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

BLAINE COLEMAN,

Plaintiff,

v.

ANN ARBOR TRANSPORTATION AUTHORITY, et al,

Defendants.

Case No.: 11-15207
Hon. Mark A. Goldsmith

BRIEF OF ANN ARBOR TRANSPORTATION AUTHORITY AND MICHAEL FORD ON SCOPE AND FORM OF INJUNCTIVE RELIEF

The Court has asked the parties to brief the issue of the appropriate scope of injunctive relief in light of the findings made in the Court's September 28, 2012 Opinion and Order ("Opinion"). The Court's power to enter injunctive relief is broadly discretionary but the Court must tailor the relief to the particular facts of the case before it, keeping in mind that an injunction cannot be used to punish a defendant. *Hecht Co. v. Bowles,* 321 U.S. 321, 330 (1944). In light of these considerations and the specific facts presented in this case, defendants urge the Court to enter an injunction directing the Ann Arbor Transportation Authority ("AATA") to reconsider its Advertising Policy in light of the Court's determination that the "good taste" provision in that policy is unconstitutional.[1] This was the remedy ordered in recent, similar cases and is the only remedy that will protect Mr. Coleman's rights, the First Amendment and the AATA's right to lawfully control the advertisements displayed on its buses.

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[1] The AATA should also be afforded an opportunity to reconsider its Advertising Policy under *AFDI v. SMART,* __ F.3d ___, Case. No. 12-0368 (6th Cir. October 25, 2012), a recent decision that upheld a "defamation, scorn and ridicule" provision similar to that in the Advertising Policy and that provides considerable fresh guidance to transit authorities in how to fashion advertising policies that bar ads that "alienate people and decrease ridership," *i.e.* the concerns that motivated the AATA to enact the policy provisions that caused it to reject Mr. Coleman's ads. A copy of the *SMART* decision is attached as Exhibit A.

A. Court has broad discretion in fashioning an equitable remedy.

The authority to enter injunctive relief lies within this Court's traditional equity powers. *Mertens v. Hewitt Assoc.,* 508 U.S. 248, 255 (1993); *Meredith v. City of Winter Haven*, 320 U.S. 228 (1943). "The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. ***Flexibility rather than rigidity has distinguished it."*** *Hecht,* 321 U.S. at 330 (emphasis added). As such, federal courts have considerable discretion in fashioning the scope of injunctive relief when such relief is warranted.

However, the Court's discretion is not without limits and an injunction that barred the AATA from engaging in lawful conduct would be impermissibly overbroad. *Shakhnes v. Berlin,* 689 F.3d 244, 257 (2nd Cir. 2012*); e360 Insight v. The Spamhaus Project*, 500 F.3d 594, 605 (7th Cir. 2007). As a guard against overbroad injunctions, federal courts must "try to limit the solution to the problem" and enjoin only the unconstitutional applications of a statute "while leaving other applications in force." *Ayotte v. Planned Parenthood of Northern New Hampshire*, 546 U.S. 320, 328-29 (2006), *internal quotations and citations omitted.* Put another way:

> Precisely because equitable relief is an extraordinary remedy to be cautiously granted, it follows that the scope of relief should be ***strictly tailored to accomplish only that which the situation specifically requires*** and which cannot be attained through legal remedy.

Aluminum Workers International v. Consolidated Aluminum Corp., 696 F.2d 437, 446 (6th Cir. 1982) (emphasis added).

Another element of this restriction on the court's discretion is the principle that, if there is a constitutional basis for the government's decision, the plaintiff is not entitled to injunctive relief simply because an unconstitutional basis may also have been used in making the decision. *Mt. Healthy School Dist. v. Doyle,* 429 U.S. 274, 285 (1977). In these circumstances, a plaintiff

is afforded complete relief by an order that does not countenance unconstitutional government action, but that also does not put the plaintiff in a better position than he would be in if the government's action were based solely on a constitutional basis. *Mt. Healthy,* 429 U.S. at 285-86. This doctrine is applied in myriad of cases involving Constitutional issues. For example, in cases alleging Fourth Amendment violations, the exclusionary rule (discussed by Mr. Coleman at n. 6 of his brief) does not bar illegally obtained evidence if the state can show good faith, an independent source for the evidence or the inevitable discovery of the evidence. *See e.g. Davis v. US,* 131 S.Ct. 2419, 2426 - 29 (2011).

Finally, this discretion for determining appropriate injunctive relief is not restricted by the fact that a violation of the First Amendment is alleged. Although Mr. Coleman suggests otherwise, none of his cited authority holds that the First Amendment limits ***in any way*** this Court's discretion to fashion injunctive relief.[2] Rather, as demonstrated below, even in the First Amendment context, the Court has discretion to craft an appropriate remedy that is "strictly tailored" to address the particular circumstances of the case before it.

B. The Court should direct the AATA to reconsider its Advertising Policy in light of the Opinion and the recent *SMART* decision.

Mr. Coleman argues that the only appropriate injunctive remedy is an order directing the AATA to run the ad. This relief is not necessary to provide Mr. Coleman with a sufficient remedy and, more importantly, is not warranted in order to protect the First Amendment. Rather, under the specific facts of this case, the appropriate remedy would be to order the AATA to reconsider its Advertising Policy in light of the Opinion. This has been the remedy ordered in a

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[2] For example, Mr. Coleman disingenuously cites *Bigelow v. Virginia,* 421 U.S. 809, 816 (1975) for the proposition that "relief must be given even to persons whose own speech would be validly proscribed were the relevant policy more narrowly crafted." *See* Coleman Brief at p. 8. *Bigelow* dealt with the issue of ***standing.*** It did not even suggest that the only way to protect the First Amendment is to force the government to allow speech that could be constitutionally restricted.

plethora of similar cases and is a remedy that would be "strictly tailored" to address the constitutional violation found by the Court, without granting Mr. Coleman extraordinary relief.

In *American Freedom Def. Initiative v. Metropolitan Transportation Authority*, ___ F.Supp.2d ___ (S.D. N.Y. 2012) (2012 WL 2958178), the plaintiff wanted to run an ad that stated, in relevant part, "In any war between the civilized man and the savage, support the civilized man. Support Israel Defeat Jihad." *See AFDI I*, attached as Exhibit B. The Metropolitan Transportation Authority ("MTA") rejected the ad under a provision of its advertising policy that barred ads that "contain images or information that demean and individual or group of individual on account of race, color, religion, national origin, ancestry, gender, age, disability or sexual orientation." *AFDI,* 2012 WL 2958178 at * 2. The *AFDI* court found that this provision to be unconstitutional under *R.A.V. v. City of St. Paul,* 505 U.S. 377, 391 (1992) because it barred demeaning speech directed at certain personal attributes, "but permits all other demeaning ads." *AFDI,* 2012 WL 2958178 at *17.[3]

The *AFDI* court did not, however, direct the MTA to run the plaintiff's ad. Rather, the court, "***in the public interest***," granted the MTA 30 days in which to consider "alternatives to the current regulation." *AFDI,* 2012 WL 2958178 at * 19 (emphasis added). In explaining the basis for the remedy ordered, the *AFDI* court noted:

> 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). [...] And in resolving this case on the narrow ground that the no-demeaning standard as currently drafted is impermissibly content-based, the Court pointedly does not reach any of

[3] In this case, the "defamation, scorn or ridicule" ban on ads is not limited to any class of people but applies to all persons or groups of persons, and therefore does not suffer from the infirmity noted in *R.A.V. See* Kagen, E., *"Private Speech, Public Purpose: The Role of Governmental Motive In First Amendment Doctrine."* 63 University of Chicago Law Review 413 (Spring 1996) at p. 417 - 418.

> the broader grounds for invalidation urged by AFDI under the First Amendment. Today's ruling instead leaves—and is intended to leave-MTA the latitude to investigate and experiment with alternative mechanisms for using ad space on the exteriors of city buses productively, profitably, and constitutionally, while ensuring that this space is not used as a tool for disparagement and division.

Id. at *19 (footnotes and internal quotations omitted). *See also, University of Cincinnati Chapter of Young Americans for Liberty v. Williams*, 2012 WL 2160969 (S.D. Ohio 2012) (university enjoined from enforcing unconstitutional restrictions on speech but not ordered to allow plaintiff's speech). The *AFDI* court afforded the MTA the opportunity to revise its policy, even though this process would require the plaintiff to resubmit its ad under the new policy.[4]

The Sixth Circuit has affirmed similar injunctions in cases alleging a violation of Constitutional rights. For example, in *Miller v. Cincinnati,* 622 F.3d 524 (6th Cir. 2010), the plaintiff challenged the constitutionality of a policy that restricted use of City Hall to only those groups that received permission from a department head and then only if the department head determined that the allowing the use of the facility was "in the public interest." *Miller,* 622 F.3d at 529. The plaintiff wanted to hold a press conference in city hall but was denied access.

In the resulting litigation, the plaintiff sought an injunction ordering the city to allow plaintiff to hold a press conference. *Miller,* 622 F.3d at 531. The district court found the policy to be unconstitutional under the First Amendment and granted the plaintiff a preliminary injunction. In upholding the district court's decision, the *Miller* court affirmed the issuance of an injunction to the extent the defendant was enjoined from enforcing the unconstitutional regulation. The *Miller* court did not order the city to allow plaintiff access to City Hall, although

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[4] This remedy was not ordered in a similar case pending in the District for the District of Columbia but the issue in that case concerned the transit authority's decision to delay the running of an otherwise permissible ad. *Amer. Freedom Def. Initiative v. Wash. Area Metro Trans. Auth.,* ___ F. Supp. 2d ___ (D. D.C. 2012)(2012 WL 4845643). The transit authority's decision to defer the placement of the ad was not based on a written policy so there was no basis for remanding the matter to the transit authority for reconsideration.

it recognized this was a possible remedy. *Miller,* 622 F.3d at 540. On remand, the city revised its policy to bar all press conferences in City Hall, a decision that rendered moot the plaintiff's claim for permanent injunctive relief. *Miller v. City of Cincinnati,* 2012 WL 3962787 (S.D. Ohio, 2012).

The Sixth Circuit also recently declined to enter a mandatory injunction in a case involving voting rights. In *Obama for America v. Husted,* __ F.3d ___, 2012 WL 4753397 (6th Cir. 2012), the Sixth Circuit considered the constitutionality of a statute that revoked early voting rights for all registered voters except those currently serving in the military. The statute did not make early voting mandatory, but left the decision of whether to offer early voting to local voting boards. The district court declared unconstitutional the statute's revocation of early voting rights for non-military registered voters and enjoined state election officials from enforcing that provision of the statute. The majority in *Husted* affirmed on the express understanding that it was not requiring any voting board to allow early voting. Rather, the effect of the injunction was that, if a voting board offered early voting, it had to offer it to all voters.

Federal courts clearly have the authority when faced with a violation of the Constitution to provide the state with an opportunity to remedy the violation and to grant an injunction like that sought by Mr. Coleman only if the state fails to act. The Sixth Circuit in *Miller* and *Husted* allowed for this limited injunctive relief as did the federal district courts in *AFDI, Williams* and *McCollum v. City of Powder Springs*, 720 F.Supp. 985, 990 (N.D. Ga. 1989). The scope of injunctive relief awarded in these cases reflects the need to "limit the solution to the problem" and to strictly tailor the relief to the particular facts presented. *Ayotte,* 546 U.S at 328. It is the

appropriate relief in this case.[5]

C. An order directing the AATA to run the ad is not warranted.

Mr. Coleman's argument in support of his proposed remedy is based on false assumptions and inapposite authority. The record developed through discovery and presented at the evidentiary hearing establishes conclusively that Mr. Coleman's rights and the public interest would be sufficiently vindicated if the AATA were given an opportunity to reconsider its Advertising Policy in light of the Opinion and the *SMART* case.

First, there is no basis in fact or law for assuming that the AATA cannot draft a constitutional Advertising Policy. The First Amendment is not violated by a transit authority's effort to set a "minimum level of discourse" in the advertisements displayed on its buses and in its terminals. *Ridley v. Mass. Bay Trans. Auth,* 390 F.3d 65, 90 (1st Cir. 2004); *AFDI,* 2012 WL 2958178 at *19. Indeed, the Sixth Circuit recently held that a transit authority has the right to ban ads that "have a strong potential to alienate people and decrease ridership" by defaming or holding up to scorn or ridicule a person or group of persons. *See SMART,* Exhibit A at pp. 15 – 16. The AATA contends that the "defamation, scorn and ridicule" provision in the Advertising Policy is such a valid restriction and the Court did not find otherwise. *See* Opinion at n. 15. As the Court noted, Mr. Coleman himself did not make a facial challenge to this provision, but merely argued (without any supporting evidence) that the provision was invalid as applied to his ad. *See* Opinion at p. 15. Thus, the record does not establish– or even suggest – that an Advertising Policy without the "good taste" provision violates the Constitution. There is no reason to assume that it would, in light of *Ridley, SMART* and similar cases.

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[5] Given the breadth of the Court's discretion, the Court could also order the AATA to reconsider Mr. Coleman's ad (either as is or in a revised form) in light of a revised Advertising Policy or order the AATA to strike the "good taste" language from its Advertising Policy. Any of these orders would reflect the "narrow tailoring" the Supreme Court had held is required in these types of cases.

Second, although Mr. Coleman argued vociferously that AATA's application of the Advertising Policy was "arbitrary" and that the AATA engaged in "view-point based decision making" and was likely to do so again, he presented no evidence to support his argument. In fact, the Court found that the AATA "created an orderly process" in which the final decision on whether to run an ad was made by "a committee of senior employees, rather than at the discretion of one individual . . .." *See,* Opinion at p. 25. In other words, on the specific facts of this case, there is no basis for assuming that the AATA will not give objective consideration of any ad submitted by Mr. Coleman under a revised, constitutional Advertising Policy. These circumstances distinguish this case from those relied on by Mr. Coleman, where the defendant transit authorities were found to have acted arbitrarily and to have engaged in view point discrimination. *United Food & Commercial Workers, v. Southwest Ohio Reg. Trans. Auth.,* 163 F.3d 341 (6th Cir. 1998); *Pittsburgh League of Young Voters Educ. Fund v. Port Authority of Allegheny County,* 653 F.3d 290, 297 (3rd Cir. 2011).

