15-1997

In the United States Court of Appeals for the Second Circuit

AMERICAN FREEDOM DEFENSE INITIATIVE, PAMELA GELLER, ROBERT SPENCER,
Plaintiffs-Appellants,

v.

METROPOLITAN TRANSPORTATION AUTHORITY, ("MTA"), THOMAS F. PRENDERGAST, individually and in his official capacity as the Director of the MTA Real Estate Department, JEFFREY B. ROSEN, Individually and in his official capacity as the Director of the MTA Real Estate Department,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK
HONORABLE JOHN G. KOELTL
CASE NO. 14-CV-7928 (JGK)

APPELLANTS' BRIEF AND SPECIAL APPENDIX

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Plaintiff-Appellant American Freedom Defense Initiative (AFDI) states as follows: AFDI is a nonprofit corporation. AFDI has no parent, subsidiary, or affiliated corporation, and no public entity, including any publicly held corporation, has any ownership interest in AFDI.

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JURISDICTIONAL STATEMENT

On October 1, 2014, Plaintiffs filed a civil rights complaint pursuant to 42 U.S.C. § 1983, challenging the MTA's rejection of their advertisement on First Amendment and Fourteenth Amendment grounds. (Compl. Dkt. Entry [R-1] at A4-5[1]). The district court had jurisdiction under 28 U.S.C. § 1331.

On November 28, 2014, Plaintiffs filed a motion for a preliminary injunction. (Mot. for Prelim. Inj. Dkt. Entry [R-12] at A8). The district court held an evidentiary hearing on Plaintiffs' motion on March 24, 2015 (Hr'g Tr. Dkt. Entry [R-31] at A12), and on April 21, 2015, the court granted the motion. (Op. & Order Granting Mot. for Prelim. Inj. [hereinafter "Prelim. Inj. Op."] at A374-401). The district court stayed the enforcement of the preliminary injunction for thirty days "[i]n order to enable the defendants to consider their appellate options and methods for display of the proposed advertisement." (*Id*. at A401).

Instead of appealing the court's order or displaying the advertisement, the MTA modified its advertising guidelines and then moved the district court to dissolve the injunction. (Defs.' Mot. to Dissolve Prelim. Inj. Dkt. Entry [R-44] at A15).

On June 19, 2015, the district court granted the MTA's motion. (Op. & Order Dissolving Prelim. Inj. at SPA7-28). And on June 22, 2015, Plaintiffs filed a

[1] Citations to the Joint Appendix and to the Special Appendix appear as "A__" and "SPA__," respectively.

timely Notice of Interlocutory Appeal, seeking review of the district court's order dissolving the preliminary injunction. (Notice of Interlocutory Appeal Dkt. Entry [R-57] at A18).

This Court has jurisdiction under 28 U.S.C. § 1292.

STATEMENT OF THE ISSUES

I. Whether the preliminary injunction was rendered moot by the intervening policy change of the MTA board of directors when:

A. there was minimally *prima facie* evidence that the policy change was directed at and a result of the MTA's viewpoint-based censorship of Plaintiffs' speech;

B. the MTA did not properly convert the forum from a designated public forum to a limited public forum; and

C. under New York state law, Plaintiffs had a vested right to have the MTA display its advertisement.

II. Whether the proper constitutional standard for content-based restrictions imposed upon the categories of expressive speech permitted in a limited public forum is strict scrutiny or reasonableness and viewpoint neutrality.

III. Even assuming *arguendo* that the proper constitutional standard was reasonableness and viewpoint-neutrality, whether a policy that prohibits speech based upon whether or not it is "disputed" is reasonable and viewpoint neutral.

STATEMENT OF THE CASE

A. Nature of the Case and Relevant Procedural History.

This appeal arises out of the MTA's violation of Plaintiffs' First Amendment right to freedom of speech—an issue that is not contested. (*See* Order of Partial J. Dkt. Entry [R-67] at A21). The nature of this case was described by the district court in its original order granting Plaintiffs' motion for preliminary injunction as follows:

> The plaintiffs, a pro-Israel advocacy organization known for its public criticism of Islam, and its co-founders, submitted a political advertisement to the Metropolitan Transportation Authority ("MTA") to be displayed on the backs of MTA buses. The advertisement portrayed a menacing-looking man whose head and face are mostly covered by a head scarf. The ad includes a quote from "Hamas MTV": "Killing Jews is Worship that draws us close to Allah." Underneath the quote, the ad stated: "That's His Jihad. *What's yours?*" The bottom of the ad included a disclaimer that it was sponsored by the plaintiff organization, the American Freedom Defense Initiative ("AFDI"), and did not imply the MTA's endorsement of the views expressed by the ad.
>
> Although the MTA accepted other controversial advertisements submitted by the plaintiffs, it refused to run this advertisement, which the parties both term the "Killing Jews" advertisement. In doing so, the MTA cited its standards prohibiting advertisements that would incite or provoke violence. The plaintiffs promptly sued, alleging that the MTA's refusal to run the advertisement on its buses infringed on the plaintiffs' First Amendment rights. The plaintiffs moved for a preliminary injunction that would order the defendants to display the ad. The Court held an evidentiary hearing on the preliminary injunction motion on March 24, 2015.
>
> While the Court is sensitive to the MTA's security concerns, the defendants have not presented any objective evidence that the Killing

> Jews advertisement would be likely to incite imminent violence. Indeed, as the defendants knew when considering whether to run the ad, substantially the same advertisement ran in San Francisco and Chicago in 2013 without incident. The advertisement qualifies as protected speech, and the defendants have restricted it based on its content without a compelling interest or a response narrowly tailored to achieving any such interest. Accordingly, the plaintiffs' motion for a preliminary injunction is granted.

(Prelim. Inj. Op. at A374-75).

The district court stayed the enforcement of the preliminary injunction for thirty days "[i]n order to enable the defendants to consider their appellate options and methods for display of the proposed advertisement." (*Id*. at A401).

The MTA neither appealed nor provided for the display of Plaintiffs' advertisement. Instead, the MTA used the time afforded by the stay to change its advertising guidelines so as to prohibit the display of Plaintiffs' ad. The MTA then moved the district court to dissolve its injunction. (Defs.' Mot. to Dissolve Prelim. Inj. Dkt. Entry [R-44] at A15).

The district court granted the MTA's motion in a decision rendered by the Honorable John G. Koeltl. (Op. & Order Dissolving Prelim. Inj. at SPA7-28). This appeal follows. (Notice of Interlocutory Appeal Dkt. Entry [R-57] at A18).

B. Statement of Facts.

There is without question a long and contentious history between the MTA on the one hand and the American Freedom Defense Initiative ("AFDI") and its

co-leaders, Pamela Geller and Robert Spencer, on the other.[2] This history involves numerous and *unlawful* efforts by the MTA to restrict Plaintiffs' First Amendment right to freedom of speech.[3] This case, which includes the MTA's most recent effort here to dissolve the district court's preliminary injunction, is just the latest example. We turn now to briefly review that history.

In 2010, Plaintiffs submitted for display on MTA property a "Ground Zero Mosque" advertisement. *See Am. Freedom Def. Initiative v. Metro. Transp. Auth.*, No. 10-civ-5947 (S.D.N.Y. filed Aug. 6, 2010). The MTA, through its advertising agent, refused to accept the ad, prompting the filing of a federal civil rights lawsuit. *See id*. Shortly after filing the lawsuit, the MTA backtracked, claiming that it had not yet rendered a "final" determination on the ad, and then agreed to display it, prompting Plaintiffs to dismiss their lawsuit. (Geller Decl. ¶¶ 9-16 at A590-91).

In 2011, the MTA again rejected one of Plaintiffs' advertisements, prompting Plaintiffs to sue the MTA once again. In this second lawsuit, Plaintiffs

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[2] AFDI, Pamela Geller, and Robert Spencer collectively referred to herein as "Plaintiffs."

[3] *See Am. Freedom Def. Initiative v. Metro. Transp. Auth.*, No. 10-civ-5947 (S.D.N.Y. filed Aug. 6, 2010); *see* Geller Decl. ¶¶ 9-16 at A590-91 (noting that AFDI challenged the MTA's initial rejection of Plaintiffs' "Ground Zero Mosque" ad and then voluntarily dismissed the Complaint only after the MTA agreed to display the ad); *Am. Freedom Def. Initiative v. Metro. Transp. Auth.*, 889 F. Supp. 2d 606, 614-15 (S.D.N.Y. 2012) (granting injunction and chastising the MTA for wasting time by not taking action during the stay); *Am. Freedom Def. Initiative v. Metro. Transp. Auth.*, No. 14-cv-07928, 2015 U.S. Dist. LEXIS 52241 (S.D.N.Y. Apr. 20, 2015) (granting preliminary injunction) at A374-401.

challenged on First Amendment grounds the MTA's no-demeaning standard. The MTA had refused to run Plaintiffs' "Savages" ad, claiming that it demeaned Muslims and Palestinians in violation of the standard. (Prelim. Inj. Op. at A378). Judge Engelmayer ruled in Plaintiffs' favor, holding that the non-demeaning standard was content based in violation of the First Amendment. *Am. Freedom Def. Initiative v. Metro. Transp. Auth.*, 880 F. Supp. 2d 456 (S.D.N.Y. 2012).

Indeed, in this earlier case, even after Judge Engelmayer generously granted a stay for the MTA to amend its unconstitutional advertising policy and then extended the stay yet again at the MTA's urging, the MTA informed the court that it needed still more time to amend its policy to conform to the court's earlier ruling. After the MTA failed to act, Plaintiffs asked the court to enter a final judgment and permanent injunction, to which the MTA forcefully objected, arguing to the court that it needed more time to amend its policy to restrict disparaging speech in what it considered a constitutional fashion. *Am. Freedom Def. Initiative v. Metro. Transp. Auth.*, 889 F. Supp. 2d 606, 608-12 (S.D.N.Y. 2012). As noted by the district court below, "[i]n September 2012, the MTA considered alternatives for remedying the constitutional defects identified by Judge Engelmayer, *such as only permitting commercial advertising*, but ultimately chose to continue accepting all forms of advertising and amended its standards to

discontinue the no-demeaning standard." (Prelim. Inj. Op. at A379 [emphasis added]; *see also* Rosen Decl. ¶¶ 27-28 at A125-26).

There was good reason for the MTA's decision to reject a "commercial ad only" policy: political and public issue ads brought in much needed revenue for the cash-strapped transit authority, and experience proved that commercial ads were even more controversial. *Am. Freedom Def. Initiative v. Metro. Transp. Auth.*, 880 F. Supp. 2d 456, 460-62 (S.D.N.Y. 2012) (citing to Rosen declaration). This remained the MTA's position in this case (Rosen Decl. ¶ 10 at A119-20), provided as sworn testimony, through the preliminary injunction hearing held on March 24, 2015. (Prelim. Inj. Hr'g. Tr. 4:9-24 at A231; 10:10-12:6 at A237-39 [agreeing that the MTA had not only rejected prohibiting public issue ads, but had actually expanded the range of vigorous debate by not replacing the unconstitutional non-disparagement provision]).

Notwithstanding the MTA's disingenuous representations to Judge Engelmayer about remedying the constitutional defects in the advertising standards, around the same time, the MTA added language that prohibited ads that "contain[] material the display of which the MTA reasonably foresees would imminently incite or provoke violence or other immediate breach of the peace, and so harm, disrupt, or interfere with safe, efficient, and orderly transit operations." (Prelim. Inj. Op. at A379; *see also* Rosen Decl. ¶ 30 at A126-27). Not

surprisingly, this was the standard the MTA next employed to reject an advertisement submitted by Plaintiffs—the advertisement at issue here. And it was the "as-applied" enforcement of this standard that the district court enjoined, finding that it violated Plaintiffs' right to freedom of speech under the First Amendment and ordering the MTA to display the ad. (Prelim. Inj. Op. at A389-98). Indeed, in its opinion granting Plaintiffs' request for a preliminary injunction, the district court noted that "at one point in his testimony, Diaz suggested that even if 'nobody ever committed a violent act as a result of this ad and we knew in the future that nobody was ever going to do that,' he still would have refused to run it because it advocated violence. Tr. 100."[4] (Prelim. Inj. Hr'g Tr. 100:5-18 at A327; Prelim. Inj. Op. at A391). The "incitement" standard remains today a part of the MTA's advertising standards. (*See* MTA Advertising Policy [rev'd Apr. 29, 2015] ["New Policy"], § IV.B.12. at SPA4). Without an injunction, nothing prevents the MTA from reasserting this provision as the basis for the MTA's rejection of Plaintiffs' proposed ad.

