Next Stop Censorship: A Facial Challenge to the Metropolitan Transportation Authority's Newly Adopted Advertising Standards

Michael J. Garvey
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INTRODUCTION

The New York Metropolitan Transportation Authority (the "MTA") recently adopted new rules allowing it to control the content of a wide array of advertisements displayed on its properties. The new rules permit the MTA to reject certain controversial advertisements upon a determination by an MTA official that the advertisement falls into one of six broad categories. Before the new standards were adopted, the MTA’s only criteria for accepting advertisements were that the advertisements not be obscene or false. Since it commenced selling advertising space, the MTA has, in fact, displayed numerous political and non-commercial advertisements.

This Note examines the constitutionality of the MTA’s advertising standards and concludes that they are facially violative of the First Amendment. Part I details the newly adopted standards and the procedure by which the MTA intends to implement them. Part II establishes that the MTA is a state actor and therefore is required to comport with the First Amendment. Part III asserts that the MTA advertising standards effectuate a prior restraint on protected speech and therefore are subject to a facial constitutional attack. Part IV applies the public forum

1 For example, the MTA has displayed advertisements calling for a boycott of Citibank because of the company’s allegedly unfair treatment of union workers, public service messages relating to contraception and AIDS, advertisements supporting or opposing political candidates, and advertisements against smoking and lung cancer.

doctrine to the MTA's advertising spaces; this section determines that courts are divided as to the nature of the limited public forum, especially as applied to advertising spaces managed by government agencies. Part V examines the facial constitutionality of the standards in the context of both a public and non-public forum. If a court determines that the advertising spaces on MTA properties are limited public fora, the standards will be found to be facially unconstitutional.

I. THE NEW MTA ADVERTISING STANDARDS

A. Content and Context Restrictions

On September 30, 1997, the MTA enacted new advertising standards giving it substantial discretion over the content of advertisements it chooses to display. The old standards prohibited advertisements that were obscene or false. The new standards were promulgated in response to numerous complaints the MTA had received about its advertisements. The MTA designed six new categories of advertisements that could be constitutionally valid.

See Metropolitan Transportation Authority, Board Resolution Adopting Amendments, Sept. 30, 1997 [hereinafter Board Resolution] (on file with author). The MTA's former advertising standards were adopted in March 1994. See id. 4

See Andy Newman, New M.T.A. Rules on Ads Anger Civil Libertarians, N.Y. TIMES, Oct. 1, 1997, at B3 (stating that a few years ago, agency officials said that they thought the First Amendment barred them from rejecting any advertisements unless the ads were "sexually explicit or made false claims"); Niraj Warikoo, MTA Approves Limits on Ads: Opinions Vary on Scope of The Decision, NEWSDAY, Oct. 1, 1997, at A27 (discussing a statement made by Michael Vaccari, head of the MTA's legal department, that "previous MTA advertising standards only allowed the banning of ads that were obscene or misleading").

See Metropolitan Transportation Authority, Legal Dep't Staff Summary, at 1, Sept. 18, 1997 [hereinafter MTA Staff Summary] (on file with author) (providing background for legal department's approval of new advertising standards by noting that "certain ads have provoked strong reactions from public officials, private individuals and organizations"). In particular, the MTA was barraged with complaints after it displayed a 1995 Calvin Klein underwear advertisement campaign featuring underage models in provocative poses. See Editorial, Limiting Speech in Subways, N.Y. TIMES, Sept. 30, 1997, at A30 (stating that MTA was voting "to modify the guidelines after Calvin Klein underwear ads on buses generated public complaints"); Newman, supra note 4, at B3 (quoting MTA Chairman, E. Virgil Conway, as saying that the new guidelines were "aimed at racy fashion ads like a 1995 campaign for Calvin Klein underwear that appeared to depict under-age models in provocative poses"). The MTA standards were developed under the guidance of its legal department which hired noted constitutional scholar Michael W. McConnell. See MTA Staff Summary, supra, at 1.
prohibited. The 1997 standards added six new categories of advertisements that may be rejected by the MTA. In addition to being able to reject obscene or false advertisements, the MTA may now reject an advertisement that (a) "contains an image of a person, who appears to be a minor, in sexually suggestive dress, pose, or context"; (b) is, or contains information in it that is, "directly adverse to the commercial or administrative interests of the MTA or is harmful to the morale of MTA employees"; (c) "contains images or information that demean an individual or group of individuals on account of race, color, religion, national origin, ancestry, gender, age, disability or sexual orientation"; (d) "contains images . . . that are so violent, frightening, or otherwise disturbing as to be harmful to minors"; (e) "promotes an escort service, dating service, or sexually oriented business"; or (f) "contains images or information that would be deemed by a significant segment of the public to be patently offensive, improper, or in bad taste." The advertising standards do not define any of the various terms of art used in these regulations.

B. Approval Procedures

Under the new standards, once an advertiser contracts with the MTA to advertise on its property, the advertiser must submit the advertisement to the MTA advertising contractor so that the contractor may determine whether the advertisement falls, or may fall, within any of the aforementioned categories. If the contractor makes such a finding, they must notify the MTA. If the MTA concurs with its contractor, it has the option of discussing alternate designs with the advertiser and allowing the advertiser an opportunity to submit a revised advertisement. The MTA may reject the advertisement if it finds that the advertisement is unsalvageable under the standards or if the MTA and the advertiser cannot reach an agreement with regard to proper

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6 See id. The MTA Board had approved the standards by a twelve to one vote. See Newman, supra note 4, at B3.
8 See id. § 3(c).
9 See id. § 3(c)(i).
10 See id. § 3(c)(i)-(v).
C. Justifications for the New Standards

The MTA and its legal department offered various justifications for restricting what is otherwise constitutionally protected speech. The department concluded that, in general, the MTA's private commercial interests in maintaining and operating a transportation system allowed it greater "discretion to impose reasonable restrictions on ads." The MTA legal department determined that the MTA was permitted to take into account its own interests in "maximizing revenues generated by advertising" and in "promoting and maintaining the orderly administration and operation of the MTA . . . ." According to the department's analysis, the MTA's fear that passengers would associate the MTA with controversial ads appearing on its property gave the MTA the right to limit types of advertising set out in the standards. Furthermore, the legal department concluded that the advertising standards advanced the MTA's compelling interest in protecting minors, and captive audience passengers who would be forced to confront objectionable ads. Finally, the

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11 See id.
12 See id. The formal determination is made by the MTA Contract Administrator or his designee. See id. The Contract Administrator may, but is not required to, consult with the advertising contractor, the MTA General Counsel, the Executive Director, or the Chairman of the Board. See id. § 3(c)(iv). The Administrator must notify the advertiser of any determination. See id.
13 See id.
14 MTA Staff Summary, supra note 5, at 1 (emphasis omitted).
15 Id. In 1996 alone, the MTA generated close to $34 million in revenue from selling advertising space on MTA properties. See Metropolitan Transportation Authority Real Estate Advertising Revenue, 1994-1996 (chart) (on file with author). Therefore, the MTA's decision to allow or disallow a given advertisement significantly affects the advertiser's ability to circulate its message. See Limiting Speech in Subways, supra note 5, at A30 ("Generating ad revenues is part of the M.T.A.'s job in serving transit passengers. It can do that without unconstitutionally restricting ad content or denying its critics a powerful public forum.") (emphasis added).
16 MTA Staff Summary, supra note 5, at 1.
17 See id.
18 See id. at 1-2. Advertisements in New York's MTA reach an enormous segment of the population. In 1996, approximately 1.6 billion people rode on the various forms of MTA transportation, including over 1.11 billion subway riders and over 435.9 million New York City bus riders. See Metropolitan Transportation Authority, New York City Transit, Annual Ridership, 1994-1996 (chart) (on file with author).
department determined that the new standards advanced the MTA's compelling interest in protecting itself from the negative commercial effects of displaying ads that could adversely affect business and employee morale.¹⁹