Further, Mr. Coleman unfairly downplays the harm the AATA would suffer if it were ordered to run the ad instead of being afforded an opportunity to reconsider its Advertising Policy in light of the Opinion. The only evidence presented in this case established conclusively that ridership and revenues would be impaired if the ad were run. [6] S*ee* Ahuvia Report, Dkt. #19-4 at ¶3C. Dr. Ahuvia's opinion, based on empirical research and expert analysis, was that running the ad would "significantly conflict" with the AATA's goals of "providing revenue,

[6] Although such contentions are subject to proofs, Mr. Coleman likewise offers no empirical support for his argument that citizens would stop filing suits to redress First Amendment violations if plaintiffs are not automatically awarded an injunction allowing their disputed speech. *See* Coleman Brief at pp. 7 - 9. Absent a shred of supporting evidence, Mr. Coleman's argument on "incentives" is no more than "sound and fury, signifying nothing." In any event, Mr. Coleman received considerable publicity by filing this suit, including the publication of his ad in Ann Arbor's on-line newspaper. *See* annarbor.com entry, attached as Exhibit C. This, along with the potential for damages under §1983, is certainly an incentive for a self-described "political activist" to file suit.

increasing ridership and assuring a safe and pleasant environment for passengers."[7] *See* Dkt. #19-4 at ¶2. Mr. Coleman offered no contrary evidence and failed to impeach this testimony. Thus, the only evidence presented is that the ad would actually interfere with the AATA's business, and not just upset some of its riders. Dr. Ahuvia's unrebutted conclusion also distinguishes the instant case from *United Food* where the court found on the evidence before it that running the proposed ad "would not adversely affect SORTA's image or ridership." *United Food,* 163 F.3d at 363. The specific facts of this case are different than those in *United Food* and a different remedy is warranted.

Moreover, Mr. Coleman's alleged harm is not "ongoing" simply because AATA allows other advertisers to place ads on its buses. Mr. Coleman has available to him the full range of public fora and is able to deliver his speech in these places freely and without restrictions. He can wear the sandwich board he often wears, bearing his proposed ad, and walk around the very areas covered by his preferred AATA bus routes. As a matter of law and common sense, he would not be "silenced" in anyway by the AATA's proposed relief.

Finally, Mr. Coleman's request for a mandatory injunction is premised on the mistaken assumption that the AATA rejected his ad because of Mr. Coleman's views of Middle East politics. The Court made no such finding and the evidence does not support any such finding. Therefore, Mr. Coleman's suggestion that any harm suffered by AATA in running the ad can be cured by ads expressing the "opposite" view (what ever that may be) is nonsensical and contrary to Supreme Court precedent. *Rosenberger v. Rector and Visitors of University of Virginia,* 515 U.S. 819, 831 (1995) ("The dissent's assertion . . . reflects an insupportable assumption that all debate is bipolar and that antireligious speech is the only response to religious speech.") The

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[7] The AATA was well within its rights to ban ads that impair these legitimate goals. *See, SMART,* Exhibit A at p. 14 – 15.

AATA rejected the ad because it was defamatory and held up a group of people to scorn and ridicule. The harm caused the AATA and its riders by the ad cannot be remedied by speech that defames of holds up a different type of person to scorn and ridicule. Mr. Coleman presents a false dichotomy and misstates the nature of the harm the AATA was legitimately attempting to guard against.

D. Next steps.

AATA and Mr. Ford agree with Mr. Coleman that the scope of the injunction dictates what additional actions are necessary in this case and that a post-injunction status conference is appropriate.[8] However, regardless of the form of the injunction, AATA and Mr. Ford have not taken discovery with regard to the claim against Mr. Ford or Mr. Coleman's (alleged) damages and request a reasonable time to conduct this discovery.

E. Conclusion.

Mr. Coleman's proposed order would strip the AATA of its right to enact and enforce a constitutionally valid Advertising Policy. The AATA therefore respectfully asks the Court to limit its injunction to an order directing the AATA to reconsider its Advertising Policy in light of the Opinion and the *SMART* case.

/s/ Kathleen H. Klaus
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[8] Mr. Coleman has refused to dismiss Michael Ford from this case, although there is no evidence that Mr. Ford took any action concerning Mr. Coleman's proposed ad. The record is unequivocal that Mr. Coleman's proposed ad was considered first by AATA staff and then the AATA Board. Therefore, there is no basis in law or fact that would support an injunction against Mr. Ford. *Ashcraft v. Iqbal,* 129 S.Ct. 1937, 1948 (2009) (plaintiff required to show that "each Government-official defendant, through the official's own individual actions, has violated the Constitution.") Mr. Ford should not be part of any order awarding injunctive relief.

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CERTIFICATE OF SERVICE

I hereby certify that on October 26, 2012 I electronically filed the above document(s) with the Clerk of the Court using the ECF system, which will send notification of such filing to the following: all counsel of record.

/s/ Kathleen H. Klaus
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IN THE UNITED STATES DISTRICT COURT
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EXHIBIT INDEX TO:
ANN ARBOR TRANSPORTATION AUTHORITY AND
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TAB	DESCRIPTION
A	*American Freedom Defense Initiative, et al. v SMART, et al.;* (Docket No.: 11-1538, October 25, 2012)
B	*American Freedom Defense Initiative, et al. v Metropolitan Transportation Authority, et al.* 2012 WL 2958178 (S.D.N.Y.)
C	The Associated Press: "Ann Arbor Transportation Authority Loses Key Ruling Over Anti-Israel Ads." (September 29, 2012)

EXHIBIT A

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206

File Name: 12a0368p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

AMERICAN FREEDOM DEFENSE INITIATIVE; PAMELA GELLER; ROBERT SPENCER,
Plaintiffs-Appellees,

v.

SUBURBAN MOBILITY AUTHORITY FOR REGIONAL TRANSPORTATION (SMART); JOHN HERTEL, individually and in his official capacity as General Manager of SMART; BETH GIBBONS, individually and in her official capacity as Marketing Program Manager of SMART,
Defendants-Appellants,

GARY I. HENDRICKSON, individually and in his official capacity as Chief Executive of SMART,
Defendant.

No. 11-1538

Appeal from the United States District Court
for the Eastern District of Michigan at Detroit.
No. 2:10-cv-12134—Denise Page Hood, District Judge.

Argued: July 26, 2012

Decided and Filed: October 25, 2012

Before: ROGERS and KETHLEDGE, Circuit Judges; MARBLEY, District Judge.*

COUNSEL

ARGUED: Christian E. Hildebrandt, VANDEVEER GARZIA, P.C., Troy, Michigan, for Appellants. Robert J. Muise, AMERICAN FREEDOM LAW CENTER, Ann Arbor, Michigan, for Appellees. **ON BRIEF:** Christian E. Hildebrandt, John J. Lynch, VANDEVEER GARZIA, P.C., Troy, Michigan, Avery E. Gordon, Anthony Chubb, SUBURBAN MOBILITY AUTHORITY FOR REGIONAL TRANSPORTATION, for

*The Honorable Algenon L. Marbley, United States District Judge for the Southern District of Ohio, sitting by designation.

Appellants. Robert J. Muise, THOMAS MORE LAW CENTER, Ann Arbor, Michigan, David Yerushalmi, LAW OFFICES OF DAVID YERUSHALMI, P.C., Chandler, Arizona, for Appellees.

OPINION

ROGERS, Circuit Judge. Plaintiff American Freedom Defense Initiative is a nonprofit corporation that wanted to place an advertisement on the side of city buses in Michigan. The advertisement read: "Fatwa on your head? Is your family or community threatening you? Leaving Islam? Got Questions? Get Answers! RefugefromIslam.com". Defendant Suburban Mobility Authority for Regional Transportation (SMART) refused to display the advertisement, citing its policy prohibiting content that is political or that subjects any group to scorn. Upon learning of the rejection, plaintiffs sued SMART, claiming a First Amendment violation. The district court granted a preliminary injunction, holding that plaintiffs likely could show that SMART's decision was arbitrary and capricious. The injunction should not have issued, however, because plaintiffs are not likely to succeed in demonstrating that SMART unreasonably excluded this political speech from a nonpublic forum.

I

SMART, a state-run transit authority, operates public transportation throughout Michigan's four southeastern-most counties. Through an exclusive agent, CBS Outdoor, Inc., SMART supplements its revenue by selling advertising space on its vehicles. The advertising space is subject to SMART's "Restriction on Content" policy, which limits the permissible content of advertisements displayed on SMART vehicles. The policy reads:

> In order to minimize chances of abuse, the appearance of favoritism, and the risk of imposing upon a captive audience, [SMART] shall not allow the following content:
>
> 1. Political or political campaign advertising.

2. Advertising promoting the sale of alcohol or tobacco.

3. Advertising that is false, misleading, or deceptive.

4. Advertising that is clearly defamatory or likely to hold up to scorn or ridicule any person or group of persons.

5. Advertising that is obscene or pornographic; or in advocacy of imminent lawlessness or unlawful violent action.

CBS administers the SMART advertising program and makes the initial determination whether a proposed advertisement may fall into a prohibited category. CBS submits advertisements that fail this preliminary screening to SMART for review. SMART then makes the final determination whether the advertisement violates the content restrictions.

American Freedom Defense Initiative (AFDI) is a nonprofit corporation that "acts against . . . government officials, the mainstream media, and others" who "capitulat[e] to the global jihad and Islamic supremacism." AFDI promotes "its political objectives by, *inter alia*, sponsoring anti-jihad bus and billboard campaigns, which includes seeking advertising space on SMART vehicles." Compl. ¶¶ 6-8. Plaintiffs Pamela Geller and Robert Spencer are directors of AFDI, and "engage[] in political and religious speech through [A]FDI activities, including [A]FDI's anti-jihad bus and billboard campaigns."

In May 2010, AFDI tried to place the fatwa advertisement on SMART buses. CBS screened the advertisement and referred it to SMART for further review. SMART determined that the advertisement violated the content restriction against political advertising, as well as the restriction against content "likely to hold up to scorn and ridicule a group of persons."

AFDI sued for equitable relief, accusing SMART of violating the First and Fourteenth Amendments. The district court granted a preliminary injunction, enjoining SMART from applying its content restrictions to plaintiffs' speech. *Am. Freedom Def. Initiative v. Suburban Mobility Auth. for Reg'l Transp.*, No. 10-12134, 2011 WL 1256918, at *6 (E.D. Mich. Mar. 31, 2011). The court held that SMART's advertising space was a nonpublic forum, but that the content restrictions failed to provide adequate

guidance to decisionmakers about the difference between permissible and non-permissible advertisements. The district court noted, as an example of this lack of guidance, that SMART had allowed an advertisement by the Detroit Coalition for Reason (the "atheist advertisement"), but disallowed the fatwa advertisement. The atheist advertisement read: "Don't believe in God? You are not alone. DetroitCoR.org". The district court found that this purportedly disparate treatment showed the absence of guidance. SMART timely appeals.

II

When considering a motion for a preliminary injunction, a district court must balance four factors: "(1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant would suffer irreparable injury absent the injunction; (3) whether the injunction would cause substantial harm to others; and (4) whether the public interest would be served by the issuance of an injunction." *Bays v. City of Fairborn*, 668 F.3d 814, 818–819 (6th Cir. 2012). Although a district court's decision whether to grant a preliminary injunction is generally reviewed for an abuse of discretion, *Certified Restoration Dry Cleaning Network, LLC v. Tenke Corp.*, 511 F.3d 535, 540 (6th Cir. 2007), in cases with First Amendment implications, the standard of review is *de novo*. *Bays*, 668 F.3d at 819. This is because "[w]hen First Amendment rights are implicated, the factors for granting a preliminary injunction essentially collapse into a determination of whether restrictions on First Amendment rights are justified to protect competing constitutional rights." *Cnty. Sec. Agency v. Ohio Dep't of Commerce*, 296 F.3d 477, 485 (6th Cir. 2002). Put another way, in the First Amendment context, the other factors are essentially encompassed by the analysis of the movant's likelihood of success on the merits, which is a question of law that must be reviewed *de novo*. *Tenke Corp.*, 511 F.3d at 541.

III

SMART's actions are reviewed for reasonableness and viewpoint neutrality because the advertising space created by SMART was a nonpublic forum. We are

required to classify the forum under the Supreme Court's forum analysis, which courts use to determine "whether a state-imposed restriction on access to public property is constitutionally permissible." *United Food & Commercial Workers Union v. Sw. Ohio Reg'l Transit Auth.*, 163 F.3d 341, 349 (6th Cir. 1998). It is undisputed that SMART's restrictions are state-imposed, *see* Mich. Comp. Laws § 124.403, and that the relevant forum is the advertising space on SMART's buses. The analysis, therefore, turns on whether the advertising space is a traditional public, designated public, or nonpublic forum. *United Food*, 163 F.3d at 349. The forum type dictates the level of scrutiny applied to content-based restrictions like SMART's advertising rules. *See Cornelius v. NAACP Legal Defense and Education Fund*, 473 U.S. 788, 800 (1985). The parties agree that this case does not involve a traditional public forum. In distinguishing between a designated public forum and a non-public forum, we focus on whether the government intentionally opened the forum for public discourse. *See United Food*, 163 F.3d at 350. We are guided not only by the government's explicit statements, policy, and practice, *id.*, but also by the "nature of the property and its compatibility with expressive activity to discern the government's intent." *Cornelius*, 473 U.S. at 802.

SMART's tight control over the advertising space and the multiple rules governing advertising content make the space incompatible with the public discourse, assembly, and debate that characterize a designated public forum. Although SMART's written policy does not explicitly identify the buses as a nonpublic forum, SMART's policy restricts the content of that forum. SMART has banned political advertisements, speech that is the hallmark of a public forum. Moreover, SMART has limited the forum by restricting the type of content that nonpolitical advertisers can display. While reasonable minds can disagree as to the extent of the restriction—SMART has provided only three examples of excluded advertisements—the policy of exclusion has been exercised in a manner consistent with the policy statement.

The Supreme Court held that similar restrictions created a nonpublic forum in *Lehman v. City of Shaker Heights*, 418 U.S. 298, 299, 301–302 (1974). The plaintiff in *Lehman* was a political candidate that sought to place political advertisements on "car

cards" on a city's transit vehicles. The *Lehman* Court held that advertising space sold on city buses was not a public forum because the city had rejected all political advertisements. The plurality reasoned that a ban on political advertisements was a "managerial decision to limit [advertising] space to innocuous and less controversial commercial and service oriented advertising." *Id.* at 304. The plurality noted that under a contrary holding, "display cases in public hospitals, libraries, office buildings, military compounds, and other public facilities immediately would become Hyde Parks open to every would-be pamphleteer and politician." *Id.* Justice Douglas, concurring to provide the fifth vote, was even more emphatic, quoting Justice Brandeis as follows:

> "[a]dvertisements of this sort are constantly before the eyes of observers on the streets and in street cars to be seen without the exercise of choice or volition on their part. Other forms of advertising are ordinarily seen as a matter of choice on the part of the observer. . . . In the case of newspapers and magazines, there must be some seeking by the one who is to see and read the advertisement. The radio can be turned off, but not so the billboard or street car placard."

Id. at 307-08 (Douglas, J., concurring), quoting *Packer Corp. v. Utah*, 285 U.S. 105, 110 (1932).

AFDI attempts to distinguish *Lehman* by relying on three cases in which courts have treated the exterior of city buses as designated public forums. However, in each of those cases, the courts held that a designated public forum existed because the transit authority had accepted most, but not all, political advertisements. In *United Food*, 163 F.3d at 352, the city had allowed a wide array of political and public speech on the side of its buses, including advertisements by political candidates for public office, but not advertising "of controversial public issues." We held that by allowing political advertisements, the city had opened the forum to the public; therefore, the city's rejection of controversial advertisements was subject to strict scrutiny:

> In accepting a wide array of political and public-issue speech, SORTA has demonstrated its intent to designate its advertising space a public forum. Acceptance of a wide array of advertisements, including political and public-issue advertisements, is indicative of the government's intent to create an open forum. Acceptance 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, which the Court in *Lehman* recognized as inconsistent with operating the property solely as a commercial venture.

