No. _____

In the Supreme Court of the United States

AMERICAN FREEDOM DEFENSE INITIATIVE, *et al.*,
Petitioners,

v.

MASSACHUSETTS BAY TRANSPORTATION AUTHORITY, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

There is currently a split in the United States courts of appeals regarding the application of the First Amendment to the display of public-issue advertisements on government transit authority property.

1. Whether the Massachusetts Bay Transportation Authority (MBTA) created a public forum by accepting for display on its property a wide array of controversial political and public-issue ads, including ads that address the same controversial subject matter as Petitioners' pro-Israel ad, and thus violated the First Amendment by rejecting Petitioners' ad based on its content.

2. Regardless of the nature of the forum, whether the MBTA's rejection of Petitioners' advertisement based on an advertising guideline that prohibits ads considered by MBTA officials to be "demeaning and disparaging" was a viewpoint-based restriction of speech in violation of the First Amendment.

PARTIES TO THE PROCEEDING

The Petitioners are American Freedom Defense Initiative (AFDI), Pamela Geller, and Robert Spencer (collectively referred to as "Petitioners").

The Respondents are the Massachusetts Bay Transportation Authority (MBTA) and Beverly Scott, individually and in her official capacity as Chief Executive Officer / General Manager of the MBTA (collectively referred to as "Respondents").

RULE 29.6 STATEMENT

Petitioner AFDI is a non-stock, nonprofit corporation. Consequently, it has no parent or publicly held company owning 10% or more of the corporation's stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTION

STATUTES AND RULES

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals appears at App. 1 and is reported at 781 F.3d 571. The opinions of the district court appear at App. 58 and App. 66 and are reported at 2014 U.S. Dist. LEXIS 34428 and 989 F. Supp. 2d 182, respectively. The denial of the petition for rehearing en banc appears at App. 89.

JURISDICTION

The opinion of the court of appeals affirming the denials of Petitioners' requests for preliminary injunctions was entered on March 30, 2015. App. 1. A petition for rehearing was denied on April 29, 2015. App. 89. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Free Speech Clause of the First Amendment provides, "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I.

STATEMENT OF THE CASE

Petitioners filed two separate civil rights lawsuits against the MBTA, challenging the MBTA's rejection of their advertisements addressing the Israeli-Palestinian conflict—a permissible subject matter for the forum at issue. Both lawsuits challenged the MBTA's speech restrictions under the First and Fourteenth Amendments and sought declaratory and injunctive relief and nominal damages. In each case, Petitioners filed a motion for preliminary injunction, which the district court denied. Petitioners filed timely notices of appeal, and the First Circuit consolidated the appeals.

At issue in both cases is the application of the MBTA's advertising guidelines to restrict Petitioners' public-issue speech on the basis that Petitioners' anti-jihad viewpoint conveyed by their advertisements was "demeaning and disparaging." The district court denied the motions for preliminary injunctions, holding that the MBTA's advertising space is a limited public forum and that its restrictions on Petitioners' speech were reasonable and viewpoint neutral. App. 58-88. A divided panel of the First Circuit affirmed. App. 1-57. A petition for rehearing was denied, with Circuit Judge Torruella dissenting. App. 89-90.

STATEMENT OF FACTS

In September 2013, the MBTA accepted for display on its advertising space a controversial ad that addressed the Israeli-Palestinian conflict from a viewpoint that was critical of Israel. The advertisement, which appeared on numerous posters throughout the transit system, depicted four maps that purported to show the "Palestinian loss of land" to Israel between 1946 and 2010. Text accompanying the maps read: "4.7 million Palestinians are Classified by the UN as Refugees." *See* App. 4, 52 (Appendix—"Committee for Peace ad").

The pro-Palestinian ad began running in early October 2013, and after receiving a rash of complaints, the MBTA, acting through its advertising agent, ceased displaying the ad. However, shortly thereafter, the MBTA decided, without much of a public explanation, except to claim that it was a "miscommunication" between the MBTA and its advertising agent, to re-post the controversial ad. App. 4-5.

Soon after the MBTA announced that it would re-post the Committee for Peace ad, Petitioners submitted the first of the advertisements at issue here. The first ad read as follows: "In any war between the civilized man and the savage, support the civilized man. Support Israel. Defeat jihad" ("AFDI Ad I"). App. 5, 53 (Appendix—"AFDI's first submission").

The MBTA rejected AFDI Ad I because it allegedly violated the MBTA's prohibition on ads containing

demeaning or disparaging content.[1] App. 5-6. Petitioners promptly filed a civil rights lawsuit, *see Am. Freedom Def. Initiative v. Mass. Bay Transp. Auth.*, No. 1:13-cv-12803-NMG (D. Mass. filed Nov. 6, 2013) ("*MBTA I*"), and a motion for a preliminary injunction. The district court denied the motion, ruling that while the most reasonable interpretation of the word "jihad" in context was understood to implicate only violent terrorism, the MBTA's interpretation to include even peaceful or pietistic jihad and together with the word "savage" could be reasonably understood to disparage all Muslims and Palestinians. App. 6-7.

After a careful review of the district court's ruling in *MBTA I*, Petitioners submitted a new proposed ad to the MBTA. This second ad read: "In any war between the civilized man and those engaged in savage acts, support the civilized man. Defeat violent jihad. Support Israel" ("AFDI Ad II"). App. 7-8, 54 (Appendix—"AFDI's second submission"). The MBTA accepted this ad, but Petitioners chose not to run it and instead submitted a revised version. App. 8.

Petitioners' revised ad ("AFDI Ad III") read as follows: "In any war between the civilized man and the savage, support the civilized man. Defeat violent jihad. Support Israel." App. 8-9, 54 (Appendix—"AFDI's third submission").

The MBTA rejected this ad based on the same considerations as its rejection of AFDI Ad I. App. 9. As

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[1] The MBTA's advertising guidelines prohibit advertisements that "contain[] material that demeans or disparages an individual or group of individuals." App. 5-6.

a result, Petitioners filed a second lawsuit, *Am. Freedom Def. Initiative v. Mass. Bay Transp. Auth.*, No. 1:14-cv-10292-NMG (D. Mass. filed Feb. 7, 2014) ("*MBTA II*"), requesting, once again, a preliminary injunction.

In denying Petitioners' motion for a preliminary injunction in *MBTA II*, the district court stated that it was doing so "on the grounds previously set out in its opinion in" *MBTA I*. App. 9. The court further denied Petitioners equitable relief based on its erroneous conclusion that Petitioners acted in "bad faith" by submitting their third version of the ad instead of having the MBTA run the second one.[2] App. 9.

Petitioners timely appealed both rulings, which the First Circuit consolidated. A divided panel affirmed, and a petition for rehearing was denied with one circuit judge dissenting.

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[2] Both the majority and the dissent rejected the district court's "bad faith" conclusion, specifically noting that Petitioners were not acting in "bad faith" by using the MBTA's submission process "to probe the parameters of the government's speech restriction in order to vindicate its interest in running the most effective advertisement possible." App. 36 n.6; App. 50-51 n.9.

REASONS FOR GRANTING THE PETITION

A split among the United States courts of appeals is among the most important factors in determining whether certiorari should be granted. *See* Sup. Ct. R. 10(a). And this factor takes on added importance when, as here, the split involves the fundamental right to freedom of speech. *See generally NAACP v. Button*, 371 U.S. 415, 433 (1963) (observing that First Amendment "freedoms are delicate and vulnerable, as well as supremely precious in our society"). Additionally, the Court should grant review because this case presents important First Amendment issues that have not been, but should be, definitively settled by this Court. *See* Sup. Ct. R. 10(c).

I. The First Circuit's Forum Analysis Conflicts with the Authoritative Decisions of the Majority of Other United States Courts of Appeals.

At issue here is whether the MBTA's advertising space is a designated public forum, which exists when the government intentionally opens its property for expressive activity, *Perry Educ. Ass'n v. Perry Local Educators*, 460 U.S. 37, 45 (1983), or a nonpublic forum. As this Court stated, "[A] public forum may be created by government designation of a place or channel of communication for use by the public at large for assembly and speech, *for use by certain speakers*, or *for the discussion of certain subjects*." *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 802 (1985) (emphasis added).

Under the facts of this case, the Second, Third, Sixth, and Seventh Circuits would hold that the forum

at issue is a designated public forum, thereby subjecting the government's content-based restrictions to strict scrutiny, whereas the First and Ninth Circuits would not.

While speech restrictions in traditional[3] and designated public forums are subject to the same heightened level of scrutiny,[4] it is a mistake to conflate the two forums. *See* App. 43-44 (dissent) ("Building a constitutional framework around a category as rigid as 'traditional public forum' leaves courts ill-equipped to protect First Amendment expression in times of fast-changing technology and increasing insularity."). Indeed, the First Circuit's approach to the forum analysis essentially does away with the designated public forum as a category and replaces it with the limited public forum, which is treated by the circuit the same as a nonpublic forum. *Ridley v. Mass. Bay Transp. Auth.*, 390 F.3d 65, 76 n.4 (1st Cir. 2004) ("We adopt the usage equating limited public forum with non-public forum and do not discuss the issue further.").

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[3] Public streets, sidewalks, and parks are typical examples of traditional public forums. *See Hague v. CIO*, 307 U.S. 496, 515 (1939).

[4] *Cornelius*, 473 U.S. at 800 ("[S]peakers can be excluded from a public forum only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest. . . . Similarly, when the government has intentionally designated a place or means of communication as a public forum speakers cannot be excluded without a compelling government interest.").

In a nonpublic forum, speech restrictions need only be reasonable and viewpoint neutral, *Perry Educ. Ass'n*, 460 U.S. at 46, thereby granting the government "almost unlimited authority to restrict speech on its property." *See* App. 43 (dissent) (quoting *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 695 (1992) (Kennedy, J., concurring in the judgments)).

An additional problem with the First Circuit's approach—one that is inconsistent with the Second Circuit—is that even in a limited public forum, strict scrutiny applies "to restrictions on speech that falls within the designated category for which the forum has been opened." *Children First Found., Inc. v. Fiala*, No. 11-5199-cv, 2015 U.S. App. LEXIS 8485, at *17 (2d Cir. May 22, 2015) (internal quotations and citation omitted). Therefore, "in a limited public forum, government is free to impose a blanket exclusion on certain types of speech, but once it allows expressive activities of a certain genre, it may not selectively deny access for other activities of that genre." *Travis v. Owego-Apalachin Sch. Dist*., 927 F.2d 688, 692 (2d Cir. 1991). Consequently, even if the forum were a limited public forum, because it is open for the subject matter of Petitioners' advertisements (*i.e.*, the Israeli-Palestinian conflict), strict scrutiny should nonetheless apply to the MBTA's speech restrictions. Indeed, this also highlights the viewpoint-based problem with the MBTA's rejection of Petitioners' ads, a problem that we will discuss further in section II below.

We turn now to the relevant case law regarding the forum question, starting with *Lehman v. City of Shaker Heights,* 418 U.S. 298 (1974). *See Ridley*, 390 F.3d at 78 (describing *Lehman* as "[t]he only Supreme Court

case directly on point");[5] *but see* App. 41 (dissent) (observing that "*Ridley* also proclaimed that the MBTA's advertising program was 'indistinguishable' from the one described in *Lehman*, [*Ridley*, 390 F.3d at 78], apparently ignoring the fact that the Shaker Heights advertising program in *Lehman* had never accepted any political or public issue advertising").

In *Lehman*, this Court found that the consistently enforced, twenty-six-year ban on political advertising was consistent with the government's role as a proprietor precisely because the government "limit[ed] car card space to *innocuous* and *less controversial*

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[5] In *Ridley*, the case which decided the forum question for the First Circuit, the court also purported to rely upon this Court's decision in *Arkansas Educational Television Commission v. Forbes*, 523 U.S. 666 (1998) (hereinafter "*AETC*"), citing and quoting it for the following proposition: "For the government's policy and practice to create a designated public forum, 'the government must intend to make the property 'generally available' to *a class of speakers*.'" *Ridley*, 390 F.3d at 102 (emphasis added). In *AETC*, the petitioner, a state-owned public television broadcaster, denied the request of respondent Forbes, an independent candidate with very little support, for permission to participate in a sponsored debate between major party candidates. This Court upheld the exclusion, finding that it was reasonable and viewpoint-neutral in that it was based on Forbes' *status* as a speaker (*i.e.*, he was not a serious candidate) and not the message he sought to convey. *Id.* at 682 (finding no "objections or opposition to his views"). Here, Petitioners, as paid advertisers, are part of the "class of speakers" for which the MBTA's forum is open and available. And there is little doubt that had Forbes' status as a speaker made him eligible for the debate (*i.e.*, he was a serious candidate) but that he had been denied permission to participate because he held the view that jihadis who opposed Israel in the Israeli-Palestinian conflict (an acceptable subject of the debate) were "savages," the Court would have found a First Amendment violation.

commercial and service oriented advertising." *Id*. at 304 (emphasis added). A majority of the circuit courts have followed *Lehman* to conclude that transportation advertising space was a nonpublic forum when the government "consistently promulgates and enforces policies restricting advertising on its buses to commercial advertising." *Children of the Rosary v. City of Phoenix*, 154 F.3d 972, 978 (9th Cir. 1998).

As the Ninth Circuit observed in *DiLoreto v. Downey Unified School District Board of Education,* 196 F.3d 958 (9th Cir. 1999):

> Government policies and practices that historically have allowed commercial advertising, but have excluded political and religious expression, indicate an intent not to designate a public forum for all expressive activity, but to reserve it for commercial speech. . . . However, where the government historically has accepted a wide variety of advertising on commercial and non-commercial subjects, courts have found that advertising programs on public property were public fora.

Id. at 965-66 (citing, *inter alia*, *Lehman*).

Despite this articulation of the law, the Ninth Circuit has recently joined the First Circuit in its approach to the forum question. In *Seattle Mideast Awareness Campaign v. King County*, 781 F.3d 489, 498 (9th Cir. 2015), *reh'g denied*, a divided panel held that the County's bus advertising space was a limited public forum even where the transit authority accepted controversial political and public-issue ads. In doing so, the Ninth Circuit acknowledged the circuit split.

See id. ("We recognize that other courts have held that similar transit advertising programs constitute designated public forums.").

The majority of the United States courts of appeals that have addressed this forum question, however, disagree with the First and Ninth Circuits.

The Second Circuit, for example, holds that "[d]isallowing political speech, and allowing commercial speech only, indicates that making money is the main goal. Allowing political speech, conversely, 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." *N.Y. Magazine v. Metro. Transp. Auth.*, 136 F.3d 123, 130 (2d Cir. 1998) (holding that the transit authority's advertising space was a designated public forum) (emphasis added).

In *Christ's Bride Ministries, Inc. v. Southeastern Pennsylvania Transportation Authority,* 148 F.3d 242, 253 (3d Cir. 1998), the Third Circuit concluded that the transit authority's advertising space was a designated public forum, noting that "the purpose of the forum does not suggest that it is closed, and the breadth of permitted speech points in the opposite direction."

In *Planned Parenthood Ass'n/Chicago Area v. Chicago Transit Authority*, 767 F.2d 1225 (7th Cir. 1985), the Seventh Circuit concluded that the transit authority's advertising space was a designated public forum because the transit authority permitted "a wide variety" of commercial and non-commercial advertising.

And the Sixth Circuit similarly concluded that a transit authority's property is a designated public forum when it is open to political and public-issue advertisements:

> 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.

United Food & Commercial Workers Union, Local 1099 v. Sw. Ohio Reg'l Transit Auth., 163 F.3d 341, 355 (6th Cir. 1998) (hereinafter "*United Food*").

Consequently, consistent with *Lehman* and the majority of federal appeals courts that have analyzed and followed its holding, the forum at issue here is a designated public forum for Petitioners' speech. *See* App. 41 (dissent) ("I am in disagreement with the *Ridley* decision, and would have held that the MBTA, by opening its advertising facilities to all forms of public discourse, created a designated public forum akin to the fora discussed in *United Food*, *Christ's Bride*, *New York Magazine*, and *Planned Parenthood Association/Chicago Area*, and distinguishable from the virtually commercial-only fora addressed in *Lehman*, *Children of the Rosary*, and *Lebron* [*v. Nat'l R.R. Passenger Corp.*, 69 F.3d 650, 656 (2d Cir. 1995) (holding that a large billboard in New York City's Pennsylvania Station constituted a nonpublic forum where Amtrak had 'never opened [the space] for anything except purely commercial advertising")]).

Here, the MBTA accepts advertisements on the hotly-debated Israeli-Palestinian conflict—advertisements "which by their very nature generate conflict"—thereby "signal[ing] a willingness on the part of the government to open the property to controversial speech, which [this] Court in *Lehman* recognized as inconsistent with operating the property solely as a commercial venture." *See United Food*, 163 F.3d at 355.

Moreover, a forum analysis does not end simply because the government transit authority has adopted some restrictions on speech or employed these restrictions to reject certain advertisements. *See N.Y. Magazine*, 136 F.3d 129-30 ("[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, such that we would examine the exclusion of the category only for reasonableness. This reasoning would allow every designated public forum to be converted into a non-public forum the moment the government did what is supposed to be impermissible in a designated public forum, which is to exclude speech based on content."). And this is particularly the case where, as here, the government is attempting to impose a "civility" restriction on what it knows is controversial political and public-issue speech—an impermissible task to begin with. *See, e.g., N.Y. Times v. Sullivan*, 376 U.S. 254, 271 (1964) ("[First Amendment] protection does not turn upon the truth, popularity, or social utility of the ideas and beliefs which are offered.") (internal quotations and citation omitted).

