RELIGIOUS ADVERTISEMENTS SPARKING DEBATE ON BUSES: A CIRCUIT COURT SPLIT ON VIEWPOINT VERSUS CONTENT-BASED DISCRIMINATION

*Jonathan P. Rava**

I. Introduction

A content-based law or regulation discriminates against speech based on the content, substance, or subject matter of what it communicates, whereas a content-neutral law applies to expression without regards to its substance.[1] An important first step in ascertaining whether a law violates the First Amendment is determining if the law is either content based or content neutral, because content-based laws are presumptively unconstitutional and subject to strict scrutiny, the highest form of judicial review.[2] In contrast, content-neutral laws generally must survive only intermediate scrutiny.[3]

Viewpoint discrimination, on the other hand, occurs when a governmental regulation restricts expression based not only on its content, but specifically on the underlying views in the message.[4] Content-based restrictions limit speech based on its subject matter, while viewpoint-based restrictions limit speech based on ideology and perspective.[5] For example, "a law banning all political speeches in a public park would be content-based,"[6] whereas "a law banning only political speeches by members of the Socialist Party" would be viewpoint based.[7] Since the government is essentially picking a side in a debate when it engages in viewpoint discrimination, the Supreme Court has held viewpoint-based restrictions to be especially offensive to the First Amendment, thus making them presumptively unconstitutional.[8] In the words of Justice Kennedy,

---

* Assistant Managing Editor, Rutgers Journal of Law and Religion; J.D. Candidate May 2021, Rutgers Law School.

[1] David L. Hudson Jr., *Legal Terms and Concepts Related to Speech, Press, Assembly, or Petition*, FIRST AMEND. ENCYCLOPEDIA (2009), https://www.mtsu.edu/first-amendment/article/935/content-based.

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] Hudson Jr., *supra* note 1.

[8] *Id.*

"Viewpoint discrimination is thus an egregious form of content discrimination."[9] Moreover, Justice Thurgood Marshall once wrote for the court that "the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[10]

Although the difference between the two principles of content-based discrimination and viewpoint-based discrimination may seem easy to distinguish, recently, however, two circuit courts are split on the issue. In a 2-1 opinion, a Third Circuit panel determined that the County of Lackawanna Transit System, which operates the bus transit system in Scranton, Pennsylvania, ran afoul of the First Amendment when it enacted a 2013 policy with prohibitions on religious and political messages.[11] The majority explained that in any forum, "the government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction," quoting from the U.S. Supreme Court's decision in *Rosenberger v. Rector & Visitors of the University of Virginia*.[12]

Incidentally, this decision diverges from the D.C. Circuit's 2018 decision in Archdiocese of Washington v. Washington Metropolitan Area Transit Authority, which found that WMATA's policy banning "issue-oriented ads, including political, religious and advocacy ads" regulated content, not viewpoint.[13] The D.C. Circuit had reasoned that because WMATA prohibited messages on many subjects, it had not "invite[d] debate on religion," so there was a much narrower forum at issue.[14]

The opposite rulings, despite some key distinctions, could create a tension that only the U.S. Supreme Court could resolve. Therefore, this note will focus on the history of content-based discrimination and viewpoint-based discrimination, as well as provide an analysis of the two Circuit Court decisions. Lastly, this note will offer an explanation as to how the U.S. Supreme Court should rule on this issue, if they were to decide on it.

---

[9] Rosenberger v. Rector & Visitors of the Univ. of Va., 115 S. Ct. 2510, 2516 (1995).
[10] Police Dept. of City of Chi. v. Mosley, 408 U.S. 92, 95 (1972).
[11] Ne. Pa. Freethought Soc'y v. Cnty. of Lackawanna Transit Sys., 938 F.3d 424 (3d Cir. 2019).
[12] *Id.* at 432 (quoting *Rosenberger*, 115 S. Ct. at 2510).
[13] Archdiocese of Wash. v. Wash. Metro. Area Transit Auth., 897 F.3d 314, 335 (D.C. Cir. 2018).
[14] *Id.* at 327.

II. History of Viewpoint-Based Discrimination

The United States Supreme Court addressed viewpoint neutrality for one of the first times in *Hague v. Comm. for Indus. Org.,* where it struck down a city ordinance governing the issuance of permits on public streets.[15] The Court stated that the ordinance allowed the city's Director of Safety to refuse a permit on his mere opinion which thus, "as the record discloses, be made the instrument of arbitrary suppression of free expression of views on national affairs."[16] Four years later in *W. Va. State Bd. of Educ. v. Barnette*, the Court further clarified this point through invalidating a public school resolution that ordered a salute to the American flag.[17] Justice Jackson wrote, "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[18] This soon became a reigning principle of First Amendment jurisprudence.[19]

The Court continued to support the *Barnett* decision on viewpoint neutrality throughout the 1950's when McCarthyism was at an all-time high and "the Court acquiesced in many executive and legislative initiatives to suppress speech or punish speakers based on perceived 'subversive' viewpoint."[20] Although the Court in *Am. Commc'ns Ass'n, C.I.O., v. Douds*[21] held that the Taft-Hartley Act's imposition of an anticommunist oath on labor union leaders does not violate the First Amendment, the Court made sure to note its disapproval of laws "frankly aimed at the suppression of dangerous ideas."[22] The majority asserted that the anticommunist oath did not "aim at the suppression of dangerous ideas … but only against the combinations of those affiliations or beliefs with occupancy of a position of great power over the economy of the country."[23] As

---

[15] Hague v. Comm. for Indus. Org., 307 U.S. 496 (1939); *see also* Marjorie Heins, *Viewpoint Discrimination*, 24 HASTINGS CONST. L.Q. 99, 105 (1996).
[16] *Id.* at 516.
[17] W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).
[18] *Id.* at 642.
[19] Heins, *supra* note 15, at 100.
[20] *Id.* at 105 & n.30.
[21] 339 U.S. 382 (1950).
[22] *Id.* at 402.
[23] *Douds*, 339 U.S. at 402-04.

expected, Justice Jackson, author of *Barnette*, dissented on this point.[24]

The year after *Douds*, the Court in *Niemotko v. Maryland*[25] held that a city in Maryland had violated the free exercise of Jehovah's Witnesses' religion by not issuing a permit for him and his religious group to meet in a public park when other religious and civic groups had been given permits for holding their meetings there. In ruling the city's permit requirement as unconstitutional, the Court looked to the decision in *Hague*, noting the potential for viewpoint discrimination in discretionary government policies, and that the rule against viewpoint discrimination was grounded in Equal Protection, as well as First Amendment principles.[26]

Throughout the second half of the twentieth century, the Supreme Court established that the viewpoint neutrality principle applies regardless of whether a government action is direct suppression, "forced speech," as in *Barnette*[27], or "manipulation of benefit and subsidy programs."[28] Moreover, the Court has applied the principle "regardless of the medium being regulated."[29] For example, in *Turner Broadcasting*, the Supreme Court decided on whether statutes requiring cable television networks to devote a portion of their channels to specific stations violated the First Amendment.[30] Justice Kennedy, for the Court, explained:

> At the heart of the First Amendment lies the principle that each person should decide for him or herself the ideas and beliefs deserving of expression, consideration, and adherence. Our political system and cultural life rest upon this ideal … Government action that stifles speech on account of its message, or that requires the utterance of a particular message favored by the Government, contravenes this essential right.[31]

As Justice Kennedy continued, however, he began to merge the two concepts of viewpoint and content: "Our precedents thus

---

[24] *See id.* at 442, 443; *see also* Heins, *supra* note 15, at 106.
[25] 340 U.S. 268 (1951).
[26] *Id.* at 271-73.
[27] Heins, *supra* note 15, at 109 n.57.
[28] *Id.* at 109.
[29] *Id.*
[30] *Turner Broad. Sys., Inc. v. F.C.C.*, 114 S. Ct. 2445, 2448 (1994).
[31] *Id.* at 2459.; *see also* Heins, *supra* note 15, at 109 n.58.

apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content."[32] Engaging in a merger of the two ideas is part of the reason there is a circuit court split, due to a comparison of the two issues.

