

2-15-2022

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Scott Gutierrez, *Battle Over Bus Ads: Rethinking Lehman and Speech Restrictions on Public Transportation*, 17 WASH. J. L. TECH. & ARTS 1 (2022).

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BATTLE OVER BUS ADS: RETHINKING *LEHMAN* AND SPEECH RESTRICTIONS ON
PUBLIC TRANSPORTATION

Scott Gutierrez *

ABSTRACT

*Public transportation systems carry millions of daily commuters and provide a valuable platform for display advertising. However, transit authorities that open their rolling billboards to speech may be hesitant to carry ads that offend riders and create conflicts with their mission of providing a safe and comfortable commuting experience. Advocacy groups have sued to overturn bans on controversial transit ads, prompting inconsistent rulings about whether such bans violate the first amendment. These rulings rely on *Lehman v. City of Shaker Heights*, a divided supreme court decision from 1974 that held that the first amendment did not require the Shaker Heights transit system to run political ads inside buses. This article proposes that it is time for the Supreme Court to revisit *Lehman*, and time for public transit agencies to choose between advertising revenue and unfettered speech.*

* J.D. 2021, University of Washington School of Law. The author is immensely grateful to Professor Robert Gomulkiewicz for his time and guidance on this project, as well as his input on multiple drafts. Additional thanks go to Professor William S. Bailey for his advice and support, and to the incredible staff members of the Washington Journal of Law, Technology & Arts for their proofreading, suggestions, and patience. Finally, the author would like to thank King County Metro Transit in Seattle for an educational 1L summer internship, as well as public transit workers everywhere who keep people and the economy moving, even amidst the depths of a pandemic.

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INTRODUCTION

Battles over bus ads have erupted all over the country.¹ The fight is between public transit agencies and advocacy groups over controversial advertising that some organizations seek to display on buses and transit stations.² Transit officials generally refuse to accept ads related to topics such as religion or abortion, citing concerns that commuters might take offense and boycott their services.³ Various political and religious advocacy groups have sued over these policies, arguing free speech is threatened if ads are allowed only when public transit authorities agree with the message.⁴ A transit system thus may find itself having to choose between “complaints about the advertisements it accepts” and “lawsuits over the advertisements it rejects.”⁵

The First Amendment famously prohibits the government from “abridging the freedom of speech.”⁶ But courts have long allowed more leeway when speech occurs on government property or interferes with government services.⁷ In *Lehman v. City of Shaker Heights*, nearly 50 years ago, a plurality of the United States Supreme Court declared that public transit systems are free to make “reasonable choices” concerning advertising on their vehicles to avoid disruptions and create a comfortable environment for commuters.⁸ But *Lehman*’s authority hangs on the narrowest of concurrences from Justice William Douglas.⁹ As a result, courts have inconsistently applied *Lehman*,¹⁰ resulting in weaker protection for bus ads in Boston or Seattle than in New York or Chicago.¹¹

This article explores whether the Court should revisit *Lehman* as transit officials struggle to balance their pursuit of advertising revenue, which helps offset the costs of service, with First Amendment rights. It explains how three significant First Amendment doctrines have evolved since *Lehman*, which create conflicts that fuel some of the recent litigation. It also proposes how the Supreme Court could address those conflicts.

¹ Martine Powers, *In an era when everything is political, is any Metro ad noncontroversial?*, WASH. POST (Aug. 18, 2018), https://www.washingtonpost.com/local/trafficandcommuting/in-an-era-when-everything-is-political-is-any-metro-ad-noncontroversial/2018/08/18/a0e691e8-a0c8-11e8-8e87-c869fe70a721_story.html; see also Engy Abdelkader, ‘Savagery’ in the Subways: Anti-Muslim Ads, the First Amendment, and the Efficacy of Counterspeech, 21 ASIAN AM. L.J. 43, 58 (2014).

² *Id.*

³ *Id.*; see also Child. of the Rosary v. City of Phoenix, 154 F.3d 972 (9th Cir. 1998).

⁴ Powers, *supra* note 1; see also Press Release, American Civil Liberties Union, ACLU sues DC Metro over Rejection of First Amendment Ad (Aug. 9, 2017), <https://www.aclu.org/press-releases/aclu-sues-dc-metro-over-rejection-first-amendment-ad>.

⁵ Am. Freedom Def. Initiative v. Wash. Metro. Area Transit Auth., 901 F.3d 356, 373 (D.C. Cir. 2018).

⁶ U.S. Const. amend. I.

⁷ WHITNEY K. NOVAK, CONG. RSCH. SERV., LSB10383, RELIGIOUS SPEECH AND ADVERTISING: CURRENT CIRCUIT SPLIT AND ITS IMPLICATIONS FOR CONGRESS (2019).

⁸ *Lehman v. City of Shaker Heights*, 418 U.S. 298, 303 (1974).

⁹ *Id.* at 305, (Douglas, J., concurring).

¹⁰ *Id.*

¹¹ See Am. Freedom Def. Initiative v. King County, 136 S. Ct. 1022, 1023 (Thomas, J., dissenting from denial of certiorari).

Part I focuses on transit advertising practices and how buses fit within public forum doctrine, which classifies the government's authority to regulate private speech depending on the type of forum where it occurs. Part I also explains why some federal courts differ in how they interpret *Lehman* to determine what type of forum exists on the side of a bus.

Part II provides an overview of commercial speech doctrine and how courts distinguish between commercial and non-commercial ads, and why that distinction can complicate a transit system's ability under *Lehman* to regulate advertising that blends commercial speech with political or religious messages.

Part III explains the First Amendment's vigilance for viewpoint discrimination and how the Supreme Court broadly defines a protected viewpoint. Part III also will explain how the Court's definition of viewpoint discrimination has evolved since *Lehman*, and why this presents a conflict for transit systems that prohibit religious speech or ads containing offensive material.

Part IV examines *Lehman*'s holding that transit riders are a captive audience with a right to be free from offensive advertising. It analyzes whether that right can provide a basis for transit authorities to ban controversial ads on bus exteriors when riders are seated inside.

Part V argues that the Supreme Court must revisit *Lehman* to provide clearer guidance on First Amendment protection for bus ads. Furthermore, it proposes new criteria for assessing the level of protection for speech in government forums with high communicative value.

Part VI recommends alternatives to all-out censorship for transit authorities, including the use of counterspeech, or internally created ads, to challenge messages conveyed by offensive ads. Finally, it explores the possibility that Congress may intervene, as transit systems rely heavily on federal funding.

Part VII will conclude with a summary as to why *Lehman* is outdated in light of more recent Supreme Court decisions and how public transit authorities can use strategies such as counterspeech to emphasize their core values.

I. ADVERTISING ON PUBLIC TRANSPORTATION

A. *Offensive Bus Ads on the Rise*

Millions ride public transportation every day, providing advertisers with a low-cost means of marketing,¹² and “a singular opportunity to sway public opinion.”¹³ After the Great Recession, more transit authorities sought to increase ad revenue to

¹² See Ken Klein, *As Transit Ridership Dips, Advertising Revenue Grows*, OUT OF HOME ADVERTISING ASSOCIATION OF AMERICA: SPECIAL REPORTS (Sept. 24, 2018), <https://specialreports.oaaa.org/transitdipsadsgrow> (stating that transit ad revenue increased to nearly \$500 million in 2018, compared to roughly \$15 billion collected in fare revenue).

¹³ See *Am. Freedom Def. Initiative v. Mass. Bay Transp. Auth.*, 781 F.3d 571, 592 (1st Cir. 2015) (Stahl, J., concurring in part); see also *Antelope Valley Transit Experiments with Digital Bus Ads*, METRO MAGAZINE (May 26, 2015), <https://www.metro-magazine.com/10036920/antelope-valley-transit-experiments-with-digital-bus-ads> (stating that some transit agencies are experimenting with digital ads that can be programmed to display various content).

help recover financially.¹⁴ Advertising standards vary by city and agency.¹⁵ Commercial ads that promote services or products commonly are permitted, while forbidden content typically includes depictions of violence or weapons, obscenity or adult-oriented material, or ads that are libelous, false, or misleading.¹⁶ In some cities, ads related to alcohol or tobacco are also not allowed.¹⁷

Some transit agencies have adopted policies comparable to dinner table rules: no politics, no religion, and no controversy or disparaging words.¹⁸ This article primarily focuses on policies related to these categories involving “non-commercial”¹⁹ or “public issue”²⁰ ads, which contain political, religious, or issue-advocacy speech.

Transit advertising policies were tested during the last decade when the American Freedom Defense Initiative (AFDI) launched a campaign of “anti-jihad bus and billboard” ads in several major cities.²¹ Led by Pamela Geller, who has been described as “one of the most flamboyant anti-Muslim activists in the United States,”²² AFDI “express[ed] its message on current events and public issues,” including global terrorism.²³ AFDI’s ads were instantly controversial and often placed on transit systems where other organizations had sponsored ads supportive of Palestinians in the Israeli-Palestinian conflict.²⁴

Transit agencies, some under intense community pressure, tried to block Geller’s ads out of concern they would incite hate crimes or worse.²⁵ Geller sued,

¹⁴ Brittini Rubin, *Revised Ad Policies Helping Transit Agencies*, METRO MAGAZINE (Nov. 14, 2012), <https://www.metro-magazine.com/bus/article/211681/revised-ad-policies-helping-transit-agencies>.

¹⁵ See Lew R.C. Bricker, Ryan B. Jacobsen & Colin P. Gainer, *Transit Cooperative Research Program, Developing and Implementing a Transit Advertising Policy*, LEGAL RESEARCH DIGEST 33, 11-12 (August 2010), <https://books.nap.edu/read/22932/chapter/1>.

¹⁶ *Id.* at 13-15 (stating that some agencies manage advertising internally while others contract with private firms to sell ad space and screen ads under the agency’s policies, with final decisions made by transit officials); see *Ridley v. Mass. Bay Transp. Auth.*, 390 F.3d 65, 72 (1st Cir. 2004).

¹⁷ Luis Ferre-Sadurni, *M.T.A. Will Ban Alcohol Advertising on Buses and Subways*, N.Y. TIMES (Oct. 25, 2017), <https://www.nytimes.com/2017/10/25/nyregion/alcohol-advertising-mta-subway.html>.

¹⁸ See MASSACHUSETTS BAY TRANSP. AUTH., GUIDELINES REGULATING MBTA ADVERTISING (amended Nov. 20, 2017), <https://cdn.mbta.com/sites/default/files/business-center/2017-11-20-mbta-advertising-guidelines.pdf> (stating that transit guidelines prohibit “[d]emeaning or disparaging ads,” “[p]olitical campaign speech,” and “[p]olitical Issues or Matters of Public Debate” such as “economic, political, moral, religious, or social issues”).

¹⁹ See *Lehman v. City of Shaker Heights*, 418 U.S. at 300.

²⁰ See *Amalgamated Transit Union Loc. 1015 v. Spokane Transit Auth.*, 929 F.3d 643, 648 (9th Cir. 2019).

²¹ Engy Abdelkader, ‘Savagery’ in the Subways: Anti-Muslim Ads, the First Amendment, and the Efficacy of Counterspeech, 21 ASIAN AM. L.J. 43, 58 (2014).

²² Pamela Geller, SOUTHERN POVERTY LAW CENTER: EXTREMIST FILES <https://www.splcenter.org/fighting-hate/extremist-files/individual/pamela-geller>.

²³ *Petitioner-Appellant’s Br. at 7, Am. Freedom Def. Initiative v. King County*, 796 F.3d 1165 (9th Cir. 2018) (No. 17-35897).

²⁴ See *Am. Freedom Def. Initiative v. Mass. Bay Transp. Auth.*, 781 F.3d 571, 574 (1st Cir. 2015); see also Abdelkader, *supra* note 21, at 66 (stating that the AFDI ads equated Muslims with “savages” or portrayed them as terrorists).

²⁵ See Abdelkader, *supra* note 21, at 67.

and in several cases, including in New York, Philadelphia, and Washington, D.C., courts ruled that transit authorities had violated free speech rights protected by the First Amendment.²⁶ In response, many transit systems closed their programs altogether or enacted more restrictive policies that affected other advertisers.²⁷ More lawsuits followed from the American Civil Liberties Union, news media, religious groups and others, evincing a fundamental and sometimes painful truth about the First Amendment: “it protect[s] the freedom to express ‘the thought that we hate.’”²⁸

B. Lehman Divides the Court

Transit officials turned to the *Lehman* decision to support their regulations on speech. In 1970, Harry Lehman sued the Shaker Heights Rapid Transit System for refusing to run his election ads inside the city’s buses, which carried many of his potential constituents.²⁹ The Cleveland suburb had long forbidden political ads as a courtesy to customers and accepted only commercial advertising.³⁰ Lehman, running for state office, argued the advertising car cards were a “public forum protected by the First Amendment,” which guaranteed access to publicly owned and controlled areas of communication opened to other advertisers.³¹

A plurality of the Supreme Court disagreed, holding “[n]o First Amendment forum is here to be found,” as the transit system’s advertising space was consciously limited “in order to minimize chances of abuse, the appearance of favoritism, and the risk of imposing upon a captive audience.”³²

Writing for the plurality, Justice Harry Blackmun reasoned that bus systems were not like street corners and meeting halls that are traditional places for the exchange of ideas, and had to be treated more like government-run businesses.³³ Thus, the city was free to impose restrictions that were not “arbitrary, capricious, or invidious” and reasonably served its mission to provide convenient and pleasant travel.³⁴ Blackmun found the city’s preference for “innocuous and less controversial [commercial] and service[-]oriented advertising” to be reasonable.³⁵ Furthermore, he noted the policy had been in place consistently for

²⁶ See *Am. Freedom Def. Initiative v. Metro. Transp. Auth.*, 880 F. Supp. 2d 456 (S.D.N.Y. 2012); *Am. Freedom Def. Initiative v. Se. Pa. Transp. Auth. (SEPTA)*, No. 14-5335, 2014 WL 6676517, at 1 (E.D. Pa. Nov. 25, 2014); *Am. Freedom Def. Initiative v. Wash. Metro. Area Transit Auth.*, 898 F. Supp. 2d 73 (D.D.C 2012).

²⁷ Answering Brief of King County at 1, *Am. Freedom Def. Initiative v. King County*, 904 F.3d 1126 (9th Cir. 2018) (noting that this became known as the “Geller Ban,” which was estimated to affect advertising for 50 million transit passengers).

²⁸ *Christian Legal Soc’y v. Martinez*, 561 U.S. 661, 705 (2010) (Alito, J., dissenting) (citing *United States v. Schwimmer*, 279 U.S. 644, 654-55 (1929) (Holmes, J., dissenting)).

²⁹ *Lehman v. City of Shaker Heights*, 418 U.S. at 299 (stating that Lehman wanted to run ads describing him as “Old-fashioned! About Honesty, Integrity and Good Government”).

³⁰ *Id.* at 300.

³¹ *Id.*

³² *Id.* at 304.

³³ *Id.* at 303.

³⁴ *Id.*

³⁵ *Id.* at 304.

