

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

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

Case No. 10-civ-5947-VM

ECF Case

Plaintiffs,

- against -

METROPOLITAN TRANSPORTATION AUTHORITY
("MTA"); and JAY H. WALDER, in his official
capacity as Chairman and Chief Executive Officer
of MTA,

Defendants.

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**PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR
TEMPORARY RESTRAINING ORDER ("TRO") / PRELIMINARY INJUNCTION**

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INTRODUCTION

This case challenges Defendants’ restriction on Plaintiffs’ right to engage in protected speech in a public forum created by Defendants based on the content and viewpoint of Plaintiffs’ message (hereinafter “Free Speech Restriction”). Defendants’ Free Speech Restriction prohibited Plaintiffs from displaying advertisements on MTA buses that travel the public streets of New York City.

The issue presented in this motion is whether denying Plaintiffs the right to engage in protected speech on a public issue in a public forum created by Defendants based on the content and viewpoint of the message causes irreparable harm to warrant temporary/preliminary injunctive relief. As demonstrated below, the relevant facts and law compel the granting of this motion.

RELEVANT FACTS

Plaintiffs Pamela Geller and Robert Spencer (“Plaintiffs”) are co-founders of Plaintiff American Freedom Defense Initiative (“FDI”), which is incorporated under the laws of the State of New Hampshire. Plaintiff Geller is the Executive Director of FDI, and Plaintiff Spencer is the Associate Director. Plaintiffs Geller and Spencer engage in political and religious speech through FDI’s activities, including FDI’s religious freedom bus and billboard campaigns. (Geller Decl. at ¶ 2 at Ex. 1).¹

FDI’s specific objective is to engage in important public debate. (Geller Decl. at ¶ 4 at Ex. 1). And it achieves its objective through a variety of lawful means, including through the

¹ Citations to the Geller Declaration, which is attached as Exhibit 1, reference the specific paragraph (¶ __) and, if applicable, the specific exhibit attached to the declaration (Ex. __).

exercise of its right to freedom of speech under the U.S. Constitution. (Geller Decl. at ¶ 5 at Ex. 1).

One example of FDI's exercise of its right to freedom of speech is the sponsoring of bus and billboard campaigns. To that end, FDI purchases advertising space on bus lines and taxi cabs operated in cities throughout the United States to express itself on various public and religious issues. (Geller Decl. at ¶ 6 at Ex. 1).

One specific campaign utilizes FDI's religious freedom message as a bus advertisement, which states as follows: "Fatwa on your head? Is your family or community threatening you? Leaving Islam? Got questions? Get answers!" The message also includes the following website address: RefugeFromIslam.com. (Hereinafter referred to as the "Religious Freedom Advertisement.") (Geller Decl. at ¶ 7, Ex. B, at Ex. 1).

Beginning on or about May 17, 2010, FDI sponsored the Religious Freedom Advertisement that was displayed on MTA buses for a period ending on June 13, 2010. FDI did so by entering into an agreement with CBS Outdoor, which acts as the advertising agent for the MTA ("CBS-FDI Agreement I"). (Geller Decl. at ¶ 8, Ex. C, at Ex. 1).

In addition to New York City, FDI has successfully run the Religious Freedom Advertisement on transit authority buses in Miami-Dade County, Florida, and San Francisco, California. (Geller Decl. at ¶ 9 at Ex. 1).

On or about July 20, 2010, FDI entered into a separate advertising agreement with CBS Outdoor to place a new advertisement on MTA buses in New York City ("CBS-FDI Agreement II"). This advertisement related to the plan to build what has been termed the "Ground Zero Mosque" at 45-47 Park Place in Manhattan. (Geller Decl. at ¶ 10, Ex. D at Ex. 1).

CBS charged FDI's credit card for full payment pursuant to the CBS-FDI Agreement II and was thus paid in full. (Geller Decl. at ¶ 11 at Ex. 1).

The new advertisement bus banner has at one side a picture of the Twin Towers aflame with a plane headed toward them. On the opposite side of the banner is a tower with a crescent moon and star. The text between the two buildings is: "Why There?" Below this text is the following:

September 11, 2001 GROUND ZERO September 11, 2011
WTC Jihad Attack ←-----→ WTC Mega Mosque

(Geller Decl. at ¶ 12, Ex. E, at Ex. 1) (hereinafter "Original GZM Bus Ad").