The advertisement at issue here, referred to as the "Killing Jews" ad, was submitted by Plaintiffs to MTA's advertising agent in or about August 2014. This

[4] Consequently, it is reasonable to conclude that the MTA adopted the "incitement" standard so that it could be used as a tool to reject future ads submitted by Plaintiffs since the ads inevitably address Islam and its connection with terrorism.

advertisement, which included the unique MTA disclaimer, was designed specifically for display on MTA advertising space, and it appears as follows:

(Geller Decl. ¶¶ 18-19 at A61). On its face, the "Killing Jews" ad does not contain political *content*.[5]

On August 25, 2014, the MTA's advertising agent informed Plaintiff Geller that the ad was rejected, claiming that it violated the MTA's "incitement" standard. (Geller Decl. ¶¶ 15-16 at A60-61). The MTA formally confirmed its rejection of the ad on September 22, 2014. (Geller Decl. ¶¶ 23-24, Ex. 3 at A63-64, A74-78).

As a result of this rejection, on October 1, 2014, Plaintiffs filed their Complaint challenging the MTA's speech restriction. (Compl. Dkt. Entry [R-1] at A4-5). And on November 28, 2014, Plaintiffs filed their motion for a preliminary injunction. (Mot. for Prelim. Inj. Dkt. Entry [R-12] at A8]).

[5] "Political" is objectively defined as "[o]f or relating to the government or public affairs of a country." Oxford Dictionaries, "political" entry at http://tinyurl.com/pg5qjou (last visited August 20, 2015). Consequently, a "political" message would include a message that "[p]romotes or opposes a political party, or promotes or opposes any ballot referendum or the election of any candidate or group of candidates for federal, state, judicial or local government offices" and any message that was "directed or addressed to the action, inaction, prospective action or policies of a governmental entity." (*See* New Policy at § IV.B.1. & 2.b. at SPA4).

On March 24, 2015, the Honorable John G. Koeltl presided over an evidentiary hearing and heard oral arguments on the motion. (Prelim. Inj. Hr'g Tr. at A228-373). The court issued its opinion and order granting Plaintiffs' motion for a preliminary injunction on April 21, 2015, but stayed its effective date for 30 days "[i]n order to enable the defendants to consider their appellate options and methods for display of the proposed advertisement." (Prelim. Inj. Op. at A401). The MTA neither sought an appeal of the court's decision nor provided for the display of Plaintiffs' ad. Instead, the MTA used the stay to attempt yet again to censor Plaintiffs' speech impermissibly.

Thus, on April 24, 2015, MTA's counsel, Peter Sistrom, filed a procedurally odd letter—one in which opposing counsel did not bother to discuss with Plaintiffs' counsel prior to filing—"to inform the Court that the MTA Board at its next scheduled meeting on Wednesday, April 29, will vote on a proposal to replace the MTA's existing standards for advertisements on its property with a new advertising policy that will convert the MTA's property from a designated public forum into a limited public forum by, *inter alia*, excluding all advertisements of a political nature." (MTA Letter at A402). The MTA's letter further stated, "The proposed advertisement at issue in this case will not comply with this revised advertising policy, which bars display of advertisements that are political in nature (which this advertisement indisputably is). The MTA will no longer seek to

enforce Section (a)(x) of its current advertising policy to reject Plaintiffs' advertisement. Accordingly, Plaintiffs' claims in this case will be rendered moot."[6] (*Id.*).[7]

On April 29, 2015, the MTA Board held a public meeting to discuss changes to the MTA's advertising standards. During this meeting, MTA Board Members made it very clear that they strongly disliked Plaintiff Geller and vehemently opposed the views she expressed via her advertisements. In short, it was this

[6] The fact that counsel for the MTA would file such a letter predicting the outcome of ***two*** public meetings and ***the public votes*** that were yet to take place at those meetings and further concluding that Plaintiffs' advertisement will not comply with this yet-to-be enacted policy is highly suspicious and indeed calls into question the legitimacy of this government action. *See generally* N.Y. Open Meetings Law, §§ 100 *et seq*. (requiring all such votes to be conducted at a public meeting). Specifically, as Defendant Rosen's testimony makes clear, on April 27, three days ***after*** the filing of Sistrom's letter and two days before the MTA Board could take up the proposed amendments, the amendments were first approved by the Finance Committee, a requisite for the Board to take up the amendments two days later. (Rosen Decl. ¶¶ 66-68 at A436-37). Yet, Sistrom's letter simply ignores this interim approval and represents to the court that it was a certainty that the amendments would be presented to the MTA Board as a whole at its next meeting. Apparently, Sistrom, as MTA's counsel, was privy to certain communications with the Finance Committee members about the outcome of their future votes that led him to believe the Finance Committee's decision to pass the amendments along to the entire Board was, as they say, "in the bag."

[7] In this letter, the MTA also claimed that it was going to move the district court to "dismiss the case on the ground of mootness." (MTA Letter at SPA402]). The MTA has subsequently retreated from that legally deficient position since, *at a minimum*, a live controversy remained in light of Plaintiffs' claim for nominal damages. (*See* Pls.' Letter at A410-11; *see also* Defs.' Mem. in Support of Mot. to Dissolve [R-45] at 15, n.9 ["MTA Mem."] ["The MTA does not contend that AFDI's claims for nominal damages or attorneys' fees are moot."]). In fact, the district court has now entered an order of partial judgment in Plaintiffs' favor on this claim. (Order of Partial J. Dkt. Entry [R-67] at A21).

animus toward Plaintiffs and their viewpoints that served as the impetus for revising the advertising standards. (Geller Decl. ¶¶ 22-31 at A597-99). Later that day, MTA's counsel filed a letter with the court providing the New Policy as an attachment. (SPA1-6).

On May 5, 2015, the MTA notified Plaintiffs that it formally rejected the "Killing Jews" ad under Section IV(B)(2) of the New Policy. In this rejection, and consistent with its advertising standards, the MTA invited Plaintiffs to make revisions to the ad in order for it to comply with the New Policy. On May 11, 2015, Plaintiffs, through counsel, sent the following email to MTA's counsel: "It might be useful, Peter, to explain why [the 'Killing Jews' ad] is 'political'. As you know, 'political speech' in the context of First Amendment jurisprudence is not identical with the MTA definition, at least on its face. To expedite matters, would this ad be political, as a revision, and if so, why?"

(Yerushalmi Decl. ¶¶ 2-6 at A649-51). The MTA's counsel did not respond substantively to either inquiry (*i.e.*, the inquiry regarding the basis for concluding

that Plaintiffs' ad is "political" and the inquiry regarding the proposed revision of Plaintiffs' ad).[8] (Yerushalmi Decl. ¶¶ 4-6 at A650-51).

[8] In their rejection of the original "Killing Jews" ad under the New Policy, the MTA cites only *two* grounds for claiming that the ad is "political." First, the MTA claims that "AFDI has asserted in a brief filed with the Court that its Killing Jews advertisement 'address[es] Hamas's jihad against Jews' and so it is 'core political speech.'" (Rosen Decl. ¶ 75 A439). *This assertion is false*. In their brief to the district court, Plaintiffs stated as follows:

> "[S]peech on *public issues*," such as Plaintiffs' timely advertisement addressing Hamas's jihad against Jews, "occupies the 'highest rung of the hierarchy of First Amendment values,' and is entitled to special protection." *Connick v. Myers*, 461 U.S. 138, 145 (1983) (quoting *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982); *Carey v. Brown*, 447 U.S. 455, 467 (1980)); *see also AFDI v. MTA I*, 880 F. Supp. 2d at 466 ("As a threshold matter, the Court notes that the AFDI Ad is not only protected speech—it is core political speech. The Ad expresses AFDI's pro-Israel perspective on the Israel/Palestinian conflict in the Middle East, and implicitly calls for a pro-Israel U.S. foreign policy with regard to that conflict. . . . As such, the AFDI Ad is afforded the highest level of protection under the First Amendment.").

(Pls.' Mem. in Support of Mot. for Prelim. Inj. [R-13] at 12 [emphasis added]). The "*core political speech*" quote was from Judge Engelmayer's opinion and refers to Plaintiffs' "Savages" ad, which addressed the Israel/Palestinian conflict and U.S. Foreign policy (*i.e.*, unlike the "Killing Jews" ad, the "Savages" ad was a "political" ad). The MTA's second and final ground for rejecting the "Killing Jews" ad as "political" is because Plaintiffs "agreed without objection to its display with the MTA's required disclaimer for any advertisement that 'predominately expresses or advocates a viewpoint on a political, moral, or religious issue or related matter.'" (Rosen Decl. ¶ 75 at A439). In other words, because Plaintiffs complied with the MTA's prior rules their ad is now out of compliance. Aside from its facial absurdity, whether or not the disclaimer (which only disclaims the MTA's support for the message) appears on an ad says nothing about the *subject matter* of the ad (*i.e.*, whether its content is political, as opposed to religious, for example). Moreover, the revised "Killing Jews" ad that was submitted, but which MTA's counsel would not address, did not include the disclaimer. (*See* Yerushalmi Decl. ¶ 4 at A650-51). Finally, the New Policy similarly imposes a disclaimer requirement. (*See* New Policy, § IV.C. at SPA5).

On May 14, 2015, the MTA filed its motion to dissolve the preliminary injunction arguing that, given the New Policy and its application to the Killing Jews ad, the injunction was moot. (Mot. to Dissolve Dkt. Entry [R-44] at A15). On June 19, 2015, the district court granted the MTA's motion. (Op. & Order Dissolving Prelim. Inj. at SPA7-28). And on June 22, 2015, Plaintiffs filed a timely Notice of Interlocutory Appeal, seeking review of the district court's order dissolving the preliminary injunction. (Notice of Interlocutory Appeal Dkt. Entry [R-57] at A18).

SUMMARY OF THE ARGUMENT

Plaintiffs assert that the district court erred when it granted the MTA's motion to dissolve the preliminary injunction—an injunction that would have required the MTA to display the Killing Jews ad. The court's order to dissolve the injunction was wrong for at least three reasons, all arising from the MTA's failure to sustain its "heavy burden" to demonstrate that (1) there was no reasonable expectation that the constitutional violations would recur and (2) the adoption of the New Policy created an intervening event that completely and irrevocably eradicated the effects of the alleged violation. First, the facts more than support a reasonable expectation that the MTA remains willing and able to return to its previous advertising policy and offending conduct. Second, the adoption of the New Policy did nothing to eradicate the *effects* of the MTA's unconstitutional

suppression of Plaintiffs' speech because the application of the New Policy to Plaintiffs' ad remained unconstitutional. And finally, Plaintiffs have earned a vested right under state law to display the ad—a right which should have precluded the dissolution of the injunction.

ARGUMENT

I. Standard of Review.

Because this case involves the violation of First Amendment rights, this Court is required to "conduct an independent examination of the record as a whole, without deference to the trial court." *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 567 (1995). This is so "because the reaches of the First Amendment are ultimately defined by the facts it is held to embrace, and [this court] must thus decide for [itself] whether a given course of conduct falls on the near or far side of the line of constitutional protection." *Id.*; *see also Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 499 (1984) (noting that in cases raising First Amendment issues appellate courts must make an independent examination of the whole record in order to ensure that lower court decisions do not infringe free speech rights).

Additionally, the issue of mootness is reviewed *de novo*. *Lamar Adver. of Penn., LLC v. Town of Orchid Park*, 356 F.3d 365, 373 (2d Cir. 2004).

And finally, "[q]uestions of law decided in connection with requests for preliminary injunctions . . . receive the same *de novo* review that is appropriate for issues of law generally." *Lusk v. Village of Cold Spring*, 475 F.3d 480, 484-85 (2d Cir. 2007).

II. Defendant Has Not Met Its "Heavy Burden" as the Moving Party to Dissolve the Preliminary Injunction.

A. Defendant's Heavy Burden.

The district court recognized, at least in words, the proper test for the court to apply before granting the MTA's motion to dissolve the preliminary injunction. The MTA argued that the injunction was moot as a result of the MTA's passage of the New Policy. The court wrote:

> The defendants bear a "***heavy burden***" in showing that the plaintiffs' claims for injunctive relief have become moot. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 189, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000). "The voluntary cessation of allegedly illegal conduct usually will render a case moot if the defendant[s] can demonstrate that ***(1) there is no reasonable expectation that the alleged violation will recur and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation***." *Granite State Outdoor Adver., Inc. v. Town of Orange, Conn.*, 303 F.3d 450, 451 (2d Cir. 2002) (per curiam) (quoting *Campbell v. Greisberger*, 80 F.3d 703, 706 (2d Cir. 1996) (internal quotation marks omitted)); *see also Lamar Adver. of Penn, LLC v. Town of Orchard Park, New York*, 356 F.3d 365, 375-76 (2d Cir. 2004).

(SPA 13) (emphasis and underlining added). Thus, to successfully move this Court to uphold the district court's decision to dissolve its preliminary injunction,

the MTA must satisfy a heavy two-fold burden. First, the MTA must demonstrate that there is ***no*** reasonable expectation that the MTA might once again apply its advertising policy in an unconstitutional fashion to restrict speech, and, in particular, by applying the still quite extant "no incitement" provision. Second, the MTA must also demonstrate that intervening events (*i.e.*, the adoption of the New Policy and its use to reject Plaintiffs' ad) have ***completely*** and ***irrevocably eradicated*** the ***effects*** of the alleged violation. We purposefully highlight and underscore each of these four terms because the district court and the MTA have paid very little attention to them and have somewhat cavalierly assumed away the specifics.

