

RIDDEN WITH CONTROVERSY: APPLYING THE PUBLIC FORUM DOCTRINE TO PUBLIC TRANSIT ADVERTISING

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Public transportation is like a magnifying glass that shows you civilization up close.

—Chris Gethard†

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† Chris Gethard, *Learning About Humanity on Public Transportation*, VICE (June 23, 2013), <https://www.vice.com/en/article/5gw7nb/learning-about-humanity-on-public-transportation>.

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INTRODUCTION

Judgment Day is Coming in May.¹

Choose Adoption . . . It Works!²

I didn't serve my country to stab goats.

—Department of Defense: End 'Live Tissue Training' above an image of a soldier in fatigues.³

These three examples are among the controversial advertisements subjected to First Amendment litigation in the past decade. The reactions of the general public upon viewing controversial advertisements can often be intense.⁴ In 2010, the Washington Metro Area Transit Authority (WMATA) received “hundreds of angry phone calls and letters” complaining about advertisements that were critical of the Catholic Church’s position on condom usage.⁵ The situation eventually devolved to the point where WMATA security personnel “feared that certain ads would, due to world events, incite individuals to violence on the system.”⁶ While an often overlooked subject in free speech jurisprudence, it is clear that tensions can run high when buses and subway trains are involved.

¹ See *Ne. Pa. Freethought Soc’y v. Cnty. of Lackawanna Transit Sys.*, 327 F. Supp. 3d 767, 772 (M.D. Pa. 2018).

² See *id.* at 780.

³ PETA, *PETA Files Suit After D.C. Metro Outrageously Refuses to Run Ads, Violating the First Amendment* (Aug. 10, 2017), <https://www.peta.org/blog/peta-sues-transit-agency-for-rejecting-ads/> [<https://perma.cc/9F5T-9Y9R>].

⁴ See *Archdiocese of Wash. v. Wash. Metro. Area Transit Auth.*, 897 F.3d 314, 319 (D.C. Cir. 2018) (citing a survey where 58% of respondents opposed issue-oriented ads and 46% of respondents were extremely opposed to issue-oriented ads).

⁵ See *id.*

⁶ See *id.* (internal quotation omitted) (referencing a proposed advertisement featuring a drawing of the Prophet Muhammad, considered gravely offensive to many faithful Muslims).

This Note tackles the application of the First Amendment to public transit advertising. Under the current judicial framework, the First Amendment is filtered through the “public forum doctrine” when discussing the rights of citizens to utilize government property for expressive purposes.⁷ The Note will argue that public transit advertising constitutes a “designated public forum” in most (if not all) cases.⁸ That characterization would force any content-based restrictions to be narrowly tailored to serve a compelling government interest.⁹ The natural result is a significant expansion of access to public transit advertising by interested parties. If the U.S. Supreme Court were to grant *certiorari* to resolve the circuit split, as it declined to do in 2016,¹⁰ it should hold that most public transit systems are categorically a designated public forum.¹¹

Part I discusses the origins of, and the basic approach to, application of the public forum doctrine.¹² Part II discusses the majority approach of circuit courts, finding that public transit systems are a designated public forum.¹³ Part III discusses the minority approach of circuit courts, asserting that public transit systems are a non-public forum.¹⁴ Part IV discusses the government speech doctrine in the context of public transit advertising, including the extent to which it is applicable in that context.¹⁵ Part V discusses the issue of the “captive audience” and potential avenues to distinguish controversial public transit advertising from other types of offensive content.¹⁶ The Conclusion provides a clear overview of the four-part majority approach and cleanly integrates the major issues of government speech and captivity into the overall analysis.¹⁷

This Note uses the term “public transit” (commonly referred to as “mass transit”) to mean “the transportation of large numbers of people by means of buses, subway trains, etc., especially within urban areas” and “the system, vehicles, or facilities engaged in such transportation.”¹⁸ All public transit is presumed to be subject to the

⁷ See generally *Greer v. Spock*, 424 U.S. 828 (1976).

⁸ See generally *Planned Parenthood Ass’n/Chi. Area v. Chicago Transit Auth.*, 767 F.2d 1225 (7th Cir. 1985); *Air Line Pilots Ass’n v. Dep’t of Aviation of Chi.*, 45 F.3d 1144 (7th Cir. 1995); *Christ’s Bride Ministries, Inc. v. Se. Pa. Transp. Auth.*, 148 F.3d 242 (3d Cir. 1998).

⁹ See *Greer*, 424 U.S. at 847 (Powell, J., concurring).

¹⁰ See *American Freedom Def. Initiative v. King Cnty.*, 136 S. Ct. 1022, 1025 (2016) (Thomas, J., dissenting from denial of *certiorari*) (arguing that “transit authorities that open their ad spaces to political messages must provide compelling justifications for restricting ads, and must narrowly tailor any restrictions to those justifications”).

¹¹ See discussion *infra* Part II.

¹² See discussion *infra* Part I.

¹³ See discussion *infra* Part II.

¹⁴ See discussion *infra* Part III.

¹⁵ See discussion *infra* Part IV.

¹⁶ See discussion *infra* Part V.

¹⁷ See discussion *infra* Conclusion.

¹⁸ *Mass Transit*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/mass%20transit> [https://perma.cc/9CX2-FA5N] (last visited Dec. 13, 2021).

First Amendment, either via direct ownership by a government, or a close relationship creating “state action” on the part of a private actor.¹⁹

I. THE ORIGINS AND APPLICATION OF THE PUBLIC FORUM DOCTRINE

A. *Get Off Uncle Sam’s Lawn: The Background to the Public Forum Doctrine*

The First Amendment to the U.S. Constitution states that “Congress shall make no law . . . abridging the freedom of speech.”²⁰ While the text itself is clear, courts since the late 1960s have artificially constrained “the freedom of speech” within a judicial straitjacket known as the public forum doctrine.²¹ This doctrine is an analytical tool used to determine the “constitutionality of speech restrictions implemented on government property” and, thus, whether groups have the right to engage in expressive activities on such property.²² It is a complicated prism of judicial analysis that requires background knowledge of First Amendment jurisprudence.²³

Until the 1939 decision *Hague v. Committee for Industrial Organization*, the Supreme Court had expressed skepticism that citizens had any right whatsoever to the use of government property, likening the government to a private landowner.²⁴ In *Davis v. Massachusetts*, the Supreme Court adopted the logic of Justice Holmes when it affirmed the decision of the Massachusetts Supreme Court.²⁵ In Holmes’ view: “[f]or the legislature absolutely or conditionally to forbid public speaking in a highway or public park is no more an infringement of the rights of a member of the public than for the owner of a private house to forbid it in his house.”²⁶ In other words, Uncle Sam could tell private citizens to get off his lawn at his pleasure.²⁷ *Hague* was a seminal decision; for the first time, the Court recognized some right of citizens collectively to enjoy government property.²⁸ Justice Roberts succinctly enumerated this principle when, in dictum in *Hague*, he famously wrote:

Wherever the title of street and parks may rest, they have immemorially been held in trust for the use of the public and, time out

¹⁹ See *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 715 (1961).

²⁰ See U.S. CONST. amend. I.

²¹ See generally Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713 (1987).

²² See David L. Hudson, Jr., *Public Forum Doctrine*, THE FIRST AMENDMENT ENCYCLOPEDIA (Jan. 8, 2020), <https://www.mtsu.edu/first-amendment/article/824/public-forum-doctrine> [<https://perma.cc/FQM2-MG92>].

²³ See generally Post, *supra* note 21.

²⁴ 307 U.S. 496, 514 (1939).

²⁵ See generally 167 U.S. 43 (1897).

²⁶ See *Commonwealth v. Davis*, 39 N.E. 113, 113 (Mass. 1895).

²⁷ See *id.*

²⁸ See *Hague*, 307 U.S. at 514.

of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.²⁹

This idea was supported, in less enthusiastic language, by later decisions in *Jamison v. Texas*³⁰ and *Niemotko v. Maryland*.³¹ The revolution in public forum doctrine occurred during the turmoil of the 1960s Civil Rights movement, when the right of the public to peaceably assemble on government property became a major judicial flashpoint.³²

*Edwards v. South Carolina*³³ and *Cox v. Louisiana*³⁴ laid the groundwork for the public forum doctrine, with Harry Kalven Jr., a legal scholar, coining the term “public forum” shortly after the two decisions were laid down.³⁵ Kalven endorsed the idea that “in an open democratic society the streets, the parks, and other public places are an important facility for public discussion and political process. They are . . . a public forum that the citizen can commandeer. . . .”³⁶ This idea was gradually adopted by the Supreme Court, albeit in fits and starts.³⁷ Through the 1960s and early 1970s, the Court debated the extent to which the government could restrict expressive activity, especially when weighty public policy concerns were in the mix.³⁸ In 1976, however, the Supreme Court resolved this debate by finalizing the modern form of public forum doctrine in *Greer v. Spock*.³⁹

²⁹ *Id.* at 515.

³⁰ 318 U.S. 413, 416 (1943) (“But one who is rightfully on a street . . . carries with him there as elsewhere the constitutional right to express his views in an orderly fashion . . . extend[ing] to the communication of ideas by handbills and literature as well as by the spoken word.”).

³¹ 340 U.S. 268, 276 (1951) (Stating that the issue before the Court is “[h]ow to reconcile the interest in allowing free expression of ideas in public places with the protection of . . . the primary uses of streets and parks”).

³² *See generally* *Schneider v. State*, 308 U.S. 147 (1939); *Valentine v. Chrestensen*, 316 U.S. 52 (1942); *Talley v. California*, 362 U.S. 60 (1960); *see also* Harry Kalven, Jr., *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1, 2.

³³ 372 U.S. 229 (1963).

³⁴ 379 U.S. 559 (1964).

³⁵ *See* Kalven, *supra* note 32, at 10.

³⁶ *Id.* at 11–12.

³⁷ *See Adderley v. Florida*, 385 U.S. 39, 47 (1966) (“The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated.”); *Grayned v. City of Rockford*, 408 U.S. 104, 115 (1972) (“The right to use a public place for expressive activity may be restricted only for weighty reasons.”); *Police Dep’t of Chi. v. Mosley*, 408 U.S. 92, 96 (1972) (“Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say.”).

³⁸ *See Mosley*, 408 U.S. at 96.

³⁹ *See generally* 424 U.S. 828 (1976).

B. A Judicial Straitjacket: Modern Public Forum Doctrine

In *Greer*, the Court began to outline what has become a three-tiered system which would go on to form the doctrinal framework for public forum analysis.⁴⁰ The public forum doctrine divides government property into three distinct categories: (1) quintessential public forums (i.e., public streets and parks); (2) designated public forums (i.e., municipal theaters, school board meetings, and university meeting facilities); and (3) non-public forums (i.e., military bases).⁴¹ Quintessential public forums permit the most expressive activity, while non-public forums permit the least.⁴²

Quintessential public forums are places long devoted to assembly and debate, or “which have immemorially been held in trust” for expressive purposes.⁴³ In a quintessential public forum, the government may not ban all communicative activity because there is a First Amendment right of guaranteed access by members of the public.⁴⁴ Content-based regulations of speech must be “narrowly drawn” to serve a compelling state interest and any content-neutral time, place, and manner restrictions are permissible only if they are narrowly tailored with ample alternative channels for expressive activity.⁴⁵

Designated, sometimes called “limited,” public forums are places that the government has opened to the public to use for expressive purposes.⁴⁶ The government is not constitutionally required to open such places, and can close them to expressive activity at any time.⁴⁷ In practice, “a designated public forum may be opened to the public as a whole, therefore operating no differently than a traditional public forum.”⁴⁸ Proscribed use of the designated public forum may also be more limited in scope, open only to “‘certain groups’ or the ‘discussion of certain subjects.’”⁴⁹ Content-based regulations of speech must be narrowly drawn to meet a compelling state

⁴⁰ See generally *id.*

⁴¹ *Perry Educ. Ass’n v. Perry Loc. Educators’ Ass’n*, 460 U.S. 37, 45–46 (1983).

⁴² See *id.* at 37, 46.

⁴³ *Id.* at 45 (quoting *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939)). See also Lyrissa Barnett Lidsky, *Government Sponsored Social Media and Public Forum Doctrine Under the First Amendment: Perils and Pitfalls*, 19 PUB. LAW. 2, 4 (2011).

⁴⁴ See *Perry*, 460 U.S. at 45.

⁴⁵ See Post, *supra* note 21, at 1760 (citing *United States v. Grace*, 461 U.S. 171, 177 (1983)).

⁴⁶ See Lidsky, *supra* note 43, at 4; see also *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985) (citing *Perry*, 460 U.S. at 45–46 n.7).

⁴⁷ See *Greer v. Spock*, 424 U.S. 828, 836 (1976).

⁴⁸ See Lidsky, *supra* note 43, at 4.