On or about July 28, 2010, Mr. Will Tingle, Plaintiffs' contact at CBS Outdoor for the MTA bus advertisements, informed Plaintiff Geller by telephone that the MTA refused to run Plaintiffs' advertisement on MTA buses because the plane that appeared to be flying into the Twin Towers was objectionable. When Plaintiff Geller asked him why and to identify for her the specific MTA advertising guideline that Plaintiffs' advertisement violated, Mr. Tingle could not say. (Geller Decl. at ¶ 13 at Ex. 1).

Plaintiff Geller immediately had her graphic artist remove the plane, and she submitted the revised advertisement to CBS. ("Revised GZM Bus Ad"). On July 28, 2010, Plaintiff Geller emailed Mr. Tingle and asked him whether the Revised GZM Bus Ad was now acceptable to MTA. (Geller Decl. at ¶ 14, Ex. F, at Ex. 1).

Mr. Tingle indicated there was still a problem and responded as follows to Plaintiff Geller's email queries:

Pamela,

The problem with this ad still is the direct connection that is being associated with the Twin Towers attack and the new Mosque that is being erected. There is no connection and that is what is being deceifered (sic) here.

I am out of the office tomorrow and Friday in Philadelphia and Washington on market rides but I am reachable by cell (see below) or e-mail.

Best,

Will

(Geller Decl. at ¶ 15, Ex. G, at Ex. 1).

After Plaintiff Geller placed repeated telephone calls to Mr. Tingle to gain some clarity about the MTA guidelines and if in fact the Revised GZM Bus Ad would be acceptable to MTA, on August 5, 2010, Plaintiff Geller finally reached Mr. Tingle by telephone. After apologizing for not returning her many calls, Mr. Tingle reported to Plaintiff Geller that MTA required the flames around the Twin Towers to be removed because it too closely associated the Ground Zero Mosque with 9-11. Mr. Tingle said the sponsors of the Ground Zero Mosque had publicly stated that they were not connected to the terrorists who committed 9-11 so it would be “hurtful” if Plaintiffs’ advertisement suggested otherwise. Plaintiff Geller responded by asking what business is it of the MTA to determine the proper viewpoint of Plaintiffs’ speech. Plaintiff Geller also pointed out that Plaintiffs were making the point that it is wrong to build the Ground Zero Mosque a few hundred feet from the very place where the Twin Towers went down in a fiery heap after two jet airliners, which were piloted by Islamic terrorists, flew into the buildings like missiles. Plaintiff Geller concluded by explaining that the MTA is effectively restricting Plaintiffs’ speech based on a viewpoint and narrative that MTA accepts. Mr. Tingle insisted that

if Plaintiff Geller would just get rid of the flames, the advertisement could run. (Geller Decl. at ¶ 16 at Ex. 1).

Immediately that same day, August 5, Plaintiff Geller had her graphic artist remove the flames around the Twin Towers, but she reinserted a graphic of a plane, but not near the Twin Towers and not in a menacing flight pattern as in the Original GZM Bus Ad. (Geller Decl. at ¶ 17, Ex. H, at Ex. 1) (hereinafter Second Revised GZM Bus Ad”).

After receipt of the Second Revised GZM Bus Ad, Mr. Tingle told Plaintiff Geller to take out the plane graphic altogether. Plaintiff Geller did so under protest in a return email. (Geller Decl. at ¶ 18, Exs. I, J, at Ex. 1).

Plaintiffs have still received no MTA advertising guidelines from either Mr. Tingle or the MTA. Moreover, throughout this ordeal, Plaintiff Geller has asked Mr. Tingle to provide her with the name and contact information of his supervisor at the MTA. Mr. Tingle has not provided her with that information. (Geller Decl. at ¶ 19 at Ex. 1).

The MTA has in fact run pro-Islam advertisements that are not merely religious statements, but political and historical ones that are “hurtful” to large segments of people who have suffered murder and mayhem at the hands of Muslims and Muslim nations which proclaim that they adhere to Islamic law (i.e., Shariah). (Geller Decl. at ¶ 20, Ex. K, at Ex. 1).