Id. at 355. Similarly, in *New York Magazine v. Metropolitan Transportation Authority*, 136 F.3d 123, 129–30 (2d Cir. 1998), the Second Circuit held that the sides of New York City transit vehicles were a designated public forum "because the MTA accepts both political and commercial advertising." The *New York Magazine* court reasoned that "[a]llowing political speech . . . evidences a general intent to open a space for discourse, and a deliberate acceptance of the possibility of clashes of opinion and controversy that the Court in *Lehman* recognized as inconsistent with sound commercial practice." *Id.* at 130. The court in the third case, *American Freedom Defense Initiative v. Metropolitan Transportation Authority*, No. 11 Civ. 6774, 2012 WL 2958178, at *14–16 (S.D.N.Y. July 20, 2012), held that it was bound by the *New York Magazine* decision because the same MTA policy was at issue. SMART, by contrast, has completely banned political advertising, showing its intent to act as a commercial proprietor and to maintain its advertising space for purposes that indicate that the space is a nonpublic forum.

The fact that SMART allowed the atheist advertisement does not, as AFDI contends, demonstrate that the forum was open to political advertisements. As the First Circuit has noted, "[o]ne or more instances of erratic enforcement of a policy does not itself defeat the government's intent not to create a public forum." *Ridley v. Mass. Bay Transp. Auth.*, 390 F.3d 65, 78 (1st Cir. 2004). Although SMART's practice of excluding advertisements is not as extensively documented as that in *Ridley*—there the transit authority had excluded seventeen advertisements—the reasoning is no less persuasive. Because SMART's policy and practice demonstrate an intent to create a nonpublic forum, one purported aberration would not vitiate that intent. In any event, the atheist advertisement could reasonably have been allowed by SMART as consistent with SMART's policy. The advertisement could reasonably have been viewed as nonpolitical, as explained below.

The second part of the inquiry—the relationship between the restrictions and the purpose of the forum—also weighs in favor of finding that SMART created a nonpublic forum. SMART's advertisements are intended to boost revenue for the transit authority. SMART has stated that its policy of advertisement restrictions is intended to "minimize chance of abuse, the appearance of favoritism, and the risk of imposing upon a captive audience." Allowing the discussion of politics would likely decrease SMART's revenue. For example, if a fast-food restaurant sold advertising space on the side of its store to a neo-Nazi political group for a campaign advertisement, the restaurant would be likely to lose business. Similarly, SMART's ridership likely would diminish were SMART to allow political advertisements. The reason for the restrictions ties directly to the purpose of the forum—raising revenue—and therefore indicates that SMART wanted to establish a nonpublic forum instead of opening the forum to the public. In short, though some municipal bus systems permit wide-ranging political advertisements, other bus systems need not.

IV

Since the advertising space on SMART's vehicles is a nonpublic forum, the content restrictions imposed on that space are constitutional as long as they are reasonable and viewpoint neutral. *See Pleasant Grove City v. Summum*, 555 U.S. 460, 470 (2009). SMART could reasonably view the fatwa advertisement as falling within the prohibition against political advertisements, and AFDI is unlikely to succeed with its counterarguments that these rules are unconstitutional or merely a pretext for SMART's disagreement with AFDI's viewpoint.

First, SMART's prohibition of political advertisements appears reasonable and constitutional on its face. The reasonableness of a given restriction "must be assessed in the light of the purpose of the forum and all surrounding circumstances." *Cornelius*, 473 U.S. at 809. The reasonableness inquiry turns on "whether the proposed conduct would 'actually interfere' with the forum's stated purposes." *United Food*, 163 F.3d at 358 (quoting *Air Line Pilots Ass'n v. Dep't of Aviation*, 45 F.3d 1144, 1159 (7th Cir. 1995)). As discussed above, the policy serves a viewpoint-neutral purpose as in *Lehman*

and does not run afoul of the problems with the partial bans on political advertisements in *United Food* or *New York Magazine*. An outright ban on political advertisements is permissible if it is a "managerial decision" focused on increasing revenue to limit advertising "space to innocuous and less controversial commercial and service oriented advertising." *Lehman*, 418 U.S. at 304. It was reasonable for SMART to focus on longer-term commercial advertising in an effort to boost revenue instead of short-term political advertisements that might alienate riders. SMART reasonably concluded that permitting any political advertisement could interfere with the forum's revenue-generating purpose. It was generally permissible, in other words, for SMART to permit commercial and public service ads, but to turn down political ads.

Assuming this is so, it necessarily follows that such distinctions must be made on an ad-by-ad basis, and that some cases will be close. A commercial ad may have political overtones, such as the ad in the *New York Magazine* case, which read, "Possibly the only good thing in New York Rudy hasn't taken credit for." Determining the extent to which such an ad is political requires some judgment in marginal cases, with knowledge of the current political context, while in contrast a "Vote for Giuliani" ad clearly would be political and a "Buy New York Magazine" ad clearly would not. However, merely because it is sometimes unclear whether an ad is political does not mean the distinction cannot be drawn in the case of a nonpublic forum. The holding in *Lehman* demands that fine lines be drawn. Otherwise, as a practical matter, a nonpublic forum could never categorically exclude political speech.

This reasoning is consistent with *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150–51 (1969), which held unconstitutional ordinances that vested unbridled discretion in the hands of a government official or agency. *Shuttlesworth* was animated by the concern that unbridled discretion would give decisionmakers "substantial power to discriminate based on the content or viewpoint of the speech." *H.D.V.-Greektown, LLC v. City of Detroit*, 568 F.3d 609, 620 (6th Cir. 2009). To avoid the *Shuttlesworth*-discretion problem, ordinances "must contain precise and objective criteria on which [officials] must make their decisions; an ordinance that gives too much discretion to

public officials is invalid." *Id.* at 621 (internal quotation marks omitted). Put more succinctly, the rule may not be so vague that "a person of ordinary intelligence [could not] readily identify the applicable standard for inclusion and exclusion." *United Food*, 163 F.3d at 358–59. SMART's advertising rules guide officials in distinguishing between permissible and impermissible advertisements in a non-arbitrary fashion. The rule in question prohibits "[p]olitical or political campaign advertising." This directive is not so vague or ambiguous that "a person [could not] readily identify the applicable standard." *Id.* Although, as the district court noted, there were not additional guidelines that precisely define the term "political," there is no question that a person of ordinary intelligence can identify what is or is not political. On the margins, there may be some difficult determinations, on which reasonable people may disagree. However, eliminating all discretion is not required by *Shuttlesworth*. Whenever a rule is applied by an official, a certain amount of discretion must necessarily be exercised. While decisionmakers under SMART's policy may at times make incorrect determinations within their limited discretion, these errors are not the sort that *Shuttlesworth* intended to address. As discussed above, *Shuttlesworth* was concerned with the extent of the discretion and not with decisions made within the bounds of properly vested discretion. SMART's policies do not appear to have vested unbridled discretion in the decisionmakers in the manner contemplated by *Shuttlesworth*. That a different administrator may have ruled differently in a close case is not enough to invalidate the exclusion of political ads from a non-public forum.

Our court's decision in *United Food,* 163 F.3d at 352, does not compel a different conclusion. The transit authority in *United Food* sold bus advertising space, but disallowed advertising that was either aesthetically displeasing or that addressed "controversial public issues." *Id.* We found unbridled discretion had been vested in the decisionmakers because there was no articulated definitive standard to determine what was "controversial." This discretion allowed for the arbitrary rejection of advertisements based on viewpoint. By contrast, SMART's policy did not vest similar wide-ranging discretion in its employees. By adopting a blanket prohibition on political advertisements, SMART avoided the pitfalls of employee discretion presented by the

policy in *United Food*. A SMART employee must determine whether or not something is political—a reasonably objective exercise. In the *United Food* situation, however, the employee would have to determine where—on a hypothetical spectrum of controversy—an advertisement fell. The determination in *United Food* inherently would require a more subjective evaluation than the decision required under SMART's policies. Because of the difference between the two inquiries, SMART's policy does not create the same *Shuttlesworth* problem that plagued the policy in *United Food*.

V

Because the ban on political advertising was permissible, it was reasonable for SMART to turn down the fatwa advertisement as political. Through the fatwa advertisement, AFDI seeks to oppose the perceived sanction of violence that AFDI believes threatens people in the United States. The plain language of the advertisement—"Fatwa on your head? . . . Leaving Islam?"—can well be read to suggest that Muslim-Americans who decide to leave Islam will be threatened or killed. The decision to place the advertisement in a Detroit suburb rather than in the Middle East indicates that the authors believe that such threats are present in the United States. To substantiate our understanding of the apparent message of the advertisement, we may look beyond the four corners to websites that the advertisement incorporates by reference. *See Ridley*, 390 F.3d at 74. A visit to the website listed in the Fatwa advertisement, RefugeFromIslam.com, confirms our understanding of the advertisement's message. The website is a blog that contains postings about both AFDI and an organization called "Stop Islamization of America." RefugeFromIslam.com (last visited October 23, 2012). The site also refers to conferences about "Islamic Law in America," accusations of threatened honor killings in the United States, and numerous other political issues.

Based on recent court cases, legislative actions, and political speeches, it was reasonable for SMART to conclude that the content of AFDI's advertisement—the purported threat of violence against nonconforming Muslims in America—is, in America today, decidedly political. The very idea of having Islamic law apply in the United

States has become one of political controversy. In *Awad v. Ziriax*, 670 F.3d 1111 (10th Cir. 2012), the court struck down a voter-approved amendment to the Oklahoma Constitution that would have forbidden courts from considering or using Sharia law. The Oklahoma legislature put the amendment on the ballot, and over seventy percent of voters approved. *Id.* at 1118. Legislatures in our own circuit have similarly addressed Sharia law: a bill proposed last year in the Tennessee Senate would have made any adherence to Sharia law a felony, punishable by up to fifteen years in prison. S.B. 1028, 107th Gen. Assemb., Reg. Sess. (TN 2011). The politicization of this issue is not confined to state legislatures. During the 2012 presidential primary, former candidate Newt Gingrich suggested a federal ban on Sharia law, stating, "I believe Sharia[ ]is a mortal threat to the survival of freedom in the United States and in the world as we know it." Scott Shane, *In Islamic Law, Gingrich Sees a Mortal Threat to U.S.*, N.Y. Times, Dec. 21, 2011, at A22. The existence of these positions in the political sphere—whether on ballots, in state legislatures, or in presidential primaries—could lead a reasonable person to conclude that the enforcement of Islamic law in America has become a political issue.

The reasonableness of SMART's conclusion is confirmed by the language that AFDI uses in its complaint. According to the complaint, AFDI "acts against the treason being committed by national, state, and local government officials . . . in their capitulation to the global jihad and Islamic supremacism." Compl. ¶ 7. The complaint explains that AFDI "promotes its political objectives by, *inter alia*, sponsoring anti-jihad bus and billboard campaigns, which includes seeking advertising space on SMART vehicles." *Id.* ¶ 8. By its own admission, therefore, AFDI sought to place advertisements on the SMART vehicle to "promote[] its political objectives." Moreover, by denying the placement of the fatwa advertisement, AFDI alleges that SMART "denied Plaintiffs' advertisement, and thus denied Plaintiffs access to a public forum to express their political and religious message." *Id.* ¶ 21. AFDI understood its own advertisement to contain a political message; therefore, it would be reasonable for SMART to read the same advertisement and reach the same conclusion.

Not only was the designation of the advertisement reasonable, it was also viewpoint neutral. As noted above, the AFDI advertisement expresses a political message aimed at curbing the perceived threat of Islamic law enforcement in the United States. The opposing viewpoint to AFDI's position is not that Islam is good—as AFDI appeared to suggest at oral argument—but rather either that Islamic law should be enforced against Muslims in the United States or that concerns about the enforcement of Islamic law in America are overblown. Either of these opposing views would be comparably political. The banned content here is the debate about enforcement of Islamic law in the United States, regardless of the viewpoint of the participants. Either side of the debate would reasonably be labeled political and the content could be restricted under SMART's policy.

AFDI contends that SMART's actions could not have been viewpoint neutral because SMART allowed the atheist advertisement but disallowed the fatwa advertisement. AFDI contends that because both advertisements discuss religion, SMART must have discriminated against the fatwa advertisement based on viewpoint. The analogy, however, does not hold. The atheist advertisement could be viewed as a general outreach to people who share the Detroit Coalition's beliefs, without setting out any position that could result in political action. The fatwa advertisement, however, addresses a specific issue that has been politicized. Two hypothetical changes to the advertisements demonstrate the difference. Had the atheist advertisement read, "Being forced to say the Pledge of Allegiance even though you don't believe in God? You are not alone. DetroitCoR.org," the advertisement would likely be political. The hypothetical advertisement would address an issue that has been politicized—requiring atheists to recite "under God," *see, e.g., Myers v. Loudoun Cnty. Pub. Schools,* 418 F.3d 395 (4th Cir. 2005)—and the advertisement would presumably not be permitted under SMART's policies. Similarly, had AFDI changed its advertisement to read, without more: "Thinking of Leaving Islam? Got Questions? Get Answers," SMART presumably could not ban the advertisement. These changes reflect differences in the two actual advertisements that a reasonable administrator, applying an objective standard, could identify.

Moreover, when SMART had been previously presented with advertisements that were both religious and political, it rejected them. The Pickney Pro-Life organization approached SMART with a proposed advertisement that depicted Jesus and stated, "Hurting after Abortion? Jesus, I trust you." Following the same procedure applied to the fatwa advertisement, CBS referred the matter to SMART for a final determination. SMART reasonably determined that the advertisement contained political speech regarding abortion, even though the advertisement also contained a religious message.

AFDI's reliance on the testimony of Beth Gibbons, a marketing manager for SMART, is misplaced. Gibbons testified that she saw "nothing about [the fatwa advertisement] itself that was political." She also testified that her opinion of the fatwa advertisement changed only after reading about the controversy surrounding the same advertisement in Miami, Florida. Gibbons stated: "I knew that [the fatwa advertisement] was of concern in that there is controversy on both sides of the issue on whether they should be posted." Even though Gibbons was designated as a Rule 30(b)(6) witness, a review of the transcript indicates that the above statements expressed Gibbon's personal opinion after she was shown the fatwa advertisement at the deposition. Gibbons was not the SMART official who ultimately found the advertisement to be political, and elsewhere she testified that SMART had rejected the advertisement because it was political.

VI

Plaintiffs are thus not likely to succeed on the merits of their injunction suit. The other three factors in the preliminary injunction test have largely been considered in the preceding analysis.