⁴⁹ See *id.* (citing *Perry*, 460 U.S. at 46 n.7). But see generally *Widmar v. Vincent*, 454 U.S. 263 (1981) (striking down a school’s exclusion of religious groups from facilities open to all other student groups); *City of Madison Joint Sch. Dist. v. Wis. Pub. Emp’t Rels. Comm’n*, 429 U.S. 167 (1976) (allowing a non-union teacher to speak at a public meeting of the school board opposing a demand by the teacher’s union).

interest, and content-neutral regulations are permissible if assessed to be reasonable by a court.⁵⁰

Non-public forums are places that are neither traditional nor designated public forums.⁵¹ The government in a non-public forum is essentially in the position of a private property owner relative to the general public.⁵² Reasonable time, place, and manner restrictions are permissible, and subject matter regulation of speech is allowed so long as the regulation is “reasonable” and does not constitute an effort to suppress speech because government officials arbitrarily oppose the speaker’s viewpoint.⁵³

While this framework has been both criticized⁵⁴ and defended,⁵⁵ it remains the analytical tool federal courts use to determine which types of speech restrictions are permissible on government property.⁵⁶ As many scholars note, the doctrine has a tendency to distract courts from “the first amendment values at stake in a given case.”⁵⁷ Despite the knowledge that public forum doctrine is “crude, historically ossified, and seemingly unconnected to any thematic view of the free expression guarantee,” there has been no indication that courts are searching for an alternative framework.⁵⁸

This Note will not attempt to fight that particular battle. Rather, within the existing public forum framework, this Note argues that when public transit advertising campaigns do not categorically exclude certain types of advertisements, they create a “designated” public forum that prevents content-based discrimination absent a compelling public interest.⁵⁹ This approach should then be adopted to resolve the current circuit split on the issue should the Supreme Court receive a ripe appeal from a circuit court decision.⁶⁰

⁵⁰ See Post, *supra* note 21, at 1748.

⁵¹ See Lidsky, *supra* note 43, at 4.

⁵² See *Perry Educ. Ass’n v. Perry Loc. Educators’ Ass’n*, 460 U.S. 37, 46 (1983); *Greer*, 424 U.S. at 836.

⁵³ See Post, *supra* note 21, at 1751.

⁵⁴ See, e.g., TIMOTHY ZICK, *SPEECH OUT OF DOORS: PRESERVING FIRST AMENDMENT LIBERTIES IN PUBLIC PLACES* 55–56 (2009); Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 93 (1987); C. Thomas Dienes, *The Trashing of the Public Forum: Problems in First Amendment Analysis*, 55 GEO. WASH. L. REV. 109, 110 (1986); Daniel W. Park, *Government Speech and the Public Forum: A Clash Between Democratic and Egalitarian Values*, 45 GONZ. L. REV. 113, 114–15 (2009).

⁵⁵ See generally Lillian R. Bevier, *Rehabilitating Public Forum Doctrine: In Defense of Categories*, 1992 SUP. CT. REV. 79.

⁵⁶ See Park, *supra* note 54, at 114.

⁵⁷ See Daniel A. Farber & John E. Nowak, *The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication*, 70 VA. L. REV. 1219, 1224 (1984).

⁵⁸ See Calvin Massey, *Public Fora, Neutral Governments, and the Prism of Property*, 50 HASTINGS L.J. 309, 310 (1999).

⁵⁹ See discussion *infra* Conclusion.

⁶⁰ See discussion *infra* Conclusion.

II. THE MAJORITY CIRCUIT APPROACH

Under the majority circuit approach, followed by the Second, Sixth, Seventh, and D.C. Circuits, a public transit agency's acceptance of a wide array of political and issue-related advertisements is evidence "that the government intended to create a designated (rather than limited) public forum because 'political advertisements . . . [are] the hallmark of a public forum.'"⁶¹ Any restriction on advertising content must be supported by a compelling justification, and must be narrowly tailored to those justifications.⁶² What is "compelling" is difficult to define with precision. However, it seems to involve cases where the interest is more than an exercise of discretion or preference.⁶³ Cases from the Seventh and Third Circuits will be used to demonstrate the application of the majority circuit approach.⁶⁴

A. *Planned Parenthood Association/Chicago Area v. Chicago Transit Authority*⁶⁵

The *Planned Parenthood Association* case clearly shows the dangers of allowing potentially biased employees to serve as gatekeepers for the public's speech.⁶⁶ The Chicago Transit Authority (CTA) contracted with Winston Network, Inc. (Winston) to maintain advertising space on its properties throughout Chicago, including car cards on the interiors of its buses and subway trains.⁶⁷ Commercial advertisers paid the full rate, while non-profit organizations could advertise for a nominal fee that covered Winston's costs in posting the advertisements.⁶⁸ It was Winston's policy to accept all commercial advertising that did not raise questions of "vulgarity or legality," but Winston often sought the CTA's express approval for non-profit advertisements.⁶⁹

The Planned Parenthood Association of the Chicago Area (PPA) contacted Winston about placing an advertisement on CTA buses and trains.⁷⁰ Winston's

⁶¹ See *Am. Freedom Def. Initiative v. King Cnty.*, 136 S. Ct. 1022, 1024 (2016) (Thomas, J., dissenting from denial of *certiorari*) (quoting *Am. Freedom Def. Initiative v. Suburban Mobility Auth. for Reg'l Transp.*, 698 F.3d 885, 890 (6th Cir. 2012)).

⁶² See *id.* at 1025 (Thomas, J., dissenting from denial of *certiorari*).

⁶³ See generally Robert T. Miller, *What is a Compelling Government Interest?*, 21 J. MKTS. & MORALITY 71 (2018); *Roberts v. United States Jaycees*, 468 U.S. 609 (1984) (in the context of large impersonal organizations, promoting gender equality was a compelling governmental interest that justified restricting freedom of association); *Grutter v. Bollinger*, 539 U.S. 306 (2003) (achieving a diverse student body in a public law school justified the government's considering of race in admissions decisions).

⁶⁴ See, e.g., *Planned Parenthood Ass'n/Chi. Area v. Chicago Transit Auth.*, 767 F.2d 1225, 1232 (7th Cir. 1985); *Air Line Pilots Ass'n, Int'l v. Dep't of Aviation of Chi.*, 45 F.3d 1144, 1154–55 (7th Cir. 1995); *Gregoire v. Centennial Sch. Dist.*, 907 F.2d 1366, 1369 (3d Cir. 1990).

⁶⁵ See generally 592 F. Supp. 544 (N.D. Ill. 1984), *aff'd*, 767 F.2d 1225 (7th Cir. 1985).

⁶⁶ See generally 767 F.2d at 1225.

⁶⁷ See *id.* at 1227.

⁶⁸ See *id.*

⁶⁹ See *id.*

⁷⁰ See *id.*

liaison with the CTA forwarded the proposed advertisement—which “mentioned the availability of family-planning services”—to the CTA, where it was rejected.⁷¹ A revised advertisement—which “mentioned the availability of counseling about ‘prenatal care, abortion, or adoption’”—also was rejected.⁷² PPA then filed an action against CTA, alleging a violation of the First and Fourteenth Amendments.⁷³ In its answer, the CTA responded that it had rejected PPA’s proposed advertisements by applying its “long-standing, consistently-enforced policy . . . to reject controversial public issue advertisements.”⁷⁴

B. Family Planning—Too Controversial for the CTA?

The CTA claimed that its property was a non-public forum rather than a designated public forum, which would severely limit the PPA’s ability to bring a First Amendment claim.⁷⁵ A designated public forum is “government property that has not traditionally been regarded as a public forum” but that has been “intentionally opened up for that purpose” by a government actor.⁷⁶ “To create a designated public forum, the government must intentionally open up a location or communication channel for use by the public at large.”⁷⁷ The scope of the relevant forum is defined by “the access sought by the speaker.”⁷⁸ The government can claim that a limited public forum has been established—thus allowing substantial restrictions on speech—only if the government limits its property “to use by certain groups or dedicate[s] it solely to the discussion of certain subjects.”⁷⁹

In analyzing the CTA’s policy, both the district and appellate courts referred back to the three-tiered approach common in public forum jurisprudence.⁸⁰ Citing *Perry Education Association v. Perry Local Educators’ Association*,⁸¹ the Seventh Circuit noted that “[i]f public property is a public forum, either traditionally or by designation, the government bears a heavy burden in justifying restrictions on speech

⁷¹ *See id.*

⁷² *See id.*

⁷³ *See id.*

⁷⁴ *See id.* (internal quotation omitted).

⁷⁵ *Id.* at 1231–32.

⁷⁶ *See Christian Legal Soc’y of Univ. of Cal. v. Martinez*, 561 U.S. 661, 679 n.11 (2010) (internal quotation omitted) (quoting *City of Pleasant Grove v. Summum*, 555 U.S. 460, 469 (2009)).

⁷⁷ *See Bloedorn v. Grube*, 631 F.3d 1218, 1321 (11th Cir. 2011) (citing *Cornelius v. NAACP*, 473 U.S. 788, 802 (1984)).

⁷⁸ *See Cornelius*, 473 U.S. at 801.

⁷⁹ *See Christian Legal Soc’y*, 561 U.S. at 679 n.11 (internal quotations omitted) (quoting *Summum*, 555 U.S. at 470).

⁸⁰ *See Planned Parenthood Ass’n/Chi. Area*, 592 F. Supp. 544, 552–53 (N.D. Ill. 1984); *Planned Parenthood Ass’n*, 767 F.2d at 1231–32.

⁸¹ 460 U.S. 37 (1983).

therein.”⁸² Unfortunately for lower courts, *Perry* does not clearly establish guidelines for determining when government property has become a designated public forum.⁸³ Rather, courts have found it helpful to consider the uses to which the property has previously been put⁸⁴ as well as whether the proposed speech is inconsistent or incompatible with the primary use of the government facility.⁸⁵ The public forum analysis is therefore a fact-intensive inquiry.⁸⁶

First, the CTA’s actions must be analyzed to see whether it “intentionally opened up” its advertising to the public at large.⁸⁷ The Seventh Circuit noted that “if there was a policy of rejecting controversial public-issue ads, it was neither consistently enforced nor applied to any issue except abortion.”⁸⁸ Casting a skeptical eye on the policy asserted by the CTA in the action, the district court stated that the CTA’s policy was “really nonexistent and [was] contrived for this action.”⁸⁹ The policy “[had] never been written and no guidelines exist[ed] for its application” at the time of litigation.⁹⁰ As a result of the policy being “articulated differently by different CTA and Winston officers and employees,” the end result was a non-policy that effectively allowed “purely subjective decisions as to what advertising to accept or reject.”⁹¹ Other cases demonstrate that this particular kind of inconsistent content policy creates a designated public forum.⁹²

For further evidence of this proposition, the CTA had in the past accepted advertisements from other family planning organizations, including the Illinois Family Planning Council.⁹³ While this inconsistent application was not fatal to the CTA’s case, it did weigh against the CTA.⁹⁴ What was more damaging to the CTA was the consistent

⁸² See *Planned Parenthood Ass’n*, 767 F.2d at 1232.

⁸³ See *Perry*, 460 U.S. 45–46.

⁸⁴ See, e.g., *Widmar v. Vincent*, 454 U.S. 263, 263 (1981); *Jarman v. Williams*, 753 F.2d 76, 79 (8th Cir. 1985); *Int’l Soc’y for Krishna Consciousness, Inc. v. N.J. Sports & Exposition Auth.*, 691 F.2d 155, 158–60 (3d Cir. 1982).

⁸⁵ See, e.g., *Greer v. Spock*, 424 U.S. 828, 838 (1976); *Eastern Conn. Citizens Action Grp. v. Powers*, 723 F.2d 1050, 1053–54 (2d Cir. 1983); *United States Sw. Africa/Namibia Trade & Cultural Council v. United States*, 708 F.2d 760, 764 (D.C. Cir. 1983).

⁸⁶ See *Greer*, 424 U.S. at 828.

⁸⁷ See *City of Pleasant Grove v. Sumnum*, 555 U.S. 460, 469 (2009).

⁸⁸ See *Planned Parenthood Ass’n/Chi. Area v. Chicago Transit Auth.*, 767 F.2d 1225, 1228 (7th Cir. 1985).

⁸⁹ See *Planned Parenthood Ass’n/Chi. Area v. Chicago Transit Auth.*, 592 F. Supp. 544, 549 (N.D. Ill. 1984), *aff’d*, 767 F.2d 1225 (7th Cir. 1985).

⁹⁰ See *id.*

⁹¹ See *id.*

⁹² See, e.g., *New York Magazine v. Metro. Transit Auth.*, 136 F.3d 123, 130 (2d Cir. 1998) (“Allowing 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.”).

⁹³ See *Planned Parenthood Ass’n*, 592 F. Supp. at 550.