II. THE MTA AS A STATE ACTOR

It is well settled that constitutional constraints apply only to governmental entities and not to the conduct of private parties.²⁰ In Lebron v. National Railroad Passenger Corp.,²¹ the Supreme Court held that where "the Government creates a corporation by special law, for the furtherance of governmental objectives, and retains for itself permanent authority to appoint a majority of the directors of that corporation, the corporation is part of the Government for purposes of the First Amendment."²² The MTA was created by the New York Metropolitan Transportation Authority Act²³ and is specifically designated as a public benefit corporation.²⁴ The majority of the MTA's board of directors are

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¹⁹ See id. at 1.
²⁰ See, e.g., Hurley v. Irish-American Gay, Lesbian & Bisexual Group, 515 U.S. 557, 566 (1995) (holding that the First and Fourteenth Amendments do not guarantee a shield against private conduct); Edmonson v. Leesville Concrete Co., 500 U.S. 614, 619 (1991) ("[C]onstitutional guarantees of individual liberty and equal protection do not apply to the actions of private entities."); San Francisco Arts & Athletics, Inc. v. United States Olympic Comm., 483 U.S. 522, 542 n.22 (1987) (holding that because the respondent was not a state actor, the Court need not reach the petitioner's Fifth Amendment claims); Shelley v. Kraemer, 334 U.S. 1, 13 (1948) (stating that the "[F]ourteenth Amendment erects no shield against merely private conduct, however discriminatory or wrongful.").
²² Id. at 400. In Lebron, Amtrak contended that it was a private corporation, pointing specifically to language in its charter that disclaimed government agency status. See id. at 392. Justice Scalia, writing for an eight to one majority, stated that the language in Amtrak's charter was not determinative of whether Amtrak was "an agency or instrumentality of the United States for the purpose of individual rights guaranteed against the Government by the Constitution." Id. at 394. The majority reasoned that the government cannot "evade the most solemn obligations imposed in the Constitution by simply resorting to the corporate form." Id. at 397. Because Amtrak was created and controlled by the government, the Court concluded that Amtrak was a state actor amenable to the First Amendment. See id. at 400.
²³ N.Y. PUB. AUTH. LAW §§ 1260-1278 (McKinney 1997).
²⁴ See N.Y. PUB. AUTH. LAW § 1263(1)(a) (McKinney 1997) ("There is hereby created the 'metropolitan transportation authority.' The authority shall be a body corporate and politic constituting a public benefit corporation."); id. § 1264(2)
appointed by various New York State government officials.\(^\text{25}\) Therefore, under Lebron, the MTA is a state actor.\(^\text{26}\) Indeed, courts have repeatedly applied the First Amendment to the MTA without pausing to consider the state actor issue.\(^\text{27}\)

III. THE MTA STANDARDS CAN BE ATTACKED ON THEIR FACE AS A CONTENT BASED PRIOR RESTRAINT OF EXPRESSION

By giving MTA officials substantial power to censor advertisements based on their content, the MTA, a state actor, has created an unconstitutional prior restraint on free speech. A prior restraint gives "public officials the power to deny use of a forum in advance of actual expression."\(^\text{28}\) The Supreme Court has consistently held that any "law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional."\(^\text{29}\) The MTA is imposing a
prior restraint on speech because an MTA official has virtually "unbridled discretion" to deny the use of an advertising forum in advance of actual expression. In determining whether a spe-

tion was contrary to "decency, good order, [or] morals" in effect gave the government "virtually unbridled and absolute" discretion and was facially unconstitutional. Id. at 150.

30 Cf. Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750, 755 (1988) (holding unconstitutional an ordinance that gave the mayor discretion in granting permits for newspaper stands); Heffron v. International Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 649 (1981) (upholding the constitutionality of a Minnesota Agricultural Society rule that limited the sale or distribution of printed material to designated areas); Freedman v. Maryland, 380 U.S. 51, 56 (1965) (upholding appellant's challenge of section 2 of the Maryland Motion Picture Censorship Statute as an invalid prior restraint); Thornhill v. Alabama, 310 U.S. 88, 97 (1940); Desert Outdoor Adver., Inc. v. City of Moreno Valley, 103 F.3d 814, 819 (1996) (finding a town ordinance unconstitutional because it gave "[c]ity officials... unbridled discretion in determining whether a particular structure or sign [would] be harmful to the community's health, welfare, or 'aesthetic quality').

The above cases address whether a particular regulation gives a government authority "unbridled discretion" to grant or deny expressive activity by conditioning use of a forum on over broad, sometimes non-existent, subjective criteria. A "speech" licensing scheme can also give a government authority "unbridled discretion" by not providing procedural safeguards to limit the authority's ability to indirectly deny access to the forum by delaying grant of the license. See, e.g., FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 225-26 (1990) (noting that the failure to place time limits on a censor's decision and giving a governmental official decisionmaking power without procedural safeguards constitute two different types of "unbridled discretion" which are subject to facial attacks as prior restraints); Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 558-62 (1975) (noting that procedural safeguards, such as prompt judicial review, may avoid a finding of unconstitutionality); Blount v. Rizzi, 400 U.S. 410, 416-17 (1971) (stating that a determination should be made within a brief period of time to avoid the effect of finality); Carroll v. President & Comm'rs of Princess Anne, 393 U.S. 175, 181 (1968) (holding invalid a 10 day restraining order issued without notice); Freedman, 380 U.S. at 59 (holding that procedural safeguards must contain "prompt final judicial decision[s], to minimize the deterrent effect of an... erroneous denial of a license"); Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70-71 (1963) (mandating "judicial superintendence and... an almost immediate judicial determination of the validity of the restraint"). The Court has required three procedural safeguards to ensure expeditious decisionmaking:

(1) any restraint prior to judicial review can be imposed only for a specified brief period during which the status quo must be maintained; (2) expeditious judicial review of that decision must be available; and (3) the censor must bear the burden of going to court to suppress the speech and must bear the burden of proof once in court.

FW/PBS, Inc., 493 U.S. at 227 (citing Freedman, 380 U.S. at 58-60). None of these requirements are met by the MTA's present system. It would seem, however, that placing such procedural requirements would make managing the advertising business of a state-run commercial enterprise "inconvenient if not unworkable." Lebron, 749 F.2d at 898 n.10 (holding that transit authority's advertising standard was unconstitutional prior restraint due to over broadness yet doubting that procedural re-

requirements were workable in a state-run commercial enterprise).
cific advertisement is, for example, "offensive," the MTA official is not guided by any objective standards. Rather, approval is based on an MTA official's subjective interpretation of several broad categories.31

It is well settled that "reasonable time, place, and manner restrictions are an exception to the general prohibition against prior restraints."32 Although the MTA advertising standards arguably regulate the "manner" in which advertisers express their message, they are not valid content-neutral, time, place and manner restrictions. Courts have defined the term manner narrowly, stating "to be considered a valid manner restriction, a regulation cannot be directed at the communicative impact of expressive conduct."33 The MTA regulations, however, violate these standards by looking solely to the impact of the advertisements: the censor tries to predict whether an advertisement will, for example, frighten children, offend the public, or harm employee morale. Furthermore, a requirement is only "content neutral" if it is "justified without reference to the content of the regulated speech . . . ."34 The MTA regulations are by definition "content-based," because they specifically mandate that an MTA official apply the advertising standards to the content of each advertisement, with the goal of controlling the words or images that

31 See Planned Parenthood Ass'n v. Chicago Transit Auth., 767 F.2d 1225, 1230 (7th Cir. 1985) ("We question whether a regulation of speech that has as its touchstone a government official's subjective view that the speech is 'controversial' could ever pass constitutional muster."); cf. Consolidated Edison Co. v. Public Serv. Comm'n of New York, 447 U.S. 530, 546 (1980) (Stevens, J., concurring) ("A regulation of speech that is motivated by nothing more than a desire to curtail expression of a particular point of view on controversial issues of general interest is the purest example of a 'law ... abridging the freedom of speech, or of the press' ") (alteration in original) (quoting U.S. CONST. amend. I).
33 AIDS Action Comm. of Mass. v. Massachusetts Bay Transp. Auth., 42 F.3d 1, 8 (1st Cir. 1994) (emphasis added) (citing LAURENCE A. TRIBE, AMERICAN CONSTITUTIONAL LAW §12-2, at 791-92 (2d ed. 1988)); see also Cohen v. California, 403 U.S. 15, 19-26 (1971) (holding that the government may regulate the manner in which a speaker chooses to convey speech, but not the substance of the speech).
the advertiser might select to convey its message.