AFDI alleges that it will suffer irreparable injury without the preliminary injunction, due to the continuing denial of its First Amendment rights. That argument is unpersuasive because the restrictions imposed on the use of a nonpublic forum are reasonable, viewpoint-neutral limits that do not deny AFDI its First Amendment rights. The injunction would also cause substantial harm to others, by compelling SMART to

post on its buses messages that have the strong potential to alienate people and decrease ridership.

Finally, the public interest would not be served by this preliminary injunction. While the public interest is promoted by the robust enforcement of constitutional rights, as well as by the healthy discussion of political issues in appropriate fora, none of these interests is degraded by the removal of this injunction. For the reasons discussed above, these interests remain undamaged because SMART's reasonable, viewpoint-neutral limits on the use of this nonpublic forum neither violate AFDI's constitutional rights nor prevent political discussion in public fora.

VII

The district court's grant of a preliminary injunction is reversed.

EXHIBIT B

--- F.Supp.2d ----, 2012 WL 2958178 (S.D.N.Y.)
(Cite as: 2012 WL 2958178 (S.D.N.Y.))

Only the Westlaw citation is currently available.

United States District Court,
S.D. New York.
AMERICAN FREEDOM DEFENSE INITIATIVE et al, Plaintiffs,
v.
METROPOLITAN TRANSPORTATION AUTHORITY et al., Defendants.

No. 11 Civ. 6774(PAE).
July 20, 2012.

Background: Pro-Israeli advocacy organization brought a First Amendment challenge to the refusal by a metropolitan transit authority to permit a political advertisement to run on the exteriors of buses in a city. The organization moved for a preliminary injunction.

Holdings: The District Court, Paul A. Engelmayer, J., held that:
(1) advertisement fell within the transit authority's no-demeaning advertising standard;
(2) advertising space on the exterior of city's public buses was a designated public forum; and
(3) transit authority's no-demeaning standard regarding advertising permitted on city buses discriminated among speech on the basis of its content, in violation of the First Amendment.

Ordered accordingly.

West Headnotes

[1] Injunction 212 1092

212 Injunction
212II Preliminary, Temporary, and Interlocutory Injunctions in General
212II(B) Factors Considered in General
212k1092 k. Grounds in General; Multiple Factors. Most Cited Cases

To justify a preliminary injunction, a movant must demonstrate: (1) irreparable harm absent injunctive relief; (2) either a likelihood of success on the merits, or a serious question going to the merits to make them a fair ground for trial, with a balance of hardships tipping decidedly in the plaintiff's favor; and (3) that the public's interest weighs in favor of granting an injunction.

[2] Injunction 212 1246

212 Injunction
212IV Particular Subjects of Relief
212IV(E) Governments, Laws, and Regulations in General
212k1246 k. Injunctions Against Government Entities in General. Most Cited Cases

When a moving party seeks a preliminary injunction that will affect government action taken in the public interest pursuant to a statutory or regulatory scheme, the injunction should be granted only if the moving party meets the more rigorous likelihood-of-success standard.

[3] Injunction 212 1080

212 Injunction
212II Preliminary, Temporary, and Interlocutory Injunctions in General
212II(A) Nature, Form, and Scope of Remedy
212k1080 k. Mandatory Preliminary Injunctions. Most Cited Cases

Injunction 212 1572

212 Injunction
212V Actions and Proceedings
212V(E) Evidence
212k1567 Weight and Sufficiency
212k1572 k. Clear Showing or Proof. Most Cited Cases

Party seeking a mandatory preliminary injunction, which alters the status quo by commanding some positive act, faces an even higher burden than likelihood of success on the merits; such a party must make a clear showing that the moving party is enti-

tled to the relief requested, or that extreme or very serious damage will result from a denial of preliminary relief.

[4] Civil Rights 78 ⚿1457(1)

78 Civil Rights
78III Federal Remedies in General
78k1449 Injunction
78k1457 Preliminary Injunction
78k1457(1) k. In General. Most Cited Cases

Where infringement of free speech is claimed, irreparable harm may normally be presumed for purposes of a motion for a preliminary injunction. U.S.C.A. Const.Amend. 1.

[5] Constitutional Law 92 ⚿1766

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(G) Property and Events
92XVIII(G)2 Government Property and Events
92k1766 k. Transit Systems and Stations. Most Cited Cases

Municipal Corporations 268 ⚿718

268 Municipal Corporations
268XI Use and Regulation of Public Places, Property, and Works
268XI(C) Public Buildings, Parks, and Other Public Places and Property
268k718 k. Means of Public Transportation and Communication. Most Cited Cases

Advertisement which a pro-Israeli advocacy organization sought to place on the exterior of metropolitan buses, stating "In any war between the civilized man and the savage, support the civilized man. / Support Israel / Defeat Jihad," fell within a metropolitan transit authority's no-demeaning advertising standard, which barred advertising that demeaned a person or group on account of, inter alia, religion, national origin, or ancestry, and thus, it was necessary to address a First Amendment challenge to the standard; transit authority reasonably read the advertisement to target as "savages" persons who adhered to Islam, i.e., Muslims. U.S.C.A. Const.Amend. 1.

[6] Constitutional Law 92 ⚿1730

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(G) Property and Events
92XVIII(G)2 Government Property and Events
92k1730 k. In General. Most Cited Cases

Where the government seeks to restrict speech by restricting access to its own property, the level of scrutiny to which the restriction is subjected depends on how the property is categorized as a forum for speech; this forum analysis is 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. U.S.C.A. Const.Amend. 1.

[7] Constitutional Law 92 ⚿1738

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(G) Property and Events
92XVIII(G)2 Government Property and Events
92k1736 Traditional Public Forum in General
92k1738 k. Nature and Requisites. Most Cited Cases

For purposes of a First Amendment analysis, the "traditional public forum," refers to areas, such as public streets and parks, which 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. U.S.C.A. Const.Amend. 1.

[8] Constitutional Law 92 ⚿1739

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and

Press
92XVIII(G) Property and Events
92XVIII(G)2 Government Property and Events
92k1736 Traditional Public Forum in General
92k1739 k. Justification for Exclusion or Limitation. Most Cited Cases

For purposes of a First Amendment analysis, in a traditional public forum, content-based restrictions on speech must survive strict scrutiny, i.e., the restriction must be narrowly tailored to serve a compelling government interest. U.S.C.A. Const.Amend. 1.

[9] Constitutional Law 92 1514

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)1 In General
92k1511 Content-Neutral Regulations or Restrictions
92k1514 k. Narrow Tailoring Requirement; Relationship to Governmental Interest. Most Cited Cases

Constitutional Law 92 1515

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)1 In General
92k1511 Content-Neutral Regulations or Restrictions
92k1515 k. Existence of Other Channels of Expression. Most Cited Cases

For purposes of a First Amendment analysis, Government may impose content-neutral time, place, and manner restrictions, but these must be narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication. U.S.C.A. Const.Amend. 1.

[10] Constitutional Law 92 1746

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(G) Property and Events
92XVIII(G)2 Government Property and Events
92k1744 Designated Public Forum in General
92k1746 k. Nature and Requisites. Most Cited Cases

For purposes of a First Amendment analysis, the "designated public forum," refers to government property which, although not a traditional public forum, has been intentionally opened up for that purpose. U.S.C.A. Const.Amend. 1.

[11] Constitutional Law 92 1739

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(G) Property and Events
92XVIII(G)2 Government Property and Events
92k1736 Traditional Public Forum in General
92k1739 k. Justification for Exclusion or Limitation. Most Cited Cases

Because the government, as property owner, has opened up a designated public forum to the same breadth of expressive speech as found in traditional public forums, the same First Amendment standards apply; specifically, any content-based restrictions on speech must survive strict scrutiny, meaning they must be narrowly tailored to serve a compelling government interest, and content-neutral time, place, and manner restrictions are permissible only if they are narrowly tailored and leave open other avenues for expression. U.S.C.A. Const.Amend. 1.

[12] Constitutional Law 92 1750

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(G) Property and Events
92XVIII(G)2 Government Property and Events
92k1748 Non-Public Forum in General

92k1750 k. Nature and Requisites. Most Cited Cases

For purposes of a First Amendment analysis, "non-public forums" are property that the government has not opened for expressive activity by members of the public; examples include airport terminals, military bases and restricted access military stores, and jailhouse grounds. U.S.C.A. Const.Amend. 1.

[13] Constitutional Law 92 1751

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(G) Property and Events
92XVIII(G)2 Government Property and Events
92k1748 Non-Public Forum in General
92k1751 k. Justification for Exclusion or Limitation. Most Cited Cases

Restrictions on speech in non-public forums must only be reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view. U.S.C.A. Const.Amend. 1.

[14] Constitutional Law 92 1766

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(G) Property and Events
92XVIII(G)2 Government Property and Events
92k1766 k. Transit Systems and Stations. Most Cited Cases

Municipal Corporations 268 718

268 Municipal Corporations
268XI Use and Regulation of Public Places, Property, and Works
268XI(C) Public Buildings, Parks, and Other Public Places and Property
268k718 k. Means of Public Transportation and Communication. Most Cited Cases

For purposes of a First Amendment analysis, advertising space on the exterior of city's public buses was a designated public forum, in which content-based restrictions on expressive activity were subject to strict scrutiny. U.S.C.A. Const.Amend. 1.

[15] Constitutional Law 92 1747

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(G) Property and Events
92XVIII(G)2 Government Property and Events
92k1744 Designated Public Forum in General
92k1747 k. Justification for Exclusion or Limitation. Most Cited Cases

Same constitutional protections for speech that apply in a traditional public forum apply in a designated public forum, and virtually all regulations of speech in these forums are subject to the highest level of First Amendment scrutiny. U.S.C.A. Const.Amend. 1.

[16] Constitutional Law 92 1766

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(G) Property and Events
92XVIII(G)2 Government Property and Events
92k1766 k. Transit Systems and Stations. Most Cited Cases

Municipal Corporations 268 718

268 Municipal Corporations
268XI Use and Regulation of Public Places, Property, and Works
268XI(C) Public Buildings, Parks, and Other Public Places and Property
268k718 k. Means of Public Transportation and Communication. Most Cited Cases

Metropolitan transit authority's no-demeaning standard regarding advertising permitted on city buses discriminated among speech on the basis of its content, in violation of the First Amendment; the

standard proscribed ads that demeaned a person or group on account of one of nine enumerated subjects, specifically, "race, color, religion, national origin, ancestry, gender, age, disability or sexual orientation," but, outside of those specified disfavored topics, it permitted all other demeaning ads. U.S.C.A. Const.Amend. 1.

[17] Constitutional Law 92 1739

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(G) Property and Events
92XVIII(G)2 Government Property and Events
92k1736 Traditional Public Forum in General
92k1739 k. Justification for Exclusion or Limitation. Most Cited Cases

Constitutional Law 92 1747

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(G) Property and Events
92XVIII(G)2 Government Property and Events
92k1744 Designated Public Forum in General
92k1747 k. Justification for Exclusion or Limitation. Most Cited Cases

In a traditional or designated public forum, content-based regulations are presumptively invalid and will be upheld only if they are necessary to serve a compelling state interest and are narrowly drawn to achieve that end. U.S.C.A. Const.Amend. 1.

[18] Constitutional Law 92 1512

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)1 In General
92k1511 Content-Neutral Regulations or Restrictions
92k1512 k. In General. Most Cited Cases

Constitutional Law 92 1517

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)1 In General
92k1516 Content-Based Regulations or Restrictions
92k1517 k. In General. Most Cited Cases

In determining whether a speech restriction is content-based as opposed to content-neutral, the court inquires whether the regulation is justified without reference to the content of the regulated speech. U.S.C.A. Const.Amend. 1.

[19] Constitutional Law 92 1150

92 Constitutional Law
92X First Amendment in General
92X(A) In General
92k1150 k. In General. Most Cited Cases

Where a violation of the First Amendment is concerned, the government's benign, even noble, intentions are no cure. U.S.C.A. Const.Amend. 1.

OPINION & ORDER

PAUL A. ENGELMAYER, District Judge.

***1** This case involves a challenge under the First Amendment to the refusal by the Metropolitan Transit Authority ("MTA"), the public authority which provides mass transit in the New York City metropolitan area, to permit a political advertisement to run on the exteriors of buses in New York City.

Plaintiff American Freedom Defense Initiative ("AFDI") is a pro-Israeli advocacy organization known for its provocative writings on Middle Eastern affairs. In September 2011, AFDI submitted a text-only advertisement (the "AFDI Ad" or the "Ad") to MTA. The Ad read: "In any war between the civilized man and the savage, support the civilized man. / Support Israel / Defeat Jihad." MTA rejected the Ad, finding that it violated one of MTA's written advertising standards. That standard (the "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."

In this lawsuit, AFDI seeks a preliminary injunction enjoining MTA's no-demeaning advertising standard, thereby permitting the AFDI Ad to run. For the reasons that follow, the Court agrees that that advertising standard, as presently written, violates the First Amendment. The Court, accordingly, grants AFDI's motion for a preliminary injunction.

I. Background

A. Factual Background

1. The Parties

AFDI is an advocacy organization. Its stated objective is to protect "our basic freedoms and values" by, *inter alia,* "sponsoring religious freedom and political speech bus and billboard campaigns." Compl. ¶¶ 6, 8. AFDI advocates pro-Israeli causes in the political, military, and social realms. Its advertisements and publications attack radical Islam and the "Islamization of America." *See, e.g.,* Atlas Shrugs, http://atlasshrugs2000.typepad.com (last visited July 18, 2012) (AFDI-associated website which, among other things, promotes a book, written by AFDI's Executive Director, entitled "Stop the Islamization of America: A Practical Guide to the Resistance"). AFDI's writings, as described in further detail later, have equated the "struggle" between Israel and "the Muslim world" with "the struggle between good and evil." *See infra* § III. A. Among other means, AFDI spreads its message through articles, books, blog posts, television, and other media appearances by its officers; by filing lawsuits; and by holding rallies and other demonstrations. Plaintiffs Pamela Geller and Robert Spencer are, respectively, AFDI's Executive and Associate Directors.

MTA is a New York State public authority and public benefit corporation. Together with its affiliated operating agencies, MTA provides mass transportation services in the New York City metropolitan area. Defendant Jay H. Walder, sued in his official capacity, was, at the time of the Complaint, MTA's Chairman and Chief Executive Officer.[FN1]

2. MTA's Advertising Standards

*2 MTA accepts paid ads for placement within its transit facilities and on its transportation vehicles, including on the sides and tails of public buses. Declaration of Jeffrey Rosen, MTA Director of Real Estate ("Rosen Decl.") ¶ 4. MTA is cash-strapped. It regards the money it receives from such ads as an important source of revenue. *Id.* ¶¶ 4–5. MTA accepts both commercial ads and non-commercial ads (*i.e.,* ads by government agencies, not-for-profit and religious organizations, political ads, and public service announcements); [FN2] in 2010, MTA received $5.17 million in revenue from non-commercial advertising. *Id.* ¶ 11.