Additionally, it is incorrect to conclude that the MBTA's "civility" restriction is a restriction on an ad's subject matter (such as restrictions on advertisements for alcohol, tobacco, or political candidates) that might reasonably lead a court to conclude that this forum is closed to controversial matters. Rather, this restriction, particularly as applied in this case, is an impermissible viewpoint-based restriction on speech. At a minimum, it certainly *allows for* viewpoint discrimination, as evidenced here, and this alone is sufficient to render the advertising guideline unconstitutional. *See infra* sec. II.

In sum, it is without question that the nature of the property is compatible with Petitioners' expressive activity. *See Ridley*, 390 F.3d 76-77 ("As to the nature of the property, the MBTA does run advertisements and so there is nothing inherent in the property which precludes its use for some expressive activity."). And it is undisputed that the MBTA permits advertisements expressing messages on exceedingly controversial political subject matter, including the very subject matter of Petitioners' ads that were rejected by the MBTA. Indeed, the MBTA is willing to accept *some* political viewpoints that generate conflict and complaints amongst its ridership (we refer here to the Committee for Peace ad)—actions which speak louder than any written policy. *Grace Bible Fellowship, Inc. v. Maine Sch. Admin. Dist. No. 5,* 941 F.2d 45, 47 (1st Cir. 1991) (stating that when conducting a forum analysis, "actual practice speaks louder than words"). Therefore, because the forum is wholly suitable for Petitioners' speech, including its subject matter, it is a

designated public forum for Petitioners' ads.[6] Consequently, the MBTA must demonstrate a *compelling* reason that is *narrowly tailored* to justify its restraint on Petitioners' speech, *Cornelius*, 473 U.S. at 800—a burden it cannot meet.

Indeed, the First and the Ninth Circuits support their forum conclusion based upon a faulty rationale. As stated by the Ninth Circuit: "Municipalities faced with the prospect of having to accept virtually all political speech if they accept any—regardless of the level of disruption caused—will simply close the forum to political speech altogether. First Amendment interests would not be furthered by putting municipalities to that all-or-nothing choice. Doing so would 'result in less speech, not more'—exactly what the Court's public forum precedents seek to avoid." *Seattle Mideast Awareness Campaign*, 781 F.3d at 499 (citation omitted); *see also Ridley*, 390 F.3d at 81 (stating that "the MBTA is not to be put to an all-or-nothing choice") (internal quotations and citation omitted); App. 16. This reasoning is fundamentally flawed because it permits the government to pick and choose which "political speech" it deems acceptable, thereby doing more harm to the First Amendment,

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[6] Concluding that the forum is a designated public forum does not mean that the MBTA is without any authority to make certain categorical restrictions, such as restrictions on advertisements for tobacco sales, pornography, or political campaigns. *Cornelius*, 473 U.S. at 802 ("[A] public forum may be created . . . for use by certain speakers, or for the discussion of certain subjects."). However, "if the concept of a designated open forum is to retain any vitality whatever, the definition of the standards for inclusion and exclusion must be unambiguous and definite." *Gregoire v. Centennial Sch. Dist.*, 907 F.2d 1366, 1375 (3d Cir. 1990).

which is intended to operate as a brake on the government's power to censor speech, than closing the forum altogether. In short, the First Amendment is not concerned about the quantity of speech (*i.e.*, "result in less speech, not more"), but rather preventing government officials from being the arbiters of acceptable speech. The First and Ninth Circuits' reasoning thus opens a forum for certain political speech (and speakers) which the government favors by permitting government officials to make content-based restrictions based on nothing more than "reasonableness." Thus, rather than limiting government censorship of speech, the goal of the First Amendment, these decisions grant the government broader powers of censorship. *Southeastern Promotions, Ltd. v. Conrad,* 420 U.S. 546, 553 (1975) ("[T]he danger of censorship and of abridgment of our precious First Amendment freedoms is too great where officials have unbridled discretion over a forum's use.").

In the final analysis, the United States courts of appeals are split on the question of whether a government transit authority creates a designated public forum for speech when it opens its advertising space to controversial political or public-issue advertisements. This Court should resolve this circuit split—a division that has serious implications for the First Amendment—by favoring free speech over government censorship.

II. The MBTA's "Demeaning and Disparaging" Restriction Is Inherently Viewpoint Based in Violation of the First Amendment.

Viewpoint discrimination is an egregious form of content discrimination that is prohibited in all forums. *See Rosenberger v. Rector & Visitors of Univ. of Va.,* 515 U.S. 819, 829 (1995). "The principle that has emerged from [Supreme Court] cases is that the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others." *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993) (internal quotations and citation omitted). "When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant." *Rosenberger*, 515 U.S. at 829. Consequently, when speech "fall[s] within an acceptable subject matter otherwise included in the forum, the State may not legitimately exclude it from the forum based on the viewpoint of the speaker." *Cogswell v. City of Seattle*, 347 F.3d 809, 815 (9th Cir. 2003). Thus, viewpoint discrimination occurs when the government "denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject." *Cornelius*, 473 U.S. at 806. As recently articulated by the Second Circuit:

> Two principles guide our evaluation of viewpoint neutrality within the context of a nonpublic forum. First, the government may permissibly restrict content by prohibiting *any* speech on a given topic or subject matter, as long as the restriction encompasses the entirety of the

> discrete subject. . . . Second, if the government has permitted *some* comment on a particular subject matter or topic, it may not then regulate speech in ways that favor some viewpoints or ideas at the expense of others. . . . Accordingly, the state must be careful *to excise the entire matter from the forum*, or else it will violate the First Amendment by denying access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject.

Children First Found., Inc., 2015 U.S. App. LEXIS 8485, at *40-41 (internal citations and quotations omitted) (emphasis added).

Here, the content of Petitioners' message (and thus its subject matter) is permissible in this forum, as evidenced by the fact that the MBTA has willingly accepted controversial advertisements that address the same subject matter: the Israeli-Palestinian conflict. *See* App. 4, 52 (Appendix—"Committee for Peace ad").

Consequently, it is not the subject matter that is being restricted, but Petitioners' viewpoint on the subject. This is a classic form of viewpoint discrimination that is prohibited in all forums. *See Cornelius*, 473 U.S. at 806; *see also R.A.V. v. St. Paul*, 505 U.S. 377, 389 (1992) (stating that "a State may not prohibit only that commercial advertising that depicts men in a demeaning fashion" without violating the First Amendment); *Good News Club v. Milford Cent. Sch. Dist.*, 533 U.S. 98, 112 (2001) ("[S]peech discussing otherwise permissible subjects cannot be excluded from a limited public forum on the ground that the subject is discussed from a religious viewpoint.").

As noted by the dissent:

> [T]he MBTA's incongruous decision to post the Committee for Peace ad, but reject AFDI's submissions, at the very least, raises the specter of viewpoint discrimination by the MBTA. As we have said in the past, "grave damage is done if the government, in regulating access to public property, even appears to be discriminating in an unconstitutional fashion."

App. 48-49 (dissent) (quoting *AIDS Action Comm. of Mass., Inc. v. Mass. Bay Transp. Auth.*, 42 F.3d 1, 12 (1st Cir. 1994)).

Moreover, attempting to reduce the effectiveness of a message by changing the thrust of its meaning, even if the entire message itself is not prohibited, by way of a "civility" standard (*i.e.* prohibiting the use of "savage" as a noun) is a form of viewpoint discrimination.[7] *See Cohen v. California*, 403 U.S. 15, 26 (1971) ("[W]e cannot indulge the facile assumption that one can

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[7] It is evident through the series of advertisements submitted to the MBTA that the word "savage" is not itself on a list of banned words, and it is apparently acceptable to the government when the word is used as an adjective describing some undefined "acts" but unacceptable when used as a noun to refer to the persons engaged in such acts (*e.g.*, you can say your political opponent lies, but you can't call him a liar). *Compare* AFDI Ad I and AFDI Ad III *with* AFDI Ad II. First Amendment freedoms should not rise or fall on such arbitrary distinctions. *See United Food*, 163 F.3d at 359 (stating that a speech restriction "offends the First Amendment when it grants a public official 'unbridled discretion' such that the official's decision to limit speech is not constrained by objective criteria, but may rest on 'ambiguous and subjective reasons'") (citation omitted).

forbid particular words without also running a substantial risk of suppressing ideas in the process. Indeed, governments might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views.").

As stated by the dissent in *Ridley*, "The government cannot allow dissemination of one viewpoint that it finds inoffensive or bland, and prohibit the dissemination of another viewpoint that it finds offensive or 'demeaning,' . . . . Such distinctions are viewpoint based, not merely reasonable content restrictions."[8] *Ridley*, 390 at 100 (Torruella, J., dissenting).

CONCLUSION

The petition for a writ of certiorari should be granted.

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[8] The Ninth Circuit in *American Freedom Defense Initiative v. King County*, No. 14-35095 (9th Cir. docketed Feb. 10, 2014), is currently deciding whether the government transit authority in Seattle Washington may, consistent with the First Amendment, restrict advertisements based upon a similar "demeaning and disparaging" advertising standard that was applied to reject a public-issue ad submitted by the same petitioners in this case. *See Am. Freedom Def. Initiative v. King County*, No. 2:13-cv-01804-RAJ, 2014 U.S. Dist. LEXIS 11982 (W.D. Wash. Jan. 30, 2014) (denying preliminary injunction and ruling, *inter alia*, that the County's speech restriction was viewpoint neutral).

Respectfully submitted,

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APPENDIX

APPENDIX

TABLE OF CONTENTS

APPENDIX A

United States Court of Appeals
For the First Circuit

No. 14-1018
No. 14-1289

[Filed March 30, 2015]

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

Plaintiffs-Appellants,

v.

MASSACHUSETTS BAY TRANSPORTATION AUTHORITY; AND BEVERLY A. SCOTT, INDIVIDUALLY AND IN HER OFFICIAL CAPACITY AS CHIEF EXECUTIVE OFFICER / GENERAL MANAGER OF THE MBTA,

Defendants-Appellees.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

App. 2

[Hon. Nathaniel M. Gorton, U.S. District Judge]

Before

Lynch, Chief Judge,
Stahl and Barron, Circuit Judges.

Robert Joseph Muise, with whom David Yerushalmi and American Freedom Law Center were on brief, for appellants.
Joseph D. Steinfield, with whom Jeffrey J. Pyle, Julia A. Brennan, and Prince Lobel Tye LLP were on brief, for appellees.

March 30, 2015

BARRON, Circuit Judge. These consolidated appeals require us to decide whether the First Amendment permits the Massachusetts Bay Transportation Authority ("MBTA") to refuse to display a pair of paid, private advertisements on the trains, buses, and transit stations that the MBTA operates. Many circuits and district courts have addressed the First Amendment issues that public transit authority advertising policies raise. We set forth our approach most recently and most thoroughly in Ridley v. Massachusetts Bay Transportation Authority, 390 F.3d 65 (1st Cir. 2004).

In that case, we considered a free speech challenge to the same aspect of the MBTA's advertising policy at issue in these appeals: the restriction on the display of advertisements that "demean or disparage" individuals or groups. And, as in Ridley, we again conclude that

this restriction does not violate the First Amendment, either on its face or as it was applied. We thus affirm the District Court, which reached that same conclusion with respect to the MBTA's refusal to run the two advertisements at issue here, each of which concerns a highly charged issue -- the Israeli-Palestinian conflict.

I.

The MBTA operates the public transit system in the greater Boston area. Through an advertising agent, the MBTA makes its buses, trains, and transit stations available for the display of advertisements by private parties. The MBTA accepts most advertisements only upon payment, though the MBTA apparently accepts some public service advertisements for no charge. But the key fact is that the MBTA will not run every advertisement it receives, even when the advertiser is willing to pay the going rate. Instead, each advertisement must conform to the MBTA's Advertising Program Guidelines.

Those Guidelines state that the MBTA's program objectives are maximizing revenue from both advertising and ridership; preserving a safe and orderly operation and a welcoming environment for riders; and avoiding the identification of the MBTA or the Commonwealth with the point of view of the advertisements or the advertisers. To further those ends, the Guidelines restrict what the advertisements may say. The Guidelines also set forth a procedure by which the MBTA may review proposed advertisements that might contain prohibited content. Under that procedure, the MBTA may suggest changes that would permit the advertisements to be accepted upon re-submission.

In these appeals, the parties dispute the lawfulness of the application of the Guidelines to bar two advertisements about the Israeli-Palestinian conflict. These advertisements were submitted by the American Freedom Defense Initiative ("AFDI"), a non-profit advocacy organization dedicated to "freedom of speech . . . and individual rights."

AFDI offered to pay the MBTA to run the first of the advertisements in October 2013. But the actual roots of the dispute reach back somewhat earlier. Months before, the MBTA ran a different non-profit group's advertisement concerning the Israeli-Palestinian conflict. The message of that earlier advertisement was very different from the one in AFDI's advertisement. AFDI makes that fact a centerpiece of its First Amendment challenge.

The earlier advertisement was submitted in September 2013 by a group called the Committee for Peace in Israel and Palestine. The advertisement depicted four maps reflecting different points in time with the caption, "Palestinian Loss of Land - 1946 to 2010." The advertisement also contained bold text to the right of the maps stating that "4.7 Million Palestinians are Classified by the U.N. as Refugees."

The MBTA accepted the advertisement, and it began to run for a fee in October 2013. After receiving complaints about the advertisement later that month, the MBTA briefly ceased displaying the advertisement. But, shortly thereafter, the MBTA re-posted the advertisement. The MBTA claimed that there had been a miscommunication between it and its advertising agent, but did not otherwise explain its decision either

to pull the Committee for Peace advertisement or to re-post it.

Very soon after the MBTA announced it would re-post the Committee for Peace advertisement, AFDI submitted the first of the advertisements at issue in these appeals. This advertisement included, without attribution, a modified version of a quotation from the political theorist Ayn Rand.[1] The advertisement read as follows:

IN ANY WAR
BETWEEN THE
CIVILIZED MAN
AND THE SAVAGE,
SUPPORT THE
CIVILIZED MAN.
✡ SUPPORT ISRAEL ✡
DEFEAT JIHAD

AFDI asked the MBTA to display this ad in ten transit stations where the Committee for Peace advertisement also had been posted.

The MBTA applied the Guidelines' stated procedures for reviewing submitted advertisements. The MBTA, through its General Manager, defendant Beverly Scott, then rejected AFDI's submission. The MBTA concluded that AFDI's submission violated one of its Guidelines -- namely, the prohibition on

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[1] In response to a question about the 1973 Arab-Israeli war, Ayn Rand was quoted as saying, as a reason to support Israel, "[w]hen you have civilized men fighting savages, you support the civilized men, no matter who they are." Ayn Rand, Egalitarianism and Inflation, Address at the Ford Hall Forum (Oct. 20, 1974).

"advertisement[s] contain[ing] material that demeans or disparages an individual or group of individuals."[2] Scott notified AFDI of the decision on November 4, 2013.[3] Two days later, AFDI brought suit in federal court. The suit alleged violations of the First and Fourteenth Amendments and sought a preliminary injunction ordering the MBTA to run the ad.

The District Court denied the preliminary injunction request on December 20, 2013. See Am. Freedom Def. Initiative v. Mass. Bay Transp. Auth. ("MBTA I"), 989 F. Supp. 2d 182 (D. Mass. 2013). The District Court agreed with AFDI "that the most reasonable interpretation of their advertisement is that they oppose acts of Islamic terrorism directed at Israel." Id. at 189. Nonetheless, the District Court concluded that the references to "jihad" and "savage[s]," taken together and considered in light of the reference to "war," could, as the MBTA argued, reasonably be construed to demean or disparage Muslims or Palestinians, rather than to take aim only at terrorist acts. Id. at 188. The District Court also

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[2] The guideline further provides that, "[f]or purposes of determining whether an advertisement contains such material, the MBTA will determine whether a reasonably prudent person, knowledgeable of the MBTA's ridership and using prevailing community standards, would believe that the advertisement contains material that ridicules or mocks, is abusive or hostile to, or debases the dignity and stature of, an individual or group of individuals."

[3] The District Court found that there was no evidence that anyone either explained to AFDI how this first submission violated the Guidelines or provided AFDI an opportunity to bring the advertisement into compliance.

concluded that even though the Committee for Peace advertisement "deeply offends [AFDI] and . . . other members of the community" and "portrays Israel in a negative light," that advertisement "does not do so in a way that violates the demeaning and disparaging guideline." Id. at 191. By contrast, the District Court explained, "labeling a member of a group 'a savage', as defendants not unreasonably believe is done by plaintiffs' advertisement, directly debases that person's dignity." Id.

The District Court expressed concern that the MBTA could use the guideline to strip messages of their effectiveness. But the District Court read this Court's decision in Ridley v. Massachusetts Bay Transportation Authority, 390 F.3d 65 (1st Cir. 2004), to require the conclusion that, in this context, advertisers "do not have the right to use whatever terms they wish to use . . . simply because they are the most effective means of expressing their message." MBTA I, 989 F. Supp. 2d at 190.