The MTA advertising standards can be challenged on their face as violative of the First Amendment, because they serve to create a prior restraint on expression. When a government actor has "substantial power to discriminate based on the content or viewpoint of speech by suppressing disfavored speech or disliked speakers," a person subjected to the regulation has standing to challenge it on its face without having to apply for and be denied a license to speak. A facial challenge enables a party whose own free speech rights may not be threatened by the government regulations to challenge "the wording of the statute in order to protect future victims against the potential for abuse that the statute creates." By carving out an exception to the normal rules of standing, courts alleviate two identifiable risks to free expression, first, the risk that the pervasive threat of censorship will intimidate the speaker into censoring his or her own speech, and, second, the risk that courts will be unable to effectively detect and review "content-based censorship 'as applied.'" These risks clearly exist where an advertiser's ability to communicate his message is subject to review by an MTA official armed with a broadly defined list of advertising restrictions. Before expend-

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35 *City of Lakewood*, 486 U.S. at 759 (emphasis added); see also *FW/PBS, Inc.*, 493 U.S. at 223 ("Although facial challenges to legislation are generally disfavored, they have been permitted in the First Amendment context where the licensing scheme vests unbridled discretion in the decisionmaker . . . .") (citing *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 798 & n.15 (1984)); *Freedman*, 380 U.S. at 56 ("[I]t is well established that one has standing to challenge a statute on the ground that it delegates overly broad licensing discretion to an administrative office, whether or not his conduct could be proscribed by a properly drawn statute, and whether or not he applied for a license.").


37 *City of Lakewood*, 486 U.S. at 759.

In order to ensure an optimal level of constitutional enforcement, it is necessary to allow facial challenges to overbroad statutes [affecting speech] irrespective of the plaintiff's particular injury. This is so because piece-meal litigation is an inadequate method of enforcing the Constitution when a governmental official is given unrestricted authority to regulate speech on a case-by-case basis.

*Gannett Satellite Info. Network*, 894 F.2d at 65-66 (noting that ordinary litigation, which requires standing, cannot effectively police this type of censorship).

38 See generally THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 506 (1970). Emerson noted:

A system of prior restraint is in many ways more inhibiting than a system of subsequent punishment: It is likely to bring under government scrutiny a far wider range of expression; it shuts off communication before it takes
ing time, energy, and money in developing an advertisement campaign, advertisers seeking to avoid rejection by the MTA will engage in self-censorship by choosing to produce ads that are non-controversial. Furthermore, the MTA may censor a significant number of advertisements without any means of detection by the judiciary.\footnote{See City of Lakewood, 486 U.S. at 758 (noting that while courts can quickly determine whether a licensor acts unconstitutionally, it cannot provide relief where a speaker censors herself and that many censored individuals or entities are unable or unwilling to litigate).}

Systems of prior restraint are not per se unconstitutional.\footnote{See Southeastern Promotions, 420 U.S. at 558.} A government actor who seeks to impose a prior restraint, however, bears a heavy burden to prove its constitutionality.\footnote{See id. (quoting Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 n.10 (1963)); see also United States v. National Treasury Employees Union, 513 U.S. 454, 468 (1995) (imposing presumption against constitutional validity); Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 558 (1976); New York Times Co. v. United States, 403 U.S. 713, 714 (1971) (same).} The precise burden of proving the constitutionality of a system of prior restraint depends on both (a) the type of speech (commercial or non-commercial) being restricted\footnote{See Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 64 (1983). It is well settled that commercial speech has been afforded less protection than other constitutionally protected forms of speech. See id.; Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 455 (1978). The court has defined “commercial speech” as speech that “relate[s] solely to the economic interests of the speaker and its audience,” Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 561 (1980), or, elsewhere, as speech that “[does] no more than propose a commercial transaction.” Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 385 (1973). Commercial speech that is truthful and concerns lawful activity still receives “substantial” First Amendment protection. See Central Hudson, 447 U.S. at 564 (holding that the government must show asserted interest in restricting commercial speech is substantial, restriction directly advances such interest, and such restriction is no more extensive than necessary to advance that interest). But see Posadas de Puerto Rico Assoc. v. Tourism Co. of P.R., 478 U.S. 328, 350 (1986) (Brennan, J., dissenting) (“I see no reason why commercial speech should be afforded less protection than other types of speech where, as here, the government seeks to suppress commercial speech in order to deprive consumers of accurate information concerning lawful activity.”).} and (b) the na-

\[\text{Id.} \]

place; suppression by a stroke of the pen is more likely to be applied than suppression through a criminal process; the procedures do not require attention to the safeguards of the criminal process; the system allows less opportunity for public appraisal and criticism; the dynamics of the system drive toward excesses, as the history of all censorship shows.
ture of the government property on which the speech is being restricted.

IV. THE MTA ADVERTISING SPACES AS LIMITED PUBLIC FORA: IS IT POSSIBLE UNDER CURRENT SUPREME COURT DOCTRINE?

Government restriction of expression on government property necessitates an inquiry into the "murky status of the public forum doctrine." Since opening the transit system to advertisers, the MTA indiscriminately has opened its display cases to all types of commercial and non-commercial advertisements. By adopting the new advertising standards, however, the MTA has expressly labeled its advertising spaces as non-public fora for those advertisements that an MTA censor decides fall within one of the prohibited categories. The MTA asserts the right to redefine a limited public forum so as to exclude certain advertisements along content-based lines. Although allowing a government actor to change a public forum into a non-public forum in

used to assess governmental restrictions on commercial speech. See Gannett Satellite Info. Network, 894 F.2d at 69 (subjecting facial challenge of ordinance reaching "advertisements," which includes both commercial and non-commercial forms of speech, to stricter scrutiny given non-commercial speech applicability); cf. Posadas de Puerto Rico, 478 U.S. at 340 (subjecting facial challenge of prior restraint to commercial speech scrutiny because restriction involves only pure commercial speech); San Francisco Arts & Athletics, Inc. v. United States Olympic Comm., 483 U.S. 522, 535 (1987) (analyzing first whether prior restraint reaches non-commercial speech). By definition, a facial challenge allows a plaintiff to assert the First Amendment rights of a third party. See Gannett Satellite Info. Network, 894 F.2d at 66 (observing that "an individual whose own speech or expressive conduct may validly be prohibited . . . is permitted to challenge a statute on its face because it also threatens others not before the court . . .") (quoting Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 503 (1985)). Thus, any purely "commercial" advertiser could still raise a constitutional challenge to the advertising standards as applied to non-commercial speech. Furthermore, the mere fact that the MTA regulations cover "advertising" does not mean that these regulations reach only "commercial speech." See New York Times v. Sullivan, 376 U.S. 254, 265-66 (1964); see also Bigelow v. Virginia, 421 U.S. 809, 826 (1975) ("The relationship of speech to the marketplace of products or of services does not make it valueless in the marketplace of ideas."). The MTA has had a long history of accepting both commercial and non-commercial advertisements. As such, the remainder of this Note will consider the advertising standards as applied to non-commercial speech.


See Board Resolution, supra note 3 ("[T]he MTA is not a public forum for advertisements that fall into one or more of the categories set forth in the Advertising Standards . . ."). It is possible to make the argument the MTA, by making this statement, implicitly recognizes that formerly, all advertising spaces were a designated public forum.
this way would seem to frustrate the overall aim of the First Amendment, the Supreme Court's existing interpretation of the public forum doctrine upholds the MTA's ability to do so.

The extent to which the MTA may restrict a speaker's right to communicate its message hinges on the relevant forum to which the speaker wants access and how that forum is characterized for First Amendment purposes. Classifying the relevant forum is often determinative of whether or not a government restriction on speech survives scrutiny. The first step in performing what has come to be known as "forum analysis" is defining the relevant forum. The relevant forum is determined by "focus[ing] on the access sought by the speaker." For purposes of this Note, the relevant forum will be all advertising space on MTA properties, including display cases inside and outside of buses and train cars.