⁹⁴ See *Bannon v. Sch. Dist. of Palm Beach Cnty.*, 387 F.3d 1208, 1212–13 (11th Cir. 2004)

acceptance of the types of advertising it claimed to prohibit over a long period of time.⁹⁵ The CTA claimed it had a policy of declining the subset of “controversial” public issue advertising.⁹⁶ Despite this stated policy, the CTA entirely lacked written standards for its officers to ascertain which advertisements were sufficiently “controversial” to bar from publication.⁹⁷ The CTA had recorded only two prior rejections of advertisements, one related to the Vietnam War—later posted pursuant to a settlement agreement—and one calling for the impeachment of President Nixon, later posted pursuant to a court order.⁹⁸ The PPA advertisement was denied publication despite perhaps more controversial advertisements being approved by CTA on a regular basis.⁹⁹ This was extremely damaging to the CTA’s claim that it had created a non-public forum.¹⁰⁰

On appeal, the Seventh Circuit held that the CTA’s actions had created a designated public forum.¹⁰¹ This was the correct outcome because of the lack of consistently enforced written policy guidelines and the acceptance of at least some political advertising.¹⁰² The CTA maintained no written policy on advertisements, the only restriction being the informal “directive to Winston to refuse vulgar, immoral, or disreputable advertising.”¹⁰³ As a result of the *laissez-faire* policy of granting space to virtually everyone willing to pay, the CTA opened the forum to a huge range of “commercial, public-service, public-issue, and political ads.”¹⁰⁴ Thus, the advertisements on the CTA’s buses and subway cars became a channel of communication for the general public and a designated public forum.¹⁰⁵

The CTA’s counter-argument relied heavily on the Supreme Court’s decision in *Lehman v. Shaker Heights*.¹⁰⁶ The Court distinguished *Lehman* in noting that Shaker Heights had a consistently enforced written policy of rejecting all political

(quoting *Hazelwood v. Kuhlmeier*, 484 U.S. 260, 267 (1988) (“The government does not create a public forum by inaction or by permitting limited discourse, but *only by intentionally opening a nontraditional forum for public discourse.*”)).

⁹⁵ See *Planned Parenthood Ass’n*, 592 F. Supp. at 549–51.

⁹⁶ See *Planned Parenthood Ass’n/Chi. Area v. Chicago Transit Auth.*, 767 F.2d 1225, 1229 (7th Cir. 1985).

⁹⁷ See *id.* at 1229–30.

⁹⁸ See *Impeach Nixon Comm. v. Buck*, 498 F.2d 37, 37–38 (7th Cir. 1974); *Planned Parenthood Ass’n*, 767 F.2d at 1230.

⁹⁹ See *Planned Parenthood Ass’n*, 767 F.2d at 1230 (for example, an ad showing bombs falling on a child had been accepted).

¹⁰⁰ See also *New York Magazine v. Metro. Transit Auth.*, 136 F.3d 123, 129–30 (2d Cir. 1998).

¹⁰¹ *Planned Parenthood Ass’n*, 767 F.2d at 1232.

¹⁰² See *id.* at 1230; *New York Magazine*, 136 F.3d at 129–30.

¹⁰³ See *Planned Parenthood Ass’n*, 767 F.2d at 1232.

¹⁰⁴ See *id.*

¹⁰⁵ See *id.*; see also *Coalition for Abortion Rts. & Against Sterilization Abuse v. Niagara Frontier Transp. Auth.*, 584 F. Supp. 985, 989 (W.D.N.Y. 1984).

¹⁰⁶ See generally 418 U.S. 298 (1974).

and public issue advertising.¹⁰⁷ Additionally, in the twenty-six years prior to the case, Shaker Heights had not permitted any political or public issue advertising on its vehicles.¹⁰⁸ As such, the Seventh Circuit noted that the *Lehman* decision “stands for the proposition that the interior of a transit system’s cars and buses is not a traditional public forum” but not that “such space may never become a public forum.”¹⁰⁹ Fortunately, the court in this case managed to avoid a pitfall that many others had fallen into.¹¹⁰

Another important consideration is whether the proposed speech is inconsistent or incompatible with the primary use of the government facility.¹¹¹ Advertising was not incompatible with the primary use(s) of the CTA’s facilities because the CTA “already permits its facilities to be used for public-issue and political advertising.”¹¹² In an era of declining local government revenue, most public agencies have an “eagerness for additional revenue” that creates a symbiotic relationship with individuals eager to provide money in exchange for the display of advertising.¹¹³ While the CTA was unwilling to “accept PPA’s proposed ad even at the higher [commercial] rate,” they obviously stood to profit handsomely for accepting most types of advertisements due to the low costs involved in posting ads.¹¹⁴ Even when running political advertisements, other transit systems had experienced only “minor . . . graffiti on some signs,” which had a minimal impact on advertising-related revenue.¹¹⁵ Therefore, operating public transit advertising as a designated public forum would allow more speech without adversely impacting its core purpose.¹¹⁶

As the “CTA [did] not attempt to justify its exclusion of PPA’s message as a narrowly tailored, content-neutral time, place, or manner restriction,” the Seventh Circuit held that the CTA’s refusal to run PPA’s advertisements was a violation of the First Amendment.¹¹⁷ The CTA’s counter-arguments were unconvincing, and did not appear to outweigh the CTA’s policy of deliberately opening advertising on its

¹⁰⁷ See *id.* at 301.

¹⁰⁸ See *id.* at 300–01.

¹⁰⁹ See *Planned Parenthood Ass’n*, 767 F.2d at 1233; see also *Gay Activists All. of Wash., D.C., Inc. v. Wash. Metro. Area Transit Auth.*, No. 78-2217, 1979 U.S. Dist. LEXIS 15415, at *11–13 (D.C. Cir. 1979) (“Thus, although the interiors of Metro Buses are not a traditional public forum . . . a city or regional transit system nevertheless may create a public forum for the advertising [of] asocial or political speech by the acceptance of other advertisements dealing with social or political issues.”).

¹¹⁰ See *Ridley v. Mass. Bay Transp. Auth.*, 390 F.3d 65, 76–77 (1st Cir. 2004).

¹¹¹ See *Greer v. Spock*, 424 U.S. 828, 843 (1976) (Powell, J., concurring).

¹¹² *Planned Parenthood Ass’n*, 767 F.2d at 1232.

¹¹³ See *CBS Outdoor, Inc. v. N.J. Transit Corp.*, 2007 U.S. Dist. LEXIS 64155, at *18 (D. N.J. 2007).

¹¹⁴ See *Planned Parenthood Ass’n*, 767 F.2d at 1227 n.2.

¹¹⁵ See *Planned Parenthood Ass’n/Chi. Area v. Chicago Transit Auth.*, 592 F. Supp. 544, 551 (N.D. Ill. 1984).

¹¹⁶ See discussion *supra* Section II.B.

¹¹⁷ See *Planned Parenthood Ass’n*, 767 F.2d at 1233.

public transit system to the general public for expressive purposes.¹¹⁸ The circuit court’s analysis in this particular case is a strong example of the majority approach, and lays out the basic foundation for what other courts should ideally follow.¹¹⁹

C. *Air Line Pilots Association, International v. Department of Aviation of the City of Chicago*¹²⁰

The Air Line Pilots Association (ALPA) was the collective bargaining representative for the pilots of Air Wisconsin, Inc. (Air Wisconsin).¹²¹ Air Wisconsin had its fleet sold off in 1993, with United Airlines (UA) retaining rights to the name.¹²² In its representative capacity, ALPA sought to place an advertisement honoring the Air Wisconsin pilots in a diorama display case at Chicago O’Hare Airport (O’Hare), a municipal airport wholly owned by the City of Chicago (the City).¹²³ The advertisement was highly critical of UA, depicting the dismantling of an Air Wisconsin plane beneath a headline reading: “It wasn’t broke until they fixed it.”¹²⁴

After designing the advertisement, ALPA entered into a contract—worth \$1,440 for a two month display period—for a diorama of unknown content with Transportation Media Incorporated (TMI).¹²⁵ TMI controlled all advertising in O’Hare on behalf of the City.¹²⁶ The City policy on advertising was that “[u]se of all advertising material is subject to approval by office of Commissioner of Aviation, City of Chicago, and [is] subject to its orders of removal if deemed unaesthetic or objectionable for any reason whatsoever.”¹²⁷ After TMI had signed a contract with ALPA and the installation was set to begin, a representative of the City ordered TMI not to

¹¹⁸ *See id.*

¹¹⁹ *See* discussion *supra* Section II.B.

¹²⁰ *See* *Air Line Pilots Ass’n v. Dep’t of Aviation of Chi.*, No. 93 C 6696, 1994 U.S. Dist. LEXIS 512 (N.D. Ill. January 18, 1994), *vacated and remanded*, 45 F.3d 1144 (7th Cir. 1995).

¹²¹ *See* *Air Line Pilots Ass’n*, 45 F.3d at 1147.

¹²² *See id.*

¹²³ *See id.*; CHICAGO DEPARTMENT OF AVIATION, *O’Hare History*, <https://www.flychicago.com/business/CDA/Pages/OHare.aspx> [<https://perma.cc/S9HP-SK8C>] (last visited Dec. 13, 2021).

¹²⁴ *See* *Air Line Pilots Ass’n*, 45 F.3d at 1147. The full text of the advertisement stated:

Air Wisconsin employees built their company into one of the largest regional airlines in the nation, but UAL Corp. broke it into pieces and sold parts of it to others for its own benefit. Hundreds of Air Wisconsin employees lost their jobs. This advertisement is dedicated to the workers at Air Wisconsin and other airlines who have lost the ability to support their families because of corporate greed and indifference.

Id.

¹²⁵ *See id.* at 1148.

¹²⁶ *See id.*

¹²⁷ *See id.*

install it.¹²⁸ ALPA alleged this action was the result of pressure from UA, which paid the City approximately \$4,000,000 a year for advertising.¹²⁹ The diorama was eventually displayed, but was removed after a few hours, implied to be as a result of City pressure.¹³⁰ While ALPA made numerous attempts to have the diorama displayed—including changing the headline to “Dismantled, but not forgotten”—ALPA was unable to convince TMI to restore the diorama.¹³¹ ALPA then brought suit against the Department of Aviation and TMI, alleging a violation of its First and Fourteenth Amendment rights.¹³²

D. Dismantled: A Memorial Advertisement Too Offensive for the Department of Aviation?

The error of the district court in this case emphasizes the need for a thorough, fact-specific inquiry whenever the issue of whether a space is a public forum is raised.¹³³ On first impression, a district court cannot rely on sweeping categorizations in precedent to dismiss claims out of hand.¹³⁴ The district court erroneously dismissed ALPA’s claims, relying on the Supreme Court’s holding in *International Society for Krishna Consciousness v. Lee*.¹³⁵ The district court interpreted *Krishna* as holding that airport terminals were categorically not public forums.¹³⁶ The fact that a municipal entity allowed largely unregulated advertising displays and dioramas—as well as a host of other commercial enterprises—in the interior corridors of the airport was considered to be irrelevant.¹³⁷ Thus, the district court ruled O’Hare was a non-public forum and dismissed ALPA’s claims.¹³⁸

On appeal, the Seventh Circuit reversed the district court.¹³⁹ It distinguished the *Krishna* holding by noting the difference between “general access” and “limited

¹²⁸ See *id.*

¹²⁹ See *id.*

¹³⁰ See *id.*

¹³¹ See *id.*

¹³² See *id.*

¹³³ See *Air Line Pilots Ass’n v. Dep’t of Aviation of Chi.*, No. 93 C 6696, 1994 U.S. Dist. LEXIS 512, at *4–5 (N.D. Ill. Jan. 18, 1994).

¹³⁴ *Air Line Pilots Ass’n*, 45 F.3d at 1160. *But see Air Line Pilots Ass’n*, 1994 U.S. Dist. LEXIS 512, at *4–5.

¹³⁵ See *Air Line Pilots Ass’n*, 1994 U.S. Dist. LEXIS 512, at *5; *Int’l Soc’y for Krishna Consciousness v. Lee*, 505 U.S. 672, 672, 676–77 (1992) (explaining that the Hare Krishnas sought a declaratory judgment that a regulation limiting distribution of literature and solicitation at an airport to areas outside the terminals was a violation of the First Amendment. The Supreme Court held that airports were not traditional public forums because their traditional purpose was not to promote the free exchange of ideas but to facilitate air travel and, therefore, the regulation needed only to be reasonable.).

¹³⁶ See *Air Line Pilots Ass’n*, 1994 U.S. Dist. LEXIS 512, at *6–7.

¹³⁷ See *id.* at *6.

¹³⁸ See *id.* at *7–8.

