Constitutional Law—First Circuit Upholds MBTA Guidelines Prohibiting "Demeaning or Disparaging" Advertisements—*Ridley v. Massachusetts Bay Transportation Authority*, 390 F.3d 65 (1st Cir. 2004)

Although the First Amendment to the United States Constitution guarantees freedom of speech, the guarantee is not absolute.[1] The government can regulate speech in various ways depending on the forum where the speech occurs.[2] But under no circumstances may the government regulate speech because it disagrees with the speaker's viewpoint.[3] In *Ridley v. Massachusetts Bay Transportation Authority*,[4] the First Circuit Court of Appeals considered whether the Massachusetts Bay Transportation Authority (MBTA) violated the First Amendment by refusing to run a religious advertisement.[5] The court held that the MBTA's advertising spaces are nonpublic fora and their advertising guidelines are viewpoint neutral, therefore it rejected the First Amendment claim.[6]

The MBTA is a quasi-governmental transportation provider for the Commonwealth of Massachusetts.[7] It has approximately forty thousand advertising spaces available for sale on its trains, trolleys, buses, and station platforms.[8] The main objective of the advertising program is to maximize the MBTA's revenue.[9] Some of the spaces that the MBTA cannot sell at competitive rates are offered to public charities or governmental agencies at a fifty-percent discount.[10]

In June 2002, Lischen Ridley, on behalf of herself and the other members of the Church with the Good News, submitted a proposed advertisement to the

[1] *See, e.g.*, R.A.V. v. City of St. Paul, 505 U.S. 377, 382-83 (1992) (noting government may regulate certain classes of speech with limited social value); Miller v. California, 413 U.S. 15, 24 (1973) (stating First Amendment's protections do not extend to obscene material); Kovacs v. Cooper, 336 U.S. 77, 86-87 (1949) (plurality opinion) (declaring government may regulate noise emanating from blaring sound truck).

[2] *Infra* notes 24-25 and accompanying text (setting forth framework for First Amendment forum analysis).

[3] *Infra* note 44 and accompanying text (discussing unconstitutionality of viewpoint-based speech regulations).

[4] 390 F.3d 65 (1st Cir. 2004).

[5] 390 F.3d at 69-71 (setting forth procedural history and holding).

[6] 390 F.3d at 71 (announcing court's holding).

[7] 390 F.3d at 72 (describing MBTA's extensive transportation network).

[8] 390 F.3d at 72 (setting forth statistics concerning MBTA ridership and advertising program).

[9] 390 F.3d at 72 (citing to MBTA statutory directives to maximize revenue). Nevertheless, the MBTA General Manager testified that by running advertisements for nonprofits and governmental agencies, the MBTA is "performing a public service in another flavor rather than a transportation service. We're letting [commuters] know about government services or social services or not-for-profit services that might have a direct impact on their quality of life." *Id.* at 81 (considering whether advertising spaces qualify as designated public fora).

[10] 390 F.3d at 72 (illustrating MBTA hierarchy of preferred uses for advertising spaces).

MBTA that described five religions as "false."[11] Six months later, the MBTA revised its advertising guidelines in response to an interlocutory order issued by the United States District Court for the District of Massachusetts.[12] The MBTA decided that Ridley's advertisement did not comply with the revised advertising guidelines.[13] The revised guidelines prohibited advertisements that "demean[] or disparage[] an individual or group of individuals."[14] The guidelines also prohibited ads that promote illegal goods, ads that contain sexually prurient material or political speech, and other types of advertisements.[15] The MBTA had only turned down approximately seventeen proposed advertisements in the five years preceding this case.[16]

Ridley filed suit, arguing that any guideline prohibiting "denigrating," "demeaning," or "disparaging" speech is viewpoint discriminatory and therefore unconstitutional.[17] The district court concluded that the decision to reject the advertisement was not viewpoint discriminatory.[18] The district court, however, refused to consider whether the advertising guidelines were viewpoint

[11] 390 F.3d at 74-75 (setting forth content of proposed advertisement). The full text of the proposed advertisement reads as follows:

> The Bible teaches that there is only one religion. There are no scriptures in the Bible that teach that God set up the Catholic religion, the Baptist religion, the Pentecostal religion, the Jehova's Witness religion or the Muslim religion. These religions are false. The Bible says in Revelation 9:12, "And Satan, which deceiveth the whole world." The whole world is going to hell if they do not turn from their ungodly ways. God sent Prophet Andre into this world to teach people the truth. www.prophet-andre.com.