Generally, government property falls into one of three categories: (1) the traditional public forum, (2) the designated public forum, and (3) the non-public forum. See Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 44 (1983) (distinguishing the First Amendment protection provided for communications in teachers' mailboxes and other areas of school speech).


See Air Line Pilots Ass'n v. Dep't of Aviation, 45 F.3d 1144, 1151 (7th Cir. 1995) (citing Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 797 (1985)); see also Lebron v. National R.R. Passenger Corp. (AMTRAK), 69 F.3d 650, 655 (2d Cir. 1995) (defining relevant forum not as all advertising space in Penn Station, but rather as the unique billboard hanging above Penn Station rotunda).

Cornelius, 473 U.S. at 801.

See Air Line Pilots Ass'n, 45 F.3d at 1151-52 (determining that relevant forum for purposes of an advertiser's challenge of FAA advertising standards was airport display cases and not the entire airport concourse); see also Lehman v. City of Shaker Heights, 418 U.S. 298, 302 (1974) (analyzing whether "car card space" for advertisements in city transportation vehicles was a public forum). Some earlier cases involving challenges to similar advertising restrictions have not taken the step to limit the forum to advertising spaces on transit systems and, instead, have considered the transit system as a whole. See Penthouse Int'l v. Koch, 599 F. Supp. 1338, 1346-47 (S.D.N.Y. 1984); Planned Parenthood Ass'n v. Chicago Transit Auth., 592 F. Supp. 544 (N.D. Ill. 1984), aff'd, 767 F.2d 1225 (7th Cir. 1985).

See Perry Educ. Ass'n, 460 U.S. at 45 (noting that traditional public fora include those places, such as streets and parks, that have traditionally been devoted to assembly and debate).
lic forum, whether of a limited or unlimited character, and (3) the non-public forum. The MTA advertising spaces admittedly do not fall into the traditional public forum category, which includes parks, streets, or any property that has been historically devoted to assembly and debate. The central issue raised by a challenge to the MTA advertising standards is whether the MTA advertising spaces are a designated or limited public forum and, therefore, whether regulation of expression in those spaces should be subjected to strict scrutiny.

A designated public forum is property that the government has opened for expressive activity by all or part of the public. "The government does not create a [designated] public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse." Any regulation of speech in a designated public forum is subject to the highest level of scrutiny. A content-based regulation can only withstand such scrutiny if there is a showing "that [the] regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end."

A. Forum Designated by Intent of State Actor

1. Cornelius v. NAACP Legal Defense & Educational Fund, Inc.

The Court in Cornelius v. NAACP Legal Defense & Educa-
tional Fund, Inc. examined the government’s intent to establish and maintain a particular property to determine whether the government property has become a designated forum. In *Cornelius*, the Court looked at three factors to determine whether the government “intended” to open the relevant forum, a charity drive in the federal workplace, as a “public forum”:\(^6\) (1) whether the government’s “policy and practice” in opening and operating the relevant forum suggested an intent to promote free expression;\(^7\) (2) whether the government’s motivation for opening the forum was a desire to create an open forum for expression or to accomplish purposes unrelated to expression;\(^8\) and (3) whether the nature of the government property invoked government’s role as proprietor or its role as law-maker.\(^9\) In concluding that the charity drive was a non-public forum, Justice O’Connor observed that (1) the government had never expressly designated the charity drive as open to the public and had a clear policy aimed at limiting entrants to the forum; (2) when initiating the charity drive program, the government was not motivated by a desire to provide an open forum for charity solici-


\(^6\) See *Cornelius*, 473 U.S. at 802.

\(^7\) The procedure with which the Court determined whether the federal government intended to open the Combined Federal Campaign, an annual charity drive conducted in the federal workplace, as a public forum, is not entirely clear. The opinion begins the analysis by setting forth a two-part test: (1) what has been the “policy and practice” of the government, and (2) whether the nature of the property and its compatibility with expressive activity have any bearing on the government’s intent. *Id.* at 802. Thus, where government opens a municipal auditorium, clearly the forum was “designed for and dedicated to expressive activities.” *Id.* at 803 (citing Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 555 (1975)). The Court went on to observe, however, that in cases where the government has demonstrated a policy of limiting certain types of expression, the government has not demonstrated the requisite intent to create a public forum. *See id.* at 802-03. As support for this, the Court cited *Perry Educ. Ass’n*, which held that a school principal, by restricting access to school mailboxes, prevented the mailboxes from becoming a public forum. *See id.* at 803. Similarly, in *Lehman v. City of Shaker Heights*, the Court noted that for twenty-six years the local transit authority had prevented political advertising and thereby prevented the advertising spaces from becoming public fora. *See id.* at 803.

\(^8\) *Id.* at 802.

\(^9\) *See id.* at 805 (noting that courts examine whether the property is compatible with expressive activity to determine the government’s intent).

\(^10\) *See id.* at 806. Earlier in the opinion, Justice O’Connor, citing the *Lehman* opinion, noted that the Court was particularly reluctant to hold that the government intended to designate a public forum where expressive activity might disrupt the principal function of the property. *See id.* at 804.
tations but rather to control workplace interference caused by unregulated solicitations by charities; and (3) the government property involved, the federal workplace, existed to accomplish the business of the employer and, as such, the government/employer has the discretion to control speaker access so as not to frustrate the forum's principal purpose.64

2. International Society for Krishna Consciousness, Inc. v. Lee

The Court substantially narrowed the Cornelius definition of a designated forum in International Society for Krishna Consciousness, Inc. v. Lee.65 The plaintiffs in Krishna Consciousness challenged an airport regulation banning distribution of flyers and the solicitation of funds in the airport terminal.66 Chief Justice Rehnquist, writing for the majority, determined that the airports were non-public fora.67 He began his analysis by observing that "[w]here the government is acting as a proprietor, managing its internal operations, rather than acting as lawmaker with the power to regulate or license, its action will not be subjected to the heightened review to which its actions as a lawmaker may be subject."68 The Court next determined that airport terminals are non-public fora because airport operators, who had brought "frequent and continuing litigation" to challenge speech activity, evidently did not intend that such fora be opened for such speech activity.69 Finally, the Court emphasized that "[a]s commercial enterprises, airports must provide services attractive to the marketplace. In light of this, it cannot fairly be said that an airport terminal has as a principal purpose promoting 'the free exchange of ideas.'"70 Under Krishna Conscious-

64 See id. at 805-06.
66 See Krishna Consciousness, 505 U.S. at 675-76. The plaintiffs asserted that it was their First Amendment right to perform the ritual of Sankirtun, which involved the dissemination of religious literature and the solicitation of funds to support their organization. See id.
67 See id. at 679.
68 Id. at 678 (citing United States v. Kokinda, 497 U.S. 720, 725 (1990)). In Kokinda, the Supreme Court held that a sidewalk leading up to the door of a post office was a non-public forum, thereby allowing the post office to deny access to a political lobby soliciting contributions on the sidewalk. See 497 U.S. at 736-37. The Court gave considerable weight to the fact that post offices are examples of the government functioning in its proprietary capacity. See id. at 725.
69 Krishna Consciousness, 505 U.S. at 680-81.
70 Id. at 682 (quoting Cornelius, 473 U.S. at 800).
ness, a government actor does not intend to designate a public forum if (1) the government is acting in its role as proprietor, or commercial entrepreneur, and (2) the government has, in some way, articulated an intent to limit expression in that forum.\footnote{See id. at 678-82.}

The Court's distinction between government in its role as proprietor and as lawmaker substantially narrows the designated public forum doctrine by mandating that when the government is somehow involved in the operation of a "commercial" enterprise, it does not intend to designate a "public" forum. Rather, the Court suggests that the government intends to maximize profits and maintain the efficient use of the property.\footnote{See, e.g., Gannett Satellite Info. Network, 745 F.2d at 772 (delineating the MTA's argument that the purpose of its facilities is to maximize revenues).}