B. Defendant Has Not Met Its Heavy Burden.

1. The MTA's Voluntary Cessation Does Not Satisfy the First Prong of Its Heavy Burden.

The MTA argues that since it is now applying the "no political" restriction from the New Policy to censure Plaintiffs' speech—one different from the "no incitement" provision utilized unconstitutionally in the past—this amounts to a voluntary cessation of its illegal conduct. (MTA Mem. at 16-22). Further, the MTA argues that there is no reasonable expectation that it might return to its previous bad ways since it enjoys the deference of a legislative or administrative government agency. (MTA Mem. at 16-17). The MTA's argument, however, fails to treat this Court's precedence with any real care and ignores almost completely

the Supreme Court's overarching instructions on the law of voluntary cessation. We turn to both now, examining first the High Court's approach and then to the actual language used and logic applied by this Court.

The Supreme 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.

As the Supreme Court set out clearly in its most recent decision on the subject, the rule that the voluntary cessation of illegal conduct, even as applied to

government defendants, will not rob a court of its power to adjudicate a claim is "well settled." Here is what the Court had to say about this rule in *Northeastern Florida Chapter of Associated General Contractors of America v. City of Jacksonville, Florida*, 508 U.S. 656, 662 (1993):

> In their brief on the merits, respondents reassert their claim that the repeal of the challenged ordinance renders the case moot. We decline to disturb our earlier ruling, however; now, as then, the mootness question is controlled by *City of Mesquite v. Aladdin s Castle, Inc.*, 455 U.S. 283, 71 L. Ed. 2d 152, 102 S. Ct. 1070 (1982), where we applied 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.' *Id.*, at 289. Although the challenged statutory language at issue in *City of Mesquite* had been eliminated while the case was pending in the Court of Appeals, we held that the case was not moot, because the defendant's 'repeal of the objectionable language would not preclude it from reenacting precisely the same provision if the District Court's judgment were vacated.'[9] *Ibid.*
>
> This is an *a fortiori* case. There is no mere risk that Jacksonville will repeat its allegedly wrongful conduct; it has already done so. *Nor does it matter that the new ordinance differs in certain respects from the old one*. *City of Mesquite* does not stand for the proposition that it is only the possibility that the *selfsame* statute will be enacted that prevents a case from being moot; if that were the rule, a defendant could moot a case by repealing the challenged statute and replacing it with one that differs only in some insignificant respect. *The gravamen of petitioner's complaint is that its members are disadvantaged in their efforts to obtain city contracts*. The new ordinance may disadvantage them to a lesser degree than the old one, but insofar as it accords preferential treatment to black- and female-owned contractors—and, in particular, insofar as its 'Sheltered Market

[9] As noted by the Court (and contrary to the MTA's assertion), there were no "unusual facts in *City of Mesquite*." (MTA Mem. at 16, n.10). It was a straightforward application of the "well settled" rule.

> Plan' is a 'set aside' by another name—*it disadvantages them in the same fundamental way*.

Ne. Fla. Chapter of Associated Gen. Contractors of Am., 508 U.S. at 661-62 (emphasis added). It is worth emphasizing here that the offending parties in both *Northeastern Florida* and *City of Mesquite* were municipalities acting in their legislative capacity when they sought to revamp their ordinances to render the claims against them moot. In neither case did the government body enjoy some deference to its claim that it was not reasonable to expect the city to return to its unconstitutional ways. In both cases the Supreme Court applied the well-settled rule that voluntary cessation does not moot the matter before the court.

The Second Circuit applied this doctrine in *Lamar Advertising of Pennsylvania, LLC v. Town of Orchard Park*, 356 F.3d 365 (2004), and concluded under the facts of that case that the regulatory change mooted the advertiser's claim for injunctive relief. *Lamar* supports Plaintiffs' position in many respects, and its holding is readily distinguishable in important ways.

Prior to filing suit, Lamar submitted requests for permits to display various signs pursuant to the regulations in effect at the time. The signs Lamar proposed exceeded the ordinance's size limits for such signs and were therefore rejected. Lamar filed suit under 42 U.S.C. § 1983, claiming that the sign ordinance was facially unconstitutional, but unconstitutional in ways unrelated to the size limitations used to reject Lamar's permits. There is no indication that Lamar

challenged the ordinance as applied. Moreover, as noted, the only basis for rejecting Lamar's permit requests was a content-neutral, manner restriction that placed size limits on the signs—a constitutionally permissible restriction. *See id.* at 369. There is *zero* evidence that the Town objected to the content or viewpoint of any of Lamar's signs nor is there a shred of evidence that the Town disfavored Lamar as a speaker.

In the lawsuit, "Lamar asserted that the entire sign regulation scheme should be declared unconstitutional and that the Town should be enjoined from interfering with its erection of signs. Shortly after filing suit, Lamar moved for summary judgment, and for preliminary and permanent injunctions." *Id.*

In its opposition, the Town, unlike the MTA here, "conceded that its sign ordinance—at least in some respects—was unconstitutional in light of prior decisions from the Supreme Court and this Court." *Id.* Consequently, the Town amended the ordinance in an effort to repair its constitutional deficiencies (*n.b.*: there is no evidence that the Town amended its ordinance because it wanted to prevent Lamar from conveying certain messages and viewpoints via its sign displays, unlike this case). "No change, however, was made to the ordinance's size and location restrictions, or to the fee payment provisions." *Id.* at 370. In other words, the Town's basis for rejecting Lamar's sign permit application was the same ***permissible*** basis both before and after the zoning amendments. The zoning

amendments were not an effort to create legislatively a new reason to deny Lamar but simply to rid the zoning scheme as a whole of a facial constitutional infirmity that had nothing to do with Lamar's application. Moreover, unlike this case, the amendments were not made following the *granting* of an injunction.

In this case, the facts are quite different and relevantly so. First, the district court ordered the preliminary injunction because the MTA was engaged in patently illegal and unconstitutional conduct all in an effort to suppress Plaintiffs' speech. Second, and as the district court itself noted, this was not the first time. Indeed, this was the third occasion Plaintiffs were forced to sue the MTA and the second time Plaintiffs had to put on a full-day evidentiary hearing to obtain a preliminary injunction to uphold their constitutional rights.

The third factual distinction between *Lamar* and the case at bar addresses the governmental deference claim. To begin, we again note that the Supreme Court has recognized no such deference under its well-settled rule. In fact, *Lamar* cites to the case of *Harrison & Burrowes Bridge Constructors, Inc. v. Cuomo*, 981 F.2d 50, 59 (2d Cir. 1992), for the proposition that "some deference must be accorded to a [legislative body's] representations that certain conduct has been discontinued." *Lamar Adver.*, 356 F.3d at 376. In *Harrison*, there was in fact a government representation that the *offending* program had been suspended. *Harrison & Burrowes Bridge Constructors, Inc.*, 981 F.2d at 58-59. Similarly, in the Supreme

Court case cited by *Harrison* for this proposition, there was an expressed representation made by the attorney to the court in oral argument in circumstances that made it rather plain that the *offending* behavior would not continue. *Id*. at 59 (citing *DeFunis v. Odegaard*, 416 U.S. 312, 317 (1974) (per curiam)). In this case, the MTA has made no representations whatsoever that it would not at some future time return to its previous policy of permitting political and public issue ads, which it could do and which is unlike returning to a policy that is itself unlawful on its face. In fact, the only representation by the MTA in this regard is that it has "no plan to revise or consider revising the New Advertising Policy." (Rosen Decl. ¶ 73 at A438]). In other words, the MTA seeks to close the forum now to reject Plaintiffs' speech, but understands that the option remains to reopen the forum once this controversy subsides. This watered-down statement is quite obviously not a representation that the MTA will not return to its previous advertising policy and offending conduct (*i.e.*, the MTA understands that it is "free to return to [its] old ways").

Moreover, given the MTA's very recent testimony, any claim now that it has sworn off political and public issue ads is suspect in the extreme. Today, the MTA scoffs at the $14 million in annual revenue it received from public issue ads. (Rosen Decl. ¶ 64 at A435-36). Yet, in 2012, the MTA's Jeffrey Rosen testified how important even the $5 million of revenue from such ads was to the MTA.

Indeed, Rosen went on to testify that in his experience commercial advertisements created even more controversy than public issue ads and were more often rejected for violating MTA ad policy. *Am. Freedom Def. Initiative v. Metro. Transp. Auth.*, 880 F. Supp. 2d 456, 460-62 (S.D.N.Y. 2012) (citing to Rosen declaration).

Fast forward three years and we arrive at March 24, 2015, the hearing on the preliminary injunction. At the hearing, the MTA's Rosen testified (in his sworn declaration), once again as follows:

> When I joined the MTA in 2009, I learned that the MTA Board had adopted standards for advertising displayed on its properties and facilities but that, unlike some other public mass transit agencies, the MTA permits display of paid non-commercial advertising (including advertisements expressing political and religious views). It is my understanding that the MTA Board has not undertaken to change that long-standing policy because the MTA's continued acceptance of such non-commercial advertising brings in *much-needed revenue*. In 2013, for example, MTA received $10 million in paid noncommercial advertisements by government agencies and not-for-profit and religious organizations as well as political advertisements and public service messages. In addition, *accepting paid non-commercial advertising, including advertisements expressing political and religious viewpoints, avoids the difficulty other public mass transit agencies have encountered in trying to identify political and religious advertising. Furthermore, my experience at the MTA has been that commercial advertising can create controversy no less than non-commercial advertising that expresses political and religious viewpoints. In my view, it is fully consistent with sound commercial practice for the MTA to accept noncommercial advertising including political and religious advertising.*

(Rosen Decl. ¶ 10 at A119-20 [emphasis added]). During Rosen's cross-examination at the hearing, he was given the opportunity to disavow this position

and to explain to the court that the MTA was already (if not clandestinely and tentatively) reversing course out of a sincere desire to leave the designated public forum behind. When asked about his written testimony and the MTA's desire to maintain political and public issue ads, Rosen confirmed this remained the position of the MTA. Not a word on cross-examination and not a word on redirect examination to inform the court that the MTA was gearing up to claim voluntary cessation if the preliminary injunction motion went against the MTA. (Prelim. Inj. Hr'g Tr. at 10:14-12:6 at A237-39; 44:17-46:14 at A271-73).

Given this very recent ringing endorsement of the MTA's previous long-standing policy, it is simply not plausible to argue that it would be unreasonable to expect the MTA to go back to political and public issue ads to raise funds during the next fiscal crunch. Past history suggests that such a possibility is not only reasonable, but also quite likely given the MTA's consistent testimony why public issue ads have been so important to the cash-strapped transit authority and no more problematic, if not less so, than commercial ads.

Moreover, the "no incitement" provision remains very much a part of the New Policy. Without the MTA's affirmative assurances that it will not revise its New Policy to once again permit political discourse (and, once again, seek to impermissibly reject Plaintiffs' ads), neither Plaintiffs nor this Court have any

assurance that the MTA would not once again improperly apply its "no incitement" provision to suppress Plaintiffs' speech.

This leads to the fourth substantive distinction between *Lamar* and this case. In *Lamar*, as in *Harrison*, this Court found a basis to extend "some deference" when the government body not only expressly renounces any intent to return to the offending ordinance, but also based upon a showing of no prior history of discrimination or illegal conduct toward the plaintiff. *Lamar Adver.*, 356 F.3d at 377 (citing representation in open court by defendant-municipality that there would be no future revision and a finding of no evidence in the record of any bad history between the parties); *Harrison & Burrowes Bridge Constructors, Inc*., 981 F.2d at 59 ("The implementation of the set-aside program by New York State—absent specific findings of past discrimination—cannot be regarded as reasonably likely to be repeated."); *see also People Against Police Violence v. City of Pittsburgh*, 520 F. 3d 226, 231 n.2 (3d Cir. 2008) (rejecting the City's mootness argument based on its representation that it would no longer enforce an ordinance because the City had a "long history of unconstitutional conduct"). Quite simply, the MTA does not enjoy clean hands, whether we consider the three prior efforts to suppress Plaintiffs' speech leading to litigation, the MTA's refusal to acknowledge publicly its unconstitutional policies, or the personal attacks leveled against Plaintiffs during the public debate leading up to passage of the New Policy.

Finally, this brings us ineluctably to the fifth important distinction between *Lamar* and the case at hand. The first prong of the mootness test places a heavy burden on the offending party to demonstrate that there is "no reasonable expectation that the alleged violation will recur." *Lamar Adver.*, 356 F.3d at 375. It is no accident that this Court has looked for a number of supporting factors *other than* a simple legislative or regulatory fix to support the voluntary cessation argument. There is a reason the Court looks for expressed representations of future compliance and public expressions distancing itself from past unconstitutional behavior—neither of which exists here.

