



First Amendment Implications for Transit Facilities: Speech, Advertising, and Loitering

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FIRST AMENDMENT IMPLICATIONS FOR TRANSIT FACILITIES: SPEECH, ADVERTISING, AND LOITERING

This report was prepared under TCRP Project J-5, "Legal Aspects of Transit and Intermodal Transportation Programs," for which the Transportation Research Board is the agency coordinating the research. The report was prepared by Joseph Van Eaton, Matthew C. Ames, and Matthew K. Schettenhelm, Miller & Van Eaton. James B. McDaniel, TRB Counsel for Legal Research Projects, was the principal investigator and content editor.

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The Problem and Its Solution

The nation's 6,000 plus transit agencies need to have access to a program that can provide authoritatively researched, specific, limited-scope studies of legal issues and problems having national significance and application to their business. Some transit programs involve legal problems and issues that are not shared with other modes; as, for example, compliance with transit-equipment and operations guidelines, FTA financing initiatives, private-sector programs, and labor or environmental standards relating to transit operations. Also, much of the information that is needed by transit attorneys to address legal concerns is scattered and fragmented. Consequently, it would be helpful to the transit lawyer to have well-resourced and well-documented reports on specific legal topics available to the transit legal community.

The *Legal Research Digests* (LRDs) are developed to assist transit attorneys in dealing with the myriad of initiatives and problems associated with transit start-up and operations, as well as with day-to-day legal work. The LRDs address such issues as eminent domain, civil rights, constitutional rights, contracting, environmental concerns, labor, procurement, risk management, security, tort liability, and zoning. The transit legal research, when conducted through the TRB's legal studies process, either collects primary data that generally are not available elsewhere or performs analysis of existing literature.

Applications

Transit agencies face many challenges in balancing the obligation to provide passengers with a free-flowing and efficient means of travel against the freedom of expression guaranteed by the Constitution to commercial, charitable, and other organizations or persons who take advantage of the public-like forum of most transit facilities to engage in free speech and expressive behavior. *TCRP Legal Research Digest 10: Restrictions on Speech and Expressive Activities in Transit Terminals and Facilities* addressed these issues more than 10 years ago. That publication is a primer and comprehensive study of the history and state of the relevant law up to the time of publication. Since then, however, changes in society suggest that this area of transportation law should be reexamined. In recent years, there has been increased interest in banning or placing restrictions on speech, advertising, loitering, and panhandling.

Specifically, this digest provides an analytical legal synthesis of available regulations, statutes, policies, and case decisions pertaining to permissible and impermissible restrictions on speech and expressive behavior at transit facilities and aboard transit vehicles; a clear discussion pertaining to sidewalks and transit facilities as public fora; attempts to regulate advertising on public property; and a discussion of the enforcement of anti-loitering and anti-panhandling regulations on or near transit facilities.

This digest should be useful to attorneys, state and local transportation administrators, researchers, legislators, and others who are in need of an updated discussion of these issues.

TRANSPORTATION RESEARCH BOARD
OF THE NATIONAL ACADEMIES

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FIRST AMENDMENT IMPLICATIONS FOR TRANSIT FACILITIES: SPEECH, ADVERTISING, AND LOITERING

By Joseph Van Eaton, Matthew C. Ames, and Matthew K. Schettenhelm
Miller & Van Eaton, Washington, DC

PURPOSE AND SCOPE

Transit agencies face numerous challenges in providing passengers with a safe and efficient means of travel while respecting the freedom of expression protected by the First Amendment. In May 1998, the Transportation Research Board published Transit Cooperative Research Program Legal Research Digest (LRD) 10, *Restrictions on Speech and Expressive Activities in Transit Terminals and Facilities* (“LRD 10”),¹ a survey of the relevant law and its development up to the time of publication. This digest supplements LRD No. 10, summarizing and analyzing the status of this important area of the law in light of court decisions and other developments that have arisen in subsequent years.

The challenges facing transit agencies have increased in complexity since the release of LRD 10, and will only continue to do so in the future. New technological developments—such as the ease of access to all forms of electronic media made possible by the convergence of wireless communications, the Internet, and portable computing devices—suggest that transit authorities will need to apply existing First Amendment principles in an increasing variety of new and often difficult factual circumstances. Attorneys advising transit agencies about matters related to the regulation of expression in transit facilities may use this research digest as a guide in this complex environment.

I. A PRIMER ON FIRST AMENDMENT ANALYSIS

The courts have developed a series of basic tests to evaluate the legality of regulations affecting expression in a broad range of circumstances. This research digest is not intended to serve as a comprehensive study of free speech doctrine or current First Amendment law. Still, a brief review of the general principles of First Amendment jurisprudence is essential to understanding how the courts analyze First Amendment issues in the context of transit facilities.²

* The authors are attorneys with the Washington, D.C., law firm of Miller & Van Eaton, P.L.L.C.