¹³⁹ See *Air Line Pilots Ass’n*, 45 F.3d at 1160.

access.”¹⁴⁰ Especially important was the very thing the district court had glossed over: the forum at issue.¹⁴¹ The relevant expressive forum was not using the concourse for the purpose of activities like solicitation and the distribution of literature as was the case in *Krishna*.¹⁴² Rather, the relevant expressive forum was “[using] one of the [terminal] display cases to communicate [a] message.”¹⁴³ The district court’s error was in defining the desired access too broadly.¹⁴⁴ It is critical for courts to closely scrutinize the plaintiff’s claims because “‘forum should be defined in terms of the access sought by the speaker.’”¹⁴⁵ Even if a piece of government property considered as a whole is not a public forum, “channels for public communication—or alternative fora—may well exist within [that] . . . piece of government property.”¹⁴⁶ Hence, the error of the district court began with this overbroad categorization of the public forum at issue.¹⁴⁷

With the forum at issue clarified, it became immediately clear why the Seventh Circuit found that TMI’s practices could have given rise to a designated public forum.¹⁴⁸ While a public forum does not arise due to inaction, the supervising agency’s policy must be of more substance than “a strategy adopted or relied upon for the purposes of litigation.”¹⁴⁹ While the City claimed there was a policy of excluding “political” advertisements, the City presented absolutely no evidence that such a policy was ever enforced at O’Hare.¹⁵⁰ Further, it appeared that “TMI [was willing to] . . . accept the ads of all who were willing to pay the fee.”¹⁵¹ While the City argued this *ipso facto* created a non-public forum, the Seventh Circuit plainly noted that in “allow[ing] all advertisers willing to pay its fee the indiscriminate use of its property, [the City] cannot now argue that it maintains a policy of limited access.”¹⁵²

The City countered that the charging of a fee meant that “access to the display cases [was] not unlimited” and, thus, a non-public forum existed.¹⁵³ This argument was erroneous. Charging a fee does not impact the analysis of whether the government has designated a public forum at all.¹⁵⁴ So long as a party is willing to “tender[] the

¹⁴⁰ *See id.* at 1151.

¹⁴¹ *See id.* at 1151–52.

¹⁴² *See id.* at 1151.

¹⁴³ *See id.* at 1151–52.

¹⁴⁴ *See id.* at 1151.

¹⁴⁵ *See id.* at 1152 (quoting *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 801 (1985)).

¹⁴⁶ *See id.*

¹⁴⁷ *See id.*

¹⁴⁸ *See id.* at 1151. Instead of holding that O’Hare’s advertising was a designated public forum, the appeals court remanded the case back to the district court for a final determination due to the insufficiency of the record. *See id.*

¹⁴⁹ *See id.* at 1154.

¹⁵⁰ *See id.* at 1155.

¹⁵¹ *See id.*

¹⁵² *See id.*

¹⁵³ *See id.*

¹⁵⁴ *See id.*

same fee required of all other advertisers,” it does not matter that a fee is in place in order to generate revenue.¹⁵⁵ This point raises an important consideration, as most public transit systems charge a fee to advertisers, even if it is nominal (i.e., covers the cost of posting the advertisement sans profit).¹⁵⁶

It is critical that courts look closely at the facts of the case to determine the relevant forum at issue and the type of access for expressive activity demanded by the public.¹⁵⁷ The comparison between the district court and Seventh Circuit opinions demonstrates the peril of discounting out of hand a plaintiff’s argument that a public forum exists.¹⁵⁸ Even if there appears to be Supreme Court precedent on point, a full analysis must always be conducted.¹⁵⁹

*E. Christ’s Bride Ministries, Inc. v. Southeastern Pennsylvania Transportation Authority*¹⁶⁰

The facts of this Third Circuit case push the boundaries of what might be considered controversial but benign advertising. However, the First Amendment does not discriminate.¹⁶¹ The Southeastern Pennsylvania Transportation Authority (SEPTA) contracted with Transportation Display’s Inc. (TDI) for the construction and sale of advertising space in its stations, and in and on its vehicles.¹⁶² Christ’s Bride Ministries (CBM) sought to display a factually untrue advertisement¹⁶³ stating that “Women Who Choose Abortion Suffer More & Deadlier Breast Cancer.”¹⁶⁴ TDI

¹⁵⁵ *See id.*

¹⁵⁶ *See, e.g.,* Planned Parenthood Ass’n/Chi. Area v. Chicago Transit Auth., 767 F.2d 1225, 1227 (7th Cir. 1985).

¹⁵⁷ *See, e.g.,* Int’l Soc’y for Krishna Consciousness, Inc. v. N.J. Sports & Exposition Auth., 691 F.2d 155, 158–60 (3d Cir. 1982) (racetrack was not a public forum); Stewart v. D.C. Armory Bd., 863 F.2d 1013, 1014 (D.C. Cir. 1988) (stadium could be a public forum but remanded for further factual investigation); United States v. Grace, 461 U.S. 171, 172 (D.C. Cir. 1983) (sidewalk outside the United States Supreme Court Building was a public forum); Ysleta Fed’n of Tchrs. v. Ysleta Ind. Sch. Dist., 720 F.2d 1429, 1429 (5th Cir. 1983) (an internal school mail system became a public forum once the school “opened [the] mail system to all employee organizations without distinction”).

¹⁵⁸ *See Air Line Pilots Ass’n*, 45 F.3d at 1152.

¹⁵⁹ *See discussion supra* Section II.D.

¹⁶⁰ 937 F. Supp. 425 (E.D. Pa. 1996), *rev’d*, 148 F.3d 242 (3d Cir. 1998).

¹⁶¹ *See generally* Cohen v. California, 403 U.S. 15, 15 (1971) (overturning the conviction of a man who wore a jacket emblazoned with “Fuck the Draft” in a courthouse); Ronald J. Krotoszynski, Jr., Cohen v. California: “Inconsequential” Cases and Larger Principles, 74 TEX. L. REV. 1251 (1995).

¹⁶² *See Christ’s Bride Ministries*, 148 F.3d at 244.

¹⁶³ *See* PLANNED PARENTHOOD, MYTHS ABOUT ABORTION AND BREAST CANCER (2013), https://www.plannedparenthood.org/uploads/filer_public/af/1a/af1ae95f-de81-43dd-91a3-470043b06dce/myths_about_abortion_and_breast_cancer.pdf [<https://perma.cc/9C4W-739J>]; *Christ’s Bride Ministries*, 148 F.3d at 245.

¹⁶⁴ *See Christ’s Bride Ministries*, 148 F.3d at 245 (the advertisement was graphically

initially accepted the advertisement, to be run for one year at a cost of \$3,042.60 per month.¹⁶⁵ The terms and conditions of the contract between CBM and TDI included a clause that “if the Transportation Facility concerned should deem such advertising objectionable for any reason, TDI shall have the right to terminate the contract and discontinue the service without notice.”¹⁶⁶ After the advertisements were posted, SEPTA received numerous complaints, “including ‘rider protest’ and ‘criticism’ by ‘women’s health organizations’ and ‘local government officials.’”¹⁶⁷ Under pressure from then-Assistant Secretary of Health Dr. Phillip Lee, SEPTA removed the advertisements.¹⁶⁸ CBM then brought suit, alleging a violation of its First and Fourteenth Amendment rights.¹⁶⁹

F. Fire and Brimstone: Taking It Too Far for SEPTA?

The district court—in a manner similar to the district court in *Air Line Pilots Association*—dismissed CBM’s claims without a proper forum analysis.¹⁷⁰ An analysis must begin with a determination of “the nature of the property and the extent of its use for speech.”¹⁷¹ The forum here was relatively broad, but described by the district court as “‘the stations in a public transit system,’ a ‘public transportation system,’ and ‘SEPTA’s subway and rail stations and their advertising space.’”¹⁷² While the space at issue was not a “traditional public forum,” that did not preclude classification as a designated public forum.¹⁷³ The key factor is intent.¹⁷⁴ SEPTA and TDI primarily intended the advertisements to be an additional source of revenue (comprising about 0.5% of SETPA’s budget).¹⁷⁵ A secondary goal was to promote “awareness” of social issues and “provid[e] a catalyst for change” by subsidizing the cost

designed with bold white lettering on a background of black and bright red, with the word “deadlier” written in red).

¹⁶⁵ *See id.*

¹⁶⁶ *See id.*

¹⁶⁷ *See id.*

¹⁶⁸ *See id.* at 245–46.

¹⁶⁹ *Id.* at 246.

¹⁷⁰ *Compare id.* at 244, with *Air Line Pilots Ass’n v. Dep’t of Aviation of Chi.*, 45 F.3d 1144, 1160 (7th Cir. 1995).

¹⁷¹ *Christ’s Bride Ministries*, 45 F.3d at 247–48.

¹⁷² *See id.* at 248; *cf. Air Line Pilots Ass’n*, 45 F.3d at 1151 (holding that display diorama in airport, not entire concourse, constituted the relevant forum); *Lebron v. Nat’l R.R. Passenger Corp.*, 69 F.3d 650, 655 (holding that one billboard was the relevant forum, not the entirety of Penn Station); *New York Magazine v. Metro. Transp. Auth.*, 136 F.3d 123, 123, 130 (2d Cir. 1998) (holding that because MTA allowed both commercial and political speech, the outside walls of MTA buses constituted a designated public forum).

¹⁷³ *See Christ’s Bride Ministries*, 148 F.3d at 248.

¹⁷⁴ *See id.*

¹⁷⁵ *See id.* at 249.

of advertisements addressing issues of public concern.¹⁷⁶ The advertising space generated a profit through expressive activity, suggesting “that the government dedicated the space to expression in the form of paid advertisements.”¹⁷⁷

On appeal, the Third Circuit dismissed SEPTA’s argument that because it retained the right in its sole discretion to reject or to remove any advertisement that it deemed objectionable, the forum was non-public.¹⁷⁸ The Third Circuit emphasized that courts should not rely on “the authority’s own statement of its intent” because such statements are frequently at odds with the factual nature of the inquiry.¹⁷⁹ Additionally, reserving a right to reject advertisements “for any reason at all” does not signify that no designated public forum has been created.¹⁸⁰ While arguably arbitrary, if the category of a designated public forum is to mean anything at all, “standards for inclusion and exclusion” in a limited public forum “must be unambiguous and definite. . . .”¹⁸¹

SEPTA did have some restrictions in place, notably “alcohol and tobacco advertising beyond a specified limit and ads deemed libelous or obscene.”¹⁸² However, restrictions in a designated public forum are permissible so long as they are narrowly tailored to serve a compelling government interest.¹⁸³ Generally, courts will gloss over boilerplate restrictions, considering them as a class to be “reasonable” by default.¹⁸⁴ Despite the “reasonable” restrictions in place, the viewpoint-neutral regulations did not suddenly give rise to a non-public forum.¹⁸⁵ Courts must cast a skeptical eye at the transit agency’s content policy and the types of content it permits in order to be able to accurately determine the type of forum created.¹⁸⁶

¹⁷⁶ *See id.*

¹⁷⁷ *See id.* at 250; *see also* *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 555 (1975) (holding municipal theaters were “public forums designed for and dedicated to expressive activities”).

¹⁷⁸ *See id.* at 251.

¹⁷⁹ *See id.*; *see also* *Air Line Pilots Ass’n v. Dep’t of Aviation of Chi.*, 45 F.3d 1144, 1153–54 (7th Cir. 1995); *Stewart v. D.C. Armory Bd.*, 863 F.2d 1013, 1016–17 (D.C. Cir. 1988).

¹⁸⁰ *See Christ’s Bride Ministries*, 148 F.3d at 251; *see also* *Gregoire v. Centennial Sch. Dist.*, 907 F.2d 1366, 1374 (3d Cir. 1990) (“[I]ntent, as evidenced by a government’s statements, is a factor to be considered . . . [but] the forum inquiry does not end with the government’s statement of intent.”).

¹⁸¹ *See Christ’s Bride Ministries*, 148 F.3d at 251 (internal quotations omitted) (quoting *Gregoire*, 907 F.2d at 1375); *see also* *Denver Area Educ. Telecomms. Consortium v. Fed. Comm’n Comm’n*, 518 U.S. 727, 801 (1996) (Kennedy, J., concurring in part and dissenting in part) (“The power to limit or redefine fora for a specific legitimate purpose does not allow the government to exclude certain speech or speakers from them for any reason at all.”).

¹⁸² *See Christ’s Bride Ministries*, 148 F.3d at 251.

¹⁸³ *See* Post, *supra* note 21, at 1748.

¹⁸⁴ *Id.* at 1749; *Christ’s Bride Ministries*, 148 F.3d at 247–48.

¹⁸⁵ *See Christ’s Bride Ministries*, 148 F.3d at 251.

¹⁸⁶ *See* discussion *supra* Section II.B.

