UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

VAGUELY QUALIFIED PRODUCTIONS LLC,

Plaintiff,

v.

METROPOLITAN TRANSPORTATION AUTHORITY (the "MTA"); THOMAS F. PRENDERGAST, in his official capacity as Chairman and Chief Executive Officer of the MTA; and JEFFREY B. ROSEN, in his official capacity as the Director of the MTA Real Estate Department,

Defendants.

Case No. 1:15-cv-04952-CM (GWG)

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

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> *"The Ugly Truth About Muslims: Muslims have great frittata recipes."*
>
> *"Muslims! They invented coffee, the toothbrush, and algebra. Oh wait, sorry about the algebra. That's a year of class you'll never get back."*
>
> *"Facts about Muslims: Grownup Muslims can do more pushups that baby Muslims."*

To call these statements "political in nature" is to ignore the obvious comedic messages designed to promote a critically acclaimed feature film produced by a for-profit company. Yet that is precisely what Defendants Metropolitan Transportation Authority ("MTA"), Thomas F. Prendergast, and Jeffrey B. Rosen did when they refused to display in the subway system six advertisements containing these and similar statements (the "Advertisements") prepared by Plaintiff Vaguely Qualified Productions, LLC ("VQP").

VQP is a for-profit company that seeks to promote its feature film *The Muslims Are Coming!* in the subway system. Utilizing the same comedic messaging underlying the feature film, VQP prepared the tongue-in-cheek Advertisements for display in the subway system as part of a campaign to promote its movie. Each Advertisement clearly references the Internet website—www.themuslimsarecoming.com—where information about the film is detailed, together with instructions for viewing or purchasing the movie and related merchandise.

VQP submitted the Advertisements in November 2014. After an unnecessary and unreasonable four-month delay, Defendants finally approved them for display in the subway system. But, rather than run the Advertisements, the MTA continued to hem and haw, and refused to post the Advertisements as the parties agreed. Instead, two days after the Advertisements were scheduled to run, Defendants adopted a new advertising policy (the "Revised Policy") permitting certain categories of advertisements (*e.g.,* "commercial

advertising") and prohibiting certain other categories of advertisements (*e.g.*, advertisements that are "political in nature").

In reliance on the Revised Policy, Defendants ultimately rejected VQP's Advertisements from display in the subway system. Defendants' proffered rationale for rejecting the Advertisements was their mistaken determination that the Advertisements constitute prohibited "political advertising" under the MTA's Revised Policy.

Defendants' refusal to run VQP's Advertisements violates the Free Speech Clause of the First Amendment and 42 U.S.C. § 1983. VQP seeks a preliminary injunction requiring Defendants to display the Advertisements in the subway system for a period of 28 days, as the parties previously agreed.

STATEMENT OF FACTS

I. Vaguely Qualified Productions Created a Series of Advertisements Promoting Its Commercial Feature Film Using the Underlying Theme of the Film—That American Muslims Are Ordinary People.

In 2013, VQP, a for-profit video production company, produced a feature film documentary, *The Muslims Are Coming!*, that follows a band of American Muslim comedians as they perform stand-up comedy and interact with residents in big cities, small towns, and rural villages across the United States. Declaration of Negin Farsad ("Farsad Decl.") ¶ 6. Underlying the film's comedic content is the message that American Muslims are ordinary people. *Id.* The film received critical praise when it was released and is currently available for purchase through various online mediums including Netflix, Amazon, iTunes, and Xbox. *Id*. The message of *The Muslims Are Coming!* is consistent with that of other commercial works produced by VQP, which specializes in "smart, insightful, and comedic social justice media." *Id.*

In September 2014, VQP launched a campaign to purchase MTA advertising space that would promote the film by using the same comedic message depicted in *The Muslims Are*

Coming! Id. ¶ 7. Negin Farsad, Director of VQP and co-director of *The Muslims Are Coming!*, and Dean Obeidallah, VQP's consultant and co-director of *The Muslims Are Coming!*, described the campaign as "the next step" to the feature film. *Id*. The timing of the campaign was, in part, a reaction to the American Freedom Defense Initiative's ("AFDI") announcement that it planned to purchase advertising space in the subway system to display a series of incendiary advertisements advocating for particular foreign policy positions while criticizing Islam and Muslims. *Id.* ¶ 9. VQP's campaign did not oppose AFDI's political positions; rather, it used comedy to promote the central theme of the movie it had produced—that American Muslims are ordinary people. *Id.* In preparing the Advertisements, VQP purposefully avoided making any political or socially controversial statements in its posters, choosing instead to offer silly statements together with a link to the film's website: www.themuslimsarecoming.com. *Id.* ¶ 10.