¹ Available at http://onlinepubs.trb.org/Onlinepubs/tcrp/tcrp_lrd_10.pdf.

² The First Amendment provides that “Congress shall make no law...abridging the freedom of speech.” U.S. CONST. amend. I. For general background, the authors have principally relied upon RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON

A. The State Action Doctrine

The first rule of constitutional law is that the Constitution limits only governmental actions. If there is no “state actor,” there can be no First Amendment violation.³ The courts have not developed any single test for determining what constitutes state action, particularly when the dispute involves the First Amendment.⁴ Instead, the Supreme Court has looked to a variety of factors to determine whether the government should be considered “responsible” for the conduct at issue:

...a challenged activity may be state action when it results from the State’s exercise of “coercive power,” when the State provides “significant encouragement, either overt or covert,” or when a private actor operates as a “willful participant in joint activity with the State or its agents[.]” We have treated a nominally private entity as a state actor when it is controlled by an “agency of the State,” when it has been delegated a public function by the State, when it is “entwined with governmental policies,” or when government is “entwined in [its] management or control[.]”⁵

A licensing relationship is generally insufficient in itself to give rise to governmental responsibility for actions taken by a private licensee or tenant.⁶ In addition,

CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE (4th ed. 2007).

³ *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 295 (2001) (“What is fairly attributable [as state action] is a matter of normative judgment, and the criteria lack rigid simplicity.”); *Edmonson v. Leesville*, 500 U.S. 614, 632 (1991) (O’Connor, J., dissenting); *Wickersham v. City of Columbia*, 371 F. Supp. 2d 1061, 1076 (W.D. Mo. 2005).

⁴ See 2 ROTUNDA & NOWAK, *supra* note 2, § 16.4; see also *Lee v. Katz*, 276 F.3d 550, 554 (9th Cir. 2002).

⁵ *Brentwood Acad.*, 531 U.S. at 296 (internal citations omitted); *Edmonson*, 500 U.S. at 632 (O’Connor, J., dissenting) (constitutional standards are invoked only when government is responsible for conduct at issue); see also *Air Line Pilots Ass’n, Int’l v. Dep’t of Aviation of Chi.*, 45 F.3d 1144, 1149 (7th Cir. 1995). In the latter case, the Seventh Circuit found that there was “a level of interdependence” between a private company that had been awarded a contract to operate advertising displays at O’Hare Airport and the City of Chicago, and concluded that the contractor’s decision not to display an ad constituted a decision of the city. *Id.*

⁶ See *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972); *Gannett Satellite Info. Network v. Berger*, 894 F.2d 61, 67 (3d Cir. 1990) (actions taken by concessionaires leasing space from port authority do not constitute state action, and may not be attributed to the port authority). But see *Burton v. Wilmington*

courts have recognized that owners of privately-owned shopping malls are generally free to restrict speech on their property without raising First Amendment concerns.⁷ Nonetheless, as suggested by *Brentwood Academy*, private ownership or status as a for-profit entity is not dispositive. For example, the Supreme Court has ruled that Amtrak is a state actor for constitutional purposes, despite its original designation by Congress as a “for profit corporation,” and later as one that would be “operated and managed as a for profit corporation.”⁸ Accordingly, any relationship between a government-owned or -operated facility and a private party using, leasing, or managing any aspect of the facility’s property or operations may be subject to scrutiny.

B. Content-Based and Content-Neutral Regulation of Speech

The Supreme Court has stressed that “above all else” the First Amendment embraces one principle: the government “has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”⁹ Consequently, “[c]ontent-based regulations are presumptively invalid.”¹⁰ Such regulations of content are allowed only in limited areas “of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.”¹¹ These areas include: 1) incitement of imminent, lawless action,¹² 2) fighting words,¹³ 3) obscenity,¹⁴ 4) confidential communications

Parking Auth., 365 U.S. 715, 724 (1961) (finding “degree of state participation and involvement in discriminatory action” of lessee).

⁷ *Lloyd Corp. v. Tanner*, 407 U.S. 551, 567 (1972) (“[I]t must be remembered that the First and Fourteenth Amendments safeguard the rights of free speech and assembly by limitations on state action, not on action by the owner of private property used nondiscriminatorily for private purposes only.”). Note that the result may be different under state constitutions that are more protective of speech than the United States Constitution. *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 81 (1980) (*Lloyd* “does not *ex proprio vigore* limit the authority of the State to exercise its police power or its sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution.”). For example, in *Robins v. PruneYard Shopping Ctr.*, 592 P.2d 341, 347 (1979), the Supreme Court of California held that the California Constitution protects certain speech and petitioning in privately owned shopping centers, even if the First Amendment does not.