26 years.³⁶ He reasoned that if the Court were to rule otherwise, “other public facilities immediately would become Hyde Parks open to every would-be pamphleteer and politician.”³⁷

Lehman’s precedential authority rests on the opinion by Justice Douglas concurring only in the Court’s judgment. He concurred only to protect the rights of transit riders, whom he considered a captive audience because they rely on a bus or streetcar “to get to work or back home.”³⁸ He argued *Lehman* had “no right to force his message upon an audience incapable of declining to receive it.”³⁹ He noted, “if we are to turn a bus or streetcar into either a newspaper or a park, we take great liberties with people who . . . at the same time are captive viewers or listeners”⁴⁰ and have “no choice but to sit and listen, or perhaps to sit and to try not to listen.”⁴¹ But Douglas noted he did not oppose political ads per se, as “[c]ommercial advertisements may be as offensive and intrusive to captive audiences as any political message.”⁴²

Justice William Brennan, who authored the dissent, castigated the other justices for condoning censorship of political speech.⁴³ Brennan argued the city had no right to “select which issues are worth discussing or debating” once it opened its property to speech,⁴⁴ and that excluding political advertising amounted to “invidious discrimination on the basis of subject matter” prohibited by the First and Fourteenth Amendments.⁴⁵

Brennan also rejected the argument that political ads were any more likely than commercial or public service advertisements to interfere with the mission of public transportation.⁴⁶ He noted that “[i]n the eyes of many passengers, certain commercial or public service messages are as profoundly disturbing as some political advertisements.”⁴⁷

Decades later, Brennan’s dissent and a related footnote would trigger disagreement over the scope of *Lehman*. Brennan noted that Harry Lehman had been denied access to both the interior and exterior of transit vehicles.⁴⁸ Brennan rejected the idea that riders truly were powerless to ignore bus ads, further noting, “[w]hatever applicability a ‘captive audience’ theory may have to interior advertising, it simply cannot justify the city’s refusal to rent Lehman exterior advertising space.”⁴⁹ Interestingly, the plurality never directly addresses exterior

³⁶ *Id.* at 300.

³⁷ *Id.* at 304.

³⁸ *Id.* at 306.

³⁹ *Id.* at 307.

⁴⁰ *Id.* at 306-7.

⁴¹ *Id.* at 307.

⁴² *Id.* at 308.

⁴³ *See id.* (Brennan, J., dissenting).

⁴⁴ *Id.* at 316 (emphasizing that the First Amendment and Equal Protection Clause of the Fourteenth Amendment establish “an ‘equality of status in the field of ideas’” and provide “all points of view an equal opportunity to be heard”).

⁴⁵ *Id.* at 319-20.

⁴⁶ *Id.* at 314.

⁴⁷ *Id.* at 319.

⁴⁸ *Id.* at 320 n.12.

⁴⁹ *Id.*

advertising.⁵⁰ Still, some federal courts treat the *Lehman* decision as though it does.

C. Public Forums and the Government's Rights

Nothing in the Constitution requires the government to freely open buses or other property anytime someone wants to exercise their right to free speech.⁵¹ In other words, free speech is not a free pass to every protestor.⁵² Like a private property owner, the government has a right to preserve its property “for the use to which it is lawfully dedicated.”⁵³ For instance, a military base can remain off-limits to leafletting because such activity would potentially interfere with training soldiers and strengthening the nation’s defenses.⁵⁴

Public forum doctrine arose as a framework for balancing the government’s property interests with the interests of those who wish to use the property for expression.⁵⁵ Under the doctrine, public forums are classified as one of three varieties: traditional, designated, or limited.⁵⁶ The type of forum determines the government’s authority to regulate speech on its property.⁵⁷

Traditional public forums include parks, streets, and public squares, which “by long tradition or by government fiat have been devoted to assembly and debate.”⁵⁸ These represent “quintessential” forums that “have immemorially been held in trust for the use of the public and . . . communicating thoughts between citizens, and discussing public questions.”⁵⁹ Traditional public forums thus warrant the First Amendment’s strongest protection, meaning any restrictions can only survive if narrowly tailored to serve a compelling state interest.⁶⁰ That is a high bar that is rarely cleared.

Designated public forums refer to government properties “designated” as forums for expressive use, such as a public auditorium.⁶¹ Designated forums can be closed when the government chooses, but speech must be allowed while the forum is open unless restrictions are narrowly tailored to serve a compelling interest.⁶² The government may impose “time, place, and manner” restrictions to manage the forum,⁶³ but only if necessary to further a substantial interest and as

⁵⁰ *See id.* at 303 (concluding a city transit system has discretion to make reasonable choices concerning the advertising that may be displayed “in” its vehicles).

⁵¹ *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 799 (1985).

⁵² *Cornelius*, 473 U.S. at 800.

⁵³ *Id.* at 800.

⁵⁴ *Greer v. Spock*, 424 U.S. 828, 838 (1976).

⁵⁵ *Cornelius*, 473 U.S. at 800.

⁵⁶ *Id.*; *see also* *Christian Legal Soc’y v. Martinez*, 561 U.S. 661, 679 (clarifying that nonpublic forums now referred to as “limited public forum[s]”).

⁵⁷ *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. at 800.

⁵⁸ *See Perry Educ. Ass’n. v. Perry Loc. Educators’ Ass’n.*, 460 U.S. 37, 45 (1983).

⁵⁹ *Id.* (quoting *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939)).

⁶⁰ *Id.*

⁶¹ *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 677-78 (1998).

⁶² *Perry Educ. Ass’n. v. Perry Loc. Educators’ Ass’n.*, 460 U.S. 37, 45.

⁶³ *Id.*; *see also* *Cox v. New Hampshire*, 312 U.S. 569, 576 (1941) (upholding parade licensing law, which served the municipality’s legitimate interests in regulating traffic, securing public order, and ensuring that parades are not scheduled simultaneously).

long as speakers have alternate channels for expression.⁶⁴

“Limited public forums” are property opened for expression but with limitations on preserve the property’s main purpose.⁶⁵ Here, the government has more leeway to decide which speakers, groups, and subjects are allowed.⁶⁶ Even with more flexibility, the government may only censor speech when it “would actually” interfere with the forum’s stated purposes.”⁶⁷ Any restrictions must be reasonable in light of those purposes and not be a pretext for the government to silence speech with which it disagrees.⁶⁸

Reasonableness does not require the “most reasonable” or “only reasonable” options.⁶⁹ The content of the ad or the advertiser’s identity need not have a “strict incompatibility” with the forum’s purpose to be prohibited.⁷⁰ A ban on certain types of bus ads, for example, might be reasonable if such ads were likely to discourage people from riding the bus.⁷¹

Non-traditional forums are not open to speech unless the government intentionally permits it.⁷² When a dispute arises, courts may infer intent from “looking to the policy and practice[s]” of the forum, as well as “the nature of the property and its compatibility with expressive activity.”⁷³ Intent can also be established where the government makes the property “generally available” to a class of speakers or grants permission “as a matter of course.”⁷⁴ Where the government runs a business that would be disrupted by expressive activity, courts are “particularly reluctant to hold that the government intended to designate a public forum.”⁷⁵

The scope of the forum is defined by where the speaker seeks access.⁷⁶ If a teachers’ union seeks exclusive use of school mailboxes, for example, the mail system is considered the forum and not the school.⁷⁷ Finally, when the government designates a public forum, it retains the authority to convert the property back to a limited public forum at any time as long as it is not used as a pretext to censor a particular viewpoint.⁷⁸

⁶⁴ *Perry*, 460 U.S. at 45.

⁶⁵ *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. at 800.

⁶⁶ *Id.* at 808.

⁶⁷ *See Am. Freedom Def. Initiative v. Suburban Mobility Auth. for Reg’l Transp. (SMART)*, 698 F.3d 885, 892 (6th Cir. 2012).

⁶⁸ *Id.* at 499.

⁶⁹ *Cornelius*, 473 U.S. at 808.

⁷⁰ *Id.*

⁷¹ *See Ne. Pa. Freethought Soc’y v. Cnty. of Lackawanna Transit Sys.*, 938 F.3d 424, 438 (3d Cir. 2019); *see also* KING COUNTY DEPARTMENT OF TRANSPORTATION, TRANSIT ADVERTISING POLICY (Dec. 27, 2018), <https://kingcounty.gov/~media/depts/transportation/metro/about/advertising/transit-advertising-policy.pdf> (stating that the “primary purpose of the transit system . . . is to provide safe and reliable transportation” and “retain existing riders and attract new users of public transit services”).

⁷² *See Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. at 802.

⁷³ *Id.*

⁷⁴ *Perry Educ. Ass’n v. Perry Loc. Educators’ Ass’n*, 460 U.S. at 47.

⁷⁵ *Cornelius*, 473 U.S. at 804.

⁷⁶ *Id.* at 801.

⁷⁷ *Perry*, 460 U.S. at 41.

⁷⁸ *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. at 803.

D. Buses: Designated or Limited Public Forums?

Public transit systems and transportation hubs have proven difficult to generalize within the public forum framework.⁷⁹ The Supreme Court decided *Lehman* before public forum doctrine was clearly established, thus circuit courts have taken different approaches to interpreting what *Lehman* means in terms of assessing a transit authority's intent.⁸⁰ A majority of courts conclude that when a transit system "accept[s] a wide array of political and issue-related ads," (unlike the transit system in *Lehman*) that means transit officials intended to open the forum to debate and exercise less control over content.⁸¹ The First and the Ninth Circuits, however, are more deferential to what transit advertising policies actually say.⁸² Under the latter approach, a transit agency that occasionally accepts ads related to political issues but maintains a formal policy banning political ads would not necessarily be considered a designated forum.⁸³

In the late 1990s, *New York Magazine* drew the ire of then-Mayor Giuliani by sponsoring a bus ad displaying the magazine's logo and this message: "Possibly the only good thing in New York Rudy hasn't taken credit for."⁸⁴ The Mayor's Office demanded the Metropolitan Transit Authority remove the ad because it had appropriated the mayor's name to promote a product.⁸⁵ The magazine sued, and the Second Circuit concluded New York's transit system was a designated public forum, and therefore could not censor the ad because "[a]llowing political speech . . . evidences a general intent to open a space for discourse, and a deliberate acceptance of the possibility of clashes of opinion and controversy that the Court in *Lehman* recognized as inconsistent with sound commercial practice."⁸⁶

The Ninth Circuit, however, criticized decisions by its sister courts for

⁷⁹ See *Int'l Soc'y. for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 681, (1992) (holding an airport terminal is not a public forum because modern air travel hasn't existed long enough to be considered a traditional forum); see also *Lebron v. Wash. Metro. Area Transit Auth.*, 749 F.2d 893, 896 (D.C. Cir. 1984) (finding acceptance of political ads in subway station constituted a public forum). *But cf.* *Metro Display Advert., Inc. v. City of Victorville*, 143 F.3d 1191, 1195 (9th Cir. 1998) (avoiding question of forum definition but reasoning bus shelters could be either limited or designated public fora as they are maintained like private property but installed along the streets, which are traditional forums).

⁸⁰ See *Ne. Pa. Freethought Soc'y v. Cnty. of Lackawanna Transit Sys.*, 938 F.3d 424, 439 (noting *Lehman* had to be "retconned" into modern public forum analysis).

⁸¹ *Am. Freedom Def. Initiative v. King County*, 136 S. Ct. at 1024 (Thomas, J., dissenting from denial of certiorari).

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *New York Magazine v. Metro. Transp. Auth.*, 136 F.3d 123 (2d Cir. 1998); see also *United Food & Com. Workers Union, Loc. 1099 v. Sw. Ohio Reg'l Transit Auth.*, 163 F.3d 341, 346 (6th Cir. 1998) (finding bus agency's explicit policy that "buses, bus shelters, and billboards are not public forums" was undercut by acceptance of political and public speech ads). *But cf.* *Am. Freedom Def. Initiative v. Suburban Mobility Auth. for Reg'l Transp. (SMART)*, 698 F.3d 885 (6th Cir. 2012) (holding a transit system in Detroit was a limited public forum because it had "completely banned political advertising, showing its intent to act as a commercial proprietor"); *abrogated by Am. Freedom Def. Initiative v. Suburban Mobility Auth. for Reg'l Transp.*, 978 F.3d 481 (6th Cir. 2020).

⁸⁵ *New York Magazine*, 136 F.3d at 126.

⁸⁶ *Id.* at 130.

“mistakenly [concluding] that if the government opens a forum and is willing to accept political speech, it has necessarily signaled an intent to create a designated public forum.”⁸⁷ The Ninth Circuit held King County Metro Transit in Seattle had established a limited public forum because it “pre-screened all proposed ads and consistently rejected ads that were non-compliant.”⁸⁸ In addition, the court explained that it considered “the county’s enforcement of the policy as a whole, not just the specific provision invoked to exclude the ads at issue.”⁸⁹

Courts that defer to a transit agency’s written policy argue that it “encourage[s] the government to open its property to some expressive activity in cases where, if faced with an all-or-nothing choice, it might not open the property at all.”⁹⁰ Since the government ultimately has the power to close the forum, “[m]unicipalities faced with the prospect of having to accept virtually all political speech if they accept any . . . will simply close the forum to political speech altogether” which results in “less speech, not more – exactly what the Court’s public forum precedents seek to avoid.”⁹¹ Transit authorities argue this approach better serves their proprietary interests by avoiding any ads that might offend riders and lead to a reduction in fare or ad revenue.

Some courts, however, question whether forum analysis is weakened by allowing “the government’s own self-serving statements about its intended use for a public place to outweigh the forum’s inherent attributes.”⁹² Circuit Judge Norman Stahl, partially concurring in a First Circuit case, wrote it “leaves the government with almost unlimited authority to restrict speech on its property by doing nothing more than articulating a nonspeech-related purpose for the area.”⁹³ And it contradicts the “unique suitability” of a transit system “for open discourse between citizens,” which is “indicative of a public, rather than private forum.”⁹⁴

Members of the Supreme Court, including Justices Clarence Thomas and Samuel Alito, have raised alarm that transit authorities in some major cities “are bound by rulings that classify their ad spaces as designated public forums” while others that are similarly open to political speech “can freely restrict speech based on its content.”⁹⁵ But the Court has thus far let the issue percolate, narrowly rejecting certiorari in recent cases.⁹⁶

⁸⁷ *Seattle Mideast Awareness Campaign v. King County*, 781 F.3d 489, 499 (9th Cir. 2015); *see also* *Am. Freedom Def. Initiative v. Mass. Bay Transp. Auth.*, 781 F.3d 571, 579 (1st Cir. 2015) (holding Boston’s transit system “was indistinguishable from the program at issue in *Lehman*” even if willing to accept a wider range of advertisements, including “many controversial ones”).

⁸⁸ *Seattle Mideast Awareness Campaign*, 781 F.3d. at 498.

⁸⁹ *Id.*

⁹⁰ *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. at 680.

⁹¹ *Seattle Mideast Awareness Campaign*, 781 F.3d. at 500.

⁹² *Am. Freedom Def. Initiative v. Mass. Bay Transp. Auth.*, 781 F.3d 571, 592 (1st Cir. 2015) (Stahl, J., dissenting).

⁹³ *Id.* at 592–93 (quoting *Int’l Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 695 (1992) (Kennedy, J., concurring)).

⁹⁴ *Id.*

⁹⁵ *See* *Am. Freedom Def. Initiative v. King County*, 136 S. Ct. at 1023 (Thomas, J., dissenting from denial of certiorari).

⁹⁶ *Id.*

II. COMMERCIAL AND NON-COMMERCIAL SPEECH

Transit agencies have inherent control over whether to operate a designated or limited public forum, and some have switched to a limited public forum by banning previously-allowed political ads and accepting only commercial ads to “indicate[] that making money is the goal.”⁹⁷ This is another reason why *Lehman* is remarkable: it allowed transit authorities to “reverse the traditional priorities of the First Amendment” by granting stronger protection to commercial speech than political speech.⁹⁸

Part II provides an overview of commercial speech doctrine and why commercial-only ad policies present a challenge when commercial speech blends with political and religious elements. Part II also explains how the commercial speech doctrine evolved in a relatively short period of time to a point where efforts to regulate it are disfavored.

A. Commercial Speech and the Right to Information

Commercial speech did not always enjoy First Amendment protection.⁹⁹ The Supreme Court ordained in 1942 that the “Constitution imposed no such restraint on government as respects purely to commercial advertising.”¹⁰⁰ For many years, courts deferred to states on economic regulations that affected speech.¹⁰¹ That changed when a Virginia newspaper published ads for legal abortion clinics in New York, resulting in the publisher’s conviction under a state law criminalizing any publication that encouraged or promoted abortion.¹⁰² *Roe v. Wade* had been decided a few years earlier, and perhaps in furtherance of a woman’s right to choose, the Court overturned the publisher’s conviction, holding that the First Amendment protects commercial ads, particularly on matters of “clear” public interest.¹⁰³

A year later, the Court struck down a Virginia law that prohibited pharmacists from advertising drug prices, finding that the “free flow of commercial information is indispensable” to the nation’s economy and “intelligent and well informed” economic decision-making.¹⁰⁴ The Court also found that even when advertising is tasteless or excessive, it still informs consumers about who is “producing and selling what product, for what reason, and at what price.”¹⁰⁵ The Court concluded that “speech which does no more than *propose a commercial transaction*” should

⁹⁷ *New York Magazine v. Metro. Transp. Auth.*, 136 F.3d at 130.

