No. 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' REPLY BRIEF

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I. Initial Observations.

This case presents a constitutional derailment of sorts with First Amendment carnage strewn all over the tracks and the MTA essentially telling this Court in its opposition brief to simply "move along, there is nothing to see here."

The MTA claims that its last minute policy change designed to undermine a previously issued injunction that was granted for the purpose of protecting and upholding Plaintiffs' fundamental free speech rights is essentially beyond this Court's watchful eye (*i.e.*, the close scrutiny courts are required to exercise when addressing First Amendment cases). The MTA's claim is wrong, and, indeed, contrary to long-standing First Amendment jurisprudence.

Unlike other cases cited in the opening and responsive briefing, this case is unique in that the MTA has a court-documented history of hostility toward Plaintiffs' speech. But even more damning are the MTA's own explanations for the need for a new policy, articulated by Charles Moerdler, an MTA board member, during the public meeting, which culminated in the affirmative vote for the "New Policy." According to Moerdler, Plaintiffs' ads did not deserve constitutional protection because they were what he, a prominent lawyer, termed "hate speech," apparently some new exception to the First Amendment. Beyond labeling such speech "loathsome vitriol," "scurrilous vitriol," and "filth," board

member Moerdler actually tipped the MTA's hand by noting that in addition to the ad at issue, the New Policy had in its sights new ads that were submitted by Plaintiffs attacking prominent, wealthy Jews for providing financial support to the pro-Palestinian movement to boycott, divest, and sanction Israel as the latest apartheid state. (Geller Decl. ¶¶ 22-31 at A597-99). The MTA's response to these unique and troubling facts is to assert that the MTA only violated Plaintiffs' free speech rights on a few occasions, but otherwise allowed their pro-Israel/anti-Jihad ads to run. But this very defense, together with Moerdler's open-aired contempt, demonstrates the MTA's hostility to viewpoints that cross some imaginary line. Government censorship is most insidious when it is used to establish politically correct boundaries, disallowing those ads the MTA considers beyond the pale and allowing less provocative ones. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995) ("Viewpoint discrimination is thus an *egregious* form of content discrimination.") (emphasis added).

The MTA offers yet an additional defense that even if it were true that MTA officials are hostile to certain of Plaintiffs' viewpoints, the New Policy precludes all such speech without regard to the speaker by shutting off all political speech. As we pointed out in our opening brief and as we reiterate below, this assertion of a categorical prohibition against political speech is simply wrong. But even if the MTA were prepared to sacrifice all political speech in order to snuff out Plaintiffs'

more provocative speech, this does not absolve the MTA nor cleanse its constitutionally dirty hands sufficiently to dissolve the preliminary injunction. This is especially true given the MTA's monetary incentive to return to public issue and political ads as a way to battle consistent budgetary shortfalls. Beyond this, the MTA argues that the constitutionality of the New Policy and its application to Plaintiffs' ad is not properly before the Court and thus not subject to any level of scrutiny.

The most intriguing of the MTA's arguments is this: the MTA insists it remediated its illegal and unconstitutional use of the anti-incitement rule by legally and constitutionally converting the forum from a designated public forum to a limited public forum and added a new provision against political ads that should effectively shut down Plaintiffs' speech. Yet, the MTA argues, Plaintiffs may not challenge, nor may this Court examine, whether the MTA in fact legally and constitutionally converted the forum and/or properly rejected Plaintiffs' ad under the New Policy. That is, at least per the MTA, the very premise of the MTA's motion to dissolve is outside the purview of critical assessment—at least not without the time-consuming and procedural formality of an amended complaint. One is tempted to ask at this point just how far this logic goes. Had the MTA simply chosen to outlaw all ads submitted by Plaintiffs, would that conduct similarly be beyond a court's purview when reviewing an order to dissolve an

injunction on mootness grounds based on that very conduct? In effect, the MTA would have us all believe that this Court is without the power to *critically* review the MTA's "remedial" actions to determine whether it was proper to dissolve an injunction designed, in the first instance, *to remedy harm to Plaintiffs' First Amendment rights*. This position is unsustainable because it flies in the face of constitutional precedent, the brute facts, and good sense.