⁸ See *Lebron v. Nat’l R.R. Passenger Corp.*, 513 U.S. 374, 384–85, 394 (1995).

⁹ *Police Dep’t of Chi. v. Mosley*, 408 U.S. 92, 95 (1972).

¹⁰ *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992).

¹¹ *R.A.V.*, 505 U.S. at 383 (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)).

¹² *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

¹³ *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

¹⁴ *Miller v. California*, 413 U.S. 15 (1973).

(in some instances),¹⁵ 5) defamation (in some instances),¹⁶ 6) false or deceptive advertising,¹⁷ 7) advertising of harmful or illegal products or transactions,¹⁸ and 8) coercion (in some instances).¹⁹ In addition, as discussed in Part I.C, in cases concerning whether particular government property is appropriate for expressive activity, courts have permitted reasonable content-based regulation of speech in locations that have not been opened to the public for expression (nonpublic fora), provided that such regulation does not discriminate based on a speaker’s viewpoint and is otherwise reasonable.²⁰ Otherwise, the courts have generally evaluated content-based regulations of expressive activities²¹ under what the Supreme Court calls “strict scrutiny,” a standard under which few regulations are upheld.²²

If the government regulates expressive activities on a content-neutral basis, it may establish regulations with respect to when, where, and how speech may be delivered pursuant to the “time, place, and manner doctrine.” Under that doctrine, regulations are permissible if they “are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.”²³ Courts

¹⁵ *Landmark Commc’ns Inc. v. Virginia*, 435 U.S. 829 (1978); *N.Y. Times Co. v. United States*, 403 U.S. 713, 725–27 (Brennan, J. concurring) (1971).

¹⁶ *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964).

¹⁷ *Friedman v. Rogers*, 440 U.S. 1 (1979).

¹⁸ *Posadas de P.R. Assoc. v. Tourism Co.*, 478 U.S. 328 (1986).

¹⁹ *Int’l Longshoremen’s Ass’n v. Allied Int’l*, 456 U.S. 212 (1982).

²⁰ Viewpoint discrimination occurs if a regulation targets the “underlying ideology or perspective that the speech expresses.” *Ridley v. Mass. Bay Transp. Auth.*, 390 F.3d 65, 82 (1st Cir. 2004). Thus, for example, in a nonpublic forum, a government could ban *all* discussion of a particular issue (a content-based regulation), assuming that the ban was otherwise reasonable in such a setting; but it could not ban *only* comments *in support* of one position on an issue (a viewpoint-based regulation) unless it could overcome strict scrutiny. See *infra* pts. III.A.2, IV.

²¹ The Supreme Court has viewed at least some activities, such as being in a state of public nudity, as having no inherent expressive content. *City of Erie v. Pap’s A.M.*, 529 U.S. 277, 289 (2000) (noting that “[b]eing ‘in a state of nudity’ is not an inherently expressive condition.”).

²² *United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803, 813 (2000). Under strict scrutiny, a regulation will only be upheld if it is “narrowly tailored to promote a compelling Government interest.” *Id.*

²³ *United States v. Grace*, 461 U.S. 171, 177 (1983) (quoting *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45). In their treatise on constitutional law, Professors Rotunda and Nowak note that the Court has stated its time, place, or manner test in a slightly different form in *Members of City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 805 (1984) (quoting *United States v. O’Brien*, 391 U.S. 367, 377 (1968)). 5 ROTUNDA & NOWAK, *supra* note 2, § 20.47(a) at 459–

have struggled to draw the line between content-neutral and content-based regulations. In *Ward v. Rock Against Racism*,²⁴ the Supreme Court noted that “Government regulation of expressive activity is content neutral so long as it is *justified* without reference to the content of the regulated speech.”²⁵ Other courts have asked whether an administrator or officer enforcing the regulation must read the substance of a message in order to decide whether it is permissible.²⁶ The decisions on this issue can at times appear arbitrary.²⁷

62. Rotunda and Nowak assert that, regardless of which test is used, a court is essentially engaging in a two-step analysis:

First, it seeks to determine whether the regulation is in fact an attempt to suppress content because of its message.... If the regulation is not an attempt to censor content, the Court will go on to determine whether the incidental restriction on speech is outweighed by the promotion of significant governmental interests.... [T]he analysis really assesses whether the regulation leaves open ample means for communication of the message and thus is not an unnecessary or gratuitous suppression of communication.

Id. at 460–62. See *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984) (preventing use of parks as campgrounds (or as symbolic “tent cities”) is reasonable time, place, and manner regulation).

²⁴ 491 U.S. 781 (1989).

²⁵ *Id.* at 791. In certain situations, a government can regulate nonexpressive conduct even if it has incidental effects on speech. *United States v. O’Brien*, 391 U.S. 367, 376–77 (1968); *City of Erie v. Pap’s A.M.*, 529 U.S. 277, 289 (2000).

