yerushalmi@verizon.net
Tel: (646) 262-0500
Fax: (801) 760-3901

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.

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

Constitution

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).

---

[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 any 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

Robert J. Muise, Esq. (D.C. Court Bar No. MI 0052)
P.O. Box 131098
Ann Arbor, Michigan 48113
Tel: (734) 635-3756
rmuise@americanfreedomlawcenter.org

/s/ David Yerushalmi
David Yerushalmi, Esq. (DC Bar No. 978179)
1901 Pennsylvania Avenue NW, Suite 201
Washington, D.C. 20001
david.yerushalmi@verizon.net
Tel: (646) 262-0500
Fax: (801) 760-3901

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.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN FREEDOM DEFENSE INITIATIVE, et al.,	:	
Plaintiffs,	:	
v.	:	**Case No. 12-1564 (RMC)**
RICHARD SARLES,	:	
Defendant.	:	

Defendant's Memorandum of Points and Authorities in Opposition to Plaintiffs' Motion for Preliminary Injunction

Phillip T. Staub
Associate General Counsel
#442013

Bruce P. Heppen
Deputy General Counsel
#252171

Carol B. O'Keeffe*
General Counsel

Attorneys for Defendant Richard Sarles[1]
600 Fifth St., N.W.
Washington, D.C. 20001
(202) 962-2555

*Not admitted.

[1] On September 21, Plaintiffs amended their complaint to name Richard Sarles as Defendant. Mr. Sarles is the General Manager and Chief Executive Officer of the Washington Metropolitan Area Transit Authority (WMATA), and Plaintiffs sue him in this capacity. For simplicity, this Opposition uses WMATA to encompass the Washington Metropolitan Area Transit Authority and Mr. Sarles.

Table of Contents

INTRODUCTION

WMATA's foremost obligation is to provide safe transit in the nation's capital. Both the region and WMATA are no strangers to terrorism. WMATA thus owns the unique privilege and duty to protect the riding public, in the seat of federal government, from terrorist attack and other dangers. Faced with the choice between endangering the public by displaying the AFDI Ad when it was likely to cause violence on Metrorail, or delaying the display to avoid the danger to passengers and without impinging on AFDI's freedom of expression, WMATA chose delay.

Plaintiffs have failed to establish that they suffered irreparable harm when their contract to display advertising in diorama displays in four Metrorail stations was delayed. Only a very small fraction of WMATA's patron's would be reached by such advertising, as there are approximately 613 dioramas within the 86 stations in the Metrorail system. Murray Aff. ¶ 2. There are many other advertising venues available to plaintiffs in the National Capital region which could be used to reach a random cross section of the populace. Moreover, plaintiffs continue to spew their messages regarding the Jihadist threat to the public on their website. In the absence of a showing of irreparable harm, they are not entitled to any injunctive relief.

The Delay does not violate AFDI's constitutional right to free expression for three key reasons. First, because the AFDI Ad constitutes fighting words in the context of current events, it falls outside First Amendment protection. Second, because the Delay is a content-neutral time, place and manner restriction, which is narrowly tailored to WMATA's compelling interest in passenger safety. Third and finally, should the Court

find that the Delay is a content-based restriction that concrete, objective and temporary and thus the least restrictive means to meet WMATA's compelling interest in passenger safety. The common thread is that the Delay does not discriminate based on AFDI's viewpoint.

In addition, publication of the AFDI ads in the present climate, following a violent reaction to an anti-Muslim video associated with the West, would potentially injure many others, including WMATA's patrons and employees. Plaintiffs have failed to establish that there is an immediate need for publication of their ads and thus the public interest will be furthered by the delay sought by WMATA. For these reasons, WMATA urges the Court to deny AFDI's motion for preliminary injunction.

ISSUE

Does the First Amendment compel WMATA to display advertisements that expose passengers to terrorism and threaten their safety without regard to timing, or may WAMTA briefly delay posting such ads?

STATEMENT OF FACTS

WMATA is the transit provider for the National Capital Region. Its rail transit system, Metrorail, encompasses 86 stations over a 106 mile network. In 2011, Metrorail provided 217,052,000 trips. http://www.wmata.com/about_metro/docs/metrofacts.pdf WMATA's ridership includes a high percentage of the federal workforce in the region and large numbers of school children in the District of Columbia. Taborn Aff. ¶¶ 6 & 8. WMATA's highest obligation is to the safety of its passengers. See Taborn Aff. ¶

1; http://www.wmata.com/about_metro/incidents_investigations.cfm? ("Safety is the number one priority at Metro.")

I. WMATA's Advertising Program

Since the early 1970's, WMATA has operated a commercial advertising program.[2] Commercial advertisements are placed in a variety of locations throughout the transit system, including approximately six hundred thirteen (613) diorama spaces on Metrorail platforms. Murray Aff. ¶2. In August 1972, WMATA adopted its Guidelines Governing Commercial Advertising. The current "Guidelines" are attached as Exhibit A.

WMATA's objection to an advertisement is extremely rare and has typically been resolved by discussions between WMATA and the advertiser. Murray Aff. ¶5. WMATA has always remained "content neutral" when reviewing proposed advertisements. Consequently, WMATA has run many controversial advertisements in spite of public protests. Murray Aff. ¶5 and Exhibits B through G.

II. AFDI Advertisement

On August 22, 2012, WMATA's advertising agent, CBS Outdoor, informed WMATA that the American Freedom Defense Initiative ("AFDI") had submitted a potentially controversial diorama advertisement (the "AFDI Ad" attached as Exhibit H). Murray Aff. ¶6.

AFDI is a self-described pro-Israeli advocacy organization. AFDI aggressively opposes Muslim activities and spreads anti-Muslim/anti-Islam messages. AFDI

[2] WMATA acted as proprietor of its advertising space. See Murray Aff. ¶ 2. A lower level of scrutiny usually applies when the government acts as proprietor. Ridley v. Mass. Bay Transp. Auth., 390 F.3d 65 (1st Cir. 2004).

previously appeared in the national news with its attempts to block the construction of a mosque near the site of the World Trade Center in New York City.[3]

Prior to submitting the AFDI Ad to WMATA, AFDI submitted the same advertisement to New York City's Metropolitan Transportation Authority (MTA). MTA refused to run the AFDI Ad because its incendiary language violated MTA's advertising standards prohibiting advertisements that demean a group of individuals on account of race, color, religion, national origin, ancestry, gender, age, disability or sexual orientation. AFDI sued MTA, claiming that MTA's standard was unconstitutional.

The United States District Court for the Southern District of New York held that the MTA was clearly correct to regard the AFDI Ad as demeaning because it referred to Muslims and Middle Easterners as "savage" but the Court found that MTA's standard was unconstitutional because it selectively protected certain groups, but not others, from demeaning speech without offering any justification for the protection. See AFDI v. MTA., 2012 U.S. Dist. LEXIS 101274 (S.D.N.Y.).

CBS Outdoor is also the advertising agent for the MTA and was already familiar with the AFDI Ad when it was submitted to WMATA. CBS Outdoor notified WMATA of the controversial history of the AFDI Ad. WMATA's Office of Marketing and Advertising reviewed the AFDI Ad and thought its reference to Muslims and Middle Eastern persons as "savage" would be very controversial. When used as a noun, as in the AFDI Ad, the term "savage" is particularly insidious. The American Heritage Dictionary of the English Language (4th ed. 2007) defines the noun "savage" as "not civilized; barbaric" and "vicious or merciless; brutal." Synonyms of the noun "savage" include beast, devil, fiend,

[3] http://nymag.com/daily/intel/2010/08/mta_approves_ads_in_opposition.html

miscreant, monster, Nazi, and barbarian.[4] The AFDI Ad also used the terms war, defeat, and Jihad, all of which were clearly employed for their provocative nature.

WMATA staff forwards all advertisements that are potentially controversial, offensive, or obscene, to WMATA's Office of General Counsel to determine (i) if the advertisement complies with the Guidelines and (ii) whether the advertisement is protected speech under the First Amendment of the U.S. Constitution. In spite of the incendiary language of the AFDI Ad, WMATA determined that it complied with the Guidelines and was protected speech. On August 22, 2012, WMATA informed CBS Outdoor that the AFDI Ad was cleared to run. Murray Aff. ¶7-8.

The AFDI Ad was scheduled to run in four dioramas in the Metrorail system from September 24, 2012 to October 21, 2012. Under the Advertising Agreement (Exhibit I), WMATA requires advertisers to provide copies of the advertisement material at least ten (10) business days before the advertisement is scheduled to run. AFDI was required to deliver its display copies to WMATA on or before September 10, 2012. AFDI failed to provide the display copies to CBS Outdoor or WMATA by September 10, 2012. In fact, to date, AFDI still has not provided the copies of the AFDI Ad to CBS Outdoor or WMATA. Murray Aff. ¶10.