Indeed, the injunction in this case wasn't issued simply to enjoin the anti-incitement provision (the MTA's constant refrain). The injunction was issued because the MTA violated Plaintiffs' free speech rights by refusing to display Plaintiffs' advertisement (an advertisement that does not contain "political" content, despite the MTA's *ipse dixit* to the contrary, [*see* MTA's Opp'n Br. at 55-56]). An order requiring the MTA to display Plaintiffs' ad remedies the harmful *effects* of the MTA's violation of the First Amendment. By dissolving the injunction, the harmful *effects* of the MTA's unlawful actions continue. *See Granite State Outdoor Adver., Inc. v. Town of Orange, Conn.*, 303 F.3d 450, 451 (2d Cir. 2002) (per curiam) ("The voluntary cessation of allegedly illegal activities usually will render a case moot if the defendant[s] can demonstrate that . . . interim relief or events have completely and irrevocably eradicated the *effects* of the alleged violation") (emphasis added); *Lamar Adver. of Penn, LLC v. Town of Orchard Park, N.Y.*, 356 F.3d 365, 375-76 (2d Cir. 2004) (same).

Indeed, allowing the MTA to get away with this scheme will only serve to incentivize government actors to engage in this sort of First Amendment gamesmanship. This Court has the authority, indeed, the constitutional duty, to closely examine the MTA's actions in this case and the lower court's order to ensure the protection of the First Amendment.

II. Standard of Review Redux.

As noted above, Plaintiffs contend, contrary to the MTA's assertion (*see* MTA's Opp'n Br. at 16-17 [rejecting Plaintiffs' statement of the standard of review and incorrectly claiming that it is simply the deferential abuse of discretion standard]), that this Court can and *must* make a "fresh examination" and take an "independent" look at the basis for the MTA's claim that the free-speech protecting injunction was properly dissolved on mootness grounds. The courts, including this one, agree with Plaintiffs.

As cogently stated by the Third Circuit (and recognizing that the standard of review applicable in this case is the same for this Court as a review of a lower court's denial of a preliminary injunction, *see infra* n.1):

> We review the District Court's ultimate decision to deny a preliminary injunction for abuse of discretion. . . . But any determination that is a prerequisite to the issuance of an injunction . . . is reviewed according to the standard applicable to that particular determination. . . . Thus we exercise plenary review over the District Court's conclusions of law and its application of the law to the facts. . . .

> Ordinarily we will not disturb the factual findings supporting the disposition of a preliminary injunction motion in the absence of clear error. . . . This case, however, involves First Amendment claims, and "the reaches of the First Amendment are ultimately defined by the facts it is held to embrace." . . . Therefore, we have "a constitutional duty to conduct an independent examination of the record as a whole," and we cannot defer to the District Court's factual findings unless they concern witnesses' credibility. . . . Accordingly, we *examine independently the facts in the record and "draw our own inferences" from them*. . . .

Tenafly Eruv Ass'n v. Borough of Tenafly, 309 F.3d 144, 156-57 (3d Cir. 2002) (emphasis added) (internal citations omitted, quoting *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 567 (1995)); *see also Bery v. City of New York*, 97 F.3d 689, 693 (2d Cir. 1996) (stating that "[t]his court reviews the district court's denial of appellants' preliminary injunction motions with an abuse of discretion standard"; however, "since appellants seek vindication of rights protected under the First Amendment, we are required to make an independent examination of the record as a whole without deference to the factual findings of the trial court . . . Such a 'fresh examination of crucial facts' is necessary even in the face of the 'clearly erroneous' standard of factual review . . ."") (citing, *inter alia*, *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 499 (1984), & *Hurley*, 515 U.S. at 567-68).[1]

[1] The case law and logic make clear that the standard of review for an appeal of an order granting a motion to dissolve a preliminary injunction is the same as for an appeal of an order granting or denying a motion for preliminary injunction. Both of the cases cited by the MTA to support its argument that the "abuse of discretion"

Having now disposed of the MTA's erroneous standard of review argument,[2] we will turn next to the MTA's equally faulty arguments on the substantive issues. But before doing so, we pause here momentarily to address an issue about the construction and proper interpretation of the MTA's New Policy.