²⁶ *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134 (1992). See also *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429 (1993) (“Under the city’s newsrack policy, whether any particular newsrack falls within the ban is determined by the content of the publication resting inside that newsrack.”); *ACLU v. City of Las Vegas*, 466 F.3d 784, 796 n.12 (9th Cir. 2006) (noting limited exceptions to the “officer must read it” test).

²⁷ For example, in *Loper v. N.Y. City Police Dep’t*, 999 F.2d 699, 705 (2d Cir. 1993), the Second Circuit ruled that a total ban on panhandling is not content-neutral because the court concluded that such a ban silences speech and expressive conduct on the basis of its message. On the other hand, in *People v. Barton*, 861 N.E.2d 75 (N.Y. 2006), the Court of Appeals of New York held that a ban on soliciting for purposes of immediately obtaining money or something else of value was content-neutral. The court relied on *Ward’s* teaching, *supra* n.24, that “regulation of expressive activity is content neutral so long as it is *justified* without reference to the content of the regulated speech” and found that the Council adopted the regulation “to promote the free and safe flow of traffic.” *Id.* at 80 (citing *Ward*, 491 U.S. at 791). In another case, *Cinevision Corp. v. City of Burbank*, 745 F.2d 560, 571–72 (9th Cir. 1984), the Ninth Circuit ruled that the City Council’s exclusion of “hard rock” music at concerts in a municipally-owned amphitheater was content-based. At least in theory, one could argue that this is only regulation of the manner in which music is played (e.g., volume limitations), not its content; or is independently justified because of its accompanying adverse effects (e.g., attracting narcotics users). As a general matter, outside the realm of obscenity, courts have been reluctant to treat regulations as content neutral when expressed in terms of the content of speech itself

C. The Public Forum Doctrine

Speech is not fully protected by the First Amendment simply because it is delivered on government property. Only speech delivered on government property that has been traditionally reserved for or intentionally opened to the public for expressive activity—a public forum—is entitled to full First Amendment protection. The Supreme Court has identified two types of public forum: “traditional” public fora and “designated” public fora.²⁸ Traditional public fora are those which “have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.”²⁹ Designated public fora consist of public property “which the state has opened for use by the public as a place for expressive activity.”³⁰ In these fora, the government can only enforce a content-based regulation if it survives strict scrutiny—that is, if the regulation is “necessary to serve a compelling state interest and...it is narrowly drawn to achieve that end.”³¹

Nonpublic fora are locations owned or controlled by the government that have not been opened to the public for expressive activity; expression in nonpublic fora is entitled to less-extensive protection. The Supreme Court has held that, like a private owner of property, a government may reserve a forum for its intended purposes, communicative or otherwise, “as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker’s view.”³² This reasonableness analysis requires courts to assess a forum’s “special attributes” since “the significance of the governmental interest must be assessed in light of the characteristic nature and function of the particular forum involved.”³³ Courts have found that a regulation of a particular nonpublic

(hard rock) as opposed to its characteristics (all music played above a certain decibel level).

²⁸ *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n* 460 U.S. 37, 45–46 (1983). Some decisions use the term “limited” public forum, but because this term has also been used to describe a type of nonpublic forum, the term “designated public forum” is preferred. The term is also confusing because a public forum may be designated for a limited purpose such as for “use by certain groups, or for the discussion of certain subjects.” See *Perry*, 460 U.S. at 46 n.7 (citations omitted).

²⁹ *Id.* at 45 (quoting *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939)).

³⁰ *Id.* A government actor’s decision to allow “political or public issue” speech is often key to the analysis of whether a particular place constitutes a designated public forum.

³¹ *Id.*

³² *Id.* at 46. With respect to viewpoint discrimination, see *supra* note 20.

³³ *Heffron v. Int’l Soc’y for Krishna Consciousness, Inc.*, 452 U.S. 640, 650–51 (1981).

forum may be reasonable if it is supported by “common sense.”³⁴

As discussed in later sections, the public forum doctrine has played an especially important role with respect to transit facilities.³⁵

D. The Vagueness and Overbreadth Doctrines

Even in cases where the regulation of certain expressive activity or speech is permissible,³⁶ the Supreme Court has cautioned that such regulation must not be substantially vague or overbroad. Vague standards may lead to arbitrary enforcement, or cause a chilling effect on free expression.³⁷ A statute affecting expression is unconstitutionally vague either if it does not “give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly” or if it fails to provide “explicit standards” for its enforcement.³⁸

The courts disapprove of statutes that are “substantially overbroad” for similar reasons.³⁹ In determining whether a statute is overbroad, the courts ask whether there is a “realistic danger” that the statute will compromise First Amendment rights,⁴⁰ but they also examine the restriction of free speech in relation to the legitimate scope of the statute.⁴¹ Nevertheless, “[t]he Government may not suppress lawful speech as the means to suppress unlawful speech.”⁴² The courts have relaxed the ordinary rules with respect to facial challenges in this area, finding that a showing of “substan-

³⁴ *United States v. Kokinda*, 497 U.S. 720, 734–35 (1990). This differs from analysis under the time, place, and manner doctrine. See *infra* note 157.