III. History of Content-Based Discrimination

The famous quote from Justice Kennedy in *Turner Broadcasting* suggests the Supreme Court had a difficult time distinguishing viewpoint from the broader concept of content.[33] While the Court focused on polishing the viewpoint neutrality principle, it simultaneously progressed the condemnation of not just viewpoint-based but content-based discrimination.[34] One of the cases most cited for this developing principle is *Police Dept. of City of Chicago v. Mosley*,[35] in which the Court ruled that the Chicago's ordinance prohibiting non-labor pickets on school property violated the First Amendment's Freedom to Protest. Justice Marshall, for the Court, wrote: "Above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[36]

Nevertheless, the government may, in certain circumstances, favor some types of speech over others, based on their subject matter or content.[37] Some of the many examples include: "art exhibits on particular themes; research grants for particular projects; merit-based selection decisions by public libraries, broadcast stations, or arts and humanities endowments";[38] "limited public for[a]" that are legitimately "reserv[ed] … for certain groups or for the discussion of certain topics";[39] and "academic judgments as to how best to allocate scarce resources,"[40] including public school and college curricula.[41] Certainly, the First Amendment exceptions for classifications of

---

[32] *Turner Broad. Sys., Inc. v. F.C.C.*, 114 S. Ct. at 2459.
[33] Heins, *supra* note 15, at 110.
[34] *Id.*
[35] 408 U.S. at 92.
[36] *Id.* at 95.
[37] Heins, *supra* note 15, at 110.
[38] *Id.*
[39] *Id.* at 110 n.64.
[40] *Rosenberger*, 115 S. Ct. at 2518 (quoting Widmar v. Vincent, 454 U.S. 263, 276 (1981)).
[41] Heins, *supra* note 15, at 110.

speech like "libel, perjury, extortion, threats, false advertising, or fight words,"[42] as well as the "constitutional distinction between 'commercial" and 'political speech,'"[43] are all undeniably content-based.[44] In furtherance of this belief, Justice Stevens is quoted, "often cited as a proposition of law … is perhaps more accurately described as a goal or an ideal, for the Court's decisions do, in actuality, tolerate quite a bit of content-based regulation."[45]

IV.The Forum Doctrine

The public forum doctrine originated in *Hague v. Comm. for Indus. Org.*[46] became a core concept within the First Amendment. However, in *Cornelius v. NAACP Legal Def. & Educ. Fund*[47]and *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*[48], the Court developed a three-tiered approach to evaluate speech restrictions in public places based on whether the forum involved is a traditional public forum, a designated public forum, or a nonpublic forum.[49] In *Cornelius*, the Court stated that:

> [e]ven protected speech is not equally permissible in all places and at all times and that the government is not require[d] . . . freely to grant access to all who wish to exercise their right to free speech on every type of [g]overnment property without regard to the nature of the property or to the disruption that might be caused by the speaker's activities.[50]

Further, in *Perry*, the Supreme Court acknowledged that, under the forum doctrine, "[t]he existence of a right of access to public property and the standard by which limitations upon such right must be evaluated differ depending on the character of the property at issue."[51]

---

[42] *Id.* at 111.
[43] *Id.*
[44] *Id.* at 111 n.66.
[45] Justice John Paul Stevens, *The Freedom of Speech,* 102 YALE L.J. 1293, 1304 (1993); *see* Heins, *supra* note 15, at 111 n.68.
[46] 307 U.S. 496 (1939).
[47] 473 U.S. 788 (1985).
[48] 460 U.S. 37 (1983).
[49] Heins, *supra* at 112 n.72.
[50] *Cornelius*, 473 U.S. at 799-800.
[51] *Perry*, 460 U.S. at 44.

The *Perry* Court identified three categories of property. First, public forums are "places which by long tradition or by government fiat have been devoted to assembly and debate," such as sidewalks or parks, where "the rights of the state to limit expressive activity are sharply circumscribed."[52] To enforce a content-based exclusion in a public forum, the regulation must satisfy strict scrutiny.[53] Second, designated public forums are those in which the government has "opened" public property "as a place for expressive activity."[54] "Although [the government] is not required to indefinitely retain the open character of the facility, as long as it does so it is bound by the same standards as apply in a traditional public forum."[55] Third, a nonpublic forum is public property which is not by tradition or designation a public forum, and "the [government] may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view."[56] In this third category, policy or practice may establish that the property is not held open to the public for general debate because "the [government], 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."[57] In *Cornelius*, the Court elaborated:

> Control over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint-neutral … Although a speaker may be excluded from a nonpublic forum if he wishes to address a topic not encompassed within the purpose of the forum . . . or if he is not a member of the class of speakers for whose especial benefit the forum was created . . . the government violates the First Amendment when it denies access to a speaker solely to suppress the point

---

[52] *Id.* at 45.
[53] *Id.*
[54] *Id.*
[55] *Id.* at 46.
[56] *Id.*
[57] *Perry*, 460 U.S. at 46.

> of view he espouses on an otherwise includible subject.[58]

Thus, despite the *Mosley* Court's aspirational perspective to condemn all government restrictions on expression based on subject matter or content, "such restrictions are not allowed in traditional public for a like sidewalks–the venue involved in *Mosley*–but they are allowed in numerous other contexts."[59]

V. Religious Speech

Prior to *Rosenberger v. Rector and Visitors of the University of Virginia*[60], the Supreme Court took an expansive approach to viewpoint in *Lamb's Chapel v. Center Moriches Union Free School District*.[61] In *Lamb's Chapel*, a school district permitted school property to be used for "the holding of 'social, civic and recreational meetings and entertainments, and other uses pertaining to the welfare of the community,'" but it could "not be used by any group for religious purposes."[62] When an evangelical church in the community and its pastor applied for permission to use school facilities to show lectures by Doctor James Dobson on his "views on the undermining influences of the media that could only be counterbalanced by returning to traditional, Christian family values instilled at an early stage," that is, a "[f]amily oriented movie – from a Christian perspective," permission was denied. The Supreme Court, acknowledging that "[t]here is no suggestion from the courts below or from the [school] District or the State that a lecture or film about child rearing and family values would not be a use for social or civic purposes otherwise permitted," reasoned that

---

[58] *Cornelius*, 473 U.S. at 806 (citations omitted). In *Cornelius*, the Supreme Court ruled that a policy excluding advocacy organizations from participating in a program that solicited contributions from federal employees did not violate the First Amendment, because, according to the Court, "the discrimination was based merely on subject matter and speaker, not viewpoint–even though one justification for the exclusion was to avoid controversy." Heins, *supra* note 15, at 113 (citing *Cornelius*, 473 U.S. at 808). However, the *Cornelius* Court did acknowledge the ability for content restrictions to be pretexts for the suppression of ideas, especially when the discrimination is against "controversial" speech: "[T]he purported concern to avoid controversy excited by particular groups may conceal a bias against the viewpoint advanced by the excluded speakers." *Cornelius*, 473 U.S. at 812.

[59] Heins, *supra* note 15, at 113.

[60] 115 S. Ct. 2510 (1995).

[61] 508 U.S. 384 (1993).

[62] *Lamb's Chapel*, 508 U.S. at 386-87.

because "[t]hat *subject matter is not one . . . off limits* to any and all speakers," the government had impermissibly "denie[d] access to a speaker solely to suppress the point of view he espouses on an otherwise includable subject."[63]

In other words, where secular groups were allowed to use school premises to address the same subject matter during the same hours, the school district's denial of the church's request was impermissibly viewpoint-based.[64] However, the "*Lamb's Chapel* majority did not seem concerned that there are countless differing, even opposing, 'religious' perspectives on family life; the views of some religions on child rearing, birth control, divorce, or premarital sex are undoubtedly closer to those of many secular groups than to those of other religions."[65] In this sense, the *Lamb's Chapel* Court struck down a previously narrow construction of the viewpoint concept[66], and expanded it to welcome broader "perspectives" such as religion.[67]

The rule set out in *Lamb's Chapel* was further established by the Court in *Rosenberger v. Rector and Visitors of the University of Virginia*,[68] where the Court quashed a state university rule excluding religious publications from eligibility for student funds because it was impermissibly viewpoint based. In *Rosenberger*, the University's Guidelines stated that "the purpose of the [Student Activities Fund ('SAF')]" was "to support a broad range of extracurricular student activities that 'are related to the educational purpose of the University,'" because "the University 'recogni[zed] that the availability of a wide range of opportunities' for its students 'tends to enhance the University environment.'"[69] Its Guidelines "recognize[d] 11 categories of student groups that may seek payment to third-party contractors because they 'are related to the educational purpose of the University of Virginia,'" including "student news, information, opinion, entertainment, or academic communications media groups."[70] The University denied funding for *Wide Awake: A Christian Perspective at the University of Virginia*,

---

[63] *Id.* at 393-94 (quoting *Cornelius,* 473 U.S. at 806) (emphasis added).
[64] Heins, *supra* note 15, at 120.
[65] Heins, *supra* note 15, at 120 & n.111.
[66] *Id.* at 120 n.109.
[67] *Id.* at 120.
[68] 115 S. Ct. 2510 (1995).
[69] *Id.* at 824.
[70] *Id.*