⁹⁸ *See Lehman v. City of Shaker Heights*, 418 U.S. at 315 (Brennan, j., dissenting).

⁹⁹ *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942).

¹⁰⁰ *Id.* at 54 (recalling the plaintiff unsuccessfully tried to evade a city ordinance banning commercial leaflets by double-siding his submarine tour fliers with a political ad criticizing the city).

¹⁰¹ VICTORIA L. KILLION, CONG. RSCH. SERV., IF11072, THE FIRST AMENDMENT: CATEGORIES OF SPEECH (2019).

¹⁰² *See Bigelow v. Virginia*, 421 U.S. 809 (1976).

¹⁰³ *Id.* at 822.

¹⁰⁴ *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976).

¹⁰⁵ *Id.*

not lose its First Amendment protection simply because it is paid for.¹⁰⁶

However, the Court carved out exceptions for false or deceptive ads,¹⁰⁷ finding commercial speech was less vulnerable to regulation due to its profit motive.¹⁰⁸ The Court also recognized a reciprocal right to “receive information and ideas” in advertising, which provided the Virginia Citizens Consumer Council with standing to challenge the law.¹⁰⁹

In subsequent years the Court observed a “common-sense” distinction between speech that proposes a commercial transaction, which the government regulates, and other varieties of speech.¹¹⁰ In *Central Hudson Gas & Elec. Corp. v. Public Service Commission of New York*, the Court concluded that commercial speech warranted “lesser protection” than other forms of expression due to its informational value to consumers.¹¹¹ The Court found that unless an advertisement is misleading or related to illegal activity, the government need only show a substantial interest that is directly advanced by the regulation, which must not be more extensive than necessary.¹¹²

Nonetheless, the Court “stress[ed] the importance of free dissemination of information about commercial choices in a market economy.”¹¹³ It invalidated restrictions on truthful advertising by lawyers promoting legal services,¹¹⁴ and ruled that a private utility has a First Amendment right to express its opinion on public policy through advertising inserted into customers’ monthly billing statements.¹¹⁵

More recently, the Court has moved toward broader protection for commercial speech.¹¹⁶ The Court unanimously struck down a Rhode Island ban on the advertising of liquor prices aimed at keeping prices high so consumers would purchase less alcohol, but the justices split on their reasoning.¹¹⁷ Justice Stevens, writing for a plurality, reasoned that the Court should apply a rigorous First Amendment analysis “when a State entirely prohibits the dissemination of truthful, nonmisleading commercial messages for reasons unrelated to the preservation of a fair bargaining process,” such as to achieve an underlying policy goal.¹¹⁸ The

¹⁰⁶ *Id.* at 761-62 (rejecting the state’s argument that without the law consumers would be endangered by pharmacies offering lower prices and potentially lower-quality medications).

¹⁰⁷ *Id.* at 771.

¹⁰⁸ *Id.* at 771 n.24.

¹⁰⁹ *Id.* at 757.

¹¹⁰ See *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 455-56 (1978).

¹¹¹ See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 563 (1980) (concluding commercial speech did not warrant strict scrutiny, which requires that any restrictions on speech must be narrowly tailored to serve a compelling government interest).

¹¹² *Id.* at 564-566 (applying test to invalidate state order that electric utilities stop promoting the use of electricity, finding the state’s “rationale, as important as it is, cannot justify suppressing information about electric devices or services that would cause no net increase in total energy use”); see also *Bd. of Trustees v. Fox*, 492 U.S. 469, 480 (1989).

¹¹³ *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 521 (1996) (Thomas, J., concurring in part).

¹¹⁴ *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977).

¹¹⁵ *Consol. Edison Co. of N.Y. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 530 (1980).

¹¹⁶ *Liquormart*, 517 U.S. at 484 (1996) (striking down state law intended to encourage temperance by making it harder to find who sells the cheapest alcohol).

¹¹⁷ *Id.* at 515.

¹¹⁸ *Id.* at 501.

plurality concluded that the state thus needed to show that its ban on price advertising “significantly” advanced the state’s interest in reducing alcohol consumption, which the Court found it failed to do.¹¹⁹

In a concurrence with the judgment but not with Stevens’ reasoning, Justice Thomas argued the *Central Hudson* test was problematic where the Court seemed to “accept the legitimacy of laws that suppress information in order to manipulate the choices of consumers—so long as the government could show that the manipulation was in fact successful.”¹²⁰ He also found no “philosophical or historical basis” for ascribing a “lower value” to commercial speech than political speech, and that some “historical materials suggest to the contrary.”¹²¹

More than a decade later, the Court invalidated a Vermont law that regulated access to pharmacy prescription data after concluding such data was commercial speech because it was used by drug companies to market medications to doctors.¹²² When applying the heightened scrutiny test from *Central Hudson*, the Court found the law failed to permissibly advance the state’s interests in reducing health care costs and promoting public health.¹²³

B. Blurred Lines: When Commercial Ads Blend with Politics

Bus ads that blend commercial speech with political or religious elements present a conundrum for courts. New York Magazine’s bus ad aimed at Mayor Giuliani, referenced in Part I (D), is an example because it promoted the magazine’s logo while “just as clearly criticiz[ing] the most prominent member of the City’s government on an issue relevant to his performance of office.”¹²⁴ Whether such an ad is political or commercial may determine a transit agency’s ability to regulate it.¹²⁵

The Supreme Court has decreed that “reference to a specific product does not by itself render [the message] commercial speech.”¹²⁶ Nor does the mere fact that the speaker has an economic motivation.¹²⁷ The message must be assessed as a whole to evaluate whether commercial elements are “inextricably intertwined” with fully protected speech.¹²⁸ Employment ads with no opinion on social issues, for example, are “classic examples of commercial speech.”¹²⁹ But ads that convey a political message while soliciting financial contributions for a movement are not.¹³⁰

¹¹⁹ *Id.* at 505, 516.

¹²⁰ *Id.* at 521 (Thomas, J., concurring in part).

¹²¹ *Id.*

¹²² *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 557 (2011).

¹²³ *Id.*

¹²⁴ *New York Magazine v. Metro. Transp. Auth.*, 136 F.3d at 131 (describing the ad which included magazine’s logo with text that read “[p]ossibly the only good thing in New York Rudy hasn’t taken credit for”).

¹²⁵ *Id.*

¹²⁶ *Bolger v. Youngs Drug Prod. Corp.*, 463 U.S. 60, 66 (1983).

¹²⁷ *Id.* at 67.

¹²⁸ *Bd. of Trustees v. Fox*, 492 U.S. 469, 474 (1989) (holding university had established a limited public forum where commercial speech was not permitted).

¹²⁹ *Pittsburgh Press Co. v. Pittsburgh Comm’n on Hum. Rels.*, 413 U.S. 376, 385 (1973).

¹³⁰ *New York Times v. Sullivan*, 376 U.S. 254, 266, (1964).

If an ad merely “links a product to a current public debate,” that does not equate to political speech.¹³¹ The same is true vice-versa, as the Court has said “free speech would be endangered” “i[f] affixing the commercial label permits the suppression of any speech that may lead to political or social ‘volatility.’”¹³²

The Ninth Circuit has held that a city bus system has the right to prohibit exterior ads “combining political and religious advertisements with a commercial offer.”¹³³ In *Children of the Rosary v. City of Phoenix*, a religious organization sued after an anti-abortion bus ad was rejected.¹³⁴ The ad displayed the symbol of a fetus surrounded by a rosary with the following language:

“Before I formed you in the womb, I knew you” – God
Jeremiah 1:5 ...
CHOOSE LIFE!¹³⁵

The city’s new policy only allowed “speech which proposes a commercial transaction.”¹³⁶ When city officials pointed out the ad did not sell anything, Children of the Rosary added the following:

“To purchase this message as a bumper sticker for your vehicle!
Contact [phone number].”¹³⁷

In a split decision,¹³⁸ retired Supreme Court Justice Byron White found that if Children of the Rosary were successful, “the reasoning of *Lehman* is hollow . . . because any candidate for political office could convert his political advertisement into a commercial advertisement by simply offering the message as a bumper sticker.”¹³⁹ The appeals court cited the Supreme Court’s determination that blended speech must be evaluated as a whole,¹⁴⁰ and found the city’s interests in protecting transit revenue and staying neutral on political and religious issues to be especially

¹³¹ *Id.*

¹³² *Matal v. Tam*, 137 S. Ct. 1744, 1765 (2017) (Thomas, J., concurring) (writing separately to express that truthful commercial speech should warrant strict scrutiny).

¹³³ *Child. of the Rosary v. City of Phoenix*, 154 F.3d 972, 981 (9th Cir. 1998).

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.* at 975 (describing the city’s previous policy which specified what was prohibited instead of what was permitted and prohibited ads “support[ing] or oppos[ing] a candidate, issue or cause, or which advocates or opposes a religion, . . . or belief”).

¹³⁷ *Id.* (stating that the ACLU sponsored its own ad which was rejected for the following language: “[t]he ACLU Supports Free Speech for Everyone . . . [t]o purchase this bumper sticker please call [phone number].”)

¹³⁸ *See Perry Educ. Ass’n v. Perry Loc. Educators’ Ass’n*, 103 S. Ct. 948, 954 (1983) (recalling that Justice White authored the *Perry* decision establishing modern public forum doctrine during his tenure on the Supreme Court); *see also Lehman v. City of Shaker Heights*, 418 U.S. at 299 (recalling that Justice White was among the justices who joined Justice Blackmun’s opinion in *Lehman*).

¹³⁹ *Child. of the Rosary v. City of Phoenix*, 154 F.3d 972, 981 (9th Cir. 1998) (arguing an opposite ruling would undermine the government’s ability to act as a proprietor and force it into “an all-or-nothing choice”).

¹⁴⁰ *Id.* at 982 (citing *Bd. of Trustees v. Fox*, 492 U.S. at 474).

strong.¹⁴¹ The Court also found that since the city had “consistently restrict[ed] political and religious advertising” similar to the transit system in *Lehman*, it had established a limited public forum.¹⁴²

The dissent, authored by Circuit Judge John Noonan, argued the city’s policy was flawed because “commercial media advertising can be full of political or religious content.”¹⁴³ The dissent argued the city should abandon the “simplicity” of a commercial-only policy and become more “specific as to the content of the commercial messages [the city] will not accept.”¹⁴⁴ Under the current policy, he noted, a private utility could advertise its commercial services while the Sierra Club would be denied an opportunity to run ads opposing the construction of new dams.¹⁴⁵

Two decades later, the Ninth Circuit was less deferential to the Spokane Transit Authority (STA) when it ruled that STA unreasonably rejected an ad sponsored by its own workers’ union.¹⁴⁶ The Amalgamated Transit Union Local 1015 (ATU) had accused the transit agency of viewpoint discrimination by unfairly prohibiting labor unions from promoting their services and making public service announcements.¹⁴⁷ STA, stung by bad publicity over prior religious and labor-related ads, had turned down a request to run an ATU ad urging Uber and Lyft drivers to unionize.¹⁴⁸

STA cited its “Commercial Advertising Policy,” which allowed only public service announcements and commercial and promotional advertising.¹⁴⁹ The latter defined as an ad that: “[P]romotes or solicits the sale, rental, distribution or available of goods, services, food, entertainment, events, programs . . . products or property for commercial purposes or more generally promotes an entity that engages in such activity.”¹⁵⁰ STA concluded the union ad fell under banned “public issue” ads, which were defined as: “expressing or advocating an opinion, position, or viewpoint on matters of public debate about economic, political, religious or social issues.”¹⁵¹

The Ninth Circuit found STA’s rejection of the ad as “public issue” advertising was not supported by the record.¹⁵² The court concluded the agency provided “no written guidance on how to assess whether an ad might express or advocate” on a public issue.¹⁵³ The appeals court was troubled that STA’s chief executive was “the

¹⁴¹ *Id.* at 981.

¹⁴² *Id.* at 978.

¹⁴³ *Id.* at 985 (Noonan, J., dissenting).

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *See* *Amalgamated Transit Union Loc. 1015 v. Spokane Transit Auth.*, 929 F.3d 643 (9th Cir. 2019).

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 648 (stating that the STA received numerous complaints and negative media coverage when it allowed a grocer’s union to run attack ads against two local grocery chains, as well as when it allowed ads from religious organizations).

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.* at 655 (expressing skepticism as to whether “public issue” ban could survive a facial challenge, which the union did not raise).

¹⁵³ *Id.* at 654-56.

final arbitrator” and “her standard seem[ed] entirely driven by what she believe[ed] would reflect badly on STA.”¹⁵⁴ The court also found her justifications were unreasonable because the record showed STA had accepted other union ads that generated no public complaints.¹⁵⁵ In addition, the court noted that ATU had for years displayed union stickers on the inside of STA buses without incident.¹⁵⁶

The court also determined STA’s policy allowing commercial and promotional speech was broader than the policy in *Children of the Rosary*, which meant an advertiser “need not strictly propose a commercial transaction” to qualify.¹⁵⁷ The court thus concluded ATU’s ad also could have met the definition because ATU engages in interstate commerce and advances developments in labor and commercial markets,¹⁵⁸ even if it did not collect fees for its service.¹⁵⁹

III. VIEWPOINT DISCRIMINATION

Even in a limited public forum, the government’s ability to regulate speech has its limits. Any content restrictions in a limited forum must be viewpoint neutral and reasonable.¹⁶⁰ Content refers to ideas or the subject matter expressed by the speaker, and in some cases, the function or purpose of the speaker’s message.¹⁶¹ In a public forum, content discrimination is presumably unconstitutional unless such laws are narrowly tailored to achieve a compelling interest.¹⁶² This applies even when a law does not target content on its face, but the law was enacted with the content of certain speech in mind.¹⁶³ Laws that regulate time, place and manner of speech are content-neutral.¹⁶⁴

Viewpoint discrimination targets a “specific motivating ideology or the opinion or perspective of the speaker.”¹⁶⁵ It is thus an “egregious form of content discrimination” that is forbidden in any situation because a free society is threatened when the government controls the message.¹⁶⁶ It also may not be obvious.¹⁶⁷ Even in a limited public forum, viewpoint discrimination “is presumed impermissible when directed against speech otherwise within the forum’s limitations.”¹⁶⁸

¹⁵⁴ *Id.* at 654.

¹⁵⁵ *Id.* at 655.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 656.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. at 800.

¹⁶¹ *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015).

¹⁶² *Id.*

¹⁶³ *Id.* at 165 (citing *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429 (1993)).

¹⁶⁴ *See Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989).

¹⁶⁵ *See Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 829 (1995).

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*; *see also Women’s Health Link, Inc. v. Fort Wayne Pub. Transp. Corp.*, 826 F.3d 947 (2016) (finding viewpoint discrimination where Citilink bus service rejected a bus ad for woman’s health services because it violated rule banning “opinions or positions upon political, religious or moral issues” such as abortion because it was affiliated with clinic promoting “life-affirming health care,” but the ad itself had no mention of abortion).

¹⁶⁸ *See Rosenberger*, 515 U.S. at 830.

