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Legal Sidebar

Religious Speech and Advertising: Current Circuit Split and its Implications for Congress

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On September 17, 2019, the U.S. Court of Appeals for the Third Circuit (Third Circuit), in a divided decision, held that a transit system's policy banning ads with religious and atheistic messages violated the First Amendment's Free Speech Clause. This decision came shortly after the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) held that a similar ban was a permissible and reasonable regulation in a nonpublic forum. A petition to review (i.e., certiorari) the D.C. Circuit case is currently pending before the Supreme Court. Although the two cases differ slightly, together, they present the question of when a blanket ban on religion as a subject matter becomes unconstitutional viewpoint discrimination. This developing split amongst the circuit courts, while relevant to the specific context of the regulation of local transit systems, may have broader implications for Congress and free speech law that this Sidebar explores in more detail.

First Amendment and Religious Speech

The Free Speech Clause provides that "Congress shall make no law . . . abridging the freedom of speech. . . ." It is well settled, however, that the government does not have to permit all forms of speech on property that it owns and controls. The Supreme Court has developed a "forum based" approach for evaluating the constitutionality of speech restrictions the government may impose on the use of its property. The Court has identified three categories of forums. Within each, courts will apply a different level of scrutiny when determining whether a speech-based regulation violates the First Amendment. In other words, courts will look at *where* the government is attempting to regulate speech and *then* decide how limited the government is in its ability to regulate speech in that forum.

In both the "traditional public forum" (a place that has "by long tradition" been devoted to assembly and debate, such as a sidewalk or park) and the "designated public forum" (a space that the government has intentionally opened up to a broad audience for expressive activity), the government must satisfy strict scrutiny to impose a content-based restriction on speech (i.e., a restriction that is based on the subject matter or type of speech). To satisfy this heightened judicial scrutiny, the government must show that the restriction is necessary to serve a compelling state interest and is narrowly drawn to achieve that interest. By contrast, the "nonpublic forum" is one that is not traditionally designed, nor intentionally opened up, for public speech, such as a jail or public school classroom. In nonpublic forums, the government has

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more flexibility to limit speech based on its content. Any restrictions on speech, however, must be reasonable in light of the purposes served by the forum. Importantly, regardless of the type of forum at issue, viewpoint-based restrictions, or restrictions that target speech not because of its subject matter but because of the "particular views taken by speakers on a subject," are "prohibited."

The exclusion of *religious* speech from public spaces on its face raises concerns about whether the government is engaging in content or viewpoint based regulation. Nonetheless, unique constitutional questions arise when the speech being regulated concerns religion because of the interplay between the Free Speech Clause and another provision in the First Amendment, the Establishment Clause. The latter clause forbids Congress from making laws "respecting an establishment of religion. . . ." and has been viewed as reflecting broader interests in maintaining a separation between church and state. The Court has read the Establishment Clause to prohibit the government not only from establishing religion through coercion but also through symbolic endorsement or financial support. While governments have long justified restricting religious speech from a forum by citing the need to avoid Establishment Clause violations, the Supreme Court has largely resolved Establishment Clause concerns in favor of religious groups, holding that the Establishment Clause does *not* require a government to exclude religious speech from forums it has otherwise opened to expression. As a result, in three cases, the Court squarely confronted the question of whether government regulations aimed at limiting religious speech in a nonpublic forum violates the Free Speech Clause.

First, in the 1993 case *Lamb's Chapel v. Center Moriches Union Free School District*, the Court invalidated a public school district's regulation allowing groups to use its facilities for social, civic, and recreational meetings, but prohibiting any use for "religious purposes." The Court ruled that the school had discriminated on the basis of viewpoint, rather than subject matter, because it opened its facilities to presentations on child rearing and family values, but excluded those with religious views on the same subject matter.