Id.

[12] 390 F.3d at 75 (delineating requirements of revised advertising guidelines).

[13] 390 F.3d at 75.

[14] 390 F.3d at 75 (reproducing relevant portion of MBTA advertising guidelines). This portion of the revised guidelines reads as follows:

> Demeaning or disparaging. The advertisement contains material that demeans or disparages an individual or group of individuals. For purposes of determining whether an advertisement contains such material, the MBTA will determine whether a reasonably prudent person, knowledgeable of the MBTA's ridership and using prevailing community standards, would believe that the advertisement contains material that ridicules or mocks, is abusive or hostile to, or debases the dignity or stature of, an individual or group of individuals.

Id.

[15] 390 F.3d at 75 (listing prohibited forms of advertisement under revised guidelines).

[16] 390 F.3d at 78 (analyzing MBTA practice of enforcement to determine whether designated public forum exists).

[17] Ridley v. Mass. Bay Transp. Auth., No. 02-10113-RFK, slip op. at 6-7 (D. Mass. June 5, 2003) (outlining Ridley's request for relief), *aff'd*, 390 F.3d 65 (1st Cir. 2004). Ridley did not argue the forum issue before the trial court, nor did she argue that the MBTA's guidelines were unreasonable restrictions. *Id.* at 7-8 (noting Ridley based her entire case on her viewpoint discrimination claim). The Court of Appeals for the First Circuit addressed both of these issues on appeal in the case in chief. 390 F.3d at 76-83, 93 (deciding against Ridley on both issues).

[18] Ridley v. Mass. Bay Transp. Auth., No. 02-10113-RFK, slip op. at 11 (D. Mass. June 5, 2003) (denying Ridley's request to enjoin MBTA from refusing her advertisement), *aff'd*, 390 F.3d 65 (1st Cir. 2004).

discriminatory on their face.[19] On appeal, *Ridley* was consolidated with *Change the Climate, Inc. v. Massachusetts Bay Transportation Authority*,[20] a case concerning a series of proposed advertisements promoting the legalization of marijuana.[21] The First Circuit Court of Appeals held that the MBTA made a viewpoint-neutral decision in rejecting Ridley's advertisement and also concluded that the advertising guidelines were viewpoint neutral on their face.[22] The court went on to decide that the MBTA's refusal to run the advertisement was a reasonable regulation of speech in a nonpublic forum and thus ruled in favor of the MBTA.[23]

The appropriate standard of judicial review for speech regulations varies according to the forum where the speech at issue occurs.[24] The three types of fora are traditional public fora, designated public fora, and nonpublic fora.[25] In order to create a designated public forum, the government must actually *intend* to open the forum for public discourse.[26] The governmental policies enacted in the forum at issue help the court to ascertain the government's intent.[27] The court will also discern governmental intent from the government's "practice": the extent to which the forum has already been opened to a broad range of

[19] Ridley v. Mass. Bay Transp. Auth., No. 02-10113-RFK, slip op. at 12 (D. Mass. June 5, 2003) (determining court lacked sufficient evidentiary basis to ascertain constitutionality of guidelines), *aff'd*, 390 F.3d 65 (1st Cir. 2004).

[20] 214 F. Supp. 2d 125 (D. Mass. 2002), *rev'd and remanded*, 390 F.3d 65 (1st Cir. 2004).

[21] 390 F.3d at 69 (recognizing both cases involve similar First Amendment issues).

[22] 390 F.3d at 71 (summarizing holdings in case at-bar). In contrast, the court decided that rejection of Change the Climate's advertisements constituted viewpoint discrimination. *Id.* at 87-89 (highlighting three situations where viewpoint discrimination typically inheres).

[23] 390 F.3d at 71. With respect to Change the Climate's claim, however, the court concluded that MBTA failed the reasonableness test. *Id.* at 90 (concluding rejection of advertisements not reasonably calculated to protect children).