III. Middle Eastern Events Of September 11, 2012

On September 9, 2012, an Arabic-language newspaper reported on a crude internet video titled *The Innocence of Muslims* ("Video").[5] The Video caused turmoil in the Muslim community because it depicted the Prophet Muhammad as vulgar, barbaric, a

[4] http://www.merriam-webster.com/thesaurus/savage%5Bnoun%5D?show=0&t=1348234728

[5] http://www.slate.com/articles/news_and_politics/map_of_the_week/2012/09/libya_u_s_embassy_attack_an_interactive_timeline_of_the_violence_in_the_middle_east_.html

rapist, a child molester, and swaggering in the desert with a gang of thugs.[6] The video depicts Muslims as inherently violent and uncivilized.

On September 11, 2012, reportedly in response to the Video, large masses of protestors surrounded several United States government facilities in the Middle East. Protestors attacked the U.S. facilities in Benghazi, Libya and killed four Americans, including the American ambassador to Libya. Subsequent investigations have linked the attacks to the Al Qaeda terrorist group.[7] In the days that followed, protestors surrounded U.S. Embassies in Egypt, Yemen, Tunisia, and Kuwait.[8] Several of these protests turned violent, including several instances where protestors were killed and others where protestors breached the U.S. facility perimeters and began setting fires.

The situation continues to be unstable, as evidenced by protests spreading out of the Middle East this week into countries such as Greece, Bangladesh, and Pakistan.[9] On September 26, 2012, in a speech to the United Nations, Egyptian President Mohamed Morsi referred to the Video and other insults to Islam and stated, "'We reject this. We cannot accept it,' Morsi said, his voice thin with anger. 'We will not allow anyone to do this by word or deed.'"[10]

---

6 http://www.washingtonpost.com/local/origins-of-controversial-anti-muslim-video-remain-a-mystery/2012/09/13/5ac25184-fddb-11e1-8adc-499661afe377_story.html

7 http://www.denverpost.com/nationworld/ci_21639987/clinton-directly-links-al-qaeda-libya-attack-that

8 http://www.reuters.com/article/2012/09/13/us-protests-idUSBRE88C0J320120913

9 http://articles.philly.com/2012-09-24/news/34062984_1_muslim-protesters-greek-riot-police-iranian-students

10 http://www.washingtonpost.com/world/national-security/egypts-president-morsi-tells-un-insults-to-muhammad-unacceptable/2012/09/26/fef14e46-07f3-11e2-858a-5311df86ab04_story.html

IV. WMATA's Safety Concerns

The fierce reactions to the Video around the world caused WMATA to reevaluate running the AFDI Ad. Murray Aff. ¶12. WMATA must put the safety and security of its patrons above all other concerns. Many school age children in the District of Columbia use the Metrorail system. Taborn Aff. ¶ 7. WMATA personnel felt strongly that this duty required a reassessment of the AFDI Ad's inflammatory language in light of the Video's depiction of the prophet Muhammad and Muslims as violent, barbaric and uncivilized, or in other words, as savages. Taborn Aff. ¶ 5.

On September 13, 2012, WMATA staff, headed by Metro Transit Police Chief Michael Taborn, evaluated the safety risks of running the AFDI Ad in an environment made toxic by the growing fury spilling out of the Middle East. Taborn Aff. ¶ 2. WMATA's transit system was the target of an organized terrorist plot in 2009 and WMATA worked closely with Transportation Security Administration ("TSA") and the FBI to stop that plot. Chief Taborn reached out to his TSA contacts about the AFDI Ad. The TSA officials expressed concern because the Metrorail system is a uniquely inviting target due to its close association with the federal government. The TSA officials supported the decision to delay running the AFDI Ad. Taborn Aff. ¶ 8.

On September 14, 2012, Chief Taborn received an official federal communiqué ("Federal Communiqué"). Taborn Aff. ¶ 4. The Federal Communiqué warned of the risk of violence at home and abroad because of the Video (Exhibit K, filed under seal).

WMATA decided the events of the past two weeks have created a tinderbox likely to be set alight at any further provocation and so the AFDI Ad must be temporarily

delayed to ensure the safety of WMATA's patrons, employees, and the transit system. WMATA's transit system is an extremely porous system, with multiple entry points, many of which are unmonitored for periods of time throughout the hours of revenue service. The potential risks to WMATA and its customers include: (i) WMATA employees and/or the Metrorail targeted for violence, (ii) violence toward Muslims or Middle Easterners, (iii) violence from Muslims or Middle Easterners, (iv) an unacceptably dangerous environment for all passengers who must travel along crowded platforms, adjacent to deep track beds, and moving trains. Taborn Aff. ¶ 7.

Recent incidents directly responding to the AFDI Ad are particularly illustrative. On September 25, 2012, WMATA's transit police received notice of a threat (Exhibit L) promising violence if WMATA ran the AFDI Ad. The FBI Joint Terrorism Task Force is investigating this threat. Also on September 25th, a scuffle broke out between two people arguing about the AFDI Ad in an MTA station in New York City. The police were called and the protestor was arrested.[11] There were several instances of defacing the AFDI Ads in the MTA stations with spray paint and other materials.[12]

ARGUMENT

I. PLAINTIFFS HAVE NOT ESTABLISHED THEY SUFFERED IRREPARABLE HARM

Plaintiffs' unsupported assertion that they have suffered a restriction on their first amendment rights is insufficient to establish sufficient irreparable harm to warrant

---

11 http://nymag.com/daily/intel/2012/09/anti-jihad-israel-sign-scuffle-times-square.html

12 http://newyork.cbslocal.com/2012/09/25/arab-group-wants-creative-social-media-response-to-controversial-subway-ads/

granting injunctive relief. AFDI Mem. at 14. Regardless of what the standard may be in the Second Circuit or in the Sixth Circuit,[13] in the D.C. Circuit the standard for establishing harm is demanding. The preliminary injunction is

> "an extraordinary remedy that should be granted only when the party seeking the relief, by a clear showing, carries the burden of persuasion." Cobell v. Norton, 391 F.3d 251, 258 (D.C. Cir. 2004).
>
> This court has set a high standard for irreparable injury. First, the injury "must be both certain and great; it must be actual and not theoretical." Wisc. Gas Co. v. FERC, 244 U.S. App. D.C. 349, 758 F.2d 669, 674 (D.C. Cir. 1985) (per curiam). The moving party must show "[t]he injury complained of is of such *imminence* that there is a 'clear and present' need for equitable relief to prevent irreparable harm." Id.

Chaplaincy of Full Gospel Churches v. England, 454 F.3d 290, 297 (D.C. Cir. 2006).[14] Accord, Hohe v. Casey, 868 F.2d 69, 72-73 (3d Cir. 1989)("…the assertion of First Amendment rights does not automatically require a finding of irreparable injury, thus entitling a plaintiff to a preliminary injunction") and Rushia v. Ashburnham, 701 F.2d 7, 10 (1st Cir. 1983) ("…the fact that Rushia is asserting First Amendment rights does not automatically require a finding of irreparable injury.") As the D.C. Circuit concluded, in Chaplaincy, "in this court, as in several others, 'there is no per se rule that a violation of freedom of expression automatically constitutes irreparable harm.'"

In Chaplaincy, the D.C. Circuit upheld the finding that the plaintiff has not articulated sufficient tangible irreparable harm, where one religious group alleged that the

---

13 Plaintiffs rely upon N.Y. Magazine v. Metro. Transp. Authority, 136 F.3d 123, 130 (2d Cir. 1998) and Newsome v. Norris, 888 F.2d 371, 378 (6th Cir. 1989).

14 Chaplaincy considered the application of the *plurality opinion* of three Justices of the Supreme Court in Elrod v. Burns, 427 U.S. 347, 373 (1976), which is principally relied upon by plaintiffs. AFDI Mem. at 14. The D.C. Circuit noted that, "[b]ecause the plurality's discussion of irreparable harm did not enjoy support from a majority of Justices, it is not binding precedent but a "considered opinion" that "should be the point of reference for further discussion of the issue." Chaplaincy, 454 F.3d at 300.

Navy had established rules which gave preference to chaplains from another Christian denomination. In contrast to the position asserted by plaintiffs, the Court held that the only circumstances where irreparable harm need not be shown is where there is a denial of rights under the Establishment Clause.