To help it administer its advertising program, MTA has entered into license agreements with various outdoor advertising companies. *Id.* ¶¶ 6, 9. MTA's license agreement with CBS Outdoor Group covers advertising space on, *inter alia,* the interior and exterior of buses operated by the New York City Transit Authority ("NYCTA"). *Id.* ¶ 9.

On March 25, 1994, MTA first adopted standards governing which ads it would accept to run in its facilities and on its vehicles (the "1994 advertising standards"). *Id.* ¶ 13 & Ex. B. In adopting these standards, MTA "strove to balance several legitimate interests" which it believed relevant to its role as a public benefits corporation serving a diverse ridership. These included:

- maximizing advertising revenue;
- maintaining orderly administration of transportation systems;
- protecting minors who utilize MTA's facilities;
- avoiding misappropriation of views expressed in advertising to MTA; and
- shielding MTA patrons from advertisements which may not lawfully be publicly displayed under New York law.

Id. ¶ 14.

The 1994 advertising standards prohibited ads

which: (1) contain, false, misleading, or deceptive claims; (2) promote unlawful or illegal goods, services, or activities; (3) inaccurately imply or declare MTA's endorsement of the subject of the advertisements; (4) contain obscene materials as defined under New York Penal Law; (5) advertise commercial material unsuitable for minors under New York Penal Law; (6) display offensive sexual material; (7) are libelous or violate New York Civil Rights Law § 50; or (8) commercially promote tobacco or tobacco products. *Id.* at Ex. B. At the same time, MTA created a three-member Advertising Standards Committee. The Committee had final responsibility for determining whether an ad fell within one of the above-named proscribed categories. *Id.*

In 1997, MTA revised its advertising standards, creating the standards that are in place today (the "advertising standards"). In addition to the interests articulated for adopting the 1994 advertising standards, MTA identified its "compelling interest" in maintaining employees' morale and shielding its ridership from "unwanted and unavoidable confrontations with advertisements that are demeaning on the basis of race, color, religion, national origin, ancestry, gender, age, disability or sexual orientation." *Id.* at Ex. C. The 1997 advertising standards left intact the above prohibitions, and added prohibitions on ads which: (9) depict a minor in a sexually suggestive manner; (10) are adverse to MTA's commercial or administrative interests, or its employees' morale; (11) "contain[ ] images or information that demean an individual or group of individuals on account of race, color, religion, national origin, ancestry, gender, age, disability or sexual orientation"; (12) contain violent images; (13) promote an escort or dating service; or (14) the public would find to be offensive or improper. *Id.*

***3** The prohibition relevant to this case is the one on ads which demean an individual or group on account of "race, color, religion, national origin, ancestry, gender, age, disability or sexual orientation." This prohibition, the no-demeaning standard, is codified at § 5.05(B)(11) of the advertising standards. Geller Decl. Ex. I.

The advertising standards adopted in 1997 also abolished the three-member Advertising Standards Committee. They vested the final determination whether an ad comported with the advertising standards in the "MTA Contract Administrator or his designee." Rosen Decl. Ex. C. Specifically, under the current advertising standards, the advertising contractor first assesses whether a proposed advertisement may fall into a prohibited category; if so, the contractor alerts the MTA Director of Real Estate. *Id.* ¶ 26. If the Director of Real Estate agrees that the ad falls within a prohibited category, the advertiser may be given an opportunity to revise the ad to conform to the relevant standard. *Id.* Alternatively, the Director of Real Estate may conclude that no revision is feasible which would bring the ad into conformity with MTA's advertising standards; where this is the case, an advertiser may request a formal determination. *Id.* In making such a determination, the MTA Director of Real Estate "may consider any materials submitted by the advertiser, and may consult with the advertising contractor, or with the MTA General Counsel, the Executive Director, the chairman of the Board, or their respective designees." *Id.* at Ex. C. The determination by the Director of Real Estate is final. *Id.*

In his declaration on behalf of the defendants, current MTA Director of Real Estate Jeffrey Rosen represents that, since he joined MTA in September 2009, only three proposed ads (other than the AFDI Ad at issue here) have been rejected for failure to conform to the advertising standards. *Id.* ¶ 27. One was an ad for Target stores; it asked riders whether they were "Sandwiched on the train?" *Id.* ¶ 29 & Ex. D. At MTA's request, Target replaced this ad with another one. *Id.* ¶ 29. The second rejected ad was from the New York State Paid Family Leave Coalition; it depicted a sneezing subway passenger next to copy that told readers: "You might catch more than the subway this morning." *Id.* ¶ 30 & Ex. E. At MTA's request, the advertiser replaced that ad, too, with another one. *Id.* ¶ 30. MTA rejected both ads as adverse to MTA's commercial or administrative interests, one of the prohibited categories under the advertising standards. *Id.* ¶¶ 29–30. Finally, a series of three ads proposed by Daffy's clothing store were rejected because they contained offensive sexually suggestive material. *Id.* ¶¶ 31–32. The ads each displayed a photograph of a seemingly naked female model, whose breasts, genitals, and buttocks were covered with text boxes. *Id.* ¶ 32.

***4** Other than the AFDI Ad at issue in this case, no ad has been rejected as inconsistent with MTA's no-demeaning standard. *Id.* ¶ 27.

3. AFDI's Ads

Before submitting the ad that is the subject of this case, AFDI had submitted two ads to MTA; both were accepted. *Id.* ¶ 5.

In May 2010, AFDI ran an ad on NYCTA buses, which read: "Fatwa on your head? Is your family or community threatening you? Leaving Islam? Got questions? Get answers!" *Id.* ¶ 36 & Ex. H. The ad referred readers to a website, RefugeFromIslam.com. *Id.* at Ex. H.

In August 2010, AFDI ran another ad on NYCTA buses. *Id.* ¶ 37. On the left side, it depicted an image of the World Trade Center's Twin Towers burning, alongside the words "September 11, 2001 / WTC Jihad Attack." On the right-hand side was a building identifiable as a mosque, with a star and crescent, alongside the words "September 11, 2011 / WTC Mega Mosque." *Id.* at Ex. I. A two-sided arrow connected the images and text on the left with the images and text on the right, under the words "Why There?" and "Ground Zero." Additional text on the ad directed readers to a website, SIOAonline.com, and stated that the ad was paid for by AFDI. *Id.* CBS Outdoor Group, MTA's advertising contractor, had initially asked AFDI to revise that ad, without consulting MTA. In response, AFDI brought suit against MTA in federal district court, seeking a temporary restraining order and a preliminary injunction. MTA then reviewed the ad, determined it was consistent with its advertising standards, and ran the ad; AFDI thereupon discontinued the suit. *Id.* ¶ 37.

The events leading to the instant dispute began in March 2011, when AFDI submitted a proposed ad to CBS Outdoor Group, to be run on the exterior of NYCTA buses. *Id.* ¶ 39. The copy along the top of the ad read: "In any war between the civilized man and the savage, support the civilized man." *Id.* at Ex. J. The ad then displayed a series of photographs, including young soldiers wearing keffiyehs and holding weapons, a man standing behind a lectern and in front of three flags displaying the star and crescent, men in keffiyehs marching and giving a salute, and Adolf Hitler with his hands on the shoulders of a child wearing a keffiyeh. *Id.* Below the photographs, the ad read: "Support Israel / Defeat Jihad" and "Paid for by the American Freedom Defense Initiative"; it directed readers to two websites, AtlasShrugs.com and FreedomDefenseInitiative.com. *Id.*

Soon after, AFDI withdrew that proposed ad and submitted a revised proposed ad to CBS Outdoor Group. *Id.* ¶ 39. The revised proposed ad differed from the first in that two photographs were removed and replaced (including by a photograph of an Arab woman wearing a hijab and holding a sign reading "God Bless Hitler"); the text below now read: "Support Israel / Defeat Islamic Fundamentalism." *Id.* at Ex. J. CBS Outdoor Group alerted MTA that it believed the ad violated the advertising standards. AFDI, however, did not seek a final determination from MTA. *Id.* ¶ 41.

***5** In September 2011, AFDI submitted a third proposed ad to be run on NYCTA buses—the AFDI Ad, which is the subject of this suit. *Id.* ¶ 45. AFDI advised MTA that the Ad was intended to respond to two ads that had been run in subway stations that same month. Geller Decl. ¶ 11. The first was an ad submitted by the WESPAC Foundation Inc. It depicted a man with his daughter, next to the words "Palestinian designer" and a man with his baby, next to the words "Israeli social worker." The WESPAC ad read: "Be on our side. We are the side of peace and justice. End U.S. military aid to Israel." The WESPAC ad directed readers to a website, www.TwoPeoplesOneFuture.org. Rosen Decl. Ex. K. The second ad, submitted by StandWithUs, depicted two young boys with their arms over each others' shoulders, one wearing a keffiyeh around his neck and the other wearing a yarmulke. The StandWithUs ad read: "Israel Needs A Partner For Peace. The Palestinian Authority Must Accept The Jewish State & Teach Peace, Not Hate." The StandWithUs ad then directed readers to a website, www.SayYesToPeace.org. *Id.* at Ex. L. CBS Outdoor Group had brought both of these ads to MTA's attention as potentially inconsistent with the advertising standards, but MTA determined that the ads met the standards, and ran them. *Id.* ¶¶ 43–44.

The AFDI Ad modified the two ads AFDI had previously proposed but withdrew. The Ad, pictured below, contained no photographs. Its text, appearing in white against a black background, read: "In any war between the civilized man and the savage, support the civilized man." Beneath that, in blue, were two Stars of David, and the words: "Support Israel." Below that, in red text, it read: "Defeat Jihad." The

AFDI Ad informed readers that it was paid for by AFDI; it directed readers to AtlasShrugs.com, SIOAonline.com, and JihadWatch.com. *Id.* at Ex. M.

The AFDI Ad

AFDI sought to run the Ad on the tails of approximately 318 NYCTA buses for four weeks, at a cost of approximately $25,000. *Id.* ¶ 45.

On September 21, 2011, after reviewing the AFDI Ad, CBS Outdoor Group sent an email to Geller. The email stated that CBS Outdoor Group had determined that the Ad did not conform to one of MTA's advertising standards, and that AFDI could either submit a revised ad or seek a formal determination from MTA. *Id.* ¶ 47. Specifically, CBS Outdoor Group stated, the AFDI Ad "contains language that, in [CBS Outdoor Group's] view, does not conform with the MTA's advertising standards regarding ads that demean an individual or group of individuals as set forth in Section 5.05(B) (11) of the MTA's Advertising Standards." *Id.* at Ex. N. On September 22, 2011, David Yerushalmi, AFDI's counsel, responded by email. *Id.* at Ex. O. He disputed that the Ad violated the no-demeaning standard, noting that the Ad did not refer to any individual or group identified within that standard. He also argued that the no-demeaning standard itself constituted viewpoint discrimination, in violation of the First Amendment. Yerushalmi stated that AFDI did not intend to revise the Ad, and sought MTA's formal and final determination. *Id.*

***6** Rosen, MTA's Director of Real Estate, was responsible for making that determination. Before doing so, he consulted with MTA General Counsel James B. Henly, other attorneys in the general counsel's office, MTA Chief Financial Officer, MTA Senior Director of Corporate and Internal Communications, and MTA Director of Communications/Press Secretary; the ultimate decision, however, was Rosen's. *Id.* ¶ 51. Rosen "undertook a careful evaluation of the proposed advertisement (together with content posted on the three websites promoted by it) and the MTA's advertising standards pursuant to the review procedure." *Id.*

On September 23, 2011, Rosen emailed his final determination on the AFDI Ad to CBS Outdoor Group, requesting that it forward the email to AFDI. *Id.* at Ex. P. Rosen stated that MTA had not approved the Ad, because it had "determined that the advertisement in its current form-and AFDI has refused CBS's invitation to consider modifying its proposed advertisement-does not conform to the MTA's advertising standards, specifically Section 5.05(B) (11)." *Id.* Rosen rejected AFDI's claim that the no-demeaning standard, or any portion of the advertising standards, constitutes viewpoint discrimination. He stated that "MTA does not decide whether to allow or not allow a proposed ad based on the viewpoint it

expresses or because that viewpoint might be controversial," and had frequently accepted controversial ads, including ads espousing different views on the same issue. *Id.*

Elaborating on the basis for rejecting the AFDI Ad, Rosen stated that the use of "savage" and "Jihad" to identify those who fail to support Israel "demeans a group (or groups) of individuals on account of their religion, national origin, or ancestry, including Palestinians or other Arabs or Muslims who do not share AFDI's views on Israel." *Id.* In reaching this judgment, Rosen stated, MTA had "consider[ed] whether a reasonably prudent person, knowledgeable of MTA's customers and applying prevailing community standards, would believe that the advertisement contains material that ridicules or mocks, is abusive or hostile to, or debases the dignity or stature of, an individual or group of individuals." *Id.* By rejecting demeaning ads, such as AFDI's, Rosen stated, MTA furthers the "significant interest that MTA's riders and employees, when reading paid advertisements that run in or on MTA's transportation facilities, not be subjected to advertising that demeans them and that MTA not be associated with such demeaning speech." *Id.*

In his sworn declaration submitted in support of defendants in this case, Rosen added that, when reviewing the Ad, he was mindful that AFDI intended it as a response to an ad calling to "[e]nd U.S. military aid to Israel," *id.* ¶ 54 & Ex. K, and that the Ad was the successor to the two ads AFDI had proposed in March 2011 but which did not run, *id.* ¶ 54 & Ex. J. Those two proposed ads, Rosen stated, "plainly implied that the conflict between Israel and the Palestinian Authority and others was a war, a war that [ ] pitted 'the civilized man' (Israel) against 'the savage[,]' only instead of 'Jihad' it referred to 'Islamic Fundamentalism,' which, for AFDI, appear to be synonymous." *Id.* ¶ 54. Read within its four corners, Rosen stated, the AFDI Ad violated MTA's no-demeaning standard, because it equated supporting Israel with supporting the civilized man, and those who do not support Israel, such as "Muslims, Arabs, and Palestinians, for example," with savages—"primitive, brutal, and uncivilized." *Id.* ¶ 55. Thus, the Ad demeaned groups of people "on account of their religion, national origin, or ancestry." *Id.*

B. Procedural History

*7 On September 27, 2011, four days after Rosen's rejection of the AFDI Ad, plaintiffs filed the Complaint, claiming that the rejection of the Ad violated their First Amendment rights (Dkt.1). On October 19, 2011, defendants filed an answer (Dkt.6). On January 31, 2012, following targeted discovery, plaintiffs filed this motion for a preliminary injunction (Dkt.16). On March 9, 2012, defendants filed opposition papers (Dkt.22). On March 22, 2012, plaintiffs filed reply papers (Dkt.26).

On April 3, 2012, the Court held a hearing in this matter. Rosen had provided direct testimony by means of a sworn declaration, and, at the hearing, counsel for AFDI cross-examined him. The Court also heard extended oral argument.