"invok[ing]" a Guideline "prohibit[ing] . . . funding on behalf of publications that primarily promot[e] or manifes[t] a particular belie[f] in or about a deity or an ultimate reality."[71] The Supreme Court found this Guideline to "effect a sweeping restriction on student thought . . . in the context of University sponsored publications" and held the Guideline was viewpoint discriminatory because "[b]y the very terms of the SAF prohibition, the University *does not exclude religion as a subject matter* but selects for disfavored treatment those student journalistic efforts with religious editorial viewpoints."[72] The Court concluded that "[t]he prohibited perspective, not the general subject matter, resulted in the refusal to make third-party payments, for the subjects discussed [in *Wide Awake*] were otherwise within the approved category of publications."[73]

A combination of precedents established in *Mosley*[74] with "language in cases like *Perry* and *Cornelius* that applies the principle of viewpoint neutrality to government benefits and subsidies,"[75] the Court said that "[v]iewpoint discrimination is … an egregious form of content discrimination," and is not a permissible basis for disfavoring speech.[76] The dissenters' argument in *Rosenberger* that the University guidelines were viewpoint neutral because they discriminated against "an entire class of viewpoints" was rejected by the five-justice majority.[77] Justice Kennedy, for the majority, recognized that public debate is not "bipolar": "[T]he complex and multifaceted nature of public discourse has not embraced such a contrived description of the marketplace of ideas . . . The dissent's declaration that debate is not skewed so long as multiple voices are silenced is simply wrong; the debate is skewed in multiple ways."[78]

Similar circumstances were present in *Good News Club v. Milford Central School*[79], where the Milford Central School "enacted a community use policy" stating purposes "for which its building

---

[71] *Id.* at 836.
[72] *Id.* at 831, 836 (emphasis added).
[73] *Id.* at 831.
[74] *Mosley*, 408 U.S. at 92.
[75] Heins, *supra* note 15, at 120.
[76] *See Rosenberger*, 115 S. Ct. at 2516; *see also Heins,* supra note 15, at 120.
[77] *Id.*
[78] *Id.*
[79] 533 U.S. 98 (2001).

could be used after school," including that "district residents may use the school for 'instruction in any branch of education, learning or the arts'" and that "the school is available for 'social, civic and recreational meetings and entertainment events, and other uses pertaining to the welfare of the community, provided that such uses shall be nonexclusive and shall be opened to the general public.'"[80] Although the school's community-use policy essentially reiterated the relevant state guidelines[81], it also expressly prohibited the use of Milford's property for "religious purposes."[82] When the "sponsors of the local Good News Club, a private Christian organization for children ages 6 to 12," sought to use the school's facilities "to have 'a fun time of singing songs, hearing a Bible lesson and memorizing scripture,'" the district's interim superintendent denied their request on the ground that their proposed use "was 'the equivalent of religious worship.'"[83] The Supreme Court held that the school's "exclusion of the Good News Club based on its religious nature is indistinguishable from the exclusions in [*Rosenberger* and *Lamb's Chapel*]" and "that the exclusion constitutes viewpoint discrimination" because there was "no question that teaching morals and character development to children is a permissible purpose under Milford's policy" and "it is clear that the [Good News] Club teaches moral and character development to children," but was excluded from the use of school facilities "because Milford found the Club's activities to be religious in nature."[84]

The *Good News Club* majority categorized Milford as a limited public forum, and in such forums, the government generally may not impose speech restrictions that discriminate based on viewpoint.[85] In the majority opinion, Justice Thomas relied heavily on the precedents of *Rosenberger* and *Lamb's Chapel*, essentially stating that this case was no different than the two prominent cases

---

[80] *Id.* at 102.
[81] *See* N.Y. EDUC. LAW 414 (McKinney 2002).
[82] *Good News Club*, 533 U.S. at 150.
[83] *Id.* at 103.
[84] *Id.* at 107-08.
[85] *Id.* at 109. "Both parties stipulated that Milford, pursuant to N.Y. EDUC. LAW 414, created a limited public forum rather than an open public forum. This distinction is important because the Court stated that a limited public forum permits the state to restrict access to its facilities, though that power is not without limitations." Jason E. Manning, *Good News Club v. Milford Central School: Viewpoint Discrimination or Endorsement of Religion?*, 78 NOTRE DAME L. REV. 833, 864 (2003).

before it.[86] In support of their determination that the substance of the Club's activities was "materially indistinguishable" from the activities in *Lamb's Chapel* and *Rosenberger*, the majority emphasized that in both cases "religion is the viewpoint from which ideas are conveyed."[87] Additionally, the Court applied the same two-part test that the district and appellate courts used to conclude no impermissible viewpoint discrimination existed, which required that the restriction be "reasonable in light of the purpose served by the forum" and also viewpoint neutral.[88] With that being said, the Court held that, "regardless of the magnitude of the religious presence of the Club, their right to use the school facilities was still constitutionally guaranteed as long as they were teaching morals and character development."[89]

While the majority opinion placed a nail in the coffin for the viewpoint discrimination principles established in *Rosenberger* and *Lamb's Chapel*, Justice Stevens's dissent advocated a radically different process for analyzing viewpoint discrimination cases that involved a much more active, discretionary role of the court.[90] Justice Stevens defined three categories of speech for religious purposes: (1) discussion of a topic from a religious viewpoint, (2) religious worship, and (3) proselytizing.[91] Based on this classification, Justice Stevens concluded that Milford was justified in excluding the Club because the speech at issue in this case was more about "proselytizing or inculcating belief in a particular religious faith."[92]

---

[86] *Good News Club*, 533 U.S. at 109. ("Concluding that Milford's exclusion of the Good News Club based on its religious nature is indistinguishable from the exclusions in these cases, we hold that the exclusion constitutes viewpoint discrimination.").
[87] *Id.* at 112.
[88] *See id.* at 107 (quoting *Rosenberger*, 515 U.S. at 829; *Cornelius*, 473 U.S. at 806).
[89] Manning, *supra* note 85, at 861.
[90] *See Good News Club*, 533 U.S. at 131 (Stevens, J. dissenting); *see also* Manning, *supra* note 85, at 863.
[91] *See Good News Club*, 533 U.S. at 131 (Stevens, J. dissenting).
[92] Manning, *supra* note 85, at 863; *see id.* at 130 (Stevens, J. dissenting). *Good News Club* also incurred a concurrence from Justice Scalia, which held that Milford's policy was clearly viewpoint discrimination, as well as a concurrence from Justice Breyer, who focused on the Establishment Clause issue. Lastly, Justice Souter filed a dissent, which stated that the Club's use of the school was a violation of the Establishment Clause.

VI. Archdiocese of Washington v. Washington Metropolitan Area Transit Authority

a. Facts

The Washington Metropolitan Transit Authority ("WMATA") was established to provide secure and efficient transportation services by a compact between the State of Maryland, the Commonwealth of Virginia, and the District of Columbia.[93] It sells commercial advertising space, like other transit agencies, to fund the costs of its services and has approved advertisements for all forms of subjects for years.[94]

Until 2015, most issue-oriented commercials, including political, religious, and advocacy advertising, were approved by WMATA.[95] As a result of near-monthly feedback from its employees, passengers, elected officials, and community and business leaders regarding its ads, WMATA started to rethink its strategy beginning in 2010.[96] The complaints raised objections to ads that were critical of the Catholic Church's stance against use of condoms, to ads by People for the Ethical Treatment of Animals with graphic pictures of animal cruelty, to ads opposing discrimination based on sexual orientation.[97] The condoms ad, for example, "generated hundreds of angry phone calls and letters and generated the second-largest negative response to any ad[] ever run in WMATA advertising space."[98] An "anti-Islam ad . . . was also a factor in WMATA's decision to change its advertising space to a nonpublic forum."[99] The Metro Transit Police Department and the United States Department of Homeland Security "feared that certain ads would, due to world events, incite individuals to violence on the system and harm WMATA employees and customers."[100] Specifically, they referred to events following "a contest to create a cartoon depiction

---

[93] *See* Washington Metropolitan Area Transit Regulation Compact of 1966, Pub. L. No. 89-774, 80 Stat. 1324.
[94] Archdiocese of Wash. v. Wash. Metro. Area Transit Auth., 897 F.3d 314, 318 (D.C. Cir. 2018).
[95] *Id.* at 319.
[96] *Id.*
[97] *Id.*
[98] *Id.*
[99] *Id.*
[100] *Archdiocese of Wash.*, 897 F.3d at 319.