Plaintiff bears the burden of persuasion on irreparable harm. Chaplaincy of Full Gospel Churches, 454 F.3d at 297. "[A] movant must demonstrate 'at least some injury' for a preliminary injunction to issue, . . . for 'the basis of injunctive relief in the federal courts has always been irreparable harm.'" Chaplaincy of Full Gospel Churches, 454 F.3d at 297 (quoting Sampson v. Murray, 415 U.S. 61, 88 (1974)). To qualify, the plaintiff's injury "must be both certain and great; it must be actual and not theoretical." Wisc. Gas Co. v. FERC, 758 F.2d 669, 674 (D.C. Cir. 1985) (per curiam). Further, "[b]are allegations of what is likely to occur are of no value since the court must decide whether the harm will *in fact* occur." Id. at 674. The alleged injury must be "of such imminence that there is a 'clear and present' need for equitable relief to prevent irreparable harm." Id. Finally, "the injury must be beyond remediation" to warrant preliminary injunctive relief. Chaplaincy of Full Gospel Churches, 454 F.3d at 297. District courts in this jurisdiction have declined to issue preliminary injunctions where there was a failure to show sufficient irreparable harm. See Majhor v. Kempthorne, 518 F. Supp. 2d 221, 255 (D.D.C. 2007)(Walton, J.)(plaintiff did not establish that issues relating to his health, which were long standing, constituted the type of injury which would warranted injunctive relief to immediately remove him from a correctional facility in American Samoa); Sterling Commer. Credit — Mich., LLC v. Phoenix Indus. I, LLC, 762

F. Supp. 2d 8, 16 (D.D.C. 2011)(Friedman, J.) (bare allegations of what is likely to occur couched in mere possibilities are of no value since the court must decide whether the harm will in fact occur; moreover, plaintiff has not demonstrated that the harm would be serious in terms of its effect on the plaintiff's business or its existence); Baumann v. District of Columbia, 655 F. Supp. 2d 1, 15 (D.D.C. 2009) (injunction denied - plaintiff missed the mark with his blithe assertions that "the threat of Plaintiff losing his job" is no longer "speculative) and Sierra Club v. United States DOE, 825 F. Supp. 2d 142, 148, 153 (D.D.C. 2011)(Bates, J.) (showing of irreparable injury is an independent prerequisite for a preliminary injunction; failure to show any irreparable harm is therefore grounds for refusing to issue a preliminary injunction, even if the other three factors entering the calculus merit such relief).

In determining the adequacy of plaintiff's case, consideration must be given to the record generally, and in particular to Ms. Geller's affidavit, which is the only verified document in the record. Sampson v. Murray, 415 U.S. 61, 88-89, 90 (1974). There, a six-person majority of the Supreme Court overturned the decision of the District of Columbia Circuit, which had affirmed the grant of an injunction in a case involving the due process rights of a probationary federal employee. The Court held that "mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough. The possibility that adequate compensation or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm."[15] 415 U.S. at 90.

---

[15] Here, WMATA has indicated that it will conduct a reassessment of the situation and that "it is prepared to run the advertisement beginning on November 1." Taborn Aff., ¶ 11. Thus, in the

The Supreme Court has recently confirmed the importance of pleading with specificity the essential elements of a cause of action. In Ashcroft v. Iqbal, 556 U.S. 662 (U.S. 2009), the Court reversed the decision of the Second Circuit and held that the motion to dismiss should have been granted because the complaint failed to plead sufficient facts to state a claim for purposeful and unlawful discrimination. The Court held that plaintiff "has not "nudged [his] claims" of invidious discrimination "across the line from conceivable to plausible." Id. 680. Although the present inquiry does not arise in the context of a motion to dismiss, here plaintiffs are asking for extraordinary relief and should be held to the same high standards before this Court may grant the request relief. The Court held that "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. Although for the purposes of a motion to dismiss we must take all of the factual allegations in the complaint as true, we are not bound to accept as true a legal conclusion couched as a factual allegation. (internal quotation marks omitted)." Id. at 678.

Plaintiffs have failed to adequately establish that they have suffered irreparable harm – nothing in Ms. Geller's affidavit suggests its existence. Plaintiff alleges that WMATA does not want to display a message that it deems to be "critical of Islam, critical of jihad, or supportive of Israel," but these themes have been playing out in the public marketplace of ideas for many years, and there is no urgency cited to a need for publication of the message in September 2012 as opposed to November 2012. The

---

normal course of events, the advertising will be displayed and there is no need for this Court to issue any form of injunctive relief. It is noteworthy that two days before plaintiffs brought this lawsuit, they asked for contact information regarding whom to address at WMATA regarding the decision to delay the advertising. They were promptly given that information. Exhibit 3. Instead of contacting WMATA, they filed suit.

path to publication in the New York MTA, as reflected in, American Freedom Defense Initiative v. MTA, 2012 U.S. Dist. LEXIS 101274 (S.D.N.Y. 2012), slip op. at *11 - *13, followed AFDI's decision to twice withdraw the advertisement and to resubmit it, stretching the process from March 2012 to September 2012. During this time period, as reflected in the factual background of Judge Engelmayer's opinion, AFDI honed and simplified its message. Apparently it could live with the self-inflicted delay.

To the extent that plaintiffs suggest that it is necessary to rebut the DC Riders for Peace ad, (Geller Aff. ¶¶ 5, 7 and 8; Am. Comp. ¶ 21; and Murray Aff. ¶ 5i), there is no basis in fact for this assertion. The Riders for Peace ad was last run in the Metrorail system in Nov. 2011, 10 months before AFDI entered into a contract with CBS Outdoor. In the world of mass media, 10 months is an eternity and none but the most dedicated partisan could conceivably construe the AFDI Ad as a rebuttal to the Riders for Peace advertising. This is to be contrasted with the example of 2007, when advertising addressing both sides of the Arab-Israeli issues was displayed in close proximity. Exhibits C, D and E. To the extent the suggestion is that this advertising relates to the demonstrations taking place in Muslim countries in response to the video (Geller Affidavit ¶ 9), the decision by AFDI to place this advertisement in the Metrorail system preceded the current unrest by several weeks. Ms. Geller avers that the contract was signed on Sept. 6, 2012, 5 days before violence erupted which took the life of the American ambassador to Libya.

II. THE FIRST AMENDMENT DOES NOT PROTECT AFDI FROM EXPRESSING FIGHTING WORDS

WMATA's decision to delay posting the AFDI Ad ("the Delay") does not violate AFDI's First Amendment Rights because the AFDI Ad is not constitutionally protected free speech. This part discusses why the AFDI Ad is not constitutionally protected; the following part presents WMATA's compelling interest in public safety, which is content-neutral and more than a sufficient basis for the Delay; and part IV distinguishes the Delay from the New York Metropolitan Transit Authority's (MTA) attempt to ban the AFDI Ad, which was rejected by the U.S. District Court for the Southern District of New York as an impermissible content-based restriction.

A. The AFDI Ad Constitutes Unprotected Fighting Words

Certain categories of speech, such as fighting words, are outside First Amendment protection. Fighting words, "by their very utterance inflict injury or tend to incite an immediate breach of peace," Chaplinski v. N.H., 315 U.S. 568, 572 (1942), and are thus outweighed by society's interest in order and morality. "Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution." Chaplinsky v. N.H., 315 U.S. 568, 571-572 (1942) (citation omitted). The Court thus upheld Chaplinsky's conviction for calling the Rochester city marshal "a God damned racketeer," and a "damned Fascist." 315 U.S. at 569, 574.

More recent cases limit the application of fighting words to those that are likely to provoke a breach of peace, as opposed to words that merely hurt feelings. R.A.V. v. St. Paul, 505 U.S. 377, 4146 (1992), NAACP v. Claiborne Hardware Co., 458 US 886, 927

(1982).

Since Chaplinski and Beauharnais,[16] the Supreme Court has shaped the understanding of fighting words more through deciding what they are not than what they are. Flag burning without words inciting others to violence does not constitute fighting words. Street v. NY, 394 U.S. 576 (1969). In contrast, the AFDI Ad characterizes Muslims as savages, which may incite violence by or against people of that faith, characterizes the relationship between the west and Middle-East as "war" and urges defeat of Muslim ideals. The AFDI Ad thus is inciteful in nature rather than the "public advocacy of peaceful change in our institutions," 394 U.S. at 591, that Street engaged in when he burned his flag.

Also, using epithets to criticize a concept does not amount to fighting words. Cohen v. Cal., 403 U.S. 15 (1971). Cohen entered a California courthouse wearing a "Fuck the Draft" jacket. He did not threaten or commit any violence, nor did anyone in response. 403 U.S. at 16-17. The Court noted Cohen's jacket lacked the necessary prerequisite of inciting violence:

> At least so long as there is no showing of an intent to incite disobedience to or disruption of the draft, Cohen could not, consistently with the First and Fourteenth Amendments, be punished for asserting the evident position on the inutility or immorality of the draft his jacket reflected.