[24] Frisby v. Schultz, 487 U.S. 474, 479 (1988) (recognizing standard of review turns on "place" of speech in question).

[25] Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45-46 (1983) (establishing tripartite framework); *see also* Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 800 (1985) (plurality opinion) (delineating appropriate standard of review in each respective forum).

[26] United States v. Kokinda, 497 U.S. 720, 730 (1990) (plurality) (recognizing government may permit public discourse without creating public forum). *But see* John V. Snyder, Note, *Forum Over Substance: Cornelius v. NAACP Legal Defense and Education Fund*, 35 CATH. U. L. REV. 307, 331-32 (1985) (arguing emphasis on governmental intent contravenes traditional First Amendment jurisprudence). In contrast, all streets, sidewalks, and parks are traditional public fora. Frisby v. Schultz, 487 U.S. 474, 480-81 (1988) (characterizing street running through residential neighborhood as traditional public forum); Hague v. Comm. for Indus. Org., 307 U.S. 496, 515-16 (1939) (recognizing citizens' rights to exchange ideas in streets and parks). *But see* United States v. Kokinda, 497 U.S. 720, 727-30 (1990) (plurality opinion) (categorizing post office sidewalk as nonpublic forum).

[27] *See, e.g.*, Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 804 (1985) (plurality opinion) (relying on governmental policy limiting participation in CFC to "appropriate" agencies); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 47 (1983) (deciding school mail system not public forum because school principal controlled access thereto); City of Madison Joint Sch. Dist. No. 8 v. Wis. Employment Relations Comm'n, 429 U.S. 167, 174-75 (1976) (noted statute allowed public citizens to participate in school board meeting).

speakers.[28] Finally, in addition to analyzing governmental intent, courts look to the nature of the property and its compatibility with expressive activity to determine whether the government has created a designated public forum.[29]

In *Lehman v. City of Shaker Heights*,[30] the Court considered whether the advertising spaces on Shaker Heights' public transportation vehicles qualified as public fora.[31] The issue arose when the city transit system refused to run a political candidate's campaign advertisement.[32] The transit system in *Lehman* had guidelines prohibiting political advertising and had not accepted any political advertisements in twenty-six years of operation.[33] In a plurality opinion, the Supreme Court held that the advertising spaces were not public fora because of the commercial nature of the transit system.[34]

If a court determines that a particular forum is a traditional public forum or a designated public forum, strict scrutiny applies to speech restrictions.[35] In nonpublic fora, however, speech restrictions are only subjected to a reasonableness test.[36] Speech restrictions are reasonable if the speech targeted

[28] *See, e.g.*, Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 804 (1985) (plurality opinion) (discussing government's practice of screening access to charitable fund raiser); Widmar v. Vincent, 454 U.S. 263, 267-271 (1981) (considering whether university created public forum by opening its facilities to student organizations); Lehman v. City of Shaker Heights, 418 U.S. 298, 300-01 (1974) (plurality opinion) (noting transit system had not accepted any political advertisements in twenty-six years).

[29] *See, e.g.*, Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 682-83 (1992) (plurality) (describing airport's function primarily as facilitation of air travel); U.S. Postal Serv. v. Council of Greenburgh, 453 U.S. 114, 128-29 (1981) (concluding post office boxes cannot qualify as public fora because of their secure character); Greer v. Spock, 424 U.S. 828, 838 (1976) (focusing on military installation's duty to train soldiers). It is firmly established that a forum hosting a government-run business is less likely to be classified as a public forum. Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 678 (1992) (plurality opinion) (suggesting strict scrutiny can not apply to governmental proprietorships). *But see* Calvin Massey, *Public Fora, Neutral Governments, and the Prism of Property*, 50 HASTINGS L.J. 309, 324-27 (1999) (pointing out unclear distinction between government's role as sovereign versus proprietor); Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713, 1764 (1987) (characterizing sovereign or proprietor test as failed standard).

[30] 418 U.S. 298 (1974) (plurality opinion).

[31] Lehman v. City of Shaker Heights, 418 U.S. 298, 301 (1974) (plurality) (summarizing plaintiff's argument).