Through its advertising campaign, which it called *The Fighting-Bigotry-with-Delightful-Posters Campaign!*, VQP raised the funds necessary to purchase advertising space in the subway system. *Id.* ¶¶ 7, 9. In October 2014, VQP prepared the Advertisements for display. *Id.* ¶ 10. The posters feature tongue-in-cheek statements that are intended to be funny and prompt the viewer to purchase or rent *The Muslims Are Coming! Id.* ¶ 10, Exs. 1-6. As part of the humorous content, each poster promotes the VQP brand and refers the reader to the movie's website, which offers the film and related merchandise for sale. Farsad Decl. ¶ 10. One of the Advertisements prominently features the logo of the film displayed in type-face evocative of horror films from the 1950s. *Id.* ¶ 10, Ex. 4.

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II. After More Than Four Months Of Unnecessary and Unreasonable Delay, and After Approving VQP's Advertisements for Display in the Subway System, Defendants Refused to Run Them.

The MTA, through its advertising agent, OUTFRONT Media Inc.[1] ("Outfront Media") leases advertising space on its vehicles and transportation stations.[2] MTA's "advertising opportunities . . . are handled by Outfront Media."[3] VQP first submitted the Advertisements to Defendants for approval on November 10, 2014, through Outfront Media. Farsad Decl. ¶ 11, Ex. 7. Farsad and Obeidallah corresponded with Outfront Media on behalf of VQP. Farsad Decl. ¶ 11.

By November 17, 2014, Defendants received the artwork initially submitted for the Advertisements by VQP to Outfront Media. Farsad Decl. ¶ 12, Ex. 8. Those advertisements were consistent with the MTA's advertising standards in force at that time. Farsad Decl. ¶ 12, Ex. 9 (the "2012 MTA Advertising Standards"). Nevertheless, on December 8, 2014, Defendants, through their authorized agent, Outfront Media, required that VQP remove the word "penis" from a joke in one Advertisement and resubmit the artwork. Farsad Decl. ¶ 13, Ex. 10. VQP complied with the requirement, and on December 11, 2014, resubmitted two alternate versions of the Advertisement, including one that substituted the word "genitals" and another that used the words "weird stuff." Farsad Decl. ¶ 14, Ex. 11. On December 16, 2014, Outfront Media confirmed that Defendants had received the re-submitted artwork. Farsad Decl. ¶ 15, Ex. 13.

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[1] Formerly CBS Outdoor Americas Inc.

[2] *See Am. Freedom Def. Initiative v. Metro. Trans. Authority*, Case No. 14-cv-7928 (S.D.N.Y.) (hereinafter, the "AFDI Matter"), Declaration of Jeffrey B. Rosen, Dkt. No. 46 (Rosen Decl.) ¶¶ 6, 78 (Outfront Media is the "MTA's advertising contractor").

[3] *See* Metropolitan Transportation Authority, MTA Real Estate Department, http://web.mta.info/mta/realestate/ad_tele.html (last visited June 27, 2015).

And yet, more than a month after the artwork was submitted for consideration, Defendants refused to make a decision on the submission. VQP sought a decision on December 30, 2014, and again on January 12, 2015. Farsad Decl. ¶ 16, Exs. 14-15. Outfront Media noted that the process was taking "longer than usual." Farsad Decl. ¶ 16, Ex. 16. Finally, after another full month of delay, on January 15, 2015, Defendants required that VQP re-submit the Advertisements without the joke, "Please draw your penis here," ignoring that VQP had done so a month prior. Farsad Decl. ¶ 17, Ex. 18. Defendants then requested an additional change to the submitted jokes, and VQP re-submitted the Advertisements on January 21, 2015. Farsad Decl. ¶ 18, Ex. 21.

Still, Defendants failed to approve or deny the Advertisements. Instead, Defendants sought information about VQP itself. On February 3, 2015, after VQP again requested an update on the status of the Advertisements, and expressed that it was considering seeking help from the Office of the Public Advocate for the City of New York, Outfront Media informed VQP that Defendants had requested information about VQP itself. Farsad Decl. ¶ 20. Outfront Media responded by sending Defendants a "link showing all the companies" with which VQP had worked. Farsad Decl. ¶ 20, Ex. 24.