³⁵ See *Int’l Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 688 (1992) (finding special attributes of airport terminal justify regulation of face-to-face solicitation but not leafleting).

³⁶ *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 245–46 (2002) (“The freedom of speech has its limits; it does not embrace certain categories of speech, including defamation, incitement, obscenity, and pornography produced with real children.”). See *supra* pt. I.B.

³⁷ *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972); *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 604 (1967); *NAACP v. Button*, 371 U.S. 415, 432–33 (1963) (“First Amendment freedoms need breathing space to survive”).

³⁸ *Grayned*, 408 U.S. at 108.

³⁹ 5 ROTUNDA & NOWAK, *supra* note 2, § 20.9(a) at 52–53. (“The problem of vagueness in statutes regulating speech activities is based on the same rationale as the overbreadth doctrine and the Supreme Court often speaks of them together.”). See, e.g., *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965); *Keyishian*, 385 U.S. at 609; *Button*, 371 U.S. at 433; *Kolender v. Lawson*, 461 U.S. 352, 358 n.8 (1983).

⁴⁰ *Members of City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 801 (1984).

⁴¹ *Virginia v. Hicks*, 539 U.S. 113, 118–19 (2003) (citing *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973)).

⁴² *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 255 (2002).

tial overbreadth” will suffice to invalidate all enforcement of the particular regulation or law in question.⁴³

The key in an overbreadth case is whether the challenged rules are structured in a way that may chill lawful speech. The courts are particularly open to challenges where criminal penalties are involved, because the chilling effect is thought to be most significant. On the other hand, some courts have been more reluctant to entertain overbreadth challenges to advertising guidelines for transit facilities, at least where the only result is temporary rejection of an advertisement.⁴⁴

E. Prior Restraints on Speech

The Supreme Court has also explained that a “chief purpose” of the First Amendment is to avoid prior restraints on speech.⁴⁵ In the Court’s words, “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.”⁴⁶ Thus, while prior restraints are not unconstitutional *per se*,⁴⁷ any system of prior restraints bears a “heavy presumption” against its validity.⁴⁸ Courts have also been concerned that permitting schemes, if not sufficiently tailored, can effectively serve as illegal prior restraints.⁴⁹ As the Supreme Court has explained, “in the area of free expression a licensing statute placing unbridled discretion in the hands of a government official or agency constitutes a prior restraint and may result in censorship.”⁵⁰ In such cases, a plaintiff may bring a facial challenge to such a permitting scheme without first applying for, and being denied, a license.⁵¹

⁴³ *N.Y. State Club Ass’n v. City of New York*, 487 U.S. 1, 11 (1988). The ordinary rule is that a litigant only has standing to vindicate his own constitutional rights, and that a facial challenge to a statute can only succeed if it “could never be applied in a valid manner.” *Id.* However, this rule does not apply with respect to overbreadth challenges. See *Coates v. City of Cincinnati*, 402 U.S. 611, 619–20 (1971) (“Although a statute may be neither vague, overbroad, nor otherwise invalid as applied to the conduct charged against a particular defendant, he is permitted to raise its vagueness or unconstitutional overbreadth as applied to others.”).

⁴⁴ *Ridley v. Mass. Bay Transp. Auth.*, 390 F.3d 65, 94 (1st Cir. 2004).

⁴⁵ *Near v. Minnesota*, 283 U.S. 697, 713–14 (1931).

⁴⁶ *SE Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559 (1975).

⁴⁷ *Times Film Corp. v. City of Chicago*, 365 U.S. 43, 46–47 (1961); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 n.10 (1963).

⁴⁸ *Bantam Books*, 372 U.S. at 70.

⁴⁹ *City of Lakewood v. Plain Dealer Publ’g Co.*, 486 U.S. 750 (1998).

⁵⁰ *Id.* at 757.