32. Lehman v. City of Shaker Heights, 418 U.S. 298, 299-300 (1974) (plurality) (noting advertising agency's management agreement with Shaker Heights forbade political advertising).

[33] Lehman v. City of Shaker Heights, 418 U.S. 298, 300 (1974) (plurality) (describing restrictions on transit system's advertising program). Like the MBTA, the transit authority in *Lehman* ran advertisements for public service organizations. *Id.* (listing advertisements city transit system had accepted); *see also* 390 F.3d at 75 (setting forth strictures of MBTA's revised advertising guidelines).

[34] Lehman v. City of Shaker Heights, 418 U.S. 298, 303 (1974) (plurality) (likening city transit system to private enterprise); *see also supra* note 29 (observing lesser scrutiny applies to governmental proprietorships).

[35] *See, e.g.*, Frisby v. Schultz, 487 U.S. 474, 481 (1988) (applying strict scrutiny to ordinance prohibiting picketing in residential neighborhood); Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 800 (1985) (outlining applicable standard of review in each type of forum); Widmar v. Vincent, 454 U.S. 263, 267-71 (1981) (applying strict scrutiny where university excluded student organization from its meeting facilities).

[36] *See, e.g.*, Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 683-85 (1992) (plurality) (assessing reasonableness of ban on solicitation in airport terminals); Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 807-11 (1985) (plurality) (assessing reasonableness of decision to exclude legal defense funds from charity drive); Lehman v. City of Shaker Heights, 418 U.S. 298, 303-04 (1974) (plurality) (assessing reasonableness of guideline prohibiting political advertising on bus placards).

by the regulation would disrupt the forum's purpose.[37] Justice O'Connor's concurring opinion in *International Society for Krishna Consciousness, Inc. v. Lee*,[38] however, indicates that reasonableness is not a mere illusory standard.[39] There, Justice O'Connor emphasized that a forum's "special attributes" and "surrounding circumstances" must be taken into account.[40] She concluded that a regulation prohibiting leafleting in an airport terminal was unreasonable in light of the facility's dual purpose as both an airport and a shopping mall.[41]

Thus, speech in nonpublic fora may be regulated using reasonable content-based restrictions which target subject matter or the identity of the speaker.[42] Content-based restrictions, such as regulations prohibiting subversive speech or perjury, are restrictions that silence speech because of its message.[43] Viewpoint-discriminatory restrictions are content-based regulations that target the speaker's viewpoint instead of his identity or the subject matter of the speech.[44] They are strictly prohibited in any type of forum.[45] Furthermore, in

[37] United States v. Kokinda, 497 U.S. 720, 732-35 (1990) (plurality) (upholding ban on solicitation because it disrupts post office business). The court also looks to the availability of alternative avenues of communication. Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 684-85 (1992) (plurality) (concluding freedom of speech on airport sidewalks supports reasonableness of restrictions in terminals); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 53-54 (1983) (confirming reasonableness of agreement excluding organization from school mail system).

[38] 505 U.S. 672 (1992) (plurality opinion).

[39] Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 687 (1992) (plurality) (O'Connor, J., concurring) (discussing limitations on governmental control over speech in nonpublic fora); *see also* Irene Segal Ayers, *What Rudy Hasn't Taken Credit For: First Amendment Limits on Regulation of Advertising on Government Property*, 42 ARIZ. L. REV. 607, 618-19 (2000) (maintaining Justice O'Connor set higher standards for reasonableness than plurality).

[40] Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 687-88 (1992) (plurality) (O'Connor, J., concurring) (accounting for various shops located inside airport).

[41] Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 690 (1992) (plurality) (O'Connor, J., concurring) (observing solicitation creates greater problems than leafleting).

[42] *See, e.g.*, Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 682-83 (1998) (holding broadcaster could exclude unpopular candidate from televised debate); Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 806 (1985) (plurality opinion) (distinguishing between permissible and impermissible content-based restrictions in nonpublic fora); Greer v. Spock, 424 U.S. 828, 839 (1976) (upholding regulation prohibiting political speech on military reservation); *see also* Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95 (1972) (striking down content-based regulation limiting speech on public sidewalk).