Two weeks later, AFDI submitted a revised version of its proposed advertisement. This second submission read as follows:

IN ANY WAR BETWEEN THE CIVILIZED MAN
AND THOSE ENGAGED IN SAVAGE
ACTS,
SUPPORT THE CIVILIZED MAN.
DEFEAT VIOLENT JIHAD
✡ SUPPORT ISRAEL ✡

Unlike AFDI's first ad, this second submission referred to "violent jihad" instead of merely "jihad." In addition, the second version's "defeat" clause preceded

its "support" clause. In the first AFDI advertisement, by contrast, the two clauses appeared in the opposite order. Finally, and most crucially given the District Court's opinion in MBTA I, AFDI's second version changed the language at the beginning of the advertisement. The new language juxtaposed "the civilized man" with "those engaged in savage acts" rather than with "the savage," as had been the case in the first version.

The MBTA accepted AFDI's second submission and requested specifications so that the advertisement could be displayed within a week of its submission. But AFDI chose not to have the MBTA run this second version. Instead, AFDI submitted a new version the day after learning the MBTA had accepted its second submission.

This third advertisement, which AFDI claimed was merely a "tweak[ed]" version of the accepted submission, read as follows:

IN ANY WAR BETWEEN THE CIVILIZED MAN
AND THE SAVAGE,
SUPPORT THE CIVILIZED MAN.
DEFEAT VIOLENT JIHAD
✡ SUPPORT ISRAEL ✡

This third version maintained the second version's reference to "violent jihad" (as opposed to merely "jihad," as in AFDI's first ad). The "defeat" and "support" clauses also appeared in the same order as they had in the second ad -- and thus, once again, in the opposite order from how they had appeared in the first ad. But unlike the second ad, which had been accepted, the third version returned to the

juxtaposition that had appeared in the initial, rejected version. The revised language once again counterposed "the civilized man" and "the savage" rather than "the civilized man" and "those engaged in savage acts."

The MBTA rejected AFDI's third submission. The MBTA concluded that, like AFDI's first submission, the third ad violated the guideline that prohibits advertisements containing material demeaning or disparaging individuals or groups. AFDI then again brought suit, seeking another preliminary injunction.

The District Court denied the motion "on the grounds previously set out in its opinion in" MBTA I. Am. Freedom Def. Initiative v. Mass. Bay Transp. Auth. ("MBTA II"), No. 1:14-cv-10292-NMG, 2014 WL 1093138, at *3 (D. Mass. Mar. 17, 2014). In addition, the District Court charged AFDI with "blatant gamesmanship" -- submitting this third version instead of having the MBTA run the second one -- and noted that this "bad faith" was an independent ground for denying the requested equitable relief. Id.

After AFDI timely appealed both decisions, the parties agreed to consolidate the two cases, given their common issues of fact and law and that the appeals involve the same parties. AFDI advances three basic contentions on appeal.

AFDI argues first that the MBTA has so opened up its buses, trains, and transit stations to private advertisements that the MBTA has effectively established what is known as a designated public forum. See Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45-46 (1983). For that reason, AFDI argues, the MBTA may regulate the content of

advertisements only through restrictions that are narrowly tailored to serve a compelling interest. See Pleasant Grove City, Utah v. Summum, 555 U.S. 460, 469-70 (2009) (designated public fora "are subject to the same strict scrutiny as restrictions in a traditional public forum"). Further, AFDI argues that, under that strict standard, the MBTA cannot justify the content-based decision to reject the advertisements at issue here.

AFDI next argues that, even if the MBTA has not established a designated public forum and instead is operating only what is known as a nonpublic forum, the MBTA's guideline prohibiting the display of an advertisement that "demeans or disparages" individuals or groups is still facially unconstitutional. And that, AFDI says, is for either of two reasons. AFDI argues that the MBTA's guideline necessarily discriminates on the basis of an advertisement's viewpoint. See Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 806 (1985) (explaining that speech restrictions in nonpublic fora must be viewpoint neutral). And, alternatively, AFDI argues that the guideline is so vague that it confers too much uncabined discretion on the MBTA to sort between permitted and prohibited ads. See Ridley, 390 F.3d at 93-95 (discussing the high bar vagueness challenges face in nonpublic forum context).

Finally, AFDI argues that even if its forum argument and facial challenges do not succeed, the MBTA still violated AFDI's First Amendment rights. AFDI contends that the MBTA's actual application of its guideline (especially given the MBTA's decision to run the Committee for Peace advertisement) was

unconstitutional. Specifically, AFDI contends that the MBTA discriminated against the viewpoint expressed in the two rejected AFDI advertisements or, at least, acted unreasonably in denying those ads given the purposes of the MBTA's overall advertising policy.

We consider each of these arguments in turn. In doing so, we explain why, in light of our prior ruling in Ridley -- which, if not strictly controlling as to each issue, is instructive as to all -- we find none of these arguments persuasive.

II.

Before turning to the merits of AFDI's argument, we note that we are reviewing the denial of a preliminary injunction. In evaluating AFDI's contentions, the standard of review is thus abuse of discretion. Sindicato Puertorriqueño de Trabjadores, SEIU Local 1996 v. Fortuno, 699 F.3d 1, 9 (1st Cir. 2012). That standard, however, applies in this context only to "issues of judgment and balancing of conflicting factors." Water Keeper Alliance v. U.S. Dep't of Def., 271 F.3d 21, 30 (1st Cir. 2001) (quoting Cablevision of Bos., Inc. v. Public Improvement Comm'n, 184 F.3d 88, 96 (1st Cir. 1999)). By contrast, findings of fact are reviewed for clear error, and rulings on legal issues are reviewed de novo. Id. at 30-31. Moreover, in order to secure preliminary injunctive relief, AFDI must "establish a 'strong likelihood' that they will ultimately prevail" on the merits of their First Amendment claim.[4]

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[4] In light of our conclusion that AFDI has not demonstrated that it is likely to succeed on the merits in either of its challenges, and because likelihood of success on the merits is the "sine qua non" of the four-part inquiry a district court must undertake in

Sindicato Puertorriqueño, 699 F.3d at 10 (quoting Respect for Me. PAC v. McKee, 622 F.3d 13, 15 (1st Cir. 2010)).

III.

We start with AFDI's contention that the MBTA's advertising program is so unselective that it constitutes a designated public forum. The MBTA argues we must reject that contention. In support of this point, the MBTA relies on Ridley, which held that the MBTA's advertising program was a nonpublic forum. See 390 F.3d at 78-79. And the MBTA further contends that the law of the circuit doctrine makes Ridley's holding on the forum issue binding on this panel. See United States v. Rodriguez, 311 F.3d 435, 438-39 (1st Cir. 2002) (prior panel decision are "inviolate" absent intervening authority (quoting United States v. Chhien, 266 F.3d 1, 11 (1st Cir. 2001))).

As a result, the MBTA argues, its content-based restrictions on speech need not be narrowly tailored to serve a compelling interest, as AFDI contends. Instead, the MBTA argues that the restrictions must be upheld under the more forgiving standards that apply in nonpublic fora. See Davenport v. Wash. Educ. Ass'n, 551 U.S. 177, 189 (2007) (restrictions in nonpublic fora are permitted so long as they do not discriminate on the basis of viewpoint and are reasonable in light of the purposes for which the forum was established).

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adjudicating a preliminary injunction request, New Comm Wireless Servs., Inc. v. SprintCom, Inc., 287 F.3d 1, 9 (1st Cir. 2002), we do not address the final three factors of the preliminary injunction inquiry in this opinion.

But even though Ridley held that the MBTA was operating a nonpublic forum, AFDI is right that "the forum question is not a static inquiry." Thus, we must still consider whether the MBTA has done anything since Ridley to transform its advertising program from a nonpublic forum into a designated public forum, in which case the MBTA's content-based restriction on disparaging or demeaning advertisements then would be subject to more exacting scrutiny. See Ridley, 390 F.3d at 76 (courts look to "explicit expressions about intent" as well as the actual practice of the government actor in question to determine whether said actor intended to designate a place or program as a public forum).

Ridley based its forum holding in part on the MBTA's formally expressed intention. Ridley explained that the MBTA had consistently maintained that its advertising program constituted a nonpublic forum rather than a designated one open to the display of all manner of private communication without regard to the content of the message. See id. at 77. But Ridley did not rely on the MBTA's expressed intention alone. See id. Ridley also made clear that, although the MBTA did run many private advertisements, the MBTA had not in practice opened itself up as a forum for the communication of ideas generally. Instead, Ridley concluded that the MBTA was trying only to capitalize on the market for display advertising as part of its general effort to increase revenue. See id. at 79.

Ridley further observed that the MBTA's selectivity in choosing advertisements was, from the start, consistent with that overriding commercial purpose. See id. at 78. Ridley explained that the MBTA had

concluded that riders of subways and buses might not appreciate certain kinds of content in the advertisements that those riders would encounter. Thus, the MBTA set forth a number of rules restricting advertising content that were crafted to maximize advertising revenue without thereby adversely affecting its ridership. See id. at 72, 77-78 (describing the MBTA's advertising policy).

As was true in Ridley, the MBTA's advertising policy still states that the MBTA operates a nonpublic forum. And the MBTA's Guidelines still consist of the same basic rules regarding prohibited advertising content as were in place at the time of Ridley. Nor does AFDI argue otherwise.

AFDI contends instead that the MBTA's decision to run the Committee for Peace advertisement shows that the MBTA is now, in actual practice, willing to permit speech on even the most controversial of issues. And thus, AFDI argues, the MBTA has effectively created a designated public forum, because it is simply incongruous for a nonpublic forum to allow itself to be open to the display of such controversial advertising.

Contrary to AFDI's contention, however, the MBTA's decision to run the Committee for Peace advertisement did not transform the nature of the forum. Ridley involved a challenge to the MBTA's attempt to regulate speech on such controversial topics and issues as religion and the debate over the legalization of marijuana. See id. at 69. In defending those restrictions at that time, the MBTA did not argue that all speech on such topics and issues was per se off limits. See id. at 83. The MBTA instead was quite clear that its Guidelines allowed such speech. See id. And

yet, Ridley concluded that the MBTA's willingness to accept advertisements on those hot-button matters did not make the MBTA's advertising program a designated public forum. See id. at 81-82.

It is true, as AFDI argues, that the Supreme Court held in Lehman that an urban transit authority had not created a designated public forum when it limited advertising space on its transit cars "to innocuous and less controversial commercial and service oriented advertising." Lehman v. City of Shaker Heights, 418 U.S. 298, 304 (1974). But Ridley took account of Lehman and concluded that it did not require a nonpublic forum to limit itself to such anodyne messages. See Ridley, 390 F.3d at 78-79. Ridley concluded that, for purposes of forum analysis, the MBTA's advertising program was indistinguishable from the program at issue in Lehman, even though the MBTA -- unlike the transit authority at issue in Lehman -- had opened itself up to a wider range of advertisements, including many controversial ones. See id. at 78- 82. Ridley thus makes clear that, contrary to AFDI's contention, the MBTA need not reject all but "innocuous and less controversial" advertisements in order to maintain a nonpublic forum.

In so holding, Ridley followed the Supreme Court's instruction that a governmental proprietor creates a designated public forum "only by intentionally opening a nontraditional forum for public discourse." E.g., Cornelius, 473 U.S. at 802. True, a governmental actor's stated intent cannot determine the nature of the forum in the face of countervailing actions by that actor. See Ridley, 390 F.3d at 77. But Ridley explained that the MBTA's expressed intent, as implemented

through various restrictions on advertising content, fit with the MBTA's announced purposes in establishing the advertising program as a nonpublic forum -- namely, the MBTA's desire to balance its interest in maximizing revenue from advertising against its interest in ensuring customer satisfaction. See id. at 80. Moreover, Ridley relied on the Supreme Court's observation in Arkansas Education Television Commission v. Forbes, 523 U.S. 666 (1998), that by recognizing the distinction between a government's decision to open its property to private messages selectively rather than generally, "we encourage the government to open its property to some expressive activity in cases where, if faced with an all-or-nothing choice, it might not open the property at all." Ridley, 390 F.3d at 80 (quoting Ark. Educ. Television Comm'n, 523 U.S. at 680).

We are aware that, as AFDI points out, a number of out-of-circuit decisions have held that transit systems' advertising spaces constitute designated public fora. These cases have done so, moreover, after noting that those transit systems have allowed controversial advertisements. See, e.g., United Food & Commercial Workers Union, Local 1099 v. Sw. Ohio Reg'l Transit Auth., 163 F.3d 341, 355 (6th Cir. 1998) (holding that a transit authority had "demonstrated its intent to designate its advertising space a public forum" by accepting a wide array of controversial advertisements in contravention of its policy barring such advertisements); N.Y. Magazine v. Metro. Transp. Auth., 136 F.3d 123, 130 (2d Cir. 1998) (suggesting that "deliberate acceptance of the possibility of clashes of opinion and controversy" is inconsistent with operating a nonpublic forum); Planned Parenthood Ass'n/Chi.

Area v. Chi. Transit Auth., 767 F.2d 1225, 1232-33 (7th Cir. 1985) (holding that a transit authority had created a designated public forum where it had accepted a wide range of controversial advertising).

But Ridley controls in this appeal. And Ridley plainly held that a transit agency's decision to allow the display of controversial advertising does not in and of itself establish a designated public forum. Ridley also held that the MBTA had not established such a forum even though the MBTA permitted such advertising. See 390 F.3d at 81-82. Moreover, Ridley reached that conclusion after considering those very same sister circuit cases and concluding that each "is distinguishable on its facts." Id. at 81.

Ridley is not alone in so analyzing the forum issue. The Ninth Circuit recently concluded that the Seattle transit system's paid advertising program was a nonpublic forum. Seattle Mideast Awareness Campaign v. King County, __ F.3d ___, Nos. 11-35914, 11-35931, 2015 WL 1219330, at *6 (9th Cir. Mar. 18, 2015). We agree with the Ninth Circuit that a transit authority, like Seattle's and the MBTA, that allows a wider range of speech than was permitted in Lehman is not automatically stripped of its ability to adopt other viewpoint-neutral criteria for selecting content that reasonably served the agency's overriding commercial purpose. See id. at *6. Like the MBTA's, Seattle's program granted only "selective access" to advertisers, and the selective criteria the agency used to determine which ads could be run were consistently applied. Id. at *5. Further, as here, the advertising program was "part of a government-run commercial enterprise, and the expressive activities the

government permit[ted]" under that program were "only incidental to" the commercial use. Id. Thus, the Ninth Circuit concluded -- as do we -- that the bare fact that a transit system runs some controversial ads does not mean that its advertising program becomes a designated public forum. See id. at *6 ("Any such rule would undermine the [Supreme] Court's efforts to 'encourage the government to open its property to some expressive activity in cases where, if faced with an all-or-nothing choice, it might not open the property at all.'" (quoting Ark. Educ. Television Comm'n, 523 U.S. at 680)).

That brings us to AFDI's last point on this issue. AFDI argues that whatever the nature of the MBTA's advertising program in general, when the MBTA accepted an advertisement on the Israeli-Palestinian conflict -- a highly politicized and controversial issue -- the MBTA necessarily established a designated public forum with respect to speech about that particular issue.

But this argument, too, cannot be reconciled with Ridley. There, we "reject[ed] the argument that because a government commercial enterprise has opened up discussion on one particular 'topic' . . . it must allow any and all discussion on that topic." Id. at 91. Ridley therefore necessarily held that the fact that the MBTA had accepted advertising certain to inspire controversy of one sort or another did not mean that the MBTA runs a designated public forum. See id. And nothing in the record before us reveals developments that permit us to reach a different conclusion. Thus, the MBTA's advertising program is a nonpublic forum. The MBTA may therefore restrict the content of the

advertisements it accepts for display so long as such restrictions are not viewpoint-based and are reasonable in light of the purposes for which the forum was established.

IV.

According to AFDI, even if the MBTA is operating a nonpublic forum, the MBTA has nonetheless selected a constitutionally impermissible criterion for restricting speech. And, AFDI maintains, that is true regardless of how the MBTA applied that criterion to AFDI's particular advertisements. To make that argument, AFDI first claims that the demeaning or disparaging guideline on its face discriminates on the basis of viewpoint. And, second, AFDI argues that the guideline is so inherently vague that it must be struck down on its face for conferring excessive discretion on the MBTA to select messages it favors and reject ones it dislikes.

These facial attacks, however, like the challenge to the nature of the forum itself, run directly into our decision in Ridley and the law of the circuit doctrine. Ridley squarely held that exactly the same guideline was not invalid on its face. See 390 F.3d at 90-91, 93-96. And Ridley's holding still binds us.

With respect to viewpoint discrimination, Ridley explained that the demeaning or disparaging guideline is merely a "[r]easonable ground rule[]" under which "all advertisers on all sides of all questions are allowed to positively promote their own perspective and even to criticize other positions so long as they do not use demeaning speech in their attacks." Id. at 91. Thus, we rejected the contention that the demeaning or

disparaging guideline is an attempt by the government "to give one group an advantage over another in the marketplace of ideas." Id.; cf. Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 84 (1983) (Stevens, J., concurring in the judgment) (distinguishing between a law that "regulates communications for their ideas" and a law that regulates communications "for their style").

With respect to vagueness, Ridley identified "two basic concerns." Id. at 93. Those concerns were: "1) concerns about fair notice, and about the related danger of chilling expression, and 2) concerns about excessive discretion being invested in administering and enforcing officials." Id.

But Ridley made clear that the MBTA's advertising Guidelines in general raise "no serious concern about either notice or chilling effects" for the simple reason that "there are no consequences for submitting a non-conforming advertisement and having it rejected." Id. at 94. And AFDI offers no basis for concluding that the MBTA implements its policy differently in that regard at present. In fact, AFDI's own experience -- in which it had a second advertisement accepted after its first had been rejected -- would seem inconsistent with that conclusion.