Thus, since Krishna Consciousness, government "property" that somehow involved the government as commercial participant has been repeatedly classified as a non-public forum.\footnote{See, e.g., Lebron v. Nat'l R.R. Passenger Corp., 69 F.3d 650, 657 (2d Cir. 1995) (holding it "especially significant" that AMTRAK acted as proprietor, and not as law-maker, in concluding that AMTRAK had not designated advertising space as public forum); Christ's Bride Ministries, Inc. v. Southeastern Pennsylvania Transp. Auth., 937 F. Supp. 425, 430-31 (E.D. Pa. 1996) (citing Lehman and Krishna Consciousness in holding that SEPTA, acting in its proprietary function as owner of the transit system, intended to properly manage a commercial venture and not open a forum for expressive activity); cf. Texas v. Knights of the Ku Klux Klan, 58 F.3d 1075, 1078 (5th Cir. 1995) (holding that the relevant forum was not the shoulder of highways (where the KKK wanted to engage in expressive activity), but rather the Texas Adopt-A-Highway Program, and since that program's purpose was to clean up highways rather than to promote free speech, the court labeled the program a non-public forum).}

The government qua proprietor can reasonably create content-based limitations on expression provided it does not engage in viewpoint discrimination.\footnote{See Rosenberger v. Rectors & Visitors of Univ. of Va., 515 U.S. 819, 829 (1995) (positing that regulation of subject matter jurisdiction would be a reasonable limitation, while regulations based on a particular viewpoint would not).}

Furthermore, under the Krishna Consciousness test for determining the government's intent, a state actor has free reign both to designate a forum as "public" and implement a policy by which it has broad discretion to place content-based limitations on expression that can be communicated in that public forum.\footnote{This analysis may be illustrated by the following hypothetical: The state opens an auditorium that can be used by anyone for any lawful purpose. Clearly, this is a designated public forum. The state allows the auditorium to operate without state interference for a number of years. After a lecturer gives a speech champi-}
First Amendment legal scholars observe that the public forum doctrine’s distinction between the designated public forum and the non-public forum has become obsolete.\textsuperscript{76} Citing \textit{Cornelius} and \textit{Krishna Consciousness}, these scholars assert that if the government can constantly redefine the scope of a designated public forum along content-based lines, it has unilateral authority to restrict access to what was once a public forum on the basis of content and can thus avoid the burden of meeting the strict

scrutiny standard.\textsuperscript{77} The reasoning set forth in \textit{Krishna Consciousness}, taken to its logical extreme, grants government actors unchecked powers to avoid strict scrutiny review of restrictions on expression in non-traditional fora because every time it articulates a desire to restrict speech the government actor evinces an intent to treat the forum as a non-public forum.

3. MTA Advertising Standards Under Intent-Based Forum Designation

Under the \textit{Krishna Consciousness} analysis, MTA advertising spaces would be considered a non-public forum. The MTA has always sold advertisements not to promote the free exchange of ideas, but rather to gain revenue. In so doing, the government actor is engaging in commerce. Controversial ads displayed in MTA advertising spaces have the potential to interfere with the MTA's successfully managed business.\textsuperscript{78} In response, the MTA has enacted a regime of censorship that evinces a clear intent to limit expression.\textsuperscript{79} For example, it is clear that the MTA no longer wishes to keep its designated public forum open for advertisements that are critical of the MTA. Under \textit{Krishna Consciousness}, such considerations are determinative of the MTA's intent to manage the advertising space as a non-public forum. Any subsequent litigation challenging the constitutionality of MTA censorship of ads that fall within the new delineated categories would, therefore, be subject to the lower level of scrutiny applicable to non-public fora.

\textsuperscript{77} See, e.g., \textit{Krishna Consciousness}, 505 U.S. at 699-700 (Kennedy, J., concurring) (arguing that an airport terminal is a public forum that cannot be subsequently closed off to expressive activities unless the government physically alters the property or changes its principal use prior to the imposition of restrictions); Christopher M. Kelly, Note, "The Spectre of a 'Wired Nation": Denver Area Educational Telecommunications Consortium v. FCC and First Amendment Analysis in Cyberspace, 10 HARV. J.L. & TECH. 559, 574 (1997) (expressing concern for the government's ability to deny access to speech through the placement of content-based regulations).

\textsuperscript{78} The MTA's constitutional expert hired to design the advertising standards justifies the use of the standards by pointing to the recent trends in First Amendment jurisprudence that grant government actors participating in commerce significant discretion in limiting expression. \textit{See} MTA Staff Summary, \textit{supra} note 5, at 1.

\textsuperscript{79} The MTA Board unequivocally stated its intent not to create a public forum. \textit{See} Board Resolution, \textit{supra} note 3.
B. Forum Designated by Practice and Policy of State Actor and Nature of Forum

Prior to *Cornelius* and *Krishna Consciousness*, many lower courts determined that transit authority advertising spaces were designated public fora when the transit authority had previously accepted both commercial and non-commercial advertisements.\(^8^0\) Even after *Krishna Consciousness*, some circuit and lower courts have adhered to this system of fora classification, echoing the concern of legal scholars and dissenting members of the Court.\(^8^1\) These lower court decisions limit government actors’ ability to “undesignate” what has been designated a public forum and at the same time make no mention of the proprietor/law-maker distinction that was at the center of Justice Rehnquist’s forum analysis.\(^8^2\)

1. Air Line Pilots Association v. Department of Aviation of Chicago

In *Air Line Pilots Ass’n v. Department of Aviation of Chicago*,\(^8^3\) the Seventh Circuit concluded that advertising displays in a Chicago airport were designated public fora, reasoning that ascertaining the government’s intent is “not merely a matter of

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\(^8^0\) See Planned Parenthood Ass’n v. Chicago Transit Auth., 767 F.2d 1225, 1232 (7th Cir. 1985) (holding that the CTA was a public forum because it had not demonstrated a “system of control over the advertisements it accepts”); Lebron v. Washington Metro. Area Transit Auth., 749 F.2d 893, 896 (D.C Cir. 1984) (“[N]or is there a question that WMATA has converted its subway stations into public fora by accepting other political advertising.”); Penthouse Int’l, Ltd. v. Koch, 599 F. Supp 1338, 1347 (S.D.N.Y. 1984) (holding that the NYCTA violated the First Amendment by removing a poster advertisement depicting the caricature of Walter Mondale when it had previously designated the subway system as a public forum by displaying political advertisements); Coalition for Abortion Rights & Against Sterilization Abuse v. Niagara Frontier Transp. Auth., 584 F. Supp. 985, 989 (W.D.N.Y. 1984) (finding that the NFTMS had created a public forum by allowing other forms of protected speech); Gay Activists Alliance of Washington, D.C., Inc. v. Washington Metro. Area Transit Auth., 5 Media L. Rep. (BNA) 1404 (D.D.C. 1979) (explaining that the transit authority’s past acceptance of social and political communications designated the interior of buses public fora and, as such, advertisements for gay rights could not be banned).

\(^8^1\) See *Air Line Pilots Ass’n v. Dep’t of Aviation Chicago*, 45 F.3d 1144 (7th Cir. 1995).

\(^8^2\) See, e.g., id. at 1153.

\(^8^3\) 45 F.3d 1144 (1995).
deference to [the government's] stated purpose." The court, in a narrow reading of Cornelius, defined the government actor's intent by employing a two-factor analysis aimed at determining: (1) the government's consistent "policy and practice . . . with respect to the underlying property," and (2) the nature of the underlying property and whether it is incompatible with the expressive activity at issue. Furthermore, the court gave a narrow reading to Justice Rehnquist's proprietary function analysis, stating that although proprietary status is a "relevant factor," it is "not dispositive." The Air Line Pilots analysis demands that courts first inquire whether the government actor has previously maintained a "system of control" over the advertisements it accepts. By looking objectively at the actual past practice of the government actor, the Seventh Circuit guarded against "post-hoc policy formulation or the discretionary enforcement of an effectively inoperative policy." The court cited with approval Planned Parenthood Ass'n v. Chicago Transit Authority, the Seventh Circuit's decision which held that advertising spaces in city buses were designated public fora because the "CTA maintains no system of control over the advertisements it accepts for posting on its system . . . ." In applying the second factor, the Air Line Pilots

84 Id. at 1152. The court further stated "the government's stated policy, without more, is not dispositive with respect to the government's intent in a given forum." Id. at 1153; see also Planned Parenthood, 767 F.2d at 1232 (rejecting CTA's assertion that it did not intend to make advertising space a designated public forum).