III. The MTA's New Policy Permits Arbitrary and Subjective Application.

In its opposition, the MTA accuses Plaintiffs of "badly misread[ing] the policy." (MTA's Opp'n Br. at 43). But it's not Plaintiffs' *reading* that is bad; it is the MTA's lawyers' *drafting* that is the problem. And this problem is exacerbated when, as here, the government is attempting to regulate speech. As the Supreme

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standard of review applies here (*see* MTA's Opp'n Br. at 16 [citing *SmithKline Beecham Consumer Healthcare, L.P. v. Watson Pharm., Inc.*, 211 F.3d 21, 24 (2d Cir. 2000) & *Huminski v. Corsone*s, 396 F.3d 53, 69 (2d Cir. 2005)]), rely upon *ABKCO Music, Inc. v. Stellar Records, Inc.*, 96 F.3d 60, 64 (2d Cir. 1996) and *Niagara Hooker Employees Union v. Occidental Chemical Corp.*, 935 F.2d 1370, 1374 (2d Cir.1991). *ABKCO Music* involves an appeal of an order granting a preliminary injunction, and *Niagra Hooker Employees Union* makes clear that the standard of review of a trial court's denial of a motion to dissolve a preliminary injunction is the same as when reviewing a lower court's grant or denial of a preliminary injunction (*i.e.*, they demonstrate that the standard is the same whether the Court is reviewing an order to grant, deny, or dissolve an injunction). To the extent that the MTA relies on the passing remark (and rather slipshod treatment of the standard of review) in *Huminski* to argue that the First Amendment does not demand *de novo* review in this case, such reliance is misplaced in light of the Supreme Court's decisions in *Bose Corporation* and *Hurley*, as well as this Court's more careful ruling in *Bery*.

[2] Aside from the fact that the First Amendment issues presented are reason enough for this Court to conduct a "fresh examination" of this case, there are perhaps other lingering reasons as well. (*See* Tr. of Hr'g 2:13-14 at A 548 ["THE COURT: Okay. I should point out at the outset that *I know Mr. Kovner* <u>*personally*</u>*, professionally*. There's nothing about that that affects anything that I do in the case."]) (emphasis added).

Court has made clear, "Broad prophylactic rules in the area of free expression are suspect. . . . *Precision of regulation* must be the touchstone in an area so closely touching our most precious freedoms." *NAACP v. Button*, 371 U.S. 415, 438 (1963) (internal citations omitted) (emphasis added).

Moreover, when interpreting a statute (or regulation as in this case), it must not be construed in a way that makes some of its provisions surplusage, which is precisely what the MTA is doing here. *See, e.g., New York v. Shore Realty Corp.*, 759 F.2d 1032, 1044 (2d Cir. 1985) ("Without a clear congressional command otherwise, we will not construe a statute in any way that makes some of its provisions surplusage."). If the speech regulation is as the MTA claims it to be (*i.e.*, a "'blanket exclusion' on political advertising," [MTA's Opp'n Br. at 48]), then this regulation is truly incoherent (*see* MTA's Opp'n Br. at 44 [falsely accusing Plaintiffs of attempting "to parse it into incoherence"]), and ultimately fails to provide the "precision" required under the First Amendment. *See Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553 (1975) ("[T]he danger of censorship and of abridgment of our precious First Amendment freedoms is too great where officials have unbridled discretion over a forum's use."); *United Food & Commercial Workers Union, Local 1099 v. Sw. Ohio Reg'l Transit Auth.*, 163 F.3d 341, 359 (6th Cir. 1998) ("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."); *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).

As we pointed out in our opening brief, if the MTA truly wanted to make a "blanket exclusion on political advertising," it certainly knew how to do so.[3] But it didn't. Instead, the New Policy begins by creating three categories of permissible speech: commercial ads, government speech, and non-profit public service announcements. Having created these permissible categories, the MTA's New Policy next seeks to prohibit some, but certainly not all, political speech. For example, political speech by the government or by non-profits addressing certain

[3] As Plaintiffs noted in their opening brief:
"[I]n 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." (Pls.' Opening Br. at 43-44) (emphasis omitted).