[43] Boos v. Barry, 485 U.S. 312, 318-19 (1988) (characterizing regulation prohibiting criticism of foreign governments as content-based); Consol. Edison Co. v. Pub. Serv. Comm'n, 447 U.S. 530, 537-40 (1980) (characterizing restriction on discussion of public controversies as content-based); *see also* Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 47-48 (1987) (highlighting differences between content-based and content-neutral speech restrictions).

[44] Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 830-31 (1995) (categorizing viewpoint discrimination as subset of content discrimination); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 59-62 (1983) (Brennan, J., dissenting) (illustrating distinctions between content neutrality and viewpoint neutrality); Schact v. United States, 398 U.S. 58, 63 (1970) (invalidating statute permitting praise but prohibiting criticism of Vietnam War); *see also supra* note 42 and accompanying text (noting restrictions targeting subject matter or speaker identity can pass muster in nonpublic fora).

[45] Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 806 (1985) (stating viewpoint-discriminatory regulations in nonpublic fora violate First Amendment); Members of City Council of Los Angeles v. Taxpayers ex rel. Vincent, 466 U.S. 789, 804 (1984) (describing viewpoint-based regulations as

Rosenberger v. Rector and Visitors of the University of Virginia,[46] the Supreme Court held that viewpoint-discriminatory restrictions are unconstitutional whether they limit only one perspective, or a variety of viewpoints.[47]

In *Ridley v. Massachusetts Bay Transportation Authority*, the First Circuit Court of Appeals considered whether the MBTA violated Ridley's First Amendment rights by refusing to run her advertisement.[48] The court determined that the MBTA had demonstrated its intent to keep the forum closed to public debate, because it promulgated and enforced guidelines limiting access to its advertising spaces.[49] The court found support for its conclusion in the *Lehman* decision, which it characterized as "indistinguishable" from the case at bar.[50] In addition, the court determined that the MBTA's guidelines were viewpoint neutral, because they applied equally to all speakers.[51] Finally, the majority concluded that the advertising guidelines were reasonable, because they served to maximize the MBTA's overall revenue.[52]

The majority incorrectly characterized the MBTA's advertising spaces as nonpublic fora.[53] The majority was on point in mentioning that the advertising guidelines contained a panoply of limitations, indicating that the MBTA had no intent of creating a forum for public discourse.[54] As the dissent noted, however, the MBTA ran public issue advertisements, demonstrating that its advertising spaces are compatible with expressive activity.[55] In addition, the MBTA's failure to reject but more than a handful of advertisements in prior

"plainly illegitimate"). *But see* Nicole B. Casarez, *Public Forums, Selective Subsidies, and Shifting Standards of Viewpoint Discrimination*, 64 ALB. L. REV. 501, 533-43 (2000) (maintaining Court exhibits greater sensitivity to claims of viewpoint discrimination in public fora).

[46] 515 U.S. 819 (1995).

[47] Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 831-32 (1995) (declaring exclusion of both theistic and atheistic viewpoints constitutes viewpoint discrimination); *see also* Marjorie Heins, *Viewpoint Discrimination*, 24 HASTINGS CONST. L.Q. 99, 122 (1996) (arguing suppression of entire class of viewpoints constitutes viewpoint discrimination).

[48] 390 F.3d at 70-71 (describing Ridley's various claims for relief under First Amendment).

[49] 390 F.3d at 77-78 (illustrating inception and evolution of MBTA's advertising guidelines). *But see id.* at 104-05 (Torruella, J., dissenting) (detailing MBTA's lackadaisical enforcement of its advertising guidelines).

[50] 390 F.3d at 78-79 (recognizing MBTA, like transit system in *Lehman*, follows written guidelines and accepts public service advertisements).

[51] 390 F.3d at 91 (deciding "demeaning or disparaging" guideline restricts content but not viewpoint). *But see id.* at 100-01 (Torruella, J., dissenting) (noting guidelines would allow advertisements espousing opposite viewpoint from Ridley's ad).

[52] 390 F.3d at 93 (describing advertising program's purposes).

[53] 390 F.3d at 82 (deciding MBTA's policy clearly demonstrated intent to restrict speech).