The MTA has run all sorts of controversial advertisements on the exterior of MTA buses, on interior subway advertisement spaces, and on MTA advertising space at the Times Square station. For example, MTA permitted a religious group, Muslims for Peace, to run an advertisement on 90 public buses. The advertisement stated, “Muslims for Peace, Love for All, Hatred for None, 1-800-WHY-ISLAM.” The MTA permitted the display of “Jesus for Jews”

posters on the interior advertising space of MTA subways and on MTA's advertising space in Times Square Station in Manhattan. And the MTA permitted an atheist group, the Big Apple Coalition of Reason, to display an advertisement stating, "A million New Yorkers are good without God. Are you?," among others. (Geller Decl. at ¶ 21, Exs. L, M, N, O, at Ex. 1).

In the final analysis, the MTA rejected Plaintiffs' advertisement because it disagreed with Plaintiffs' viewpoint on a very public issue. That is, the MTA disagrees with Plaintiffs' view that there is a connection between the controversial Ground Zero Mosque and the Islamic terrorist attack on 9-11 that destroyed the World Trade Center and killed thousands of innocent Americans.

ARGUMENT

"A party seeking injunctive relief ordinarily must show: (a) that it will suffer irreparable harm in the absence of an injunction and (b) either (i) a likelihood of success on the merits or (ii) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly in the movant's favor." *Doherty Assoc., Inc. v. Saban Entm't, Inc.*, 60 F.3d 27, 33 (2d Cir. 1995). However, where an injunction "will alter, rather than maintain, the status quo" or "will provide the movant with substantially all the relief sought and that relief cannot be undone even if the defendant prevails at a trial on the merits," as in this case, the movant must make a "clear" or "substantial" showing that he is likely to prevail on the merits. *Id.* at 33-34; *see also New York Magazine v. Metropolitan Transp. Auth.*, 136 F.3d 123, 127 (2d Cir. 1998) (affirming order enjoining the MTA from refusing to display an advertisement on the outside of its buses). Plaintiffs can make that showing here.

A. Plaintiffs' Likelihood of Success on the Merits.

The First Amendment provides in pertinent part that “Congress shall make no law . . . abridging the freedom of speech.” U.S. Const. amend. I. Plaintiffs’ First Amendment right to freedom of speech is protected from infringement by States and their political subdivisions, such as Defendants, by operation of the Fourteenth Amendment. *See Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). Indeed, the freedom of speech is a fundamental right that is essential for the preservation of our republican form of government. As the Supreme Court has long recognized, “[Speech] concerning public affairs is more than self-expression; it is the essence of self-government.” *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982) (citations omitted). Moreover, Supreme Court precedent “establishes that private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression.” *Capitol Square Rev. & Adv. Bd. v. Pinette*, 515 U.S. 753, 760 (1995).

The likelihood of success of Plaintiffs’ free speech claim is examined in essentially three steps. First, the court must determine whether the speech in question—Plaintiffs’ bus advertisement—is protected speech. Second, the court must conduct a forum analysis as to the forum in question to determine the proper constitutional standard to apply. And third, the court must then determine whether Defendants’ Free Speech Restriction comports with the applicable standard.

As demonstrated below, Defendants’ denial of Plaintiffs’ request to display their bus advertisements on the sides of MTA buses—a public forum created by Defendants—violates Plaintiffs’ right to freedom of speech.

1. Plaintiffs' Advertisement Constitutes Protected Speech.

The first question is easily answered. Conveying a political or religious message on a public issue with signs constitutes protected speech under the First Amendment. *See Hill v. Colorado*, 530 U.S. 703, 714-15 (2000) (“[S]ign displays . . . are protected by the First Amendment.”); *United States v. Grace*, 461 U.S. 171, 176-77 (1983) (demonstrating with signs constitutes speech under the First Amendment). This includes signs posted on bus advertising space. *See New York Magazine*, 136 F.3d at 123; *United Food & Commercial Workers Union, Local 1099 v. Southwest Ohio Reg'l Transit Auth.*, 163 F.3d 341 (6th Cir. 1998) (affirming preliminary injunction on First Amendment grounds requiring state agency to accept union’s proposed wrap-around bus advertisement).