The very language of the Court's formulation of the voluntary cessation prong is instructive. The offending party must demonstrate that "there is ***no*** reasonable expectation" of a return to the offending conduct. Note that this formulation does not allow for a range of reasonable expectations, some favoring future compliance and some not so. In other words, it is not sufficient for the offending party to argue that there is a viable case to be made for ***a*** reasonable expectation of future compliance. The Court's language does not provide the option to argue voluntary cessation by narrating a scenario of future compliance ***more*** reasonable than one of non-compliance. Rather, the "heavy burden" on the MTA is to demonstrate that there is simply no reasonable expectation whatsoever

that the MTA might return to its previous decades-long embrace of vibrant public issue debate on its advertising spaces.

Is it so unreasonable to expect the winds of policy reversion to sweep over MTA advertising real estate with the next revenue-shortfall crisis? What would prevent the MTA from looking under every financial rock, including advertising revenues from political and public issue ads? Past history suggests that such a possibility is not only reasonable, but also quite likely. It should come as no surprise that the MTA has not met its heavy burden, having come to the Court contradicting itself about the importance of political advertising revenue and the problems and controversies associated with commercial ads, having failed to represent clearly that it will not return to its prior unlawful suppression of Plaintiffs' speech, and all the while having refused to acknowledge publicly that its prior conduct was illegal and unconstitutional.

2. Interim Events Have Not Completely and Irrevocably Eradicated the Effects of the MTA's Unconstitutional Application of Its Ad Policies to Restrict Plaintiffs' Speech.

Even assuming the MTA could make out a case that the ***only*** reasonable expectation is that the MTA will never return to its prior bad conduct, the MTA fails the second prong of the mootness test. This prong requires the MTA to demonstrate that the adoption of the New Policy and the application of the "no political speech" prohibition were the intervening events that "completely and

irrevocably eradicated the effects" of the MTA's unconstitutional application of its ad policies to restrict Plaintiffs' speech. *Lamar Adver.*, 356 F.3d at 375-76. We first note, and for good reason, that what must be eradicated are the "effects" of the offending conduct—not the "means" used. The "effects" in this particular case, as found by the district court in its opinion granting the motion for preliminary injunction, was "[a] content-based restriction in a public forum, as the defendants concede their exclusion of the Killing Jews ad is, [that failed to] survive strict constitutional scrutiny." (Prelim. Inj. Op. at A396). The "means" to achieve these effects, of course, was the use of the no-incitement provision. The use of a particular provision, however, is not the "effects" that must be eradicated. Simply applying a different ad policy to achieve the same effects does not satisfy the second prong of the mootness test.

Thus, it is the MTA's heavy burden to demonstrate that its new advertising policy as applied to the Killing Jews advertisement has completely eradicated the unconstitutional "effects" of a failed strict scrutiny analysis. Indeed, both the MTA and the district court appear to understand that to meet this burden, the MTA must demonstrate that it successfully converted its designated public forum to a limited public forum and that the application of the new advertising policy is no longer subject to the strictures of a designated public forum and the burdens of a

strict scrutiny analysis. (SPA12-13, SPA16-22). We turn now to address these issues.

(a) The MTA Did Not Constitutionally Convert the Forum to a Limited Public Forum.

(1) The MTA's Actions Were Motivated by a Viewpoint-Based Animus toward Plaintiffs and Their Speech.

As noted by the court in *Coleman v. Ann Arbor Transportation Authority*, 947 F. Supp. 2d 777 (E.D. Mich. 2013)—a cased relied upon by the MTA below (MTA Mem. at iii) and cited by the district court (SPA22, 26)—"[i]t is true that changes to a forum motivated by actual viewpoint discrimination may well limit the government's freedom of action." *Id*. at 788. As the Ninth Circuit stated in *United States v. Griefen*, 200 F.3d 1256, 1265 (9th Cir. 2000), "[s]hould it appear that the true purpose of . . . an order [closing a forum] was to silence disfavored speech or speakers, or that the order was not narrowly tailored to the realities of the situation, or that it did not leave open alternative avenues for communication, the federal courts are capable of taking prompt and measurably appropriate action."

In *Ridley v. Massachusetts Bay Transportation Authority*, 390 F.3d 65, 77 (1st Cir. 2004), for example, a case involving the display of advertisements on property controlled by the MBTA, the court noted that "[t]he government is free to change the nature of any nontraditional forum as it wishes. *Cornelius v. NAACP Leg. Def. Fund*, 473 U.S. 788, 802 (1985). Thus, even if MBTA's previous intent

was to maintain a designated public forum, it would be free to decide in good faith to close the forum at any time." *Ridley*, 390 F.3d at 77. The court proceeded to find that "[t]here is *no evidence that the 2003 changes were adopted as a mere pretext to reject plaintiff's advertisements*," concluding as follows: "To the contrary, the MBTA acted in response to expressed constitutional concerns about its prior guidelines, and cannot be faulted for trying to adhere more closely to the constitutional line. And if the MBTA revised a guideline *merely as a ruse for impermissible viewpoint discrimination, that would be found unconstitutional regardless of the type of forum created*." *Id*. (emphasis added).

In other words, even assuming *arguendo* that the MTA lawfully closed the forum to Plaintiffs' speech (a point Plaintiffs contest, as demonstrated further below), the evidence demonstrates that the MTA's actions were motivated by an animus toward Plaintiffs and the viewpoints they express such that a "prompt and measurably appropriate action" for this Court would be to enforce the existing injunction. It would hardly be equitable to permit the government to dissolve a properly issued injunction protecting a party's First Amendment right to freedom of speech based on actions taken by the government designed to suppress the very

speech at issue, which is precisely what has happened in this case.[10] *See also supra* sec. II.B.1.

Here, the evidence is without reasonable dispute: the MTA adopted the New Policy *for the very purpose of avoiding the court's injunction to display Plaintiffs' ad.*. This ploy is unconstitutional regardless of the type of forum created.

(2) The MTA's New Policy Neither Eliminates Nor Survives Strict Scrutiny, Nor Is It Viewpoint Neutral.

Regardless of the MTA's animus toward Plaintiffs and their speech, the MTA's actions did not lawfully close the forum for Plaintiffs' ad. As the Supreme Court warned, "[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." *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553 (1975). Consequently, "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

[10] The MTA's gamesmanship is further demonstrated by the fact that despite Defendant Rosen's claim that "[i]n early March" and thus before the day-long preliminary injunction hearing held by this Court on March 24, the MTA was considering adopting a policy that would close the forum (*see* Rosen Decl. ¶¶ 65-66 at A436). Yet, there was no mention of this proposal at any time during the hearing (nor during the briefing on Plaintiffs' motion) and Rosen's declaration speaking of the importance of maintaining public issue ads was introduced as evidence at that very hearing. The reality is that the MTA was waiting for this Court's ruling before deciding whether to adopt the New Policy. That is the only reasonable conclusion to draw from the MTA's actions. In short, the MTA sandbagged Plaintiffs and the district court.

unambiguous and *definite*." *Gregoire v. Centennial Sch. Dist.*, 907 F.2d 1366, 1375 (3d Cir. 1990) (emphasis added). And the reason for this in the First Amendment context is evident: "The absence of clear standards guiding the discretion of the public official vested with the authority to enforce the enactment invites abuse by enabling the official to administer the policy on the basis of impermissible factors." *United Food & Commercial Workers Union, Local 1099 v. Sw. Ohio Reg'l Transit Auth.*, 163 F.3d 341, 359 (6th Cir. 1998) (hereinafter "*United Food*"); *see also id.* 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) (emphasis added). Indeed, this requirement for unambiguous and definite standards is necessary in order to prevent the very type of situation presented here where the government seeks to suppress disfavored speech.

To begin, even under the New Policy, the MTA's restriction on Plaintiffs' speech is a prior restraint. *N.Y. Magazine v. Metro. Transp. Auth.*, 136 F.3d 123, 131 (2d Cir. 1998) (stating that the MTA's refusal to accept the advertisement for display, "which it took pursuant to regulations, [is] an exercise of a prior restraint"). And "[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." *Bantam Books*,

Inc. v. Sullivan, 372 U.S. 58, 70 (1963) (collecting cases); *see also Lebron v. Wash. Metro. Area Transit Auth.*, 749 F.2d 893, 896 (D.C. Cir. 1984) (Bork, J.) (stating that the transit authority "carries a heavy burden of showing justification for the imposition of [a prior] restraint") (internal quotation marks and citation omitted).

Further, as noted above and confirmed by the Second Circuit, "a law subjecting speech to a prior restraint must, as a prophylactic matter, contain 'narrow, objective, and definite standards to guide the licensing authority.'" *Amidon v. Student Ass'n*, 508 F.3d 94, 103 (2d Cir. 2007) (citation omitted).

Moreover, "it 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.

Here, the MTA claims it has converted its advertising space from a designated to a limited public forum and that it has closed the forum to Plaintiffs' speech because the ad at issue is "political" in violation of "Section IV(B)(2) of the New Policy (the 'Political Ads Prohibition')." (MTA's Mem. at 6). However, a

close examination of the MTA's speech restriction demonstrates that Plaintiffs' ad does not fall within any clear and objective standard that could be used to *lawfully* restrict the ad from the forum, thus requiring the injunction to issue.

At the outset, it is important to understand what the MTA's New Policy does to limit speech and how it goes about doing so. First, the New Policy permits commercial speech, government speech, and public service announcement ("PSA") speech. (New Policy, §§ IV.A.1.-3. at SPA3). Within these ***permitted categories*** of speech, the New Policy then places various restrictions on such speech. One restriction prohibits what we might refer to as "electioneering" speech. (*Id*., § IV.B.1. at SPA4). This restriction applies to all three categories of speech: commercial, government, and PSA. The second restriction imposed upon these permitted areas is anything "political in nature." (*Id*., § IV.B.2. at SPA4). At this level, without any definition supplied, "political in nature" would be objectively defined by the common dictionary definition as "[o]f or relating to the government or public affairs of a country." Oxford Dictionaries, "political" entry at http://tinyurl.com/oycdobs (last visited August 20, 2015). This restriction applies to all three categories of speech. The New Policy, however, provides two additional provisions that operate as two non-exclusive descriptors of what "political in nature" means and thus expands the restriction beyond the dictionary definition (*i.e.*, the provisions seek to broaden the definition). The first of these

descriptors covers only speech relating to government actions and policies and thus is redundant of the dictionary definition. (*Id*., § IV.B.2.a. at SPA4). Moreover, this particular restriction does not apply to government or PSA speech because by its own terms ("except as permitted in Sections IV.A.2 [government speech]-IV.A.3. [PSA speech] of this Policy") it does not apply when government agencies and PSAs speak about government actions or policies. The second non-exclusive descriptor intended to give meaning to "political in nature" refers to a "political message," which is further described as extending to subjects well beyond political matters, such as religion and economics, insofar as they are "disputed" issues. (*Id*., § IV.B.2.b. at SPA4). In other words, on its face the New Policy permits an ad discussing religion, economics, morals, and social issues so long as MTA officials deem the particular issue discussed as *not* "disputed." Indeed, to advocate or oppose any "disputed issues or causes" of any kind is prohibited in all three categories of speech: commercial, government, or PSA.[11]

Plaintiff AFDI is a tax-exempt non-profit (Geller Decl. ¶ 3 at A58), and the Killing Jews ad is both educational and relating to public safety, which are

[11] It goes without saying that the New Policy's prohibition on expressing a particular viewpoint (*i.e*., advocacy or opposition) on any disputed issue or cause is hardly viewpoint neutral since expressing an "undecided" or ambivalent viewpoint is permissible. Apparently, if you wish to speak to the mushy middle viewpoint, the MTA has room for you on the sides of its buses. If you speak with conviction, however, you stand outside the politically acceptable bounds set by the government.

acceptable topics for a PSA. Consequently, this speech falls within the PSA permitted category of speech. While it is true that the "disputed issues" restriction is imposed upon this permitted category of speech, the question remains: what level of constitutional scrutiny should the court apply to this restriction? As we explain below, Plaintiffs do not believe the MTA has properly converted the forum to a limited public forum and, in any event, the "disputed issues" restriction is patently viewpoint-based and prohibited in all forums. But even if we assume *arguendo* that the MTA has successfully converted the forum to a limited public forum, the proper judicial review of such a restriction (*i.e.*, "political in nature" defined as "disputed" issues) imposed upon a permitted category of speech (*i.e.*, PSA speech) is strict scrutiny. In short, regardless of the nature of the forum (designated public forum vs. limited public forum), the MTA's restriction on Plaintiffs' speech under the New Policy must survive strict scrutiny, which it cannot. We turn now to the forum question.