85 Air Line Pilots, 45 F.3d at 1152 (citing Cornelius v. NAACP Legal Defense Fund & Educ. Fund Int'l, 472 U.S. 788, 802-03 (1985)).

In Air Lines Pilots, the city of Chicago argued that, in light of the recent Supreme Court decisions, the test to determine whether the airport advertising space was a public forum should ask "1) whether the government requires permission to speak; 2) whether the government has contracted with a third party; 3) whether the message is inconsistent with the commercial enterprise; and 4) whether the government is acting as a proprietor." Id. at 1152 n.2. The court suggested these factors might be relevant, but Cornelius did not "mandate" their consideration. Id.

86 Id. at 1158.

87 Id. at 1153 (finding that the CTA's "laissez faire policy" of offering advertising space to any advertiser willing to pay a fee supported the holding that advertising space inside of buses was designated public forum) (quoting Planned Parenthood, 767 F.2d at 1232).

88 Id. The court continued to explain that "[t]he government may not create a policy to implement its newly-discovered desire to suppress a particular message." Id. (citing Hays County Guardian v. Supple, 969 F.2d 111, 117-18 (5th Cir. 1992)).

89 767 F.2d 1225 (7th Cir. 1985).

90 Id. at 1232.
analysis demands an examination of the overall physical nature of the forum, including but not limited to, the obtrusiveness of the expressive activity and whether the regulated expression frustrates the functioning of the forum.\textsuperscript{91} If free expression is compatible with the operation of the government property, no inference can be drawn in the absence of a consistent policy and practice restricting speech on the property that the government did not intend to open up its forum as a public forum.\textsuperscript{92}

2. MTA Advertising Standards Under Policy, Practice and Nature Forum Designation

Under the \textit{Air Line Pilots} analysis, a court would determine that the MTA’s advertising space was opened as a designated public forum. Local courts, in pre-\textit{Krishna Consciousness} decisions, already addressed the first \textit{Air Line Pilots} factor and determined that the MTA had “actively solicited the advertising public by promoting the subway system as an advertising medium, and ha[d] accepted a variety of commercial and political messages for display to its riders.”\textsuperscript{93} The fact that the MTA has a policy of accepting political advertisements is determinative of the MTA’s intent to establish a designated public forum. Similarly, with regard to the second \textit{Air Line Pilots} factor, a district court in New York has already observed that MTA’s own “literature proclaims that the ‘high average frequency of exposure because of the necessity of regular riding,’ combined with the substantial waiting time and lack of other colorful distractions for thousands of daily commuters, make the [transit] system a ‘veritable “Niagara Falls” of buying power.’”\textsuperscript{94} The MTA, itself, labels its advertising space as ideal for communicating to the public. The court concluded that “[the MTA] is an appropriate site for passive expressive activity.”\textsuperscript{95} Courts could therefore

\begin{itemize}
\item \textsuperscript{91} Air Line Pilots, 45 F.3d at 1156.
\item \textsuperscript{92} See id.
\item \textsuperscript{93} Penthouse Int’l, Ltd. v. Koch, 599 F. Supp. 1338, 1346-47 & n.13 (S.D.N.Y. 1984) (finding that the New York City Transit Authority, and by association, the MTA, had specifically created advertising spaces throughout the system, reserved their use for any advertisers willing to pay the fee, and has accepted “a variety of commercial and political messages”). \textit{But see} Gannett Satellite Info. Network, Inc. v. Metropolitan Transp. Auth., 745 F.2d 767, 773 (2d Cir. 1984) (holding that public areas of the MTA are non-public fora) (citing U.S. Southwest Africa/Namibia Trade & Cultural Council v. United States, 708 F.2d 760, 764-66 (D.C. Cir. 1983)).
\item \textsuperscript{94} Penthouse Int’l, 599 F. Supp at 1346 (citations omitted).
\item \textsuperscript{95} Id.
\end{itemize}
conclude that these advertising spaces are designated public fora.

C. Forum Designated by Waiver of State Actor

1. Yeo v. Lexington

In Yeo v. Lexington,96 prior to withdrawing its opinion on other grounds,97 the First Circuit reached a similar conclusion, stating that it was unable to “accept the proposition that government can selectively, and with sole and absolute discretion, open its facilities or avenues of communication along purely content-based lines, and thus determine to admit the messages it likes and choose to exclude the messages it dislikes on no basis beyond the messages’ content.”98 In Yeo, the plaintiff’s advertisement was rejected by school publications that had a history of accepting advertisements on a wide range of commercial and non-commercial subjects.99 The state actors claimed that the publications had policies subjecting all advertisements to the approval of the editorial board and that the publications did not accept “political” or “advocacy” advertisements.100 The court explicitly rejected the government’s argument that state actor’s can create a non-public forum and escape strict scrutiny by merely reserving broad discretion to censor expression.101 Such an application of the public forum doctrine would render it a “circular nullity.”102 The court ultimately held that in determining

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96 No. 96-1623, 1997 WL 292173 (1st Cir. June 6, 1997), withdrawn, 131 F.3d 241 (1st Cir. 1997) (en banc). This Note does not present the original Yeo opinion as a basis for precedential value, but rather as a potential example of an approach to public forum doctrine.
97 The First Circuit withdrew its opinion after rehearing Yeo en banc. See Yeo, 131 F.3d at 241. The full court affirmed the district court's denial of relief to the plaintiff, holding that there was no state action and, therefore, no first amendment violation. See id. Thus, the court did not withdraw its opinion based on its determination of whether or not the school newspaper was a public forum. Chief JudgeToruella did, however, author a concurring opinion in which she departed from the original Yeo opinion and argued that the school newspaper was not a public forum. See id. (Toruella, C.J., concurring). In any event, the court's withdrawal of its original opinion renders its public forum discussion a nullity for precedential purposes.
98 Yeo, 1997 WL 292173, at *11.
99 Id. Plaintiff sought to print advertisements promoting abstinence as a method for birth control. See id. at *1.
100 Id. at *10.
101 See id. at *11.
102 Id.
whether a government intended to create a designated public forum, a court must examine “whether [the] government opened up the forum . . . indiscriminately to the public, thereby manifesting its intent to create a limited public forum, or reserved that forum for a specific, lawful purpose and excluded expression incompatible with that purpose, thereby manifesting an intent to create a nonpublic forum.”

By focusing on the government’s intent in creating, or “opening” the forum, the Yeo court foreclosed government officials from subsequently qualifying that forum’s policy of free speech by anything more than clear, content-neutral, rational standards.

2. MTA Advertising Standards Under the Yeo Rationale

The Yeo rationale lends support to the assertion that MTA advertising spaces are designated public fora. The MTA, by “indiscriminately” accepting advertisements, has designated its advertising spaces as public fora and now has subsequently adopted a policy allowing it broad discretion to re-define the scope of the fora using a post-hoc, content-based analysis. MTA is attempting to accomplish precisely what the Yeo court could not accept, the redefinition of a designated public forum along content-based lines.

Several other lower court decisions suggest that the courts are unwilling to define public fora by the broad governmental intent standard set forth in Krishna Consciousness. In the end, it is not certain which way courts will rule in determining whether the MTA advertising spaces are designated public fora or non-public fora. The MTA advertisements will give courts an opportunity to revisit the “murky” public forum doctrine. Strict application of the recent Supreme Court decisions would yield the result that the advertising spaces are non-public fora. Fun-

103 Id. at *13 (quoting Planned Parenthood v. Clark County Sch. Dist., 941 F.2d 817, 844 (9th Cir. 1991) (Norris, C.J., dissenting) (emphasis added).