G. Four Steps to Success: The Amalgamated Majority Approach

The majority circuit approach is a four-step process.¹⁸⁷ Through the application of the majority approach, it is clear that public transit advertising is, in most cases, a designated public forum.¹⁸⁸ The majority approach acknowledges that public transit agencies frequently do not regulate advertising in a manner consistent with a non-public forum.¹⁸⁹ The most common approach is essentially that mentioned by the Seventh Circuit: public transit agencies take “the ads of all who were willing to pay the fee.”¹⁹⁰

First in a court’s consideration is determining which type of forum the public transit agency and associated advertising contractor intended to create.¹⁹¹ The agency’s intent, if clear, is controlling.¹⁹² To determine the agency’s intent, courts should first look to the government entity’s prior practices.¹⁹³ For instance, SETPA had previously accepted a wide range of controversial advertisements.¹⁹⁴ On the topic of abortion, SEPTA had previously accepted pro-choice advertisements.¹⁹⁵ SEPTA in its history had requested modification of only three advertisements, ultimately accepting all of them in their revised forms.¹⁹⁶ Acceptance is strong evidence that SEPTA had opened advertising on its property to the general public for expressive purposes.¹⁹⁷

In another example, the record showed that the Chicago Transit Authority (CTA) had only twice recorded rejections of advertisements, both of which the CTA

¹⁸⁷ See discussion *infra* Section II.G.

¹⁸⁸ See discussion *supra* Section II.B.

¹⁸⁹ See discussion *supra* Section II.B.

¹⁹⁰ See *Air Line Pilots Ass’n v. Dep’t of Aviation of Chi.*, 45 F.3d 1144, 1155 (7th Cir. 1995).

¹⁹¹ See *id.* at 1151.

¹⁹² See *United States v. Kokinda*, 497 U.S. 720, 725–26 (1990) (plurality opinion) (quoting *Lehman v. City of Shaker Heights*, 418 U.S. 298, 303 (1974)).

¹⁹³ See *Christ’s Bride Ministries, Inc. v. Se. Pa. Transp. Auth.*, 148 F.3d 242, 251 (3d Cir. 1998).

¹⁹⁴ See *id.* (SEPTA allowed religious messages, such as “Follow this bus to FREEDOM, Christian Bible Fellowship Church”; explicitly worded advertisements such as “Safe Sex Isn’t” and an advertisement urging readers that “Virginity—It’s cool to keep.”).

¹⁹⁵ See *id.* at 252 (“When Abortion Was Illegal, Women Died. My Mother Was One of Them. Keep Abortion Legal and Safe. Support the Clara Bell Duvall Education Fund.”).

¹⁹⁶ See *id.* (“One was the large wrap-around bus ad for Haynes hosiery, which would have covered the entire bus with the picture of a ‘scantly clad’ woman The same ad was accepted as a smaller ‘poster’ ad on the sides of buses. SEPTA also asked for modification of an ad depicting a gun with a condom stretched over it. The text of the ad, ‘Safe Sex Isn’t,’ ultimately ran without the graphics. SEPTA also requested that an advertisement for a personal injury law firm delete references to rail accidents.”).

¹⁹⁷ See *id.*

ultimately ran once confronted with legal pressure.¹⁹⁸ The same policy—or lack thereof—also was applied to municipal airport terminals.¹⁹⁹ The Chicago Department of Aviation appeared willing to accept advertisements from any party “willing to pay the fee.”²⁰⁰ There was no evidence in the record that any content policy whatsoever was considered in choosing which advertisements to accept for publication.²⁰¹ Still, it is important to keep in mind that any written policy statements by the agency are not in and of themselves determinative, and the primary factor should be the agency’s actual practices.²⁰²

Second, the types of restrictions imposed by the public transit agency and associated advertising contractor ought to be considered. A transit agency’s policy of permitting almost unlimited access to the forum by anyone willing to pay a specified fee is substantial evidence that it creates a designated public forum.²⁰³ Just because a government entity exercises “some restrictions” does not mean that a designated public forum does not exist.²⁰⁴ Certain types of restrictions can be imposed if they are narrowly drawn to meet a “compelling state interest.”²⁰⁵ Content-neutral regulations are permissible if they are “reasonable,” but the state actor cannot engage in viewpoint discrimination.²⁰⁶

Generally speaking, a state actor can reasonably refuse to accept advertisements that are plainly obscene, graphic, or impede the purpose of public transit advertising or the transit agency itself.²⁰⁷ Allowing controversial advertising does not prevent the transit agency from imposing certain restrictions on content that appear outside the ambit of mere “controversy.”²⁰⁸ In practice, this generally means courts will not weigh restrictions of alcohol, tobacco, and pornographic advertising as strong evidence against the creation of a designated public forum.²⁰⁹

¹⁹⁸ See *Planned Parenthood Ass’n/Chi. Area v. Chicago Transit Auth.*, 767 F.2d 1225, 1230 (7th Cir. 1985).

¹⁹⁹ See *Air Line Pilots Ass’n v. Dep’t of Aviation of Chi.*, 45 F.3d 1144, 1155 (7th Cir. 1995).

²⁰⁰ See *id.*

²⁰¹ See *id.*

²⁰² See *id.* at 1153. *But see* *AIDS Action Comm. of Mass. v. Mass. Bay Transp. Auth.*, 849 F. Supp. 79, 83 (D. Mass. 1994) (suggesting, though not holding, that the very existence of a written policy may be a sufficient basis for finding that car interiors are not public fora).

²⁰³ See *Christ’s Bride Ministries, Inc. v. Se. Pa. Transp. Auth.*, 148 F.3d 242, 253 (3d Cir. 1998).

²⁰⁴ See *id.*

²⁰⁵ See *Post*, *supra* note 21, at 1748 (quoting *Widmar v. Vincent*, 454 U.S. 263, 270 (1981)).

²⁰⁶ See *id.* at 1750.

²⁰⁷ See discussion *infra* Section III.B.

²⁰⁸ See generally discussion *infra* Part III.

²⁰⁹ See generally *Am. Freedom Def. Initiative v. Mass. Bay Transp. Auth.*, 781 F.3d 571, 580 (1st Cir. 2015); *Ridley v. Mass. Bay Transp. Auth.*, 390 F.3d 65 (1st Cir. 2004).

Third, the nature of the access demanded for expressive purposes must be analyzed, taking special care not to draw the forum at issue too broadly. It is especially important to distinguish prior Supreme Court cases about the forum at issue if they involve a meaningful difference in expressive conduct.²¹⁰ As in *Air Line Pilots Ass'n*, even when a particular place is not a quintessential public forum, it may become a designated public forum for a particular expressive purpose.²¹¹ If the type of access requested is limited to commercial advertisements, then what matters is the state actor's acceptance of a broad array of commercial advertisements without any "real" content policy.²¹² If that requirement is satisfied, a designated public forum will be created for that limited purpose.²¹³ Therefore, even if a court held that a public transit system could be a non-public forum (i.e., for the purpose of collecting signatures or distributing pamphlets), advertisements run on buses and trains may well be because they involve an entirely different set of considerations.²¹⁴

Fourth, the court must undertake a holistic analysis of the prior factors. Based on those facts, if the agency appears to have accepted almost anyone willing to pay the fee—which is fairly often the case—a designated public forum has been created.²¹⁵ If the transit agency has seriously restricted most or all controversial advertising consistently, then a designated public forum will not have been created.²¹⁶ While this is inevitably somewhat subjective, often the record on appeal can be defective in certain critical respects. The intuitive judgments of the bench can often be useful in directing lower courts on remand, especially as to whether a content policy truly existed, or whether, as is often the case, it is a 'self-serving' policy created in anticipation of litigation.²¹⁷ As the Supreme Court has wryly observed, "common sense often makes good law."²¹⁸

Most cases also have a public policy rationale behind classifying public transit advertising as a designated public forum.²¹⁹ Public transit advertising remains a hot

²¹⁰ See *Air Line Pilots Ass'n v. Dep't of Aviation of Chi.*, 45 F.3d 1144, 1151–52 (7th Cir. 1995) (noting the critical difference between using an airport terminal for solicitation and the distribution of literature and using an airport terminal to display advertisements on issues of public concern).

²¹¹ See *id.* at 1152 (citing *Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n*, 460 U.S. 37, 45 (1983)).

²¹² See *id.* at 1155; see also *Christ's Bride Ministries, Inc. v. Se. Pa. Transp. Auth.*, 148 F.3d 242, 251 (3d Cir. 1998); *Planned Parenthood Ass'n/Chi. Area v. Chicago Transit Auth.*, 767 F.2d 1225, 1232 (7th Cir. 1985).

²¹³ See *Planned Parenthood Ass'n*, 767 F.2d at 1231–32.

²¹⁴ See discussion *infra* Section III.E.

²¹⁵ See discussion *supra* Part II.

²¹⁶ See discussion *supra* Section II.D.

²¹⁷ See *Air Line Pilots Ass'n v. Dep't of Aviation of Chi.*, 45 F.3d 1144, 1154 (7th Cir. 1995).

²¹⁸ See *Peak v. United States*, 353 U.S. 43, 46 (1957).

²¹⁹ See generally *Roberts v. United States Jaycees*, 468 U.S. 609 (1984) (in the context

commodity.²²⁰ Controversial advertising frequently triggers an emotional response in viewers.²²¹ The aim is not “to polarize an audience”; rather, it is to use the controversy as “an attention-grabbing technique . . . to spark conversations about certain moral values.”²²² Such advertisements are especially useful when they speak to a company’s values.²²³ One recent example occurred when Nike partnered with athlete Colin Kaepernick after Kaepernick was released from his National Football League contract for kneeling during the National Anthem.²²⁴ Nike’s campaign was extremely successful despite its controversial nature, receiving high approval ratings from Nike’s target audience.²²⁵ Making public transit a designated public forum allows companies to engage actively with audiences, even when that engagement may offend those outside the target demographics.²²⁶

III. THE MINORITY CIRCUIT APPROACH

In the minority circuits, “a transit agency’s decision to allow the display of controversial advertising does not in and of itself establish a designated public forum.”²²⁷ This perspective gives the transit agency “far more leeway to restrict speech,”²²⁸ resulting in content policies that may ban advertisements for a variety of reasons that

of large impersonal organizations, promoting gender equality was a compelling governmental interest that justified restricting freedom of association); *Grutter v. Bollinger*, 539 U.S. 306 (2003) (achieving a diverse student body in a public law school justified the government’s considering of race in admissions decisions).

²²⁰ See Nicole Perrin & Andrew Lipsman, *The Renaissance of Somewhat Controversial Public Transit Ads*, EMARKETER (Sept. 9, 2019), <https://www.emarketer.com/content/podcast-the-renaissance-of-somewhat-controversial-public-transit-ads> [<https://perma.cc/X27P-ZR2E>]; J.R. Thorpe, *The 7 Most Notable Subway Ad Controversies*, BUSTLE (Nov. 16, 2015), <https://www.bustle.com/articles/123328-the-7-most-notable-subway-advertisement-controversies> [<https://perma.cc/E5P6-UGY3>].

²²¹ See Tom Salvat, *When (and How) to Effectively Use Controversial Advertising*, CONCURED (Feb. 25, 2019), <https://www.concured.com/blog/when-and-how-to-effectively-use-controversial-advertising> [<https://perma.cc/BP3M-96LU>].

²²² See *id.*

²²³ See *id.*

²²⁴ See E. J. Schultz, *New Poll Lends More Evidence that Nike Scored with Kaepernick Ad*, ADAGE (Sept. 13, 2018), <https://adage.com/article/cmo-strategy/poll-shows-approval-nike-s-kaepernick-ad/314924> [<https://perma.cc/WCL6-5BY6>].

²²⁵ *Id.*

²²⁶ See discussion *supra* Section II.D.

²²⁷ See *Am. Freedom Def. Initiative v. Mass. Bay Transp. Auth.*, 781 F. 3d 571, 580 (1st Cir. 2015).

²²⁸ See *Am. Freedom Def. Initiative v. King Cnty.*, 136 S. Ct. 1022, 1025 (2016) (Thomas, J., dissenting from denial of *certiorari*).

could be deemed subjective.²²⁹ The result is that, much like a private landowner, a public transit system may permit or deny applications for advertising in any manner it sees fit, so long as the regulation is “reasonable” and not an arbitrary suppression of a speaker’s viewpoint.²³⁰ Cases from the First Circuit will be used to demonstrate the weaknesses of the minority circuit approach.

A. *Ridley v. Massachusetts Bay Transportation Authority*²³¹

The *Ridley* case involved a consolidation of two appeals, the *Change the Climate* appeal²³² and the *Ridley* appeal.²³³ Both appeals involved controversial advertisements rejected by the Massachusetts Bay Transportation Authority (MBTA).²³⁴ Similar to other public transit systems, the “principal purpose” of the MBTA advertising program was to generate and maximize revenue, and the MBTA was directed to “provide for the maximization of non-transportation revenues from all sources.”²³⁵ In pursuit of this goal, the MBTA contracted with Viacom Outdoor of Braintree (Viacom) to sell advertising space consisting of interior “car card” displays in buses, trains, and trolleys.²³⁶ The *Change the Climate* campaign involved three distinct advertisements, run as part of a “provocative advertising campaign[] in order to generate debate about the laws criminalizing the use of marijuana.”²³⁷ The *Ridley* ad involved a text display which stated in part “The Bible says in Rev 12:9 ‘And Satan which deceiveth the whole world.’ . . . There is only one true religion. All the rest are false.”²³⁸ In 1992, the MBTA first adopted guidelines in an attempt to limit the types of advertisements it would accept.²³⁹ Both advertisements eventually were rejected under the MBTA’s 2003 guidelines.²⁴⁰

²²⁹ See *Am. Freedom Def. Initiative v. King Cnty.*, No. C13-1804RAJ, 2014 U.S. Dist. LEXIS 11982, at *5 (W.D. Wash. 2014), *aff’d*, 2015 U.S. App. LEXIS 14098 (9th Cir. 2015).