A limited public forum is often considered a subset of the designated public forum. *Hotel Emples. & Rest. Emples. Union, Local 100 v. City of N.Y. Dep't of Parks & Rec.*, 311 F.3d 534, 545 (2d Cir. 2002) ("A subset of the designated public forum, the 'limited' public forum, exists 'where the government opens a non-public forum but limits the expressive activity to certain kinds of speakers or to the discussion of certain subjects.'"). In a limited public forum, the government

has opened up its property to certain categories of speech to members of the public. As this Court has explained on several occasions, restrictions imposed on speech outside the permitted categories need only be viewpoint neutral and reasonable. *Id*. at 546 ("As to expressive uses not falling within the limited category for which the forum has been opened, restrictions need only be viewpoint neutral and reasonable.") (citing *N.Y. Magazine*, 136 F.3d at 128 n.2; *Gen. Media Communs. v. Cohe*n, 131 F.3d 273, 278 n.6 (2d Cir. 1997); *Deeper Life Christian Fellowship, Inc. v. Bd. of Educ.*, 852 F.2d 676, 679-80 (2d Cir. 1988)). In other words and in the context of our facts, the restriction that precludes speakers and speech that fall outside of the permitted categories of commercial, government, and PSA speech need only be viewpoint neutral and reasonable. Thus, as just one example, a personal ad to announce a wedding without any commercial characteristic is restricted because it is outside the permitted categories of speech (*i.e*., it is neither commercial, government, nor PSA speech), and any challenge to that restriction would be subject only to the reasonable and viewpoint-neutral standard.

However, if a speaker falls within one of the three permitted categories of speech—commercial, government, or PSA—and is challenging a restriction (*i.e*., "political in nature") imposed upon that permitted category of speech, strict scrutiny applies. As this Court explained in *Hotel Employees*, "[i]n limited public fora, strict scrutiny is accorded only to restrictions on speech that falls within the

designated category for which the forum has been opened. Thus, 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." *Hotel Emples. & Rest. Emples. Union, Local 100*, 311 F.3d at 545-46.

It is rudimentary then that the blanket exclusion of speech outside the permitted categories of commercial, government, and PSA speech is constitutionally permissible, and speech outside of those categories attempting to get heard will be up against the lesser viewpoint neutral and reasonableness standard. Restrictions imposed on the three permitted categories of speech, such as the restriction relating to speech that is "political in nature," are quite clearly subject to strict scrutiny.

While it is true that the MTA and the district court describe the political speech restriction as a blanket restriction in an attempt to describe the permitted category of speech as all things not political (SPA15, n.5), that is just not the way the New Policy is structured or worded.[12] In fact, as we've seen above,

[12] For an example of the MTA properly creating a limited public forum, we need only turn to the MTA advertising policy for its MetroCard. (MetroCard Advertising Policy (dated Mar. 7, 2013), § IV at A498-99). There, the MTA permits only commercial advertising. The definition of "commercial" excludes commercial ads that are in fact sending a non-commercial message, such as a political message. (*Id.*, § IV.A.1. at A498) (restricting ads to those "paid advertisements that propose or promote a commercial transaction"). Thus, the

government speakers and PSAs may engage in political speech relating to government and government policy (assuming the speech is not "disputed"). Insofar as strict scrutiny applies to the "political in nature" restriction and its application to Plaintiffs' speech, there is no question a restriction prohibiting "disputed" issues fails strict scrutiny and as such the MTA has failed to completely and irrevocably eradicate the effects of MTA's prior bad conduct. Indeed, the MTA does not even suggest that the "disputed issues" restriction could survive strict scrutiny.

There is yet a more fundamental failure in the MTA's mootness claim. Plainly, the content of the "Killing Jews" ad does not "[p]romote[] or oppose[] a political party, or promote[] or oppose[] any ballot referendum or the election of any candidate or group of candidates for federal, state, judicial or local government offices," nor is it "directed or addressed to the action, inaction, prospective action or policies of a governmental entity." (New Policy, § IV.B.2.a. at SPA4]). Consequently, the only basis for the MTA to close the forum for Plaintiffs' ad is if

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permitted category of speech is commercial, and the blanket restriction on all other speech is subject only to viewpoint neutrality/reasonableness. The very definition of commercial speech precludes non-commercial messaging (*i.e.*, political) built into a commercial ad to get around the non-commercial prohibition. Insofar as a "commercial only" category of speech is both viewpoint neutral and reasonable, the MetroCard restriction would likely survive constitutional scrutiny. This is not the structure or the mechanism adopted within the New Policy for bus advertising. The differences between the two approaches are substantively and constitutionally distinct.

MTA officials conclude that the ad expresses "an opinion, position, or viewpoint regarding ***disputed*** economic, political, moral, religious or social issues or related matters, or support for or opposition to ***disputed*** issues or causes." (New Policy, § IV.B.2.b. at SPA4] [emphasis added]). But this standard, at best, is nothing more than a restriction on speech that MTA officials deem to be controversial.[13] And such a standardless restriction is impermissible, regardless of the forum, because it "unquestionably allows for viewpoint discrimination." *See United Food*, 163 F.3d at 361 (affirming grant of a preliminary injunction and stating, "[w]e believe any prohibition against 'controversial' advertisements unquestionably allows for viewpoint discrimination"). Consequently, this unlawful standard cannot be invoked to close the forum for Plaintiffs' speech. In short, the newly adopted standard is unconstitutional on its face as a form of viewpoint discrimination; therefore, it cannot serve as the basis for dissolving the injunction.

Indeed, as the Supreme Court made clear in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943), "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion."

[13] By what standard does the MTA make an official determination as to whether a particular religious issue is "disputed"? Indeed, this standard is more egregious than a "controversial" speech restriction in that it permits MTA officials to allow messages on "economic, political, moral, religious or social issues" that might be highly controversial, yet the MTA considers them "undisputed." In short, as noted above, this is a viewpoint-based restriction at its core.

Under the MTA's New Policy, that "fixed star" in our constitutional constellation has been obscured and rendered mobile at the discretion of the MTA in violation of the First Amendment.

(b) The MTA's New Policy Does Not Convert Ad Space to a Limited Public Forum.

In addition to its unlawful efforts to close the forum to Plaintiffs' speech, the MTA's adoption of its New Policy fails to convert the forum in the first instance. In *Lehman v. City of Shaker Heights*, 418 U.S. 298, 304 (1974), the Court found that the consistently enforced, twenty-six-year ban on political campaign advertising[14] 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." Other circuit courts have followed the holding in *Lehman* to conclude that transportation advertising space was a limited public 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) (emphasis added).

[14] The issue presented in *Lehman* was "whether a city which operates a public rapid transit system and sells advertising space for car cards on its vehicles is required by the First and Fourteenth Amendments to accept paid political advertising on behalf of a candidate for public office." *Lehman*, 418 U.S. at 299.

Similarly, this Court has stated that "[d]isallowing political speech, *and allowing commercial speech only*, indicates that making money is the main goal." *N.Y. Magazine*, 136 F.3d at 130 (emphasis added); (*see also* Prelim. Inj. Op. at 6 [observing that "[i]n September 2012, the MTA considered alternatives for remedying the constitutional defects identified by Judge Engelmayer, *such as only permitting commercial advertising* . . ."] [emphasis added]).

Here, even under the New Policy, the MTA has not limited its advertising space to *commercial advertising only*, but instead has retained the authority to permit a wide range of public-issue speech (including expressly matters touching upon economic, moral, religious or social issues) that MTA officials deem, based on their own subjective views, "[un]disputed." The MTA's failure to close the forum at issue is further demonstrated by the MTA's actions with regard to other forums under its control. For example, in 2013, the MTA began selling advertising on its MetroCards and for its On The Go Travel Station network. However, for both of these forums, the MTA "permits *only* paid advertisements that propose or promote a commercial transaction and paid notices by certain governmental entities that are directly involved with the governance or financing of the MTA—that is, New York City, New York State, and the counties that compose the Metropolitan Transportation Commuter District." (Rosen Decl. ¶¶ 33-34 at A11-12 [emphasis added]). Per the MTA, "*it has chosen to allow only paid commercial*

advertising on these spaces because the MTA did not want to create a designated public forum." (*Id*. [emphasis added]). The MTA intentionally did *not* follow this course with regard to the forum at issue here. Additionally, as noted, the MTA retained the challenged "incitement" restriction in the New Policy. (*See* New Policy, § IV.B.12. at SPA5]). If the forum were open to only innocuous commercial and public service advertisements, why retain this standard?

In sum, the MTA's New Policy is vague and subjective, viewpoint based, and ultimately fails to close the forum for Plaintiffs' speech.

III. Plaintiffs Have a Vested Right to Display Their Ad.

A. *Pokoik v. Silsdorf*: Special Facts Exception.

The Second Circuit has acknowledged that "a party may avert mootness of its claims if it demonstrates that prior to the amendment it accrued certain property rights or fixed expectations protected under state law . . ." *Lamar Adver*., 356 F.3d at 379 (citing various New York state court decisions).

New York state law makes clear that under the "special facts" at issue in this case, Plaintiffs have obtained vested rights under the original advertising standards such that their claim for injunctive relief is not moot. *See, e.g., id*. at 379 (citing New York state law for the proposition that it could provide a basis for avoiding mootness, but holding that Lamar's claim did not meet the state law requirements). In *Pokoik v. Silsdorf*, 358 N.E.2d 874 (N.Y. 1976), the New York Court of Appeals

ruled in favor of the petitioner who was seeking a building permit but was ultimately denied based on a claim that the zoning ordinance had been changed thus rendering his permit request moot. The Court of Appeals noted that the petitioner's application complied with the village's zoning ordinance at the time it was submitted and that the village unlawfully delayed the approval of the application. Consequently, the New York high court held that "this case fits into the 'special facts exception'" to the general rule that "a case must be decided upon the law as it exists at the time of the decision." *Id*. at 876. Accordingly, the Court held that "[t]he petitioner has demonstrated that he was entitled to the permit as a matter of right by full compliance with the requirements at the time of the application and that proper action upon the permit would have given him time to acquire a vested right." *Id*. The Court of Appeals concluded, "It seems clear from the record that the village improperly delayed reviewing the application and the board presented unsatisfactory reasons for denial, resulting in the disregard of petitioner's rights. The action of the board must be annulled as arbitrary and the relief requested granted." *Id*.

The same is true in this case. Plaintiffs were entitled to run their advertisement as a matter of right when it was submitted in August 2014. The MTA improperly (in fact, unlawfully) denied Plaintiffs' request and thus unlawfully delayed the display of Plaintiffs' ad. If the MTA had lawfully acted

upon Plaintiffs' request to display the "Killing Jews" ad, the ad would have been displayed a year ago. Plaintiffs have been "denied this right by the unjustifiable actions of [MTA] officials, and by an abuse of administrative procedures." *See id*. Thus, it is clear from the record that the MTA "improperly delayed" the display of Plaintiffs' ad and "presented unsatisfactory reasons for denial, resulting in the disregard of [Plaintiffs'] rights. The action of the [MTA] must be annulled as arbitrary and the relief requested granted." *See id*.

In many ways, this case presents an even more egregious set of "special facts" giving rise to Plaintiffs' vested right than in *Pokoik*. In *Pokoik*, the village authorities had effectively used delaying tactics to avoid making a decision on a building application. In this case, however, as was made clear during the evidentiary hearing for the preliminary injunction, the MTA used a patently fraudulent claim of "incitement"[15] to unconstitutionally reject Plaintiffs' ad, followed by the consequent delay necessarily incurred as a result of the ad rejection and this litigation, stretched to its limit because the MTA waited to amend its policy until the district court ruled in favor of Plaintiffs. The MTA then took advantage of the district court's stay—a stay that was expressly intended only to provide the MTA time to decide whether to appeal or, alternatively, to work

[15] (*See* Prelim. Inj. Op. at A384 [noting testimony on behalf of MTA "that even if 'nobody ever committed a violent act as a result of this ad and we knew in the future that nobody was ever going to do that,'" the MTA "still would have refused to run" it]).

through the logistics of running the ad. The MTA chose not to appeal but to execute the backup plan devised in early March should the court rule against them. Even more egregiously, that plan was to formally adopt a patently viewpoint-based policy that clearly targets Plaintiffs' speech. In the final analysis, the MTA's voluntary cessation of its illegal conduct does not deprive this Court of its power to enforce the injunction in this case.

B. Certification.

Both the MTA and the district court counter Plaintiffs' vested right argument with the assertion that the "special facts exception" extended in *Pokoik* to cases of unjust delay is strictly limited to land use. (SPA24). Both are wrong on this point. There is no question that the doctrine to date has only been applied in land use cases, but nothing in the doctrine itself and certainly nothing in the language of the cases cited restrict the logic and application to formal land use circumstances. *See, e.g., Rocky Point Drive-In, L.P. v. Town of Brookhaven*, 999 N.E.2d 1164, 1167 (N.Y. 2013); *Soundview Associates v. Town of Riverhead*, 725 F.Supp.2d 320, 335 (E.D.N.Y. 2010); *Ellington Const. Corp. v. Zoning Bd. of Appeals*, 566 N.E.2d 128, 132 (N.Y. 1990); *see also Lamar Adver.*, 356 F.3d at 379 (addressing the issue in the context of a sign restriction). There is simply no support for the proposition that *Pokoik*'s special facts exception is expressly or even impliedly restricted to land use cases.