Finally, on February 6, 2015, almost three months after VQP first submitted the Advertisements, Outfront Media conveyed to VQP that the Advertisements were approved by Defendants—with exceptions. Farsad Decl. ¶ 21. Defendants wanted the phrase "stepping in poop" removed from a poster that listed things Muslims hate, even though that phrase did not violate the 2012 MTA Advertising Standards. Farsad Decl. ¶ 21, Ex. 25. Defendants also would not accept a poster that said, "Those terrorists are all ~~Muslims~~ nutjobs." Farsad Decl. ¶ 21, Ex. 25. Five days later, on February 11, 2015, Outfront Media informed VQP that Defendants'

rejection of "nutjobs" was attributable to the font type used for that particular advertisement; VQP redesigned and resubmitted those two posters on February 28, 2015. Farsad Decl. ¶¶ 21-22, Exs. 27, 29.

Even with this final re-design of the Advertisements, Defendants refused to make a decision on the Advertisements. VQP requested updates on the status of the Advertisements on March 5, March 12, and March 25, 2015. Farsad Decl. ¶¶ 23-25. Finally, on March 25, 2015, after yet another delay of almost a month—and more than four months after VQP initially submitted the Advertisements—VQP learned through the New York City Public Advocate's Office that all but the two revised posters were approved by Defendants. Farsad Decl. ¶ 25, Ex. 31. Later that day, after VQP reached out to Outfront Media, Outfront Media conveyed that Defendants had, in fact, approved the Advertisements (the "MTA Approval"). Farsad Decl. ¶ 25, Ex. 33.

VQP signed and returned an initial contract, which they understood was approved by Defendants, on April 3, 2015, to display the Advertisements throughout the New York City subway system from April 13, 2015, through May 10, 2015. Farsad Decl. ¶ 26, Ex. 34. On April 6, 2015, Outfront Media informed VQP that they received the executed contract and inquired as to when they would receive the posters from VQP. Farsad Decl. ¶ 26, Ex. 35. In order to allow for preparation and printing time after the MTA's many delays and changes to the design that were not required by its then-applicable standards, a revised contract provided for the Advertisements to be displayed in the subway system for 28 days from April 27, 2015, through May 24, 2015. Farsad Decl. ¶ 27, Ex. 36. On April 14, 2015, VQP returned the executed advertising contract to Outfront Media to post the Advertisements in 144 subway station locations across New York City. Farsad Decl. ¶¶ 28-29, Exs. 37, 39.

On April 22, 2015, Outfront Media informed VQP that it would endeavor to post some copies of the Advertisements by April 27, 2015, but that in any event, it was "definite" that the Advertisements would be posted in the subway system by April 28, 2015. Farsad Decl. ¶ 30, Exs. 40-41. In order to maximize the exposure of its advertising campaign, VQP expended a substantial amount of time and money to promote the Advertisements, including hiring a public relations firm and launching a public relations campaign. Farsad Decl. ¶ 31. On April 28, 2015, Outfront Media informed VQP that the posters were being prepped for display that day. Farsad Decl. ¶ 32, Ex. 42. Despite the MTA Approval and Outfront Media's assurances, the Advertisements were not posted in the subway system on April 27 or 28, nor any day thereafter. Farsad Decl. ¶ 33. On May 1, 2015, Outfront Media informed VQP that someone from Defendant MTA would call them. Farsad Decl. ¶ 34, Ex. 43.

III. After Accepting VQP's Advertisements, Defendants Revised Their Advertising Policy and Rejected VQP's Advertisements.

Since 2012, Defendant Rosen and others "have continued to revisit the issue of whether the MTA should disallow political advertisements and become a limited public forum." AFDI Matter, Rosen Decl. ¶ 64. In early March 2015, almost four months after VQP submitted to Outfront Media the artwork for its Advertisements, Defendant Prendergast "asked [Defendant Rosen] and other MTA staff to prepare for consideration by the MTA Board a revised advertising policy that would convert the MTA's advertising space from a designated public forum into a limited public forum in a fashion consistent with the Constitution." *Id.* ¶ 65.

On April 29, 2015, more than a month after the MTA approved VQP's Advertisements, Defendants adopted a revised advertising policy, the Revised Policy,[4] to "establish uniform,

[4] The Revised Policy took effect immediately upon its adoption by the MTA Board on April 29, 2015. AFDI Matter Rosen Decl. ¶ 74.