of the Prophet Muhammad."[101] A cartoon that was submitted as an ad to WMATA "raised concerns, because some Muslims consider drawing the Prophet Mohammed so offensive that they have reacted violently to such depictions in the past."[102] "WMATA was aware that two gunmen were killed after they attempted to attack the building where the contest . . . was being held."[103] Additionally, a survey showed that "98% of the public was familiar with the types of ads found on buses, in trains, and in stations," that "58% opposed issue-oriented ads," and that "46% were extremely opposed to . . . issue-oriented ads."[104]

On 19 November 2015, with members from Maryland, Virginia, and the District of Columbia, the WMATA Board of Directors voted to narrow down the subjects it would allow in the WMATA advertising space.[105] Upon resolving that WMATA's advertising space is closed "to issue-oriented ads, including political, religious and advocacy ads," Res. 2015-55, the Board adopted *Guidelines Governing Commercial Advertising*, (Nov. 19, 2015) (eff. 30 days after adoption), including Guideline 12 prohibiting "[a]dvertisements that promote or oppose any religion, religious practice or belief."[106] The Board decided that four factors outweighed any financial gain gained from issue-oriented ads:

> (1) complaints from its employees, community opposition and outcry, and adverse publicity for WMATA; (2) security concerns from the Metro Transit Police Department and the United States Department of Homeland Security; (3) vandalism of WMATA property; and (4) the administrative burden associated with the time-intensive process of reviewing proposed ads and responding to complaints about ads.[107]

---

[101] *Id.*
[102] *Id.*
[103] *Id.*
[104] *Id.*
[105] *Id.*
[106] *Guidelines Governing Commercial Advertising*, WASH. METRO. AREA TRANSIT AUTH. (Nov. 19, 2015), https://www.wmata.com/about/records/public_docs/upload/Advertising_Guidelines.pdf.
[107] *Archdiocese of Wash.*, 897 F.3d at 320.

As the *Guidelines* came into force, WMATA routinely rejected ads as non-compliant with its *Guidelines*, including Guideline 12.[108]

Following the establishment of the *Guidelines*, the Archdiocese of Washington ("Archdiocese") submitted to WMATA an advertisement to place on the outside of its buses, depicting a starry night and the silhouettes of three shepherds and sheep on a hill facing a bright shining star high in the sky, along with the words "Find the Perfect Gift."[109] The web address and a hashtag for social media were included in the ad. Its website, although still under construction when the ad was submitted to WMATA, "contained substantial content promoting the Catholic Church," including "a link to 'Parish Resources,' . . . a way to 'Order Holy Cards,' and . . . religious videos and 'daily reflections' of a religious nature."[110] The Archdiocese explained that "[t]he 'Find the Perfect Gift' campaign is an important part of [its] evangelization efforts,"[111] "welcoming all to Christmas Mass or . . . joining in public service to help the most vulnerable in our community during the liturgical season of Advent,"[112] A representative for the Archdiocese stated: "It is critically important for the goals of the . . . campaign that the Archdiocese begin spreading its message before the Advent season" because "[t]he Roman Catholic Church teaches" that in "sharing in the long preparation for the Savior's arrival with the first Christmas, we renew our ardent desire for Christ's second coming."[113]

*Source: Archdiocese of Wash. v. Wash. Metro. Area Transit Auth., 910 F.3d 1248, 1249 (D.C. Cir. 2018).

---

[108] *Id.*
[109] *Id.*
[110] *Id.*
[111] *Id.*
[112] *Id.*
[113] *Archdiocese of Wash.*, 897 F.3d at 320.

When the Archdiocese sought to purchase space for the "Find the Perfect Gift" ad on the exterior of Metrobuses, WMATA declined on the ground that it was impermissible under Guideline 12 "because it depicts a religious scene and thus seeks to promote religion."[114] The Archdiocese filed a complaint on November 28, 2017 for declaratory and injunctive relief under the First Amendment's Free Speech and Free Exercise Clauses, Religious Freedom Restoration Act ("RFRA"), and the Fifth Amendment's guarantees of due process and equal protection. The Archdiocese requested a declaration that Guideline 12 was unconstitutional under the First and Fifth Amendments and violated the RFRA, and an injunction prohibiting WMATA from enforcing Guideline 12 to reject the Archdiocese's ad.[115]

After the district court ruled in favor of WMATA, the United States Court of Appeals for the District of Columbia Circuit granted the Archdiocese's appeal. The D.C. Circuit Court ruled that WMATA had not violated the Free Speech Clause because bus advertising space is treated as a nonpublic forum, and exclusion of religion as subject matter is permissible in a nonpublic forum.[116] Additionally, the Archdiocese was unlikely to succeed on its Free Exercise Clause claim because Guideline 12 was not motivated by hostility or irrationality, as well as a RFRA claim because there was no claim that the institution required bus advertisements.[117]

b. Holding

The D.C. Circuit's analysis began with categorizing WMATA's advertising space as a nonpublic forum, a decision consistent with longstanding Supreme Court precedent.[118] In *Lehman v. City of Shaker Heights*[119], the First Amendment challenge arose with respect to prohibiting advertising on city buses. The Court held that public transit advertising space was adequately regarded as a nonpublic forum because a "bus is plainly not a park or sidewalk or other meeting place for discussion" but rather "only a way to get to work or back home."[120] The Court drew

---

[114] *Id.*
[115] *Id.*
[116] *Id.* at 314.
[117] *Id.*
[118] *Id.* at 323.
[119] 418 U.S. 298 (1974).
[120] *Id.* at 306 (Douglas, J., concurring).

on its precedent differentiate between "traditional settings where First Amendment values inalterably prevail," and "commercial venture[s]," in which "[p]urveyors of goods and services saleable in commerce may purchase advertising space."[121] The Court concluded "the managerial decision to limit car card space to innocuous and less controversial commercial and service oriented advertising does not rise to the dignity of a First Amendment violation," in spite of concerns about threatening advertising venues and "lurking doubts about favoritism, and sticky administrative problems [that] might arise in parceling out limited space."[122] A contrary result would mean "display cases in public hospitals, libraries, office buildings, military compounds, and other public facilities immediately would become Hyde Parks open to every would-be pamphleteer and politician."[123]

The D.C. Circuit continued their analysis by stating that WMATA's decision in Guideline 12 was "consonant with recognition by the Supreme Court that the government has wide latitude to restrict subject matters – including those of great First Amendment salience[124] – in a nonpublic forum as long as it maintains viewpoint neutrality and acts reasonably."[125] Far from undermining First Amendment values, the D.C. circuit specified that the Supreme Court has recognized the latitude granted to the government in regulating a nonpublic forum to promote these values. Where there is no constitutional requirement to do so, the nonpublic forum retains some speech. The Court in *Arkansas Educ. Television Comm'n v. Forbes* explained:

> The *Cornelius* distinction between general and selective access furthers First Amendment interests. By recognizing the distinction, we encourage the government to open its property to some expressive activity in cases where, if faced with an all-or-nothing choice, it might not open the property at all. That this distinction turns on governmental intent does not render it unprotective of speech. Rather, it reflects the reality that, with the

---

[121] *Id.* at 302-04 (plurality opinion).
[122] *Id.* at 304 (plurality opinion).
[123] *Id.*
[124] *See* Minnesota Voters All. v. Manksy, 138 S. Ct. 1876, 1885-86 (2018) (collecting citations on political speech); *Cornelius*, 473 U.S. 788 (political speech); *Rosenberger*, 515 U.S. at 831 (religious speech).
[125] *Archdiocese of Wash.*, 897 F.3d at 324.

> exception of traditional public fora, the government retains the choice of whether to designate its property as a forum for specified classes of speakers.[126]

The government should not be forced to choose between "the prospect of cacophony, on the one hand, and First Amendment liability on the other."[127]

The D.C. Circuit further stated that in addition to preserving speech, "the non-public forum doctrine, by requiring that the regulations[128], preserves the government's ability to manage potentially sensitive non-public forums while cabining its discretion to censor messages it finds more or less objectionable."[129] The court noted that this limitation is particularly relevant in the sense of religious speech, "given our cultural and constitutional commitment to religious liberty and the historic role of religiously motivated dissent from government orthodoxy in the development of free-speech rights."[130] Applying these principles to the present case, the court explained that because Guideline 12 prohibits religious and anti-religious ads in clear, broad categories, "bureaucrats are not called upon to decide whether the ad criticizing the Catholic Church's position on condom usage, or the anti-Islam Muhammad ad, or the Find a Perfect Gift campaign ad is the more 'offensive,' or otherwise censor religious messages."[131] WMATA's subject-based prohibition, the D.C Circuit justifies, abides by the Supreme Court's recognition that "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or pretty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion."[132] By quoting one of the most notable principles in First Amendment jurisprudence, written by Justice Jackson in *Barnette*, the D.C. Circuit submits that WMATA's Guideline 12 is viewpoint neutral.