Indeed, the Court of Appeals in *Ellington* purposefully noted that the doctrine of vested rights has a source both in the constitutionally-based common law rule to protect non-conforming uses and more broadly in equity—where the black letter rules of the common law give way to the fairness doctrines unique to the courts of equity:

> The doctrine of vested rights has generally been described as an application of the constitutionally based common-law rule protecting nonconforming uses. But the doctrine is also said to have been grounded on principles of equitable estoppel.

Ellington Constr. Corp., 566 N.E.2d at 132; *see also SEC v. Manor Nursing Centers, Inc.*, 458 F.2d 1082, 1102 (2d Cir. 1972) ("[I]in deciding whether to grant injunctive relief, a district court is called upon to assess all those considerations of fairness that have been the traditional concern of equity courts."). (*See also* MTA Mem. at 7 [describing the court's power to dissolve an injunction as equitable]).

The black letter common law rule of vested rights and the case law upholding the special facts exception do not perforce restrict *Pokoik*'s application to land use cases. But even so, this case is about the use of the MTA's real estate and the advertising policies are in effect the zoning rules. Moreover, the equity doctrines, such as equitable estoppel, speak not of strict factual settings for their application, but rather matters of fairness and fair play—balancing the interests to achieve the correct result. As such, Plaintiffs respectfully ask this Court to

recognize *Pokoik* as controlling and reverse the district court's order to dissolve its order granting the preliminary injunction.

If, however, this Court believes the New York Court of Appeals has not yet spoken, or not spoken clearly, as to the reach of *Pokoik*'s special facts exception to the circumstances presented here, Plaintiffs would respectfully ask the Court to certify the question to the New York Court of Appeals pursuant to Local Rule 27.2. LR & IOP 27.2 (authorizing certification of state law question to that state's highest court if state law permits); New York State Constitution, art. 6, §3(b)(9) (authorizing New York Court of Appeals to promulgate rules authorizing certification); New York Court of Appeals Rules of Practice, §500.27(a) (providing procedure for certification).

CONCLUSION

Plaintiffs hereby request that the Court reverse the district court and enter an injunction, enjoining Defendants' unconstitutional restriction on Plaintiffs' speech and ordering the display of Plaintiffs' advertisement.

AMERICAN FREEDOM LAW CENTER

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CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P. 32(a)(7), the foregoing Brief is proportionally spaced, has a typeface of 14 points Times New Roman, and contains 12,592 words, excluding those sections identified in Fed. R. App. P. 32(a)(7)(B)(iii).

AMERICAN FREEDOM LAW CENTER

/s/ David Yerushalmi
David Yerushalmi, Esq.

CERTIFICATE OF SERVICE

I hereby certify that on August 21, 2015, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. I further certify that all of the participants in this case are registered CM/ECF users.

AMERICAN FREEDOM LAW CENTER

/s/ David Yerushalmi
David Yerushalmi, Esq.

SPECIAL APPENDIX

CASE NO. 15-1997

INDEX TO DOCUMENT REFERENCES IN SPECIAL APPENDIX

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Metropolitan Transportation Authority
State of New York

April 29, 2015

Honorable John G. Koeltl
U.S. District Judge
United States Courthouse
500 Pearl Street
New York, New York 10007-1312

Re: *American Freedom Defense Initiative v. Metropolitan Transportation Authority,* 14-cv-7928 (JGK)

Dear Judge Koeltl:

I represent defendants the Metropolitan Transportation Authority (MTA) and two MTA officials, and am writing to inform the Court that, as expected, the MTA Board at its meeting this morning, approved a new MTA Advertising Policy, which converts the MTA's property from a designated public forum into a limited public forum by, *inter alia*, excluding all advertisements of a political nature. A copy is attached.

Respectfully,

Peter Sistrom

Cc: David Yerushalmi (by ECF)

Robert J. Muise (by ECF)

Victor A. Kovner
Davis Wright Tremaine LLP (by email)

MTA ADVERTISING POLICY

I. PURPOSE

A. To establish uniform, reasonable, and viewpoint-neutral standards for the display of advertising in and on the facilities, vehicles and other property (together "Property") of the Metropolitan Transportation Authority and its affiliated and subsidiary agencies (together "MTA").

B. To convert the MTA's Property from a designated public forum into a limited public forum by excluding advertising of a political nature after the Effective Date.

II. SCOPE

This policy applies to all advertisements proposed to be displayed in and on the Property on or after the Effective Date set forth below.

III. OBJECTIVE

The MTA's mission is to provide safe, reliable, and efficient public transportation and crossings within its service area. The MTA's transportation operations are funded by a combination of federal, state, and local funds, including grants and taxes, as well as fare box and toll revenue. Advertising revenues are an important supplemental source of revenue that supports the MTA's transportation operations. The MTA's purpose in allowing paid advertising to be displayed in and on the Property is to maximize such supplemental revenue to support transportation operations.

By accepting paid advertising for display in and on the Property, the MTA is acting in a proprietary capacity as a provider of public transportation and crossings seeking to maximize advertising revenue to support its transportation operations. Starting from the Effective Date, the MTA does not intend that the advertising permitted to be displayed in and on the Property be created, designated, or used as a public forum for expressive activities or general discourse or opinions. In furtherance of the MTA's purpose of maximizing advertising revenue, the MTA in its proprietary capacity is limiting advertisements it will accept for display in and on the Property to paid commercial advertising, certain public service announcements that will help build goodwill for the MTA among its riders and the public, and governmental messages. The MTA retains control over the advertising that it will allow to be displayed in and on the Property by subjecting all proposed advertisements to the Advertising Standards below. MTA expressly intends that the advertising permitted to be displayed in and on the Property be a limited public forum.

In establishing and enforcing these Advertising Standards, the MTA seeks to fulfill the following goals and objectives:

- Maximize advertising revenue
- Maximize ridership and fare revenue
- Maintain a secure and orderly operating environment

- Maintain a safe and welcoming environment for all MTA employees and customers, including minors, who use MTA's subways, buses, commuter trains and crossings
- Minimize the resources and attention that have been expended to resolve disputes relating to the permissibility of certain political advertisements, thus unnecessarily diverting the organization from performing its mission
- Avoid identification of MTA with, and the appearance of MTA endorsement of, the advertisements of non-MTA parties displayed in or on the Property, including the associated messages, products, services, or events being proposed or promoted

IV. ADVERTISING STANDARDS

A. Permitted Advertising

The MTA may display advertisements that fall under one or more of the following categories:

1. Commercial advertising. Paid advertisements that propose, promote, or solicit the sale, rent, lease, license, distribution, or availability of, or some other commercial transaction concerning, goods, products, services, or events for the advertiser's commercial or proprietary interest, or more generally promote an entity that engages in such activities.

2. Governmental advertising. Notices or messages from the MTA that promote the MTA or any of its functions or programs, and also paid notices or messages of the United States government, the State of New York and its agencies, the City of New York and its departments, or of any of the County governments within the Metropolitan Commuter Transportation District that advance specific governmental purposes.

3. Public service announcements. Public service announcements not otherwise prohibited under Section IV.B of this Policy, which are sponsored by either a government entity or a nonprofit corporation that is exempt from taxation under Section 501(c)(3) of the Internal Revenue Code and which are directed to the general public and relate directly to:

- Prevention or treatment of illnesses;
- Promotion of safety or personal well-being;
- Education or training;
- Art or culture;
- Provision of children and family services;
- Provision of services and programs that provide support to low income citizens, senior citizens, or people with disabilities; or
- Solicitation by broad-based contribution campaigns that provide funds to multiple charitable organizations active in the above-listed areas.

B. **Prohibited Advertising**

Notwithstanding the foregoing, the MTA will not accept any advertisement for display in or on the Property if it falls within one or more of the following categories:

1. Promotes or opposes a political party, or promotes or opposes any ballot referendum or the election of any candidate or group of candidates for federal, state, judicial, or local government offices.

2. Is political in nature, including but not limited to advertisements that either:

   a. Are directed or addressed to the action, inaction, prospective action or policies of a governmental entity, except as permitted in Sections IV.A.2–IV.A.3 of this Policy; or

   b. Prominently or predominately advocate or express a political message, including but not limited to an opinion, position, or viewpoint regarding disputed economic, political, moral, religious or social issues or related matters, or support for or opposition to disputed issues or causes.

3. Is false, misleading, or deceptive.

4. Promotes unlawful or illegal goods, services, or activities, or involves other unlawful conduct.

5. Falsely implies or declares an endorsement by the MTA of any service, product, or point of view.

6. Encourages or depicts unsafe behavior with respect to MTA's transportation operations, such as failure to comply with normal safety precautions in awaiting, boarding, riding upon or debarking from MTA vehicles, or is otherwise directly adverse to the commercial, administrative or operational interests of the MTA as a business.

7. Depicts or describes in a patently offensive manner sexual or excretory activities so as to satisfy the definition of obscene material as contained in New York Penal Law § 235.00, as such provision may be amended, modified, or supplemented from time to time.

8. Contains material, which, if sold or loaned to a minor for monetary consideration with knowledge of its character and content, would give rise to a violation of New York Penal Law § 235.21, which prohibits the dissemination of indecent material to minors, as such provision may be amended, modified, or supplemented from time to time.

9. Contains material, which, if displayed with knowledge of its character and content, would give rise to a violation of New York Penal Law § 245.11, which prohibits the public display of offensive sexual material, as such provision may be amended, modified, or supplemented from time to time.

10. Promotes tobacco or any tobacco-related product.

11. Contains an image of a person who appears to be a minor in sexually suggestive dress, pose, or context.

12. Contains material the display of which the MTA reasonably foresees would imminently incite or provoke violence or other immediate breach of the peace, and so harm, disrupt, or interfere with safe, efficient, and orderly transit operations.

13. Contains material that demeans or disparages an individual or group of individuals. For purposes of determining whether an advertisement contains such material, the MTA will determine whether a reasonably prudent person, knowledgeable of the MTA's ridership and using prevailing community standards, would believe that the advertisement contains material that is abusive to, or debases the dignity of, an individual or group of individuals.

14. Contains sexually explicit material that appeals to the prurient interest in sex or is so violent, frightening, or otherwise disturbing as to reasonably be deemed harmful to minors.

15. Promotes an escort service or sexually oriented business.

C. **Additional Provisions Relating to Advertisements**

To avoid identification of the MTA with messages or images contained within advertisements displayed in and on the Property and to avoid the appearance of MTA endorsement of goods, products, services, events by advertisers, advertisements shall readily and unambiguously identify the person, corporation, or entity paying for the advertisement. An advertiser may, at the MTA's discretion, be required to include in the advertisement a statement explicitly identifying the person, corporation, or entity paying for the advertisement. An advertiser may also, at the MTA's discretion, be required to incorporate additional language to avoid the appearance of MTA endorsement.

V. REVIEW OF ADVERTISING PROPOSED FOR DISPLAY IN OR ON THE PROPERTY

1. Before accepting an advertisement for display in or on the Property, the advertising contractor shall review such proposed advertisement to determine whether the advertisement complies with the Advertising Standards.

2. If the advertising contractor determines that a proposed advertisement does not, or may not, comply with the Advertising Standards it shall promptly notify the Director of MTA Real Estate (or a designee) in writing of its determination and the reason for its determination.

3. If the Director of Real Estate determines, following receipt and consideration of such recommendation, that a proposed advertisement does not comply with the Advertising Standards, the advertiser shall be notified by the advertising contractor. The advertising contractor, in consultation with the Director of Real Estate, may discuss with the advertiser revisions to the advertisement to try to bring the advertisement into compliance with the Advertising Standards, and the advertiser may submit a revised advertisement to the advertising contractor for review.

3. If the advertiser and the advertising contractor do not reach agreement with regard to a revision of the advertisement, or the Director of Real Estate determines that no appropriate revision would bring the advertisement into compliance with the Advertising Standards, or the advertiser chooses not to submit a revised advertisement, the advertiser may request a final determination from the Director of Real Estate. The Director of Real Estate, in reaching a final determination, may consult with the advertising contractor, or with the MTA General Counsel, and the Chairman and Chief Executive Officer, or their designees, or with any other individuals, and may consider any materials submitted by the advertiser. The Director of Real Estate shall advise the advertiser and the advertising contractor of the final determination in writing.

VI. SEVERABILITY

If any section, subsection, sentence, clause, phrase or other portion of this Policy is, for any reason, declared invalid, in whole or in part, by any court of competent jurisdiction, such portion shall be deemed severable, and such invalidity shall not affect the validity of the remaining portions of this Policy, which remaining portions shall continue in full force and effect.