Three years later, the Court in *Rosenberger v. Rector and Visitors of University of Virginia*, relied on *Lamb's Chapel* to invalidate a University of Virginia policy in which subsidies from a Student Activities Fund were withheld from student groups whose activities "primarily promote[d] or manifest[ed] a particular belief in or about a deity or an ultimate reality." Applying this policy, the University denied funding to a student group that published a Christian-themed magazine that covered topics such as racism, pregnancy, and student stress. The Court held that the policy amounted to viewpoint discrimination because the school had granted funding to student publications with secular views on topics such as racism, but not to publications with "religious editorial viewpoints" on the same topics. For the Court, the University's policy was constitutionally problematic because it did not "exclude religion as a subject matter," but instead had uniquely disfavored those with religious viewpoints, seeming to leave open the question of whether bans on religion as a subject matter were constitutional.

Finally, in 2001 in *Good News Club v. Milford Central School*, the Court reaffirmed its holdings in *Lamb's Chapel* and *Rosenberger*, deciding that a public school district violated the First Amendment when it excluded a Christian children's club from using school facilities for after-school meetings, while still allowing secular groups to use public facilities for social, civic, and recreational meetings. In doing so, the Court suggested that if the government allows for discussion on morals and character, then it must allow religious viewpoints on the same.

The Circuit Split

Archdiocese of Washington v. Washington Metropolitan Area Transit Authority

Using this Supreme Court precedent as a guide, two circuit courts of appeal recently addressed, among other legal issues, whether public transit systems' bans on religious advertising violated the Free Speech Clause of the First Amendment.

The first case, *Archdiocese of Washington v. Washington Metropolitan Area Transit Authority (WMATA)*, involved a challenge to a policy implemented by WMATA in which WMATA closed its advertising space to "issue-oriented ads"—defined to include political, religious, and advocacy ads. WMATA implemented the policy due to complaints from riders, community groups, and business interests, as well as concerns about safety and vandalism of its property. In 2017, the Archdiocese of Washington submitted its "Find the Perfect Gift" ad to WMATA, seeking to place the ad on the side of WMATA buses. The ad, which was part of the Archdiocese's evangelization efforts, and more specifically, a campaign promoting the Advent season, depicted a scene featuring the silhouettes of three shepherds and sheep on a hill facing a star shining brightly in the night sky with the words "Find the Perfect Gift." The ad also displayed an address for a website that included information about the Catholic Church, including a link to parish resources, religious videos, and other religious content. WMATA rejected the "Find the Perfect Gift" ad under its policy prohibiting "advertisements that promote or oppose any religion, religious practice, or belief." After the district court rejected a challenge to WMATA's policy, the Archdiocese appealed.

On appeal, the D.C. Circuit determined that, because buses are not traditional meeting places for discussion, and because WMATA had placed restrictions on what speech it would allow on its buses, WMATA's advertising space was a nonpublic forum. WMATA therefore had "wide latitude to restrict subject matters" so long as it maintained viewpoint neutrality and its restrictions were reasonable. In concluding that the WMATA policy was viewpoint neutral and reasonable, the D.C. Circuit rejected the Archdiocese's arguments that, like the restrictions in *Lamb's Chapel*, *Rosenberger*, and *Good News Club*, the WMATA policy suppressed its religious viewpoints on subjects that were otherwise allowed in the advertising space. The court explained that the nonpublic forums in those cases had been opened to a wide range of subjects and the policies had functionally suppressed religious viewpoints on each of those subjects. By contrast, the D.C Circuit concluded that the WMATA policy instead banned advertising on the entire subject matter of religion, in that it barred both religious and non-religious viewpoints on a variety of topics. According to the D.C. Circuit, the Supreme Court in *Rosenberger* had approved of this type of subject-matter restriction.

Northeastern Pennsylvania Freethought Society v. County of Lackawanna Transit System

More than a year after the D.C. Circuit's decision, the Third Circuit issued an opinion resolving a similar dispute in *Northeastern Pennsylvania Freethought Society v. County of Lackawanna Transit System (COLTS)*. In 2013, COLTS enacted a policy banning ads on its buses "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." Northeastern Pennsylvania Freethought Society (Freethought), an atheist organization, submitted a proposal to COLTS for an advertisement that simply read "Atheists" and included Freethought's web address on an image of a blue sky with clouds. COLTS rejected the ad under its religious speech prohibition, but accepted a follow-up proposal from Freethought in which the word "Atheists" was removed. Freethought's challenge to the policy was rejected by the United States District Court for the Middle District of Pennsylvania.