⁵¹ *Id.* at 755–56; *Freedman v. Maryland*, 380 U.S. 51, 56 (1965) (“In the area of freedom of expression it 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

F. The Commercial Speech Doctrine

Commercial speech is “speech of any form that advertises a product or service for profit or for business purposes.”⁵² Because governments have the power to regulate commercial transactions, the courts have allowed more rigorous regulation of speech that is “linked inextricably” to those transactions.⁵³ While commercial speech was once entitled to no protection under the First Amendment,⁵⁴ it is now protected, but not as vigorously as political speech. However, the distinction between the standards for regulation of commercial speech and other speech may be narrowing. Several Supreme Court justices, led by Justice Thomas,⁵⁵ have questioned whether commercial speech regulation should be shielded from ordinary First Amendment scrutiny. For example, Justices Stevens, Kennedy, and Ginsburg have suggested that the doctrine should not automatically apply to any speech with a commercial message, but only in contexts where it is necessary to ensure a “fair bargaining process” with consumers.⁵⁶

For now, the commercial speech doctrine remains in force.⁵⁷ Under the current test, provided by *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*,⁵⁸ courts will permit a total ban on commercial speech that is either misleading or that relates to unlawful activity. Beyond this, however, commercial speech may be restricted if: 1) the state actor can assert a “substantial interest”; 2) the restriction “directly advance[s]” the state interest; and 3) the state interest could not be served as well by a more limited restriction on commercial speech.⁵⁹ There need only be a “reasonable” fit—a “fit that is not necessarily perfect”—between the state actor’s ends and the means.⁶⁰ The Court has suggested that this test is comparable to the test under the “time, place, and manner” doctrine.⁶¹

applied for a license.”) See also *Lebron v. Wash. Metro. Area Transit Auth.*, 749 F.2d 893, 899 n.10 (D.C. Cir. 1984) (recognizing that administrative restraint can only be temporary).

⁵² 5 ROTUNDA & NOWAK, *supra* note 2, § 20.26, at 221.

⁵³ 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 499 (1996), (citing *Friedman v. Rogers*, 440 U.S. 1, 10 n.9 (1979)).

⁵⁴ See *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942). For a review of the development of the commercial speech doctrine, see 44 *Liquormart*, 517 U.S. at 495–505.

⁵⁵ See *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 575 (2001) (Thomas, J., concurring) (stating that strict scrutiny should apply).

⁵⁶ 44 *Liquormart*, 517 U.S. at 501.

⁵⁷ *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 506 (1981); see also *Lorillard Tobacco*, 533 U.S. at 554. It remains to be seen how the departures of Justices O’Connor and Rehnquist will affect the doctrine in the future.

⁵⁸ 447 U.S. 557, 563–64 (1980).

⁵⁹ *Id.* at 564.

⁶⁰ *Bd. of Trustees of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 477–80 (1989) (finding that the “least restrictive means” test does not apply to regulations of commercial speech).

⁶¹ *Lorillard Tobacco*, 533 U.S. at 554.

II. THE PUBLIC FORUM DOCTRINE: APPLICATION TO TRANSIT FACILITIES

This part will address the public forum doctrine in detail, with particular emphasis on the classification of transit facilities under that doctrine. The classification of a facility as a public or nonpublic forum is important because it has such a fundamental impact on the scope of permissible regulation.⁶² Later sections discuss the application of First Amendment principles to particular forms of speech within different types of fora.⁶³

The public forum doctrine evolved out of a series of cases in which the Supreme Court was faced with First Amendment issues related to specific uses of different types of property. The public forum concept was introduced by the Supreme Court in *Hague v. Committee for Industrial Organization*,⁶⁴ which stated that, “The privilege...to use the streets and parks for communication of views on national questions may be regulated in the interest of all; ...but it must not, in the guise of regulation, be abridged or denied.”⁶⁵

The Court’s first complete elaboration of the public forum doctrine appears in *Perry Education Association v. Perry Local Educators’ Association*.⁶⁶ Although not a transit facility case, *Perry* provides the analytical framework that the courts apply in such cases.⁶⁷ There are several (conflicting) principles that underlie the doctrine: First, the right to speak is a right members of the public generally carry with themselves wherever they go, and the government, for its part, may not generally condition access to property on an agreement to give up those rights. Second, the right to speak and assemble is illusory unless there are low-cost, accessible alternatives for all members of the public to engage in spirited public debate. On the other hand, there are some locations where public protest and debate are not appropriate, or where speech must be restricted in order for business to proceed (e.g., a courtroom or office building). The “public forum” analysis is the means through which the courts attempt to balance these interests.

A traditional public forum is an area that by long tradition or by government fiat has “been devoted to assembly and debate.”⁶⁸ The government may not prohibit all speech in a traditional public forum, and any

⁶² See *supra* pt. I.C for general discussion of the public forum doctrine.

⁶³ We emphasize that the classification of a facility under the forum doctrine is not the final step in the analysis. For example, even if a facility is classified as a nonpublic forum, regulations of expressive activity therein must be reasonable and viewpoint-neutral. See *infra* pts. III.A, IV.

⁶⁴ 307 U.S. 496 (1939).

⁶⁵ *Id.* at 515–16.

⁶⁶ 460 U.S. 37, 44–47 (1983).

⁶⁷ See, e.g., *Int’l Soc’y for Krishna Consciousness v. Lee*, 505 U.S. 672, 678 (1992).