[54] 390 F.3d at 77-78 (examining MBTA's current advertising guidelines and tracing their development); *supra* notes 26-27 and accompanying text (demonstrating governmental policy evidences intent to create designated public forum).

[55] 390 F.3d at 105-06 (Torruella, J., dissenting) (contending Ridley's advertisement would not interfere with MBTA's financial objective); *supra* note 29 and accompanying text (observing forum analysis requires assessment of property's compatibility with expressive activity). *But see supra* note 29 (noting governmental proprietorships usually qualify as nonpublic fora).

years evinced a practice that belied the austerity of its guidelines.[56] The majority overlooked the MBTA's practice of sparse enforcement and the relative novelty of their latest guidelines in erroneously concluding that this case is indistinguishable from *Lehman*.[57]

In concluding that the MBTA passed the reasonableness test, the court failed to consider the surrounding circumstances and special attributes of the advertising spaces.[58] By running both commercial and public service advertising, the MBTA created a multipurpose forum similar to the airport in *International Society for Krishna Consciousness, Inc. v. Lee*.[59] Thus, the MBTA unreasonably refused to run Ridley's advertisement because, in addition to maximizing revenue, the advertising spaces served as a source of information for the public welfare.[60]

Finally, the court failed to recognize that a guideline prohibiting "demeaning and disparaging" speech discriminates based on viewpoint.[61] A prohibition on "demeaning and disparaging" speech is a content-based restriction that does not target either subject matter or speaker identity.[62] Instead, as the dissent noted, the guideline would permit an advertisement characterizing a particular religion as "true," and prohibit an advertisement characterizing the same religion as "false."[63] Thus, even though the MTBA's guideline applies universally, it is viewpoint discriminatory because it skews the playing field across a variety of topics of debate.[64]

In *Ridley v. Massachusetts Bay Transportation Authority*, the First Circuit considered whether the MBTA could refuse to run an advertisement denigrating certain religions. The court failed to pick up on the MTBA's demonstrated intent to open a designated public forum. The court also failed to

[56] 390 F.3d at 104 (Torruella, J., dissenting) (noting MBTA only rejected fifteen advertisements from 1995 to 1999); *supra* note 28 and accompanying text (observing general access to forum indicates intention to create public forum). *But see* 390 F.3d at 78 (maintaining MBTA satisfactorily enforced its advertising policy).

[57] 390 F.3d at 78-79 (concluding *Lehman* controls in case at-bar); *see also supra* note 33 and accompanying text (noting transit system in *Lehman* accepted no political advertisements for twenty-six years).

[58] 390 F.3d at 93 (confirming reasonableness of guidelines in light of advertising program's objectives); *supra* note 40 and accompanying text (stressing importance of "special attributes" and "surrounding circumstances" in reasonableness test).

[59] *Supra* notes 38-41 and accompanying text (describing Justice O'Connor's concurring opinion in *Lee*); *see also supra* note 9 (setting forth testimony attesting to advertising program's dual purpose).

[60] *Supra* notes 38-41 and accompanying text (observing *Lee* struck down leafleting restriction because forum served dual purposes).

[61] 390 F.3d at 90-91 (arguing guideline prohibits all potential speakers from using demeaning speech).

[62] *Supra* notes 42-43 and accompanying text (outlining permissible forms of content discrimination in nonpublic fora).

[63] 390 F.3d at 100-01 (Torruella, J., dissenting) (characterizing guideline as viewpoint discriminatory); *supra* note 44 and accompanying text (noting viewpoint discriminatory regulations favor only one side of debate).

[64] *Supra* note 51 and accompanying text (outlining majority's argument based on guidelines' applicability to all speakers); *supra* note 47 and accompanying text (noting viewpoint-discriminatory regulations may silence multiple viewpoints).

recognize the unreasonableness of the MBTA's decision, because it made its advertising spaces available for other public service announcements. In addition, the court mistakenly characterized the MBTA's advertising strictures, which prohibited "demeaning or disparaging" speech, as viewpoint neutral. In sum, the court missed every opportunity to strike down a clear violation of the First Amendment.

Nicholas G. Keramaris