reasonable, and viewpoint-neutral standards for the displaying of advertising" and "convert the MTA's Property from a designated public forum into a limited public forum by excluding advertising of a political nature."[5] Among other things, the Revised Policy prohibits advertisements that are "political in nature, including but not limited to advertisements that . . . [p]rominently 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."[6] Defendants contend that the Revised Policy's "references to 'disputed issues' appear only in an example to an example of what is a prohibited political ad, and both layers of examples are non-exhaustive."[7] The Revised Policy "prohibits all ads that are 'political in nature,' including ads that 'prominently or predominantly advocate or express a political message.'"[8] According to Defendants, "[t]he 'disputed issues' language is simply a useful touchstone in distinguishing between what is at core a political ad, and what is at core an advertisement aimed at promoting, for example, safety or prevention or treatment of illness."[9] "Thus," according to Defendants, "an advertisement promoting a 'disputed' proposed ban on smoking in certain public places [is] a forbidden political ad, whereas an ad warning people of the dangers of smoking [constitutes] a classic public service announcement promoting

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5 Metropolitan Transportation Authority Board Action Items, at 164 (April 2015), http://web.mta.info/mta/news/books/pdf/150429_1000_Board.pdf ("MTA Board Action Items"); *see also* AFDI Matter, Rosen Decl. ¶ 70.

6 MTA Board Action Items, at 166; *see also* Rosen Decl., ¶ 72; AFDI Matter, Supplemental Declaration of Jeffrey B. Rosen, Dkt. No. 53 (Supp. Rosen Decl.) ¶¶ 14-15.

7 AFDI Matter, Supp. Rosen Decl. ¶ 14.

8 *Id.* ¶ 15.

9 *Id.* ¶ 16.

prevention of illness."[10] According to Defendants' interpretation of their Revised Policy, the former type of advertisement is prohibited while the latter is permissible.

The Revised Policy expressly allows commercial advertising, which it defines as "[p]aid 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."[11]

Defendants claim to "have applied" the Revised Policy since its adoption.[12] Defendants "directed Outfront [Media] . . . to identify any advertisement that had been submitted for display on MTA property but not yet displayed that might not comply" with the Revised Policy "because [the advertisement] was political in nature . . . ."[13] Outfront Media identified three sets of advertisements, including VQP's Advertisements.[14]

On May 1, 2015, Defendants' counsel informed VQP via telephone that the MTA would not permit display of the Advertisements in the subway system. Farsad Decl. ¶ 35. On May 6, 2015, VQP requested a decision in writing from Defendants. *Id.* ¶ 36, Ex. 44. On May 6, 2015—more than one month after the MTA Approval—Defendant Rosen, on behalf of Defendants, issued a decision regarding VQP's Advertisements via email (the "Final Determination"). Farsad Decl. ¶ 37, Ex. 45. Defendant Rosen emailed to VQP the Final Determination on May 7, 2015, which reads in relevant part:

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10 *Id.* (emphasis added).

11 MTA Board Action Items, at 165; AFDI Matter, Rosen Decl. ¶ 72.

12 AFDI Matter, Rosen Decl. ¶ 78.

13 *Id.*

14 *Id.* ¶¶ 78-79.

> Acting on a proposal that had been under consideration since 2012, the MTA Board on April 29, 2015, adopted a new MTA Advertising Policy, effective immediately. . . . An article about the "Muslims are Coming" advertising campaign . . . described it as a response to a "campaign of hateful, anti-Muslim ads in the New York City bus and subway system" sponsored by [AFDI], and an effort to make the "hateful images" of the AFDI advertisements "less culturally acceptable." . . . I have reviewed the six "Muslims are Coming" advertisement under the new MTA Advertising Policy and have concluded that they are within one of the categories of prohibited advertisements, Section IV.B.2, because they are political in nature. Taken together, the Muslims are Coming advertisements prominently or predominately advocates or expresses a political message-Vaguely Qualified Production's opinion, position, or viewpoint regarding a disputed political, moral, religious or social issue or related matters or its support for or opposition to disputed issues or causes.

Farsad Decl., ¶ 37, Ex. 45. Based upon these erroneous findings, Defendant Rosen, on behalf of Defendants, rejected the Advertisements. Farsad Decl. ¶ 37, Ex. 45.

ARGUMENT

I. LEGAL STANDARD.

To obtain a preliminary injunction, plaintiff "must establish that [it is] likely to succeed on the merits, that [it is] likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in [its] favor, and that an injunction is in the public interest." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). "Where the movant seeks a mandatory injunction (one that will alter the status quo) rather than a prohibitory injunction (one that maintains the status quo), the likelihood-of-success standard is elevated: the movant must show a clear or substantial likelihood of success." *Hoblock v. Albany Cnty. Bd. of Elections*, 422 F.3d 77, 97 (2d Cir. 2005).

II. VQP IS ENTITLED TO A MANDATORY PRELIMINARY INJUNCTION ORDERING DEFENDANTS TO DISPLAY VQP'S ADVERTISEMENTS IN THE SUBWAY SYSTEM.