The Supreme Court in recent years has broadly defined viewpoint discrimination to protect more than just the right to pick a side – it also protects “the right to create and present arguments for particular positions in particular ways, as the speaker chooses.”¹⁶⁹ The Supreme Court also has blurred the lines between content and viewpoint discrimination, finding speech that offends represents a viewpoint,¹⁷⁰ and that certain content, such as religious speech, can also serve as the basis for a worldview or life perspective.¹⁷¹ Some circuit courts still tend to focus more narrowly on religion as content even when it may be reflective of viewpoint.¹⁷²

A. Speech That Offends Expresses a Viewpoint

When speech is censored because it may offend or disparage someone, courts pay close attention to whether the censorship is really viewpoint discrimination.¹⁷³

Take Paul Cohen as an example. His claim to fame was walking into a Los Angeles courthouse wearing a jacket that read “Fuck the Draft” during the Vietnam War.¹⁷⁴ Authorities prosecuted him for “maliciously and willfully disturbing the peace” because onlookers had to see the inscription on his back.¹⁷⁵ The Supreme Court overturned his conviction, ruling that his back-of-the-jacket profanity was speech, not conduct, and did not amount to obscenity or fighting words.¹⁷⁶ Furthermore, the Court ruled it certainly did not rise to the level of a crime because “some unwilling listeners in a public building may have been briefly exposed.”¹⁷⁷

Justice John Marshall Harlan, writing for the majority, described free expression as “powerful medicine in a society as diverse and populous as ours”¹⁷⁸ and “[t]hat the air may at times seem filled with verbal cacophony is, in this sense not a sign of weakness but of strength.”¹⁷⁹

Harlan reasoned that the Constitution protects not just words, but their “emotive function, which practically speaking, may often be the more important element of the overall message.”¹⁸⁰ He cautioned that if the government is given authority to criminalize words merely because they offend someone, it “might soon seize upon

¹⁶⁹ *Matal v. Tam*, 137 S. Ct. at 1766 (Kennedy, J., concurring in part).

¹⁷⁰ Rodney A. Smolla, *SMOLLA & NIMMER ON FREEDOM OF SPEECH: A TREATISE ON THE FIRST AMENDMENT* § 8:26, Examples of public and nonpublic forums – Public Transportation (2020).

¹⁷¹ *Id.* § 8:25, Examples of public and nonpublic forums – University funding: the Rosenberger case (2020).

¹⁷² See *Archdiocese of Wash. v. Wash. Metro. Area Transit Auth.*, 140 S. Ct. 1198, 1199 (2020) (Gorsuch & Thomas, JJ., *statement on denial of cert.*).

¹⁷³ See *Matal*, 137 S. Ct. 1744 (2017).

¹⁷⁴ *Cohen v. California*, 403 U.S. 15 (1971).

¹⁷⁵ *Id.* at 17 (noting disagreement with state appeals court’s conclusion that “it was certainly reasonably foreseeable that [Cohen’s] conduct might cause others to rise up to commit a violent act”).

¹⁷⁶ *Id.* at 22.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 25.

¹⁷⁹ *Id.* at 26.

¹⁸⁰ *Id.*

the censorship of particular words as a convenient guise for banning the expression of unpopular views.”¹⁸¹

A half-century later, in *Matal v. Tam*, the lead singer of a rock band known as “The Slants” sued the U.S. Patent and Trademark Office (PTO) after it refused to register a trademark for the band’s name.¹⁸² Simon Tam’s application was denied under a federal trademark law prohibiting trademarks that may ‘disparage ... or bring ... into contemp[t] or disrepute’ certain persons or groups because it discriminated against offensive speech.¹⁸³ The trademark office cited the term’s use as a racial slur for people of Asian descent.¹⁸⁴ Tam countered that was his whole point – as an Asian American musician, he was trying to “reclaim” the term and “stereotypes about people of Asian ethnicity.”¹⁸⁵ Tam pointed to the band’s lyrics and songs, which drew inspiration from “childhood slurs and mocking nursery rhymes.” The band had produced albums with names such as “The Yellow Album.”¹⁸⁶

The Court sided unanimously with Tam, ruling the disparagement clause failed to pass the test for viewpoint discrimination because it singled out a subset of expression based on the government’s determination that such speech would offend others.¹⁸⁷ But the eight justices who heard the case split evenly between two plurality opinions. A plurality led by Justice Samuel Alito ruled the disparagement clause violated a “bedrock First Amendment principle that “[s]peech may not be banned [because it] expresses ideas that offend.”¹⁸⁸ Alito concluded it was irrelevant whether the disparagement clause “evenhandedly prohibits disparagement of all groups” because “[t]hat is viewpoint discrimination in the sense relevant here: giving offense is a viewpoint.”¹⁸⁹

In a separate plurality opinion, Justice Kennedy noted that under the law, an applicant may register a positive trademark but not a derogatory one, “reflect[ing] the Government’s disapproval of a subset of messages it finds offensive,” which is the “essence of viewpoint discrimination.”¹⁹⁰ Kennedy wrote that “[t]he Government may not insulate a law from charges of viewpoint discrimination by tying censorship to the reaction of the speaker’s audience,”¹⁹¹ and that the government was attempting “to decide whether the relevant audience would find

¹⁸¹ *Id.*

¹⁸² *Matal v. Tam*, 137 S. Ct. at 1751.

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 1754.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 1763 (declining to address whether trademarks are commercial speech, but reasoning that even if they were, the disparagement clause would fail under *Central Hudson* because the government was trying to squelch offensive speech”).

¹⁸⁸ *Id.* See generally Clay Calvert, *Merging Offensive-Speech Cases with Viewpoint Discrimination Principles: The Imminent Impact of Matal v. Tam on Two Strands of First Amendment Jurisprudence*, 27 WM. & MARY BILL RTS. J. 829 (2019) (presenting an analysis as to whether *Matal* reached the right conclusion while incorrectly conflating offensive name-calling with viewpoint discrimination).

¹⁸⁹ *Matal v. Tam*, 137 S. Ct. at 1754.

¹⁹⁰ *Id.* at 1766.

¹⁹¹ *Id.*

the speech offensive.”¹⁹² Kennedy noted that while thoughtful persons might disagree with Tam’s approach, “the dissonance between the trademark’s potential to teach and the Government’s own insistence on its own, opposite and negative interpretation confirms the constitutional vice of the statute.”¹⁹³

B. Matal Cuts Both Ways on Discriminatory Bus Ads

Ironically, *Matal* became a weapon for the American Freedom Defense Initiative to attack public transit agencies over similar policies intended to protect underrepresented groups riding the bus from being “bombard[ed] with demeaning messages.”¹⁹⁴ The D.C. Circuit rejected AFDI’s argument outright, finding *Matal* did not apply to transit systems because “*Matal* did not discuss forum doctrine in any depth” and “dealt not with Government permitting speech on government property but with government protection of speech and commercial infringement.”¹⁹⁵ Prior to *Matal*, the First Circuit had upheld a disparagement clause adopted by Boston’s transit system while the Second Circuit ruled in favor of AFDI by invalidating a ban on ads that demeaned on the basis of “race, color, religion, national origin, ancestry, gender, age, disability or sexual orientation” on buses in New York.¹⁹⁶

The Sixth Circuit reconsidered a prior decision invalidating a ban on bus ads that subjected people to “scorn or ridicule,”¹⁹⁷ concluding that in light of *Matal*, the policy “cannot survive this broader understanding of viewpoint discrimination” because it operates “[l]ike the trademark statute prohibiting marks that bring individuals into ‘disrepute.’”¹⁹⁸

The Ninth Circuit held *Matal* applies “with full force” to a King County Metro policy in Seattle banning ads that “demean[] or disparage[] an individual, group of individuals or entity.”¹⁹⁹ The appeals court struck down the policy, finding “[n]o material textual difference distinguished Metro’s disparagement clause from the trademark provision at issue in *Matal*,” and like the disparagement clause, King County’s policy “require[d] the rejection of an ad solely because it offends.”²⁰⁰ At issue in the Seattle case was a large AFDI-sponsored bus ad that displayed a gallery of suspected terrorists and offered a \$25 million reward for information leading to

¹⁹² *Id.* at 1767.

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 1764.

¹⁹⁵ *Am. Freedom Def. Initiative v. Wash. Metro. Transit Auth.*, 901 F.3d 356, 365 (D.C. Cir. 2018).

¹⁹⁶ *Am. Freedom Def. Initiative v. Massachusetts Bay Transp. Auth.*, 781 F.3d 571, 581 (1st Cir. 2015). *But see* *Am. Freedom Def. Initiative v. Metropolitan Transp. Auth.*, 880 F.Supp.2d 456, 461, 474 (citing *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) (invalidating a hate speech law because it outlawed “fighting words” based upon disfavored subjects such as race, color, religion, or gender, but permitted them if not based on those subjects, thus amounting to content discrimination)).

¹⁹⁷ *Am. Freedom Def. Initiative v. Suburban Mobility Auth. For Reg’l Transp.*, 978 F.3d 481, 486 (6th Cir. 2020).

¹⁹⁸ *Id.* at 500.

¹⁹⁹ *Am. Freedom Def. Initiative v. King County*, 904 F.3d 1126, 1131 (9th Cir. 2018).

²⁰⁰ *Id.*

the capture of “These Jihadis.”²⁰¹ The ad was recreated from a controversial bus ad originally sponsored by the FBI and State Department that ran on King County’s buses.²⁰² Federal officials withdrew the original version in response to concerns it was discriminatory and would incite hate crimes.²⁰³

The Ninth Circuit wrote “we cannot conclude that the appropriate limitation on subject matter is ‘offensive speech’ any more than we could conclude that an appropriate limitation on subject matter is ‘pro-life speech’ or ‘pro-choice speech’” because that would “exclude speech solely on the basis of viewpoint – an impermissible restriction in a nonpublic forum.”²⁰⁴ King County argued the policy applied evenhandedly, and that it would have accepted the ad with minor revisions,²⁰⁵ but AFDI insisted on presenting its message in a way that “caused discomfort and unpleasantness.”²⁰⁶

C. Religious Perspectives Are Protected Viewpoints

The Supreme Court has held in a series of cases that religious speech cannot be banned in a limited public forum if it represents a religious perspective on a topic that is otherwise allowed for discussion.²⁰⁷ In *Rosenberger v. Rector and Visitors of University of Virginia*, the Court concluded that religion serves not only as a “vast area of inquiry,” but also as “a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered.”²⁰⁸ Therefore, the Court found the university had improperly denied student activity funds to a Christian-oriented student magazine called “Wide Awake.”²⁰⁹

Members of the magazine’s staff sued after the Student Council refused to reimburse them for printing costs, citing the University’s guidelines on religious activities and final decision by the Dean of Students.²¹⁰ School officials were also concerned that subsidizing religious speech violated the separation of church and state.²¹¹

The Court concluded the activity fund constituted a limited public forum in a “metaphysical” sense, and thus was beholden to the same principle that viewpoint discrimination occurs when school property is opened to discussion from all views except those “dealing with the subject matter from a religious viewpoint.”²¹² The Court ruled the University had not excluded all religious subject matter, but instead

²⁰¹ *Id.* at 1129.

²⁰² *Id.* at 1128.

²⁰³ *Id.*

²⁰⁴ *Id.* at 1132; *see also* discussion *infra.*, Part VI.A (determining King County had unreasonably banned the ad based on a conclusion it would disrupt transit operations).

²⁰⁵ *Am. Freedom Def. Initiative v. King County*, 904 F.3d at 1131.

²⁰⁶ Answering Brief of King County at 1, *Am. Freedom Def. Initiative v. King County*, 904 F.3d 1126 (9th Cir. 2018).

²⁰⁷ *See generally* *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819 (1995).

²⁰⁸ *Id.*

²⁰⁹ *Id.* at 823-27 (stating that school guidelines defined a religious activity as one that “primarily promotes or manifests a particular belie[f] in or about a deity or an ultimate reality”).

²¹⁰ *Id.* at 827.

²¹¹ *Id.*

²¹² *Id.* at 830.

had targeted student publications with “religious editorial viewpoints” for “disfavored treatment.”²¹³ Here, students were allowed to write about topics such as “racism, or stress, or pregnancy – but not if their faith informed the message.”²¹⁴ Finally, the Court held that the First Amendment’s Establishment Clause, which bars the government from favoring one religion over the other, did not prohibit the University from honoring its duties to free speech as long as the program was neutral toward religion.²¹⁵

In *Lambs Chapel v. Center Moriches Union Free School District*, the Court found that a school district discriminated against a religious viewpoint when it opened its facilities to after-hours public use but objected when a church group sought to host a film series on family issues and child rearing.²¹⁶ The Court found that the “film series here no doubt dealt with a subject otherwise permissible . . . and its exhibition was denied solely because the series dealt with the subject from a religious standpoint.”²¹⁷ The Court similarly ruled in *Good News Club v. Milford School District* that a Christian children’s club could not be prevented from holding meetings on school grounds solely because it sought to engage on the “teaching of morals and character,” which was a topic that allowed for discussion in the forum.²¹⁸

D. Circuit Courts Split on Religious Bus Ads

Federal courts disagree on how this line of cases should apply to transit agencies, particularly in light of *Lehman*.²¹⁹ In Washington, D.C., the Washington Area Metropolitan Transit Authority (WAMTA) banned religious ads on its system in 2015, along with political and advocacy ads, after tracking “near-monthly complaints” about increasingly offensive and controversial ad campaigns.²²⁰ Such ads had alienated riders, increased costs due to vandalism, and raised concerns about inciting violence or terrorism, according to a declaration from Lynn Bowersox, an assistant general manager.²²¹ An ad on WAMTA buses decrying the Catholic Church’s stance on condoms, for instance, “generated hundreds of angry phone calls and letters,” making it “the second-largest negative response to any ad.”²²²

The breaking point came when the American Freedom Defense Initiative sought to promote a bus ad campaign that caricatured the Prophet Muhammad, similar to a contest the organization had sponsored in Texas that led to a shooting.²²³

²¹³ *Id.* at 831.

²¹⁴ *Id.* at 832.

²¹⁵ *Id.* at 845.

²¹⁶ *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.* 508 U.S. 384, 389 (1993).

²¹⁷ *Id.*

²¹⁸ *Id.* at 110.

²¹⁹ *See* *Ne. Pa. Freethought Soc’y v. Cnty. of Lackawanna Transit Sys.*, 938 F.3d at 435.

²²⁰ *Archdiocese of Wash. v. Wash. Metro. Area Transit Auth.*, 897 F.3d 314, 319-20 (D.C. Cir. 2018).

²²¹ *Id.*

²²² *Id.*

²²³ *Id.*

WAMTA's executive board imposed an immediate moratorium on religious ads, along with "issue-oriented" ads, political and advocacy ads,²²⁴ and later adopted the ban permanently.²²⁵

The new policy was challenged in several lawsuits,²²⁶ including one that required the Circuit Court of Appeals for the District of Columbia to determine whether a religious-themed Christmas ad can be treated differently than a holiday shopping ad from Macy's.²²⁷

1. A Christmas Ad Controversy

WMATA, acting under the new "Guideline 12" which prohibited ads "promot[ing] or oppos[ing] any religion, religious practice or belief,"²²⁸ had refused to run an ad promoted by the Catholic Archdiocese of Washington.²²⁹ Entitled "Find the Perfect Gift, the ad depicted a starry night and three silhouetted shepherds."²³⁰ It was intended "to share a simple message of hope, welcoming all to Christmas Mass or in joining in public service to help the most vulnerable in our community during the liturgical season of Advent."²³¹

The Archdiocese argued in its lawsuit that WAMTA would not have objected if Amazon or Macy's wanted to run ads "with the same text and graphics or with reindeer instead of shepherds."²³² It accused WAMTA of suppressing religious viewpoints on subjects "otherwise allow[ed] on bus exteriors, such as charitable giving and Christmas."²³³ WAMTA argued the ad also featured a website and social media hashtag that led to "substantial content promoting the Catholic Church."²³⁴

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ See *Am. Civil Liberties Union v. Wash. Metro. Area Transit Auth.*, 303 F. Supp. 3d 11 (2018) (noting plaintiffs included far-right political commentator Milo Yiannopoulos, the People for Ethical Treatment of Animals (PETA), and Carafem, a nonprofit that specializes in providing women with access to birth control and abortion medication); see also *Am. Freedom Def. Initiative v. Wash. Metro Area Transit Auth.*, 901 F.3d 356 (2018).