With respect to excessive discretion, Ridley explained that "a grant of discretion to exercise judgment in a non-public forum must be upheld so long as it is 'reasonable in light of the characteristic nature and function' of that forum." Id. at 95 (quoting Griffin v. Sec'y of Veterans Affairs, 288 F.3d 1309, 1323 (Fed. Cir. 2002)). Ridley further observed that "selectivity and discretionary access are defining characteristics of

non-public fora, which unlike public fora are not intended to be open to all speech." Id. (internal quotation marks omitted). And Ridley concluded that the words "demean" and "disparage" are not so unclear that the guideline effectively confers the kind of excessive discretion that might raise concerns about surreptitious viewpoint discrimination or the unreasonable targeting of messages for reasons unrelated to the revenue-generating purposes of the forum. See id. at 95-96.

That leaves one last wrinkle. At oral argument, counsel for the MBTA, in response to questioning by the court about hypotheticals, noted that the demeaning or disparaging guideline requires the MBTA to determine what "a reasonably prudent person, knowledgeable of the MBTA's ridership and using prevailing community standards, would believe." And counsel went even further and explained, in responding to hypothetical applications, that he believed the MBTA would not apply the demeaning or disparaging guideline to some groups that the community would deem worthy of opprobrium. On that basis, he opined that even though the guideline did not permit the display of the AFDI advertisements under challenge, the MBTA would construe the guideline to permit advertisements using otherwise identical language that targeted a group the MBTA deemed to be held in general disrepute by the public.

At points in its briefs to us, AFDI appears to argue that the MBTA should construe its guideline in that very way. AFDI contends in these passages that its first and third advertisements could not reasonably be understood to be demeaning or disparaging because

they merely criticize terrorists. But in its rebuttal at oral argument, AFDI seized on the response to questions by the MBTA's counsel. AFDI argued that the guideline would be suspect if it did not protect certain groups that the MBTA determined were beyond the pale. And AFDI did so with good reason.

If the MBTA counsel's response to hypotheticals about the MBTA's authority were in fact the MBTA's view, and it had acted accordingly, then there would be a substantial argument that the guideline would be suspect under the Supreme Court's opinion in R.A.V. v. City of St. Paul, Minn., 505 U.S. 377 (1992). In R.A.V., the Supreme Court invalidated a municipal ordinance that prohibited "plac[ing] on public or private property a symbol, object, appellation, characterization or graffiti" amounting to fighting words "on the basis of race, color, creed, religion or gender." Id. at 380-81, 391; see also Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) (defining fighting words).

Even though fighting words have no "claim upon the First Amendment," the Supreme Court held the ordinance unconstitutional. R.A.V., 505 U.S. at 386, 391. The Court concluded that the ordinance went "beyond mere content discrimination, to actual viewpoint discrimination," and thus violated the First Amendment. Id. at 391. The ordinance did so, the Court explained, because it prohibited only "those symbols that communicate a message of hostility based on" one of the ordinance's enumerated characteristics: "race, color, creed, religion or gender," thereby leaving similarly hostile messages focused on other characteristics unrestricted. Id. at 393.

And while R.A.V. involved a direct restriction on private speech and not the regulation of speech in a nonpublic forum, Ridley noted the potential R.A.V. problem with a demeaning or disparaging guideline that would protect certain groups or individuals but not others, notwithstanding that the MBTA's advertising program was a nonpublic forum. See Ridley, 390 F.3d at 90-91 n.11. Precedent from outside our circuit, moreover, has relied on R.A.V. to invalidate a transit authority's demeaning or disparaging advertising guideline that explicitly protected some groups but not others. See Am. Freedom Def. Initiative v. Metro. Transp. Auth., 880 F. Supp. 2d 456, 474-78 (S.D.N.Y. 2012).

Furthermore, accepting the MBTA's counsel's logic would raise concerns that the guideline was impermissibly vague. The test for whether speech falls within the guideline's ambit would then no longer be defined only by the meaning of the words "disparaging" and "demeaning." Instead, the MBTA would have reserved to itself the discretion to decide in each case whether "prevailing community standards" would deem the targeted individual or group worthy of the guideline's protection. That would raise the concern that the MBTA had reserved to itself discretion to pick and choose between favored and disfavored views.

But we are not bound to accept counsel's guess about how the agency would apply the guideline in hypothetical cases. And there is no evidence in the record that the MBTA in fact construes the guideline as counsel suggested that it might. Nor does the text of the guideline compel that hypothetical construction. We thus decline to attribute such a constitutionally

suspect interpretation of the regulation to the MBTA. See Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988) (explaining that, where possible, if "an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems"); see also Markadonatos v. Vill. of Woodridge, 760 F.3d 545, 550 (7th Cir. 2014) (noting that "the doctrine of constitutional avoidance functions to minimize friction between courts and legislatures (including state and municipal legislatures)").

We instead conclude, as we did in Ridley, that "[t]he current regulation simply prohibits the use of advertisements that 'demean[] or disparage[] an individual or group of individuals,' without listing any particular protected groups," 390 F.3d at 90-91, and thus without suggesting that any individual or group may be so disparaged or demeaned. Under Ridley, therefore, "the guideline is just a ground rule." Id. at 91. As such, the guideline does not attempt to give one group an advantage over another in the marketplace of ideas. We thus follow our prior holding. The MBTA's guideline prohibiting advertisements containing material that "demeans or disparages" individuals or groups is not invalid on its face.

V.

That brings us to the final issue on appeal: the constitutionality of the MBTA's actual application of its demeaning or disparaging guideline to AFDI's ads. For even though the MBTA's advertising platform is a nonpublic forum and the guideline at issue is facially valid, it could still be the case that the MBTA violated

the First Amendment if the rejection of AFDI's submissions were either viewpoint-based or "unreasonable in light of the purpose of the forum." Id. at 90.

A.

According to AFDI, the MBTA did engage in viewpoint discrimination in turning down AFDI's first and third advertisements. AFDI chiefly advances that contention by asserting that the ads the MBTA rejected are no more demeaning or disparaging than the Committee for Peace advertisement (which the MBTA ran). AFDI argues that its rejected submissions differ from the Committee for Peace advertisement only in the side of the Israeli-Palestinian conflict that they favor. And thus, AFDI contends, viewpoint discrimination necessarily explains the MBTA's different treatment of those ads.

But the record shows otherwise. The MBTA determined that the text of AFDI's first and third ads did use language that assigned a demeaning or disparaging label to an individual or group. But the MBTA also determined that the text of the Committee for Peace advertisement -- which used no such directly targeted, negative language at all -- did not. And Ridley supports the conclusion that the MBTA's reliance on such a linguistic distinction does not constitute viewpoint discrimination.

In Ridley, we considered the MBTA's treatment of three advertisements submitted by a representative of the Church with the Good News, a religious group. See 390 F.3d at 73-75. The MBTA accepted the first two. Id. at 73-74. The MBTA found that the third, however,

violated the demeaning or disparaging guideline. Id. at 74-75. The MBTA's reason for its decision was similar to the reason the MBTA relies on here. See id.

The religious group's first advertisement, which the MBTA accepted, read as follows:

> Christians in the Bible never observed 'Christmas' neither did they believe in lies about Santa Claus, flying reindeer elves and drunken parties. How can you honor Jesus with lies? prophet-andre.com.

Id. at 73.

Good News then made a second submission. The MBTA initially rejected it, but then ultimately accepted after promulgating new guidelines. Id. at 74. This second advertisement stated:

> The Bible says in Rev 12:9 'And Satan which deceiveth the whole world.' Yes, Satan set up over a thousand false religions in the world causing wars, racism and hatred in the world. There is only one true religion. All the rest are false. www.prophet-andre.com."

Id.

Good News then submitted a final advertisement. Id. The MBTA ultimately rejected this one. Id. at 74-75. That final advertisement read as follows:

> The Bible teaches that there is only one religion. There are no scriptures in the Bible that teach that God set up the Catholic religion, the Baptist religion, the Pentecostal religion, the Jehovah's Witness religion or the Muslim religion. These

> religions are false. The Bible says in Revelation 9:12, 'And Satan, which deceiveth the whole world.' The whole world is going to hell if they do not turn from their ungodly ways. God sent Prophet Andre into this world to teach the people the Truth. www.prophetandre.com.

Id.

We upheld the MBTA's rejection of the third advertisement against a charge of viewpoint discrimination. See id. at 92. We explained that the MBTA had not based its judgment to refuse to run this ad -- and to agree to run the others -- on a preference for one view over another. See id. Instead, we concluded that the MBTA based its decision on the relative directness and harshness of the hostile characterizations with which the respective submissions targeted individuals or groups. See id.

The first advertisement merely "questioned the waywardness of today's Christians," and the second "issued a condemnation of other religions" generally. Id. But the third submission, we explained, "went a vitriolic further step." Id. Specifically, the third Good News advertisement "directly demeaned a number of religions" -- many of which "are likely to be the shared religions of a number of the MBTA riders" -- "by calling them false" and, more pointedly, telling their respective adherents that "they are 'going to hell.'" Id.

Here, too, the MBTA concluded that the AFDI's first and third ads went a "vitriolic further step." Neither advertisement goes quite so far as the last Good News submission in calling out its intended targets by name. But both of AFDI's rejected versions do plainly equate

with "the savage" those who are Israel's enemy in "war" and who practice "jihad" or "violent jihad." In that respect, AFDI's rejected advertisements are more targeted than either of the two accepted Good News ads. And, of course, to describe an opponent as not only uncivilized but savage is to disparage or demean that opponent in terms not unlike those used in the third Good News ad. See Oxford English Dictionary (3d ed. 2012) (defining the term "savage" as meaning, among other things, "[a] person living in a wild state; a member of a people regarded as primitive and uncivilized" and "a cruel and brutal person"); American Heritage Dictionary of the English Language (5th ed. 2014) (defining "savage" as "a member of a people regarded as primitive, uncivilized, brutal, or fierce").

AFDI responds as follows. It notes that numerous legal definitions of the Committee for Peace advertisement's operative term -- "refugee" -- require that one either have been or will be persecuted in order to fall within its ambit. See, e.g., 8 U.S.C. § 1101(a)(42) (defining "refugee" as one who is unable to return to one's national homeland "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion"); United Nations Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137, 152 (similar). AFDI argues that this advertisement thus in effect labels Israel a persecutor. And for that reason, AFDI argues, this advertisement is as disparaging or demeaning as AFDI's rejected submissions.

But the Committee for Peace advertisement, in calling Palestinians "refugees," does not label anyone

as a persecutor. Neither the word "persecutor" nor any reasonably synonymous hostile label is used at all. And the fact that the advertisement calls Palestinians "refugees" -- however offensive or inaccurate a supporter of Israel might find the use of that label -- does not change that simple fact. Thus, the MBTA has identified a distinction that is unrelated to the viewpoint the ads express and instead relates directly to the guideline's purpose: to screen out content that is demeaning or disparaging.

Consistent with the conclusion that this linguistic focus is not viewpoint based, we note that the MBTA did accept the second AFDI advertisement. The MBTA did so even though that second AFDI ad, like AFDI's first and third ones, plainly conveyed a viewpoint distinct from the one that is conveyed by the Committee for Peace advertisement. And the MBTA did so because it determined, on the basis of the language used rather than the view advanced, that the second AFDI advertisement lacked the demeaning or disparaging language that the guideline prohibits. For although the second AFDI advertisement is no doubt critical of certain persons or groups, it used the epithet "savage" only to characterize the nature of certain acts, not to describe the perpetrators of those acts. That is, the second AFDI advertisement, though critical, did not directly denigrate anyone.

In this respect, the MBTA consistently applied the guideline in each of these cases. The MBTA focused each time on the directness of the hostile language used to describe groups or individuals. And the MBTA maintained that focus in applying the guideline both to messages offered in support of Israel and to one

advanced to promote the Palestinian cause. Such consistent application is at odds with the contention that the MBTA engaged in viewpoint discrimination.[5] See Ridley, 390 F.3d at 82 ("The bedrock principle of viewpoint neutrality demands that the state not suppress speech where the real rationale for the restriction is disagreement with the underlying ideology or perspective that the speech expresses."); see also McGuire v. Reilly, 386 F.3d 45, 62 (1st Cir. 2004) ("The essence of a viewpoint discrimination claim is that the government has preferred the message of one speaker over another.").

AFDI does argue that its second advertisement is not nearly as effective at conveying AFDI's message as the two rejected advertisements would have been. And that may well be true. But as we have explained, there is no evidence that the MBTA barred AFDI's first and third advertisements because of the viewpoint they expressed. Thus, the fact that the application of the demeaning or disparaging guideline prevented AFDI from putting forth its message through a more effective means does not show that the MBTA wished to disfavor AFDI's point of view. That consequence is merely an

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[5] We note in this regard that the MBTA accepted not only AFDI's second version of its ad, but also an advertisement from a "pro-Israel" organization called "StandWithUs.com" that purports to directly rebut the Committee for Peace advertisement. The Stand With Us advertisement contains three maps of the Middle East, the first depicting "3000 years ago," the second 1920, and the third "today." The maps visually contrast the sizes of, on the one hand, the "Ancient Jewish Kingdom" of 3000 years ago and the "Jewish Homeland" of 1920 with, on the other, the "State of Israel," the latter of which is depicted as being far smaller than either of the former.

incidental effect of the MBTA's application of the general ground rule against the use of demeaning or disparaging language to individual or groups. And because, as Ridley held, that ground rule does not itself favor any particular viewpoint, neither does its neutral application. See Ridley, 390 F.3d at 82 ("The essence of viewpoint discrimination is not that the government incidentally prevents certain viewpoints from being heard in the course of suppressing certain general topics of speech, rather, it is a governmental intent to intervene in a way that prefers one particular viewpoint in speech over other perspectives on the same topic.").

For these reasons, we conclude that, although the MBTA accepted the Committee for Peace advertisement, the MBTA did not engage in viewpoint discrimination in rejecting AFDI's first and third submissions.

B.

That leaves one last issue. AFDI argues that the MBTA failed to apply the demeaning or disparaging guideline in a way that is "reasonable in light of the purpose served by the forum." Id. at 93 (quoting Cornelius, 473 U.S. at 806). That is because, AFDI contends, the distinctions the MBTA drew between AFDI's advertisements -- which, AFDI says, turned simply on whether the term "savage" was used as a noun or an adjective -- do not reasonably advance any purpose that the MBTA's guideline may legitimately serve.

To support that argument, AFDI once again focuses (at least in part) on the Committee for Peace

advertisement. AFDI points out that even though that ad provoked strongly negative reactions from many members of the public, the MBTA still permitted the ad to run. By contrast, AFDI argues, the MBTA rejected the first and third AFDI ads. The MBTA did so, AFDI argues, on the basis of unreasonable speculation -- namely, that the shift from the use of "savage" as an adjective in AFDI's second ad to the use of "savage" as a noun in the first and third versions would provoke concern among the MBTA's customers. AFDI contends that noun/adjective distinction is "patently unreasonable" given that the MBTA's stated rationale for the demeaning or disparaging guideline relates to the interest in promoting ridership. In AFDI's view, it is simply not reasonable to believe that riders would be more likely to be troubled by the message conveyed by the two rejected AFDI ads than by either the accepted AFDI ad or the Committee for Peace ad.

In evaluating that argument, we start with the fact that Ridley held that the disparaging or demeaning guideline does reasonably serve the purposes of the transit authority in establishing the nonpublic forum. Id. at 93. The guideline does so, Ridley explained, because a transit authority may reasonably conclude that disparaging or demeaning advertisements are especially incompatible with the mission of operating buses, trains, and transit stations for the benefit of the public. Id. The harshness and targeted nature of ads containing such language makes them different -- and, at least one could reasonably conclude, more concerning -- than other ads. And that includes ads that do not contain such language but may themselves provoke intense disagreement or even cause offense. See id. at 92-93.

Thus, the question we must focus on in conducting our reasonableness review is relatively narrow. We must determine whether the MBTA acted reasonably in concluding that the rejected advertisements (and not the accepted ones) fall within that especially denominated category of prohibited advertisements -- a category, we emphasize, that cuts across all advertisements, no matter the viewpoint they express.

In evaluating the reasonableness of the MBTA's decision that AFDI's first and third submissions fall within that prohibited category (and that AFDI's second version and the Committee for Peace ad do not), we are mindful that "there can be more than one reasonable decision, and an action need not be the most reasonable decision possible in order to be reasonable." Id. at 90. And given this relatively generous standard, we conclude that, although the issue is close, the MBTA has reasonably applied the guideline in a manner that advances its purpose.

In rejecting AFDI's as-applied viewpoint discrimination challenge, we explained why the Committee for Peace ad differs from the first and third AFDI ads along the dimension that the guideline makes relevant. The Committee for Peace ad makes no use of language that directly ascribes a hostile characterization to anyone. Its criticism is implicit and indirect, even if some might infer that the hostile term "persecutor" was intended. By contrast, AFDI's first and third advertisements, by using the word "savage" to describe certain of Israel's enemies, went "a vitriolic further step." See id. at 93. Thus, the MBTA could reasonably conclude that the first and third ads were

disparaging and demeaning while the Committee for Peace ad was not.