2. Forum Analysis.

To determine the extent of Plaintiffs’ free speech rights in this matter, the court must next engage in a First Amendment forum analysis. “The [Supreme] Court has adopted a forum analysis as a means of determining when the Government’s interest in limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the property for [expressive] purposes.” *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 800 (1985). Forum analysis has traditionally divided government property into three categories: traditional public forums, designated public forums, and nonpublic forums. *Cornelius*, 473 U.S. at 800. Once the forum is identified, the court must then determine whether the speech restriction is justified by the requisite standard. *Id.*

On one end of the spectrum lies the traditional public forum. Traditional public forums, such as streets, sidewalks, and parks, are places that “have immemorially been held in trust for

the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.” *Hague v. CIO*, 307 U.S. 496, 515 (1939).

Next on the spectrum is the designated public forum, which exists when the government intentionally opens its property for expressive activity. *Perry Educ. Ass’n v. Perry Local Educators*, 460 U.S. 37, 44 (1983). As the Supreme Court stated, “[A] public forum may be created by government designation of a place or channel of communication for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects.” *Cornelius*, 473 U.S. at 802.

In a traditional or designated public forum, restrictions on speech are subject to strict scrutiny. *Id.* at 800 (“[S]peakers can be excluded from a public forum only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest. . . . Similarly, when the government has intentionally designated a place or means of communication as a public forum speakers cannot be excluded without a compelling government interest.”).

At the opposite end of the spectrum is the nonpublic forum. The nonpublic forum is “[p]ublic property which is not by tradition or designation a forum for public communication.” *Perry Educ. Ass’n*, 460 U.S. at 46. In a nonpublic forum, the government “may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker’s view.” *Id.* Thus, even in a nonpublic forum, a speech restriction must be reasonable and viewpoint neutral to pass constitutional muster. *Id.*

The forum at issue here is a designated public forum. A designated public forum is created when the government “intentionally open[s] a nontraditional forum for public discourse.” *Cornelius*, 473 U.S. at 802. To discern the government’s intent, courts “look[] to the policy and practice of the government to ascertain whether it intended to designate a place not traditionally open to assembly and debate as a public forum,” as well as “the nature of the property and its compatibility with expressive activity.” *Id.*

In this case, the MTA has designated its advertising space as a public forum based on its express policy *and* its practice. *New York Magazine v. Metropolitan Transp. Auth.*, 136 F.3d 123, 130 (2d Cir. 1998) (concluding that MTA advertising space on the outside of its buses was a public forum where the transit authority permitted “political and other non-commercial advertising generally”). Indeed, the MTA has permitted a wide variety of commercial, public-service, public-issue, religious, and anti-religious advertisements. Thus, Defendants have intentionally designated the advertising space on MTA buses as a public forum for a wide range of political and religious messages. *See United Food & Commercial Workers Union, Local 1099*, 163 F.3d at 355 (concluding that the advertising space on a bus system was a public forum and stating that “[a]cceptance of political and public-issue advertisements, which by their very nature generate conflict, signals a willingness on the part of the government to open the property to controversial speech”); *Planned Parenthood Ass’n/Chicago Area v. Chicago Transit Auth.*, 767 F.2d 1225 (7th Cir. 1985) (concluding that the advertising space on a bus system became a public forum where the transit authority permitted advertising on “a wide variety of commercial, public-service, public-issue, and political ads”). Furthermore, it is without question that the “nature of the property”—the advertising space—is “compatible” with Plaintiffs’ proposed

expressive activity. See *New York Magazine*, 136 F.3d at 130; *United Food & Commercial Workers Union, Local 1099*, 163 F.3d at 355 (concluding that the advertising space on a bus system was a public forum and stating that “acceptance of political and public-issue speech suggests that the forum is suitable for the speech at issue”—a pro-union message). Consequently, as a matter of official policy and practice, the MTA has intentionally dedicated its advertising space on its vehicles to expressive conduct, thereby creating a public forum for Plaintiffs’ speech.

3. Application of the Appropriate Standard.

a. Content-Based Restriction.