VQP is entitled to a mandatory preliminary injunction ordering Defendants to display VQP's Advertisements in the subway system.

A. VQP Can Demonstrate A Clear and Substantial Likelihood of Success on the Merits on Its Claim that Defendants Unconstitutionally Rejected VQP's Advertisements Under the MTA's Revised Policy.

VQP can demonstrate a clear and substantial likelihood of success on the merits on its claim that Defendants are violating the Free Speech Clause of the First Amendment to the United States Constitution[15] and 42 U.S.C. § 1983[16] by wrongfully rejecting the Advertisements under MTA's Revised Policy.

1. Defendants Claim to Have Created a Limited Public Forum in Which Strict Scrutiny Applies to Restrictions on Speech that Falls Within the Designated Category for Which the Forum Has Been Opened.

To determine the extent of VQP's free speech rights, the court must engage in a First Amendment forum analysis. "Where the government seeks to restrict speech by restricting access to its own property," as the MTA does in this case, the level of scrutiny "to which we subject the restriction depends on how we categorize the property as a forum for speech." *N.Y. Magazine v. Metro. Transp. Auth.*, 136 F.3d 123, 128 (2d Cir. 1998). There are three traditional categories of government property: (1) traditional public forums; (2) designated public forums; and (3) non-public forums. *Id.* There is also a "limited public forum," which is a "sub-category of the designated public forum, where the government 'opens a nonpublic forum but limits the expressive activity to certain kinds of speakers or to the discussion of certain subjects.'" *Id.* at 128 n.2. The Second Circuit has previously identified the MTA's bus advertising space as a "designated public forum." *Id.* at 130. However, in its Revised Policy, the MTA expressly seeks

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[15] The First Amendment's protection of the freedom of speech applies to the states through its incorporation into the due process clause of the Fourteenth Amendment.

[16] For purposes of claims arising under 42 U.S.C. § 1983, the MTA is a governmental actor. *N.Y. Magazine v. Metro. Transit Auth.*, 987 F. Supp. 254, 260 (S.D.N.Y.), vacated in part on other grounds, 136 F.3d 123 (2d Cir. 1997). Defendants Prendergast (Chairman and Chief Executive Officer of the MTA) and Rosen (Director of the MTA Real Estate Department), sued in their official capacities only, are "person[s]" acting "under color of any statute, ordinance, regulation, custom, or usage of any State . . . ." 42 U.S.C. § 1983.

to "convert" its property "from a designated public forum into a limited public forum."[17] Although the MTA is involved in litigation to determine whether it successfully reclassified its property,[18] Plaintiff does not challenge this reclassification at this time.

In a limited public forum, the level of protection afforded to speech depends on whether it falls within the designated category for which the forum has been opened. Strict scrutiny is accorded to "restrictions on speech that falls within the designated category for which the forum has been opened." *Hotel Emps. & Rest. Emps. Union, Local 100 v. City of N.Y. Dep't of Parks & Recreation*, 311 F.3d 534, 545 (2d Cir. 2002). Restrictions on speech that fall outside a designated category "need only be viewpoint neutral and reasonable." *Id.*

As the Supreme Court has noted:

> [o]nce it has opened a limited forum . . . the State must respect the lawful boundaries it has itself set. The State may not exclude speech where its distinction is not reasonable in light of the purpose served by the forum, nor may it discriminate against speech on the basis of its viewpoint.

Rosenberger v. Rector and Visitors of U. of Va., 515 U.S. 819, 829 (1995) (internal quotes and citations omitted). As described fully below, the MTA's exclusion of VQP's advertisements neither respects the boundaries it has itself set nor makes a distinction reasonable in light of the purposes served by the forum.

2. VQP's Advertisements Are "Commercial Advertising" and Therefore Fall Within a Designated Category for Which Defendants Have Opened their Purported Limited Public Forum.

VQP's Advertisements are "commercial advertising" under the MTA's Revised Policy because they promote VQP's feature film, *The Muslims Are Coming!*, using comedy to draw viewers' attention to an Internet website on which viewers can purchase or rent the film and buy

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17 *See* MTA Board Action Items, at 164.

18 *See* AFDI Matter.

related merchandise. *See* Farsad Decl. ¶¶ 7, 10. Each Advertisement refers the reader to www.themuslimsarecoming.com, a website with information about the film, a promotional video clip, links to purchase the film on DVD or Blu-ray, or download or view it on Netflix, Amazon, iTunes, and Xbox. *See id.* ¶ 10. Pursuant to the definition of "commercial advertising" in the Revised Policy, VQP's Advertisements "promote" and "solicit the sale" of VQP's product, *The Muslims Are Coming!*, by both featuring information about the film and promoting the underlying message of the film.[19] Therefore, VQP's Advertisements are "commercial advertising" within the meaning of the Revised Policy and fall squarely within a designated category for which Defendants have opened their self-proclaimed limited public forum.