That same distinction also explains why the MBTA could reasonably distinguish the use of "savage" in the first and third AFDI ads from the use of "savage" in the second AFDI ad. That second ad simply did not use the directly disparaging or demeaning noun "savage" to describe one side of a debate. The two rejected ads, by contrast, did. Those ads used the word "savage" to describe not just certain types of actions, as the second AFDI ad did in describing certain acts as "savage." Those ads instead used the word "savage" to characterize the nature of those who are responsible for those acts -- namely those engaged in a war against Israel.

And while neither of AFDI's rejected submissions directly states that those with whom Israel is at "war" are "savages," we cannot say the ads' subtlety in that one regard makes the MBTA's decision to reject them unreasonable. In context, the target of the opprobrium was focused. The ads aimed at those who practice jihad or violent jihad in the "war" against Israel, a focus that reasonably led the MBTA to identify the ads as targeted at that country's Muslim and Palestinian enemies in particular. By contrast, the Committee for Peace ad did not use any direct, vitriolic descriptor, while the second AFDI ad used one only to describe acts and not any individual or group. Thus, just as we found in Ridley that the MBTA could reasonably discern material distinctions among the three Good News ads in the stridency and targeted nature of the language used, see id. at 92-93, so, too, here.

Whether these linguistic and grammatical distinctions reflect distinctions in substance that would be meaningful to the public is, of course, hard to know. Nor is it clear that these distinctions actually reflect differences in the messages that the advertisements' sponsors intended to communicate. Nor is it even clear that the MBTA has properly identified the intended object of the harsh language AFDI used in the rejected ads.

But an administrative rule of this sort is, in application, sure to present close cases about its parameters. And such a rule is sure as well to require in some cases some careful parsing of the language and meaning of the speech the rule restricts. Our review, however, is only for reasonableness. We thus decline AFDI's invitation, in such a borderline case, to undertake such review in a manner that would effectively transfer to the federal judiciary the detailed and case-specific application of a facially constitutional public transit authority advertising guideline. We are especially disinclined to do so when reviewing a denial of a preliminary injunction, given that AFDI may still press its constitutional challenge on a more developed record. Cf. Syndicato Puertoriqueño, 699 F.3d at 10 (plaintiffs seeking preliminary injunction must "establish a 'strong likelihood' that they will ultimately prevail" on the merits (quoting Respect Me. PAC, 622 F.3d at 15)).

We thus conclude that the application of the guideline to the advertisements at issue here was not just viewpoint neutral. We also conclude that the application of the guideline was reasonable in light of

the valid purposes Ridley held that the guideline serves.[6]

VI.

For the foregoing reasons, the judgments of the District Court in MBTA I and MBTA II are **affirmed**.

–Opinion Concurring In Part And Dissenting In Part Follows–

STAHL, Circuit Judge, concurring in part and dissenting in part. I concur in part because I recognize that Ridley v. Massachusetts Bay Transportation Authority, 390 F.3d 65 (1st Cir. 2004), controls Parts III and IV of the majority's analysis. I respect that the law of the circuit doctrine dictates the outcome of the forum question and the facial validity of the guideline at issue. I write separately to express my opinion that Ridley was wrongly decided. By opening

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[6] We note that the District Court's main reason for denying preliminary injunctive relief as to AFDI's third ad was that AFDI had supposedly acted in bad faith and engaged in gamesmanship by altering the second advertisement and then submitting the third version. We need not resolve whether this ground for denying the requested relief was permissible, because we affirm the District Court on other grounds. But we do note that the MBTA had established a mechanism for the submission of revised advertisements that had been previously rejected. In submitting the third advertisement, therefore, AFDI was using that process to probe the parameters of the government's speech restriction in order to vindicate its interest in running the most effective advertisement possible. And, in response, the MBTA did not conclude that AFDI had forfeited its right to receive further guidance. Instead, the MBTA applied the guideline once again.

up its advertising facilities to controversial topics of the gravest political issues of our day, the MBTA has created a designated public forum for speech, not a nonpublic forum. I dissent from Part V of the majority opinion because even under the more forgiving standard mandated by Ridley, the MBTA engaged in viewpoint discrimination and acted unreasonably when it rejected AFDI's third advertisement.

It goes without saying that discussions of the Israeli-Palestinian conflict and Israel's role in the Middle East have become ever more contentious, heated, and often vitriolic. In enacting the Bill of Rights, the framers recognized that vigorous debate on matters of public concern was necessary and desirable in a functioning Republic. The First Amendment not only protects each speaker's ability to offer his or her perspective on fractious issues without fear of government muzzling, but affirmatively encourages such robust argument in the public sphere. E.g., Red Lion Broad. Co. v. F.C.C., 395 U.S. 367, 390 (1969) ("It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas . . . rather than to countenance monopolization of that market . . . ."). Indeed, "[s]peech on matters of public concern . . . is at the heart of the First Amendment's protection." Snyder v. Phelps, 131 S. Ct. 1207, 1215 (2011) (internal quotation marks and citations omitted).

Thus, from the beginning, the government has been limited in its ability to restrict speech in traditional public fora such as sidewalks and parks, which serve a role as "sites for discussion and debate" and "venues for the exchange of ideas." McCullen v. Coakley, 134 S. Ct. 2518, 2529 (2014). That said, the First Amendment

does not require governmental entities to allow all matter and manner of speech on government-owned property. E.g., Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 678 (1992). For example, in Lehman v. City of Shaker Heights, a plurality of the Supreme Court concluded that a public transit system which opened itself up to commercial advertisements had created a nonpublic forum in which it could choose not to accept a political candidate's campaign advertising. 418 U.S. 298, 304 (1974). Lehman noted that the Shaker Heights transit system's advertising policy explicitly forbade "political advertising." Id. at 299. The system consistently enforced that policy: in twenty-six years of operation, the transit system had accepted commercial advertising, advertising from churches, and advertising from "civic and public-service oriented groups," but had never "accepted or permitted any political or public issue advertising." Id. at 300–01.

Following Lehman, some of our sister circuits have deemed public transit advertising facilities nonpublic fora where the transit authority's policy limits advertising facilities to commercial speech, and/or the authority had consistently rejected non-commercial submissions that addressed political or civic issues. Am. Freedom Def. Initiative v. Suburban Mobility Auth. for Reg'l Transp. (SMART), 698 F.3d 885, 890–92 (6th Cir. 2012) (finding that Michigan public bus system established a nonpublic forum where SMART's written policy "banned political advertisements, speech that is the hallmark of a public forum" and "restrict[ed] the type of content that nonpolitical advertisers [could] display"); Children of the Rosary v. City of Phoenix, 154 F.3d 972, 978 (9th Cir. 1998) (White, J.) (finding a nonpublic forum where the city "consistently

promulgate[d] and enforce[d] policies restricting advertising on its buses to commercial advertising"); Lebron v. Nat'l R.R. Passenger Corp. (Amtrak), 69 F.3d 650, 656 (2d Cir. 1995) (holding that a large billboard in New York City's Pennsylvania Station constituted a nonpublic forum where Amtrak had "never opened [the advertising facility] for anything except purely commercial advertising").

By contrast, other circuits have considered controversial advertisements in the context of public transportation systems and rightly concluded that when public transit facilities open themselves up to a variety of non-commercial speech, those facilities become designated public fora for members of the public to opine, discuss, and comment upon the civic and political issues of the day. United Food & Commercial Workers Union, Local 1099 v. Sw. Ohio Reg'l Transit Auth., 163 F.3d 341, 355 (6th Cir. 1998); Christ's Bride Ministries, Inc. v. Se. Pa. Transp. Auth., 148 F.3d 242, 252 (3d Cir. 1998); N.Y. Magazine v. Metro. Transp. Auth., 136 F.3d 123, 130 (2d Cir. 1998); Planned Parenthood Ass'n/Chi. Area v. Chi. Transit Auth., 767 F.2d 1225, 1232-33 (7th Cir. 1985); Lebron v. Wash. Metro. Area Transit Auth., 749 F.2d 893, 896 (D.C. Cir. 1984); see also DiLoreto v. Downey Unified Sch. Dist. Bd. of Educ., 196 F.3d 958, 966 (9th Cir. 1999) (observing that "where the government historically has accepted a wide variety of advertising on commercial and non-commercial subjects, courts have found that advertising programs on public property were public fora"). Thus, in United Food, a Sixth Circuit case, the state agency operating transit service in Cincinnati (known by the acronym SORTA) sold advertising space on its buses and bus shelters.

163 F.3d at 346. The agency's advertising policy explicitly excluded submissions with "controversial public issues that may adversely affect SORTA's ability to attract and maintain ridership" and required all posted advertisements to be "aesthetically pleasing." Id. SORTA accepted "a wide variety of advertisements . . . including public-service, public-issue, and political advertisements in addition to traditional commercial advertisements," id., but rejected the plaintiff's pro-union advertisement as "aesthetically unpleasant and controversial" in violation of the policy, id. at 347. While acknowledging that SORTA had consistently applied its policy in the past, id. at 353, the Sixth Circuit held that SORTA nevertheless had designated its advertising space a public forum by "accepting a wide array of political and public-issue speech," id. at 355. "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 [Supreme Court] in Lehman recognized as inconsistent with operating the property solely as a commercial venue." Id. (citing Lehman, 418 U.S. at 303–04). The Second Circuit similarly observed in New York Magazine, "[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." 136 F.3d at 130; see also Planned Parenthood Ass'n/Chi. Area, 767 F.2d at 1233 (holding that Chicago transit advertising facilities was a public forum and noting that where defendant "has accepted political and public-issue advertising. . . . Lehman is not controlling"); but see Seattle Mideast Awareness

Campaign v. King County ("SeaMAC"), ___ F.3d ___, Nos. 11-35914, 11-35931, 2015 WL 1219330, at *6 (9th Cir. Mar. 18, 2015) (holding, over dissent, that bus advertising program created a limited public forum even where it accepted political speech).

The majority opines that Ridley had the opportunity to consider almost all of these cases and ultimately chose to conclude that each was "distinguishable on its facts." Ridley, 390 F.3d at 80. Ridley also proclaimed that the MBTA's advertising program was "indistinguishable" from the one described in Lehman, id. at 78, apparently ignoring the fact that the Shaker Heights advertising program in Lehman had never accepted any political or public issue advertising, 418 U.S. at 300–01; see also Lehman v. City of Shaker Heights, 296 N.E.2d 683, 684 (Ohio 1973) (noting that the city "has not opened up its transit vehicles to any exchange or presentation of ideas, political or otherwise").

I am in disagreement with the Ridley decision, and would have held that the MBTA, by opening its advertising facilities to all forms of public discourse, created a designated public forum akin to the fora discussed in United Food, Christ's Bride, New York Magazine, and Planned Parenthood Association/ Chicago Area, and distinguishable from the virtually commercial-only fora addressed in Lehman, Children of the Rosary, and Lebron v. Amtrak. Instead, relying on the MBTA's self-serving declarations, Ridley concluded that the authority's policy evidenced an intent "not to open its advertising space to all persons and organizations for public dissemination of their views on all topics without limitation" and that its

enforcement of the guidelines "further show[ed] that it intended not to create such a forum." 390 F.3d at 78.

In order to create a designated public forum, the governmental entity need not accept every speaker and all topics. Indeed, a forum can become public where the government by its actions has designated the forum "for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects" in order to "open [the non-traditional public forum] to assembly and debate." Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 802 (1985) (emphasis added); see also Int'l Soc'y for Krishna Consciousness, 505 U.S. at 678 (describing a designated public forum, "whether of a limited or unlimited character," as "property that the State has opened up for expressive activity by part or all of the public").

An agency or governmental entity, like the MBTA, may create a designated public forum even where it does not allow certain categories of speech to participate in its advertising program, such as advertisements for mature video games or alcoholic products. Cf. N.Y. Magazine, 136 F.3d at 129–30. A guidelines' ban on political campaign ads does not make the advertising facilities a nonpublic forum if the governmental entity affirmatively opens up its facilities to advertisements concerning civic or political issues unrelated to a particular campaign season. Here, as the Ridley dissent cogently noted, the MBTA made and continues to make its facilities the "modern analogue" to traditional public fora. Ridley v. Mass. Bay Transp. Auth., 390 F.3d 65, 108 (1st Cir. 2004) (Torruella, J., concurring in part and dissenting in part). Indeed, the

Committee for Peace submitted its advertisement to the transit authority because the availability of advertising in a system used by millions of people each day provides a singular opportunity to sway public opinion about the Israeli-Palestinian conflict. See id. at 109 ("The MBTA's advertising system is indeed a powerful tool with which to influence public opinion, one which should be opened to the crucible of competing viewpoints to the largest extent possible.").

The Ridley dissent highlights a weakness in the current forum analysis framework, in that it can allow the government's own self-serving statements about its intended use for a public place to outweigh the forum's inherent attributes. As Justice Kennedy has observed in the past, if "public forum jurisprudence is to retain vitality, we must recognize that certain objective characteristics of Government property and its customary use by the public may control the case." United States v. Kokinda, 497 U.S. 720, 737–38 (1990) (Kennedy, J., concurring in the judgment). By relying primarily on "the government's defined purpose for the property" rather than on "the actual, physical characteristics and uses of the property," the mode of forum analysis embraced in Ridley "leaves the government with almost unlimited authority to restrict speech on its property by doing nothing more than articulating a nonspeech-related purpose for the area." Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 695 (1992) (Kennedy, J., concurring in the judgments). Building a constitutional framework around a category as rigid as "traditional public forum" leaves courts ill-equipped to protect First Amendment expression "in times of fast-changing technology and increasing insularity." Id. at 697–98 (observing that

"our failure to recognize the possibility that new types of government property may be appropriate forums for speech will lead to a serious curtailment of our expressive activity").

Ridley exemplifies Justice Kennedy's concerns, in that its analysis relied heavily on the MBTA's attempts to control speech on its property through its advertising guidelines, 390 F.3d at 76–82, but only cursorily examined the forum's characteristics and compatibility with expressive activity, id. at 77. By doing so, the Ridley majority ignored the indisputable fact that, like an airport, a public transit system is "one of the few government-owned spaces where many persons have extensive contact with other members of the public." Int'l Soc'y for Krishna Consciousness, 505 U.S. at 698 (Kennedy, J., concurring in the judgments). Such unique suitability for open discourse between citizens is indicative of a public, rather than a private, forum. Cf. McCullen, 134 S. Ct. at 2529 (observing that public streets "remain one of the few places where a speaker can be confident that he is not simply preaching to the choir" because members of the public cannot avoid "uncomfortable message[s]," which the First Amendment regards as "a virtue, not a vice").

Nevertheless, recognizing that Ridley controls the forum analysis in this appeal, I concur with Part III of the majority's opinion. Bound by the law of the circuit, I also join Part IV of the majority's opinion, acknowledging that the "demeaning and disparaging" guideline at issue here contains the same language as the guideline deemed facially valid by Ridley, even though I agree with the Ridley dissent that the guideline and its invocation of "prevailing community

standards" permits "subjective, ad hoc determinations about speech that appears controversial because it endorses a minority viewpoint." Ridley, 390 at 98 (Torruella, J., concurring in part and dissenting in part); cf. SeaMAC, 2015 WL 1219330, at *8 (observing that a transit authority's exclusion of advertisements it deems "objectionable under contemporary community standards," standing alone, "would be too vague and subjective to be constitutionally applied"); Planned Parenthood Ass'n/Chi. Area, 767 F.2d at 1230 (questioning whether "a regulation of speech that has as its touchstone a government official's subjective view that the speech is 'controversial' could ever pass constitutional muster").