Eventually the D.C. Circuit addressed the Archdiocese's contention that Guideline 12 is unconstitutional because, like the restrictions challenged in *Rosenberger*, *Lamb's Chapel*, and *Good*

---

[126] Arkansas Educ. Television Comm'n v. Forbes, 523 U.S. 666, 680 (1998).
[127] *Id.* at 681.
[128] *See Rosenberger*, 515 U.S. at 829.
[129] *Archdiocese of Wash.*, 897 F.3d at 324.
[130] *Id.* at 324-25; *see also Barnette*, 319 U.S. at 642.
[131] *Id.* at 325.
[132] *Id.*; *see Barnette*, 319 U.S. at 642; *see also* Masterpiece Cakeshop, Ltd. V. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1731 (2018).

News Club, it suppresses the Archdiocese's religious viewpoint on subjects that are otherwise includable in the forum.[133] Each of these cases represents an application of the Supreme Court's viewpoint discrimination analysis, which, the D.C. Circuit contends, Guideline 12 "does not run afoul."[134] In reference to these three cases, the court stated that:

> In each, the Court held that the government had engaged in unconstitutional viewpoint discrimination because the challenged regulation operated to exclude religious viewpoints on otherwise includable topics. An examination of each case demonstrates the contrast between the breadth of subjects encompassed by the forums at issue and WMATA's in which, unlike the restrictions struck down by the Court, Guideline 12 does not function to exclude religious viewpoints but rather proscribes advertisements on the entire subject matter of religion.[135]

The D.C. Circuit went on to explain how the restrictions in Guideline 12 are unlike those challenged in *Rosenberger*, *Lamb's Chapel*, and *Good News Club*.[136] The reasoning behind the court's main difference stemmed from the fact that the property in each of those cases had been opened to a wide range of subjects without excluding religion and disallowing a religious viewpoint to be expressed in those forums was unconstitutional.[137] "To the extent those cases can be read to blur the line between religion-as-subject matter and religious viewpoint," the D.C. Court stated, "the Supreme Court's analysis emphasizes the breadth of the forums involved."[138] The court proceeded to list the "breadth of forums involved" in those comparable Supreme Court cases, such as the "broad range" of activities in service of "educational purpose" contemplated in *Rosenberger*, and the capacious range of "social, civic and recreational meetings and entertainments, and other uses pertaining to the welfare of the community" that might have been

---

[133] *Archdiocese of Wash.*, 897 F.3d at 325.
[134] *Id.*
[135] *Id.*
[136] *Id.* at 325-27.
[137] *Id.* at 327.
[138] *Archdiocese of Wash.*, 897 F.3d at 327.

permitted in *Lamb's Chapel* and *Good News Club*.[139] By contrast, the D.C. Circuit found that WMATA's forum, which is the advertising space on the outside of its buses, is not so broad, let alone inviting through its ads public debate on religion.[140] The court noted that given the express boundaries and narrow character of WMATA's forum, the Archdiocese's "Find the Perfect Gift" ad did not represent an "excluded viewpoint on an otherwise includable subject."[141] Moreover, "the rejection of its ad instead reflects WMATA's implementation of a policy that the Supreme Court has deemed permissible in a non-public forum, namely the 'exclu[sion] of religion as a subject matter.'"[142]

Before concluding their viewpoint discrimination analysis, the D.C. Circuit addressed the recent decision before the Second Circuit in *Byrne v. Rutledge*[143]. In *Byrne*, a Vermont regulation on vanity license plates allowed motorists to place secular messages relating to their "personal philosophy, beliefs, and values … identity and affiliation … and statements of inspiration," but excluded religious messages "on matters of self-identity or … statements of love, respect, or inspiration."[144] The Second Circuit held that the State engaged in viewpoint discrimination because it "distinguish[ed] between those who seek to express secular and religious views *on the same subjects*."[145] The D.C. Circuit drew on specific language from the Second Circuit's opinion to support their position that Supreme Court precedent permits the exclusion of religion as a subject matter from a nonpublic forum. Finding that "*Lamb's Chapel, Rosenberger,* and *Good News Club*, read together, sharply draw into question whether a blanket ban such as Vermont's on all religious messages in a forum that has otherwise been broadly opened to expression on a wide variety of subjects can neatly be classified as purely 'subject matter' restriction for purposes of First Amendment analysis," the court declined to "address bans on religious speech in forums limited to discussion of certain, designated topics."[146] Thus, using this language from the Second Circuit, the D.C. Circuit reasoned that WMATA's view that

---

[139] *Id.*
[140] *Id.*
[141] *Id.*
[142] *Id.*; *see also Rosenberger*, 515 U.S. at 831; *Lamb's Chapel*, 508 U.S. at 393.
[143] 623 F.3d 46 (2d Cir. 2010).
[144] *Id.* at 57.
[145] *Id.* at 56-57 (emphasis in original).
[146] *Id.* at 59.

the government may, in a nonpublic forum it has established for its advertising space, prohibit religion as a subject matter consistent with the Supreme Court's precedent.[147]

In conclusion, the D.C. Circuit majority found that WMATA's policy banning "issue-oriented ads, including political, religious and advocacy ads" regulated subject matter, not viewpoint.[148] Since the court decided there was no viewpoint discrimination in this case, the trio of Supreme Court precedents did not apply.[149] Moreover, the D.C. Circuit reasoned that because WMATA prohibited messages on many subjects, it had not "invite[d] debate on religion," so there was a much narrower forum at issue.[150]

VII. Northeastern PA Freethought Society v. County of Lackawanna Transit System

a. Facts

The County of Lackawanna Transit System ("COLTS") provides public bus service in Lackawanna County, Pennsylvania. COLTS is funded almost entirely by the Pennsylvania Department of Transportation, Lackawanna County, and the federal government because its ticket revenue is insignificant.[151] The revenue COLTS generates from leasing advertising space on both the inside and outside of its buses makes up less than two percent of COLTS's budget.[152]

Northeastern Pennsylvania Freethought Society ("Freethought") is an association of atheists, agnostics, secularists, and skeptics.[153] Its goals are to build a community for likeminded people, to organize social and educational events, and through these events and other activism to "promot[e] critical thinking and uphold[] the separation of church and state."[154] Through filing complaints and protesting public religious displays, Freethought promotes its view of "proper" church-state separation.[155]

---

[147] *Archdiocese of Wash.*, 897 F.3d at 328.
[148] *Id.* at 335.
[149] *Id.* at 325-27.
[150] *Id.* at 327.
[151] *Ne. Pa. Freethought Soc'y*, 938 F.3d at 428.
[152] *Id.*
[153] *Id.*
[154] *Id.*
[155] *Id.*

Justin Vacula, the organizer and spokesman for Freethought, was a student at Marywood University in 2012. One day during his commute to campus, Vacula noticed a "God Bless America" message on the outside of a COLTS bus.[156] This message was added by the bus manufacturer after the terrorist attacks on September 11, 2011. The message scrolled across the bus's digital route-information display when enabled by the driver.[157] After Vacula complained, COLTS removed the message from its software.[158] When this instruction upset some drivers, one driver defiantly displayed a "God Bless America" magnet on the inside of his bus. Vacula complained again, and COLTS made the driver remove it.[159]

In response to these expressions of religious sentiment, Freethought attempted to run an advertisement to "challenge a potential church/state violation and test COLTS'[s] advertising policy."[160] The proposed ad included the word "Atheists" in large block letters, and included Freethought's web address, with a blue sky background.[161] Vacula said the ad was intended to show local religious believers that there are atheists in the community and offer a resource for those believers to learn about Freethought.[162] The ad would also show other nonbelievers in the region that they are "not alone" and that "a local organization for atheists exists."[163]

* Source: Brief of Petitioner-Appellant at 18, Ne. Pa. Freethought Soc'y v. Cnty. of Lackawanna Transit Sys., 938 F.3d 424 (3d Cir. 2019) (No. 18-2743).