II. Applicable Legal Standard

[1][2][3] In order to justify a preliminary injunction, a movant must demonstrate: (1) irreparable harm absent injunctive relief; (2) either a likelihood of success on the merits, or a serious question going to the merits to make them a fair ground for trial, with a balance of hardships tipping decidedly in the plaintiff's favor; and (3) that the public's interest weighs in favor of granting an injunction. *See Metro. Taxicab Bd. of Trade v. City of N.Y.*, 615 F.3d 152, 156 (2d Cir.2010) (citation omitted). " 'When, as here, the moving party seeks a preliminary injunction that will affect government action taken in the public interest pursuant to a statutory or regulatory scheme, the injunction should be granted only if the moving party meets the more rigorous likelihood-of-success standard.' " *Id.* (quoting *Cnty. of Nassau, N.Y. v. Leavitt*, 524 F.3d 408, 414 (2d Cir.2008)). A party seeking a mandatory preliminary injunction, which "alters the status quo by commanding some positive act," faces an even higher burden than likelihood of success on the merits; such a party must make " 'a clear showing that the moving party is entitled to the relief requested, or [that] extreme or very serious damage will result from a denial of preliminary relief' *Cacchillo v. Insmed, Inc.*, 638 F.3d 401, 406 (2d Cir.2011) (quoting *Citigroup Global Mkts., Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 35 (2d Cir.2010)) (additional internal quotation marks and citation omitted).

[4] Plaintiffs bring their challenge under the First Amendment, claiming that MTA's no-demeaning standard is unconstitutional and that MTA's rejection

of the Ad for non-conformity with that standard unlawfully restricted their free speech. Where infringement of free speech is claimed, irreparable harm may normally be presumed, and the Court does so here. *See* *Amaker v. Fisher*, 453 F. App'x 59, 63 (2d Cir.2011) (citing *Bronx Household of Faith v. Bd. of Educ. of City of N.Y.*, 331 F.3d 342, 349 (2d Cir.2003)) ("Where a plaintiff alleges injury from a rule or regulation that directly limits speech, the irreparable nature of the harm may be presumed."); *see also* *N.Y. Magazine v. Metro. Transp. Auth.*, 136 F.3d 123, 127 (2d Cir.1998) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury"). Thus, the Court must assess whether, upon a searching review of the factual record, plaintiffs successfully demonstrate by a clear showing that they are entitled to the relief requested under this Circuit's First Amendment jurisprudence.

III. Analysis

***8** The ensuing analysis is in three parts. First, the Court assesses whether, as MTA determined, the AFDI Ad is prohibited under MTA's no-demeaning standard. The Court holds that it is-and that the Court therefore must address whether that prohibition comports with the First Amendment. Second, the Court analyzes the forum (advertising space on the exterior of MTA buses) to determine the standard applicable to MTA's speech restriction. The parties sharply disagree on this critical issue. Largely on the basis of the Second Circuit's decision in *New York Magazine v. Metropolitan Transportation Authority*, 136 F.3d 123 (2d Cir.1998), the Court agrees with AFDI that this space is a designated public forum, in which content-based restrictions on expressive activity are subject to strict scrutiny. The Court therefore rejects MTA's claim that this space is either a limited public forum or not a public forum at all, both of which would give the government greater latitude to impose restrictions on speech. The Court then applies the analysis applicable to speech restrictions in designated public forums to MTA's no-demeaning standard.

As a threshold matter, the Court notes that the AFDI Ad is not only protected speech—it is core political speech. The Ad expresses AFDI's pro-Israel perspective on the Israeli/Palestinian conflict in the Middle East, and implicitly calls for a pro-Israel U .S. foreign policy with regard to that conflict. The AFDI Ad is, further, a form of response to political ads on the same subject that have appeared in the same space.[FN3] As such, the AFDI Ad is afforded the highest level of protection under the First Amendment. *See* *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 269, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964) (" '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.' ") (quoting *Stromberg v. California*, 283 U.S. 359, 369, 51 S.Ct. 532, 75 L.Ed. 1117 (1931)); *see also* *Hustler Magazine v. Falwell*, 485 U.S. 46, 50, 108 S.Ct. 876, 99 L.Ed.2d 41 (1988) ("At the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern."). The Court, therefore, analyzes plaintiffs' claim that MTA violated the First Amendment in rejecting the AFDI Ad "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *N.Y. Times Co.*, 376 U.S. at 270.

A. Applicability of MTA's No–Demeaning Standard to the AFDI Ad

[5] The Court first considers whether MTA correctly determined that the AFDI Ad falls within the no-demeaning standard, *i.e.*, that the Ad demeans a person or group on account of, *inter alia*, religion, national origin, or ancestry. AFDI, in attempting to persuade MTA to run the Ad, originally had argued that the Ad falls outside that prohibition; however, before the hearing in this case, it appeared to abandon this position. The Court asked counsel to address this potential narrower ground for relief, mindful that, where possible, federal courts should avoid reaching constitutional questions. *See, e.g.*, *Arizona v. Evans*, 514 U.S. 1, 33, 115 S.Ct. 1185, 131 L.Ed.2d 34 (1995); *Bray v. Alexandria Women's Health Clinic*, 498 U.S. 1119, 111 S.Ct. 1070, 112 L.Ed.2d 1176 (1991); *United States v. Rybicki*, 354 F.3d 124, 144 (2d Cir.2003); *Allstate Ins. Co. v. Serio*, 261 F.3d 143, 149–50 (2d Cir.2001).

***9** In determining whether the AFDI Ad is demeaning, the operative word in the Ad is "savage." "Savage" is defined as: "fierce, ferocious, cruel," "uncivilized; existing in the lowest stage of culture," and "wild, undomesticated, untamed," OXFORD ENGLISH DICTIONARY (2d ed.2012); "not civi-

lized; barbaric" and "vicious or merciless; brutal," AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed.2007); and "fierce, violent and uncontrolled," NEW OXFORD AMERICAN DICTIONARY (3d ed.2010). Terming a person or a people "savage" clearly demeans that individual or group.[FN4] The issue presented, then, is whether the AFDI Ad demeans on the basis of religion, national origin, or ancestry, as MTA concluded, or whether the Ad instead demeans those of Israel's enemies who (regardless of their religion, national origin, or ancestry) engage in "savage" *behavior,* as AFDI originally sought to defend the Ad in its discussions with MTA. *See* Rosen Decl. ¶ 49.

In the Court's view, MTA reasonably read the AFDI Ad to target as "savages" persons who adhere to Islam, *i.e.,* Muslims. The Ad reads: "In any war between the civilized man and the savage, support the civilized man. / Support Israel / Defeat Jihad." In postulating a "war" between "the civilized man" and "the savage," the Ad identifies the former as Israel and the latter as persons adhering to Jihad. "Jihad," in turn, is widely understood to be a religious doctrine of Islam. It is defined as: a "war or crusade for or against some doctrine, opinion, or principle; war to the death" and "a religious war of Muslims against unbelievers, inculcated as a duty by the Qur'an and traditions," OXFORD ENGLISH DICTIONARY (2d ed.2012); a "holy war waged on behalf of Islam as a religious duty," MERRIAM–WEBSTER'S COLLEGIATE DICTIONARY (11th ed.); "a war or struggle against unbelievers," NEW OXFORD AMERICAN DICTIONARY (3d ed.2010); and "the central doctrine that calls on believers to combat the enemies of their religion," BRITTANICA CONCISE ENCYCLOPEDIA (15th ed.2009).[FN5]

To be sure, there are likely adherents to Jihad who are non-Muslims, such that the Ad can literally be read to assail as savages all adherents to Jihad regardless of their religion—much as there assuredly are many adherents to Islam who do not accept Jihad, at least when defined as a violent crusade against enemies generally, or against Israel specifically. But, realistically, when it is read as a reasonable person would, the AFDI Ad plainly depicts Muslims—the primary adherents to this tenet of Islam—as "savages."

A review of the websites to which viewers of the AFDI Ad are referred confirms the reasonableness of MTA's understanding of the Ad's message. MTA consulted these websites in the course of making its determination, *see* Declaration of MTA Associate Counsel Peter Sistrom ("Sistrom Decl.") ¶¶ 2–7, and doing so was appropriate: Because these websites are listed in the AFDI Ad itself, they are fairly considered in assessing how a reasonable reader would interpret the Ad.

***10** In particular, at the time the Ad was under consideration, the first of those websites, www.AtlasShrugs.com—of which plaintiff Pamela Geller, AFDI's Executive Director, is editor and publisher—reproduced three relevant articles by Geller. Each echoes the "civilized man vs. savages" theme of the AFDI Ad. For a viewer of the AFDI Ad who consulted the website, each of Geller's articles would shed light on who precisely the Ad depicts as a "savage." *Id.*

In the first article, entitled "Glenn Beck and the Struggle for Israel's Survival," Geller writes that "[t]he Jewish people" are "under relentless and unremitting attack from the Muslim world," and that this struggle is:

> the struggle between good and evil. The hatred of Israel is a hatred that in itself is reviled by good rational men. Islamic societies are among the least developed cultures, the product of nomadic civilization. Their culture is primitive and barbaric, and they hate Israel because it is the sole beacon of modern science and civilization and technology in the Middle East.

Geller then quotes Ayn Rand: "[W]hen you have civilized men fighting savages, you support the civilized men, no matter what." Geller goes on to contrast Israel (a "free society") with "the Muslim countries" ("slave societies"). Geller then warns Muslim that if they were to succeed with their "conquest of Israel," they would "die as well," because "their survival depends on their constant jihad, because without it they will lose the meaning and purpose of their existence." *Id.* ¶ 3 & Ex. A.

In the second article, entitled "Fatal Thinking," Geller writes that "Iran's nukes are not just Israel's problem. They are the non-Muslim world's problem. It is the world's complicity with Islamic barbarism

that catapults the Jewish issue to the fore because of the fierce Jew-hatred that is commanded in Islam." *Id* . ¶¶ 4–5 & Ex. B. Geller adds:

> Even the godless cannot escape this religious war declared on the world by Islam. The fact is, this is a values issue. Right and wrong. Good and evil. And what side you are on in the war between the civilized man and the savage speaks volumes about your character, your credibility, and your morality.
>
> *Id.* at Ex. B.

Finally, in an article entitled "Civilized Man vs. Savage," Geller recounts an incident involving an Arab woman who was treated for burns by an Israeli plastic surgeon and was later arrested wearing a suicide belt, en route to blowing up the hospital at which she had been treated. Geller writes that that story "is only an example of the war between Jews and Muslims in the land of Israel"—a war that "is not a territorial conflict. This is a civilizational conflict." *Id.* ¶ 6 & Ex. C.

In light of these articles, to which the AFDI Ad effectively referred its viewers, MTA was reasonable—indeed, clearly correct—to regard the AFDI Ad as demeaning a group of people based on religion (Islam) and/or national origin and ancestry (from "Muslim countries" in the Middle East). The Court therefore cannot resolve this case on the nonconstitutional ground that MTA misapplied its nodemeaning standard. The Court must instead address the constitutionality of that standard.

B. Forum Analysis

1. Categories of Forums

***11** [6] Where the government seeks to restrict speech by restricting access to its own property, the level of scrutiny to which the restriction is subjected depends on how the property is categorized as a forum for speech. This forum analysis is 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, 105 S.Ct. 3439, 87 L.Ed.2d 567 (1985); *see also id.* (noting that the government, like a private individual, has the "power to preserve the property under its control for the use to which it is lawfully dedicated") (internal citation and quotation marks omitted). In its First Amendment jurisprudence, the Supreme Court has classified government property into three general categories: traditional public forums, designated public forums, and nonpublic forums. *See Christian Legal Soc. ' y v. Martinez,* —— U.S. ——, —— n. 11, 130 S.Ct. 2971, 2984 n. 11, 177 L.Ed.2d 838 (2010); *see also Hotel Emps. & Rest. Emps. Union v. City of N.Y. Dep ' t of Parks & Rec.,* 311 F.3d 534, 544–46 (2d Cir.2002). Once a court has determined the type of forum at issue, it then applies the requisite standards for that forum to the challenged speech restriction.

[7][8][9] The first category, the traditional public forum, refers to areas, such as public streets and parks, "which 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." *Pleasant Grove City, UT v. Summum,* 555 U.S. 460, 469, 129 S.Ct. 1125, 172 L.Ed.2d 853 (2009) (internal citations and quotation marks omitted); *see also N.Y. Magazine,* 136 F.3d at 128. In a traditional public forum, content-based restrictions on speech must survive strict scrutiny: *i.e.,* the restriction must be narrowly tailored to serve a compelling government interest. *Hotel Emps.,* 311 F.3d at 545; *see also Pleasant Grove City,* 555 U.S. at 469. The government may impose content-neutral time, place, and manner restrictions; however, these must be "narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication ." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n,* 460 U.S. 37, 45, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983).

[10][11] The second category, the designated public forum, refers to government property which, although not a traditional public forum, has been "intentionally opened up for that purpose." *Christian Legal Soc'y,* 130 S.Ct. at 2984 n. 11; *see also Cornelius,* 473 U.S. at 802; *N.Y. Magazine,* 136 F.3d at 128. Because the government, as property owner, has opened up a designated public forum to the same breadth of expressive speech as found in traditional public forums, the same standards apply: Any content-based restrictions on speech must survive strict

scrutiny, meaning they must be narrowly tailored to serve a compelling government interest, and content-neutral time, place, and manner restrictions are permissible only if they are narrowly tailored and leave open other avenues for expression. *See Pleasant Grove City,* 555 U.S. at 469–70; *Int'l Action Ctr. v. City of N.Y.,* 587 F.3d 521, 526–27 (2d Cir.2009) (citing *Ward v. Rock Against Racism,* 491 U.S. 781, 791, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989)); *Hotel Emps.,* 311 F.3d at 545.

***12** [12][13] The final category of governmental property identified by the Supreme Court consists of non-public forums. Non-public forums are property that "the government has not opened for expressive activity by members of the public." *Hotel Emps.,* 311 F.3d at 546; *see also Perry Educ. Ass'n,* 460 U.S. at 45–46. Examples include airport terminals, military bases and restricted access military stores, and jailhouse grounds. *Hotel Emps.,* 311 F.3d at 546. Restrictions on speech in non-public forums must only be "reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." *Perry Educ. Ass 'n,* 460 U.S. at 46; *see also Cornelius,* 473 U.S. at 800; *Hotel Emps.,* 311 F.3d at 546 ("The government may restrict speech in non-public fora subject only to the requirements of reasonableness and viewpoint neutrality.").[FN6]

2. The *New York Magazine* Precedent

[14] The forum in this case consists of the advertising space on the exterior of New York City public buses. In *New York Magazine v. Metropolitan Transportation Authority,* the Second Circuit addressed that very forum. It held that this space was a designated public forum. Because the parties' arguments on the forum issue turn centrally on whether *New York Magazine* controls here, the Court begins by reviewing that decision in detail.