In a designated public forum, similar to a traditional public forum, the government’s ability to restrict speech is sharply limited. The government may enforce reasonable, *content-neutral* time, place, and manner regulations of speech if the regulations are narrowly tailored to serve a significant government interest and leave open ample alternative channels of communication. *Perry Educ. Ass’n*, 460 U.S. at 45. However, *content-based* restrictions on speech, such as the restriction at issue here, are subject to strict scrutiny. *Cornelius*, 473 U.S. at 800. That is, “[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.” *Id.* For “[i]t is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys.” *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828 (1995). Thus, content-based restrictions “are presumptively unconstitutional.” *S.O.C., Inc. v. County of Clark*, 152 F.3d 1136, 1145 (9th Cir. 1998). The government may not “impose special prohibitions on those speakers who express views on

disfavored subjects” or on the basis of “hostility—or favoritism—towards the underlying message expressed.” *R.A.V. v. St. Paul*, 505 U.S. 377, 386-92 (1992); see *Police Dept. of the City of Chicago v. Mosley*, 408 U.S. 92, 96 (1972) (holding that the government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express more controversial views).

In this case, Defendants’ “Free Speech Restriction” was, at a minimum, content-based. To determine whether a restriction is content-based, the courts look at whether it “restrict(s) expression because of its message, its ideas, its subject matter, or its content.” *Consolidated Edison Co. of N.Y. v. Public Serv. Comm. of N.Y.*, 447 U.S. 530, 537 (1980). Here, Defendants provided no content-neutral basis for denying Plaintiffs’ request to display their message. And Plaintiffs met all of the procedural requirements for displaying the message. Consequently, Defendants’ rejected the message based on its content without a compelling—let alone legitimate—reason for doing so.

b. Viewpoint-Based Restriction.

The record reveals that Defendants’ restriction is also viewpoint based, which is the most egregious form of discrimination that is *impermissible* in all speech forums, including nonpublic forums. Here, Defendants allow messages on a wide range of religious, anti-religious, and public issues. Yet, Defendants denied Plaintiffs the right to express their particular viewpoint on a permissible subject in the same forum. Indeed, Defendants, through its advertising agent, acknowledge that the advertisement was rejected because the MTA disagreed with the viewpoint expressed by Plaintiffs—that is, Defendants disagreed with Plaintiffs’ viewpoint that there is a connection between the Ground Zero Mosque and the 9-11 Islamic terrorist attack on the World

Trade Center. See *Cornelius*, 473 U.S. at 806 (stating that 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”); *Cogswell v. City of Seattle*, 347 F.3d 809, 815 (9th Cir. 2003) (“[If 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.”). Consequently, Defendants’ viewpoint-based restriction cannot withstand constitutional scrutiny.

c. No Compelling Reason for Rejecting Plaintiffs’ Message.

It is evident that Defendants rejected Plaintiffs’ message because they objected to its content and viewpoint. Defendants may have presumed that others might object to the content as well. In fact, they claimed that Plaintiffs’ message might be “hurtful” to others. However, a listener’s (or, in this case, viewer’s) reaction to speech is not a content-neutral basis for regulation. *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134 (1992). “The First Amendment knows no heckler’s veto.” *Lewis v. Wilson*, 253 F.3d 1077, 1082 (8th Cir. 2001).

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

In *Terminiello v. City of Chicago*, 337 U.S. 1 (1949), for example, the Supreme Court famously stated,

[A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech . . . is . . . protected against censorship

or punishment. . . . There is no room under our Constitution for a more restrictive view.

Id. at 4.

Therefore, the fact that Plaintiffs' speech may actually offend some persons does not lessen its constitutionally protected status; it enhances it. "The fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection." *Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 502 U.S. 105, 118 (1991) (citations omitted); *Forsyth County*, 505 U.S. at 135 (noting that speech cannot be "punished or banned, simply because it might offend a hostile mob"); *Hill*, 530 U.S. at 715 & 710, n.7 ("The fact that the messages conveyed by [the signs] may be offensive to their recipients does not deprive them of constitutional protection.").

"[T]he Constitution does not permit government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer." *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 210 (1975). Rather than censoring the speaker, the burden rests with the viewer to "avoid further bombardment of [his] sensibilities simply by averting [his] eyes." *Cohen v. California*, 403 U.S. 15, 21 (1971). As the *Cohen* Court noted, "[W]e cannot indulge the facile assumption that one can forbid particular words [or messages, as in this case] without also running a substantial risk of suppressing ideas in the process. Indeed, governments might soon seize upon the censorship of particular words [or messages] as a convenient guise for banning the expression of unpopular views." *Id.* at 26.