---

156 *Id.*
157 *Ne. Pa. Freethought Soc'y*, 938 F.3d at 428.
158 *Id.*
159 *Id.*
160 *Id.* at 429.
161 *Id.*
162 *Id.*
163 *Ne. Pa. Freethought Soc'y*, 938 F.3d at 429.

Freethought submitted its proposal in January 2012, but COLTS rejected the ad.[164] "Communications director Gretchen Wintermantel decided Freethought 'wanted to advertise so that they could spark a debate on our buses.' And the word 'atheists' (or, for that matter, the words 'Jews' or 'Muslims') might do just that."[165] In rejecting Freethought's proposed advertisement, COLTS relied on a 2011 policy that banned ads for tobacco products, alcohol, firearms, and political candidates.[166] The policy also banned ads that gave COLTS "sole discretion" to determine as "derogatory" to racial, religious, and other specified groups.[167] Even ads that were "objectionable, controversial[,] or would generally be offensive to COLTS'[s] ridership" were banned under the policy.[168]

Prior to 2011, COLTS did not have a policy concerning the restriction of certain advertisements on its buses. However, COLTS did reserve the right to reject "objectionable or controversial" ads in its contracts.[169] The right to reject those ads was never exercised until Wintermantel received an advertisement warning that "Judgment Day" was approaching.[170] COLTS rejected the ad, even though COLTS had regularly run religious ads in the past.[171] That included ads for "churches, the Office of Catholic Schools, and the evangelist Beverly Benton—who promised a 'Saturday night miracle service' at a convention she headlined."[172] There was no evidence that those ads or any others had produced a passenger complaint. Furthermore, "Partisan political ads, gambling ads, and ads for alcoholic beverages all ran without incident. Even an ad for a virulently racist and anti-Semitic website was permitted without apparent complaint."[173] Nevertheless, COLTS rejected the "Judgment Day" ad because its religious character could provoke passengers.

The rejection of the "Judgment Day" ad influenced Wintermantel to implement a formal policy.[174] When she began researching other transit authorities' policies, she discovered

---

[164] *Id.*
[165] *Id.*
[166] *Id.*
[167] *Id.*
[168] *Id.*
[169] *Ne. Pa. Freethought Soc'y*, 938 F.3d at 429.
[170] *Id.*
[171] *Id.*
[172] *Id.*
[173] *Id.*
[174] *Id.*

disputes in other cities sparked by "inflammatory" ad campaigns.[175] Moreover, "she reviewed a *New York Times* article about an atheist ad campaign in Fort Worth, which had drawn competing religious ads and a pastor-led boycott."[176] The article also noted that atheist bus ads and billboards had been vandalized in Detroit, Tampa Bay, and Sacramento.[177] Additionally, "in Cincinnati, the *Times* reported, a landlord took an atheist ad down after receiving threats."[178] In considering all of these events negatively impacted by advertisements, Wintermantel believed similar ads could trigger debate amongst COLTS riders and encourage disturbances on its buses.[179] Therefore, she drafted the 2011 policy and the COLTS board approved it.[180]

Citing the its 2011 policy's vaguest provision, COLTS rejected Freethought's first "Atheist" ad, as well as a similar one in 2013.[181] Under its "sole discretion," COLTS decided the "Atheist" advertisements would be controversial.[182] The first rejection was by phone, but the second came by letter, which stated:

> COLTS does not accept advertisements that promote the belief that "there is no God" or advertisements that promote the belief that "there is a God" . . . . The existence or nonexistence of a supreme deity is a public issue. COLTS believes that your proposed advertisement may offend or alienate a segment of its ridership and thus negatively affect its revenue. COLTS does not wish to become embroiled in a debate over your group's viewpoints.[183]

About a week later, COLTS enacted a new policy to "clarify" the 2011 policy.[184] This 2013 policy announced that COLTS opened its ad space "for the sole purpose of generating revenue for COLTS while at the same time maintaining or increasing its ridership."[185] While the 2013 policy featured new bans on religious and political

---

[175] *Ne. Pa. Freethought Soc'y*, 938 F.3d at 429.
[176] *Id.*
[177] *Id.*
[178] *Id.*
[179] *Id.*
[180] *Id.*
[181] *Ne. Pa. Freethought Soc'y*, 938 F.3d at 429.
[182] *Id.*
[183] *Id.* at 430.
[184] *Id.*
[185] *Id.*

messages, it also contained prohibitions on many of the same ads from the 2011 policy, including "disparaging" ads and ads for firearms, alcohol, and tobacco.[186] COLTS reasoned that many passengers have strong opinions about religion and politics, so eliminating those messages would help avoid discord.[187] The religion provision barred ads:

> that promote the existence or non- existence of a supreme deity, deities, being or beings; that address, promote, criticize or attack a religion or religions, religious beliefs or lack of religious beliefs; that directly quote or cite scriptures, religious text or texts involving religious beliefs or lack of religious beliefs; or [that] are otherwise religious in nature.[188]

The politics provision barred partisan and electioneering ads, and ads that "involv[e] an issue reasonably deemed by COLTS to be political in nature in that it directly or indirectly implicates the action, inaction, prospective action, or policies of a governmental entity."[189]

Citing its 2013 policy's religious speech ban, COLTS rejected a third "Atheists" ad proposed by Freethought.[190] COLTS reiterated its position that the "existence or non-existence of a supreme deity is a public issue."[191] "It is COLTS'[s] goal to provide a safe and welcoming environment on its buses for the public at large," the rejection letter explained, and "[t]he acceptance of ads that promote debate over public issues such as abortion, gun control or the existence of God in a confined space like the inside of a bus detracts from this goal."[192]

Eventually, Freethought proposed an ad that eliminated the word "Atheists" and only listed its name and web address.[193] Wintermantel decide to consult with COLTS's attorney, who admitted the proposed ad was a "borderline case" under the 2013 policy.[194] "[Vacula] is being tricky," the lawyer opined, "but he

---

[186] *Id.*
[187] *Ne. Pa. Freethought Soc'y*, 938 F.3d at 430.
[188] *Id.*
[189] *Id.*
[190] *Id.*
[191] *Id.*
[192] *Id.*
[193] *Ne. Pa. Freethought Soc'y*, 938 F.3d at 430.
[194] *Id.*

conceded the ad might not violate COLTS's religious or political speech prohibitions, so they needed to research the matter."[195] Although COLTS ultimately accepted the ad, Freethought still wanted to run its thrice-rejected "Atheists" ad, which "more clearly explain[s] who its members are."[196] So it sued under 42. U.S.C. § 1983.

Freethought challenged COLTS's 2013 policy, seeking a declaratory judgment and a permanent injunction forbidding COLTS from enforcing the policy.[197] The District Court ruled for COLTS after a one-day bench trial, holding COLTS's policy as viewpoint neutral because the religious speech prohibition "put the entire subject of religion out of bounds."[198] The District Court also deemed COLTS's ad space a limited public forum, "even though it had probably once been a designated public forum."[199] The District Court founded that conclusion in COLTS's statement of intent "not to become a public forum" and its "practice of permitting only limited access to the advertising spaces on its buses."[200] Holding Freethought's "Atheists" ad outside the forum's bounds, the District Court turned to whether that restriction was reasonable.[201]

The ad space was first opened to raise revenue, the court found.[202] With its 2013 policy, COLTS added the purpose of "maintaining or increasing COLTS'[s] ridership."[203] The court held the policy's restrictions were reasonably connected to those goals. First, the policy was intended to "keep COLTS neutral on matters of public concern," which the court said is "an especially strong interest supporting the reasonableness in limiting speech."[204] Second, the court held the policy was "reasonably connected to rider safety, since threats to rider safety also threaten revenue and ridership."[205] "Given the decrease in civil tolerance and the increase in social unrest and violence in today's society," the court explained, allowing ads like Freethought's might provoke "a controversial

---

[195] *Id.*
[196] *Id.*
[197] Ne. Pa. Freethought Soc'y v. Cnty. of Lackawanna Transit Sys., 327 F. Supp. 3d 767 (M.D. Pa. 2018).
[198] *Id.*
[199] *Id.* at 779-80.
[200] *Id.*
[201] *Id.*
[202] *Id.* at 781.
[203] *Ne. Pa. Freethought Soc'y*, 327 F. Supp.3d at 781.
[204] *Id.* at 782.
[205] *Id.* at 782-83.

discussion" which could "potentially lead to a dangerous situation for both passengers and drivers."[206] Finally, the court held the 2013 policy was not unconstitutionally vague because "a person of ordinary intelligence can generally tell what types of advertisements are permitted or proscribed."[207]

