No. 15-141

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

REPLY BRIEF FOR PETITIONERS

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I. The Circuit Conflict Is Real and this Case Provides a Suitable Vehicle for Resolving It.

Respondents' assertions that the circuit conflict is "illusory," Resp. Br. 1, and that the forum question is too fact-bound for this Court to consider, Resp. Br. 12-25, 32-34, are incorrect.

The conflict among the circuits regarding the type of forum created by a government transit authority when it accepts controversial political or public-issue ads is acknowledged by the circuit courts and judges themselves, not just Petitioners. And it is reflected in the district court cases that have relied upon these circuit court decisions.

For example, in a very recent case from the Ninth Circuit in which the court *followed* the First Circuit's lead, 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 majority stated, "We recognize that other courts have held that similar transit advertising programs constitute designated public forums," acknowledging that these circuit courts have "concluded that if the government opens a forum and is willing to accept political speech, it has necessarily signaled an intent to create a designated public forum." *Seattle Mideast Awareness Campaign v. King Cnty.*, 781 F.3d 489, 498-99 (9th Cir. 2015) (citing *N.Y. Magazine v. Metro. Transp. Auth.*, 136 F.3d 123, 130 (2d Cir. 1998) and *Lebron v. Wash. Metro. Area Transit Auth.*, 749 F.2d 893, 896 (D.C. Cir. 1984)).

The dissent in the present case further affirmed this conflict, stating, "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*." App. 41 (dissent).

In *Ridley v. Massachusetts Bay Transportation Authority*, 390 F.3d 65 (1st Cir. 2004), which is the forum decision that was binding on the panel that decided the current case, the First Circuit described this Court's decision in *Lehman v. City of Shaker Heights,* 418 U.S. 298 (1974), as "[t]he only Supreme Court case directly on point." *Ridley*, 390 F.3d at 78. However, as noted by the dissent in this case, "*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." App. 41 (writing, in part, "to express my opinion that *Ridley* was wrongly decided").

Respondents' argument also runs headlong into the rationale articulated by the Second Circuit, which soundly rejects Respondents' claim that because the government transit authority imposes certain speech restrictions by way of policy, the forum is therefore a nonpublic forum for speech. As stated by the Second Circuit:

> [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.

N.Y. Magazine, 136 F.3d at 129-30. And this is particularly the case when the restriction is a "civility" restriction like the one at issue here.

For example, the dissenting judge in *Seattle Mideast Awareness Campaign*, who would have held that King County created a designated public forum, stated, in relevant part,

> The operative inquiry in this case is not, as the majority suggests, whether Metro's policy makes its buses generally available to all advertisements, but rather whether it makes its buses generally available to noncommercial, political advertisements. . . . The majority's holding impermissibly allows the County to create a designated public forum for purposes of selling ad space, and then engage in discretionary, content-driven evaluation of speech on an *ad hoc* basis by invoking its infinitely amorphous "civility clauses."

Seattle Mideast Awareness Campaign, 781 F.3d at 504-05 (Christen, J., dissenting).

The "infinitely amorphous" demeaning and disparaging restriction that the MBTA invoked to restrict Petitioners' speech here illustrates this problem. Indeed, the MBTA's "civility" restriction is so broad and permits so much official discretion that it cannot validly serve a "selective" function for concluding that the forum is closed to Petitioners' speech. *See Hopper v. City of Pasco*, 241 F.3d 1067, 1077 (9th Cir. 2001) ("Standards for inclusion and exclusion in a limited public forum must be unambiguous and definite . . . .") (alteration and internal quotation marks omitted); *Gregoire v. Centennial Sch. Dist.*, 907 F.2d 1366, 1375 (3d Cir. 1990) ("[I]f 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."); *see also Forsyth Cnty., Ga. v. Nationalist Movement*, 505 U.S. 123, 130, (1992) (holding that a government scheme regulating competing uses of a public forum "may not delegate overly broad licensing discretion to a government official"); *Planned Parenthood Ass'n / Chi. Area v. Chi. Transit Auth.*, 767 F.2d 1225, 1230 (7th Cir. 1985) ("We question 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.").

Moreover, contrary to Respondents' suggestion, it was not a fact-intensive inquiry into the minutiae of the transit authority's policies that served as the basis for deciding the forum question in the circuits that disagree with the First Circuit. Rather, the decisions turned on whether the government transit authority

accepted for display a wide array of controversial political and public-issue ads.

The Second and Sixth Circuits, relying upon *Lehman*, make this precise point. As stated by the Second Circuit:

> Disallowing 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, 136 F.3d at 130. The Sixth Circuit described it this way:

> 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).