In fact, First Amendment protection even extends to regulatory schemes that would allow a disapproving citizen to silence a disagreeable speaker by complaining on other, apparently

neutral, grounds. In *Reno v. ACLU*, 521 U.S. 844, 880 (1997), the Supreme Court held that the prohibition on knowingly communicating indecent material to minors in Internet forums was invalid because it conferred “broad powers of censorship, in the form of a ‘heckler’s veto,’ upon any opponent of indecent speech who might simply log on and inform the would-be discourses that his 17-year-old-child . . . would be present.”

Thus, pursuant to the First Amendment, the government is not permitted to affirm the heckler; rather, it must protect the speaker and punish those who react lawlessly to a controversial message. As the Sixth Circuit observed, “[The government] has the duty not to ratify and effectuate a heckler’s veto nor may he join a moiling mob intent on suppressing ideas. Instead, he must take reasonable action to protect . . . persons exercising their constitutional rights.” *Glasson v. Louisville*, 518 F.2d 899, 906 (6th Cir. 1975).

In sum, Defendants cannot, consistent with the Constitution, prohibit Plaintiffs’ message because they or other viewers might find it offensive or “hurtful.” Otherwise, the government “would effectively empower a majority to silence dissidents simply as a matter of personal predilections.” *Cohen*, 403 U.S. at 21.

B. Irreparable Harm to Plaintiffs without the TRO/Preliminary Injunction.

Plaintiffs will be irreparably harmed without the TRO/preliminary injunction. Defendants’ restriction on Plaintiffs’ private speech deprives Plaintiffs of their fundamental First Amendment rights. It is well established that “[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *see also Newsome v. Norris*, 888 F.2d 371, 378 (6th Cir. 1989) (“The Supreme Court has unequivocally admonished that even minimal infringement upon First

Amendment values constitutes irreparable injury sufficient to justify injunctive relief.” (citing *Elrod*)). Moreover, granting the injunction will promote the public interest. *See, e.g., G & V Lounge, Inc. v. Michigan Liquor Control Comm’n*, 23 F.3d 1071, 1079 (6th Cir. 1994) (“[I]t is always in the public interest to prevent the violation of a party’s constitutional rights.”); *Dayton Area Visually Impaired Persons, Inc. v. Fisher*, 70 F.3d 1474, 1490 (6th Cir. 1995) (stating that “the public as a whole has a significant interest in ensuring equal protection of the laws and protection of First Amendment liberties”).

Furthermore, Plaintiffs respectfully ask the court to take judicial notice of the fact that the planned development of the Ground Zero Mosque is presently a matter of substantial social and political debate. *Ali v. Playgirl, Inc.*, 447 F. Supp. 723, 727 (S.D.N.Y.1978) (taking judicial notice of undisputed extrinsic facts). As such, Defendants’ denial of Plaintiffs’ free speech rights regarding the Ground Zero Mosque at this critical time is especially egregious.

In the final analysis, Defendants’ restriction on Plaintiffs’ private speech in a public forum violates fundamental constitutional rights. Plaintiffs are presently irreparably harmed by Defendants’ Free Speech Restriction, and without a TRO/preliminary injunction, this harm will continue.

CONCLUSION

Based on the foregoing, Plaintiffs respectfully request that this court grant this motion.

Respectfully submitted,

LAW OFFICES OF DAVID YERUSHALMI, P.C.

David Yerushalmi, Esq. (Ariz. Bar No. 009616;
DC Bar No. 978179; Cal. Bar No. 132011; NY Bar No. 4632568)
640 Eastern Parkway, Suite 4C
Brooklyn, NY 11213
david.yerushalmi@verizon.net
(800) 714-9650; (646) 262-0500

THOMAS MORE LAW CENTER
Robert J. Muise, Esq.* (Mich. Bar No. P62849)
24 Frank Lloyd Wright Drive
P.O. Box 393
Ann Arbor, MI 48106
rmuise@thomasmore.org
(734) 827-2001
*Subject to admission *pro hac vice*

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was personally served on Defendants MTA and Walden on _____, 2010, along with copies of the summonses and the Complaint.

LAW OFFICES OF DAVID YERUSHALMI, P.C.

David Yerushalmi, Esq.
Counsel for Plaintiffs