On appeal, the United States Court of Appeals, Third Circuit found that COLT's rejection of a public bus advertisement displaying the word "Atheists" along with the group's name and website, under its policy which excluded religious and atheistic messages, violated the First Amendment because:

> the message was one of organizational identity, and the policy discriminated based on viewpoint as the ban operated not to restrict speech to certain subjects but instead to distinguish between those who sought to express secular and religious views on the same subject.[208]

The Third Circuit also found that even if the ban were viewpoint neutral, it was an impermissible and unreasonable content-based restriction because "COLTS failed to show threatened disruption."[209] Lastly, the Third Circuit ruled that "Freethought was entitled to a permanent injunction as a matter of discretion because no remedy at law could cure its First Amendment injury or give it the prospective relief it sought."[210]

b. Holding

The Third Circuit began their analysis by stating that government actors like COLTS cannot restrict speech because they "disapprov[e] of the ideas expressed."[211] Yet, "not every public space is Hyde Park, so a government may sometimes impose content or speaker limitations that protect the use of its property."[212] However,

---

[206] *Id.*
[207] *Id.* at 784.
[208] *Ne. Pa. Freethought Soc'y*, 938 F.3d at 424.
[209] *Id.*
[210] *Id.*
[211] *Ne. Pa. Freethought Soc'y*, 938 F.3d at 432; R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992).
[212] *Id.*; *Ne. Pa. Freethought Soc'y*, 938 F.3d at *432*; *see Manksy*, 138 S. Ct. at 1885.

no matter what kind of property is at issue, the Third Circuit made clear that viewpoint discrimination is "out of bounds."[213]

The court then moved into the defining principles of viewpoint discrimination, using the famous *Rosenberger* quote that viewpoint discrimination is an "egregious form of content discrimination.[214] Moreover, rather than aiming at an entire subject, it "targets … particular views taken by speakers," which ultimately "violates the First Amendment's most basic promise."[215] Thus, viewpoint discrimination "empowers the censor to deprive the citizen of the opportunity to persuade."[216] So in any forum, "th[e] government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction."[217]

The Third Circuit opinion then tackled the distinction of subject matter from viewpoint, noting it can be difficult to distinguish the two. Ironically, the court used specific language from *Byrne v. Rutledge*[218] to justify the easiness of this distinction, which is the same case the D.C. Circuit used to support their position that Supreme Court precedent permits the exclusion of religion as a subject matter from a nonpublic forum. The Third Circuit stated that fortunately, "our task here is greatly simplified by a trilogy of Supreme Court decisions each addressing blanket bands on religious messages and each concluding that such bans constitute impermissible viewpoint discrimination."[219] The "trilogy" of cases the *Byrne* court is referring to is *Rosenberger*, *Lamb's Chapel*, and *Good News Club*, all of which, the Third Circuit notes, govern Northeastern PA Freethought Society v. County of Lackawanna Transit System.

By providing an explanation of the facts and governing principles of each of the three relevant Supreme Court cases, the Third Circuit outlined its reasoning as to why the COLTS policy was viewpoint discrimination.[220] Following an explanation of the *Good News Club* case, the court explained how the *Good News Club's* understanding of *Rosenberger* was reinforced by the Third Circuit

---

[213] *Id.*
[214] *Ne. Pa. Freethought Soc'y*, 938 F.3d at 432; *Rosenberger*, 515 U.S. at 829.
[215] *Id.*; *Rosenberger*, 515 U.S. at 829.
[216] *Id.*
[217] *Id.*; *Rosenberger*, 515 U.S. at 829; *see Good News Club*, 533 U.S. at 111-12.
[218] 623 F.3d 46 (2d Cir. 2010).
[219] *Ne. Pa. Freethought Soc'y*, 938 F.3d at 432*; Byrne*, 623 F.3d at 55.
[220] *Id.* at 432-33.

in *Child Evangelism Fellowship of New Jersey Inc. v. Stafford Township School District.*[221] *Child Evangelism* involved limitations on access to facilities and back-to-school nights.[222] Some community organizations were pre-approved for access, while others could be added at the school district's discretion.[223] As for the content allowed, the policy required prior approval by the district and a "nexus" to the students or school.[224] It prohibited partisan and for-profit messages, as well as solicitations.[225] The district permitted Child Evangelism to host meetings like those in *Good News Club*, but rejected authorization to distribute its flyers, permission slips, and Bibles.[226] Denying the district's purportedly viewpoint neutral rationales as "either incoherent or euphemisms for viewpoint-based religious discrimination,"[227] the Third Circuit underscored what was already clear after *Good News Club*.[228] Whether or not a government claims to have excluded "religion as a subject or category of speech," "if government permits the discussion of a topic from a secular perspective, it may not shut out speech that discusses the same topic from a religious perspective."[229] The Third Circuit in *Ne. Pa. Freethought Soc'y* went on to state that the same is true in this case: "Whatever its stated intent, [COLTS's] ban on religious messages in practice operates not to restrict speech to certain subjects but instead to distinguish between those who seek to express secular and religious views *on the same subjects*."[230]

Moreover, the Third Circuit explained that in 2012 the "Atheists" ad was meant to communicate to believers and atheists alike that "a local organization for atheists exists," and to atheists in particular that they are "not alone."[231] Furthermore, the court noted that the ad, "though minimalistic," reasonably communicates those messages, and that "[n]othing in the record suggests COLTS's policy would prohibit secular associations from advertising their

---

[221] 386 F.3d 514 (3d Cir. 2004).
[222] *Id.* at 519.
[223] *Id.*
[224] *Id.* at 250.
[225] *Id.*
[226] *Id.* at 523.
[227] *Ne. Pa. Freethought Soc'y*, 938 F.3d at 434; *Child Evangelism*, 386 F.3d at 527.
[228] *Id.* at 434.
[229] *Id.; Child Evangelism*, 386 F.3d at 528; *see* Donovan *ex rel.* Donovan v. Punxsutawney Area Sch. Bd., 336 F.3d 211, 226 (3d Cir. 2003).
[230] *Ne. Pa. Freethought Soc'y*, 938 F.3d at 434 (emphasis in original); *Byrne*, 623 F.3d at 56-57; *see Cornelius*, 473 U.S. at 806.
[231] *Ne. Pa. Freethought Soc'y*, 938 F.3d at 434.

organizational philosophy or from communicated the same message the Supreme Court saw in *Lamb's Chapel*: "We exist, this is who we are, consider learning about or joining us."[232] The Third Circuit elucidated, however, that atheistic and religious associations are prohibited from saying the same thing because of the character of their speech.[233]

The Third Circuit also noted that although it's true that Freethought's "Atheists" ad relates to the "subject' of religion "writ large," its core message is "one of organizational existence, identity, and outreach." Despite that speech being "quintessentially religious' or 'decidedly religious in nature'"[234], it may still "constitute a separate viewpoint on a wide variety of *seemingly* secular subject matter."[235] The court explained that what matters for the viewpoint discrimination inquiry is not how religious a message is, "but whether it communicates a religious (or atheistic) viewpoint on a subject to which the forum is otherwise open."[236]

The Third Circuit further described how this point is well-illustrated by the Second Circuit case *Byrne v. Rutledge,*[237] which invalidated a Vermont law prohibiting deity names and other religious references on license plates.[238] In reference to the popular bible passage John 3:16, the motorist in *Byrne* wanted his plate to say JN36TN. The Second Circuit explained this reference spoke to several possible topics, "all of which were open to secular speech."[239] Whether the place was "intended . . . as a statement of personal belief or philosophy or simply as a statement of self-identity as a Christian or affiliation with the Christian church . . . The critical fact is that Vermont permits" the use of its forum "for comment on *all* of these subjects, so long as the comment is from a secular perspective."[240] The Third Circuit explained that in the same way, COLTS prohibits Freethought's statement of organizational identity just because of that statement's atheistic character.[241] For

---

[232] *Id.*; *see Lamb's Chapel*, 508 U.S. at 393.
[233] *Id.*
[234] *Good News Club*, 533 U.S. at 111.
[235] *Ne. Pa. Freethought Soc'y*, 938 F.3d at 435 (emphasis in original); Good News/Good Sports Club v. Sch. Dist. of City of Ladue, 28 F.3d 1501, 1507 (8th Cir. 1994).
[236] *Id.*
[237] 623 F.3d at 49-50.
[238] *Ne. Pa. Freethought Soc'y*, 938 F.3d at 435.
[239] *Id.*
[240] *Byrne*, 623 F.3d at 57 (emphasis in original).
[241] *Ne. Pa. Freethought Soc'y*, 938 F.3d at 435.