²³⁰ See Post, *supra* note 21, at 1750.

²³¹ 390 F.3d 65 (1st Cir. 2004).

²³² See generally *Change the Climate, Inc. v. Mass. Bay Transp. Auth.*, 214 F. Supp. 2d 125 (D. Mass. 2002).

²³³ See *Ridley*, 390 F.3d at 70 (*Ridley* noted that the outcome of the forum issue in *Change the Climate* would govern the *Ridley* case; additionally, common issues of fact and law were present and the same lawyers represented both plaintiffs).

²³⁴ See *id.* at 69.

²³⁵ See *id.* at 72.

²³⁶ See *id.*

²³⁷ See *id.* at 72–73 (for instance, “[t]he first advertisement, (the ‘Teen Ad’), was a color photograph of a teenage girl with a baseball cap on backwards, with a caption saying: ‘Smoking pot is not cool, but we’re not stupid, ya know. Marijuana is *NOT* cocaine or heroin. Tell us the truth’”).

²³⁸ See *id.* at 74.

²³⁹ See *id.* at 72.

²⁴⁰ See *id.* at 75.

B. A Double Hitter: The MBTA Versus Shock Advertising

The First Circuit has adopted an approach distinct from that of other circuits in determining that public transit advertising is a non-public forum.²⁴¹ The MBTA's 2003 guidelines stated that the MBTA intended that its facilities constituted non-public forums that are "subject to . . . viewpoint-neutral restrictions."²⁴² However, it must be noted that a policy statement by the agency is not determinative of the forum analysis.²⁴³ The MBTA's initial content policy prohibited all tobacco advertisements, as well as all libelous, slanderous, or obscene ads.²⁴⁴ After a revision in 1992, other restrictions were implemented by the MBTA, mostly related to depictions of violence, unlawful activity, or the denigration of protected classes of people.²⁴⁵ The First Circuit noted that "[b]y refusing to limit the advertising program solely to commercial advertising, the MBTA was, thus, not evidencing an intent to open the forum to *all* public discourse," and held the MBTA had created a non-public forum.²⁴⁶

It is unclear why First Circuit assumed that the MBTA's narrow restrictions on the types of content it would accept were decisive evidence of an intent to create a non-public forum. Obscenity,²⁴⁷ libel,²⁴⁸ and slander²⁴⁹ already are *de jure* outside the ambit of First Amendment protection and, thus, prohibitions on them would not be relevant to the forum analysis at all. Additionally, restrictions on the promotion of violent speech are permitted in limited circumstances without running afoul of the First Amendment.²⁵⁰ As in *Lehman*, the public transit agency could place some "reasonable" viewpoint-neutral restrictions on the types of content it was willing to accept without necessarily creating a non-public forum.²⁵¹

²⁴¹ See *id.* at 82; *Am. Freedom Def. Initiative v. Mass. Bay Transp. Auth.*, 781 F.3d 571, 582 (1st Cir. 2015).

²⁴² See *Ridley*, 390 F.3d at 77.

²⁴³ See *id.*; see also *Christ's Bride Ministries, Inc. v. Se. Pa. Transp. Auth.*, 148 F.3d 242, 249 (3d Cir. 1998).

²⁴⁴ See *Ridley*, 390 F.3d at 77.

²⁴⁵ See *id.* at 77–78.

²⁴⁶ See *id.* at 81.

²⁴⁷ See generally *Roth v. United States*, 354 U.S. 476 (1957).

²⁴⁸ See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964) (placing libel outside the protection of the First Amendment in cases involving public figures when "actual malice" is shown); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974) (allowing state law to govern libel cases if the plaintiff is a private person, with "actual malice" not required). See generally *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

²⁴⁹ See *Gertz*, 418 U.S. at 342 (interpreting the central holding from *New York Times Co.*).

²⁵⁰ See generally *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (holding that speech which promotes "imminent lawless action" is not constitutionally protected); *Hess v. Indiana*, 414 U.S. 105, 108 (1973) (per curiam) (affirming *Brandenburg* by refusing to punish speech that advocated illegal action which may take place in the unforeseeable future).

²⁵¹ See *Planned Parenthood Ass'n/Chi. Area v. Chicago Transit Auth.*, 767 F.2d 1225, 1227, 1233 (7th Cir. 1985).

The First Circuit seemed to misread *Lehman* by stating that it is “indistinguishable” from *Ridley*.²⁵² *Lehman* involved a categorical choice “to limit car card space to innocuous and less controversial commercial and service oriented advertising” by excluding all public interest advertising.²⁵³ In *Ridley*, an “erratically enforced”²⁵⁴ written policy was used only seventeen times total in the years prior to litigation, in a manner that was at times contradictory.²⁵⁵ The limitations did not appear to be “unambiguous and definite.”²⁵⁶ Additionally, the MBTA explicitly refused to limit the forum solely to commercial advertising.²⁵⁷ The General Manager of MBTA noted that “we . . . are performing a public service in another flavor rather than [solely being a] transportation service. We’re letting [the public] know about government services or social services or not-for-profit services that might have a direct impact on their quality of life.”²⁵⁸ This is the exact kind of advertising limited by the City of Shaker Heights in the *Lehman* case, making the circumstances facially distinguishable.²⁵⁹

As noted by the dissent in *Ridley*, much of the MBTA’s justification for refusing to accept the plaintiffs’ advertisements relied on an extremely nebulous “prevailing community standard” for demeaning or disparaging expression.²⁶⁰ The written policy as applied to advertisements was simply not the type of “unambiguous and definite” policy that defines a non-public forum.²⁶¹ While the “erratic enforcement of a policy would not matter” if a government had not intentionally opened a forum to public discourse, the evidence in the record showed—despite the MBTA’s stated policy—that the MBTA had intentionally opened the forum to the general public for expressive purposes, including public interest advertising.²⁶² While convincingly

²⁵² See *Ridley v. Mass. Bay Transp. Auth.*, 390 F.3d 65, 78 (1st Cir. 2004).

²⁵³ See *Lehman v. City of Shaker Heights*, 418 U.S. 298, 304 (1974).

²⁵⁴ See *Ridley*, 390 F.3d at 78.

²⁵⁵ See *id.* at 78 n.5 (For instance, the MBTA refused to accept an advisement depicting a couple smoking and encouraging the responsible disposal of cigarette butts, citing its guidelines on tobacco use. Despite this, the MBTA later accepted an advertisement for the airline Al Italia which contained a picture of a woman on a motorcycle with a cigarette in one hand.).

²⁵⁶ See *Christ’s Bride Ministries, Inc. v. Se. Pa. Transp. Auth.*, 148 F.3d 242, 251 (3d Cir. 1998). See generally *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727 (1996) (Kennedy, J., concurring in part and dissenting in part).

²⁵⁷ See *Ridley*, 390 F.3d at 78–79.

²⁵⁸ See *id.* at 81.

²⁵⁹ See *Lehman v. City of Shaker Heights*, 418 U.S. 298, 299–300 (1974) (limiting political advertising).

²⁶⁰ See *Ridley*, 390 F.3d at 98 (Torruella, J., concurring in part and dissenting in part).

²⁶¹ See *Christ’s Bride Ministries*, 148 F.3d at 251 (quoting *Gregoire v. Centennial Sch. Dist.*, 907 F.2d 1366, 1375 (3d Cir. 1990)).

²⁶² See *Ridley*, 390 F.3d at 82 (The court still found to the contrary in analyzing the circumstances, stating that “the MBTA’s policy clearly evinced an intent to maintain control over the forum, and thus the MBTA *did not create a designated public forum*. As a result, the standard of review is not strict scrutiny.”) (emphasis added).

written, the First Circuit decision failed to properly distinguish *Lehman*, and in doing so came to an incorrect conclusion.²⁶³

C. American Freedom Defense Initiative v. Massachusetts Bay Transportation Authority²⁶⁴

In the follow-up case to *Ridley*, the First Circuit affirmed *Ridley* and doubled down on the premise that the MBTA's advertising was a non-public forum.²⁶⁵ The dispute revolved around a pair of advertisements, one offered by the Committee for Peace in Israel and Palestine (Committee for Peace) in support of the Palestinian position,²⁶⁶ and another offered by the American Freedom Defense Initiative (AFDI) in support of the Israeli position.²⁶⁷ The AFDI ran its advertisement in response to the MBTA accepting the Committee for Peace's advertisement.²⁶⁸ Another pro-Israel advertisement was accepted for publication at roughly the same time.²⁶⁹ The MBTA had not made substantial substantive changes since the *Ridley* case, and accepted the Committee for Peace's advertisement at the standard commercial rate.²⁷⁰ However, citing the MBTA's prohibition on "advertisement[s] contain[ing] material that demeans or disparages an individual or group of individuals," the MBTA declined to run the AFDI's responsive advertisement.²⁷¹

D. Back for Round Two: The MBTA Doubles Down

The First Circuit, relying on the premise that a governmental proprietor creates a designated public forum "only by intentionally opening a nontraditional forum for public discourse," reaffirmed *Ridley* and struck down the AFDI's constitutional

²⁶³ See *id.* at 78.

²⁶⁴ 781 F.3d 571 (1st Cir. 2015).

²⁶⁵ See *id.* at 579.

²⁶⁶ See *id.* at 574 ("The advertisement depicted four maps reflecting different points in time with the caption, 'Palestinian Loss of Land—1946 to 2010.' The advertisement also contained bold text to the right of the maps stating that '4.7 Million Palestinians are Classified by the U.N. as Refugees.'").

²⁶⁷ See *id.* at 575 (The advertisement, a modified version of a quotation from the political theorist and novelist Ayn Rand, stated: "In any war between the civilized man and the savage, support the civilized man. Support Israel. Defeat jihad.").

²⁶⁸ See *id.* at 575–76.

²⁶⁹ See *Am. Freedom Def. Initiative v. Mass. Bay Transp. Auth.*, 989 F. Supp. 2d 182, 185 (D. Mass. 2013) (An advertisement offered by the organization Stand With Us stated that "'Jews are Indigenous to Israel' and depict[ing] a series of maps that indicate[d] that Israel is geographically smaller than the 'ancient Jewish Kingdom' or the 'internationally recognized Jewish homeland' as of 1920.").

²⁷⁰ See *Am. Freedom Def. Initiative*, 781 F.3d at 574–75.

²⁷¹ See *id.* (alterations in original).

claims.²⁷² However, the rationale for taking the position that the MBTA created a non-public forum was even more questionable given the unflattering facts of this particular case.²⁷³ As noted in the dissent, “[b]y opening up its advertising facilities to controversial topics of the gravest political issues of our day, the MBTA has created a designated public forum for speech, not a nonpublic forum.”²⁷⁴

Relying heavily on the precedent set by *Ridley*, the First Circuit stated that “the display of controversial advertising does not in and of itself establish a designated public forum.”²⁷⁵ However, whether or not the advertisements were controversial was not the relevant issue.²⁷⁶ The relevant issue was instead whether the MBTA accepted other types of political advertising, which it clearly did.²⁷⁷ The MBTA, while accepting other controversial advertisements on the Israel-Palestine issue, decided by fiat that the advertisement the AFDI sought to run was simply too controversial despite being willing previously to run a functionally identical advertisement—just on the other side of the debate.²⁷⁸ While the MBTA may claim to have created a non-public forum, the existence of “some restrictions” does not mean that a designated public forum does not exist.²⁷⁹ In *Lehman*, Shaker Heights had not opened up its transit vehicles to “any exchange or presentation of ideas, political or otherwise,” which was essentially a ban on all political speech.²⁸⁰ The MBTA wanted to have its cake and eat it too, which is not how public forum doctrine functions.²⁸¹

The MBTA made its facilities the “modern analogue” to traditional public forum through largely hands-off content policies.²⁸² The First Circuit fell into a well-criticized trap of public-forum doctrine in that it allowed the government’s own self-serving statements about its intended use for a public place to “outweigh the forum’s inherent attributes.”²⁸³ By giving too much weight to the government’s “defined

²⁷² See *id.* at 579–80 (quoting *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 802 (1985)).

²⁷³ See *id.* at 589 (Stahl, J., dissenting).

²⁷⁴ See *id.* (Stahl, J., dissenting).