⁶⁸ *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983). See *supra* pt. I.C.

restriction on speech based on its content is subject to “the highest scrutiny.”⁶⁹ Streets, sidewalks, and parks generally qualify as traditional public fora.⁷⁰

Until recently, the Court typically did not examine how a particular public street was used before concluding it was a traditional public forum.⁷¹ In *United States v. Kokinda*,⁷² however, the Court determined that “the location and purpose of a publicly owned sidewalk is critical to determining whether such a sidewalk constitutes a public forum.”⁷³ The Court found that, because a sidewalk between a post office and its parking lot was built for the sole purpose of providing access to the post office, the sidewalk did not constitute a traditional public forum.⁷⁴ While *Kokinda*’s reference to the government’s “purpose” could be read to suggest that the government’s “intent” is significant in determining whether government property is a traditional public forum, this is probably not the best reading of the case. According to the Ninth Circuit, the word “purpose” as used in *Kokinda* means “use,” not “intent.”⁷⁵ The Ninth Circuit has explained why the government’s purpose can only be relevant to a very limited degree in *determining* whether a “traditional” public forum exists:

If the government’s intent were a factor in determining the existence of a traditional public forum, any new public area, even a new street or park, could be created as a nonpublic forum as long as the government’s intent to do so were memorialized in restrictive statutes or statements of purpose. This result would make a mockery of the protections of the First Amendment. Rather than permit such an outcome, we clarify that government intent is relevant only insofar as it relates to the objective use and purpose of an area. Thus, ...[the government’s specific purpose] may be relevant to forum analysis, but the government’s intent in and of itself is not a factor.⁷⁶

⁶⁹ *Int’l Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. at 678. Speech in a public forum is also subject to proper time, place, and manner regulation. *United States v. Grace*, 461 U.S. 171 (1983).

⁷⁰ *Grace*, 461 U.S. at 179.

⁷¹ See *Int’l Soc’y for Krishna Consciousness, Inc. v. Lee*, 925 F.2d 576, 580 (2d Cir. 1991), *aff’d*, 505 U.S. 672 (1992). (“Until *Kokinda* [*United States v. Kokinda*, 497 U.S. 720 (1990)] and with the exception of *Greer* [*Greer v. Spock*, 424 U.S. 828 (1976)], the Court’s decisions treated streets and sidewalks as traditional public fora without engaging in any detailed analysis of their particular purposes.”)

⁷² 497 U.S. 720 (1990).

⁷³ *Id.* at 728–29.

⁷⁴ *Id.* at 728; see also *id.* at 727 (“[t]he mere physical characteristics of the property cannot dictate forum analysis”).

⁷⁵ *ACLU of Nevada v. City of Las Vegas*, 333 F.3d 1092, 1105 (9th Cir. 2003).

⁷⁶ *Id.* at 1105 (footnotes omitted). The Supreme Court has rejected a claim that lampposts and utility poles in the public rights-of-way constitute a traditional public forum since such space is not “by tradition...a forum for public communication.” *Members of City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 813–15 (1984).

Even if a forum has not been traditionally open to expressive activity, it may still constitute a public forum if the government has designated it as such.⁷⁷ A state actor does not create a public forum merely through inaction,⁷⁸ or by allowing selective access for individual speakers rather than general access for a class of speakers.⁷⁹ To create a designated public forum, the government must intentionally allow access to property that would otherwise not be a public forum, for the purpose of allowing some degree of public discourse.⁸⁰ Some examples include university meeting facilities, school board meetings, and municipal theaters.⁸¹ A state actor may also close a designated forum, as long as it is not closed because of hostility to the speech being expressed.⁸² Restrictions on speech in a designated public forum are reviewed under the same standards as would apply in a traditional public forum.⁸³

All property not classified as a traditional public forum or a designated public forum is treated as a nonpublic forum. The government does not have an absolute right to prohibit any kind of speech in a nonpublic forum, but a decision to restrict speech need only be reasonable and viewpoint-neutral. Reasonableness is assessed based on the purpose of the forum and the circumstances of a particular case.⁸⁴ Courts have recognized a number of nonpublic fora, including, among other things, U.S. mailboxes,⁸⁵ school mail facilities,⁸⁶ military installations,⁸⁷ and certain public plazas.⁸⁸ The size and scope of the relevant forum for purposes of First Amendment analysis is determined by “the access sought by the speaker.”⁸⁹

⁷⁷ *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983). See *supra* pt. I.C.

⁷⁸ *Int’l Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 680 (1992).

⁷⁹ *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 679 (1998); see also *Perry*, 460 U.S. at 48.

⁸⁰ *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985). This is unlike the analysis of “traditional” public fora, where the government’s intent is much less important. See *supra* text accompanying notes 72–73.

⁸¹ See *Perry*, 460 U.S. at 45.