²²⁷ Petitioner's Brief at 1, *Archdiocese of Wash. v. Wash. Metro. Area Transit. Auth.*, 897 F.3d 314 (2018).

²²⁸ *Archdiocese of Wash. v. Wash. Metro. Area Transit Auth.*, 897 F.3d at 319.

²²⁹ *Id.* at 321.

²³⁰ *Id.*

²³¹ *Id.* at 320.

²³² Petitioner's Brief at 1, *Archdiocese of Washington v. Wash. Metro. Area Transit. Auth.*, 897 F.3d 314 (2018) (stating the Archdiocese's lawsuit also raised claims under the Fifth Amendment and Religious Freedom Restoration Act, both of which were denied, and are not examined in this article). In a separate line of cases, the Court has ruled the First Amendment forbids restrictions on religious practices unless the government can show a compelling interest or that the law is neutral and of general application, and the burden on religion was incidental. See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) (finding city ordinance prohibiting animal sacrifices clearly targeted Santeria religion and failed to address stated public health concerns); see also *Emp't Div. v. Smith*, 494 U.S. 872 (1990) (upholding Oregon law that criminalized a hallucinogenic drug despite its use for Native American church religious ceremony); *City of Boerne v. Flores*, 521 U.S. 507 (1997) (holding Religious Freedom Restoration Act's application to states exceeded Congressional authority).

²³³ *Archdiocese*, 897 F.3d at 321.

²³⁴ *Id.* at 320.

Circuit Judge Judith Rogers, writing for a 2-1 majority, sided with WAMTA, finding that the ad served as “an exhortation, repeatedly acknowledged by the Archdiocese to be part of its evangelization effort to attend mass at Catholic churches in connection with Advent.”²³⁵ The court found that had the ad specifically focused on charitable donations, it likely would not have been denied, as the transit agency had accepted ads from the Salvation Army with non-religious content.²³⁶

The court also cited *Lehman* as “longstanding Supreme Court precedent” that a transit system’s decision to accept only commercial advertising “does not rise to the dignity of a First Amendment violation.”²³⁷ The court said that to find the Archdiocese’s ads represented a perspective on Christmas would “eviscerate the distinction between viewpoint-based and subject-based regulation” and the “longstanding recognition that the government may limit a non-public forum to commercial advertising.”²³⁸ The court found that if it were to accept that argument, “governments might be required to accept speech on all subjects because the Archdiocese offers no principled limit cabining its position to religion.”²³⁹

The court also reasoned that WAMTA’s buses were not intended for the same “broad range” of social and civic activities as forums in *Rosenberger* and other religion cases.²⁴⁰ Thus the ad represented religious content that could be restricted and not a religious viewpoint that was impermissibly excluded on subjects such as charitable giving and Christmastime.²⁴¹ Furthermore, the court found that WAMTA’s policy prevents discrimination because it “prohibits religious and anti-religious ads in clear, broad categories” under which “bureaucrats are not called upon to decide whether the ad criticizing the Catholic Church’s position on condom usage, or the anti-Islam Muhammad ad, or the Find a Perfect Gift campaign ad is the more ‘offensive,’ or otherwise censor religious messages.”²⁴²

2. Atheists Win One for Religious Speech

The Third Circuit criticized its Beltway counterpart in a separate decision involving religious and atheistic bus ads, finding viewpoint discrimination is “impermissible in any forum.”²⁴³ The Third Circuit ruled in favor of the Northeastern Pennsylvania Freethought Society, which fought a decision by the bus system in Scranton, Pennsylvania to ban a bus ad that would have said “Atheists.”²⁴⁴

The County of Lackawanna Transit System, or “COLTS,” had for years run an

²³⁵ *Id.* at 321.

²³⁶ *Id.* (stating that WMATA had accepted an ad from the Salvation Army, a “religious organization whose ad exhorted giving to charity but contained only non-religious imagery”).

²³⁷ *Id.* at 323 (using the term “non-public forum” for limited public forum).

²³⁸ *Id.* at 329.

²³⁹ *Id.* at 335.

²⁴⁰ *Id.* at 327.

²⁴¹ *Id.*

²⁴² *Id.* at 325.

²⁴³ *Ne. Pa. Freethought Soc’y v. Cnty. of Lackawanna Transit Sys.*, 938 F.3d at 436.

²⁴⁴ *Id.* at 428.

array of ads, including ads from churches, Catholic schools, and even “evangelist Beverly Benton and her Saturday night miracle service.”²⁴⁵ However, COLTS denied the Freethought Society’s ad, which featured the organization’s web address over a blue sky with clouds, while reconsidering its policies on religious speech.²⁴⁶

COLTS staff were concerned that the Freethought Society wanted to spark religious debates that would turn violent.²⁴⁷ In a rejection letter, COLTS noted its goal of “provid[ing] a safe and welcoming environment” and that ads “promot[ing] debate over public issues such as abortion, gun control or the existence of God in a confined space like the inside of a bus detracts from that goal.”²⁴⁸

COLTS initially had no formal advertising policy, but reserved the right to reject “objectionable or controversial ads.”²⁴⁹ However, as controversies engulfed other cities, transit officials grew increasingly concerned about religious ads in particular.²⁵⁰ Gretchen Wintermantel, COLTS marketing director, wrote COLTS’s first formal policy, which was based on her research into other controversies “kindled by inflammatory ad campaigns.”²⁵¹ In 2013, COLTS revised the policy to establish a limited public forum reserved “for the sole purpose of generating revenue while maintaining or increasing its ridership.”²⁵² The policy specifically banned ads that:

[P]romote the existence or non-existence of a supreme deity, deities, being or beings; that address, promote criticize or attack a religion or religions, religious beliefs or lack of religious beliefs; that directly quote or cite scriptures, religious text or texts involving religious beliefs or lack of religious beliefs; or [that] are otherwise religious in nature.²⁵³

In a 2-1 ruling, the Third Circuit found that the advertising policy was unconstitutional, rejecting a lower court decision that determined it was appropriate to forbid religious and atheistic ads equally.²⁵⁴ Citing *Rosenberger* and other cases, Circuit Judge Thomas Hardiman concluded the Freethought Society’s ad was more akin to a marketing campaign to promote its “organizational existence, identity, and outreach.”²⁵⁵ The court wrote “[n]othing in the record suggests COLTS’s policy would prohibit secular associations from advertising their organizational philosophy or from communicating the message: “We exist, this is who we are, consider learning about or joining us.”²⁵⁶

The court noted COLTS’s stated concerns were undercut by the fact that the agency had run other religious ads and some of its drivers occasionally plugged the

²⁴⁵ *Id.* at 429.

²⁴⁶ *Id.* at 429-30.

²⁴⁷ *Id.*

²⁴⁸ *Id.* at 430.

²⁴⁹ *Id.* at 429.

²⁵⁰ *Id.*

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ *Id.* at 430.

²⁵⁴ *See id.* at 428.

²⁵⁵ *Id.*

²⁵⁶ *Id.* at 434.

words “God Bless America” in their overhead route displays.²⁵⁷ Freethought member Justin Vacula saw one of the buses go by and proposed the Atheists ad as a way to promote the separation of church and state and show atheists there were others like them in the community.²⁵⁸

The court further determined it would be “difficult, if not impossible to exclude religion as a subject matter in a forum open to topics susceptible to a religious perspective.”²⁵⁹ Religion, the court said, can represent a subject and “a standpoint from which a variety of subjects may be discussed and considered.”²⁶⁰ Hardiman wrote “[w]hat matters . . . isn’t how religious a message is, but whether it communicates a religious (or atheistic) viewpoint on a subject to which the forum is otherwise open.”²⁶¹ The majority further reasoned that to uphold the policy would mean that even the Declaration of Independence would be verboten because it referred to the rights of people “endowed by their Creator.”²⁶²

Circuit Judge Robert Cowen dissented, sharing the D.C. Circuit’s concerns that there was a “critical difference between the prohibition of religious perspectives . . . and the exclusion of religion itself as a subject,” and this case fell into the latter category.²⁶³ He drew an analogy to political speech, which also “provides . . . a specific premise” from which a variety of subjects may be discussed, and yet restrictions on political speech in limited public forums have been upheld.²⁶⁴

3. The Supreme Court Stays Out . . . Again

The Supreme Court denied certiorari on the Archdiocese’s appeal but Justice Neil Gorsuch, joined by Justice Thomas, lamented that “a reversal would be warranted for reasons admirably explained” by the dissenting opinion on the D.C. Circuit and majority opinion in *Freethought*.²⁶⁵ Gorsuch noted that “[b]ecause the full Court is unable to hear the case, it makes a poor candidate for our review.”²⁶⁶

Gorsuch said WAMTA’s actions were “viewpoint discrimination by a governmental entity” and reiterated that the Court had on “no fewer than three occasions” rejected similar “no-religious-speech policies” because “religion is not just a subject isolated to itself, but also a ‘specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered.’”²⁶⁷

“That’s not to say WAMTA lacks a choice,” Gorsuch wrote. “The Constitution requires the government to respect religious speech, not to maximize advertising

²⁵⁷ *Id.* at 430 (referring to messaging software that had been installed after the September 11 terrorist attacks but was not usually activated).

²⁵⁸ *Id.* at 431.

²⁵⁹ *See id.* at 436.

²⁶⁰ *Id.*

²⁶¹ *Id.* at 435.

²⁶² *Id.* at 438.

²⁶³ *Id.* at 442 (Cowen, J., dissenting).

²⁶⁴ *Id.* at 446.

²⁶⁵ *Archdiocese of Wash. v. Wash. Metro. Area Transit Auth.*, 140 S. Ct. 1198 (Gorsuch & Thomas, JJ., *statement on denial of cert.*).

²⁶⁶ *Id.* (noting that Justice Kavanaugh did not participate in the Court’s denial of certiorari because he was on the D.C. Court of Appeals when WMATA’s case was argued in the lower court).

²⁶⁷ *Id.*

revenues . . . if WAMTA finds messages like the one here intolerable, it may close its buses to all advertisements” or “it might restrict advertisement space to subjects where religious viewpoints are less likely to arise without running afoul of our free speech precedents.”²⁶⁸

E. Advertising Restrictions Must Be Reasonable

The Third Circuit also ruled COLTS had failed to show its policy on religious ads was reasonable.²⁶⁹ Content restrictions in a limited public forum must be viewpoint neutral and reasonable in light of the purpose of the forum.²⁷⁰ “[C]ommon-sense” is “sufficient to uphold a regulation under reasonableness review.”²⁷¹

The court assessed the forum’s purpose by how it was defined in COLTS’s policy, which stated advertising was sold for the “sole purpose of generating revenue . . . while at the same time maintaining or increasing ridership.”²⁷² The court thus evaluated the reasonableness of COLTS’ policies in terms of ad revenue and ridership, and found the agency had not justified its restrictions, particularly regarding its concerns that religious or atheistic ads might lead to heated debates that would result in physical violence directed at passengers or drivers.²⁷³

The court noted COLTS could point to “disruptions on other transit systems” but “failed to cite a single debate caused by an ad on one of its buses” despite having accepted religious and political ads in the past.²⁷⁴ Furthermore, the court observed that “[w]hile threats, boycotts, and vandalism could threaten ridership, COLTS stipulated its policy ‘was specifically to prevent debate inside of . . . buses . . . and had nothing to do with the debate outside the buses.’”²⁷⁵

The court also found COLTS’ process for screening ads was “scattershot” and “raise[d] the specter of arbitrary censorship.”²⁷⁶ For instance, the agency was inconsistent in deciding when to review an advertiser’s website and whether information contained online was relevant.²⁷⁷ The court noted COLTS had excluded one ad because the organization’s website “promoted drinking,” while it

²⁶⁸ *Id.* at 1200.

²⁶⁹ *Ne. Pa. Freethought Soc’y v. Cnty. of Lackawanna Transit Sys.*, 938 F.3d at 442; *see also* *Perry Educ. Ass’n v. Perry Loc. Educators’ Ass’n*, 460 U.S. at 45 (holding that in a public forum, which is subject to strict scrutiny, the government may impose “reasonable” restrictions on the time, place, or manner of protected speech so long as the government is not trying to censor the content and the rules are narrowly tailored to serve a significant government interest).

²⁷⁰ *See Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. at 809-10; *see also* *Seattle Mideast Awareness Campaign v. King County*, 781 F.3d at 497 (stating that advertising restrictions must be reasonably necessary to carry out the transit agency’s goals).

²⁷¹ *Freethought*, 938 F.3d at 438.

²⁷² *Id.*

²⁷³ *Id.* at 438-39.

²⁷⁴ *Id.* at 439.

²⁷⁵ *Id.*

²⁷⁶ *Ne. Pa. Freethought Soc’y v. Cnty. of Lackawanna Transit Sys.*, 938 F.3d at 441.

²⁷⁷ *Id.* at 440; *see also* *Women’s Health Link, Inc. v. Fort Wayne Pub. Transp. Corp.*, 826 F.3d 947 (finding Fort Wayne transit agency discriminated against health clinic by rejecting ad for association with pro-life website).

accepted another ad tied to a “racist and anti-Semitic blog” — which it didn’t discover until “it was shown the bigoted website during this litigation.”²⁷⁸ When COLTS’s marketing director was asked how she belatedly learned that an ad urging parents to immunize their children touched on a widely controversial topic, she replied “[t]hrough ‘[f]riends with kids, and news media.’”²⁷⁹

1. Vague Policies Encourage Viewpoint Discrimination

The Supreme Court has long cautioned that the “danger of censorship and abridgement of [] precious First Amendment freedoms is too great where officials have unbridled discretion over a forum’s use.”²⁸⁰ When the government limits access to a forum based on standards that are too vague or non-existent, free speech is endangered.²⁸¹ Thus, the Court has said the law must give a “person of ordinary intelligence a reasonable opportunity to know what is prohibited.”²⁸² As the Court has more recently added, the government “must draw a reasonable line” and “be able to articulate some sensible basis for distinguishing what may come in from what must stay out.”²⁸³

In *Minnesota Voters Alliance v. Mansky*, the Court confronted a Minnesota state law that prohibited wearing a “political badge, political button, or other political insignia” within a polling place.²⁸⁴ The law did not define the term “political,” which Chief Justice John Roberts noted could broadly refer to anything “relating to government, a government, or the conduct of governmental affairs.”²⁸⁵ The Court said its concern was the law would empower temporary “election judges” with broad authority to screen individuals at the entrance and issue civil penalties.²⁸⁶ Even though a polling place is a limited public forum, the Court found the law failed even “this forgiving test.”²⁸⁷

Minnesota officials had construed “political” as “conveying a message about the electoral choices at issue in [the] polling place.”²⁸⁸ A separate “Election Day Policy,”²⁸⁹ listed examples of banned materials, such as “[i]ssue oriented material designed to influence or impact voting” and “[m]aterial promoting a group with recognizable political views (such as the Tea Party, MoveOn.org).”²⁹⁰ But the Court found it “raise[d] more questions than it answer[ed]” because “[a]ny number of associations, educational institutions, businesses and religious organizations could

²⁷⁸ *Freethought*, 938 F.3d at 440.

²⁷⁹ *Id.*

²⁸⁰ *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553 (1975).

²⁸¹ *Am. Freedom Def. Initiative v. Wash. Metro. Area Transit Auth.*, 901 F.3d at 373; *see also Grayned v. City of Rockford*, 408 U.S. 104 (1972).

²⁸² *Am. Freedom Def. Initiative*, 901 F.3d at 372.

²⁸³ *Minn. Voters All. v. Mansky*, 138 S. Ct. 1876, 1888 (2018).

²⁸⁴ *Id.* at 1883.

²⁸⁵ *Id.* at 1880.

²⁸⁶ *Id.* at 1883.

²⁸⁷ *Id.* at 1888.

²⁸⁸ *Id.* at 1881.