subjects is permitted.[4] (Pls.' Opening Br. at 35-36). This is not some "parsing into incoherence" but a straightforward and lawyerly interpretation of the plain meaning of the New Policy's language and structure. The MTA's attempt to retain for itself an interpretive subjectivity that flies in the face of the plain language of the New Policy is in reality a rewriting of the New Policy by administrative fiat, and this "rewriting" is made possible by regulatory ambiguity—ambiguity that is prohibited when regulating in the area of free speech. Indeed, the MTA's failure to draw (*i.e.*, regulate) with clear and straight lines is yet another factor demonstrating the MTA's bad faith and why the injunction should not be dissolved.[5]

Plaintiffs' arguments regarding the New Policy and its application are reinforced by the district court's recent decision in *Vaguely Qualified Productions LLC v. Metropolitan Transportation Authority*, No. 1:15-cv-04952-CM, slip. op. (S.D.N.Y. Oct. 7, 2015), ECF No. 58. In its decision granting a preliminary

[4] On its face the New Policy permits ads discussing religion, economics, morals, and social issues so long as MTA officials deem the particular issue discussed as *not* "disputed." (*See* Pls.' Opening Br. at 35-37 [discussing the language and construction of the New Policy and its application to Plaintiffs' advertisement]). Indeed, in a case decided just two days prior to the filing of this brief, the district court determined that the New Policy's "political speech" prohibition did not apply to an ad addressing "a hot-button cultural topic" involving Islam. *Vaguely Qualified Prods. LLC v. Metro. Transp. Auth.*, No. 1:15-cv-04952-CM, slip. op. at 15 (S.D.N.Y. Oct. 7, 2015), ECF No. 58.

[5] The recently decided case involving Vaguely Qualified Productions demonstrates the abuse permitted by the interpretive subjectivity of the New Policy. *Vaguely Qualified Prods. LLC v. Metro. Transp. Auth.*, No. 1:15-cv-04952-CM, slip. op. at 15-19 (S.D.N.Y. Oct. 7, 2015), ECF No. 58.

injunction in favor of Vaguely Qualified Productions (VQP) because the MTA's rejection of VQP's pro-Islam ads (ads that were intended to counter Plaintiffs' ads) was unconstitutional, the district court stated, in relevant part, the following:

> Defendants are of course correct that commercial ads can also be "political in nature" under the MTA's New Policy. Dkt. No. 41 at 20-21. However, that commercial advertisements share subject matter with a hot-button cultural topic does not necessarily render those advertisements "political." Rather, as that term is defined in the New Policy, an advertisement is "political in nature" if it is "directed or addressed to the action, inaction, prospective action or policies of a governmental entity" or if it "prominently or predominately advocate[s] or express[es] a political message." Compl. Ex. I § IV.B.2. "Political message" is defined as including "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.*
>
> Defendants cannot plausibly argue that Plaintiffs' advertisements—humorous or satirical statements suggesting that American Muslims are just like other Americans and directing viewers to the website for Plaintiff's film, which contains similar content—address the behavior or policies of a government entity. Nor do they. Instead, Defendants suggest that these advertisements "prominently or predominately advocate[s] or express[es] (sic) a political message." Dkt. No. 41 at 14; Farsad Decl. Ex. 45.
>
> But to "prominently or predominately" advocate or express a political viewpoint, an advertisement must do far more than refer to a subject about which there is a lack of national consensus. That some individuals may hold Islamophobic views does not turn the punchline that "Muslims have great frittata recipes" into a message that "prominently or predominately . . . advocates a[] . . . viewpoint regarding [a] disputed . . . political . . . or social issue[]." And that the advertisements at issue gently mock prejudice and employ Islamophobia as a comedic device does not make their message "prominently or predominately" political.