At issue in *New York Magazine* was an ad which New York Magazine, a weekly publication featuring (among other things) news and commentary about New York City, contracted with MTA to run on buses. The ad depicted the magazine's logo with copy that read: "Possibly the only good thing in New York Rudy hasn't taken credit for." The week after the ad began to run, Mayor Rudolph Giuliani's office called MTA, and claimed that the ad violated § 50 of the New York Civil Rights Law, which bars the unconsented-to use of the names or pictures of living persons for advertising purposes.[FN7] Because MTA's advertising standards prohibit the display of any ad which violates § 50, *see supra* § I.A.ii, MTA complied with Mayor Guiliani's request, and ceased to run the ad. *N.Y. Magazine,* 136 F.3d at 125.

New York Magazine thereupon brought suit against MTA and New York City in this Court, seeking, *inter alia,* injunctive relief under the First and Fourteenth Amendments. The district court granted preliminary injunctive relief; the defendants appealed. The Second Circuit affirmed that order with respect to MTA.[FN8]

The Second Circuit's decision in *New York Magazine* turned heavily on its determination that the advertising space on the exteriors of New York City public buses was a designated public forum, as New York Magazine had argued. (MTA argued, as it does here, that it was a non-public forum.) The Second Circuit began by noting that "whether government property is designated a public forum or not depends on the government's intended purpose for the property." *N.Y. Magazine,* 136 F.3d at 129. To determine the government's intent in opening up the forum, the Court stated, it examined: (1) "the nature of the property and its compatibility with expressive activity"; (2) "the nature of the restraints on speech imposed"; and (3) "the policies by which it governed the use of the forum." *Id.* Also relevant was whether MTA, in selling advertising space, was acting in a proprietary or regulatory capacity. *Id.*

***13** As the Second Circuit noted, where the government opens a property for speech in its proprietary capacity to raise revenue or facilitate internal affairs, the Supreme Court has considered the forum non-public, thereby subjecting speech restrictions to only a reasonableness test. *Id.* (citing *Int ' l Soc. ' y for Krishna Consciousness, Inc. v. Lee,* 505 U.S. 672, 678 (1992); *Lehman v. City of Shaker Heights,* 418 U.S. 298, 303, 94 S.Ct. 2714, 41 L.Ed.2d 770 (1974); *Cornelius,* 473 U.S. at 805). By contrast, when the government has acted for the purpose of benefitting the public, it has held the forum to be public, subjecting speech restrictions to a more demanding standard. *Id.* (citing *Widmar v. Vincent,* 454 U.S. 263, 267–69, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981); *Southeastern Promotions, Ltd. v. Conrad,* 420 U.S. 546, 555, 95 S.Ct. 1239, 43 L.Ed.2d 448 (1975)).

Finally, the Second Circuit noted, in determining the Government's intent for a forum, the Supreme Court has examined not only "the characteristics of the forum, but also the policies by which it governed the use of that forum." *N.Y. Magazine,* 136 F.3d at 129. As to this point, the Court rejected MTA's claim that by restricting access to the forum through its advertising standards, MTA had "evidence[d] an intent not to create a public forum." *Id.* The Court stated: "[I]t cannot be true that if the government excludes any category of speech from a forum through a rule or standard, that forum becomes ipso facto a non-public forum, which is to exclude speech based on content." *Id.* at 129–30. That proposition "would eviscerate the [Supreme] Court's own articulation of the standard of scrutiny applicable to designated public fora." *Id.* at 130. Instead, the fact that a forum prohibits certain categories of speech is relevant because "the *nature* of the excluded categories sheds light on whether the government was acting primarily as a proprietor or a regulator." *Id.* Thus, for example, "[d]isallowing political speech, and allowing commercial speech only, indicates that making money [as a proprietor] is the main goal," whereas "[a]llowing political speech ... evidences a general intent to open a space for discourse, and a deliberate acceptance of the possibility of clashes of opinion and controversy ... [that are] inconsistent with sound commercial practice." *Id.*

Applying these principles, the Second Circuit held that the advertising space on the exteriors of public buses was a designated public forum. In so holding, the Court emphasized that MTA "accepts both political and commercial advertising" in that space, with the knowledge that "clashes of opinion and controversy" in political advertising could have adverse commercial effect. *Id.* at 129–30. Opening up its ad space up to potentially controversial political speech, a practice "inconsistent with sound commercial practice," was the action of a regulator, not a commercial proprietor. *Id.* at 130. The Second Circuit found further support for this conclusion in the specific advertising standard at issue in the case, which prohibited ads which "violate [ ] New York Civil Rights Law § 50" Because MTA's articulated interest in applying that standard was to assure compliance with law, MTA was properly held to be acting in a regulatory, not a commercial, role. *Id.*

3. Analysis

***14** As in *New York Magazine,* the parties vigorously disagree whether the advertising space on the exteriors of MTA buses is a designated public forum (AFDI's view) or a limited or nonpublic forum (MTA's view). From this Court's perspective, however, the issue is one of *stare decisis:* The Second Circuit's decision in *New York Magazine,* which dealt with the identical forum, binds this Court and controls this case, barring material changes in the nature of that forum, or the policies governing it. And it is undisputed that there have been no such changes in MTA's policies and practices governing bus ads since *New York Magazine. See* AFDI Mem. 9 n. 2; Hr'g Tr. 103, Apr. 3, 2012. The reassessment of the categorization of this forum which MTA seeks, therefore, must be made by the Second Circuit or the Supreme Court. It cannot be made by this Court.

In any event, the arguments MTA makes for reassessing the forum designation are not compelling. MTA argues, first, that Second Circuit forum doctrine has evolved since *New York Magazine.* There, MTA notes, the Circuit defined a designated public forum as "a place the government has opened for use by the public for expressive activity," 136 F.3d at 128; however, in its 2002 decision in *Hotel Employees & Restaurant Employees Union v. City of New York Department of Parks & Recreation,* 311F.3d534 (2d Cir.2002), the Circuit referred to a designated forum as "a non-public forum that the government has opened for *all* types of expressive activity," *id.* at 545 (emphasis in original). Seizing on the Circuit's use of the word "all," MTA argues that the advertising space on the exteriors of buses would fail to qualify as a designated public forum under the *Hotel Employees* formulation, because MTA does limit expression there, including via the no-demeaning standard. MTA Mem. 13–14.

MTA, however, assigns more weight to the locution used in *Hotel Employees* than is merited. First, to the extent that the Second Circuit's use of the qualifier "all" in that decision is said to bespeak a doctrinal shift since *New York Magazine,* the Supreme Court case that the Second Circuit cited for that proposition in *Hotel Employees, Cornelius v. NAACP Legal Defense & Education Fund,* tellingly, predates *New York Magazine. See Hotel Emps.,* 311 F.3d at 545; Hr'g Tr. 94, Apr. 3, 2012. Thus, although *Hotel Employees* conceivably reflects a subtle honing of the

language the Circuit uses to articulate its forum doctrine, that decision is not fairly read as more consequential than that, and certainly does not, *sub silentio,* overturn *New York Magazine.* Second, the forum in this case meets the *Hotel Employees* designated-public-forum formulation: The exteriors of MTA buses are, undisputedly, "open for *all* types of expressive activity"-*e.g.,* political, commercial, religious, charitable, military, etc. That MTA imposes restrictions within those types of expression (*e.g.,* no violent images, no false or misleading speech, no offensive sexual material, and no demeaning speech) does not alter this conclusion. Notably, the paradigmatic examples of non-public forums cited in *Hotel Employees*—"airport terminals," "military bases and restricted access military stores," and "jailhouse grounds," all characterized by severe restrictions on types of speech—are a far cry from the ad space at issue here. *See* Hotel Emps., 311 F.3d at 546 (describing non-public forums as "property that the government has not opened for expressive activity by members of the public").

***15** MTA alternatively seeks to distinguish *New York Magazine* on the facts. It argues that, although the rules and practices with respect to bus ads are unchanged since that decision, MTA has compiled in this litigation a more substantial factual record than it had previously that its goal in opening up the exteriors of buses for ads, including in the form of political speech, is to raise money. *See* MTA Mem. 14–15; Rosen Decl. ¶¶ 4–5; Hr'g Tr. 94–95, Apr. 3, 2012. But MTA's stated goal of making money from selling ad space on the outside of buses was presented to the Second Circuit at the time of *New York Magazine,* and did not carry the day. *See* NY. Magazine, 136 F.3d at 133 (Cardamone, J., dissenting). More fundamentally, in inferring the government's intent with respect to a particular forum, the Supreme Court and the Second Circuit have not deferred to the testimony of governmental decisionmakers. And any such mode of First Amendment analysis would perforce treat any paid advertising space on government property as a non-public forum, as long as the government officials responsible for that space attested that they were motivated to bring in revenue. Rather, the government's intent as to a particular forum—a legal construct—is to be discerned from policy and practice, including, the characteristics of the forum and the policies governing speech there. *See* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 302–03, 120 S.Ct. 2266, 147 L.Ed.2d 295 (2000) (Court looks to government's "policy [and] practice" with regard to the forum at issue to conduct the forum analysis); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 269–70, 108 S.Ct. 562, 98 L.Ed.2d 592 (1988) (same) (citing Perry Educ. Ass ' n, 460 U.S. at 47); Hotel Emps., 311 F.3d at 547; N.Y. Magazine, 136 F.3d at 129. As to the forum in question here, those factors are unchanged since *New York Magazine.*

Finally, MTA notes that a factor cited in *New York Magazine* to support finding a designated public forum—the specific advertising standard at issue there, prohibiting ads that violated New York Civil Rights Law § 50, *see* 136 F.3d at 130—is absent here. But, for two reasons, that argument is not dispositive on the forum issue. First, in *New York Magazine,* the Second Circuit cited the government's regulatory (*i.e.,* non-proprietary) purpose in enacting the standard as confirmation for its designated public forum determination, not as the basis for it. *Id.* Second, the standard at issue here is equally characterized as regulatory. To be sure, one reason for the no-demeaning standard was to protect MTA's interest "in avoiding the possibility of being associated with such ads and in protecting its reputation as a provider of service to all persons on a non-discriminatory basis." Rosen Decl. ¶ 22. But MTA has also justified the no-demeaning standard as a means of assuring that bus ads do not undermine civility within its diverse ridership, and of "furthering the interests of MTA patrons in avoiding unwanted and unavoidable confrontations with demeaning advertisements." *See, e.g., id.;* MTA Mem. 1, 3, 17, 18. Although civic harmony is surely beneficial to MTA commercially, as a goal, the Court regards it as, fundamentally, regulatory.

***16** The Court, therefore, concludes that the advertising space on the exteriors of MTA buses is a designated public forum.

C. Application of the First Amendment to MTA's No–Demeaning Standard

[15][16] As noted, the same constitutional protections for speech that apply in a traditional public forum apply in a designated public forum, and "[v]irtually all regulations of speech in these forums are subject to the highest level of First Amendment scrutiny." *Byrne,* 623 F.3d at 53; *see also* Zalaski v. City of Bridgeport Police Dep ' t, 613 F.3d 336, 341 (2d Cir.2010); Peck ex rel. Peck v. Baldwinsville Cent. Sch. Dist., 426 F.3d 617, 626 (2d Cir.2005).

AFDI argues that MTA's no-demeaning standard is unconstitutional under these standards, for a number of independent reasons. *See infra* p. 34 note 14. However, to resolve this case, the Court need reach only one of AFDI's arguments, which is that MTA's no-demeaning standard impermissibly discriminates among speech on the basis of its content.

[17][18] In a traditional or designated public forum, content-based regulations are presumptively invalid. *See R.A. V. v. City of St. Paul,* 505 U.S. 377, 382, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992) (citing *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.,* 502 U.S. 105, 115, 112 S.Ct. 501, 116 L.Ed.2d 476 (1991)); *Regan v. Time, Inc.,* 468 U.S. 641, 648–49, 104 S.Ct. 3262, 82 L.Ed.2d 487 (1984). In such forums, "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." *Peck,* 426 F.3d at 626. In determining whether a speech restriction is content-based as opposed to content-neutral, the Court inquires whether the regulation "is justified without reference to the content of the regulated speech." *Mastrovincenzo v. City of N.Y.,* 435 F.3d 78, 98 (2d Cir.2006) (citations omitted); *see also Boos v. Barry,* 485 U.S. 312, 318–19, 108 S.Ct. 1157, 99 L.Ed.2d 333 (1988) (invalidating as content-based a regulation prohibiting signs protesting a foreign government within 500 feet of that government's embassy, because "[o]ne category of speech has been completely prohibited [whereas] [o]ther categories of speech ... are permitted").

The Supreme Court's 1992 decision in *R.A.V. v. City of St. Paul,* 505 U.S. 377, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992), is singularly instructive in considering AFDI's claim that MTA's regulation is content-based. Overturning a conviction based on a burning of a cross, the Court in *R.A.V.* held facially invalid a municipal ordinance prohibiting bias-motivated disorderly conduct. The ordinance prohibited the display of a symbol which one knows or has reason to know "arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender"; state courts had construed the ordinance to apply only to "fighting words." *See R.A.V.,* 505 U.S. at 377, 391. The Court recognized that fighting words are often proscribable. But, even so, it held, St. Paul's ordinance violated the First Amendment, because it drew a content-based distinction among fighting words. The Court explained:

> ***17** [T]he ordinance applies only to "fighting words" that insult, or provoke violence, "on the basis of race, color, creed, religion, or gender." Displays containing abusive invective, no matter how vicious or severe, are permissible unless they are addressed to one of the specified disfavored topics. Those who wish to use "fighting words" in connection with other ideas—to express hostility, for example, on the basis of political affiliation, union membership, or homosexuality—are not covered. The First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects.
>
> *Id.* at 391.

Viewed in light of the decision in *R.A.V.,* it is unavoidably clear that MTA's no-demeaning standard differentiates based on the content of the proposed ad. It proscribes ads that demean a person or group on account of one of nine enumerated subjects: "race, color, religion, national origin, ancestry, gender, age, disability or sexual orientation." But, outside of these "specified disfavored topics," *R.A.V.,* 505 U.S. at 391, MTA's standard permits all other demeaning ads.

Thus, MTA's standard permits ads that demean individuals or groups based on a host of circumstances and characteristics—including place of residence, personal history, education, occupation or employment, physical characteristics (other than disability), political affiliation, union membership, point of view, or behavior. MTA so acknowledged at the hearing in this case. It conceded that the no-demeaning standard does not empower MTA to proscribe demeaning ads aimed at an individual or group on account of anything other than "race, color, religion, national origin, ancestry, gender, age, disability or sexual orientation." *See* Hr'g Tr. 17, 21, 25, 99, 101, 105–06, 122–23, Apr. 3, 2012.