The Second and Sixth Circuits' approach to the forum question is, as the courts themselves noted, consistent with *Lehman* in that in *Lehman*, the 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* commercial and service oriented advertising." *Lehman*, 418 U.S. at 304 (emphasis added).

The soundness of this rationale is demonstrated by the facts surrounding the pro-Palestinian "Committee for Peace" ad—the ad that prompted Petitioners' original submission, which the MBTA rejected. *See* App. 4-5.

The controversial pro-Palestinian ad was displayed on the MBTA's advertising space beginning in early October 2013. It caused a rash of complaints, prompting the MBTA's advertising agent to remove it from the advertising space. 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 ad. App. 4-5. The MBTA's decision to repost this controversial political and public-issue ad in the face of complaints from its ridership demonstrates more than any lawyer-drafted statement of intent or policy restriction that the MBTA is acting as a speech regulator rather than a commercial proprietor such that the forum is a public form for Petitioners' speech. *See also* Resp. Br. 31 (acknowledging the offensive nature of the pro-Palestinian ad and stating that "[t]he Committee for Peace's ads did not include any comparable 'hostile label[s],' and thus did not violate the guideline, *regardless of how offensive the ad's viewpoint may have been to supporters of Israel*") (emphasis added).

Thus, the facts are inconsistent with the MBTA's claim that it is operating its property solely as a commercial venture, demonstrating the wisdom of the Second, Third, Sixth, Seventh, and D.C. Circuits' approach to the forum question.[1] Consequently, per these circuits, when the MBTA opens its forum to controversial political and public-issue speech, it has created a public forum for that speech.

In addition to the circuit courts, the two district court decisions that ruled in Petitioners' favor when the respective transit authorities (the MTA in New York City and WMATA in Washington, D.C.) rejected the *very same ad* that the MBTA rejected here further support Petitioners' position.

In *American Freedom Defense Initiative v. Metropolitan Transit Authority*, 880 F. Supp. 2d 456 (S.D.N.Y. 2012), the district court granted an injunction preventing the MTA from refusing to display Petitioners' ad on MTA advertising space on the grounds that it violated the MTA's "no-demeaning" ads restriction. The court stated that it "agrees with AFDI that this space is a designated public forum, in which content-based restrictions on expressive activity are subject to strict scrutiny." *Id*. at 466. This was true despite the court's findings that the MTA had in place

> advertising standards prohibit[ing] ads which: (1) contain, false, misleading, or deceptive claims; (2) promote unlawful or illegal goods,

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[1] *See Lebron v. Wash. Metro. Area Transit Auth.*, 749 F.2d 893, 896 (D.C. Cir. 1984) (concluding that there is no "question that WMATA has converted its subway stations into public fora by accepting other political advertising").

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

The 1997 advertising standards left intact the above prohibitions, and added prohibitions on ads which: (9) depict a minor in a sexually suggestive manner; (10) are adverse to MTA's commercial or administrative interests, or its employees' morale; (11) "contain[] images or information that demean an individual or group of individuals on account of race, color, religion, national origin, ancestry, gender, age, disability or sexual orientation"; (12) contain violent images; (13) promote an escort or dating service; or (14) the public would find to be offensive or improper. . . .

The prohibition relevant to this case is the one on ads which demean an individual or group on account of "race, color, religion, national origin, ancestry, gender, age, disability or sexual orientation."

Am. Freedom Def. Initiative, 880 F. Supp. 2d at 460-61. As evidenced by the lower court's findings, the MTA had in place numerous speech restrictions, yet the court concluded that the forum was a public forum for the plaintiffs' advertisement because the transit authority permitted a wide-array of political and public-issue ads. As required, the district court followed *New York Magazine*. *See Am. Freedom Def. Initiative*, 880 F. Supp. 2d at 466 ("Largely on the basis of the Second Circuit's decision in *New York Magazine v. Metropolitan Transportation Authority*, 136 F.3d 123 (2d Cir. 1998), the Court agrees with AFDI that this space is a designated public forum . . . .").

The district court in Washington, D.C. similarly concluded that WMATA had created a public forum for the plaintiffs' ad such that its restriction based on safety concerns did not satisfy strict scrutiny. *Am. Freedom Def. Initiative v. Wash. Metro. Area Transit Auth.*, 898 F. Supp. 2d 73, 79 (D.D.C. 2012) (finding a public forum based on WMATA's concession and noting that "[t]he D.C. Circuit has previously held that 'there [is no] question that WMATA has converted its subway stations into public fora by accepting other political advertising.'") (quoting *Lebron*, 749 F.2d at 896); *see also Am. Freedom Def. Initiative v. Se. Penn. Transp. Auth.*, No. 2:14-cv-5335, 2015 U.S. Dist. LEXIS 29571, at *18 (E.D. Pa. 2015) (concluding that the transit authority created a public forum for the plaintiffs' speech and noting that "*Lehman* and subsequent cases applying its teachings make clear that SEPTA's acceptance of political and public issue speech demonstrates a general intent to open the forum for expression.").