On appeal, the Third Circuit analyzed COLTS's prohibition on religious advertising to determine whether the policy constituted permissible subject-matter regulation, or whether it impermissibly discriminated against religious and atheistic viewpoints. The court relied on the trio of Supreme Court cases discussed above and concluded that despite COLTS's stated intent to ban all religious advertising, the policy functionally suppressed religious views on otherwise allowable subjects in the forum. For example, according to the court, nothing in the policy would prohibit a secular organization from running an ad that communicated the message "We exist, this is who we are, consider learning about or joining us," but atheistic or religious organizations would be banned from advertising a similar message because of the religious nature of their organization.

While the Third Circuit noted factual differences between the D.C. Circuit case and the one before them, the court disagreed with the D.C. Circuit's reasoning in upholding the WMATA policy as a permissible subject-matter restriction. According to the Third Circuit, the D.C. Circuit relied on dicta from *Rosenberger* to support its contention that the Supreme Court permitted the exclusion of religion as an entire subject in nonpublic forums. The Third Circuit, however, concluded that *Good News Club*—decided after *Rosenberger*—rejected the notion that religion could be excluded from a forum as an entire subject. According to the court, religion is a "comprehensive body of thought" providing a perspective to view and discuss many topics. If a forum is otherwise open to topics that can be viewed from a religious perspective, the court suggested that it would be nearly impossible to bar religious speech without engaging in viewpoint discrimination.

Considerations for Congress

These two divergent circuit court opinions highlight a dispute over whether the government can restrict religious speech from government forums. Perhaps most obviously, the circuit split implicates the discretion that governments have in regulating religious speech on local public transit systems. How local governments regulate their transit systems may be of immense interest to Congress, as the United States invests more than $12 billion annually through the Federal Transit Administration to support public transit systems, including systems like WMATA. Federal grants are already conditioned on the grantee's compliance with various requirements and procedures. To the extent the courts authorize the regulation of speech in a manner contrary to Congress's intent, Congress could, within the confines of the First Amendment, choose to make federal funds that are appropriated to local public transit systems contingent on implementing policies in line with Congress's views on religious speech.

More generally, religious speech considerations arise in a broad array of forums of interest to Congress well beyond the specific context of the WMATA and COLTS cases. The federal government plays a large role in regulating speech in public and nonpublic forums as the owner of nearly 300,000 buildings and structures, including congressional buildings. Further, under *Rosenberger*, a public funding stream aimed at facilitating private speech may be considered a speech forum, meaning the circuit split may implicate when religious speech may be excluded from government funding programs, such as grant-making or fundraising campaigns. Additionally, religious speech restrictions may be implicated when a government allows for comments on its websites or social media pages. Moreover, much like Congress's interests with respect to local transit systems, through its power of the purse, the federal government may be funding a host of state or local government forums where religious speech may be the subject of regulation. Legislatively, Congress may respond to religious speech restrictions by state or local governments with action similar to The Equal Campus Access Act of 2019, which is currently pending in both the House and the Senate. This bill, for example, would require public institutions of higher education to grant the same rights to all student organizations, regardless of the organization's religious beliefs, practices, speech, or leadership standards.

As the law currently stands, the specific issue of religious advertising on public transit is unsettled. On May 20, 2019—prior to the Third Circuit's COLTS decision—the Archdiocese of Washington filed a

petition for writ of certiorari to the Supreme Court, seeking review of the D.C. Circuit's decision. On September 26, 2019, the Archdiocese filed a supplemental brief in support of its petition, claiming the Third Circuit's decision created a clear circuit split on the issue of policies restricting religious advertising on public transit. Should the Supreme Court review the WMATA case, it will likely need to resolve the D.C. Circuit and Third Circuit's conflicting interpretations of *Rosenberger* and whether the government may constitutionally impose blanket bans on religious speech in nonpublic forums, issues affecting the regulation of religious speech in a host of government forums.

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