403 U.S. at 18. Cohen's jacket also did not constitute fighting words because his comments were directed at a government program and thus were not "personally abusive" as required by Chaplinski. Id at 20. Unlike Cohen's jacket, the AFDI Ad does urge and incite violence, and is directed at a group, Muslims and Middle-Easterners. In

[16] Beauharnais v. Illinois, 343 U.S. 250 (1952), discussed in II.B, below.

sum, the AFDI Ad fits squarely within Chaplinski, and not within the exceptions to the fighting words rule.

Compared to Chaplinski, the AFDI Ad employs more offensive language, calculated to incite a violent reaction. The AFDI Ad states that Muslims are savages and calls for war to defeat Middle-Easterners and Muslims. An anti-Muslim YouTube video, similarly depicting Muslims in general (and Prophet Mohammed in particular) of being savages, has caused international furor and led to the deaths of four Americans in Libya. Taborn Aff. ¶¶ 3-6; Statement of Facts. The prospect of posting the AFDI Ad has already elicited anonymous threats to attack Metrorail. Taborn Aff. ¶ 10; Def. Exhibit L. The AFDI Ad is thus both deeply offensive and likely to incite. See Part II.B, below.

The AFDI Ad does not involve face-to-face communication, but this does not detract from the conclusion that it constitutes fighting words. No person-to-person contact is required. The R.A.V. case reflects the Court's continued willingness to find fighting words in absence of a face-to-face exchange. R.A.V. v. St. Paul, 505 U.S. 377 (U.S. 1992). R.A.V. and his accomplices lit a cross in a neighbors lawn, set fire to it and ran away.[17] He was later convicted under an anti-bias law. In the process of striking down the anti-bias law on the basis that it selectively proscribed fighting words based on viewpoint, the Court accepted the proposition that cross burning could be considered fighting words. 505 U.S. at 391, 396 (law against placing symbols, objects, appellation, characterization or graffiti including on public property would have been acceptable fighting word restriction if not accompanied by viewpoint restriction). The cross burning

[17] These facts are developed in the follow-on case: U.S. v. J.H.H., 22 F.3d 821 (8th Cir. 1994).

in R.A.V. was not a face-to-face exchange, yet was nevertheless treated as fighting words.

In addition, the view that fighting words must be face-to-face harkens back to time when there were few other means to reliably communicating a message to another person or group. That is no longer the case today, with a bulk of modern communication occurring via cell phones, email, blogs, Facebook and Twitter. As seen by the recent protests over an anti-Muslim video on YouTube, our age provides many more avenues, including indirect means, to communicate fighting words and incite violence.

Because it constitutes classic fighting words, the AFDI Ad is not entitled to First Amendment protection.

B. The Fighting Words in the AFDI Ad, Taken in the Context of Contemporaneous Events, are Likely to Provoke a Breach of Peace.

Whether expression is protected by the First Amendment depends upon the context in which they are made. As Justice Holmes famously stated,

> [T]he character of every act depends upon the circumstances in which it was done. The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and cause a panic. It does not even protect a man from an injunction against uttering words that have all the effect of force.

Schenck v. U.S., 249 US 47, 52 (1919).

The Beauharnais case illustrates the importance of context. There, the Supreme Court reviewed the history of racial tensions in Illinois when considering an anti-hate statute from that state, and concluded that history supported the legislature's decision to limit speech:

> Illinois did not have to look beyond her own borders or await the tragic experience of the last three decades to conclude that willful purveyors of falsehood concerning racial and religious groups promote strife and tend powerfully to obstruct the manifold adjustments required for free, ordered life in a metropolitan, polyglot community. From the murder of the abolitionist Lovejoy in 1837 to the Cicero riots of 1951, Illinois has been the scene of exacerbated tension between races, often flaring into violence and destruction.

Beauharnais v. Illinois, 343 U.S. 250, 258-259 (1952). In addition to historical tensions, the Court also considered how ongoing tensions increased the threat of violence and a breach of peace:

> There are limits to the exercise of these liberties [of speech and of the press]. The danger in these times from the coercive activities of those who in the delusion of racial or religious conceit would incite violence and breaches of the peace in order to deprive others of their equal right to the exercise of their liberties, is emphasized by events familiar to all. These and other transgressions of those limits the States appropriately may punish.

343 U.S. at 261 (internal quotes and citation omitted). Beauharnais upheld restrictions upon racist leaflets the context of then-current racial tensions. Thus, current events are important in determining whether the AFDI Ad constitutes fighting words.

Another determinate in context is whether the audience is held captive. Hill v. Colorado, 530 U.S. 703, 716 (2000) (the protection afforded to offensive messages does not necessarily embrace speech to a captive and unwilling audience). Passengers on subway platforms and in Metrorail stations are a "captive audience." ACLU v. Mineta, 319 F. Supp. 2d 69, 82 (D.D.C. 2004) (citation omitted). This is another reason why the AFDI Ad is entitled to less protection. Lehman v. Shaker Heights, 418 U.S. 298 (U.S. 1974).

It is therefore appropriate, even necessary, to consider the context of the AFDI Ad.

No less than the racial unrest underlying Beauharnais, our times are plagued by tensions with people of Muslim faith and Middle Eastern descent, and by the potential for violence hate speech to incite violence by and against these groups, their supporters and detractors. Context, the events of September 11, 2012, is what tipped the balance in favor of the Delay. On that day, four Americans were murdered in Benghazi, Libya, during a protest against the anti-Islamic video "The Innocence of Muslims" (the Video). Taborn Aff. ¶¶ 2-3. The Video depicts Mohammed, the Muslim prophet, as a violent madman, ruthless killer, child rapist, drunkard and fraud. In short, a savage. The Video similarly depicts all Muslims as inherently violent. Again, savages. The depth of Muslim anger over the Video's characterizations cannot be overstated.

Among the four murdered Americans was Chris Stevens, the first American ambassador to die in an attack since 1979, illustrating how extraordinary the events were and the propensity for extreme violence in response to anti-Islamic messages. Rather than calming over time, anger over the anti-Islamic messages in the Video spiraled out-of-control. Protests quickly spread through Africa, Asia and Europe. By reports, many have died in these protests.

Due to the unique target WMATA presents—its association with the federal government, its location near Washington, D.C. landmarks; its porosity; it being the main means of transport for the federal workforce in Washington—WMATA officials must remain particularly vigilant against terrorist attack. Taborn Aff. ¶¶ 7,8. Terrorists have targeted Metrorail before. Taborn Aff. ¶ 8. The extent to which terrorist organizations were responsible for these protest is still unknown. From the start, there were reports

that al Qaeda, the terrorist organization behind the September 11 attacks, including the attack on the Pentagon, may have used the protests as cover for the Benghazi murders and be the force behind the continued protests.

WMATA did not need to speculate on the threat to its passengers; it was specifically warned about it. WMATA received a September 13, 2012 official communiqué from the federal government ("Federal Communiqué") warning that the Video and spreading protests had increased the treat of terrorist attacks in the United States. Exhibit K (filed under seal); Taborn Aff. ¶ 4.[18]

This full context should be considered in order to determine whether the AFDI Ad constitutes fighting words.[19] Just as with the Video that sparked the murders and protests, the AFDI Ad called Muslims savages. The AFDI Ad enhanced this violent and provocative message by urging war against Muslims to defeat their objectives. In the context of world events, including the official notice of increase potential for attack in the United States, the AFDI Ad was likely to cause a breach of peace and therefore constitutes fighting words.

As fighting words, the AFDI Ad falls outside First Amendment protection.

---

[18] Subsequent events bear out the very real nature of the threat of terror against WMATA. On September 24, WMATA became aware of an anonymous threat to carry out an attack against Metrorail if it posts the AFDI Ad. Taborn Aff. ¶ 10.

[19] The context of the AFDI Ad on the New York subway was different, which explains why Judge Engelmayer dismissed the notion fighting words in dicta. American Freedom Defense Initiative v. MTA, No. 11-6774, 2012 U.S. Dist., LEXIS 101274 *50 (S.D.N.Y. July 20, 2012). There is nothing in the decision to indicate MTA argued that the AFDI Ad was likely to cause a breach of peace. MTA rejected the AFDI Ad on September 21, 2011, approximately one year before the Video came to light, the Benghazi attack and, the international protests. As discussed, events immediately prior to WMATA's decision completely changed the context of the AFDI Ad and raised a likelihood that it would cause a breach of peace. The change in circumstances, and in the basis of WMATA's decision with regard to the AFDI Ad, distinguishes the instant case from AFDI v. MTA.