²⁸⁹ *Id.*

²⁹⁰ *Id.* at 1884.

have an opinion on an ‘issue[] confronting voters in a given election.’²⁹¹ The Court reasoned that a “rule whose fair enforcement requires an election judge to maintain a mental index of the platforms and positions of every candidate and part on the ballot is not reasonable.”²⁹²

The Court acknowledged that “some degree of discretion...is necessary”, but speech restrictions must be amenable to reasoned application and “guided by objective, workable standards.”²⁹³ The Court noted that “[w]ithout them, an election judge’s own politics may shape his views on what counts as ‘political.’”²⁹⁴

2. Advertising Standards Must Be Objective and Workable

The Third Circuit, citing *Mansky*, ruled that the Southeastern Pennsylvania Transit Authority’s (SEPTA) advertising standards were “incapable of reasoned application.”²⁹⁵ SEPTA prohibited ads “political in nature” or that involve “matters of public debate about economic, political, religious, historic or social issues.”²⁹⁶ The Philadelphia transit system was sued after it rejected promotional interior ads for an investigative news report because the subject matter – discriminatory mortgage lending – was a “matter of public debate and litigation.”²⁹⁷

SEPTA had retooled its advertising policy after an AFDI legal victory that forced the agency to run anti-Islamic ads that drew negative publicity and prompted bus operators to boycott vehicles displaying the ads.²⁹⁸ Transit officials hoped more robust restrictions would prevent a similar situation from happening again.²⁹⁹ The Reporters Committee for the Freedom of the Press, which submitted a friend-of-the-court brief in the lawsuit, argued SEPTA had gone too far: “[T]he very purpose of the First Amendment is to encourage public discussion and debate about issues of public importance” and “[s]tifling those discussions because of fear that some transit riders may be unhappy with certain messages is not a ‘reasonable’ purpose for restricting speech.”³⁰⁰

Mansky has trickled down to other cases. The D.C. Circuit remanded an AFDI lawsuit after concluding *Mansky* raised questions as to whether WMATA’s advertising guidelines were “so broad as to provide . . . no meaningful constraint upon its exercise of the power to squelch.”³⁰¹ Finding *Mansky* and *Matal* had compelled it to “change course,” the Sixth Circuit overturned a ban on political bus

²⁹¹ *Id.* at 1890.

²⁹² *Id.* at 1889.

²⁹³ *Id.* at 1891.

²⁹⁴ *Id.*

²⁹⁵ *Ctr. for Investigative Reporting v. Se. Penn. Transp. Auth.*, 975 F.3d 300, 314 (3d Cir. 2020), *cert. denied*, 142 S. Ct. 73 (2021).

²⁹⁶ *Id.* at 309.

²⁹⁷ *Id.* at 314.

²⁹⁸ *Ctr. for Investigative Reporting v. Se. Penn. Transp. Auth.*, 337 F. Supp. 3d 572, 576 (E.D. Penn. Nov. 28, 2018), *rev’d*, 975 F.3d 300 (3rd Cir. 2020)

²⁹⁹ *Id.* at 575.

³⁰⁰ Brief for Amicus Curiae at 8, *Ctr. for Investigative Reporting v. Se. Penn. Transp. Auth.*, 975 F.3d.

³⁰¹ *Am. Freedom Def. Initiative v. Wash. Metro Area Transp. Auth.*, 901 F.3d at 373.

ads sponsored by AFDI in the Detroit area.³⁰² The court reasoned the policy established by the Suburban Mobility Authority for Regional Transportation (SMART) was unreasonable for the same reason as the ban on political apparel at polling places.³⁰³ The court found SMART offered no “sensible basis for distinguishing what may come in from what must stay out,”³⁰⁴ including no training manuals explaining how the term should be defined.”³⁰⁵

IV. The Captive Audience Exception to Free Speech

Free speech must sometimes be balanced against the rights of a captive audience or “unwilling listener.”³⁰⁶ Justice Douglas argued bus riders are a captive audience, which justified the City of Shaker Heights in banning political ads to spare the comfort and solicitude of its commuters.³⁰⁷ After all, transit agencies sell advertising “to generate revenue, not to lose it.”³⁰⁸

However, courts are not always clear about how far that protection extends. For instance, can bus riders be captive to advertising on both the interior and exterior of the bus?³⁰⁹ The answer is critical because the Supreme Court has “long connected” reasonableness of a forum’s restrictions with the intrusiveness of expressive activity.³¹⁰ More importantly, there is a danger in allowing the audience “veto power” that could be used to squelch unorthodox or unpopular views.³¹¹

A. Origins

The captive audience doctrine springs from a court-recognized right to privacy, or “right to be let alone,” which although not explicit in the Constitution, is construed from “zones of privacy” emanating from the First, Fourth, and Fifth Amendments.³¹² To be captive is somewhat of a misnomer, however, because “there is almost always something we can do to avoid exposure to whatever we find offensive,” such as “shut our eyes and plug our ears.”³¹³ The issue for courts to consider is primarily whether the “unwilling listener” has been unreasonably

³⁰² Am. Freedom Def. Initiative v. Suburban Mobility Auth. for Reg’l Transp., 978 F.3d at 502.

³⁰³ *Id.* at 495.

³⁰⁴ *Id.*

³⁰⁵ *Id.* (emphasizing its decision did not apply to political campaign speech, commercial speech, or other standards for determining “if a given ad qualifies in ‘more lucid terms’”).

³⁰⁶ Marcy Strauss, *Redefining the Captive Audience Doctrine*, 19 HASTINGS CONST. L.Q. 85 (1991).

³⁰⁷ *Lehman v. City of Shaker Heights*, 418 U.S. at 306-07 (Douglas, J. concurring in judgment).

³⁰⁸ Am. Freedom Def. Initiative v. Suburban Mobility Auth. for Reg’l Transp., 978 F.3d at 501.

³⁰⁹ *See Child. of the Rosary v. City of Phoenix*, 154 F.3d at 977. *But see Ne. Pa. Freethought Soc’y v. Cnty. of Lackawanna Transit Sys.*, 938 F.3d at 439.

³¹⁰ *Freethought*, 938 F.3d at 439.

³¹¹ Strauss, *supra* note 306, at 104.

³¹² *Griswold v. Connecticut*, 381 U.S. 479, 495 (1965).

³¹³ Strauss, *supra* note 306, at 89.

burdened in whatever measure she had to take to avoid the offensive message the speaker is trying to convey.³¹⁴ And secondly, whether avoiding the message was a necessity in the first place.³¹⁵

The Supreme Court has long recognized the unwilling listener's right to privacy inside the home, ruling in 1942 that the First Amendment did not protect using "sound trucks" to broadcast propaganda outside people's homes.³¹⁶ The Court noted the "unwilling listener is not like the passer-by who may be offered a pamphlet in the street but cannot be made to take it," for "in his home . . . he is practically helpless to escape this interference with his privacy by loudspeakers except through the protection of the municipality."³¹⁷

A "patently offensive" radio broadcast also raised strong privacy concerns because "material presented over the airwaves confronts the citizen not only in public, but also in the privacy of the home" and "broadcasting is uniquely accessible to children, even those too young to read."³¹⁸ In *F.C.C. v. Pacifica Foundation*, the Court held that the Federal Communications Commission had narrow authority to sanction a radio station for playing a recording of comedian George Carlin's "Filthy Words" monologue during the mid-afternoon when the "broadcast audience is constantly tuning in and out" and "prior warnings cannot completely protect the listener or viewer from unexpected program content."³¹⁹ The Court noted that "[t]o say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow."³²⁰ Ironically, the father who brought the complaint was not in his home, but driving with his son in the car when Carlin's program began playing on the radio.³²¹

In a lawsuit challenging online regulations during the Internet's early days, the Court distinguished the Web as less "invasive" than radio or television because it usually requires an affirmative act to access offensive content.³²² The Court reasoned users seldom encountered online content "by accident" and that "[a]lmost all sexually explicit images are preceded by warnings as to the content."³²³ Furthermore, software and other tools can be used "to block sexually explicit programming from [] children . . . in much the same way that addressees have the burden of either blocking or tossing away unwanted mail."³²⁴

Protecting the sanctity of the home and the children inside heavily influenced the Court, however, to find that "the right to communicate must stop at the mailbox" for publishers of sexually provocative materials being distributed to households that

³¹⁴ *Id.*

³¹⁵ *Id.*

³¹⁶ *Kovacs v. Cooper*, 336 U.S. 77, 87-89 (1949).

³¹⁷ *Id.* at 87.

³¹⁸ *F.C.C. v. Pacifica Found.*, 438 U.S. 726, 748-49 (1978).

³¹⁹ *Id.* at 748-49.

³²⁰ *Id.* at 749.

³²¹ *Id.* at 730.

³²² *See Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 869 (1997).

³²³ *Id.*

³²⁴ Smolla, *supra* note 170, § 5:10.

didn't order them.³²⁵ In that case, *Rowan v. U.S. Post Office Dept.*, the Court upheld a federal law authorizing the Postmaster General to remove home addresses from publishers' mailing lists at the customer's request, which prompted publishers, distributors, and owners of mail order houses to challenge on First Amendment grounds.³²⁶ But the same concerns did not weigh as significantly when the Court sided with a public utility company in *Consolidated Edison* after the company sued to insert unsolicited materials in customers' monthly electric bills.³²⁷ The Court found that customers who were offended "may escape exposure to objectionable material simply by transferring the bill insert from envelope to the wastebasket."³²⁸

Similarly, the Court ruled that a federal ban on unsolicited contraceptive advertisements was excessively sweeping because it "purg[ed] all mailboxes of unsolicited material that is entirely suitable for adults" for a "marginal degree of protection."³²⁹ The Court said mail recipients may themselves request that the Post Office block unwanted materials but "the government itself can[not] shut off the flow" to protect people who might be offended.³³⁰

However, a town ordinance that prohibited picketing "before or about" any individual's residence was upheld in part because the "type of picketers banned . . . generally do not seek to disseminate a message to the general public, but to intrude upon the targeted resident, and to do so in an especially offensive way."³³¹

B. 'Substantial Privacy Interests' Must be at Stake

Outside the home, *Cohen* emphasized "we are often 'captives' . . . to objectionable speech,"³³² but shutting off discourse solely to protect another's sensibilities would "empower a majority to silence dissidents simply as a matter of personal predilections."³³³ Justice Harlan concluded the government should not be able to silence speech for the sake of protecting others unless "substantial privacy interests are being invaded in an intolerable manner."³³⁴ Harlan reasoned that when Paul Cohen entered the courthouse in his infamous "Fuck the Draft" jacket, onlookers could not claim to be a captive audience because they "could effectively

³²⁵ *Rowan v. U.S. Post Off. Dep't.*, 397 U.S. 728, 738 (1970).

³²⁶ *Id.* at 729.

³²⁷ *Consol. Edison Co. of N.Y. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. at 540-41 (striking down state regulation banning inserts in utility customers' monthly statements that discussed nuclear power).

³²⁸ *Id.*

³²⁹ *Bolger v. Youngs Drug Prod. Corp.*, 463 U.S. at 73 (noting that the "level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox").

³³⁰ *Id.*

³³¹ *Frisby v. Schultz*, 487 U.S. 474, 477, 486 (1988) (construing an ordinance narrowly to ban picketing outside individual homes, but not in residential areas altogether, where the issue was picketers outside the home of an abortion doctor). *But see Martin v. Struthers*, 319 U.S. 141 (1943) (validating ban on door-to-door solicitation on the basis that owner could put out sign saying they are unwilling to be disturbed).

³³² *Id.*

³³³ *Cohen v. California*, 403 U.S. at 21 (noting the "mere presumed presence of unwitting listeners or viewers does not serve automatically to justify curtailing all speech capable of giving offense").

³³⁴ *Id.*

avoid further bombardment of their sensibilities simply by averting their eyes.”³³⁵

Cohen placed the burden on unwilling listeners outside the home to turn away, unlike in *Pacifica*, where the Court was concerned about exposing children inside the home to offensive speech.³³⁶ Following *Cohen*, the Court overturned a ban on nudity in drive-in movies, which were visible from streets passing the theater.³³⁷ As in *Cohen*, the Court concluded that a passer-by could readily avert his or her eyes to avoid seeing on-screen nudity, thus the city could not justify banning movies with naked content.³³⁸

The Supreme Court similarly declined to extend the captive audience exception to the father of a servicemember killed in Iraq who sued the Westboro Baptist Church after church members picketed outside his son’s funeral.³³⁹ The Court found the father was not captive because church members had stayed on public property and well away from the service, that the plaintiff could only see the tops of the picketers’ signs, and picketers had lawfully exercised their right to “address matters of public import on public property, in a peaceful manner, in full compliance with the guidance of local officials.”³⁴⁰

C. A Captive Audience on the Bus?

Lehman holds that bus riders are captive to ads inside the bus but is unclear regarding offensive ads displayed on the bus exterior. Justice Brennan argued that even if bus riders were a captive audience, that could not justify the city’s refusal to rent *Lehman* advertising space on bus exteriors, where people inside the bus can’t see them.³⁴¹ He also countered that since the ads were textual and not broadcast, “an unwilling or unsuspecting rapid transit rider is [not] powerless to avoid messages he deems unsettling.”³⁴² But Douglas countered that in his view, “the right of the commuters to be free from forced instructions on their privacy precludes the city from transforming its vehicles of public transportation into forums for the dissemination of ideas upon this captive audience.”³⁴³

In *Children of the Rosary*, then-retired Justice White found that when read in context, Douglas’s “concern about forcing messages on a captive audience applies to observers on the street and commuters inside a bus.”³⁴⁴ White rejected an argument that *Lehman* should be construed narrowly to the bus interior.³⁴⁵

³³⁵ *Id.*

³³⁶ Strauss, *supra* note 306, at 96.

³³⁷ *Erznoznick v. City of Jacksonville*, 422 U.S. 205 (1975).

³³⁸ *Id.*

³³⁹ *Snyder v. Phelps*, 562 U.S. 443, 460 (2011).

³⁴⁰ *Id.* at 460.

³⁴¹ *Lehman v. City of Shaker Heights*, 418 U.S. at 304.

³⁴² *Lehman*, 418 U.S. at 320 (Brennan, J., dissenting).

³⁴³ *Id.* at 307 (Douglas, J., concurring).

³⁴⁴ *Child. of the Rosary v. City of Phoenix*, 154 F.3d at 977 (highlighting Douglas’ quote in *Packer Corp. v. Utah*, 285 U.S. 105 (1932), the court states that “visual message in streetcars is no different [from other forms of communication imposed on a captive audience], for “[a]dvertisements of this sort are constantly before the eyes of observers on the streets and in street cars to be seen without the exercise of choice or volition on their part”).

³⁴⁵ *Id.*

Similarly, the Ninth Circuit upheld King County Metro’s ban on false political ads that appeared on the outside of the bus, ruling that the agency “has an interest in preventing the dissemination of false information to a captive audience that it has created by providing public transit services.”³⁴⁶ The D.C. Circuit similarly rejected an argument that “bus exteriors are ‘unlike the interiors with their distinct captive audience problems addressed in [*Lehman*].’”³⁴⁷

However, the court in *Freethought* concluded that the plurality and concurring opinions in *Lehman* both recognized the “degree of captivity and the resultant intrusion of privacy is significantly greater for a passenger on a bus than for a person on the street.”³⁴⁸ The Third Circuit majority reasoned that “[a] rider may see the ad for a few moments as the bus approaches or while boarding, but is not subjected to it while riding the bus,” thus “we do not think the “solicitude for a (partially) captive audience can bear the weight of COLTS’s restrictions.”³⁴⁹

Douglas’s concurrence in *Lehman* quotes his dissent from a prior case involving a government initiative in Washington, D.C., during the 1950s to play radio music inside streetcars.³⁵⁰ Douglas feared radios would someday be used to spread propaganda, writing “[s]o far as the right of privacy is concerned the purpose makes no difference.”³⁵¹ His dissent in the prior case indicates he was concerned about the risk of constant exposure inside the transit vehicle.