But I depart with the majority opinion at Part V, because even if the advertising facilities at issue constituted a nonpublic forum, the MBTA's rejection of Advertisement III was neither viewpoint neutral nor reasonable. In particular, I disagree with the majority that the Committee for Peace advertisement "does not label anyone as a persecutor." To the contrary, the advertisement all but declares that the Israeli nation-state is the persecuting entity responsible for the supposed Palestinian refugee crisis. The ad depicts four maps, labeled "Palestinian Loss of Land -- 1946 to 2010." The first map, captioned "1946," depicts part of the region then controlled by the British under the British Mandate for Palestine, labeling that area "Palestine." The next three maps place the word "Israel" in the same font and in the same place as "Palestine" is located in the first map. Over the course of the next three maps, the amount of land labeled "Israel" increases as the green section -- denoted in the key as representing "Palestinian land" -- shrinks. If

Israel, and by extension the Jewish people, are not fingered as persecutors by the ad, who, exactly, is the ad targeting as responsible for displacing 4.7 million Palestinians? While the majority brushes off the criticism as merely "implicit and indirect," a reasonable rider of the MBTA would find the message quite clear: Israelis took over Palestinian land, thereby displacing Palestinians and creating a refugee crisis in the millions. The characterization is not only inaccurate[7] but arguably demeaning and disparaging of the Israeli people in violation of the MBTA's own guideline. While Committee for Peace might not use the term "persecutor," it is a short inferential step to reach that interpretation, in the same way that the viewer of AFDI's first submitted advertisement must juxtapose "civilized man" and "savage," and then infer from AFDI's call to "support Israel" and "defeat jihad" that

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[7] I note that this number is inaccurate and misleading. The United Nations Relief and Works Agency for Palestinian Refugees in the Near East (UNRWA) estimates that there were 750,000 individuals designated as refugees in 1950 as a result of the conflict between 1946 and 1948. The 4.7 million number and similar estimates denote the descendants of these refugees who are currently eligible to register for UNRWA services. See *Palestine Refugees*, UNITED NATIONS RELIEF & WORKS AGENCY FOR PALESTINIAN REFUGEES IN THE NEAR EAST, http://www.unrwa.org/palestine-refugees, (last visited Mar. 24, 2015) (estimating that "[t]oday, some 5 million Palestine refugees are eligible for UNRWA services"); UNITED NATIONS RELIEF & WORKS AGENCY FOR PALESTINIAN REFUGEES IN THE NEAR EAST, CONSOLIDATED ELIGIBILITY AND REGISTRATION INSTRUCTIONS, at 3, available at http://unispal.un.org/pdfs/UNRWA-CERi.pdf (last visited Mar. 24, 2015) (setting out criteria for eligibility to register). A rider of the MBTA viewing the Committee for Peace Ad may come away with the erroneous impression that the proclamation of the nation-state of Israel in 1948 displaced 4.7 million people.

the ad is setting up Israel as the civilized man, and the jihadist as the savage. The reader must take an additional inferential leap to conclude, as the MBTA does, that "savage" refers not just to jihadis but to Muslims generally. By accepting the Committee for Peace advertisement but not AFDI's submission, the MBTA allowed its riders access to one perspective on the Israeli-Palestinian conflict, while denying them exposure to AFDI's perspective.[8] In contrast, the Ninth

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[8] Notably, multiple district courts have awarded preliminary injunctive relief in similar factual circumstances, albeit under the strict scrutiny standard dictated by finding that a transit advertising program constitutes a designated public forum. Two of these cases involved the exact AFDI ad at issue here. Am. Freedom Def. Initiative v. Wash. Metro. Area Trans. Auth., 898 F. Supp. 2d 73, 83 (D.D.C. 2012) (finding a likelihood of success on the merits where WMATA failed to use the least restrictive means of assuring public safety, which might be threatened by displaying AFDI's "support the civilized man" ad in the subway system); Am. Freedom Def. Initiative v. Metro. Transp. Auth., 880 F. Supp. 2d 456, 476–77 (S.D.N.Y. 2012) (finding the MTA's guideline barring advertisements deemed "demeaning on the basis of . . . religion" -- used to justify rejection of AFDI's "civilized man" submission -- inconsistent with the First Amendment). The Eastern District of Michigan rejected a city's refusal to accept an anti-Israel ad it deemed violative of the transit authority's guideline that all advertisements be "in good taste" and not "defame[] or . . . hold up to scorn or ridicule a person or group of persons." Coleman v. Ann Arbor Transp. Auth., 904 F. Supp. 2d 670, 697 (E.D. Mich. 2012). Most recently, the Eastern District of Pennsylvania granted AFDI's motion for a preliminary injunction compelling display of an advertisement demanding an end to "all [U.S.] aid to Islamic countries" under the slogan "Islamic Jew-Hatred: It's in the Quran" and next to a picture of Adolf Hitler and "his staunchest ally, the leader of the Muslim world, Haj Amin Al-Husseini." Am. Freedom Def. Initiative ("AFDI") v. Se. Pa. Transp. Auth. ("SEPTA"), -- F. Supp. 3d --, 2015 WL 1065391, at *1 (E.D. Pa.

Circuit recently found no evidence of viewpoint discrimination where Seattle's transit program withdrew acceptance of an anti-Israel bus poster "as part of a single, blanket decision to reject all submitted ads on the Israeli-Palestinian conflict." SeaMAC, 2015 WL 1219330, at *10. The Seattle authority's advertising policy prohibited advertising which "may foreseeably result in harm to, disruption of, or interference with the transportation system." Id. at *9. Noting that the transit system had received numerous credible threats in response to a news report that it had approved an ad criticizing "Israeli War Crimes," the Ninth Circuit concluded that the system reasonably applied its policy by "simultaneously reject[ing] all pending ads on the Israeli-Palestinian conflict" due to the "threat of disruption posed to the transit system" and rider safety. Id. The system then "revised its advertising policy to exclude all political or ideological ads from that point forward." Id. at *3.

In contrast, the MBTA's incongruous decision to post the Committee for Peace ad, but reject AFDI's submissions, at the very least, raises the specter of viewpoint discrimination by the MBTA. As we have said in the past, "grave damage is done if the government, in regulating access to public property, even appears to be discriminating in an

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Mar. 11, 2015). The court concluded that SEPTA's "anti-disparagement" guideline was a content-based and viewpoint discriminatory restriction on speech. Id. at *9–10. While noting that the guideline "was a principled attempt to limit hurtful, disparaging advertisements," the district court rightly concluded that such "laudable . . . aspirations do not, unfortunately, cure First Amendment violations." Id. at *12.

unconstitutional fashion." AIDS Action Comm. of Mass., Inc. v. Mass. Bay Transp. Auth., 42 F.3d 1, 12 (1st Cir. 1994). Admittedly, the MBTA here offers its "demeaning and disparaging" policy as a neutral justification for the difference in treatment -- something it could not do in AIDS Action. But even a neutral policy, if it creates "opportunities for discrimination. . . [that] have been borne out in practice," id., cannot survive under the First Amendment.

Furthermore, even if one accepts the majority's conclusion in Part V.A that the MBTA applied its prohibition on demeaning and disparaging advertisements in a viewpoint-neutral manner, I would reverse because the MBTA acted unreasonably in rejecting the third AFDI ad. This advertisement differed from the first advertisement in that it narrowed the scope of the condemned practice from "jihad" (a term which could refer broadly to an individual Muslim's internal spiritual struggle) to "violent jihad" (a phrase which can only be read to refer to terrorist practices roundly denounced as extremist by both Muslims and non-Muslims). This change clarified that the ad denounced not all adherents of jihad as "savages," but instead proponents of violent jihad.

The district court found that the "most reasonable interpretation" of AFDI's first ad, which referred to jihad generally, was that AFDI "oppose[s] acts of Islamic terrorism directed at Israel," but concluded that it was nevertheless "plausible for the [MBTA] to conclude that [AFDI's first ad] demeans or disparages Muslims or Palestinians." Am. Freedom Def. Initiative

v. Mass. Bay Transp. Auth., 989 F. Supp. 2d 182, 188–89 (D. Mass. 2013). I acknowledge that "an action need not be the most reasonable decision possible in order to be reasonable," Ridley, 390 F.3d at 90, and thus agree with the district court and the majority that the MBTA's denial of the first ad could be construed as reasonable and thus pass muster in a nonpublic forum.

Not so with the third advertisement, which explicitly advocates for the defeat of "violent jihad," and not "jihad" in general. The only reasonable reading of "savage" in the context of defeating "violent jihad" is a reference to a category of individuals engaged in an extremist campaign characterized by bloodshed and terror. The MBTA's acceptance of the second ad, which juxtaposed the civilized man with "those engaged in savage acts," demonstrates that the transit authority does not find it demeaning or disparaging to decry an individual's violent actions. Why then is it demeaning to describe that same individual, engaged in savage acts with violence as his goal, as a savage? The First Amendment protects and encourages full-throated debate, not only sanitized and diluted discussion.[9]

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[9] The majority does not reach the merits of the district court's finding that AFDI submitted the third ad in bad faith. See Am. Freedom Def. Initiative v. Mass. Bay Transp. Auth., No. 1:14-cv-10292-NMG, 2014 WL 1093138, at *3 (D. Mass. Mar. 17, 2014). However, the majority rightly notes that AFDI's submission of the third ad after the MBTA's acceptance of its second ad merely indicated AFDI's desire to "probe the parameters of the government's speech restriction in order to vindicate its interest in running the most effective advertisement possible." Ante, at 39 n.6. For those reasons, I would hold that the district court's bad

Perhaps the logical end to the MBTA's "demeaning or disparaging" guideline is to forbid condemnation of any individual or group, even if that individual or group's actions are generally regarded as worthy of denouncement. But at oral argument, MBTA's counsel stated that the guideline would not prohibit the posting of an advertisement maligning an individual that society commonly accepts as worthy of denigration, such as Adolf Hitler. Such an answer betrays the unreasonableness and viewpoint-based nature of the decision here.

As the Supreme Court has repeatedly emphasized,

> the fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection. For it is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas.

F.C.C. v. Pacifica Found., 438 U.S. 726, 745–46 (1978). This central tenet may appear to lead to "verbal tumult, discord, and even offensive utterance," but if "the air may at times seem filled with verbal cacophony[, that] is . . . not a sign of weakness but a strength." Cohen v. California, 403 U.S. 15, 25 (1971).

The MBTA seeks to maximize the financial returns it can receive from the use of its facilities for

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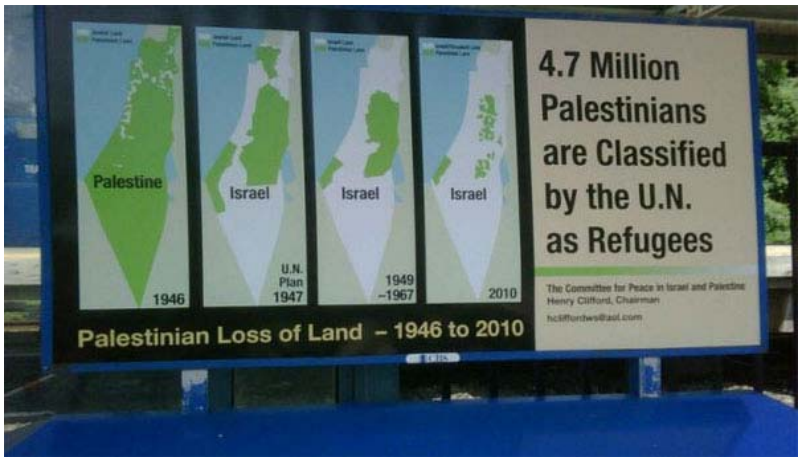
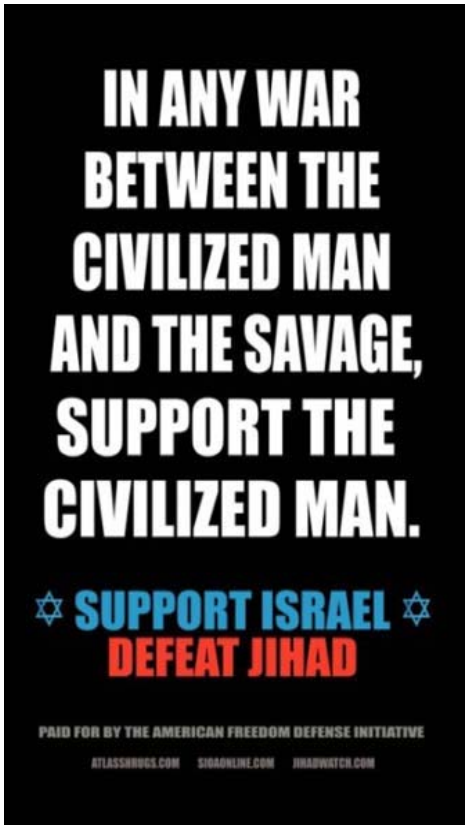
faith finding amounts to clear error, and thus does not bar equitable relief where AFDI demonstrated a likelihood of success on the merits of its First Amendment claim.

advertising. Having accepted virtually all advertisements with an eye toward filling its coffers, the MBTA's attempt to then limit submitted speech which some officials deem unacceptable is violative of the First Amendment. For the reasons stated above, I concur with Parts III and IV of the majority's analysis, and respectfully dissent from Part V.

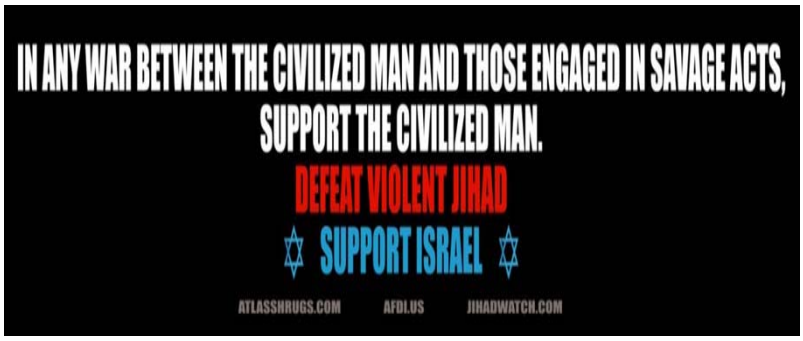
APPENDIX



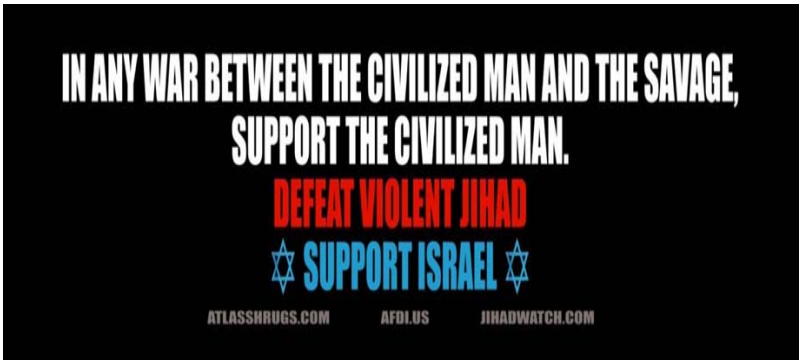
Committee for Peace ad



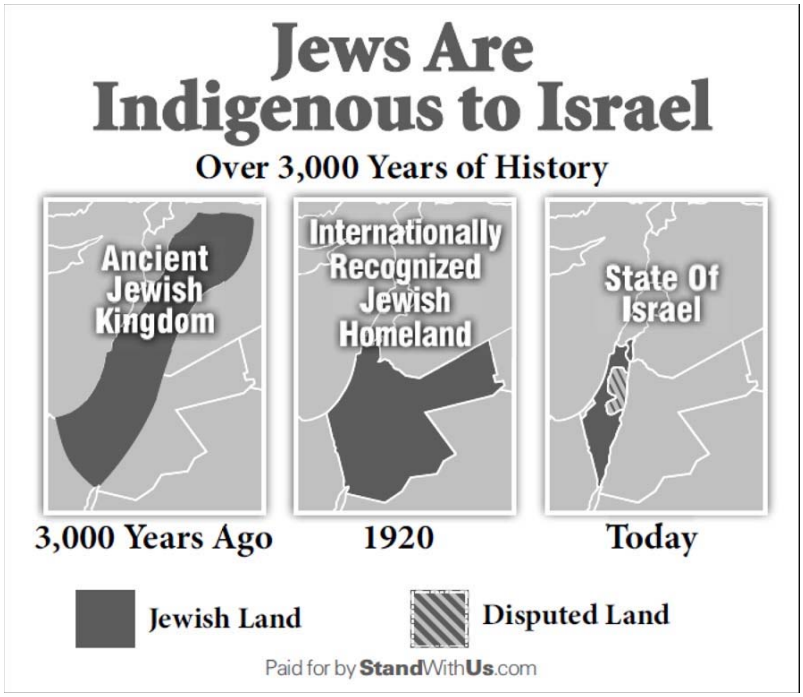
AFDI's first submission



AFDI's second submission



AFDI's third submission



StandWithUs.com ad

United States Court of Appeals
For the First Circuit

No. 14-1018
No. 14-1289

[Filed March 30, 2015]

AMERICAN FREEDOM DEFENSE INITIATIVE; PAMELA GELLER; AND ROBERT SPENCER,	)
Plaintiffs-Appellants,	)
v.	)
MASSACHUSETTS BAY TRANSPORTATION AUTHORITY; AND BEVERLY A. SCOTT, INDIVIDUALLY AND IN HER OFFICIAL CAPACITY AS CHIEF EXECUTIVE OFFICER / GENERAL MANAGER OF THE MBTA,	)
Defendants-Appellees.	)

JUDGMENT

Entered: March 30, 2015

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The judgments of the district court are affirmed.

By the Court:

/s/ Margaret Carter, Clerk

cc: Ms. Brennan, Mr. Muise, Mr. Pyle, Mr. Steinfield & Mr. Yerushalmi.

APPENDIX B

United States District Court
District of Massachusetts

Civil Action No. 14-10292-NMG

[Filed March 17, 2014]

AMERICAN FREEDOM DEFENSE INITIATIVE, PAMELA GELLER and ROBERT SPENCER,	)
Plaintiffs,	)
v.	)
MASSACHUSETTS BAY TRANSPORTATION AUTHORITY and BEVERLY SCOTT,	)
Defendants.	)

MEMORANDUM & ORDER

GORTON, J.

This case involves an as-applied First Amendment challenge to advertising program guidelines promulgated by defendant Massachusetts Bay Transportation Authority ("MBTA"). Plaintiffs American Freedom Defense Initiative ("AFDI"), Pamela Geller and Robert Spencer (collectively "plaintiffs") seek to display the following advertisement in advertising spaces owned by the MBTA:

IN ANY WAR BETWEEN THE CIVILIZED MAN AND THE SAVAGE,
SUPPORT THE CIVILIZED MAN
DEFEAT VIOLENT JIHAD
SUPPORT ISRAEL

(hereinafter "the Third Advertisement"). The MBTA rejected the Third Advertisement in January, 2014, finding that an average rider of the MBTA would perceive it as demeaning or disparaging to an individual or group in violation of the MBTA's advertising guidelines. Plaintiffs have filed suit against the MBTA and its General Manager, Beverly Scott ("Scott") (collectively "MBTA" or "defendants"), and seek a preliminary injunction requiring the MBTA to display their advertisement immediately.