²⁷⁵ See *id.* at 580 (citing *Ridley v. Mass. Bay Transp. Auth.*, 390 F.3d 65, 81–82 (1st Cir. 2004)).

²⁷⁶ See *id.* at 581.

²⁷⁷ See *id.* at 574–76.

²⁷⁸ See *id.* at 576 (A revised version of the AFDI ad the MBTA was willing to run stated: “In any war between the civilized man and those engaged in savage acts, support the civilized man. Defeat violent jihad. Support Israel.”).

²⁷⁹ See *Christ’s Bride Ministries, Inc. v. Se. Pa. Transp. Auth.*, 148 F.3d 242, 253 (3d Cir. 1998).

²⁸⁰ See *Lehman v. City of Shaker Heights*, N.E.2d 683, 685 (Ohio 1973).

²⁸¹ See *Lidsky*, *supra* note 43, at 4; see also *Perry Educ. Ass’n v. Perry Loc. Educators’ Ass’n*, 460 U.S. 37, 46 (1983).

²⁸² See *Ridley v. Mass. Bay Transp. Auth.*, 390 F.3d 65, 108 (1st Cir. 2004) (Torruella, J., concurring in part and dissenting in part).

²⁸³ See *Am. Freedom Def. Initiative*, 781 F.3d at 592 (Stahl, J., dissenting). See generally Farber & Nowak, *supra* note 57.

purpose” for the property, the First Circuit left the MBTA “with almost unlimited authority to restrict speech on its property by doing nothing more than articulating a non-speech-related purpose for the area. . . .”²⁸⁴ Similar to the airport at issue in *Lee*, a public transit system is “one of the few government-owned spaces where many persons have extensive contact with other members of the public,” and this important avenue for speech should not be closed off to the general public on the whim of a public official.²⁸⁵

E. Fundamentally Inconsistent: The Amalgamated Minority Approach

The rationale underlying the minority approach seems to be that because a public transit system has, in the past, exercised some limited amount of control over the types of advertising content accepted for publication, this *ipso facto* gives rise to a non-public forum.²⁸⁶ The minority approach focuses on the principle of “selective access,” ignoring the issue that access does not appear to be particularly selective.²⁸⁷ The MBTA’s guidelines appeared primarily targeted at types of content already beyond the protection of the First Amendment, or content which reasonably would impair the core goal of the forum (expression in the form of paid advertisements).²⁸⁸ As noted repeatedly by the dissent in *American Freedom Defense Initiative*, a designated public forum arises when “the governmental entity affirmatively opens up its facilities to advertisements concerning civic or political issues. . . .”²⁸⁹ While it is understandable why public transit systems are covetous of the ability to freely pick-and-choose the advertisements they accept, the First Amendment holds them to a high standard.²⁹⁰ Once the floodgates of public interest advertising are open, the public transit agency can no longer attempt to channel the floodwaters.²⁹¹

IV. GOVERNMENT SPEECH

A. Government Speech Generally

Public transit systems are owned by the government, and thus naturally the advertising the transit system carries must be evaluated in the context of the government

²⁸⁴ See *Int’l Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 695 (1992) (Kennedy, J., concurring in the judgment).

²⁸⁵ *Id.* at 698 (Kennedy, J., concurring in the judgment).

²⁸⁶ See *Ridley*, 390 F.3d at 102.

²⁸⁷ See *Am. Freedom Def. Initiative*, 781 F.3d at 581.

²⁸⁸ See *id.* at 583.

²⁸⁹ See *id.* at 592 (Stahl, J., dissenting).

²⁹⁰ See discussion *infra* Part IV.

²⁹¹ See discussion *infra* Section IV.B.

speech doctrine.²⁹² The government speech doctrine is a body of precedent that “generally shields the government’s own expression from Free Speech Clause challenge[s] by those who object to the government’s views.”²⁹³ “Government speech” can be categorized broadly, but includes the collective speech of a government agency, its representatives (like the Secretary of Defense), or an individual speaking while backed by the government’s power (like a Child Protective Services caseworker speaking to a parent).²⁹⁴ The general public has relatively little recourse when unhappy with their government’s speech; courts have deemed the ballot box the primary remedy.²⁹⁵ Therefore, if the government speech doctrine were applicable to public transit advertising, there might arise a potential issue preventing plaintiffs from reaching the meat of the First Amendment issues present in any given case.²⁹⁶

As early as 1973, it was recognized by the Supreme Court that “[g]overnment is not restrained by the First Amendment from controlling its own expression.”²⁹⁷ In 1990, the Supreme Court further observed that “[i]f every citizen were to have a right to insist that no one paid by public funds express a view with which he disagreed, debate over issues of great concern to the public would be limited to those in the private sector. . . .”²⁹⁸ By 2005, in *Johanns v. Livestock Marketing Association*, the Supreme Court rejected a private party’s First Amendment claim expressly on the grounds that the contested speech was actually the government’s.²⁹⁹ *Johanns* was then affirmed unanimously in the 2009 decision *Pleasant Grove City v. Summum*.³⁰⁰ *Summum* involved an attempt by the Summum religious group to erect a privately funded stone monument inscribed with the Seven Aphorisms of Summum in a public park.³⁰¹ The city of Pleasant Grove, Utah, denied the monument because of a desire to limit monuments in the park to those that either directly related to the history of Pleasant Grove or were donated by groups with long-standing ties to the Pleasant Grove community.³⁰² Because permanent monuments displayed on public

²⁹² See *Coleman v. Ann Arbor Transp. Auth.*, 904 F. Supp. 2d 670, 696 (E.D. Mich. 2012).

²⁹³ See HELEN NORTON, *THE GOVERNMENT’S SPEECH AND THE CONSTITUTION* 5 (2019). See generally Helen Norton, *The Measure of Government Speech: Identifying Expression’s Source*, 88 B.U. L. REV. 587 (2008); Helen Norton, *Constraining Public Employee Speech: Government’s Control of Its Workers’ Speech to Protect Its Own Expression*, 59 DUKE L.J. 1 (2009).

²⁹⁴ See NORTON, *THE GOVERNMENT’S SPEECH AND THE CONSTITUTION*, *supra* note 293, at 3.

²⁹⁵ See *id.* at 6.

²⁹⁶ See generally *id.*

²⁹⁷ See *CBS, Inc. v. Democratic Nat’l Comm.*, 412 U.S. 94, 140 n.7 (1973) (Stewart, J., concurring).

²⁹⁸ See *Keller v. State Bar of Cal.*, 496 U.S. 1, 12–13 (1990).

²⁹⁹ See 544 U.S. 550, 550 (2005).

³⁰⁰ See 555 U.S. 460, 460 (2009).

³⁰¹ See *id.* at 465.

³⁰² See *id.* at 464–65 (The park at issue in the case contained, at the time of litigation, fifteen permanent displays, at least eleven of which were donated by private groups or individuals.).

property typically represent government speech, the Supreme Court recognized that Pleasant Grove could exercise discretion in accepting monuments for display in the park and reject the display offered by Summum.³⁰³

B. Government Speech and Public Transit Advertising

Applying *Summum*, the Court held in the 2015 case of *Walker v. Texas Division, Sons of Confederate Veterans* that forum analysis is inappropriate in government speech cases.³⁰⁴ “A government entity may exercise [its] freedom to express its views’ even ‘when it receives assistance from private sources for the purpose of delivering a government-controlled message.’”³⁰⁵ Because of the nature of the state-issued license plates at issue in *Walker*, it was reasonable to assume the message on the plate would be interpreted as being “convey[ed] . . . on the [issuer’s] behalf.”³⁰⁶ Therefore, Texas offering plates emblazoned with “Fight Terrorism” does not obligate Texas to also issue plates promoting al-Qaida or the Muslim Brotherhood as a form of ‘balancing’ speech.³⁰⁷ However, government speech should not be read too broadly. The First Circuit noted in *In re Tam* that, in striking down the anti-disparagement clause of the Lanham Act, “the only message [trademark registration] conveys is that a mark is registered.”³⁰⁸ Thus, it is important to evaluate the following factors when evaluating whether speech is government speech in the context of the public forum: (1) whether the speech has the intent and effect of delivering the government’s message; (2) whether the contested speech is closely identified with the government by the public; (3) whether the government had historically used the speech in question for its own expressive purposes; and (4) the practical implications of denying the government the power to control the contested speech.³⁰⁹

The government speech doctrine becomes relevant to the discussion of public transit systems because most systems operate as some form of government agency or public-private partnership.³¹⁰ The existence of relationships between the public transit agencies and the advertising agencies that generally run the ads are the

³⁰³ See *id.* at 469–72.

³⁰⁴ See 135 S. Ct. 2239, 2246–47 (2015).

³⁰⁵ See *id.* at 2251 (quoting *Summum*, 555 U.S. at 468).

³⁰⁶ See *id.* at 2249 (quoting *Summum*, 555 U.S. at 471).

³⁰⁷ See *id.*

³⁰⁸ 808 F.3d 1321, 1346 (1st Cir. 2015); see also *Matal v. Tam*, 137 S. Ct. 1744, 1758 (2017).

³⁰⁹ See generally Norton, *The Measure of Government Speech: Identifying Expression’s Source*, *supra* note 293, at 597–98.

³¹⁰ FEDERAL TRANSIT ADMIN., *Public Transit in the United States* (last updated in 2015), <https://www.transit.dot.gov/regulations-and-guidance/environmental-programs/public-transit-united-states> [<https://perma.cc/B6YX-7CRZ>] (last visited Dec. 13, 2021) (“Fare box revenues on average account for only 40 percent of system operating costs. Transit systems receive funds from the Federal, state, and local levels, and private sector sources, and it remains essentially a public service that is provided and managed locally.”).

quintessential “state participation” contemplated by cases such as *Burton v. Wilmington Parking Authority*.³¹¹ An advertising agency may also be “entwined” with the government actor, another route through which state action applies.³¹²

However, it is clear that public transit agency advertisements are not government speech in light of the general analysis for government speech proposed by Helen Norton.³¹³ The speech is not intended to deliver the government’s message; it delivers the message of a private party.³¹⁴ The message is far more likely to be identified with the advertised company or brand than the government.³¹⁵ The government has not historically used public transit advertising to convey messages for its own purposes (outside of particular wartime advertisements that were distributed widely using every available means).³¹⁶ Finally, the implications of denying the government the power to control the speech seem to be limited, with existing First Amendment exceptions sufficient to deal with most dangers.³¹⁷

A clear application of the government speech analysis can be seen in *Coleman v. Ann Arbor Transportation Authority*.³¹⁸ The case involved a plaintiff attempting to place an advertisement for display on the exterior of buses of the Ann Arbor Transportation Authority.³¹⁹ The court noted that there is a substantial difference between monuments located in public parks, and advertisements placed on public buses.³²⁰ There is no authority that indicates that “the speech in ads on transit authority buses [is] reasonably attributable to the transit authority.”³²¹ Even if private speech takes place on government property, that does not automatically create government speech.³²² An additional element that could create government speech is a long tradition of the government using the private speech to “speak to the

³¹¹ See generally 365 U.S. 715 (1961) (explaining that when a state leases public property to a private entity and forms a relationship of interdependence with that entity, the private lessee becomes a state actor for purposes of applying constitutional law); *Jackson v. Metro. Edison Co.*, 419 U.S. 345 (1974); *Blum v. Yaretsky*, 457 U.S. 991 (1982); *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982).

³¹² See *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 296 (2001). See generally Christopher W. Schmidt, *On Doctrinal Confusion: The Case of the State Action Doctrine*, 2016 BYU L. REV. 575 (2016).

³¹³ See Norton, *The Measure of Government Speech: Identifying Expression’s Source*, *supra* note 293, at 597–98.

³¹⁴ See *id.*

³¹⁵ See *id.*

³¹⁶ See *id.*

³¹⁷ See *id.*

³¹⁸ See generally 904 F. Supp. 2d 670 (E.D. Mich. 2012).

³¹⁹ See *id.* at 675.

³²⁰ See *id.* at 697.

³²¹ See *id.*

³²² See *id.* at 696–97; see also *Miller v. City of Cincinnati*, 622 F.3d 524, 536–37 (6th Cir. 2010) (evaluating the City of Cincinnati’s activities using the Supreme Court’s *Sumnum* analysis).

public,” or the government generally dictating the “overarching message” with the power to “approve every word.”³²³ This phenomenon is not generally found in the context of public transit advertising.