VII. EFFECTIVE DATE

This Advertising Policy is effective as of April 29, 2015.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AMERICAN FREEDOM DEFENSE INITIATIVE, ET AL.,

Plaintiffs,

- against -

METROPOLITAN TRANSPORTATION AUTHORITY, ET AL.,

Defendants.

---

14 Cv. 7928 (JGK)

OPINION AND ORDER

JOHN G. KOELTL, District Judge:

This case began when the defendant, the Metropolitan Transportation Authority ("MTA"), excluded from its advertising space on buses a controversial political advertisement submitted by the plaintiffs, the American Freedom Defense Initiative ("AFDI") and its cofounders. In this Court's previous decision, the Court held that when the MTA excluded the ad based solely on the MTA's policy prohibiting ads that imminently incite violence, the MTA violated the First Amendment. Accordingly, the Court granted the plaintiffs' motion for a preliminary injunction enjoining the MTA's enforcement of its policy to prohibit the ad, but stayed the effect of the injunction for 30 days to allow the defendants to consider their options for appeal and methods for displaying the proposed advertisement. Shortly thereafter, the MTA, in what it contends was an action it had been considering for some time, amended its regulations

to prohibit the display of *all* political advertisements on MTA property (the "New Policy"). The MTA now moves to dissolve the preliminary injunction order, arguing that the plaintiffs' prior claims for injunctive relief are moot because they were directed at the MTA's exclusion of the ad under a different regulation, whereas the MTA is now excluding the ad under its New Policy barring all political ads.

The MTA's ban of all political ads is a dramatic change of circumstances from when the Court issued the preliminary injunction order. The Court's grant of the preliminary injunction was based on the MTA's enforcement of its standard prohibiting ads that "would imminently incite or provoke violence or other immediate breach of the peace," but the MTA's exclusion of the plaintiffs' ad is no longer based on that standard. The Court analyzed the defendants' exclusion of the ad under strict scrutiny because the MTA's advertising space constituted a "designated public forum" under binding Second Circuit precedent. N.Y. Magazine v. Metro. Transp. Auth., 136 F.3d 123, 130 (2d Cir. 1998). However, the status of MTA buses as a designated public forum was based largely on the MTA's acceptance of political advertisements. Id. Because the MTA no longer accepts any political advertisements, a different standard of review likely applies under the First Amendment.

In sum, the defendants' adoption of the New Policy has rendered this Court's preliminary injunction moot. The plaintiffs argue that the New Policy and the manner in which the MTA enacted the New Policy are unconstitutional, but those allegations should be made in an amended complaint, which is not before the Court. It is plain that the legal basis for this Court's preliminary injunction has now been removed. Accordingly, the defendants' motion to vacate the preliminary injunction is **granted.**

I.

The factual history of this case is set forth in the Court's opinion and order granting the plaintiffs' motion for a preliminary injunction. Am. Freedom Def. Initiative v. Metro. Transp. Auth. ("AFDI v. MTA II"), No. 14cv7928, 2015 WL 1775607, at *1-5 (S.D.N.Y. Apr. 20, 2015). The Court assumes the parties' familiarity with that opinion. The following factual and procedural background is provided for its relevance to the current motion.

On April 20, 2015, this Court granted the plaintiffs' motion for a preliminary injunction enjoining the MTA's exclusion of the plaintiffs' ad criticizing Hamas, which the parties termed the "Killing Jews" ad. Id. at *1. The ad includes a quote from "Hamas MTV": "Killings Jews is Worship

that draws us close to Allah." Underneath the quote, the ad stated: "That's His Jihad. *What's yours?*" The plaintiffs had sought to run that ad on MTA buses. The MTA refused to run the ad based on Section (a)(x) of the MTA's standards, which prohibited ads that the MTA reasonably foresees would "imminently incite or provoke violence or other immediate breach of the peace." See Compl. ¶ 1. Because the MTA had not shown that there was any objective evidence to support its contention that the ad was likely to incite imminent violence, and because the MTA rejected the ad based on its content without a compelling interest or a response narrowly tailored to achieving any such interest, the Court granted the plaintiffs' motion for a preliminary injunction enjoining the MTA from excluding the advertisement under Section (a)(x) of its standards. AFDI v. MTA II, 2015 WL 1775607, at *1. The Court made clear that it was only enjoining the MTA's enforcement of Section (a)(x) to reject the Killings Jews ad, rather than striking down the whole standard or granting any other relief. Id. at *10. In order to enable the defendants to consider their appellate options and methods for display of the proposed advertisement, the Court stayed the effect of the preliminary injunction order for 30 days. Id.

The defendants did not appeal the Court's April 20 order, but instead, shortly after the opinion was issued, informed the Court that the MTA Board would be voting soon on whether to revise the MTA's standards to prohibit *all* political advertisements on MTA property. See Letter Dated Apr. 24, 2015 (ECF No. 34). On April 29, 2015, after holding a public meeting on the proposal, the MTA Board voted 9-2 to adopt the MTA's New Policy limiting its acceptance of political ads. See Rosen Decl. (ECF No. 46) ¶ 69. Specifically, Section IV.B of the New Policy prohibits any advertisement that falls into the following two categories:

> 1. Promotes or opposes a political party, or promotes or opposes any ballot referendum or the election of any candidate or group of candidates for federal, state, judicial, or local governmental offices.
>
> 2. Is political in nature, including but not limited to advertisements that either:
>
>   a. Are directed or addressed to the action, inaction, prospective action or policies of a governmental entity, except as permitted in [sections allowing governmental advertising and public service announcements]; or
>
>   b. Prominently or predominantly advocate or express a political message, including but not limited to an opinion, position, or viewpoint regarding disputed economic, political, moral, religious or social issues or related matters, or support for or opposition to disputed issues or causes.

Id. Ex. J. The New Policy explicitly provides that one of its purposes is to "convert the MTA's Property from a designated

public forum into a limited public forum," and that in doing so, it seeks to, among other things, "maintain a safe and welcoming environment for all MTA employees and customers," and "minimize the resources and attention that have been expended to resolve disputes relating to the permissibility of certain political advertisements." Id. The New Policy does not amend any of the MTA's other existing standards, including the incitement standard the MTA previously used to exclude the Killing Jews ad.

The MTA's New Policy took effect immediately after it was adopted. Id. ¶ 74. Defendant Jeffrey Rosen, the MTA Director of Real Estate, determined that the Killing Jews ad falls within Section IV.B.2 because it is "political in nature," and thus would not be run. Id. On May 5, 2015, the MTA notified the plaintiffs about its determination by e-mail. Id. Ex. K. On May 14, 2015, the defendants moved to dissolve the Court's preliminary injunction order.

II.

The defendants argue that the MTA's amendment to its regulations has rendered the Court's preliminary injunction order moot because they are no longer excluding the Killing Jews ad on the unconstitutional basis identified in that order, and the New Policy converts the MTA's advertising space from a designated public forum into a limited public forum. The

plaintiffs argue that their claim for injunctive relief is not moot for several reasons, including that the New Policy remains unconstitutional, that the defendants amended their policy only to suppress the plaintiffs' views, and that the plaintiffs acquired vested rights under the Court's prior order. For the reasons that follow, the Court agrees with the defendants that the plaintiffs' request for injunctive relief is now moot.

A.

The defendants bear a "heavy burden" in showing that the plaintiffs' claims for injunctive relief have become moot.[1] Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167, 189 (2000). "The voluntary cessation of allegedly illegal conduct usually will render a case moot if the defendant[s] can demonstrate that (1) there is no reasonable expectation that the alleged violation will recur and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." Granite State Outdoor Adver., Inc. v. Town of Orange, Conn., 303 F.3d 450, 451 (2d Cir. 2002) (per curiam) (quoting Campbell v. Greisberger, 80

[1] Contrary to the plaintiffs' assertions, the defendants are not arguing that this entire case should be dismissed as moot, or that this Court no longer has jurisdiction to enforce the preliminary injunction order. Indeed, the MTA concedes that the plaintiffs may have live claims for nominal damages and attorneys' fees. See Mem. of L. in Supp. of Defs' Mot. to Dissolve Inj. (ECF No. 45), at 15 n.9. Rather than moving to dismiss the case, the defendants are moving to dissolve the court's preliminary injunction order as moot because it was decided under circumstances that no longer exist.

F.3d 703, 706 (2d Cir. 1996) (internal quotation marks omitted)); see also Lamar Adver. of Penn, LLC v. Town of Orchard Park, New York, 356 F.3d 365, 375-76 (2d Cir. 2004). "While 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,' it is nonetheless 'an important factor bearing on the question whether a court should exercise its power' to entertain a request for injunctive relief or declare it moot." Holland v. Goord, 758 F.3d 215, 223 (2d Cir. 2014) (quoting City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 289 (1982)).

In this case, the only conduct that the Court previously enjoined as unconstitutional was the defendants' exclusion of the Killing Jews ad under the "incitement of violence" standard. The defendants are now only excluding the Killing Jews ad under the New Policy banning political ads, a policy they assert that they have no plans of revising. Rosen Decl. ¶¶ 73, 76. Thus, the defendants have ceased the conduct that the Court identified as unconstitutional, and the Court must determine whether there is a reasonable expectation that that illegal conduct will recur. Here, as in Granite State, "there is no reason to think that, having . . . revised its regulations through proper procedures, the [MTA] has any intention of returning to" its

enforcement of the prior regulations. 303 F.3d at 451-52. Some deference must be afforded to the representations of a public authority that certain conduct has been discontinued. Lamar Adver., 356 F.3d at 376. In this case it would be completely unrealistic to believe that the MTA would return to rejecting the Killing Jews ad based on the "incitement of violence" standard, which the Court found to be unconstitutional as applied to that ad. The MTA has adopted a new standard that would prohibit the ad and has limited the nature of its forum such that the entire class of political ads is prohibited.

The plaintiffs appear to suggest that the MTA may return to its unconstitutional conduct based on the MTA's purported "long history" of unlawfully restricting the plaintiffs' speech. See People Against Police Violence v. City of Pittsburgh, 520 F.3d 226, 231 n.2 (3d Cir. 2008) (rejecting the City's mootness argument based on its representation that it would no longer enforce an ordinance because the City had a "long history of unconstitutional conduct"). But in making this argument, the plaintiffs exaggerate the history between the AFDI and the MTA. The plaintiffs can point to only three instances, including the present case, in which the MTA attempted to exclude the AFDI's many controversial advertisements. In the only two instances

that necessitated injunctive relief for the plaintiffs,[2] neither Judge Engelmayer nor this Court questioned the MTA's good faith in attempting to find the line between enforcing its regulations and respecting the plaintiffs' free speech rights. See Am. Freedom Def. Initiative v. Metro. Transp. Auth. ("AFDI v. MTA I"), 880 F. Supp. 2d 456, 477 (S.D.N.Y. 2012) ("In holding today that MTA's no-demeaning standard violates the First Amendment, the Court does not impugn in the slightest the motives of MTA and its officials."). Indeed, when the MTA rejected the Killing Jews ad, it accepted several other controversial AFDI advertisements for display. See AFDI v. MTA II, 2015 WL 1775607, at *3. Here, as in Lamar Advertising, there is "nothing on this record" that would lead the Court to believe that the MTA would "return to the [unconstitutional] state of affairs that existed" before the plaintiffs filed suit. 356 F.3d at 377 (holding that claims for injunctive relief were moot where Town amended regulations after the plaintiff filed suit).

B.

"Of course, a plaintiff's claims will not be found moot where the defendant's amendments are merely superficial or the law, after amendment, suffers from similar infirmities as it did

[2] The plaintiffs point to one instance where they submitted an advertisement that the MTA originally refused to accept, but then relented soon after the plaintiffs filed suit. Geller Decl. ¶¶ 9-16.

at the outset." Id. at 378. The plaintiffs raise several arguments as to why the MTA's actions and its amended regulatory scheme remain unconstitutional: (1) the amendments were motivated by a desire to suppress the plaintiff's viewpoint; (2) the Killing Jews ad does not qualify as "political in nature" under the New Policy; and (3) the New Policy is facially invalid. As an initial matter, as in Lamar Advertising, the plaintiffs have not amended their complaint to raise these new claims, and thus they are not properly before the Court. Id. Amending their complaint would allow the plaintiffs to assert the precise as-applied and facial First Amendment claims they are alleging against the MTA and the New Policy, conduct discovery on these claims, and better develop the record before this Court under these changed circumstances.[3]

For purposes of the current motion, however, the defendants have shown that their change in policy has "sufficiently altered" the circumstances underlying this case "so as to present a substantially different controversy from the one that existed when this suit was filed." Id. (internal quotation marks omitted). And the plaintiffs have failed to show at this

[3] The plaintiffs request that the Court withhold its ruling on this motion for three months while the plaintiffs conduct discovery on the MTA's amendment of its standards. But there is no basis to hold the preliminary injunction in abeyance any longer, rather than allowing the plaintiffs to amend their complaint, after which they may then conduct discovery on the allegations in the amended complaint.

point that their allegations are likely to justify injunctive relief.