that reason, the court held that the 2013 policy "facially discriminates against atheistic and religious viewpoints on all of the many topics permitted in the forum."[242]

VIII. Circuit Court Split

Before the Third Circuit concluded their opinion, the court decided to explain why they disagree with their sister court's holding in *Archdiocese of Washington v. Washington Metropolitan Area Transit Authority*.[243] The Third Circuit stated that their disagreement with their sister court began with the D.C. Circuit's choice to conduct a forum analysis before determining whether the policy discriminated on the basis of viewpoint.[244] "That put the cart before the horse," the court stated, "because the type of forum sheds no light on whether a policy or decision discriminates against a certain viewpoint," and "viewpoint discrimination is impermissible in any forum."[245] Courts "need not tackle the forum-selection question," the Third Circuit explained, since "[r]egardless of whether the advertising space is a public or nonpublic forum, the [speaker] is entitled to relief" if it establishes viewpoint discrimination.[246] So *Lamb's Chapel, Rosenberger,* and *Good News Club* cannot be distinguished by reasoning that those forums were open to a "wide[r] range of subjects,"[247] the court stated, "what matters is whether the range of subjects – narrow, wide, or in-between – includes the one the speaker wants to address."[248]

The Third Circuit also addressed the D.C. Circuit's concern that "[t]he Archdiocese's position would eliminate the government's

---

[242] *Id.*

[243] 897 F.3d 314 (D.C. Cir. 2018).

[244] *Id.* at 436.

[245] *Id.*; *see also Mansky*, 138 S. Ct. at 1885; Matal v. Tam, 137 S. Ct. 1744, 1763 (2017) (plurality opinion); *Good News Club*, 533 U.S. at 111-12; *Rosenberger*, 515 U.S. at 829.

[246] *Id.*; Pittsburgh League of Young Voters Educ. Fund v. Port Auth. of Allegheny Cnty., 653 F.3d 290, 295 (3d Cir. 2011); *see* Hedges v. Wauconda Cmty. Unit Sch. Dist. No. 118, 9 F.3d 1295, 1298 (7th Cir. 1993) ("The [F]irst [A]mendment's ban on discriminating against religious speech does not depend on whether the school is a 'public forum' and, if so, what kind . . . .").

[247] *Archdiocese of Wash.,* 897 F.3d at 327.

[248] *Ne. Pa. Freethought Soc'y*, 938 F.3d at 436; *see* Air Line Pilots Ass'n, Int'l v. Dep't of Aviation of City of Chi., 45 F.3d 1144, 1159 (7th Cir. 1995) ("It may be that an entire category of speech is banned, but this hardly satisfies a viewpoint inquiry").

prerogative to exclude religion as a subject matter in any nonpublic forum."[249] But that "prerogative," the Third Circuit stated, "is based on a dictum in *Rosenberger* that the Supreme Court has since disclaimed,"[250] and it "echoes the protestations of the *Rosenberger* dissent, not the reasoning of the majority."[251] The court reasoned that in any case, no prerogative to ban subjects can justify viewpoint discrimination.[252]

The Third Circuit continued by stating a forum maybe could be defined "so narrowly that religious perspectives would be non-germane," however, the COLTS ad space is not such a forum.[253] Further, the court doubts whether a forum like COLTS's – "defined by its exclusions and otherwise open, rather than defined by its beneficiaries and otherwise closed" – could ever fit the bill.[254] The Third Circuit explained that since COLTS has attached those exclusions to speech it considers "controversial" only exacerbates the problem.[255] Moreover, "It makes sense that it would be difficult, if not impossible, to exclude religion 'as a subject matter' in a forum open to topics susceptible to a religious perspective. After all, a typical 'subject' is not a 'comprehensive body of thought' from which 'a variety of subjects may be discussed and considered.'"[256] That is why the court must "broad[ly] constru[e] [viewpoint discrimination], providing greater protection to private religious speech on public property."[257]

At the end of the Third Circuit's disagreement portion of the opinion, the court delivered a powerful message:

---

[249] *Archdiocese of Wash.,* 897 F.3d at 325.
[250] *Ne. Pa. Freethought Soc'y*, 938 F.3d at 436; *Good News Club*, 533 U.S. at 110.
[251] *Id.*; *see Rosenberger*, 515 U.S. at 898 (Souter, J., dissenting) ("If this amounts to viewpoint discrimination, the Court has all but eviscerated the line between viewpoint and content").
[252] *Ne. Pa. Freethought Soc'y*, 938 F.3d at 436.
[253] *Id.*
[254] *Id.*; *see Cornelius*, 473 U.S. at 806 ("[A] speaker may be excluded from a nonpublic forum if he wishes to address a topic not encompassed within the purpose of the forum or if he is not a member of the class of speakers for whose especial benefit the forum was created," but "the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject." (citations omitted)).
[255] *Ne. Pa. Freethought Soc'y*, 938 F.3d at 436; *see Child Evangelism*, 386 F.3d at 527 ("A group is controversial or divisive because some take issue with its viewpoint.").
[256] *Ne. Pa. Freethought Soc'y*, 938 F.3d at 436; *Rosenberger*, 515 U.S. at 831.
[257] *Ne. Pa. Freethought Soc'y*, 938 F.3d at 437.

> Religion is not only a subject. It's a worldview through which believers see countless issues. It was so for our Nation's founders, whose moral thesis changed the world and conceived a new birth of freedom in the United States: "that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness." The Declaration of Independence para. 2 (U.S. 1776). Is there room for our revolutionary creed on a COLTS bus? Apparently not. As COLTS's counsel admitted at oral argument, the word "Creator" would be a problem.[258]

In conclusion, the Third Circuit stated that they also disagreed to the extent the D.C. Circuit reasoned that religious speech on a permissible topic may be censored if it is not "primarily" about that topic.[259] As the Supreme Court explained in *Good News Club* that a message on a permitted topic is "quintessentially religious" or "decidedly religious in nature" does not relegate it to second-class status.[260]

IX. Conclusion

If the Supreme Court were to rule on this issue, in my opinion, I believe the Court would agree with the Third Circuit's interpretation and analysis of the viewpoint-based versus content-based dispute. The Supreme Court has continually recognized that controversial viewpoints, like those of the Catholic Church in *Archdiocese of Washington v. Washington Metropolitan Area Transit Authority*, as well as those of the Atheists in *Northeastern PA Freethought Society v. County of Lackawanna Transit System*, are "the essence of First Amendment expression."[261] The viewpoint neutrality rule is "designed precisely to protect this 'essence' by preventing government suppression of controversial or otherwise disfavored ideas."[262] That purpose is "ill-served, as the *Lamb's*

---

[258] *Id.*
[259] *Id.*; *see Archdiocese of Wash.*, 897 F.3d at 329.
[260] *Ne. Pa. Freethought Soc'y*, 938 F.3d at 437; *See Good News Club*, 533 U.S. at 111.
[261] Heins, *supra* note 15, at 122.
[262] *Id.*

Chapel, *Rosenberger*, and *Good News Club* Courts recognized, if government may accomplish its goal by suppressing an entire category of viewpoints."[263]

Unfortunately for the Archdiocese of Washington, the D.C Circuit reasoned that because WMATA prohibited messages on many subjects, it had not "invite[d] debate on religion," so there was a narrower forum at issue.[264] However, as Justice Brennan pointed out, dissenting in *Lehman v. City of Shaker Heights,*[265] discrimination does not become "any less odious" when it is "among entire classes of ideas, rather than among points of view within a particular class."[266] Therefore, instead of attempting to distinguish their case from the trio of Supreme Court precedents, the D.C. Circuit should have recognized the similarities in blanket-bans on viewpoint-based messages. Even if the forum were to be considered "narrower," speech that is controversial, that "induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger," is precisely the speech most in need of constitutional protection.[267] *Rosenberger*, which declined to allow government to "skew" public debate by "disadvantaging whole categories of ideas", drives the conclusion that restrictions on speech deemed offensive or controversial, "must be understood as viewpoint-based."[268] In conclusion, I believe the Third Circuit's First Amendment analysis was the correct interpretation of the viewpoint-neutrality principle, and the Supreme Court should provide the same analysis for *Archdiocese of Washington v. Washington Metropolitan Area Transit Authority*.

---

[263] *Id.*
[264] *Archdiocese of Wash.*, 897 F.3d at 335.
[265] 418 U.S. 298 (1974).
[266] *Lehman*, 418 U.S. at 316 (Brennan, J., dissenting).
[267] Heins, *supra* note 15, at 122 n.123.
[268] *Id.* at 122.