That Plaintiff's advertising campaign was prompted, in part, by AFDI's desire to post hateful messages about Muslims in the subways does not in and of itself render VQP's advertisements "political in nature." That a commercial enterprise would seek to capitalize on controversy—namely, the advertising campaign of a pro-Israel advocacy organization known for its public criticism of Islam—is hardly surprising. *See* Dkt No. 46 at 9. VQP is a for-profit film production company, not an advocacy group. It has no specific political agenda or policy demands; it is not on a civil rights crusade. VQP saw an opportunity to reintroduce its brand of humor and promote DVD sales of a film about Muslim comedians and their interactions with Americans—and took it. That VQP used public support for the film's message and public dislike of AFDI's *modus operandi* to garner attention and finance its campaign does not transform the essential non-political nature *of the advertisements themselves*! The text of the messages that would be posted in the subways is not "prominently or predominantly political"—*unless we have reached the unhappy moment in this country where the mere mention of one of the three Abrahamic faiths is "prominently or predominantly political" simply because that faith is Islam*.[6]

Finally, although Defendants argue that Plaintiffs' ads are "political" under the definition provided in the New Policy, the MTA notes that its prohibition on political speech proscribes more than speech that satisfies that precise definition; the New Policy states that prohibited political speech *"includ[es] but [is] not limited to"* advertisements that "prominently or predominately advocate or express a political message." Compl. Ex. I § IV.B.2. It is true that Plaintiffs' advertisements are not purely commercial in nature; they send a message as well as sell a product. The questions is whether that message—one that promotes tolerance over bigotry—is political speech, even though it does not fall within the definition provided in the New Policy. As the MTA has provided no information about what else might constitute "political" speech, I cannot conclude that VQP's ads are political on their face, and an *arbitrary conclusion* by some official at the MTA, *untethered to any articulated or articulable*

[6] This, obviously, cuts more than one way, and it most certainly applies to the ad at issue here.

> *standard*, that an advertisement including the word "Muslims" is "political," *is utterly unreasonable*.[7]

Vaguely Qualified Prods. LLC v. Metro. Transp. Auth., No. 1:15-cv-04952-CM, slip. op. at 15-17 (S.D.N.Y. Oct. 7, 2015), ECF No. 58 (emphasis added).

And of course this reasoning does not *only* apply to what some, including this district court judge, have pathetically described as "Islamophobia"; it applies equally as well to the advertisement at issue here, which shows Islam's hatred of Jews, lest the courts themselves become guilty of the viewpoint discrimination that they denounce.

In sum, the MTA's "arbitrary conclusion . . . untethered to any articulated or articulable standard" that Plaintiffs' ad is "political," "is utterly unreasonable."

And this leads us into the critical issues presented in this appeal.

IV. The MTA's Actions Are Rife with Bad Faith.

Paraphrasing from the First Circuit in *Ridley v. Massachusetts Bay Transportation Authority*, 390 F.3d 65, 77 (1st Cir. 2004), while the "government is free to change the nature of any nontraditional forum as it wishes," it must do so "in good faith," without any "evidence that the . . . changes were adopted as a mere pretext to reject plaintiff's advertisements."

[7] Indeed, the MTA held up the rejection of the VQP ads as justification for its claim that the New Policy and its application are reasonable and viewpoint neutral. (Defs.' Brief in Supp. of Mot. to Dissolve [Dkt. Entry 45] at 6-7).

Here, bad faith abounds. And it appears that the MTA has decided to avoid addressing this central issue head-on (other than simply to ignore the evidence and assert, self-servingly, that there is no bad faith). Nowhere in its brief does the MTA address this aspect of *Ridley;* nowhere does the MTA address this aspect of *Coleman v. Ann Arbor Transportation Authority*, 947 F. Supp. 2d 777, 788 (E.D. Mich. 2013) ("It is true that changes to a forum motivated by actual viewpoint discrimination may well limit the government's freedom of action."), and the MTA doesn't even bother to cite, let alone address, *United States v. Griefen*, 200 F.3d 1256, 1265 (9th Cir. 2000) ("Should 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."), all of which were discussed in Plaintiffs' opening brief. (Pls.' Opening Br. at 30-31).

It would be helpful now to briefly review the history of this challenge and how we got to this point in the litigation.

As the record shows, this is the *third* time that Plaintiffs have had to file a federal civil rights lawsuit against the MTA for rejecting one of Plaintiffs' advertisements. (Pls.' Opening Br. at 4-9). The advertisement at issue in this litigation was unlawfully rejected by the MTA on *August 25, 2014*. (Pls.' Opening

Br. at 9). There can be no dispute that MTA officials rejected the advertisement based on a sham claim that it would incite violence. (Pls.' Opening Br. at 3-4). Indeed, this bogus claim was based on a *recently* adopted anti-incitement provision—which is further evidence of "bad faith" on the part of MTA officials. (Pls.' Opening Brief at 7-8).