WMATA was free to regulate the AFDI Ad with the sole proviso that the restriction must be viewpoint neutral.

C. WMATA's Stance Against Posting Fighting Words is Viewpoint Neutral

Fighting words cannot be selectively proscribed based on viewpoint.

R.A.V. v. City of St. Paul, 505 U.S. 377 (1992). In R.A.V., the Court considered the application of the following ordinance to a cross burning on a residential lawn:

> Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.

R. A. V. v. St. Paul, 505 U.S. at 380. The court observed that the cross burning was tantamount to fighting words, and therefore could be restricted including as to venue, and even content. Id at 386-88. The Court nevertheless struck down the ordinance because it prohibited displays regarding certain viewpoints while permitting others:

> St. Paul has not singled out an especially offensive mode of expression – it has not, for example, selected for prohibition only those fighting words that communicate ideas in a threatening (as opposed to a merely obnoxious) manner. Rather, it has proscribed fighting words of whatever manner that communicate messages of racial, gender, or religious intolerance. Selectivity of this sort creates the possibility that the city is seeking to handicap the expression of particular ideas.

505 U.S. at 393-94. The phrase "on the basis of race, color, creed, religion or gender" was the fly in ointment because it prohibited speech on disfavored subjects (e.g. race and

religion) while permitting others (e.g. political party and union membership).[20]

Thus, R.A.V. stands for the unremarkable proposition that the government can't pick sides. Notably, the Court observed that this does not exclude content-based restrictions on proscribable speech:

> Where the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy.

505 U.S. at 390 (citation omitted). AFDI argues that WMATA is picking the Arab side of the Arab-Israeli conflict, but that isn't so. WMATA has previously run advertising supportive of Israel. Exhibits D and E. The only ad now before WMATA is AFDI's incitement of violence against Arabs. WMATA would take the same action in a similar context involving an ad urging violence against Israeli's. WMATA urges the Court to reject AFDI's self-fulfilling speculation.

In contrast to the selective ban in R.A.V. and MTA, WMATA's decision to delay posting the AFDI Ad was based on public safety, which is a consistent basis to restrict fighting words regardless of viewpoint. The Delay should thus be upheld because it is a viewpoint-neutral restriction upon unprotected fighting words. For this reason alone, WMATA submits that the Court should deny AFDI's request for a protective order.

III. IF THE AFDI AD CAN BE CONSTRUED AS PROTECTED SPEECH, THE DELAY IS AN APPROPRIATE TIME, PLACE AND MANNER RESTRICTION

In the previous part, WMATA argued that the AFDI Ad is not protected speech. If

[20] As discussed in part V, below, the MTA decision followed R.A.V. due to the substantial similarity between this language and the MTA advertising standard.

the Court nevertheless determines that the AFDI Ad is protected, then the Delay should be upheld as an appropriate time, place and manner restriction.

Even speech that enjoys the most extensive First Amendment protection is subject to "regulations of the time, place and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest and leave open ample alternative channels of communication." Frisby v. Schultz, 487 U.S. 474, 481 (1988) (upholding ban on picketing on public streets outside residence of doctor who performed abortions). Time, place and manner restrictions are therefore subject to this intermediate scrutiny, rather than strict scrutiny that applies to content-based restrictions. This part presents how the Delay meets these requirements for an appropriate time, place and manner restriction, and the final part addresses why the Delay could pass strict scrutiny review if it is instead viewed as a content-based restriction.

A. The Delay is Content-Neutral

AFDI argues that the Delay is a content-based restriction on speech. AFDI Mem. p. 11. WMATA recognizes that it may not discriminate against views on disfavored subjects, R.A.V. v. St. Paul, 505 U.S. 377, 386-92 (1992). Appropriately, content-based restrictions on expression are subject to strict scrutiny to ensure that the government is not playing favorites among viewpoints. R.A.V., 505 U.S. at 393-94; Boos v. Barry, 485 U.S. 312 (1988) (rejecting statute prohibiting signs near embassies criticizing foreign governments as an impermissible content-based restriction). The facts, however, establish that the Delay is viewpoint neutral. The Delay is not the result of any opinion

WMATA has about AFDI's message, but rather well-founded concerns about passenger safety. It matters not that the AFDI Ad is anti-Muslim, pro-Israeli or otherwise, only that in the context of current events WMATA foresaw the AFDI Ad as endangering its passengers.

WMATA's initial approval of the AFDI Ad demonstrates that its actions are content-neutral. WMATA at first approved the AFDI Ad for posting. Geller Decl., ¶ 10; Murray Aff. ¶ 8. If WMATA's objective was to suppress AFDI's viewpoint, it would have declined to post the ad regardless of world events. The Delay arose after WMATA's initial approval, when world events created a tinderbox for incendiary statements about the Arab-Israeli conflict. Taborn Aff. ¶¶ 3-6.

AFDI will likely respond that its incendiary statements are part of its viewpoint and thus when WMATA bases the Delay upon them it has engaged in content-based discrimination. See AFDI Mem., ¶ p. 12 (citing Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 118 (1991) ("Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection.")). While one is entitled to express her viewpoint, she is not necessarily entitled to use any means of expression she pleases. Ward v. Rock Against Racism, 491 U.S. 781 (1989) (Central Park band shell noise control measures were reasonable time, place and manner restriction based on legitimate interest in protecting citizens from unwanted noise); Kovacs v. Cooper, 3336 U.S. 77 (1949) (upholding sound trucks ordinance banning "loud and raucous" noises as within government power to prevent disturbing noises). Moreover, the words likely to incite violence in the AFDI Ad—War,

Defeat, Savage—would incite regardless of AFDI's viewpoint on the Arab-Israeli conflict. The mere use of them at this time is likely to endanger WMATA passengers, justifying the Delay.

The fact that AFDI is the only party requesting to use incendiary words in the current climate, and that AFDI happens to advocate an anti-Muslim perspective, does not convert the Delay into a content-based restriction on the anti-Muslim viewpoint. It is mere happenstance that AFDI was first to the gate, and not some anti-Israeli group wishing to call Jewish people savages, or urging war against Jews in order to defeat their objectives. The Supreme Court dealt with a similar who-gets-to-the-forum-first question in Madsen v. Women's Health Ctr., 512 U.S. 753 (U.S. 1994). In that case, the government placed several time, place and manner restrictions on anti-abortion protests near clinics and clinic staff residences. The Court rejected arguments that the restrictions were content- or viewpoint-based because they related only to anti-abortion messages. Since only the anti-abortion protests were at issue, it was disingenuous for the protesters to argue that they were being singled out:

> The fact that the injunction in the present case did not prohibit activities of those demonstrating in favor of abortion is justly attributable to the lack of any similar demonstrations by those in favor of abortion, and of any consequent request that their demonstrations be regulated by injunction. There is no suggestion in this record that Florida law would not equally restrain similar conduct directed at a target having nothing to do with abortion; none of the restrictions imposed by the court were directed at the contents of petitioner's message.

Madsen v. Women's Health Ctr., 512 U.S. 753, 762-763 (U.S. 1994). Similarly here, only AFDI has thus far proposed an ad likely to endanger WMATA passengers. Murray Aff. ¶ 14. That no other party on a different side of the Arab-Israeli conflict has come

forward with a similarly provoking ad does not convert WMATA's decision to delay the AFDI Ad into a content-based restriction. And just as in Madsen, there is no evidence that WMATA would not equally restrain other messages that would endanger its passengers. To the contrary, WMATA wants to avoid igniting the current tinderbox without regard to who wields the match.

B. The Delay is Narrowly Tailored to Serve WMATA Passenger Safety

In order to be an appropriate time, place and manner restriction, the Delay must be narrowly tailored to serve a significant government interest. The interest at stake is WMATA passenger safety. Public convenience is a sufficient basis to regulate time, place and manner. Community for Creative Non-Violence v. Turner, 893 F.2d 1387, 1391-1392 (D.C. Cir. 1990) (safety and convenience of persons in forum is a valid governmental objective); Heffron v Int'l Society for Krishna Consciousness, Inc., 452 U.S. 640 (1981) (may limit distribution of literature to assigned locations in order to maintain orderly movements at state fair); International Society for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 675 (1992) (could restrict solicitation based on incremental impact on pedestrian congestion). In comparison, WMATA's public safety interest is compelling. Schenk v. Pro-Choice Network of Western N.Y., 519 U.S. 357, 375-76 (1997) (public safety, including the likelihood that the speech would cause fights to break out, is a clearly a valid interest).