Finally, Respondents' newly asserted claim that it is considering changes to its advertising policy, Resp. Br. 12-13, provides no basis for this Court to decline review. As an initial matter, this representation is a tacit acknowledgment that there is indeed something substantively different about the forum when a government transit authority accepts for display controversial political and public-issue ads. Nonetheless, this case (and thus the questions presented) is not moot for the simple fact that Petitioners have a viable claim for nominal damages regardless of the availability of prospective relief. *See, e.g., Bernhardt v. Cnty. of L.A.*, 279 F.3d 862, 872 (9th Cir. 2002) ("A live claim for nominal damages will prevent dismissal for mootness."). As this Court explained in *Carey v. Piphus*, 435 U.S. 247, 266 (1978), "By making the deprivation of [constitutional] rights actionable for nominal damages without proof of actual injury, the law recognizes the importance to organized society that those rights be scrupulously observed . . . ."

Moreover, this Court has long recognized that "voluntary cessation" of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, *i.e.*, does not make the case moot." *United States v. W. T. Grant Co.*, 345 U.S. 629, 632 (1953). As the Court noted, not only is a defendant "free to return to his old ways," but also the public has an interest "in having the legality of the practices settled." *Id.* at 632; *see also City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 n.10 (1982) ("Mere voluntary cessation of allegedly illegal conduct does not moot a case; if it did, the courts would be compelled to leave the defendant free to return to his old ways.") (alterations and quotation marks omitted).

And most important for our purposes here, "[a]long with its power to hear the case, the court's power to grant injunctive relief survives discontinuance of the illegal conduct." *W. T. Grant Co.*, 345 U.S. at 633. In fact, the Court warned the lower courts to be particularly vigilant in cases such as this, stating, "It is the duty of the courts to beware of efforts to defeat injunctive relief by protestations of repentance and reform . . . ." *Id*. at 632 n.5; *see also Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville, Fla.,* 508 U.S. 656, 662 (1993) (describing the "'well settled' rule that 'a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice'") (quoting *City of Mesquite*, 455 U.S. at 289).

In conclusion, there is a clear circuit conflict on an important question of federal law involving the First Amendment. And this case provides an ideal vehicle for resolving this conflict.

II. The MBTA's "Civility" Restriction Is Viewpoint Based on Its Face.

The "civility" restriction at issue here is closely connected to the forum question in that "[s]tandards for inclusion and exclusion . . . must be unambiguous and definite." *Hopper*, 241 F.3d at 1077; *Gregoire,* 907 F.2d at 1375 (same). The MBTA's restriction on its face fails this test, and no further factual development is necessary. Moreover, the "incongruous decision to post the Committee for Peace ad, but reject [Petitioners'] submissions, at the very least, raises the specter of viewpoint discrimination by the MBTA," App. 48-49 (dissent) (citing *AIDS Action Comm. of Mass., Inc. v.*

Mass. Bay Transp. Auth., 42 F.3d 1, 12 (1st Cir. 1994)), which is impermissible.

As noted 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."[2] *Ridley*, 390 at 100 (Torruella, J., dissenting).

Reducing the impact and effectiveness of a message by changing its meaning, even if the entire message itself is not prohibited, by way of a "civility" restriction is a form of viewpoint discrimination prohibited by the First Amendment. *See Cohen v. Cal.*, 403 U.S. 15, 26 (1971) (warning that "governments might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views").

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[2] The Respondents mistakenly claim that "[s]ince the petition was filed, the Ninth Circuit issued its decision" in *American Freedom Defense Initiative v. King County* "and rejected petitioners' viewpoint-discrimination argument." Resp. Br. 26 n.5. While Petitioners did challenge King County's "demeaning and disparaging" restriction on appeal, the Ninth Circuit did not decide the issue. Instead, it affirmed on other grounds. *See Am. Freedom Def. Initiative v. King Cnty.*, 796 F.3d 1165, 1172 (9th Cir. 2015) (concluding "that Plaintiffs have not established a likelihood of success on the merits with respect to Metro's rejection of the ad on the ground that it was false," and stating that "[w]e need not, and do not, reach Metro's other reasons for rejecting the ad").

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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