I. Background

This case is the sequel to an earlier case pending before this Session, American Freedom Defense Initiative v. Massachusetts Bay Transportation Authority, No. 13-12803, 2013 WL 6814793 (D. Mass. Dec. 20, 2013), appeal docketed, No. 14-1018 (1st Cir. Jan. 6, 2014) ("AFDI I"), which arose after the MBTA rejected a somewhat different advertisement ("the First Advertisement") submitted by these same plaintiffs. The First Advertisement states

IN ANY WAR
BETWEEN THE
CIVILIZED MAN
AND THE SAVAGE,
SUPPORT THE
CIVILIZED MAN

SUPPORT ISRAEL
DEFEAT JIHAD

According to plaintiffs, the slogan "In any war between the civilized man and the savage, support the civilized man" is a paraphrase of a famous quotation by the author Ayn Rand.

The MBTA rejected the First Advertisement on the grounds that it would demean and disparage a group of individuals, namely Muslims or Palestinians, and therefore would violate the MBTA's Advertising Program Guidelines ("the Guidelines"). The provision at issue, section b(i) of the Guidelines, states

> Demeaning or disparaging. The advertisement contains material that demeans or disparages an individual or group of individuals. For the purposes of determining whether an advertisement contains such material, the MBTA will determine whether a reasonably prudent person, knowledgeable of the MBTA's ridership and using prevailing community standards, would believe that the advertisement contains material that ridicules or mocks, is abusive or hostile to, or debases the dignity and stature of, an individual or group of individuals.

In December, 2013, this Court declined to enter a preliminary injunction to require the MBTA to display the First Advertisement, applying the standard for restrictions on speech in non-public fora articulated in Ridley v. Massachusetts Bay Transportation Authority, 390 F.3d 65 (1st Cir. 2004). It concluded that plaintiffs had not established that they were likely to succeed on their claim that the MBTA's decision was unreasonable

or that it discriminated on the basis of viewpoint. Plaintiffs' appeal of that decision is pending before the United States Court of Appeals for the First Circuit.

In January, 2014, plaintiffs submitted a modified version of the advertisement ("the Second Advertisement") which states

IN ANY WAR BETWEEN THE CIVILIZED MAN AND THOSE ENGAGED IN SAVAGE ACTS, SUPPORT THE CIVILIZED MAN
DEFEAT VIOLENT JIHAD
SUPPORT ISRAEL

The MBTA reviewed the Second Advertisement and determined that it satisfied the Guidelines and the ruling in AFDI I. Scott Goldsmith ("Goldsmith"), a representative of the MBTA's advertising contractor, Titan Outdoor LLC ("Titan"), notified plaintiffs on January 7, 2014 that their advertisement had been accepted and asked them to provide specifications.

Instead of providing specifications, plaintiff Pamela Geller ("Geller") sent Goldsmith an email the following day proposing a "tweak" of the Second Advertisement. She attached the Third Advertisement as quoted and displayed on page 1 above. The MBTA reviewed the Third Advertisement and determined that, like the First Advertisement, it was "demeaning or disparaging" in violation of section b(i) of the Guidelines. On January 17, 2014, Goldsmith emailed plaintiffs' attorney to inform him that the advertisement had been rejected. Plaintiffs' attorney requested that the MBTA issue a "formal determination" that the Third Advertisement violated the Guidelines.

The formal determination was conveyed in a letter from the MBTA's General Counsel Paige Scott Reed ("Reed") dated January 29, 2014. In her letter, Reed explained that

> The third ad is very similar to the rejected ad that was the subject of the preliminary injunction hearing. The third ad reverses the order of the two lines below "civilized man" and adds the word "violent" between "Defeat" and "Jihad." The MBTA undertook a review of the third ad and concluded it was not in compliance with section (b)(i) of the MBTA's Advertising Standards. The MBTA's conclusion was based on the same considerations as its rejection of the first ad. On January 17, 2014, Mr. Goldsmith so informed you by email. You responded by requesting this Formal Determination.
>
> The MBTA remains willing to display the second ad if AFDI so requests.

Plaintiffs filed the instant lawsuit on February 7, 2014, and moved for a preliminary injunction shortly thereafter that would require the MBTA to display the Third Advertisement.

II. Plaintiffs' motion for a preliminary injunction

A. Legal standard

In order to obtain a preliminary injunction, the moving party must establish

> that [it] is likely to succeed on the merits, that [it] is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of

> equities tips in [its] favor, and that an injunction is in the public interest.

Voices of the Arab World, Inc. v. MDTV Med. News Now, Inc., 645 F.3d 26, 32 (1st Cir. 2011) (quoting Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 129 (2008)).

Where, as here, a party contends that a restriction on speech violates the First Amendment, "the likelihood of success on the merits is the linchpin of the preliminary injunction analysis." Sindicato Puertorriqueño de Trabajadores v. Fortuño, 699 F.3d 1, 10 (1st Cir. 2012).To that end, plaintiffs must establish a "strong likelihood" that they will ultimately prevail to be entitled to injunctive relief. Id. The likelihood of success is also crucial because irreparable harm is presumed if the court finds it likely that the moving party's First Amendment rights were violated. Id. at 10-11 (explaining that the "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury" (quoting Elrod v. Burns, 427 U.S. 327, 373 (1976)).

The Court has discretion, however, to deny equitable relief to a party that has acted in bad faith or with unclean hands. See Texaco P.R., Inc. v. Dep't of Consumer Affairs, 60 F.3d 867, 880 (1st Cir. 1995). The doctrine of unclean hands applies only when the plaintiff's misconduct is "directly related to the merits of the controversy between the parties." Id. Moreover, the misconduct need not be punishable as a crime or give rise to a civil claim so long as it can be said to "transgress equitable standards of conduct". Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co., 324 U.S. 806, 815 (1945).

B. Application

The Court will deny the motion for a preliminary injunction, without a hearing, on the grounds previously set out in its opinion in AFDI I. Plaintiffs have not made the requisite "strong showing" that the MBTA acted unreasonably in rejecting an advertisement that was very similar to an advertisement it had previously found to be demeaning and disparaging in violation of its advertising Guidelines. See Sindicato Puertorriqueño, 699 F.3d at 10.

Furthermore, the Court declines to enter injunctive relief in any event. Plaintiffs acted in bad faith in submitting the Second Advertisement to the MBTA, waiting for that advertisement to be accepted and then using that acceptance as an excuse to file a second lawsuit against the MBTA rather than accepting its compromise offer to display the Second Advertisement. Such blatant gamesmanship and deliberate confrontation does not warrant the "extraordinary and drastic remedy" of ordering the MBTA to display the Third Advertisement. See Voices of the Arab World, 645 F.3d at 32; Texaco P.R., Inc., 60 F.3d at 880. Plaintiffs are entitled to display the Second Advertisement which the MBTA has already found to comply with its Guidelines.

ORDER

Accordingly, plaintiffs' motion for a preliminary injunction (Docket No. 8) is **DENIED**.

So ordered.

/s/ Nathaniel M. Gorton
Nathaniel M. Gorton
United States District Judge

Dated March 17, 2014

APPENDIX C

United States District Court
District of Massachusetts

Civil Action No. 13-12803-NMG

[Filed December 20, 2013]

AMERICAN FREEDOM DEFENSE INITIATIVE, PAMELA GELLER and ROBERT SPENCER,	)
Plaintiffs,	)
v.	)
MASSACHUSETTS BAY TRANSPORTATION AUTHORITY and BEVERLY SCOTT,	)
Defendants.	)

MEMORANDUM & ORDER

GORTON, J.

This case involves a First Amendment challenge to the rejection of an advertisement by the Massachusetts Bay Transportation Authority ("MBTA"), an independent authority that provides mass public transit in the Boston metropolitan area.

The dispute arose after the American Freedom Defense Initiative ("AFDI"), a non-profit advocacy

organization known for its provocative public transit advertising campaigns, submitted an advertisement ("the AFDI Pro-Israel Advertisement") to the MBTA that read: "In any war between the civilized man and the savage, support the civilized man. Support Israel. Defeat Jihad." The MBTA rejected the advertisement on the grounds that it would demean and disparage Muslims and/or Palestinians in violation of its advertising program guidelines.

Plaintiffs now seek an order requiring the MBTA to accept and display their advertisement. For the reasons that follow, that motion will be denied.

I. Background

A. The parties

AFDI is an advocacy organization that seeks to educate the public about the purported threats posed by Islam and jihad. AFDI promotes its viewpoint on those issues by, inter alia, purchasing advertising space on public transit vehicles and facilities. Plaintiffs Pamela Geller ("Geller") and Robert Spencer are, respectively, the organization's president and vice president.

Defendant MBTA is an independent authority established under Massachusetts law. Defendant Beverly Scott ("Scott") is the General Manager of the MBTA.

B. The MBTA Advertising Guidelines

The MBTA, through its advertising agent, Titan Outdoor LLC ("Titan"), leases space on its facilities and equipment to commercial advertisers and nonprofits.

Its Advertising Program Guidelines ("the Guidelines") describe five program objectives:

(a) maximizing revenue generated by advertising;

(b) maximizing revenue generated by attracting, maintaining and increasing ridership;

(c) maintaining safe and orderly operation;

(d) maintaining a safe and welcoming environment for all MBTA passengers; and

(e) avoiding the identification of the MBTA or the Commonwealth with ads or advertisers' viewpoints.

The Guidelines state that the MBTA will not accept advertisements that, among other things, demean or disparage an individual or group, promote the use of alcohol or tobacco products, include a depiction of graphic violence, contain profanities or obscene material or promote unlawful conduct. They also prohibit political campaign speech and any false, misleading or deceptive commercial speech. They do not, however, prohibit political speech unrelated to a political campaign, religious messages or speech that expresses controversial views.

The Guidelines include a procedure for reviewing advertisements that might contain unacceptable content. If the initial reviewer at Titan believes that an advertisement does not comply with the Guidelines, he or she refers it to the MBTA contract administrator. If

the contract administrator agrees that the advertisement is unacceptable, he or she documents the reason the advertisement should be rejected and refers it to MBTA general counsel. If he or she also agrees, the advertisement is referred to the MBTA general manager for a final determination.

The MBTA's current contract administrator, Barbara Moulton, asserts that the MBTA has rejected 13 ads since 2004. Most of those rejections were due to "prurient sexually suggestive" content or the use of profanities. The MBTA also found at least one advertisement "demeaning or disparaging" during that period.

The Guidelines provide a process for rehabilitating non-compliant advertisements. Specifically, once the MBTA determines that an advertisement is unacceptable, Titan

> may...discuss with the advertiser one or more revisions to the advertisement which, if undertaken, would bring the advertisement into conformity with the MBTA's Advertising Guidelines. The advertiser shall then have the option of submitting a revised advertisement for review by the MBTA.

If the advertiser does not agree to a mutually acceptable revision, it may request a final written notice of the MBTA's decision.

C. The subject advertisements

1. The Palestinian Refugee Advertisement

In October, 2013, the MBTA accepted an advertisement ("the Palestinian Refugee Advertisement") that depicts four maps of the Near East that purport to show how Palestinian territory was chronologically reduced within Israeli-controlled territory between 1946 and 2010. The maps are accompanied by the following statement: "4.7 million Palestinians are classified by the U.N. as refugees". That advertisement appeared on 80 posters throughout the MBTA system. The campaign was funded by a group called the Committee for Peace in Israel and Palestine which has sponsored similar transit system campaigns in New York City and Washington, D.C.

Titan employees were initially unsure if the Palestinian Refugee Advertisement complied with the Guidelines so they submitted it to the MBTA for further review but the MBTA eventually determined that it did comply. The record before the Court does not explain Titan's concerns or whether the MBTA reviewed the advertisement for compliance with any particular provision of the Guidelines. Nor does it reveal how many people at the MBTA reviewed the advertisement before it was deemed acceptable.

The Palestinian Refugee Advertisement was removed from MBTA advertising spaces at one point but then reposted after a short hiatus. It appears that Titan took the posters down after receiving complaints from the public and the Anti-Defamation League about their content. The MBTA did not offer a clear public

explanation for why the posters had been temporarily removed and reported only that there was a "miscommunication" between the MBTA and Titan.

2. The AFDI Pro-Israel Advertisement

On the day after the MBTA announced that it would re-post the Palestinian Refugee Advertisement, plaintiff Geller contacted Scott Goldsmith ("Goldsmith"), the executive vice president and chief commercial officer of Titan, and requested it to run the AFDI Pro-Israel Advertisement in ten of the Boston MBTA stations where the Palestinian Refugee Advertisement had been posted. The proposed advertisement included the slogan "In any war between the civilized man and the savage, support the civilized man", which was adapted from (but not attributed to) a 1974 speech by the author Ayn Rand, followed by the message "Support Israel. Defeat Jihad."

The MBTA followed the multi-tiered review process described above and Scott ultimately determined that the advertisement was "disparaging or demeaning" under the MBTA Guidelines. The rule against demeaning or disparaging advertisements is more particularly described as follows:

> Demeaning or disparaging. The advertisement contains material that demeans or disparages an individual or group of individuals. For the purposes of determining whether an advertisement contains such material, the MBTA will determine whether a reasonably prudent person, knowledgeable of the MBTA's ridership and using prevailing community standards, would believe that the advertisement

> contains material that ridicules or mocks, is abusive or hostile to, or debases the dignity and stature of, an individual or group of individuals.

Defendant Scott avers that she rejected the AFDI Pro-Israel Advertisement because she believed that it demeans or disparages Muslims and/or Palestinians and not because she disagrees with the ideology or perspective expressed by the advertisement.

On November 4, 2013, Goldsmith emailed Geller to tell her that the MBTA had rejected the AFDI Pro-Israel Advertisement. The body of the email states:

> The MBTA has rejected your ad because it falls within the category (b)(i) "Demeaning or disparaging". I have attached the ad policy for your review. Thank you.

There is no evidence in the record that defendants described to anyone how the advertisement violated that standard or offered plaintiffs an opportunity to bring their advertisement into compliance.

3. "Pro-Israel" advertisements accepted by the MBTA

The MBTA did, however, accept four advertisements that express a "pro-Israel" message that were submitted by an organization called Stand With Us on November 8, 2013. One states that "Jews are Indigenous to Israel" and depicts a series of maps that indicate that Israel is geographically smaller than the "ancient Jewish Kingdom" or the "internationally recognized Jewish homeland" as of 1920. Another allows viewers to link to a website that lists "The Top 10 Things Palestinian Leaders Don't Want You to

Know" and states, inter alia, that Palestinian leaders regularly promote hatred, incitement and terrorism against Israel and the Jewish people.

D. Procedural history

Plaintiffs filed the instant lawsuit on November 6, 2013, two days after Goldsmith informed Geller that the AFDI Pro-Israel Advertisement was unacceptable. They filed an amended complaint two days later and shortly thereafter moved for a temporary restraining order or preliminary injunction. The Court held a hearing on December 4, 2013, and requested additional briefing on the question of whether the MBTA had applied its Guidelines correctly to plaintiffs' advertisement. It received memoranda from both sides on December 6, 2013.

II. Plaintiff's Motion for a TRO/Preliminary Injunction

Plaintiffs seek an order that would require the defendants immediately to display the AFDI Pro-Israel Advertisement. For the reasons that follow, plaintiffs' motion will be denied.

A. Legal Standard

In order to obtain a preliminary injunction, the moving party must establish

> that [it] is likely to succeed on the merits, that [it] is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in [its] favor, and that an injunction is in the public interest.

Voices of the Arab World, Inc. v. MDTV Med. News Now, Inc., 645 F.3d 26, 32 (1st Cir. 2011) (quoting Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 129 (2008)).

In the First Amendment context, "the likelihood of success on the merits is the linchpin of the preliminary injunction analysis." Sindicato Puertorriqueño de Trabajadores v. Fortuño, 699 F.3d 1, 10 (1st Cir. 2012). The likelihood of success is crucial because irreparable harm is presumed if the court finds it likely that the moving party's First Amendment rights were violated. Id. at 10-11 (explaining that the "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury" (quoting Elrod v. Burns, 427 U.S. 327, 373 (1976)).

The same four-factor test applies to motions for temporary restraining orders. See Largess v. Supreme Judicial Court, 317 F. Supp. 2d 77, 81 (D. Mass. 2004). In this case, however, the plaintiffs ask for relief in the form of a temporary restraining order "and/or" preliminary injunction and do not distinguish between the two different kinds of relief. They did not seek interim relief prior to the hearing or to the issuance of this order. The Court will therefore treat their motion as a motion for a preliminary injunction and rule that their request for a temporary restraining order is moot.

B. Application

1. Likelihood of Success

Plaintiffs' complaint alleges that defendants violated their constitutional rights in three ways. First, they assert that defendants deprived them of their right to engage in protected speech in a public forum in

violation of the First Amendment. They allege that the disparaging and demeaning standard discriminates on the basis of content and viewpoint and is therefore invalid both on its face and as applied to their advertisement. They also allege that the standard operates as a prior restraint on plaintiffs' speech because it grants a public official unbridled discretion and permits her to apply ambiguous and subjective reasoning. Second, they claim that such restrictions on their speech violate the Equal Protection Clause.[1] Third, plaintiffs claim that the disparaging and demeaning standard violates due process because it is void for vagueness.

Defendants argue that all of those claims are foreclosed by Ridley v. Mass. Bay Transp. Auth., 390 F.3d 65 (1st Cir. 2004). Ridley consolidated two separate challenges to the Guidelines that were filed after the MBTA rejected certain advertisements. The First Circuit upheld the MBTA's decision to reject a religious advertisement that called specific religions "false" but found that the MBTA violated the First Amendment in rejecting advertisements that criticized certain drug laws.