The Madsen Court also found the state "has a strong interest in ensuring the public safety and order." 512 U.S at 768. Specifically, the anti-abortion protesters were

properly restricted from blocking roads, entrances and sidewalks. WMATA was particularly concerned that displaying the AFDI Ad during extreme Middle-East tensions would make Metrorail a target. This in turn would place millions of riders at risk, including children in the District of Columbia who rely on Metrorail to get to and from school.

WMATA perceived two ways in which the AFDI Ad would threaten public safety. The Federal Communiqué addressed the first: terrorist attack. Posting the AFDI Ad during the unrest over the Video would make WMATA a target for attack. This was an unacceptable risk to public and employee safety. Taborn Aff. ¶ 6. The second threat was the potential of the AFDI Ad, again in the context of heightened tensions, to cause disturbances on Metrorail platforms, endangering passengers. The AFDI Ad was to be posted on WMATA's platform dioramas. WMATA's crowded platforms abut deep track beds and passing trains. This environment leaves no room for fights between passengers. Taborn Aff. ¶ 7. The likelihood of the AFDI Ad inciting violence on Metrorail's platforms threatened public safety.[21] The Delay was put in place to address these public safety issues in the most narrow and temporary means practicable. Taborn Aff. ¶¶ 9,11.

WMATA's interest in public safety exceeds the legitimate government interest standard. Next, the Delay must also be narrowly tailored to that interest. WMATA's narrow tailoring of its content-neutral restriction need not be the least possible means to provide for passenger safety:

[R]egulation of the time, place, or manner of protected speech must be

[21] This perceived threat was also borne out by subsequent events, when MTA patrons got into a physical altercation over the AFDI Ad. See Statement of Facts, WMATA's Safety Concerns.

> narrowly tailored to serve the government's legitimate content-neutral interests but that it need not be the least-restrictive or least-intrusive means of doing so.

Rock Against Racism, 491 U.S. at 799. The Court further indicated that "the requirement of narrow tailoring is satisfied 'so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.'" Id. at 800 (quoting United States v. Albertini, 472 U.S. 675, 689, (1985)); see also, Madsen, 512 U.S at 765 (the challenged provisions should not burden no more speech than necessary to serve a significant government interest).

Thus, the Delay is narrowly tailored if it, 1) promotes passenger safety in a more effective manner than absent the Delay; or 2) does not burden any more speech than necessary to serve passenger safety. The Delay need only meets one standard, but meets both because it was triggered by incendiary terms during a particularly unstable time, and furthermore is temporary. WMATA is not attempting to permanently ban the AFDI Ad, it doesn't purport to ban certain words forever nor does it prevent advocates on either side of the Arab-Israeli conflict (or any issue for that matter) from expressing their viewpoints now or in the future, provided they do not to incite violence or disruption in the Metrorail system that would endanger passengers. The Delay thus effectively promotes passenger safety through a very specific, narrow and temporary burden on speech directly related to passenger safety, without impinging on speech that does not endanger passengers.

Because the Delay is a narrowly-tailored content-neutral restriction, and serves a compelling government interest, it is an acceptable time, place and manner restriction

provided there remain alternative forums for AFDI's message.

C. The Delay Leaves Ample Alternative Means for Communicating AFDI's Message

Besides voluntarily rewording its message so as not to incite violence or disruptions so as not to endanger passengers, AFDI has ample alternative means for communicating its message.

WMATA controls a tiny portion of the potential forums in the metropolitan area and elsewhere in which AFDI can exercise its speech. Many opportunities for expressing the same message exist, including near to Metro stations, which AFDI could use to get their message to the same audience. See Madsen, 512 U.S. at 770 (upholding restrictions on abortion protesters that permitted protesters to be seen and heard by the same audience of clinic patients and workers).

Further, there is nothing special about displaying the AFDI Ad in the Metrorail system. An ad displayed on Metrorail platforms carries no greater weight with the audience of WMATA passengers than it would if displayed elsewhere in the D.C. area. See City of Ladue v. Gilleo, 512 U.S. 43 (1994) (ban on displaying signs from residences not permissible time, place and manner restrictions because the other locations available lacked the same gravitas "[d]isplaying a sign from one's own residence often carries a message quite distinct" from another location).

Finally, AFDI's message has only been delayed. AFDI has the alternative to run its message in the Metrorail system starting on November 1. Taborn Aff. ¶ 11 (unless the planned reassessment demonstrates a verified likelihood of an attack against U.S.

transit systems relating to the Video). On the other hand, displaying the AFDI Ad on Metrorail creates unique threats.

D. Whether or Not the Delay is a Prior Restraint is Inconsequential to the Analysis of Whether the Delay is an Appropriate Time, Place and Manner Restriction

AFDI further argues that the Delay is an impermissible prior restraint on speech. AFDI Mem., pp. 7. Without conceding this point, WMATA notes that labeling a restriction a prior restraint does not mean the restriction is per se unconstitutional. Lebron v. Washington Metro. Area Transit Auth., 749 F.2d 893, 896 (D.C. Cir. 1984). This is not a novel concept:

> [I]t has been clear since [the Supreme] Court's earliest decisions concerning the freedom of speech that the state may sometimes curtail speech when necessary to advance a significant and legitimate state interest.

Members of the City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 104 S. Ct. 2118, 2128, 80 L. Ed. 2d 772 (1984) (citation omitted). Moreover, prior restraints on protected speech are subject to the same appropriate time, place and manner restrictions. Lebron, 749 F.2d at 896, 899. Thus, whether the Delay is a prior restraint does not change the conclusion that the Delay is an appropriate, and constitutional, time, place and manner restriction.

IV. ASSUMING ARGUENDO THAT THE AFDI AD IS PROTECTED SPEECH AND THE DELAY IS NOT AN APPROPRIATE TIME, PLACE AND MANNER RESTRICTION, IT MAY STILL PASS REVIEW AS A CONTENT-BASED RESTRICTION

In most public forums content-based restrictions on free speech face the high

hurdle of strict scrutiny.[22] Thus, presuming the AFDI is protected by the First Amendment or in the alternative that the Delay is not an appropriate time, place and manner restriction, then the Delay must be narrowly tailored to WMATA's compelling interest in passenger safety.

MTA's no-demeaning advertising standard was content-based and failed to pass strict scrutiny. The no-demeaning standard rejected in this case stands in great contrast to the Delay—unlike the Delay it is not viewpoint neutral and permanently restricts speech—and the case therefore instructs as to why these differences mean that the Delay could survive strict scrutiny review.

MTA's no-demeaning standard prohibits ads "that contain[] . . . information that demean[s] an individual or group of individuals on account of race, color, religion, national origin, ancestry, gender, age, disability or sexual orientation." American Freedom Defense Initiative v. MTA, No. 11-6774, 2012 U.S. Dist., LEXIS 101274 *2 (S.D.N.Y. July 20, 2012). The Court noted the striking similarity between this restriction and the one rejected by the Supreme Court in R. A. V. v. St. Paul, 505 U.S. 377 (1992). 2012 U.S.

---

[22] The threshold question is the nature of the forum in which the speech is restricted, which dictates the level of scrutiny required. United States v. Koklinda, 497 U.S. 720, 726-27 (1990). The types of forums recognized the Supreme Court are traditional public forums, designated public forums and nonpublic forums. Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 800 (1985). In traditional and designated public forums, content-based restrictions are reviewed under strict scrutiny. Peck v. Baldwinsville Cent. Sch. Dist., 426 F.3d 617, 626 (2nd Cir. 2005) ("content-based restrictions will be upheld only if they are necessary to serve a compelling state interest and are narrowly drawn to achieve that end.") [avoid 2nd circuit, check RAV, Simon & Regan v. Time, Inc., 468 U.S. 641, 648-9 (1984)] Only nonpublic, sometimes called limited, public forums are subject to less stringent review. This argument assumes, arguendo, that the platform dioramas are designated public forums, as posited by AFDI. AFDI Mem. Pp. 9-10. The case cited by AFDI, however, specifically did not decide which type of public forum Metrorail ad space represents. Lebron at 899 (declining to decide whether subway stations are more like airports [limited?] or public buses [designated?]; see also, ACLU v. Mineta, 319 F. Supp. 2d 69, 82 (D.D.C. 2004) ("The advertising spaces at issue in this case – buses subway cars, and subway stations – are non-public forums which WMATA over the years has chosen to designate as limited public forums."). If the Court determines that WMATA subway stations are limited public forums, then the Delay is given greater deference, akin to the content-neutral analysis.