3. Defendants Erroneously Classified VQP's Advertisements as Prohibited Political Advertising.

VQP's Advertisements do not fall within the Revised Policy's prohibition on advertisements that are "political in nature" which includes advertisements that "[p]rominently 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."[20] Defendants' characterization of the Advertisements as political under the MTA's Revised Policy is erroneous for several reasons.

First, that an advertisement relates to religion does not, of course, make it inherently "political" or "disputed." For example, statements like "Muslims have great frittata recipes,"

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[19] *See* MTA Board Action Items, at 165 (defining "commercial advertising" as "[p]aid 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.")

[20] MTA Board Action Items, at 166 (emphasis added).

"[g]rownup Muslims can do more pushups than baby Muslims," and Muslims "[h]ate . . . [w]hen the deli guy doesn't put enough schmear on the bagel" (Farsad Decl., Exs. 1, 2, 5) cannot be within any reasonable definition of "political in nature." The use of a subject such as religion in a way that does not express a disputed opinion does not render the Advertisements political in the same way that a public service announcement on a social issue such as the dangers of smoking is not deemed political.[21] As Defendants have acknowledged, Islam is "one of the world's major religions practiced by millions of people and the official religion of many nation-states."[22] An advertisement does not become political simply by referencing that religion, or any other religion. Would the MTA refuse to display advertisements promoting kosher or halal foods, Easter candy, or Christmas Mass because of their inherent reference to Judaism, Islam, Christianity, and Catholicism, respectively?

On the whole, VQP's comedic Advertisements promote a feature film by conveying its underlying message that American Muslims, like Americans of any other religion (or no religion at all) are ordinary people. Such a message is neither political nor disputed. Admittedly, some groups and individuals hold prejudicial views and preach hate about American Muslims, just as some groups and individuals hold prejudicial views and preach hate based on the race, ethnicity, gender, and sexual orientation of their fellow Americans. But the existence of people advocating bigoted views against a group of Americans cannot make posters depicting that group as ordinary people "political in nature" or "disputed." Surely, the Revised Policy does not empower those who preach hate to censor from the public transit system benign, silly, and lighthearted references to their targeted group. Such a result would amount to a heckler's veto, whereby anti-

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21 *See, supra*, n.10 and accompanying text.

22 AFDI Matter, Supp. Rosen Decl. ¶ 18.

Muslim hate groups could silence all references to Islam because their bigotry causes the supposed politicization.

Second, in making their determination that the Advertisements are "political in nature," Defendants relied nearly exclusively on comments made by Farsad and Obeidallah in *The Daily Beast*. In doing so, they went far beyond the four corners of the Advertisements. Notably, Defendants' explanation made absolutely no reference to the feature film referenced in the website listed on each poster. Defendants' reliance on statements made about the Advertisements to the exclusion of the text of the Advertisements itself led to its fatally flawed analysis. Indeed, courts caution against relying heavily on extrinsic information to determine the nature of particular advertisements because doing so distracts from the actual words used on the face of the proposed posters. *See FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 474 (2007) ("Courts need not ignore basic background information that may be necessary to put an ad in context . . . but the need to consider such background should not become an excuse for discovery or a broader inquiry.") For this reason, courts refuse to consider "the context of an event extraneous to the four corners of the advertisement" when "such contextual factors are irrelevant to [the] inquiry." *Chamber of Commerce of the U.S. v. Moore*, 288 F.3d 187, 198 (5th Cir. 2002);[23] *see also Am.*

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[23] In *Chambers*, the court analyzed the standard to determine whether a political campaign advertisement "expressly advocates" the election or defeat of a specific candidate, and was therefore subject to Federal Election Commission regulation. Determining whether a particular advertisement contained "express advocacy" required analysis of the words in the advertisement itself, and not any extrinsic materials. *See also FEC v. Furgatch*, 807 F.2d 857, 863 (9th Cir. 1987) ("The subjective intent of the speaker cannot alone be determinative. Words derive their meaning from what the speaker intends and what the reader understands. A speaker may expressly advocate regardless of his intention, and our attempts to fathom his mental state would distract us unnecessarily from the speech itself.").