104 See, e.g., Marilyn Manson, Inc. v. New Jersey Sports & Exposition Auth., 971 F. Supp. 875, 884 (D.N.J. 1997) (holding that the plaintiffs were likely to succeed on merits in showing that New Jersey Giants Stadium had become a designated public forum “as a venue for artistic performances”); Hevesi v. Metropolitan Transp. Auth., 827 F. Supp. 1069, 1071 (S.D.N.Y. 1993) (holding that plaintiffs were likely to succeed in demonstrating that MTA made advertising spaces in buses “designated public fora” by “actively promot[ing] the bus system as an advertising medium, and . . . display[ing] a wide variety of commercial and political messages as advertising”).
damental constitutional logic and several circuit court opinions, however, cast considerable doubt on the wisdom of allowing a government official to "undesignate" a designated public forum along content-based lines, and subjecting the government to lower First Amendment standards when it acts as a proprietor rather than a law-maker.

V. STRICT SCRUTINY AND THE MTA ADVERTISING STANDARDS

In ruling upon a facial challenge to the system of prior restraint embodied in the MTA advertising standards, a court will necessarily subject the regulations to one of two levels of scrutiny depending on its interpretation of the public forum doctrine.105 As noted above, often the court's determination of the type of forum involved is determinative of the regulation's survival.106 A content-based prior restraint of pure, non-commercial speech in a public forum is almost per se unconstitutional.107 At the very least, content-based regulations of pure speech are subjected to the "closest scrutiny;"108 they must serve a "compelling state interest" and be "narrowly drawn" to effectuate that interest.109 If, however, the court concludes that MTA advertising spaces are a non-public forum, the system of prior restraint need only satisfy a lower threshold by being reasonable in light of the

105 See United States v. McDermott, 822 F. Supp. 582, 594 (N.D. Iowa 1993) (discussing the relationship between the level of scrutiny and the type of regulation as determined under the public forum doctrine).

106 See International Soc'y for Krishna Consciousness, Inc. v. New Jersey Sports & Exposition Auth., 691 F.2d 155, 159-60 (3d Cir. 1982) ("Although the 'analytical line' between public and nonpublic forums 'may blur at the edges,' the distinction is a critical one.") (quoting U.S. Postal Serv. v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114, 132 (1981)).

107 See FW/PBS, Inc. v. Dallas, 493 U.S. 215, 229 (1990) (concluding that because ordinance didn't contain procedural safeguards guiding licensor's discretion, certain provisions of the statute were facially unconstitutional); City of Lakewood v. Plain Dealer Publ'g Co., 485 U.S. 750 (1948) (concluding that an ordinance was facially unconstitutional because it lacked any limitation on a government official's discretion); Saia v. New York, 334 U.S. 558 (1948) (finding a city ordinance imposing a prior restraint on the use of sound equipment for the amplification of religious speech in a public forum to be unconstitutionally void on its face).


purpose served by the forum and viewpoint-neutral.110

A. The Public Forum Analysis

None of the advertising standards are "narrowly drawn" to protect a "compelling state interest." Such compelling interests have only been found to exist "in exceptional cases,"111 such as where the prior restraint was necessary to protect national security,112 to ban fighting words,113 or, in limited circumstances, to prohibit obscenity.114 In addition, for a content-based statute to be "narrowly drawn," the statute must be the least "restrictive alternative" available.115 Thus, to the extent that these advertis-

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111 Near v. Minnesota, 283 U.S. 697, 716 (1931) (holding unconstitutional a state statute which restricted the liberty of the press); see JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 16.17 (5th ed. 1995).

112 See, e.g., Haig v. Agee, 453 U.S. 280, 307 (1981) ("It is 'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation.") (citations omitted); Snepp v. United States, 444 U.S. 507, 509 n.3 (1980) (imposing a constructive trust on the proceeds of a publication by a former CIA agent); New York Times, 403 U.S. at 726-727 (Brennan, J., concurring); id. at 730 (Stewart, J., concurring); Jonathan C. Medow, The First Amendment and the Secrecy State: Snepp v. United States, 130 U. PA. L. REV. 775, 793-96 (1982) (discussing the national security exception to the assumption against prior restraints).


114 See Kingsley v. Books, Inc. v. Brown, 354 U.S. 436, 437 (1957) (allowing government actor a "'limited injunctive remedy'" against sale of written and printed materials which were found to be obscene at trial); see also Times Film Corp. v. City of Chicago, 365 U.S. 43, 47-48 (1961) (upholding as facially valid Chicago ordinance requiring all films to be submitted to city official for viewing as prerequisite for license to show movie where ordinance's purpose was to suppress obscenity).

Such restraints have been permitted on the theory that the censored expression does not enjoy First Amendment protection. See Roth v. United States, 354 U.S. 476, 485 (1957). Restrictions aimed at unprotected speech must be narrowly tailored to avoid chilling communication that comes under the protection of the First Amendment. See, e.g., Freedman v. Maryland, 380 U.S. 51, 56 (1965) (invalidating a state statute that required state approval prior to the release of any motion picture).

ing standards reach proscribable speech, they cannot, however, be found to be "narrowly tailored" because they also reach speech that has consistently been protected under the First Amendment. Indeed, it would be impossible to conclude that a regulation based on undefined standards, such as "sexually suggestive," "frightening," "harmful," "offensive," or "bad taste," is "narrowly drawn" or the "least restrictive means" to achieve any interest. Courts have been adamant about not tolerating systems of prior restraint over non-commercial speech in public fora. It has been routinely recognized that content-based restrictions on speech predicated on "predicted adverse reactions" are not compelling state interests justifying restraint of speech.

Therefore, upon a finding that the advertising spaces are a limited public forum, the entire set of standards will likely be held to be facially unconstitutional as content-based prior restraints on protected free speech.

For the most part, the MTA asserts its commercial interest in effectively operating a transit system as its compelling inter-

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116 For example, the MTA's interest in prohibiting speech that is "offensive, improper, or in bad taste" is patently unconstitutional in a public forum. MTA Proposed Amendments, supra note 7, § 1(a)(xiv) Offensiveness is "classically not [a] justification[ ] validating the suppression of expression protected by the First Amendment." Carey v. Population Servs. Int'l, 431 U.S. 678, 701 (1977).

117 See Vance v. Universal Amusement Co., Inc., 445 U.S. 308, 316 n.13 (1980) (per curiam) (holding a Texas statute unconstitutional, which authorized a prior restraint on movies for an indefinite time prior to a determination of whether the movies were obscene). In Vance, the Court noted:

"Any system of prior restraint, however, 'comes to this Court bearing a heavy presumption against its constitutional validity.' The presumption against prior restraints is heavier—and the degree of protection broader—than that against limits on expression imposed by criminal penalties. Behind the distinction is a theory deeply etched in our law: a free society prefers to punish the few who abuse rights of speech after they break the law than to throttle them and all others beforehand. It is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable."

Id. (citations omitted); see also Penthouse Int'l Ltd. v. Koch, 599 F. Supp. 1338, 1351 (S.D.N.Y. 1984) (holding that contract language allowing MTA official to prohibit "offensive" or "unsatisfactory" advertisements without clear and objective criteria ran risk of arbitrary censorship, an idea particularly repugnant to free speech ideals). See generally Times Film Corp. v. City of Chicago, 365 U.S. 43, 50-53 (Warren, C.J., dissenting) (providing an extensive history of judicial hostility toward regulations that exert a prior restraint over protected pure speech).

118 Planned Parenthood Ass'n v. Chicago Transit Authority, 592 F. Supp. at 554, aff'd, 767 F.2d 1225 (7th Cir. 1985).
est in promulgating the advertising standards. The government asserts that this prohibition furthers its commercial interest in avoiding negative advertising that would decrease employee morale and hurt business. Such an interest has never been found to be a “compelling” governmental interest justifying prior restraint of protected speech in a public forum. Furthermore, these standards, which allow an MTA official broad discretion to reject advertisements, are not narrowly drawn to protect the government’s commercial interests. In a system that vests a single official with such discretion, it is highly possible that the censor will reject advertisements that would have been in no way harmful to the revenue interests of the MTA.