As one scholar noted, “[p]erhaps the only clear conclusions one can draw is that captive audience doctrine is more likely to be used to restrict speech when the individual is viewed as ‘captive in the home’ than simply on the street, and individuals are more likely to be viewed as captive when the speech is spoken, rather than written.”³⁵² Or again, as Justice Harlan concluded in *Cohen*, when substantial privacy rights are invaded in an intolerable manner.³⁵³ But the lack of consistency on what this means has prompted calls for clearer guidance. Otherwise, “the danger is that it will be used to silence speech in circumstances that do not justify restricting the First Amendment.”³⁵⁴

V. The Supreme Court Must Revisit *Lehman*

Federal courts are divided primarily over three questions on bus advertising: (1) whether ads with religious or offensive messages can be banned in a limited public forum, particularly if commercial advertising is accepted; (2) whether accepting political ads indicates a designated public forum that means restrictions are

³⁴⁶ *Am. Freedom Def. Initiative v. King County*, 796 F.3d 1165, 1170 (9th Cir. 2015) (“[f]aces of Terrorism” ad for bus exterior falsely claimed the FBI had offered a \$25 million reward).

³⁴⁷ *Archdiocese of Wash. v. Wash. Metro. Area Transit Auth.*, 897 F.3d at 324.

³⁴⁸ *Ne. Pa. Freethought Soc’y v. Cnty. of Lackawanna Transit Sys.*, 938 F.3d at 440.

³⁴⁹ *Id.*

³⁵⁰ *See Lehman v. City of Shaker Heights*, 418 U.S. at 303 (quoting *Public Utilities Commission of D.C. v. Pollak*, 343 U.S. 451, 468 (1952) (Douglas, J., dissenting)).

³⁵¹ *Pollak* at 468 (Douglas, J., dissenting).

³⁵² Strauss, *supra* note 306, at 90.

³⁵³ *Cohen v. California*, 403 U.S. at 21.

³⁵⁴ Strauss, *supra* note 306, at 104.

impermissible unless narrowly tailored to serve a compelling government interest; and (3) whether a captive audience inside a transit vehicle justifies banning controversial ads on the exterior of the vehicle.

The inconsistency on the first question stems in part from disagreement as to what constitutes viewpoint discrimination. The Supreme Court could address this by establishing that religious perspectives and offensive speech are protected viewpoints in advertising on transit buses. All three issues could be addressed by clarifying that *Lehman* should only apply to political ads on the interior of the bus and not to ads that are visible on the exterior, which tracks with the language of the *Lehman* opinion.

Most importantly, the Supreme Court must clarify what *Lehman* is: a plurality opinion bound by Justice Douglas's concurrence that says ads containing political content may be banned *inside* the bus to protect captive riders. It says nothing more. *Lehman* has often been interpreted more broadly which contributes to the split among federal courts and encourages overly broad advertising restrictions that produce legal headaches for transit agencies and advertisers alike.

To understand how *Lehman* could be fixed to resolve the constitutional issues it raises, it is important to understand *how* it contributed to them. First, *Lehman* was confusing from the start because it flipped "the traditional priorities of the First Amendment" by allowing stronger protection for commercial speech than political speech in a limited public forum. This contributed to the divide between courts as to whether transit systems that accept political ads are a designated or limited public forum.

Secondly, *Lehman* is not aging well. The *Lehman* opinion was written within the context of content-based restrictions on political ads. The Supreme Court has since recognized that some content can also reflect a protected viewpoint, which is a much broader understanding of viewpoint discrimination and what constitutes protected speech.³⁵⁵ Some lower courts still tend to apply a *Lehman* lens when they should be looking through the prism of *Rosenberger*, *Matal*, and *Mansky*.

Finally, *Lehman* has been broadly construed to apply to both the interior and exterior of transit vehicles when the interior and exterior should be analyzed as two distinct forums.³⁵⁶ The Supreme Court should clarify that *Lehman* applies only to the interior of the bus, which would accord with the actual language of the opinion. It also would serve to cabin *Lehman* to an area of the bus that is not frequently the subject of litigation and where the captive audience's rights provide a sound constitutional basis for restricting offensive speech. This would encourage courts and transit agencies to focus less on increasingly difficult distinctions between political, commercial and religious speech, and more on the reasonableness of the justifications for restricting ads that appear on the exterior.

A. *Lehman Invites Viewpoint Discrimination*

Clarifying that *Lehman* does not govern advertising on the outside of a bus would help wipe away confusion about whether transit advertising restrictions are

³⁵⁵ See generally *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819.

³⁵⁶ *Lehman v. City of Shaker Heights*, 418 U.S. at 308.

content—or viewpoint—based.

This tension was reflected in the *Archdiocese* case. The D.C. Circuit concluded the Archdiocese’s Christmas ad did not represent a protected religious viewpoint in part because doing so would conflict with *Lehman*.³⁵⁷ But *Lehman* dealt with restrictions on ads with political content. Had the Supreme Court agreed to hear the Archdiocese’s appeal, it likely would have overturned the D.C. Circuit’s decision because it conflicts with *Rosenberger*, *Lamb’s Chapel*, *Good News Club*, and *Matal*.³⁵⁸ Perhaps if *Lehman* had not been a factor with exterior bus ads, the appellate court may have been more inclined to conclude as the Third Circuit did regarding the atheistic ad in *Freethought*, as in *Matal*, where the Supreme Court said viewpoint discrimination should be interpreted in a “broad sense.”³⁵⁹ The current makeup of the Court reinforces this author’s estimation that it would construe viewpoint discrimination broadly in a transit advertising case.³⁶⁰

The D.C. Circuit’s determination that a public transit bus is a narrower forum than a university or school facility also does not necessarily pan out. A public transit bus is arguably *more* visible and accessible to the general public than a school newspaper or school meeting room. While a bus or subway car is proprietary and carries people to places, that does not exempt the government from the requirements of viewpoint neutrality, and in fact, it counsels in favor of greater caution when restricting speech due to its visibility to the traveling public.

Some argue that blurring the distinction between content and viewpoint discrimination “make[s] it virtually impossible for government bodies to administer [limited] public forums.”³⁶¹ But as Justice Gorsuch and others have pointed out “the government may minimize religious speech incidentally by limiting a forum . . . to subjects where religious views are unlikely or rare.”³⁶²

B. Lehman’s Broad Restrictions Are No Longer Valid

Lehman’s condoning of broad categorical restrictions is no longer constitutionally valid without objective and workable standards. A policy prohibiting ads that are “political in nature” or that involve “matters of public debate” is too broad to be objective and workable. Interestingly, the City of Shaker Heights advertising policy at issue in *Lehman* likely would not survive a facial challenge today because it lacked objective and workable criteria for defining

³⁵⁷ *Archdiocese of Wash. v. Wash. Metro. Area Transit Auth.*, 897 F.3d 314, 319-20 (2018).

³⁵⁸ *Supra* discussion, Part III.D.3.

³⁵⁹ *Matal v. Tam*, 137 S. Ct. at 1763.

³⁶⁰ Three justices – Thomas, Gorsuch, and Alito -- have expressed concerns about transit advertising. A fourth, Justice Kavanaugh, reportedly referred to WMATA’s ban on religious ads as “pure discrimination” during oral arguments on the D.C. Circuit. See Robert Barnes & Ann E. Marimow, *Supreme Court Won’t Review Ruling That Metro Can Ban Religious Advertising*, WASH. POST (April 6, 2020), https://www.washingtonpost.com/politics/courts_law/supreme-court-wont-review-ruling-that-metro-can-ban-religious-advertising/2020/04/06/6bf65c86-780b-11ea-9bee-c5bf9d2e3288_story.html.

³⁶¹ Respondent’s Brief in Opposition at 19, *Archdiocese of Wash. v. Wash. Metro. Area Transit Auth.*, 140 S. Ct. 1198 (2020).

³⁶² *Archdioceses of Wash. v. Wash. Metro. Area Transit Auth.*, 140 S. Ct. 1198 (Gorsuch & Thomas, JJ., *statement on denial of cert.*).

“political.”³⁶³

Justice Brennan warned in *Lehman* that “the line between ideological and nonideological speech is impossible to draw with accuracy.”³⁶⁴ The line is even fuzzier between commercial and non-commercial speech. The former is not easily boiled down to “speech that proposes a commercial transaction,”³⁶⁵ particularly when brands are often selling an image and affiliating their products with social issues.³⁶⁶ Nike, for example, sponsored NFL quarterback Colin Kaepernick in an ad campaign to protest racial discrimination.³⁶⁷ After the police killing of George Floyd in Minneapolis, many companies ran ads calling for racial justice amidst widespread protests in support of the Black Lives Matter movement.³⁶⁸ They included the NBA (“The Truth is #BlackLivesMatter”), McDonalds (“One of Us” ad) and Coca-Cola (“The Change”).³⁶⁹ Would ads similar to these be banned under a commercial-only policy because they contain social or political messaging? The answer likely depends on who decides.³⁷⁰

This is what the appeals court found troublesome in *Freethought*,³⁷¹ and what the Supreme Court addressed in *Mansky*. Vague and overly broad policies open the door to viewpoint discrimination, even if incidentally. Officials who enforce vague restrictions have too much discretion in discerning between commercial and political speech, and in navigating the blurred distinctions between content and viewpoint. It doesn’t matter whether it’s the head of a transit agency or a private vendor hired to screen advertisements. Justice Roberts noted the risk is that one’s bias will shape his or her views as to what is “political.”³⁷² This is all the while dealing with savvy advocacy groups who will not hesitate to use censorship as a rallying cry to their cause.

As the ACLU put it, sometimes when the government acts to avoid offensive and hateful speech, it eliminates “speech that makes us think.”³⁷³ Transit authorities

³⁶³ *Lehman v. City of Shaker Heights*, 34 Ohio St. 2d 143, 150 (1973), *aff’d*, 418 U.S. 298 (1974).

³⁶⁴ *Lehman*, 418 U.S. at 319 (Brennan, J., dissenting).

³⁶⁵ See *Seattle Mideast Awareness Campaign v. King County*, 781 F.3d at 500.

³⁶⁶ Nikki Gilliland, *Five Brand Campaigns That Took a Stand on Social Issues*, ECONSULTANCY.COM, <https://econsultancy.com/five-brand-campaigns-that-took-a-stand-on-social-issues/> (last visited April 26, 2020) (discussing how social issues have dominated many recent ads, including Gillette’s “The Best Men Can Be” campaign, which focused on sexist behavior such as bullying and harassment, or Nike’s sponsorship of NFL quarterback Colin Kaepernick, who became a controversial symbol by kneeling during the National Anthem to protest racial discrimination).

³⁶⁷ Nick Woodford, *How Have Black Lives Matter Ads Been Received by US Audiences?*, UNRULY (July 14, 2020), <https://unruly.co/blog/article/2020/07/14/how-have-black-lives-matter-ads-been-received-by-us-audiences/>.

³⁶⁸ *Black Lives Matter Themed Ads See Success*, ACE METRIX (June 14, 2020), <https://www.acemetrix.com/insights/blog/black-lives-matter-themed-ads-see-success/>.

³⁶⁹ *Id.*

³⁷⁰ *Minn. Voters All. v. Mansky*, 138 S. Ct. at 1890.

³⁷¹ *Ne. Pa. Freethought Soc’y v. Cnty. of Lackawanna Transit Sys.*, 938 F.3d at 440.

³⁷² *Mansky*, 138 S. Ct. at 1896.

³⁷³ Press Release, American Civil Liberties Union, ACLU sues DC Metro over Rejection of First Amendment Ad (Aug. 9, 2017), <https://www.aclu.org/press-releases/aclu-sues-dc-metro-over-rejection-first-amendment-ad>.

and their advertising vendors may have the best intentions and still censor information at the core of what the First Amendment was designed to protect. The rejected news ads in Philadelphia buses are a case in point.³⁷⁴ These ads promoted journalism designed to inform the public about racial discrimination in mortgage lending — a topic of critical importance. The appellate court questioned how such news ads could fall into the prohibited “matters of debate” when SEPTA had accepted ads from financial institutions promoting their lending service, as well as ads from Facebook and the Democratic National Convention.³⁷⁵

Justice Brennan similarly asked in *Lehman* whether banning one form of speech and not the other was supported by the reasons offered by the government. In *Freethought*, the Third Circuit found the record did not support COLTS’s concerns that religious bus ads would affect transit service.³⁷⁶ The Ninth Circuit reached a similar conclusion in the Spokane Transit Authority case where union ads were rejected.³⁷⁷

These cases illustrate why it’s arguably more important to focus on whether advertising restrictions are reasonably drawn than whether an ad is political or commercial. The lines are often so close between political and commercial speech, and, as these cases show, even good intentions can end up on the wrong side of the First Amendment.

C. *Lehman’s Scope Can Be Limited Without Overturning It*

A ruling that narrows *Lehman’s* scope to the interior of transit vehicles limits some of its flaws to an area of the vehicle where protecting the captive audience is a sound justification. A ruling in this direction would fit the actual language of the plurality opinion.

The plurality in *Lehman* never directly addresses exterior bus ads. Blackmun wrote “a city transit system has discretion to develop and make reasonable choices . . . in its vehicles.”³⁷⁸ Brennan specifically challenged the City’s argument that “advertising in its transit cars is incompatible with the rapid transit system’s primary function of providing transportation.”³⁷⁹ Brennan’s dissent is where we learn Harry Lehman wanted to buy ads on both the interior and exterior, to which Brennan argues the captive audience should have no bearing on either.

The only other time the justices refer to exterior ads is when both Blackmun and Douglas quote Justice Louis Brandeis’ opinion in *Packer Corp. v. Utah* upholding a ban on cigarette advertisements on billboards and streetcars in the 1930s.³⁸⁰ But the passage they cite is not specific enough to indicate one way or the other.

³⁷⁴ *Ctr. for Investigative Reporting v. Se. Penn. Transp. Auth.*, 975 F.3d at 311.

³⁷⁵ *Id.*

³⁷⁶ *Freethought* at 434.

³⁷⁷ *Amalgamated Transit Union Loc. 1015 v. Spokane Transit Auth.*, 929 F.3d at 655.

³⁷⁸ *Lehman v. City of Shaker Heights*, 418 U.S. at 303.

³⁷⁹ *Id.* at 314 (Brennan, J., dissenting).

³⁸⁰ *Lehman*, 418 U.S. at 302 (quoting *Packer Corp. v. Utah*, 285 U.S. 105, 110 (1932)

(observing that other forms of advertising are ordinarily seen as a matter of choice on the part of the observer but not so with the billboard or streetcar placard.))

One may argue that transit riders are a captive audience when exposed to exterior advertisements as they board the bus, particularly with messages that are so insidious that they are felt even once out of sight. This is especially pertinent when ads disparage based on race, gender, sexual identity or gender. However, the Court has applied captive audience doctrine “only sparingly”³⁸¹ to shield listeners from protected speech such as when substantial privacy interests are at stake.³⁸² Generally, that means inside the home or where the unwilling viewer is unable to “avert their eyes.”³⁸³ On a bus or transit vehicle, that means inside the passenger area.

This is further supported by the Court’s decision in *Snyder* regarding the Westboro Baptist Church.³⁸⁴ If a grieving father is not captive to protestors outside his son’s funeral,³⁸⁵ it is difficult to fathom the Court seeing a boarding passenger or passerby as captive. People outside the bus are likely analogous to the observers of Paul Cohen’s jacket—they can avert their eyes.

D. The Court Should Adopt a Test to Measure the Communicative Value of Government Property

The Court may take the next opportunity to re-assess whether the exterior of a transit vehicle should be a designated or limited forum. The author proposes that this would also present an opportunity to adopt a test specifically for assessing the forum’s communicative value. This test would ask two questions: (1) whether the property sought by the speaker is regularly visible from, or an extension of, a traditional public forum such as a street, park, or civic plaza,³⁸⁶ and (2) whether closing or limiting an open forum would substantially burden the public’s right to receive information or ideas.³⁸⁷ A hit on either prong would indicate the government could not have reasonably intended to operate a limited public forum because it has high communicative value. This would be one factor to consider in determining the nature and purpose of the forum.