The proposition articulated by the *Chambers* and *Furgatch* courts—that courts should rely on the advertisement itself to determine whether it contained "express advocacy"—is applicable here because, in part, of the express terms of the Revised Policy. The Revised Policy states that Outfront Media "shall review [a] proposed advertisement"—and nothing else—to determine

Freedom Def. Initiative v. Mass. Bay Transp. Auth., 781 F.3d 571, 588 (1st Cir. 2015) (the court considered only the text of advertisements concerning the Israeli-Palestinian conflict to determine whether the advertisements were prohibited under the transportation authority's policy); *Am. Freedom Def. Initiative v. Metro. Transp. Auth.,* 880 F. Supp. 2d 456, 466-69 (S.D.N.Y. 2012) (the court considered only the plain language in the advertisement and the content of the website referenced in the advertisement to determine whether the MTA had properly classified the speech as prohibited).

Here, Defendants mistakenly characterize the Advertisements solely as a response to AFDI's incendiary campaign. This purported contextual comparison is irrelevant to classifying the Advertisements. VQP's Advertisements (and the website referenced in those Advertisements) speak for themselves. And as discussed above, they are not, on their face, political in nature, irrespective of whether the timing of the Advertisements was determined in part by AFDI's announcement of its advertisements. Thus, the premise of Defendants' categorization of VQP's Advertisements with AFDI's advertisements is fundamentally flawed.

Moreover, Defendants admit they rejected VQP's Advertisements, in part, to "put[] a lie to the AFDI's accusation that the MTA adopted the [Revised] Policy because the MTA dislikes and wants to censor AFDI's viewpoint."[24] In other words, Defendants used the context of the AFDI advertisements to misclassify VQP's Advertisements as political in order to gain an advantage in their litigation with AFDI. The context of the AFDI advertisements cannot,

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whether the advertisement complies with the Revised Policy. MTA Board Action Items, at 167. Similarly, in reaching a final determination, while the Director of Real Estate may consult with Outfront Media, the MTA General Counsel, the Chairman and Chief Executive officer, or with "any other individuals," and "may consider any materials submitted by the advertiser," (MTA Board Action Items, at 168), the Revised Policy does not give Defendants the latitude to consider other context.

[24] AFDI Matter, Supp. Rosen Decl. ¶ 22.

however, define the content of VQP's advertisements, which have their own purpose: to promote *The Muslims Are Coming!*, while making people laugh and strengthening the VQP brand.

Third, VQP's Advertisements are not "political," by any commonly understood definition. The Advertisements do not "set[] out any position that could result in political action." *Am. Freedom Def. Initiative v. Suburban Mobile Auth. for Reg'l Transp.*, 698 F.3d 885, 895 (6th Cir. 2012). VQP's Advertisements do not advocate any position at all. For example, an advertisement containing language to vote for a particular politician is "clearly" political. *Id. at* 893. Here, however, VQP's Advertisements do not set out *any* position that could result in any sort of political action. To the contrary, the Advertisements are simply intended to elicit laughter while encouraging people to purchase *The Muslims Are Coming!*, a feature film with the same comedic message as is displayed on the posters—that American Muslims are ordinary people.

Fourth, since adopting the Revised Policy, Defendants have approved for display advertisements presumably categorized as "commercial advertising" under the Revised Policy, but that also convey an underlying message or theme, like VQP's Advertisements. For example, Defendants displayed an advertisement for the feature film, *Straight Outta Compton*, a biographical film chronicling the hip hop group, N.W.A. Declaration of Dean Obeidallah ¶ 6. The title of the film—which is displayed prominently on the poster—is taken from N.W.A.'s critically acclaimed debut album. Declaration of Tanya Syed ("Syed Decl.") ¶ 2, Ex. 1. While promoting the *Straight Outta Compton* film, the film's director and co-producers have publicly discussed the social and political messages underlying the film, which depicts police harassment and events leading up to the L.A. riots. Syed Decl. ¶ 2, Ex. 1. In an interview with the *Los Angeles Times*, director F. Gary Gray described the film as "timely," and noted, "Dealing with

brutality on that sort of level, we hoped that would have changed by now." Syed Decl. ¶ 2, Ex. 1. Co-producer and N.W.A. founding member Andre Young, known professionally as Dr. Dre, told the *New York Times* that, because of recent conflicts between black youths and the police, it was "a good time for us to tell our story." Syed Decl., ¶ 3, Ex. 2. In the same article, co-producer and fellow founding member O'Shea Jackson, also known as Ice Cube, was quoted as saying, "The same thing that we was going through in the '80s with the police, people going through right now." Syed Decl., ¶ 3, Ex. 2.