The preliminary injunction at issue was granted by the district court on *April 20, 2015*. (Prelim. Inj. Op. at A374-401). So for nearly *8 months*, the MTA had unlawfully deprived Plaintiffs of their fundamental First Amendment right to free speech.

However, before the ink dried on the injunction order, on April 24, 2015, the MTA informed the judge via letter that it was going to change its advertising standards, stating (incorrectly) that "Plaintiffs' claims in this case will be rendered moot."[8] (MTA Letter at A402). Consequently, *prior to any formal public hearing* on this policy change, the MTA was informing the district court with absolute confidence that two public bodies were going to vote to allegedly overhaul and fundamentally change a practice that had been in place for decades (a change that was certain to reduce much needed MTA revenue).[9] (*See* Pls.' Opening Br. at 10-11).

[8] It was also around this time that the MTA added new counsel to the case. (*See supra* n.2).

[9] While the MTA correctly notes a misplaced decimal in an argument in Plaintiffs'

And yet there is more. During the public meeting to vote on the New Policy, MTA Board Members couldn't resist exposing their animosity toward Plaintiff Geller and the views she expresses through her advertisements. This animus toward Plaintiffs and their viewpoints served as the impetus for adopting the New Policy. (Geller Decl. ¶¶ 22-31 at A597-99). And this Court need not take Plaintiffs' word for it. This point was made vividly clear by MTA Board Member Allen Capelli, who voted against the New Policy, when he remarked: "We are denying the public the opportunity to be able to express themselves in the way that they have for 100 years because we disagree with the words and views that have been offered in recent days." (Geller Decl. ¶ 31 at A598-99 [quoting Capelli's public statement *recorded on YouTube*]). Thus, it is unconscionable that the MTA would claim in its opposition brief that "AFDI's theory that the MTA is attempting to stifle its viewpoint on political issues exists only in AFDI's own imagination." (MTA Opp'n Br. at 27). Plaintiffs' argument is not based on "imagination"—it is based on ***facts*** that the MTA cannot wish away.[10] Indeed, as Plaintiffs have

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opening brief (MTA Opp'n Br. at 28), for which Plaintiffs are contrite, the MTA fails to address the actual fact that it has argued for years, and argued before the court below during the briefing and hearing on the motion for preliminary injunction, that it decided against a blanket prohibition on all ads but commercial ones precisely because it desperately needed the advertising revenue from public-issue ads. (Pls.' Opening Br. at 23-25). That is to say, the motivation for our cash-strapped MTA remains.

[10] Indeed, the facts supporting viewpoint discrimination in this case are far more developed and egregious than those relied upon by the district court in *Vaguely*

demonstrated throughout this reply, just because the MTA (or its lawyers) say it, doesn't make it true. In short, this is not "good faith" on the part of government officials by anyone's measure.[11] *Ridley*, 390 F.3d at 77 (noting the "good faith" mandate).

V. The Restrictions Imposed on the Permitted Categories of Speech under the New Policy Do Not Satisfy Constitutional Scrutiny.

As an initial matter and regarding the related forum question, the MTA makes the remarkable claim that Plaintiffs' "brief fails to even mention, let alone come to grips with *Lebron*." (MTA's Opp'n Br. at 42). Of course, the MTA is mistaken yet again. Any fair reading of *Lebron* shows that it supports Plaintiffs' (and this Court's) view of *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974), as it applies to the forum question. (*See* Pls.' Opening Br. at 42-44). As the *facts* in *Lebron* demonstrate, Amtrak "has <u>never</u> opened the Spectacular for anything except <u>purely commercial</u> advertising." *Lebron v. Nat'l R.R. Passenger*

Qualified Productions to find viewpoint discrimination. *Vaguely Qualified Prods. LLC v. Metro. Transp. Auth.*, No. 1:15-cv-04952-CM, slip. op. at 17-19 (S.D.N.Y. Oct. 7, 2015), ECF No. 58 ("The very fact that Defendants delved so deeply into whether VQP had a political objective is evidence of Defendants' lack of viewpoint neutrality.").