The MTA standards prohibiting advertisements that are demeaning to particular groups, racial and others, or are “patently offensive, improper or in bad taste,” were adopted to further the MTA’s interest in protecting a captive audience. The captive audience theory does not hold up to a facial attack. In Lehman v. City of Shaker Heights, the Supreme Court decided to designate advertising spaces inside city buses as non-public forum, in part, due to the fact that the city had the right to protect captive audience members on the bus. A year later,

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119 See MTA Staff Summary, supra note 5.
120 See id.
121 See, e.g., U.S. Southwest Africa/Namibia Trade & Cultural Council v. United States, 708 F.2d 760 (D.C. Cir. 1983). In U.S. Southwest, the D.C. Circuit Court assessed whether an airport’s commercial interest in advertising revenue amounted to a “compelling” interest justifying a ban on political advertisements. See id. The court held that there was no factual showing that revenue returns would be adversely affected by political advertisements so as to create a “compelling” interest. See id. at 771.
122 See MTA Staff Summary, supra note 5, at 2 (quoting MTA Proposed Amendments, supra note 7, § 1(a)(xiv)).
124 See id. at 302. But see Penthouse, 599 F. Supp. at 1347 n.14 (holding that Lehman’s conclusion that advertising spaces on city buses was non-public forum was divorced from “captive audience” rationale). Several courts have addressed the captive audience theory under analogous and comparable circumstances with mixed results. Compare Christ’s Bride Ministries, 937 F. Supp. at 431 (finding that passengers in rail and subway stations were a captive audience), and International Soc’y for Krishna Consciousness, Inc. v. New Jersey Sports & Exposition Auth., 691 F.2d 155 (3d Cir. 1982) (applying the captive audience theory to uphold a ban on so-
however, in *Erznoznik v. City of Jacksonville*, the Court held that a “captive audience” exists only when a medium of expression is “so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it.” Advertisements displayed throughout MTA properties involve passive expressive activity that any sensitive individual can avoid by simply averting his or her eyes. Furthermore, the fora at issue in *Lehman* were arguably located inside a city bus. The new MTA standards reach all advertisements, including those displayed outside trains and buses. Again, for purposes of a facial challenge, a plaintiff can show that the regulations are unconstitutional as applied to advertisements displayed outside of trains or buses. Certainly a person walking on a street is not a captive audience to advertisements displayed on the outside of buses.

The first advertising standard prohibits advertisements that “contain[ ] an image of a person, who appears to be a minor, in sexually suggestive dress, pose or context.” The fourth standard prohibits advertisements that are “so violent, frightening, or otherwise disturbing as to be harmful to minors.” The MTA’s asserted interest in protecting children will not justify the content-based system of prior restraint embodied in these standards. Protecting children has, in limited circumstances, been held to be a compelling governmental interest. The Supreme Court has only found this interest to exist in the context of the “uniquely pervasive” medium of radio and television broadcast, and, in limited instances, where a statute aims at child pornog-

licitation in a sports complex), with Consolidated Edison Co. of New York, Inc. v. Public Serv. Comm’n of New York, 447 U.S. 530, 542 (1980) (rejecting the captive audience argument in the context of billing inserts), and Planned Parenthood Ass’n v. Chicago Trans. Auth., 767 F.2d 1225, 1233 n.11 (7th Cir. 1985) (rejecting the captive audience argument where the regulation, as applied, censored only one topic). 125 422 U.S. 205 (1975).

126 Id. at 212 (quoting Redrup v. New York, 386 U.S. 767, 769 (1967)); see also Planned Parenthood Ass’n v. Chicago Transit Auth., 592 F. Supp. 544, 555 (N.D. Ill. 1984), aff’d, 767 F.2d 1225 (7th Cir. 1985); cf. Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 72 (1983) (holding that captive audience theory does not apply to recipients of objectionable mailings because they may “effectively avoid further bombardment of their sensibilities simply by averting their eyes.”) (citation omitted).

127 MTA Proposed Amendments, supra note 7, § 1(a)(ix).

128 Id. § 1(a)(xii).

129 See FCC v. Pacifica, 438 U.S. 726 (1978) (citing protection of children in holding that the FCC was justified in restricting offensive language on the radio).

130 Id. at 748.
Advertisements hanging in display cases surely do not rise to this level of pervasiveness. Furthermore, even if the MTA's asserted interest in protecting minors was found to be a compelling interest, the regulation is not "narrowly drawn" to achieve that goal. The public's ability to view and consider a given advertisement is subjected to what an MTA official thinks is "disturbing" or is "sexually suggestive." A regulation that censors advertisements before they are displayed simply cannot be the alternative that is the least restrictive of expression.

B. The Non-Public Forum Analysis

If a court determines that MTA advertising spaces are non-public fora, the MTA's burden is to show that the restrictions on expression are reasonable in light of the purpose served by the forum and are not viewpoint-based. It is submitted that all of the MTA's asserted interests in prohibiting these advertisements are "reasonable in light of the purpose served" by the advertising spaces throughout the transit system. The question is whether the advertising standards on their face are viewpoint biased. Perhaps due in part to the "murkiness" of the public forum doctrine, it seems to be a growing trend for courts to refrain from ruling as to whether a forum is a limited public forum or a non-public forum. Instead, courts have broadened the definition of "viewpoint-bias" by ruling that regardless of forum, the particular regulation at issue violates the First Amendment.

Regardless of the type of forum, governmental regulations of speech must be viewpoint-neutral. The MTA cannot target the

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131 See New York v. Ferber, 458 U.S. 747 (1982) (upholding a N.Y. criminal law punishing dissemination of material depicting children engaging in sexual conduct regardless of whether material was "obscene").

132 MTA Proposed Amendments, supra note 7, §§ 1(a)(xii), 1(a)(ix).


134 See Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384 (1993) (avoiding issue of whether school newspaper was limited public forum and ruling that, as applied, state action in excluding religious group's expression while permitting non-secular group's expression on identical subject constituted viewpoint discrimination); AIDS Action Comm. of Mass. v. Massachusetts Bay Transp. Auth., 42 F.3d 1, 9 (1st Cir. 1994) (declining to classify advertising spaces as limited or non-public forum, and holding that transit authority policy allowing rejection of ads that were "sexually explicit" or "patently offensive" was unconstitutional where transit authority allowed sexually suggestive movie advertisement but rejected condom advertisement).

135 See Sons of Confederate Veterans, Inc. v. Glendening, 954 F. Supp. 1099,
"particular views taken by speakers on a subject," so as "to discourage one viewpoint and advance another." A state actor may not restrict speech based on "the specific motivating ideology or the opinion or perspective of the speaker." Courts are motivated by the fear that viewpoint biased regulations allow government officials to "effectively drive certain ideas or viewpoints from the marketplace."

The second standard prohibits advertisements that are "directly adverse to the commercial or administrative interests of the MTA or harmful to the morale of MTA employees." This is an example of a standard that, on its face, is viewpoint biased. The MTA will tolerate advertisements that commend their business but refuse advertisements that are critical of it. Thus, this standard can be challenged on its face regardless of the forum classification of the advertising space. For the most part, however, courts find viewpoint discrimination in "as applied" challenges to regulations and they usually are fact sensitive.

CONCLUSION

Because of substantial disagreement as to the nature of the designated public forum, there is no clear answer as to whether the MTA advertising standards can be held to be facially unconstitutional. The Court has been extremely deferential to com-


136 Rosenberger v. Rector and Visitors of the Univ. of Virginia, 515 U.S. 819, 829 (1995) (holding that a university's refusal to authorize payment for a religious organization's printing costs violated the First Amendment).


138 Id.


140 MTA Proposed Standards, supra note 7, § 1(a)(x).

141 See Newman, supra note 4 (discussing suit brought in 1995 by Natural Resources Defense Council against MTA when MTA refused to display advertisement warning of diesel pollution caused by buses).
mercial enterprises that are operated by government actors wishing to restrict speech along content-based lines. In spite of Justice Scalia's recent proclamation that the government cannot evade "the most solemn obligations imposed in the Constitution by simply resorting to the corporate form," the Court's recent interpretation of the public forum doctrine has provided government with the very avenue to escape those obligations. The MTA advertising spaces are a limited public forum. The MTA historically has allowed political, non-commercial advertisements to be displayed there. The spaces are designed for expressive purposes. As government actors, the MTA must not be given the unilateral authority to judge what expressive activity can and cannot be displayed on its property. Such a regime leads to censorship.

Michael J. Garvey


* To my parents for all of their support.