Assessing communicative value would be especially helpful in situations as in some of the transit advertising cases where the government switched from a designated to limited forum. Some argue that the government has an unchecked ability to impose stricter regulations “by doing nothing more than articulating a non-speech-related purpose for the area.”³⁸⁸ This potentially allows safe harbor to “open and shut a forum, willy-nilly” when the government is trying to keep out

³⁸¹ *Snyder v. Phelps*, 562 U.S. at 459.

³⁸² *Cohen v. California*, 403 U.S. at 21.

³⁸³ *Id.*

³⁸⁴ *Snyder*, 562 U.S. at 460.

³⁸⁵ *Id.* at 461.

³⁸⁶ *Cf. Archdiocese of Wash. v. Wash. Metro. Area Transit Auth.*, 897 F.3d at 324 (noting how the Archdiocese proposed a similar test, arguing WMATA’s buses should be designated public forums because they are visible from quintessential public forums such as streets or parks).

³⁸⁷ *See Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. at 757 (finding a First Amendment right to receive information and ideas).

³⁸⁸ *Int’l Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. at 695 (Kennedy, J., concurring).

undesired speakers or appease hecklers who want to cancel speech with which they disagree.³⁸⁹

Justice Kennedy once critiqued the Court's approach to public forum analysis as too deferential to the government's own "defined purpose for the property" rather than the "actual, physical characteristics and uses."³⁹⁰ By adopting a test for communicative value, the Court could better assess the "objective characteristics of government property and its customary use by the public."³⁹¹ A high communicative value would not necessarily require the government to open a forum to speech, but it would help determine whether an operative forum was intended to be opened to speech.

The second prong of the proposed test – whether closing the forum substantially burdens a right to receive information — could be measured by objective factors such as audience size, accessibility, and whether it provides a low-cost or convenient source of public information. If the forum is not readily visible or not regularly visited by the public, that would support finding that the forum is limited. Applying this analysis to bus exteriors arguably would indicate a designated forum because buses "call attention to themselves" and "unlike billboards, they move down central streets."³⁹² Furthermore, public transit systems are "one of the few government-owned spaces where many persons have extensive contact with other members of the public."³⁹³

Critics might argue that such a test would raise the bar for the government to regulate its own property. Justice Blackmun expressed concern in *Lehman* that limiting the government's ability to control its property would open public facilities "to every would-be pamphleteer and politician."³⁹⁴ It's important to note, however, that the government would retain authority to impose time, place, and manner restrictions.³⁹⁵ Furthermore, Blackmun later wrote that "[a]ccess to government property can be crucially important to those who wish to exercise their First Amendment rights" because it "often provides the only space suitable for large gatherings, and it is a less-costly means of communication so "essential to the poorly financed causes of little people."³⁹⁶

A test for communicative value could also help courts better assess any future disputes involving access to government websites and social media, which have

³⁸⁹ *Seattle Mideast Awareness Campaign v. King County*, 781 F.3d at 509 (Christen, J., dissenting); *see also Am. Freedom Def. Initiative v. WMATA*, 901 F.3d at 365-68 (noting that if WMATA's guidelines were adopted with the intent of closing its forum to certain ads solely to suppress ADFI's viewpoint, it would "hold the Guidelines unconstitutional as applied").

³⁹⁰ *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. at 695 (Kennedy, J., concurring).

³⁹¹ *Id.* at 693.

³⁹² *See Child. of the Rosary v. City of Phoenix*, 154 F.3d at 981 (Noonan, J., dissenting).

³⁹³ *See Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. at 695 (Kennedy, J., concurring in the judgment).

³⁹⁴ *Lehman v. City of Shaker Heights*, 418 U.S. at 304.

³⁹⁵ *Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n.*, 460 U.S. at 45.

³⁹⁶ *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. at 815 (Blackmun, J., dissenting) (citing *Martin v. Struthers*, 319 U.S. at 146).

become gathering places for the exchange of views and public information.³⁹⁷

VI. STRATEGIES FOR PUBLIC TRANSIT AGENCIES

None of this is to say transit authorities are unreasonable in trying to avoid becoming platforms for polarizing speech. Advertising provides a valuable revenue source for public transportation, which is a vital public service, and technology is creating more opportunities to capitalize on transit systems' potential as a display space.³⁹⁸ Yet, even under the more favorable rules of a limited public forum, the Supreme Court's decisions on viewpoint discrimination and offensive speech significantly limit the ability of transit authorities to restrict controversial ads.³⁹⁹

Perhaps the best strategy is the all-or-nothing choice: Either accept all advertising and the potential consequences, or stay out of the advertising business altogether and avoid offending customers and fighting organizations like AFDI in court.⁴⁰⁰ The latter option escapes the difficulty of navigating what some call the First Amendment "paradox."⁴⁰¹ This is the notion that while the First Amendment protects civic discussion and exchange of ideas, it has to let in speech that is sometimes destructive to reasonable discourse.⁴⁰² *Matal* is example: The Court's decision enabled Simon Tam to further his efforts to diminish the power of a racial slur but also opened the door to hate ads on city buses because it was used to invalidate bans on disparaging speech.⁴⁰³ This paradox and the First Amendment's equal protection for various points and counterpoints makes it's difficult to single out unacceptable political and religious speech, even in a limited public forum.

Transit agencies can also close their forums to everything but "government speech" such as public service ads and internal agency promotions.⁴⁰⁴ For transit authorities that want to continue selling advertising, however, there are additional tools besides censorship, including the use of counterspeech, that can be effective at tempering offensive ads while upholding the First Amendment tradition of "more speech, not less."⁴⁰⁵ They are discussed more in-depth below.

³⁹⁷ *Packingham v. North Carolina*, 137 S. Ct. 1730, 1737 (2017) (noting social media is the "modern public square" that allows users to gain access to information and communicate with one another about "any subject that might come to mind").

³⁹⁸ See Antelope Valley Transit Experiments with Digital Bus Ads, *METRO MAGAZINE* (May 26, 2015), <https://www.metro-magazine.com/10036920/antelope-valley-transit-experiments-with-digital-bus-ads> (noting some transit agencies are experimenting with digital ads that can be programmed to display various content).

³⁹⁹ *Am. Freedom Def. Initiative v. Suburban Mobility Auth.*, 978 F.3d at 501.

⁴⁰⁰ See *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. at 680 (1998).

⁴⁰¹ See Robert Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell*, 103 HARV. L. REV. 601 (1990).

⁴⁰² *Id.*

⁴⁰³ See *Am. Freedom Def. Initiative v. Suburban Mobility Auth.*, 978 F.3d at 486; see also *Am. Freedom Def. Initiative v. King County*, 904 F.3d at 1131.

⁴⁰⁴ See *Pleasant Grove City v. Summum*, 555 U.S. 460 (2008) (holding monuments on public property are a form of government expression, which is not subject to strict scrutiny); see also *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200 (2015).

⁴⁰⁵ *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 361 (2010).

A. Restrictions on Extremely Disruptive Ads

The government “need not wait until havoc is wreaked” when there are genuine threats of disruption to the forum.⁴⁰⁶ To that end, the Ninth Circuit upheld a “disruption clause” in King County Metro’s policy barring any ad “so objectionable” under “prevailing community standards” as to be reasonably foreseeable the ad “may result in harm to, disruption of, or interference with the transportation system.”⁴⁰⁷

In that case, Seattle television stations had learned of a planned bus ad urging an end to U.S. support for Israel.⁴⁰⁸ Angry callers flooded the agency’s phone lines,⁴⁰⁹ and someone left “[p]hotographs depicting dead or injured bus passengers and damaged buses,” along with threatening messages at the agency’s Customer Service Center.⁴¹⁰ AFDI and other groups proposed response ads, and as the uproar grew, King County ultimately canceled its decision after consulting with law enforcement and the U.S. Attorney’s Office about terrorism risks.⁴¹¹

The Ninth Circuit concluded King County’s disruption clause was reasonably drawn to provide safe and reliable transportation.⁴¹² The court noted the policy was similar to standards adopted by the Supreme Court in *Tinker v. Des Moines Independent Community School District*, a landmark case regarding disruptive speech in school settings.⁴¹³ Further, the court found that threats posed were “reasonably foreseeable” and not speculative, particularly in terms of potential vandalism and violence; reduced ridership; and diversion of resources from Metro’s daily operations.⁴¹⁴

The Ninth Circuit, however, subsequently ruled in another case involving the same policy that King County had unreasonably censored an AFDI ad entitled “Faces of Global Terrorism” over concerns the ad would provoke hate crimes and disrupt transit service.⁴¹⁵ King County had consulted an expert who described the “invidious” nature of the ad, which depicted “only persons of a certain race or ethnicity as terrorists,” and concluded it “may upset riders which, in turn, may cause a decrease in ridership.”⁴¹⁶ The court noted an “unusual opportunity to test Metro’s hypothesis”⁴¹⁷ since AFDI had essentially copied another version of the ad that had run briefly on behalf of the FBI and State Department and King County “did not experience any harm, disruption, or interference.”⁴¹⁸ Ultimately, the two Ninth

⁴⁰⁶ Cf. *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. at 810.

⁴⁰⁷ *Seattle Mideast Awareness Campaign v. King County*, 781 F.3d at 499.

⁴⁰⁸ *Id.* at 494.

⁴⁰⁹ *Id.*

⁴¹⁰ *Id.*

⁴¹¹ *Id.*

⁴¹² *Id.* at 500.

⁴¹³ *Id.* at 501 (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 514 (1969) (holding school officials may exclude speech that could reasonably lead to “substantial disruption of or material interference with school activities”).

⁴¹⁴ *Id.* at 501.

⁴¹⁵ *Id.* at 1128.

⁴¹⁶ *Id.* at 1134.

⁴¹⁷ *Am. Freedom Def. Initiative v. King County*, 904 F.3d at 1136.

⁴¹⁸ *Id.*

Circuit rulings give a sense of how concrete and severe a threat must be for restrictions to be upheld.

B. Avoid Broad Content Restrictions

Broad and vague categorical restrictions should be avoided, such as bans on “political” ads or ads relating to “matters of public debate.”⁴¹⁹ Agencies operating a limited public forum that want to keep out controversial topics should specifically identify them, such as abortion or terrorism.⁴²⁰ A better approach to avoiding political campaign speech would be to restrict ads that “promote or oppose” an election, candidate, or campaign.⁴²¹ Religion also can be tricky as a topic but restrictions on ads regarding the “existence of a supreme being” may fare better than barring ads on religion.

C. Counterspeech

Counterspeech can take the form of government-sponsored ads that confront privately sponsored speech that is contrary to community views. It can serve to expose offensive or discriminatory messages and allow agencies to share their values. As Justice Brandeis noted in *Whitney v. California*: “[the remedy to be applied is more speech, not enforced silence.”⁴²²

San Francisco’s Municipal Transportation Agency (Muni) used counterspeech when AFDI purchased bus ads that read: “In any war between civil man and the savage, support the civilized man. Defeat Jihad. Support Israel.”⁴²³ Muni publicly announced its counterspeech ads and that proceeds would be donated to the San Francisco Human Rights Commission.⁴²⁴ The ads that went along with AFDI’s ads included the following statement:

The city of Saint Francis has a long history of tolerance for all, and while we honor a person’s right to self-expression, there are times when we must say ‘enough.’ The recent ad has no value in facilitating constructive dialogue or advancing the cause of peace and justice. While this ad is protected under the First Amendment, our ad policy, and our contractual obligations, we condemn the use of any language that belittles, demeans or disparages others.⁴²⁵

Engy Abdelkader, a scholar who researched responses to AFDI’s campaign, observed that in cities where AFDI’s ads were allowed to run, the ads prompted an organized response from American Muslim communities and other faiths, which

⁴¹⁹ *Minn. Voters All. v. Mansky*, 138 S. Ct. at 1891.

⁴²⁰ *See Child. of the Rosary v. City of Phoenix*, 154 F.3d at 985 (Noonan, j., dissenting).

⁴²¹ *See Buckley v. Valeo*, 424 U.S. 1, 43-44 n.51 (1976) (reciting a list of words the Supreme Court has identified as express words of advocacy, such as “vote for,” “elect,” “defeat,” and “reject”).

⁴²² David Hudson, *Counterspeech Doctrine*, THE FIRST AMENDMENT ENCYCLOPEDIA, (updated December 2017), <https://www.mtsu.edu/first-amendment/article/940/counter-speech-doctrine>.

⁴²³ Abdelkader, *supra* note 21, at 80.

⁴²⁴ *Id.*

⁴²⁵ *Id.*

included a Twitter campaign with the hashtag “#MySubwayAd.”⁴²⁶ Organizations “spoke out against the advertisements but nonetheless supported the First Amendment right for the ads to run.”⁴²⁷ Had the ads not run, the community would not have been informed of “the values of those responsible for the display.”⁴²⁸ Abdelkader wrote:

[I]n Detroit, where the government successfully suppressed the hate advertisements, such a consensus did not materialize. In addition to depriving the community of a potential opportunity to learn how to respond appropriately to hateful messages, suppression of the objectionable speech also redirects attention from the bigotry to a controversy regarding prior restraints on speech, potentially transforming a hate speech perpetrator like Geller into a victim of censorship.⁴²⁹

As Abdelkader references, transit systems that ban controversial ads sometimes generate negative publicity by doing so. Abdelkader also noted that counterspeech may not be effective in places where bigotry and racism are tolerated.⁴³⁰

D. Disclaimers

New York City’s transit system adopted disclaimers with all “viewpoint ads,” or political, religious or moral advertisements controversial in nature, following its legal dispute with AFDI.⁴³¹ The disclaimers included the following language: “This is a paid advertisement sponsored by [Sponsor]. The display of this advertisement does not imply MTA’s endorsement of any views expressed.”⁴³² However, disclaimers can have limited effectiveness in distancing transit officials from offensive speech, as the Spokane Transit Authority noted in a presentation to its governing board.⁴³³

E. Congressional Action

Congress could intervene by adding conditions to federal transit grants. This may not be the ideal scenario for transit systems that want to retain control over their advertising programs. But Congress may be interested in how local governments regulate transit systems, “as the United States invests more than \$12 billion annually through the Federal Transit Administration to support public transit

⁴²⁶ *Id.* at 81.

⁴²⁷ *Id.*

⁴²⁸ *Id.* at 86.

⁴²⁹ *Id.*

⁴³⁰ *Id.* at 87.

⁴³¹ Margaret Hartmann, *Following ‘Savages’ Controversy, MTA Adds Disclaimer to Subway Ads*, NEW YORK MAGAZINE (Sept. 27, 2012), <https://nymag.com/intelligencer/2012/09/mta-adds-disclaimer-to-subway-ads.html>.

⁴³² *Id.*

⁴³³ See Spokane Transit Authority Performance Monitoring and Executive Relations Committee Meeting, Agenda Item 6-A (Sept. 6, 2017), <https://www.spokanetransit.com/files/content/PMER-Packet-Sept-2017.pdf> (noting controversial ads were still associated with STA despite disclaimers).

systems.”⁴³⁴ As the Congressional Research Service notes, “Congress could, within the confines of the First Amendment, choose to make federal funds that are appropriated to local public transit systems contingent on implementing policies in line with Congress’s views on religious speech.”⁴³⁵

CONCLUSION

Public transit systems provide a valuable advertising forum but face increasing litigation over their restrictive policies. Transit authorities often cite *Lehman* as justification for banning controversial ads to protect riders and revenue, but *Lehman* is outdated in light of more recent Supreme Court decisions on offensive speech and viewpoint discrimination. The Supreme Court must revisit *Lehman* and limit its scope to the interior of transit vehicles, as this would help bring consistency to transit advertising cases and encourage advertising policies that are viewpoint-neutral and reasonable. Public transit systems that continue to accept advertising should consider other strategies beyond censorship, such as counterspeech and disclaimers to emphasize their agency values. These strategies would allow transit agencies to strike back at offensive ads while contributing to the marketplace of ideas.

⁴³⁴ See Novack, *supra* note 7, at 4.

⁴³⁵ *Id.*