Dist., LEXIS 101274 *46. There, the city of St. Paul restricted certain types of speech intended to "arose anger, alarm or resentment in others on the basis of race, color, creed, religion or gender." 505 U.S. at 380. The final phrase, "on the basis of race, color, creed, religion or gender" was an impermissible singling-out of viewpoints, "Selectivity of this sort creates the possibility that the city is seeking to handicap the expression of particular ideas." Id. at 393-394. The Court allowed that but for the phrase, St. Paul's restriction against fighting words would have been constitutionally acceptable. Id. at 396 (an acceptable content-neutral restriction "not limited to the favored topics, for example, would have precisely the same beneficial effect," and therefore be narrowly tailored).

Judge Engelmayer followed R.A.V. and held that because the no-demeaning standard restricted only demeaning language toward some groups, while permitting others, it was likewise "impermissibly content-based." 2012 U.S. Dist., LEXIS 101274 *56. At the same time, Judge Engelmayer pointedly remarked that absent the offending phrase, ads could be held to a civility standard:

> Today's ruling does not disable city authorities from adopting rules that hold ads and commentary on the exteriors of buses to a standard of civility. *See, e.g., Ridley v. Mass. Bay Transp. Auth.,* 390 F.3d 65, 90 (1st Cir. 2004) (upholding transit authority's regulation that prohibited, *without further limitation,* "advertisements that 'demean[] or disparage[] an individual or group of individuals'" . . . Today's ruling instead leaves—and is intended to leave—MTA the latitude to investigate and experiment with alternative mechanisms for using ad space . . productively, profitably, and constitutionally, while ensuring that this space is not used as a tool for disparagement and division.

Id. WMATA has done just that—applied an alternative and temporary restriction—in the interest of public safety and narrowly tailored to that compelling interest. There is no evidence that WMATA has applied or would apply a different restriction to ads with

different viewpoints.

An open-ended civility standard like that endorsed by Judge Engelmayer, the First Circuit in Ridley and the Supreme Court in R.A.V. is elusive, subjective and long-lasting, yet deemed narrowly tailored. The Delay based on an established threat to public safety, is concrete, objective and temporary.[23] There are no less restrictive content-neutral means to prevent the AFDI Ad from inciting violence and endangering the public.

As a result, the Delay is narrowly tailored to WMATA's compelling interest in protecting the riding public from terrorism and injuries.

V. PLAINTIFFS HAVE NOT ESTABLISHED AN ENTITLEMENT TO AN INJUNCTION BECAUSE THERE IS POTENTIAL HARM TO OTHERS IF AN INJUNCTION IS GRANTED AND THE PUBLIC INTEREST IN FREE SPEECH IS NOT HARMED BY THE MINOR DELAY IN PUBLICATION OF THE AFDI AD

The final factors on which plaintiffs bear the burden in order to justify grant of injunctive relief is that there must be a showing that an injunction would not substantially injure other interested parties, and that the public interest would be furthered by the injunction. CityFed Fin. Corp. v. Office of Thrift Supervision, United States Dep't of Treasury, 58 F.3d 738, 746 (D.C. Cir. 1995) and Chaplaincy of Full Gospel Churches v. England, 454 F.3d at 297. Plaintiffs had not met a sufficient showing on either of these final two factors, and given WMATA's position, which simply seeks a modest delay in the posting of the advertisement, Plaintiffs' requested relief should be denied.

[23] WMATA's focus on the fighting words employed by the AFDI Ad is more narrow than a civility standard in that it doesn't examine the feelings of the recipient, but rather the threat to passenger safety.

Plaintiffs argue that WMATA will suffer no injury because WMATA has the option of taking down the advertisements. AFDI Mem. at 15. This argument is hard to fathom, for If WMATA took down the advertisements, it would be subject to exactly the same allegations as are present in this case, that it has censored protected speech. WMATA should not be forced to play roulette with regard to the outbreak of violence. WMATA's concerns are that this advertisement will engender violence and that the threat is especially persuasive in the context of the international violence spawned by the Video. Plaintiffs make note of the fact that the advertisement is running in New York. The delay proposed by WMATA will allow WMATA to fully assess New York's experience. As of the writing of this Opposition, there has already been an altercation in New York regarding the advertisement and a threat has been received by WMATA. See Exhibits L and N. Assuming that nothing more happens, events of this caliber would still not preclude WMATA from deciding to run this advertising after the cooling off period which WMATA seeks. Taborn Aff. ¶ 11. Moreover, the New York system does not present the same target as WMATA's Metrorail system does, as WMATA's Metrorail system is closely associated with the federal government. Taborn Aff. ¶ 8.

Contrary to plaintiffs' suggestions, there is no fundamental constriction of its first amendment rights. WMATA does not seek to limit advertising regarding the Arab Israeli conflict and as Exhibits C, D, and E illustrate, vigorous debate about the subject has been displayed in the Metrorail system by partisans on each side. WMATA and its patrons should not be penalized by the threat of violence because it has chosen to allow dissemination of a broad range of advertising for which it regularly receives opprobrium.

Here it merely seeks to delay publication of the message until emotions have had an opportunity to ebb.

It is in the public interest for WMATA to assure the safety of the riding public and its employees. The delay adopted by WMATA will have little effect on plaintiffs' first amendment rights. It is inconceivable that the debate about support for the state of Israel will be moved in any particular direction by the decision to delay the posting of this small amount of advertising for a short amount of time. Delaying the advertising will allay the fears of many Metrorail riders who are worried at the prospect of violence in the Metrorail system.

Just as the law does not allow for a "heckler's veto," it does not allow for the unrestrained publication of highly incendiary advertising, whose sole purpose is to inflame passion. Plaintiffs have failed to carry their burden and their Motion for a Temporary Restraining Order/Preliminary Injunction should be denied.

Respectfully submitted,

Sept. 27, 2012
Date

/s/
Phillip T. Staub
#442013
Associate General Counsel
600 Fifth Street, NW
Washington, D.C. 20001
(202) 962-2555

CERTIFICATE OF SERVICE

I certify that on this 27th day of September, 2012, I served this Opposition with attached order, affidavits and exhibits, by electronic case filing, upon:

Robert J. Muise
American Freedom Law Center
PO Box 131098
Ann Arbor MI 48113

David Yerushalmi
1901 Pennsylvania Ave., NW
Washington, D.C. 20001

/s/
Phillip T. Staub

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

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 <u>*directly limits speech*</u>, the irreparable nature of the harm <u>*may be presumed*</u>. . . . 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.

AMERICAN FREEDOM LAW CENTER

/s/ Robert J. Muise
Robert J. Muise, Esq. (D.C. Court Bar No. MI 0052)
P.O. Box 131098
Ann Arbor, Michigan 48113
Tel: (734) 635-3756
rmuise@americanfreedomlawcenter.org

/s/ David Yerushalmi
David Yerushalmi, Esq. (DC Bar No. 978179)
1901 Pennsylvania Avenue NW, Suite 201
Washington, D.C. 20001
david.yerushalmi@verizon.net
Tel: (646) 262-0500
Fax: (801) 760-3901

CERTIFICATE OF SERVICE

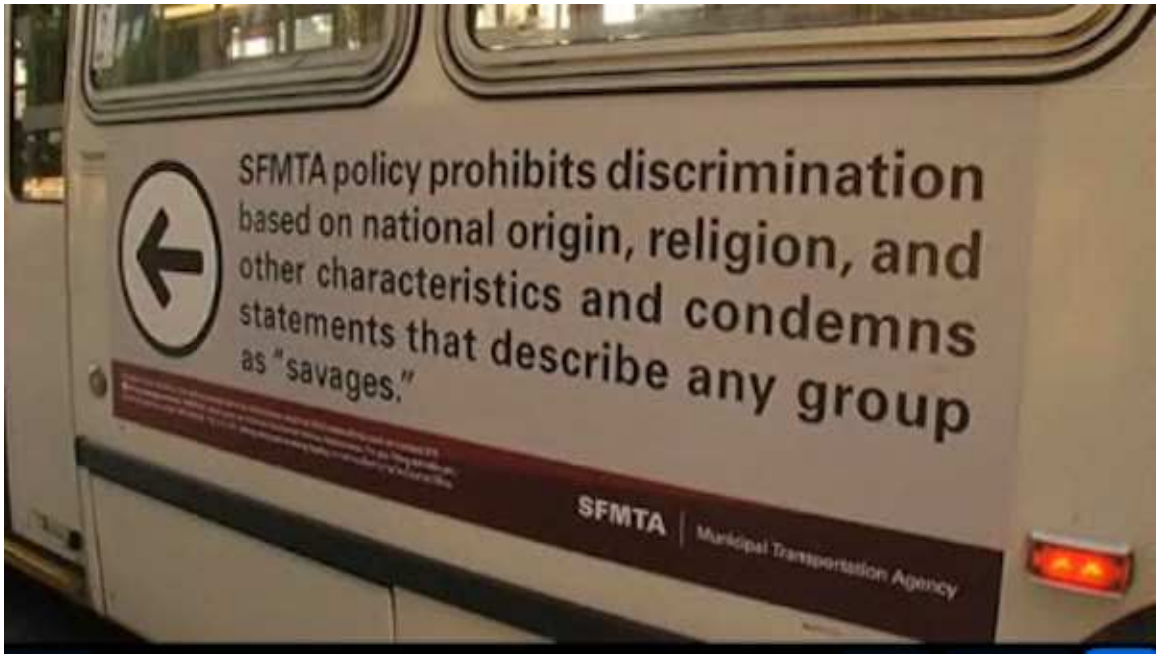
I hereby certify that on October 1, 2012, a copy of the foregoing was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system. Parties may access this filing through the Court's system. I further 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

/s/ Robert J. Muise
Robert J. Muise, Esq.