To illustrate the point concretely, under MTA's no-demeaning standard, an advertiser willing to pay for the privilege is today at liberty to place a demeaning ad on the side or back of a city bus that states any of the following: "Southerners are bigots"; "Upper West Siders are elitist snobs"; "Fat people are slobs"; "Blondes are bimbos"; "Lawyers are sleazebags"; or

"The store clerks at Gristedes are rude and lazy." The regulation also does not prohibit an ad that expresses: "Democrats are communists"; "Republicans are heartless"; or "Tea Party adherents are barbaric ." The standard would also countenance an ad that argues: "Proponents [or opponents] of the new health care law are brain-damaged." Strikingly, as MTA conceded at argument, its no-demeaning standard currently permits a bus ad even to target an individual private citizen for abuse in the most vile of terms. For example: "John Doe is a child-abuser"; "Jane Doe runs a Ponzi scheme"; or "My neighbors, the Does, are horrible parents." [FN9] Hr'g Tr. 26, 108, Apr. 3, 2012.

Thus, like the St. Paul ordinance invalidated in *R.A.V.,* MTA's no-demeaning standard, as presently worded, overtly differentiates among speech based on the target of the speech's abuse and invective. *R.A. V.* involved fighting words, whereas this case involves demeaning bus ads, but the First Amendment evil is the same: By differentiating between which people or groups can and cannot be demeaned on the exterior of a city bus, MTA's no-demeaning standard, like St. Paul's ordinance, discriminates based on content. Indeed, the discrimination here is, in an important respect, more invidious than the fighting-words ordinance in *R.A. V.:* As this case illustrates, the content discrimination embedded in MTA's no-demeaning standard applies to and among political speech, the speech most highly protected by the First Amendment. *Cf.* *Solantic, LLC v. City of Neptune Beach,* 410 F.3d 1250, 1264 (11th Cir.2005) (invalidating a municipal sign code because of its content-based exemptions, the effect of which was to differentiate among political messages, only some of which could be lawfully conveyed on signs).

***18** The derogatory term at issue in the AFDI Ad, "savage," in fact, supplies an excellent vehicle for illustrating the content-specificity of MTA's no-demeaning standard. Under that regulation, an ad on a public bus may not call a person or group "savage" based on his or her religion or nationality, or because the person or group falls within the other seven proscribed categories delineated in the regulation. But such an ad may otherwise call another person or group a "savage" or "savages" on any other basis—because they are a neighbor, a family, a school, an employer, an employee, a company, a union, a community group, a charity, an interest group, a believer in a cause, or a political foe.[FN10] Under *R.A.V.,* that line is, unavoidably, content-based. Not surprisingly, pressed at argument on this point with the use of such hypotheticals, MTA ultimately—and properly—conceded that its no-demeaning standard is content-based. Hr'g Tr. 122, Apr. 3, 2012.[FN11]

MTA does not offer any justification for selectively allowing demeaning speech to appear on the exterior of its buses, let alone demonstrate that its content-based restriction on transit advertising is narrowly tailored to serve a compelling governmental interest, as is necessary to survive strict scrutiny. [FN12] *See* *Pleasant Grove City,* 555 U.S. at 469–70; *Hotel Emps.,* 311 F.3d at 545. Whatever weight might be assigned to the governmental interest in banning demeaning speech on the exterior of New York City buses on an even-handed basis, there is no good reason for protecting some individuals and groups, but not others, from such abuse. MTA's no-demeaning standard, as currently formulated, is, therefore, inconsistent with the First Amendment.

In holding today that MTA's no-demeaning standard violates the First Amendment, the Court does not impugn in the slightest the motives of MTA and its officials—either those who put the standard into place or those who applied it to the AFDI Ad. Quite the contrary: From the testimony and evidence, it is apparent that, in promulgating and applying the no-demeaning standard, MTA has aspired to hold ads on public buses to a standard of civility. Its goal of preventing ads on city bus exteriors from being used as a medium for abuse and division in this diverse metropolis is entirely laudable. It appears likely that MTA drafted the standard in question with an eye toward the groups it felt most likely to be targeted by demeaning ads, without adequately considering the First Amendment implications under *R.A. V.* of such a selective prohibition.

[19] However, it is well-settled that, where a violation of the First Amendment is concerned, the government's benign, even noble, intentions are no cure. *See* *Texas v. Johnson,* 491 U.S. 397, 418, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989) (in invalidating prohibition on desecrating American flag, Court explains that "[i]t is not the State's ends, but its means, to which we object"); *see also* *Turner Broad. Sys., Inc. v. F.C.C.,* 512 U.S. 622, 680, 114 S.Ct. 2445, 129 L.Ed.2d 497 (1994) (O'Connor, J., concurring in part

and dissenting in part); *United States v. Eichman*, 496 U.S. 310, 316–19, 110 S.Ct. 2404, 110 L.Ed.2d 287 (1990); *Baggett v. Bullitt*, 377 U.S. 360, 373, 84 S.Ct. 1316, 12 L.Ed.2d 377 (1964); *Pico v. Bd. of Ed., Island Trees Union Free Sch. Dist. No. 26*, 638 F.2d 404, 416 (2d Cir.1980).

***19** 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' "). [FN13] And in resolving this case on the narrow ground that the no-demeaning standard as currently drafted is impermissibly content-based, the Court pointedly does not reach any of the broader grounds for invalidation urged by AFDI under the First Amendment. [FN14] Today's ruling instead leaves—and is intended to leave—MTA the latitude to investigate and experiment with alternative mechanisms for using ad space on the exteriors of city buses productively, profitably, and constitutionally, while ensuring that this space is not used as a tool for disparagement and division.

CONCLUSION

For the reasons discussed above, AFDI's motion for a preliminary injunction enjoining the enforcement of MTA's no-demeaning standard is GRANTED.

In order to enable MTA to consider its appellate options and alternatives to the current regulation, the Court, in the public interest, will stay the effect of this Order for 30 days. Absent a court order extending it, after 30 days, this stay will expire.

The Clerk of Court is directed to terminate the motion pending at docket entry number 16.

A conference in this case is scheduled for August 29, 2012, at 11:00 a.m., at the U.S. Courthouse, 500 Pearl Street, New York, New York 10007. The parties are directed to meet and confer in advance of the conference, and to advise the Court by joint letter, due August 24, 2012, as to their respective views on the next steps to be taken, if any, in this litigation.

SO ORDERED.

FN1. Since the filing of the Complaint, Walder has resigned this post. MTA's present Chairman and CEO is Joseph J. Lhota.

FN2. Examples of non-commercial advertisements that MTA has run can be found at Rosen Decl. Exs. H, I, K, and L and at the Declaration of Pamela Geller, Executive Director of AFDI ("Geller Decl") Exs. A, B, C, D, and F.

FN3. At argument, counsel for MTA conceded that the AFDI Ad constitutes political speech. Hr'g Tr. 111, Apr. 3, 2012.

FN4. To "demean" means to "lower in condition, status, reputation or character." OXFORD ENGLISH DICTIONARY (2d ed.2012); *see also* MERRIAM WEBSTER'S COLLEGIATE DICTIONARY (11th ed.2004) (same).

FN5. The word's meaning does depend, in part, on context. The Oxford Companion to Military History, for example, differentiates between " 'the greater jihad,' a spiritual struggle against the evil within oneself and a ' "lesser jihad,' physical effort in the cause of Islam." OXFORD COMPANION TO MILITARY HISTORY (2001). The word derives from the "Arabic root meaning 'to strive,' 'to exert,' 'to fight,' " and may be used to express "a struggle against one's evil inclinations" or "a struggle for the moral betterment of the Islamic community." OXFORD DICTIONARY OF ISLAM (2003).

FN6. In the Second Circuit, another category of forum, known as the limited public forum, has alternately been analyzed as a subset of the designated public forum and as a type of non-public forum opened up for discrete purposes. *See Byrne v. Rutledge*, 623 F.3d 46, 55 n. 8 (2d Cir.2010) ("the law of [the Second Circuit] describes a limited public forum as both a subset of the designated public forum and a nonpublic forum opened to certain kinds of speakers or to the discussion of certain subjects") (internal quotation

marks and citations omitted). Limited public forums are property that the government has opened up for some speech, but " 'limited to use by certain groups or dedicated solely to the discussion of certain subjects.' " *Christian Legal Soc'y,* 130 S. Ct at 2984 n. 11 (quoting *Pleasant Grove City,* 555U.S. at 470). Common examples of limited public forums include "state university meeting facilities opened for student groups, open school board meetings, city4eased theaters, and subway platforms opened to charitable solicitations." *Hotel Emps.,* 311 F.3d at 545 (internal citations omitted). The government has more leeway to restrict speech in a limited public forum than in a traditional or designated public forum. However, any restrictions on speech in such a forum must be viewpoint-neutral, and the choice to exclude particular speech must be reasonable in light of the forum's purpose. *See Good News Club v. Milford Cent. Sch.,* 533 U.S. 98, 106–07, 121 S.Ct. 2093, 150 L.Ed.2d 151 (2001); *Rosenberg v. Rector & Visitors of Univ. of VA.,* 515 U.S. 819, 829, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995); *Cornelius,* 473 U.S. at 806.

FN7. Section 50 of the New York Civil Rights Law reads:

> Right of privacy. A person, firm or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person, or if a minor of his or her parent or guardian, is guilty of a misdemeanor.
>
> Section 51 creates causes of action in equity and damages for violations of § 50.

FN8. The Second Circuit ordered that the City be dismissed, because New York Magazine lacked standing to assert a claim against the City. *N.Y. Magazine,* 136 F.3d at 127.

FN9. To be sure, in its other standards, MTA prohibits, *inter alia,* libelous ads or ads that contain false or misleading claims. However, there does not appear to be any basis in MTA's current standards to reject a demeaning ad directed at an individual where the ad demeans based on statements of opinion, or based on truthful facts.

FN10. Indeed, at argument, counsel for MTA conceded that, if the AFDI Ad had been modified to drop the word "Jihad" and to read, "People who believe in a holy war are savages," MTA probably would have been obliged to permit that ad to appear. Hr'g Tr. 101, Apr. 3, 2012. He conceded that "[i]t is the 'jihad' word" that caused the Ad to contravene MTA's current regulation. *Id.*

FN11. In its brief, MTA had argued that the no-demeaning standard was content-neutral, based on the decision in *International Action Center v. City of New York,* 587 F.3d 521 (2d Cir.2009). The Second Circuit there stated that "where the standard or rule applies without regard to the basic message being expressed, it is content-neutral." *Id.* at 525–26. *International Action Center* is, however, inapposite. At issue there was a regulation banning the issuance of permits to "new" parades (*i.e.,* ones not previously held) along Fifth Avenue in Manhattan. *Id.* at 523. The regulation was enacted to "keep public spaces safe and free of congestion," to protect "citizens from unwelcome noise," and "to preserve the quality of urban life." *Id.* at 527. The Second Circuit found that regulation content-neutral, because it "does not seek to regulate messages or distinguish between different types of speech" and "applies to all 'new' parades, irrespective of their content." *Id.* at 526. Here, by contrast, MTA's no-demeaning standard facially discriminates based on the content of expression. Further, as outlined by MTA itself, the purpose served by the standard relates "to the content of expression," *Ward,* 491 U.S. at 791: It seeks to: (1) shield the citizenry from confronting certain types of verbal or pictorial disparagement contained in ads on public buses, and (2) respect "the interests of MTA patrons in avoiding unwanted and unavoidable confrontations with demeaning

advertisements." Rosen Decl. ¶ 22.

FN12. Before this Court, MTA instead defended the no-demeaning standard on other grounds. It predominantly argued, as noted, that the advertising space on the exterior of city buses was a non-public forum, in which a speech restriction need only be reasonable and viewpoint-neutral. The Court has rejected that claim; it has no occasion here to opine whether a regulation that prohibited only some demeaning speech would be valid in a non-public forum. MTA alternatively argued that the no-demeaning standard was content-neutral, an argument the Court has rejected. Finally, MTA suggested that its ban on demeaning speech could be justified as a ban on "fighting words." MTA Mem. 16–17; Hr'g Tr. 106, Apr. 3, 2012. However, that argument fails, because the no-demeaning standard sweeps far beyond the narrow category of "fighting words," because there is no record evidence that demeaning ads on bus exteriors (as opposed to in-person slurs) would incite violence, and because a municipality's selective ban on fighting words which favors only certain targets would be clearly unconstitutional under *R.A. V.*

FN13. The First Circuit so ruled in *Ridley* after holding, based on a close examination of the history, usage, and close regulation of the advertising space in question, that the government had not created a designated public forum. 390 F.3d at 76–82.

FN14. These include that: (1) a ban on demeaning speech in a designated public forum can never be upheld, because it is not one of few categories of speech (*e.g.,* obscenity, fighting words, and defamation) that can be banned outright on account of having little or no social value, *see* Hr'g Tr. 75, Apr. 3, 2012; *cf. R.A.V.,* 505 U.S. at 382; (2) even an across-the-board ban on demeaning speech is itself content-based and subject to strict scrutiny, because such a ban draws a line between demeaning and non-demeaning content; (3) a ban on demeaning speech is impermissibly viewpoint-based, because it uniquely prohibits a form of harsh condemnation; and (4) a ban on demeaning speech, either inherently or as administered by MTA, is unconstitutionally vague, and vests undue authority in those charged with enforcing it. If MTA is inclined to repair the defect which the Court has identified today and substitute a new regulation while maintaining the exterior of public buses as a designated public forum, its counsel is well-advised to give thoughtful attention to these critiques.

S.D.N.Y.,2012.
American Freedom Defense Initiative v. Metropolitan Transp. Authority
--- F.Supp.2d ----, 2012 WL 2958178 (S.D.N.Y.)

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EXHIBIT C

Ann Arbor Transportation Authority loses key ruling over anti-Israel ads

By THE ASSOCIATED PRESS (/USERS/PROFILE/?UID=52914)
Posted on Sat, Sep 29, 2012 : 10:20 a.m.

A judge has ruled against the **Ann Arbor Transportation Authority** in a lawsuit that challenges the bus agency's rejection of an anti-Israel ad

The ad Blaine Coleman wanted to place on AATA buses.

(http://www.annarbor.com/news/aclu-sues-aata-over-refusal-of-anti-israel-bus-advertisement/#.UGcElO0XpnE).

Flint federal Judge Mark Goldsmith says the agency's policy in favor of ads that are in "good taste" is vague and unconstitutional.

Blaine Coleman wants to put an ad on buses that would have skulls and bones and say, "Boycott 'Israel.' Boycott Apartheid." He believes the Israeli government treats Palestinians unfairly.

The Ann Arbor Transportation Authority says it turns down ads that ridicule people. Officials say Coleman's ad would probably turn away riders, but the judge says the First Amendment trumps any business concerns.

The decision Friday doesn't mean Coleman's ad will get on buses. The judge plans to hold another hearing in the weeks ahead.

Read previous AnnArbor.com coverage of the lawsuit: ACLU sues AATA over refusal of anti-Israel bus advertisement (http://www.annarbor.com/news/aclu-sues-aata-over-refusal-of-anti-israel-bus-advertisement/#.UGcEIO0XpnE)

Tags: Ann Arbor Transportation Authority (/tag/Ann Arbor Transportation Authority/), Blaine Coleman (/tag/Blaine Coleman/), lawsuit (/tag/lawsuit/),