Defendants' display of the advertisement for *Straight Outta Compton* demonstrates the inconsistency with which Defendants interpret and apply the Revised Policy. In approving the *Straight Outta Compton* advertisement for display, Defendants presumably did not rely on comments made by the film's producers and director in news publications, as Defendants did in deciding to reject VQP's Advertisements. Moreover, like VQP's Advertisements, the advertisement for *Straight Outta Compton* certainly relays an underlying theme that addresses a disputed moral and social issue—yet, Defendants approved this advertisement for display, and rejected VQP's Advertisements. Ultimately, in spite of its underlying message, Defendants approved the *Straight Outta Compton* advertisement because it promotes a feature film. VQP's Advertisements should be treated no differently—its advertisements also promote a feature film and are properly classified as "commercial advertising" within the definition of the Revised Policy.

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4. Defendants' Restriction on VQP's Speech Does Not Meet Strict Scrutiny.

In a limited public forum, strict scrutiny is accorded to "'restrictions on speech that falls within the designated category for which the forum has been opened.'" *Hotel Emps.,* 311 F.3d at 545.[25]

VQP's Advertisements fall within a designated category for which Defendants have opened the forum because they are "commercial advertising" under the Revised Policy and they are not "prohibited" by the policy.[26] Thus, the Court may uphold Defendants' rejection of the Advertisements *only if* Defendants prove that their decision "is justified by a compelling government interest and is narrowly drawn to serve that interest." *Brown v. Entm't Merchs, Ass'n,* 131 S. Ct. 2729, 2738 (2011).

Defendants' rejection of the Advertisements cannot survive strict scrutiny. First, VQP is not aware of any "compelling government interest" that Defendants could claim justifies their rejection of the Advertisements. Indeed, given Defendants' maintenance of the subway system's advertising space as a designated public forum for so many years, it would be difficult to imagine a credible argument that the supposed need to deny VQP's Advertisements has somehow become compelling. Furthermore, Defendants' rejection of the Advertisements is not "narrowly tailored" because it does not serve any purported interest. Therefore, VQP can demonstrate a clear and substantial likelihood of success on the merits on its claims that Defendants violated the Free Speech Clause of the First Amendment and 42 U.S.C. § 1983 by unconstitutionally rejecting VQP's Advertisements under the Revised Policy.

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[25] *See* also AFDI Matter, Reply Memorandum of Law in Support of Defendants' Motion to Dissolve Preliminary Injunction, Dkt. No. 52, at 6.

[26] MTA Board Action Items, at 165-66.

B. VQP Will Suffer Irreparable Harm If The Injunction Does Not Issue.

"The loss of First Amendment freedoms for even minimal periods of time, unquestionably constitutes irreparable injury." *N.Y. Magazine*, 136 F.3d at 127 (internal quotation omitted). Here, VQP has demonstrated that Defendants' actions have unlawfully abridged VQP's freedom of speech, as guaranteed by the First Amendment, because Defendants have unconstitutionally refused to display VQP's Advertisements. Therefore, VQP will suffer irreparable harm if the Court does not require Defendants to display VQP's Advertisements in the subway system.

C. The Balance of Equities Tips in VQP's Favor and Granting the Preliminary Injunction is in the Public Interest.

In determining whether the balance of equities tips in VQP's favor and whether granting the preliminary injunction would be in the public interest, the Court "must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Winter*, 555 U.S. at 24 (quotations and citations omitted).

The balance of equities tips in favor of granting VQP's request for a preliminary injunction. VQP seeks only to uphold its First Amendment rights, which have been unlawfully abridged. The effect on VQP, therefore, is substantial. Defendants, however, are only requested to display VQP's Advertisements—commercial advertisements—in their subway system. Defendants previously agreed to display the Advertisements under the 2012 MTA Advertising Standards, and the MTA's Revised Policy would permit display of such commercial advertisements. Moreover, VQP does not request that the Court strike down the Revised Policy in its entirety—it only seeks for Defendants to correctly interpret and apply that existing policy.

The public interest also favors granting injunctive relief for VQP. "[S]ecuring First Amendment rights is in the public interest." *N.Y. Progress & Prot. PAC v. Walsh,* 733 F.3d 483,

488 (2d Cir. 2013). Again, VQP's First Amendment rights are at stake. Defendants cannot demonstrate any comparable compelling public interest that would warrant infringing on those rights.

CONCLUSION

For the reasons set forth above, the Court should grant VQP's Motion for Preliminary Injunction, and order Defendants to display VQP's Advertisements in the subway system.

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Respectfully submitted,

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