The Court agrees that Ridley controls several of the legal questions in this case. First, the Court is bound by Ridley's holding that the MBTA advertising

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[1]Plaintiffs' First Amendment and Equal Protection claims rely on the same arguments. The Court, therefore, will address them jointly under the framework for reviewing First Amendment claims. See Hill v. Kemp, 645 F. Supp. 2d 992, 1007 (N.D. Okla. 2009) ("When a First Amendment and equal protection claim are intertwined, the First Amendment provides the proper framework for review....").

program is a non-public forum such that restrictions on speech need only be reasonable and viewpoint neutral. Id. at 76. Plaintiffs contend that forum analysis is not "static" and that this Court is therefore free to revisit the forum issue. The Court declines to do so, however, because it finds no evidence that the nature of the forum has changed since Ridley was decided.

Similarly, the Court is bound by Ridley's holding that 1) the demeaning and disparaging standard is viewpoint neutral on its face, id. at 90-91, 2) the same guideline is facially reasonable in light of the purposes of the forum, id. at 93, and 3) the demeaning and disparaging guideline is not void for vagueness, id. at 95-96.

Ridley does not, however, control the Court's determination of whether it was reasonable for the defendants to conclude that the AFDI Pro-Israel Advertisement demeaned and disparaged Muslims or Palestinians or whether defendants rejected plaintiffs' advertisement because they disagreed with the viewpoint expressed therein. The Court will therefore consider each of those questions seriatim.

a. Reasonableness

In order to pass constitutional muster, a restriction on speech in a non-public forum must be reasonable. Ridley, 390 F.3d at 90 (citing Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 806, 808 (1985)). The First Circuit has already decided that the demeaning and disparaging guideline is facially neutral so the Court's inquiry is limited to whether the defendants applied that guideline in a reasonable manner.

In Ridley, the First Circuit explained that the reasonableness requirement is easily satisfied:

> The reasonableness standard is not a particularly high hurdle; there can be more than one reasonable decision, and an action need not be the most reasonable decision in order to be reasonable.

Id. (internal citations omitted). It found that it was reasonable for the MBTA to enact a guideline prohibiting demeaning and disparaging advertisements in light of its goals of maintaining ridership levels and providing a safe and welcoming environment. Id. at 93. It did not, however, reach the issue of whether it was reasonable to conclude that the religious advertisement in question was demeaning and disparaging. In contrast, the Ridley court determined that it was unreasonable for the MBTA to conclude that advertisements that criticize the drug laws would promote drug use by minors and to reject them on that basis. Id. at 90.

Despite the fact that the First Circuit did not consider whether the demeaning or disparaging guideline was unreasonably applied in Ridley, the Court finds that it is proper to do so in this case. Ridley acknowledged that deciding whether an advertisement is demeaning or disparaging involves "some degree of interpretation." Id. at 95. The fact that the standard requires the MBTA to exercise some discretion does not mean that the Court is required to accept whatever decision it reaches. Instead, the Court must examine the MBTA's basis for rejecting the AFDI Pro-Israel Advertisement to determine if its conclusions were reasonable. See, e.g., Am. Freedom Def. Initiative v.

Suburban Mobility Auth. Reg'l Transp., 698 F.3d 885, 892-95 (6th Cir. 2012) (finding that it was reasonable to ban political advertisements in public transit facilities in general and also reasonable for the transit authority to conclude that an advertisement referring to the Muslim concept of a "fatwa" was a political advertisement).

Plaintiffs contend that it was unreasonable to conclude that their advertisement demeans or disparages Muslims or Palestinians. They argue that their use of the terms "war" and "jihad" clarify that their message is aimed at people who engage in terrorist acts that target innocent Israeli citizens and not Muslims or Palestinians in general. They argue that the plain meaning and common understanding of those terms supports their reading and renders the MBTA's interpretation unreasonable.

Defendants respond that the MBTA acted reasonably in concluding, as a result of its review process, that the "reasonably prudent person" would believe that the advertisement demeans and disparages Muslims or Palestinians. It points to the fact that the two district courts in other circuits that have already reviewed the identical AFDI Pro-Israel Advertisement both concluded that the advertisement equates Muslims with "savages". See Am. Freedom Def. Initiative v. Metro. Transp. Auth., 880 F. Supp. 2d 456, 467-69 (S.D.N.Y. 2012) (determining, based on various definitions of "savage" and "jihad" and a review of plaintiff Geller's contemporaneous postings to her website, that the Metropolitan Transportation Authority reasonably read the subject advertisement to "target as savages persons who adhere to Islam"); Am.

Freedom Def. Initiative v. Wash. Metro. Area Transit Auth., 898 F. Supp. 2d 73, 79 (D.D.C. 2012) (finding that the advertisement "equates all Muslims with savages").

The Court finds that the meaning of the AFDI Pro-Israel Advertisement is not as clear as plaintiffs assert. In fact, the advertisement is ambiguous in several respects. For instance, "war" could refer, as plaintiffs claim, to the violent acts committed against innocent Israeli citizens. But the term might also refer to the periodic conflicts between Israel and its majority-Muslim neighbors in Egypt, the Gaza Strip, the West Bank and Lebanon. Finally, the term could refer to the metaphysical or ideological struggle between Islam and the West.

Similarly, "jihad" is susceptible to several interpretations. Plaintiffs are correct that it is commonly interpreted (by this judicial officer among others) as referring to the acts of radical Islamic terrorists. Jihad is also understood by many, however, to have a more nuanced meaning that emphasizes a duty of introspection and self-improvement over violence applicable to all Muslims. Dictionary definitions of the term do not resolve the ambiguity. See Oxford English Dictionary (2d ed. 2012) ("A religious war of Muslims against unbelievers in Islam, inculcated as a duty by the Koran and traditions"; "a war or crusade for or against some doctrine, opinion or principle; "war to the death"); Webster's Third New International Dictionary (2002) ("a holy war waged on behalf of Islam as a religious duty"; "a bitter strife or crusade undertaken in the spirit of a holy war"); Webster's II New College Dictionary (3d ed. 2005) ("a

Muslim holy war or spiritual struggle against infidels"; "a crusade"; "a struggle").

Nevertheless, the Court agrees with the plaintiffs that the most reasonable interpretation of their advertisement is that they oppose acts of Islamic terrorism directed at Israel. Thus, if the question before this Court were whether the MBTA adopted the best interpretation of an ambiguous advertisement, it would side with the plaintiffs. But restrictions on speech in a non-public forum need only be reasonable and need not be the most reasonable. See Ridley, 390 F.3d at 90. In this case, the Court understands the inquiry to require only that the MBTA reasonably interpret the ambivalent advertisement. In light of the several divergent interpretations, it was plausible for the defendants to conclude that the AFDI Pro-Israel Advertisement demeans or disparages Muslims or Palestinians.

Moreover, the Court declines to adopt the standard for reasonableness urged by plaintiffs. They contend that, in this case, it was per se unreasonable to reject the AFDI Pro-Israel Advertisement because it might cause customers to complain but accept the Palestinian Refugee Advertisement which actually provoked complaints. In effect, plaintiffs urge the Court to rule that once the MBTA decides to restrict some speech in light of its ultimate objectives of maintaining ridership levels and creating a welcoming environment, it must restrict all speech that could frustrate those objectives.

Such precision is unnecessary in a non-public forum. For instance, the First Circuit recently held that the Postal Service could reasonably ban political campaigning on its sidewalks for the purpose of

avoiding the appearance of political entanglement despite the fact that it allowed people to advocate for "even the most controversial [ballot] initiatives" on the same sidewalks. DelGallo v. Parent, 557 F.3d 58, 74 (1st Cir. 2009). The court reasoned that holding otherwise would "turn[] the law of non-public fora on its head" by creating an incentive for the Postal Service to exclude all speech from the forum. Id. at 75. Moreover, it concluded that the Postal Service had at least a plausible basis for distinguishing between candidates and ballot initiatives, finding that the latter did not raise the same concerns about favoritism or patronage. Id.

In short, the MBTA is not required to treat all advertisements that might offend riders the same so long as there are plausible reasons for any distinction. The First Circuit Court of Appeals has held that it is reasonable to exclude demeaning or disparaging content in light of the purposes of the MBTA's advertising program. The fact that excluding certain controversial content would also serve those purposes is irrelevant to the Court's as-applied analysis and, in any event, the MBTA's Guidelines do not permit it to reject an advertisement solely because it is controversial.

b. Viewpoint neutrality

Plaintiffs also contend that the defendants rejected their advertisement because they oppose plaintiffs' message and therefore unconstitutionally discriminated on the basis of viewpoint.

The "essence" of viewpoint discrimination is that the government

> inten[ds] to intervene in a way that prefers one particular viewpoint in speech over other perspectives on the same topic.

Ridley, 390 F.3d at 82. As an initial matter, the Court disagrees with plaintiffs that it must find viewpoint discrimination merely because defendants accepted an advertisement with a pro-Palestinian message. That contention is belied by the fact that defendants accepted the pro-Israel advertisements submitted by Stand With Us shortly after rejecting plaintiffs' advertisement.

Of course, the lack of blatant viewpoint discrimination in the record does not negate the Court's inquiry. Even if the MBTA did not intend to suppress pro-Israel messages in general, it could still impermissibly discriminate against plaintiffs' particular view that jihadist terrorists who target Israel are savages. Plaintiffs advance two arguments for why that is the case.

First, plaintiffs claim that they cannot effectively convey their outrage at the brutal acts committed against innocent Israeli citizens without using the term "savage" and that the defendants, who presumably object to their use of that term, have therefore unconstitutionally suppressed plaintiffs' view that jihadist terrorists are savages.

That argument finds some support in Ridley, which held that the government may not "intentionally tilt[] the playing field for speech" because reducing a message's effectiveness is also a form of viewpoint discrimination. Id. at 88. Thus, in Ridley, the First Circuit found that the MBTA violated an advertiser's

First Amendment rights because it was only willing to run advertisements criticizing the drug laws if they were accompanied by large disclaimers stating that drug use is illegal. The court found that the disclaimers would render the advertiser's message ineffective and therefore be equivalent to suppressing the message altogether.

Yet Plaintiffs' argument, while intriguing, is likely foreclosed by Ridley's discussion of the demeaning or disparaging standard. Specifically, the First Circuit reasoned that the MBTA may set reasonable ground rules that do not attempt to give one group an advantage over any other in the "marketplace for speech":

> We reject the argument that because a government commercial enterprise has opened up discussion on one particular "topic" (say, religion), it must allow any and all discussion on that topic. Reasonable ground rules, so long as they are not intended to give one side an advantage or another, can be set without falling prey to viewpoint discrimination.

Id. at 91-92.

Plaintiffs have not provided a satisfactory answer to the question posed by this Court at the hearing: Is the MBTA required to accept speech that violates those "reasonable ground rules" when applying those rules would render the message less effective? Ridley did not directly answer that question either but the opinion suggests that excluding demeaning or disparaging speech does not tilt the playing field because the requirement to be civil applies to every speaker

equally. See id. at 91. Thus, the Court finds that plaintiffs do not have the right to use whatever terms they wish to use in a non-public forum simply because they are the most effective means of expressing their message.

Plaintiffs also urge the Court to find viewpoint discrimination based on the fact that defendants accepted an advertisement (the Palestinian Refugee Advertisement) that plaintiffs believe demeans and disparages Israelis and Jews. This view also finds support in Ridley, which explained that

> where the government states that it rejects something because of a certain characteristic, but other things possessing the same characteristic are accepted, this sort of under-inclusiveness raises a suspicion that the stated neutral ground for an action is meant to shield an impermissible motive.

Id. In an earlier case, the First Circuit found that the MBTA discriminated on the basis of viewpoint when it rejected an advertisement that promoted condom use on the basis that it was sexually explicit but accepted without comment advertisements for the movie Fatal Instinct that were at least as sexually explicit. AIDS Action Comm. of Mass., Inc. v. Mass. Bay Transp. Auth., 42 F.3d 1, 10 (1st Cir. 1994). The court explained that even though the MBTA purported to be applying its viewpoint-neutral guideline banning sexually explicit content, it had failed to dispel the appearance that it actually disagreed with the viewpoint expressed by the condom advertisement. Id. at 11.

Plaintiffs contend for a similar result here. They assert that the Palestinian Refugee Advertisement demeans Israelis because it expresses the "unmistakable" message that Israelis are war criminals or, at the very least, violate international law. They also believe that the fact that the MBTA received complaints about the advertisement is evidence that it is demeaning or disparaging. Defendants respond that the Palestinian Refugee Advertisement is fundamentally different from the AFDI Pro-Israel Advertisement because it does not ridicule, mock or debase any group.

Plaintiffs are correct that the two advertisements have something in common: both take controversial stances on the Israeli-Palestinian conflict and both are likely to offend some riders of the MBTA. Those facts alone, however, do not command the same result as that reached in the AIDS Action Committee case. In order to prevail on their theory, plaintiffs must show that the Palestinian Refugee Advertisement is at least as disparaging or demeaning as the AFDI Pro-Israel Advertisement. The Court is not convinced that is the case.

While the Palestinian Refugee Advertisement surely conveys information that portrays Israel in a negative light, it does not do so in a way that violates the demeaning and disparaging guideline. A reasonable person may disagree with or dislike the message of an advertisement without finding it demeaning or disparaging. Thus, the question is not whether the advertisement upset some transit riders but instead whether a reasonably prudent person would find that it "ridicules or mocks, is abusive or hostile to, or

debases the dignity and stature of" Israelis or Jews. The Court finds that the advertisement is hostile to Israel's policies toward Palestinians, particularly Palestinian refugees but does not debase the dignity of Israelis or Jews as human beings.

In contrast, labeling a member of a group "a savage", as defendants not unreasonably believe is done by plaintiffs' advertisement, directly debases that person's dignity. The quote plaintiffs selected to express their message does not criticize "savage" acts but instead contrasts the state of Israel with the "savages" who oppose or fight against it. When used as a noun and in contrast with "the civilized man", "savage" is best understood to refer to an uncivilized or barbaric person and not merely someone who is brutal, cruel or fierce. See Oxford English Dictionary (2d ed. 2012) ("a person living in the lowest state of development or cultivation"; "an uncivilized, wild person"; "a cruel or fierce person"); Webster's Third New International Dictionary (2002) ("a person living in a primitive state or belonging to a primitive society"; "one who acts with cruelty"; "a brutal or inhumane person"; "a completely undisciplined or unmannerly person"); Webster's II New College Dictionary (3d ed. 2005) ("a barbaric or uncivilized person; "a fierce or vicious person"; "a crude person").

In so holding, the Court does not discount the fact that the Palestinian Refugee Advertisement deeply offends plaintiffs and might offend other members of the community. The Israeli-Palestinian conflict is a particularly sensitive topic that is likely to arouse strong feelings on both sides of the debate. The MBTA, in deciding to open its advertising program to speech

on controversial topics, has taken on the difficult task of determining whether speech on that topic crosses the line from being offensive or hurtful to being demeaning or disparaging such that it can be excluded from the forum. This case presents a close call but the Court concludes that defendants did not discriminate on the basis of viewpoint in excluding plaintiffs' advertisement.

At the end of the day, the Court is bound by the fact that restrictions on speech in a non-public forum need only be reasonable and viewpoint-neutral. Because the AFDI Pro-Israel Advertisement is susceptible to innuendo, the Court cannot say that defendants acted unreasonably in adopting the interpretation that they did. Furthermore, there is insufficient evidence in the record at this stage of the litigation to prove that the defendants rejected plaintiffs' advertisement because they disagreed with its message.

2. Remaining factors

Because success on the merits is the sine qua non of the preliminary injunction analysis in the First Amendment context, a discussion of the other factors is unnecessary. See Sindicato Puertorriqueño de Trabajadores, 699 F.3d at 10-11.

ORDER

For those reasons, plaintiffs' motion for a preliminary injunction (Docket No. 16) is **DENIED** and plaintiffs' motion for a temporary restraining order (Docket No. 16) is **DENIED AS MOOT.**

So ordered.

/s/ Nathaniel M. Gorton
Nathaniel M. Gorton
United States District Judge

Dated December 20, 2013

APPENDIX D

United States Court of Appeals
For the First Circuit

Nos. 14-1018 & 14-1289

[Filed April 29, 2015]

AMERICAN FREEDOM DEFENSE INITIATIVE; PAMELA GELLER; ROBERT SPENCER,	)
Plaintiffs - Appellants,	)
v.	)
MASSACHUSETTS BAY TRANSPORTATION AUTHORITY; BEVERLY A. SCOTT, individually and in her official capacity as Chief Executive Officer / General Manager of the MBTA,	)
Defendants - Appellees.	)

Before

Lynch, Chief Judge,
Torruella, Stahl, Howard,
Thompson, Kayatta and Barron,

Circuit Judges.

CORRECTED ORDER OF COURT [*]

Entered: April 29, 2015

Pursuant to First Circuit Internal Operating Procedure X(C), the petition for rehearing en banc has also been treated as a petition for rehearing before the original panel. The petition for rehearing having been denied by the panel of judges who decided the case, and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the petition for rehearing and petition for rehearing en banc be denied.

TORRUELLA, Circuit Judge, dissenting as to the petition for rehearing en banc.

By the Court:

/s/ Margaret Carter, Clerk

cc:
Robert Joseph Muise
David Yerushalmi
Joseph D. Steinfield
Jeffrey J. Pyle
Julie A. Brennan

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[*] Order corrected to note Judge Torruella's dissent.