Therefore, the government speech issue is inapplicable to public transit advertising.³²⁴ As a result, it will not bar the suits of plaintiffs aggrieved by decisions of public transit agencies regarding what types of content to accept in advertisements.³²⁵

V. THE CAPTIVITY ISSUE

A. Captivity Generally

Riding a bus, train, or trolley involves being stuck in a metal tube for the duration of one’s journey. Naturally, courts will look to see whether those circumstances are sufficient to make transit riders a “captive audience.”³²⁶ The captive audience doctrine is designed to protect recipients against being held ‘captive’ to unwanted or offensive speech.³²⁷ This doctrine has been most often applied in the context of private homes.³²⁸ However, it also has been applied beyond the context of the home to certain situations where individuals are confined for an extended period of time.³²⁹

B. Captivity and Public Transit Advertising

The driving concern behind the Supreme Court’s decision in *Lehman v. City of Shaker Heights* was that streetcar riders constituted a captive audience.³³⁰ This view is particularly prominent in the concurrence of Justice Douglas, who stated that “if we are to turn a bus or streetcar into either a newspaper or a park, we [must] take great liberties with people who because of necessity become commuters and at the

³²³ See *Coleman*, 904 F. Supp. 2d at 697 (quoting *ACLU of Tenn. v. Bredesen*, 441 F.3d 370, 375 (6th Cir. 2006)).

³²⁴ See discussion *supra* Section IV.B.

³²⁵ See discussion *infra* Conclusion.

³²⁶ See *White Coat Waste Project v. Greater Richmond Transit Co.*, 463 F. Supp. 3d 661, 705–06 (E.D. Va. 2020); *Orazio v. North Hempstead*, 426 F. Supp. 1144, 1148 (E.D.N.Y. 1977).

³²⁷ See generally Patrick Garry, *Captive Audience Doctrine in First Amendment Jurisprudence* (2006) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2280740.

³²⁸ See, e.g., *Kovacs v. Cooper*, 336 U.S. 77 (1949) (upholding an ordinance prohibiting the use of sound trucks, stating that citizens in their homes should be protected from the invasion of loud and raucous noises beyond their control).

³²⁹ See *Pub. Utils. Comm’n v. Pollak*, 343 U.S. 451, 468 (1952) (Douglas, J., dissenting) (“The streetcar audience is a captive audience. It is there as a matter of necessity, not of choice.”).

³³⁰ See 418 U.S. 298, 304 (1974).

same time captive viewers or listeners.”³³¹ Given the nature of the audience at issue—streetcar riders unable to feasibly choose other modes of transportation—Justice Douglas believed that an advertiser ought to have no right to “force his message upon an audience incapable of declining to receive it.”³³²

Lehman necessarily stands for the proposition that the “right of the commuters to be free from forced intrusions on their privacy” prevents a city from deliberately using public transit as a “forum[] for the dissemination of ideas upon this captive audience.”³³³ Ultimately, because streetcar riders are a captive audience, restrictions on political advertisements played over speaker systems in public transit vehicles were held to be constitutionally permissible.³³⁴ The *Lehman* decision has been cited in later cases involving advertising on public transit, notably by a district court in the First Circuit.³³⁵

As the Supreme Court has recognized previously, individuals riding public transportation are “captives” and, therefore, unable to avoid objectionable speech.³³⁶ However, the Court has noted that members of the public “are often ‘captives’ outside the sanctuary of the home and subject to objectionable speech.”³³⁷ Outside of the sacred curtilage of the home, “[t]he ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is, in other words, dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner.”³³⁸ This important limitation prevents “empower[ing] a majority to silence dissidents simply as a matter of personal predilections.”³³⁹

In the case of public transit advertising, controversial advertising need not necessarily run afoul of the captive audience doctrine.³⁴⁰ As noted by the Court, the government cannot automatically “shut off discourse solely to protect others from hearing it.”³⁴¹ Likewise, “a principal ‘function of free speech . . . is to invite dispute.’”³⁴² Indeed, speech may “best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to

³³¹ *See id.* at 306–07 (Douglas, J., concurring).

³³² *See id.* at 307 (Douglas, J., concurring).

³³³ *See id.* (Douglas, J., concurring).

³³⁴ *See id.* at 304.

³³⁵ *See generally* *Change the Climate, Inc. v. Mass. Bay Transp. Auth.*, 214 F. Supp. 2d 125 (D. Mass. 2002) (noting that it would be unacceptable to subject captive audiences to various sorts of graphic advertisements).

³³⁶ *See Lehman*, 418 U.S. at 304.

³³⁷ *See Cohen v. California*, 403 U.S. 15, 21 (1971).

³³⁸ *See id.*

³³⁹ *See id.*

³⁴⁰ *See generally* *Garry*, *supra* note 327.

³⁴¹ *Cohen*, 403 U.S. at 21.

³⁴² *Texas v. Johnson*, 491 U.S. 397, 408 (1989) (quoting *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949)).

anger.”³⁴³ This is not to say that reasonable limits may not be imposed, as per *FCC v. Pacifica Foundation*, because the government’s ability to regulate plainly obscene advertising in a public forum is not impeded.³⁴⁴ If there is a certain threshold of controversy too great for a public transit agency’s ridership to bear, nothing prevents a public transit agency from rejecting advertising in a matter that is narrowly tailored to serve a compelling government interest.³⁴⁵

The district court in *Planned Parenthood Association v. Chicago Transit Authority* touched on the pragmatic application of the captivity issue to public transit advertising.³⁴⁶ The standard employed is that the party asserting the captivity doctrine must show that the medium is “so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it.”³⁴⁷ While public transit vehicles are more confining than an ordinary public street, there is nothing about the medium of advertising via car cards and exterior advertisements that makes it impossible for an unwilling individual to avert their eyes.³⁴⁸ This option to ignore content may be contrasted with the advertisements played over loudspeaker at issue in *Public Utilities Commission v. Pollak*, which were genuinely unavoidable without carrying earmuffs.³⁴⁹ The court ultimately held that it was impossible for the CTA to justify its content-based regulation on the basis of the captivity doctrine because it was not impossible for CTA riders “to avert their eyes from the printed message PPA seeks to deliver.”³⁵⁰

That is not to say the ambit of the public forum doctrine is unlimited. When a compelling state interest exists, restricting advertising obviously intended to inflame or offend may be justified to spare the riders of public transit from hateful content. Some balance must be struck to guard against advertisements designed simply to “troll” the viewer rather than spark a spirited and civil discussion. Free speech is a vital principle but does not occur in a vacuum. It must be balanced with other vital principles such as diversity, tolerance, and civic unity, particularly when that speech has the air of government sponsorship. As is said by some political commentators, “[f]ree speech doesn’t mean speech free from all consequences.”³⁵¹ How exactly to construe that line, however, is beyond the scope of this Note.

³⁴³ See *id.* at 408–09.

³⁴⁴ See 438 U.S. 726, 745 (1978) (holding that a broadcast of patently offensive words dealing with sex and excretion may be regulated because of its content).

³⁴⁵ See Post, *supra* note 21, at 1750.

³⁴⁶ 592 F. Supp. 544, 546 (N.D. Ill. 1984).

³⁴⁷ See *id.* at 555 (quoting *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212 (1975)).

³⁴⁸ See *Planned Parenthood Ass’n*, 592 F. Supp. at 555.

³⁴⁹ See *generally* 343 U.S. 451 (1952).

³⁵⁰ See *Planned Parenthood Ass’n*, 592 F. Supp. at 555.

³⁵¹ Scott Lemieux, *Free Speech Doesn’t Mean Speech Free from All Consequences, Despite What Some Conservatives Argue*, NBCNEWS (July 6, 2019, 4:31 AM), <https://www.nbcnews.com/think/opinion/free-speech-doesn-t-mean-speech-free-all-consequences-despite-ncna1026911> [<https://perma.cc/PS83-LH4J>].

CONCLUSION

While the future of public transit ridership faces challenges due to the ongoing COVID-19 pandemic, there is a renewed focus on increased funding for public transit in communities across the United States.³⁵² This expectation that ad placements will increase means it is more important than ever to ensure that courts respect the principles of the First Amendment when evaluating the advertising policies of public transit agencies.³⁵³ While many public transit agencies do have “self-serving” policies on the record, such policies often are enforced in inconsistent or contradictory manners against individuals whose speech is unpopular.³⁵⁴ This pick-and-choose approach is plainly unconstitutional.³⁵⁵ If public transit agencies allow some public interest advertising, they lose the ability to act arbitrarily as a gatekeeper.³⁵⁶ While this view may be harsh, the Constitution demands a higher standard.³⁵⁷

When public transit agencies do not have strictly enforced, written content policies deliberately excluding public interest and other types of “controversial” advertising, they create a designated public forum. In doing so, the agency loses the ability to impose restrictions other than those that are content-neutral and are “reasonably” tailored to a compelling government interest. That is the view of the majority of circuit courts in the United States, and it should eventually be adopted by the Supreme Court should an opportunity for *certiorari* again present itself.

The majority circuit approach is best described as a four-part analysis.³⁵⁸ First, the nature of the public forum at issue must be considered, with extreme care taken to precisely define the scope so that it is not overbroad.³⁵⁹ Second, the type of access requested by the general public should be closely scrutinized, because designated public forums may be open to some forms of expressive activity but not others.³⁶⁰ Third, the court should analyze the public transit agency’s prior practices to determine its intent, keeping in mind that any written policy statements are not, in and of

³⁵² Mary Louise Kelly & Alisa Chang, *What Is the Future of Public Transit in the U.S.?*, NPR (Dec. 29, 2020, 3:51 PM), <https://www.npr.org/2020/12/29/951208111/what-is-the-future-of-public-transit-in-the-u-s> [<https://perma.cc/9WKY-DFWW>].

³⁵³ See discussion *supra* Section II.G.

³⁵⁴ See discussion *supra* Section II.B.

³⁵⁵ See discussion *supra* Section II.B.

³⁵⁶ See discussion *supra* Part II.

³⁵⁷ See also *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 647 (1943) (Frankfurter, J., dissenting) (“[Individuals are] not justified in writing [their] private notions of policy into the Constitution, no matter how deeply [they] may cherish them or how mischievous [they] may deem their disregard.”).

³⁵⁸ See discussion *supra* Section II.G.

³⁵⁹ See discussion *supra* Section II.G.

³⁶⁰ See discussion *supra* Section II.G.

themselves, determinative of the type of forum created.³⁶¹ Fourth, based on those facts, if the agency appears to have accepted almost anyone willing to pay the fee—almost always the case upon close scrutiny of past practices—a designated public forum exists.³⁶² This organic, fact-intensive analysis calls for intense judicial scrutiny in order to ensure that constitutional rights are given the proper deference and respect.³⁶³

The government speech issue does not seem to apply to public transit advertising cases.³⁶⁴ Unlike in *Sumnum* or *Walker*, it is clear that public transit advertising does not represent government speech.³⁶⁵ In accepting the advertising, the public transit agency merely generates revenue by conveying a message on behalf of others.³⁶⁶ Generally speaking, the speech or content in advertisements on transit authority property is not reasonably attributable to the transit authority itself; the advertiser itself is the party that stands to gain or lose from public discourse.³⁶⁷ Further, even if private speech takes place on government property, that does not create government speech absent other factors like the government dictating the “overarching message” of the speech.³⁶⁸ As this is almost never the case, the constitutional issues of government speech are not applicable to public transit advertising.³⁶⁹

The captivity issue may be present to an extent in public transit ridership, but not to an extent that justifies tyrannical restrictions to protect a captive audience.³⁷⁰ Controversial speech is important, and allowing free and open promotion of views that may be unpopular is valuable to public discourse.³⁷¹ Public interest groups and other organizations must be allowed, in a democratic society, to go where the eyeballs are.³⁷² To restrict good-faith messaging stifles civic discussion necessary to develop and maintain an informed populace.³⁷³ So long as it is possible for public transit riders to look away from advertising, they are not a truly “captive audience.”³⁷⁴

Transit agencies should allow the advertising they carry to be used for a variety of purposes. Allowing content-based restrictions potentially can prevent important messaging that some viewers may find uncomfortable from being distributed. One

³⁶¹ See discussion *supra* Section II.G.

³⁶² See discussion *supra* Section II.G.

³⁶³ See discussion *supra* Section II.B.

³⁶⁴ See discussion *supra* Section IV.A.

³⁶⁵ See discussion *supra* Section IV.B.

³⁶⁶ See discussion *supra* Section IV.B.

³⁶⁷ See discussion *supra* Section IV.B.

³⁶⁸ See discussion *supra* Section IV.B.

³⁶⁹ See discussion *supra* Section IV.B.

³⁷⁰ See discussion *supra* Section V.B.

³⁷¹ See discussion *supra* Section V.A.

³⁷² See discussion *supra* Part V.

³⁷³ See discussion *supra* Section II.F.

³⁷⁴ See discussion *supra* Section V.A.

can conceive of positions on important issues (such as allowing for same-sex marriage or promoting condom use) that once were (and in some quarters, remain) deeply controversial. Making public transit advertising a designated public forum maximizes free speech without overly harming the mission of the advertising itself (that is, to generate additional revenue to fund transit operations). In the modern era, advertising serves an important public and civic purpose. By adopting the reasoning of the majority of circuit courts, this Note hopes the Supreme Court can give public transit advertising the legal recognition it deserves.