When the government provides a forum for private speech, the nature of that forum determines the level of scrutiny that courts apply to government restrictions of that speech. See Cornelius v. NAACP Legal Defense & Ed. Fund, Inc., 473 U.S. 788, 800 (1985). In the plaintiffs' initial motion, the defendants conceded that the MTA's advertising space was a designated public forum under the binding Second Circuit precedent of N.Y. Magazine. See AFDI v. MTA II, 2015 WL 1775607, at *6. Therefore, because the Killing Jews ad qualified as protected speech and the defendants restricted it based on its content, the Court applied strict scrutiny to the defendants' conduct and required that their exclusion of the ad be "justified by a compelling government interest and [be] narrowly drawn to serve that interest." Id. at *6, 9 (quoting Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2738 (2011) (internal quotation marks omitted)). However, the Court of Appeals in N.Y. Magazine made clear that its holding labeling the MTA's advertising space a designated public forum was based almost entirely on the MTA's allowance of political speech, which "evidence[d] a general intent to open a space for discourse, and a deliberate

acceptance of the possibility of clashes of opinion and controversy." 136 F.3d at 130.

Although the MTA's advertising space remained a designated public forum in the time since N.Y. Magazine, the MTA "is not required to indefinitely retain the open character" of its property. Children First Found., Inc. v. Fiala, No. 11-5199-CV, 2015 WL 2444501, at *6 (2d Cir. May 22, 2015) (quoting Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 (1983)). Indeed, "the government may decide to close a designated public forum." Make The Rd. by Walking, Inc. v. Turner, 378 F.3d 133, 143 (2d Cir. 2004). As the Court of Appeals recognized in N.Y. Magazine, if allowing political speech shows an intent to open the forum, "[d]isallowing political speech, and allowing commercial speech only, indicates that making money is the main goal." 136 F.3d at 130.

Accordingly, the Supreme Court and several courts of appeals have made clear that public authorities are not required to accept political advertisements, and when they exclude such ads, they create a limited public or nonpublic forum. See, e.g., Lehman v. City of Shaker Heights, 418 U.S. 298, 303-04 (1974) (plurality opinion) (holding that no First Amendment forum existed where City only allowed commercial advertising on its transit system property); Lebron v. Nat'l R.R. Passenger

Corp. (Amtrak), 69 F.3d 650, 656 (2d Cir.) (holding that Amtrak billboard was a limited public forum in light of its exclusion of political speech), opinion amended on denial of reh'g, 89 F.3d 39 (2d Cir. 1995); Am. Freedom Def. Initiative v. Suburban Mobility Auth. for Reg'l Transp. ("AFDI v. SMART"), 698 F.3d 885, 890 (6th Cir. 2012) ("SMART has banned political advertisements, speech that is the hallmark of a public forum."). Most recently, the Second Circuit Court of Appeals held that the custom license plate program directed by the New York Department of Motor Vehicles ("DMV") was a nonpublic forum because the DMV "consistently exclud[ed] controversial political speech" from the program. Children First, 2015 WL 2444501, at *8.[4]

In light of these precedents, it is likely that the MTA's exclusion of all political ads has converted its advertising

[4] In Children First, the Court of Appeals held its mandate pending the Supreme Court's decision regarding a challenge to the Texas custom license plate program in Walker v. Texas Div., Sons of Confederate Veterans, Inc., 135 S.Ct. 752 (2014). Children First, 2015 WL 2444501, at *20. Two days after oral argument was held on this motion, the Supreme Court issued its decision in Walker v. Texas Div., Sons of Confederate Veterans, Inc., 576 U.S. ___ (2015), holding that Texas's custom license plate program constitutes government speech, and thus forum analysis does not apply. Id. at *6, 13. The Court distinguished the license plate program from the "advertising on city buses" found to be a nonpublic forum in Lehman because the bus advertisements were "located in a context (advertising space) that is traditionally available for private speech," and because "the advertising space, in contrast to license plates, bore no indicia that the speech was owned or conveyed to the government." Id. at *16-17. Accordingly, forum analysis remains appropriate in this case, which, like Lehman, concerns the advertising space on city buses.

space from a designated public forum to a limited public forum or a nonpublic forum.[5] The plaintiffs argue that the above cases should not apply because in those cases, the defendants allowed *only* commercial advertising, whereas the MTA's New Policy still allows public service announcements. While the plaintiffs may seek to develop this claim further in the context of a facial challenge in an amended complaint, it is sufficient to note here that courts have not been that restrictive. For example, in the amended opinion in Lebron, the Court of Appeals noted that Amtrak's allowance of many "public service announcements" on its billboard space did not convert it to a designated public forum. 89 F.3d at 40; see also AFDI v. SMART, 698 F.3d at 892-93 (holding that transit agency that excluded political ads but allowed public service ads created nonpublic forum). The holding in N.Y. Magazine was premised on the allowance of political speech and "clashes of opinion and controversy," not merely public service announcements. 136 F.3d at 130.

[5] A nonpublic forum is government property that has not been opened for expressive activity by members of the public. A restriction on speech in a nonpublic forum need only be reasonable and viewpoint neutral. See Children First, 2015 WL 2444501, at *6. A limited public forum is opened to certain kinds of speakers and subjects. Strict scrutiny is applied only to speech that falls within the category that is opened. Otherwise, restrictions need only be reasonable and viewpoint neutral. Id. In this case, because the MTA has excluded all political ads, the rejection of any ad as political is analyzed by whether the exclusion is reasonable and viewpoint neutral, regardless of whether the advertising space is a nonpublic or limited public forum.

In a factually analogous case in the United States District Court for the Eastern District of Michigan, the plaintiff initially sought and was granted a preliminary injunction when a transit agency unconstitutionally excluded his advertisement that was critical of Israel. Coleman v. Ann Arbor Transp. Auth., 947 F. Supp. 2d 777, 779 (E.D. Mich. 2013). Thereafter, the transit agency amended its policy to exclude all political ads, and the district court held that the plaintiff's request for injunctive relief was moot because there was no "ongoing constitutional violation" and that the change in policy presented a "substantially different controversy than the one previously before [the] Court." Id. at 783-85. The same result is appropriate in this case. With the MTA's change in policy, the Court's standard of review becomes more lenient than the strict scrutiny the Court applied in the preliminary injunction order. Restrictions on access to a limited public forum must be viewpoint neutral and reasonable. Christian Legal Soc. Chapter of the Univ. of California, Hastings Coll. of the Law v. Martinez, 561 U.S. 661, 679 (2010). Because the MTA is no longer enforcing the regulations at issue in the Court's prior order, and because their actions likely would be subject to a different legal standard, the plaintiffs' request for injunctive relief is moot.

c.

The plaintiffs argue that their request for injunctive relief is still live because they acquired vested rights under state law after this Court initially granted their preliminary injunction motion. "[A] party may avert mootness of its claim if it demonstrates that, prior to the amendment it accrued certain property rights or fixed expectations protected under state law." Lamar Adver., 356 F.3d at 379. However, the plaintiffs have not shown that they acquired any vested rights under state law prior to the MTA's enactment of the New Policy. See id. (holding that the plaintiff challenging sign ordinance under the First Amendment did not acquire any vested rights under New York state law).

To show they have acquired vested rights under New York law, the plaintiffs rely entirely on Pokoik v. Silsdorf, 358 N.E.2d 874 (N.Y. 1976), in which the New York Court of Appeals held that the plaintiff was "entitled to a [a building] permit as a matter of right" due to his compliance with the application procedures before they were amended. Id. at 876. Subsequently, however, the New York Court of Appeals has made clear that the "special facts exception" relied upon in Pokoik is only applied in the context of land use disputes, and also requires "extensive delay indicative of bad faith," "unjustifiable

actions," or "abuse of administrative procedures" by municipal officials. Rocky Point Drive-In, L.P. v. Town of Brookhaven, 999 N.E.2d 1164, 1167 (N.Y. 2013); see also Ellington Const. Corp. v. Zoning Bd. of Appeals, 566 N.E.2d 128, 132 (N.Y. 1990) ("The doctrine of vested rights has generally been described as an application of the constitutionally based common-law rule protecting nonconforming uses."). The plaintiffs point to no case under New York law where an applicant acquired a vested right to run an advertisement on public property. And Lamar Advertising explicitly rejected a similar claim. 356 F.3d at 379.

Accordingly, the plaintiffs have not shown that they acquired a vested right prior to the MTA's amendment of its regulations.

D.

Finally, none of the as-applied or facial challenges that the plaintiffs assert against the New Policy in this motion warrant extending the Court's previous preliminary injunction order to enjoin the MTA from enforcing the New Policy to reject the Killing Jews ad. Although the plaintiffs may assert these claims in an amended complaint in order to develop them further, based on the record currently before the Court, the plaintiffs have not shown that any of their challenges to the New Policy

have a strong likelihood of success on the merits. See New York Progress & Prot. PAC v. Walsh, 733 F.3d 483, 488 (2d Cir. 2013) ("When a party seeks a preliminary injunction on the basis of a potential First Amendment violation, the likelihood of success on the merits will often be the determinative factor." (internal quotation marks omitted)).

The plaintiffs argue that the provision of the New Policy under which the Killing Jews ad is now excluded, which prohibits advertisements "regarding disputed economic, political, moral, religious or social issues or related matters," Rosen Decl. Ex. J, vests the MTA with too much discretion because it allows it to determine which issues are "disputed." But that language is plainly an illustrative example of the New Policy's broader ban of any ad that is "political in nature." Id. Courts have found that such a "categorical ban against political advertising," even when "inartfully phrased," provides sufficient guidance to restrict the discretion of the government actor and survive facial challenges. Lebron, 69 F.3d at 658; see also AFDI v. SMART, 698 F.3d at 893 (holding that policy prohibiting "political advertising" was "not so vague or ambiguous that a person could not readily identify the applicable standard" (brackets and internal quotation marks omitted)). At this

stage, the plaintiffs have not shown that the New Policy's prohibition of political advertising is facially defective.

The plaintiffs also argue that the MTA's amendment of its policy was motivated by a desire to suppress the plaintiffs' speech in particular. The plaintiffs cite Coleman in arguing that "changes to a forum motivated by actual viewpoint discrimination may well limit the government's freedo m of action." 947 F. Supp. 2d at 788. However, if the New Policy is an otherwise constitutional blanket ban of political advertising, a purported illicit motive by the MTA may not be sufficient to invalidate it. See United States v. O'Brien, 391 U.S. 367, 383 (1968) ("It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive.").

Moreover, as in Coleman, "there has been insufficient factual development on the issue of actual viewpoint discrimination." 947 F. Supp. 2d at 788. The plaintiffs point to anti-AFDI statements made at the MTA's hearing that led to the New Policy, but those statements may have little or no bearing on the Board's decision to amend the policy. See O'Brien, 391 U.S. at 384 ("What motivates one legislator to make a speech about a statute is not necessarily what motivates

scores of others to enact it."). The defendants assure the Court that this change in policy had been debated for some time, and they point to a history of contentious political advertisements displayed on MTA property. These advertisements come from many different groups, not just the AFDI, and cover a wide variety of controversial perspectives—on the Middle East conflict and Islam. See Rosen Decl. ¶¶ 45-55. The plaintiffs may have been especially vocal participants in the "sounding board for Middle East policy debates" that the MTA's property offered, id. ¶ 45, but the record suggests the MTA has silenced the entire debate on its property, not just the plaintiffs' ad. Indeed, the MTA points to other advertisements submitted in opposition to the AFDI's ads that the MTA has already rejected under the New Policy. See id. ¶ 79 (noting rejection of the satirical "The Muslims are Coming" campaign).

Some may regret the MTA's prohibition of political advertisements and the resulting loss of a public forum for heated political debate. But no law requires public transit agencies to accept political advertisements as a matter of course, and it is not for this Court to impose its own views on what type of forum the MTA should create. Just as the MTA created a designated public forum on its property by "invit[ing] . . . political speech" and the ensuing "clashes of opinion and

controversy," Children First, 2015 WL 2444501, at *7 (quoting N.Y. Magazine, 136 F.3d at 130 (internal quotation marks omitted)), the MTA may rescind that invitation in order to reduce the political controversy amidst the MTA's day-to-day operation of its public transit system. The plaintiffs may raise the question of whether the MTA's actions were unconstitutional in an amended complaint. But at this stage, the plaintiffs' original request for injunctive relief is moot, and the Court's preliminary injunction order should be vacated. Accordingly, the defendants' motion to dissolve the preliminary injunction order is **granted.**

CONCLUSION

The Court has considered all of the arguments of the parties. To the extent not specifically addressed above, the remaining arguments are either moot or without merit. For the reasons discussed above, the defendants' motion to dissolve the preliminary injunction order issued by this Court on April 20, 2015, is **granted.** The Clerk is **directed to close Docket No. 44.**

SO ORDERED.

Dated: New York, New York
June 19, 2015

_____/s/_____
John G. Koeltl
United States District Judge