[11] This further demonstrates why there is no "good reason" to give any deference to these government officials. (*See* MTA's Opp'n Br. at 22 [arguing that MTA officials should be accorded deference and citing *DeMoss v. Crain*, 636 F.3d 145, 150-51 (5th Cir. 2011), for the following: "[G]overnment actors in their sovereign capacity and in the exercise of their official duties are accorded a presumption of good faith because they are public servants, not self-interested private parties."]). MTA officials in this case are entitled to no "presumption of good faith." Indeed, the evidence demonstrates "good reason" to find *bad faith* on their part.

Corp. (*Amtrak*), 69 F.3d 650, 656 (2d Cir. 1995) (emphasis added). Thus, it's not surprising then that this Court concluded that "Spectacular is not a public forum." *Id*. Consequently, it appears that the MTA is the one who has yet to "come to grips" with *Lebron*.

There is one aspect of the MTA's argument, however, with which Plaintiffs agree, and that is this: the MTA rightfully notes that "[i]f a limited public forum is expressly open to a particular category of speakers or speech, but the government nevertheless excludes speech falling within that category, then the exclusion is either arbitrary (and therefore unreasonable) or a result of discrimination against the particular speaker's viewpoint." (MTA Opp'n Br. at 47).

As Plaintiffs demonstrate in their opening brief, even assuming *arguendo* that the MTA acted legitimately and created a limited public forum, the restriction on Plaintiffs' advertisement is nonetheless unlawful because, like the "incitement" provision, it fails constitutional scrutiny. (*See* Pls.' Opening Br. at 32-42). This is true regardless of the nature of the forum. *See also Vaguely Qualified Prods. LLC v. Metro. Transp. Auth*., No. 1:15-cv-04952-CM, slip. op. at 15-19 (S.D.N.Y. Oct. 7, 2015), ECF No. 58 (finding that the application of the MTA's New Policy was unreasonable and viewpoint based).

In the final analysis, the New Policy does nothing to remedy the unlawful *effects* that the preliminary injunction was intended to remedy. *See Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville, Fla.*, 508 U.S. 656, 661-62 (1993) (concluding that the case was not moot despite the government's *repeal* of the challenged ordinance and observing that "[t]he *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 it nonetheless] *disadvantages them in the same fundamental way*") (emphasis added).

Here, the MTA's New Policy is simply an unlawful restriction on Plaintiffs' speech by another name. Its application and enforcement "disadvantage[Plaintiffs] in the same fundamental way" as the application and enforcement of the MTA's old policy.

VI. The MTA Fails to Explain Why New York's Vested Right Doctrine Only Applies to Property Owners and Not to Those with a Constitutional Right to Use Government Property.

The above discussion thus leads ineluctably to the conclusion that Plaintiffs have acquired a *vested* right in having their advertisement displayed. The MTA's entire defense on this point rests on the new claim that New York's "special facts"

vested right doctrine only applies to land owners.[12] (MTA's Opp'n Br. at 36). The MTA, however, provides no precedent that limits the "special facts" vested right doctrine to land owners nor does it explain logically or from a policy perspective why this doctrine does not apply to protect someone with a constitutionally protected right to advertise on real estate that was at the time held out by the MTA as a designated public forum. Indeed, as pointed out in our opening brief, the New York Court of Appeals has expressly noted that the source of this doctrine is found both in land use law and in the equitable doctrine of reasonable reliance. (Pls.' Opening Br. at 44-47). In this case, Plaintiffs' constitutionally protected right to advertise on this property was not some ephemeral or abstract claim but a right founded in the First Amendment and upheld by the trial court's original grant of a preliminary injunction.

[12] At the trial court level, Defendants argued that the "special facts" vested right doctrine only applies to "land use." (Defs.' Reply in Supp. of Mot. to Dissolve [Dkt. Entry 52] at 4).

CONCLUSION

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

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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 5,494 words, excluding those sections identified in Fed. R. App. P. 32(a)(7)(B)(iii).

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CERTIFICATE OF SERVICE

I hereby certify that on October 9, 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.

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