Exhibit B


SFMTA policy prohibits discrimination based on national origin, religion, and other characteristics and condemns statements that describe any group as "savages."
SFMTA
Municipal Transportation Agency

KQED News

news fix

KQED's Bay Area news blog

Muni Puts Up Counter Ads to Controversial Pro-Israel Messages; Activist Says 'Manifestation of Sharia'

August 20, 2012, 12:39 pm • Posted by **Caitlin Esch**

Muni has placed a counter-ad on 10 of its buses right alongside the controversial pro-Israel message that an activist bought.

Muni's ads read:

> SFMTA policy prohibits discrimination based on national origin, religion, and other characteristics, and condemns statements that describe any group as "savages."

Muni's ad has an arrow pointing downward to the original ad, which has caused a stir with this language:

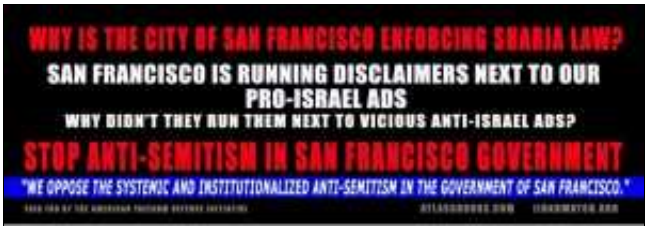
> In any war between the civilized man and the savage, support the civilized man. Support Israel. Defeat jihad.

Muni spokesman Paul Rose tells ABC 7 in San Francisco, "Obviously, we think the ads that are in place right now are repulsive and they definitely cross a line. There's not a lot we can do, in light of the First Amendment"

Pamela Geller with the American Freedom Defense Initiative paid for the original ad and responds on her blog:

> This is unprecedented in the history of outdoor advertising. This is the manifestation of Sharia in Western society. Any war on innocent civilians is savage. They are reading the idea that "all Muslims" or "all Arabs" want to destroy Israel into my ad. That is nowhere in my message. They are the Islamophobes and racists.

Geller writes she plans to run another ad, to counter the counter ad:



So will Muni place a counter-counter-counter ad? We'll keep you posted.

No related posts.

Exhibit C

October 11, 2012 EDT
HUFF POST NEW YORK

Pro-Muslim Subway Ads In New York City Going Up Next To Anti-Jihad 'Savage' Ads (IMAGE)

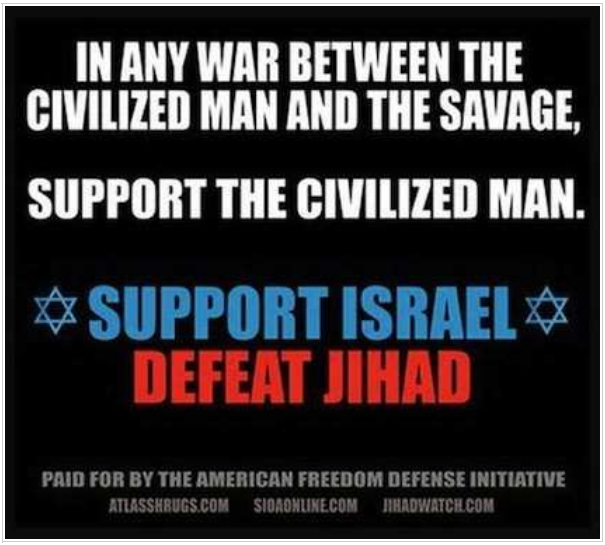
Posted: 10/05/2012 9:01 am EDT Updated: 10/06/2012 6:27 am EDT

Two religious groups have produced pro-Muslim advertising campaigns to be unveiled in New York City's subway system. The ads are meant as a response to the controversial anti-Jihad posters recently introduced to the subway.

The New York Times reports the two groups, the Rabbis for Human Rights North America and the Sojourners led by Christian author Jim Wallis, and the MTA have confirmed the new ads will hang in close proximity to the American Freedom Defense Initiative's posters, which have been widely condemned as Islamophobic.

The rabbis' ads read, **"In the choice between love and hate, CHOOSE LOVE. Help stop bigotry against our Muslim neighbors"** while the Christian ads say "**Love your Muslim neighbors."**

The language directly challenges the provocative messaging of the anti-Jihad's posters which say, "In any war between the civilized man and the savage, support the civilized man. Support Israel. Defeat Jihad."



The new ads will go up on Monday. According to the Associated Press, "On Wednesday, another group, United Methodist Women, placed pro-Muslim ads in the subway. They say: 'Hate speech is not civilized.'"

The MTA originally sought to block the anti-Jihad ads from appearing in subways because of its "demeaning" message, but were ultimately forced to put the ads up when a federal judge said the American Freedom Defense Initiative's advertising was protected under the first amendement.

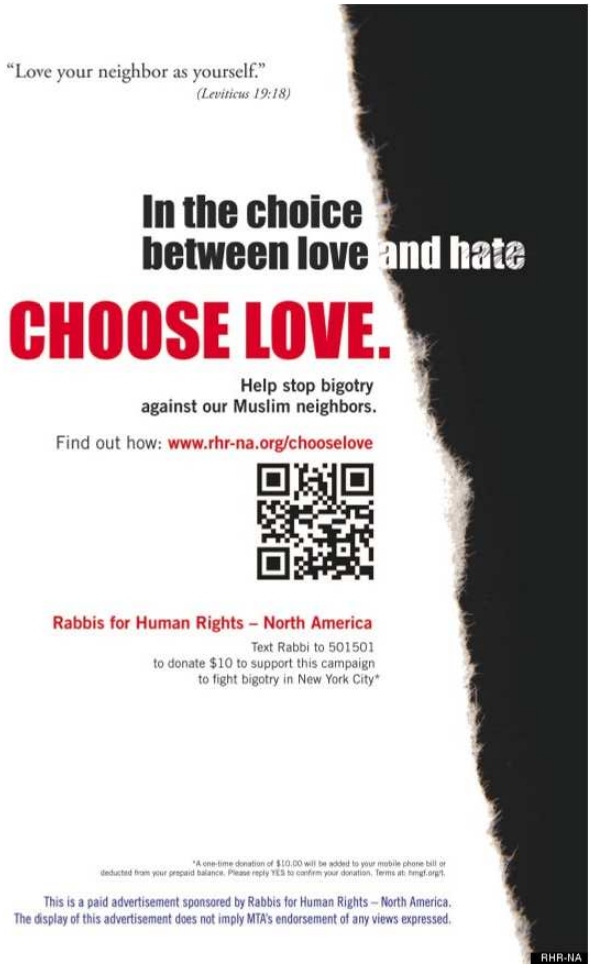
In response to the controversy however, the agency recently announced any future non-commercial advertising that could "imminently incite or provoke violence" will coincide with prominently placed disclaimers.

The disclaimers hope to distance any controversial messaging with the stances of the MTA. "This is a paid advertisement sponsored by [Sponsor], " the disclaimer will read. "The display of this advertisement does not imply MTA's endorsement of any views expressed."

#MySubwayAd 1 of 16

@lsarsour
Linda Sarsour

In NYC We Speak 140 Languages and Hate Isn't One Of Them. #MySubwayAd #antihate


"Love your neighbor as yourself."
(Leviticus 19:18)
In the choice between love and hate
CHOOSE LOVE.
Help stop bigotry against our Muslim neighbors.
Find out how: www.rhr-na.org/chooselove
Rabbis for Human Rights – North America
Text Rabbi to 501501 to donate $10 to support this campaign to fight bigotry in New York City*
*A one-time donation of $10.00 will be added to your mobile phone bill or deducted from your prepaid balance. Please reply YES to confirm your donation. Terms at: hrngf.org/t.
This is a paid advertisement sponsored by Rabbis for Human Rights – North America.
The display of this advertisement does not imply MTA's endorsement of any views expressed.
RHR-NA