⁸² *Id.* at 46; *ACLU v. Mineta*, 319 F. Supp. 2d 69, 82–83 (D.D.C. 2004). In addition, a state actor may create a designated forum for a limited purpose. See *supra* note 28.

⁸³ *Perry*, 460 U.S. at 46.

⁸⁴ *Cornelius*, 473 U.S. at 808–09.

⁸⁵ *U.S. Postal Serv. v. Council of Greenburgh Civic Assocs.*, 453 U.S. 114 (1981).

⁸⁶ *Perry*, 460 U.S. at 48.

⁸⁷ *Greer v. Spock*, 424 U.S. 828, 838 (1976).

⁸⁸ *Hotel Employees & Rest. Employees Union, Local 100 v. City of N.Y. Dep’t of Parks & Recreation*, 311 F.3d 534, 552–53 (2d Cir. 2002).

⁸⁹ *Cornelius*, 473 U.S. at 801.

Practice Aid—Public Fora

A court's classification of a transit facility as either a public forum or a nonpublic forum may be critical to the determination of whether a restriction on expressive activity within the facility will be deemed permissible. The Supreme Court has clarified that airport terminals ordinarily do not constitute public fora. Although the Court has suggested that other transit facilities might be treated differently, the Court has never clarified what standard applies to bus stations, railway stations, or subway stations.

The courts also have recognized that there can be public fora *within* transit facilities, even if the terminal itself is not a public forum. This is especially true in the case of advertising. To determine whether a transit facility has designated a public forum with respect to its advertising space, courts have examined a transit facility's prior practice and policy, and have sought to determine whether the facility has acted in a proprietary or regulatory capacity. Transit agencies that wish to avoid creating a public forum should craft policies that clearly limit access to the space in question, and should consistently enforce such policies. A court is more likely to rule that a transit agency has created a public forum through its advertising policies if the agency accepts political speech, dedicates space to public service announcements on issues of public importance, or appears to be motivated by something other than the desire to raise revenue.

A transit agency that wishes to open space to some messages on issues that relate to public policy may be able to do so without creating a public forum open to all issues, and while maintaining a reasonable level of control over the manner in which messages are presented. The key is clear statements of policy, and clear guidelines for content that do not vary based on the viewpoint expressed.

A. The Classification of Airport Terminals

For many years, despite a split in the circuit courts,⁹⁰ the Supreme Court failed to clarify whether airport

⁹⁰ See *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 677 n.2. A number of courts had previously found that airport terminals were public fora. See *Chicago Area Military Project v. City of Chicago*, 508 F.2d 921, 925–26 (7th Cir. 1975), *cert. denied*, 421 U.S. 992 (1975); *Fernandes v. Limmer*, 663 F.2d 619, 626 (5th Cir. 1981), *cert. dismissed*, 458 U.S. 1124 (1982); *U.S. Sw. African/Namibia Trade & Cultural Council v. United States*, 708 F.2d 760, 764 (D.C. Cir. 1983); *Jamison v. City of St. Louis*, 828 F.2d 1280, 1283 (8th Cir. 1987), *cert. denied*, 485 U.S. 987 (1988); *Jews for Jesus, Inc. v. Bd. of Airport Comm'rs*, 785 F.2d 791, 793–95 (9th Cir. 1986), *aff'd on other grounds*, 482 U.S. 569 (1987). The Court of Appeals for the Second Circuit questioned this conclusion. *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 925 F.2d 576, 580–82 (2d Cir. 1991).

terminals constituted public fora.⁹¹ This changed in 1992 when the Court issued its most important First Amendment decision with respect to transit facilities. In *International Society for Krishna Consciousness, Inc. v. Lee*,⁹² the majority of justices on a divided Court concluded that public areas within an airport terminal were not a public forum.⁹³

In *Lee*, the International Society for Krishna Consciousness, a frequent plaintiff in First Amendment cases, challenged a regulation of the New York Port Authority barring the solicitation of money or the distribution of literature in three major air terminals in the greater New York City area. The Court first found that an airport terminal is not a traditional public forum akin to a public sidewalk:

[G]iven the lateness with which the modern air terminal has made its appearance, it hardly qualifies for the description of having “immemorially...time out of mind” been held in the public trust and used for purposes of expressive activity. Moreover, even within the rather short history of air transport, it is only “[i]n recent years [that] it has become a common practice for various religious and non-profit organizations to use commercial airports as a forum for the distribution of literature, the solicitation of funds, the proselytizing of new members, and other similar activities.” Thus, the tradition of airport activity does not demonstrate that airports have historically been made available for speech activity.⁹⁴

In addition, the Court could not find that the Port Authority's airports, or airport terminals generally, had been intentionally opened to allow solicitation or other forms of speech.⁹⁵ The Court noted that airports are commercial enterprises, whose purpose was the facilitation of air travel. They are not designed or operated as venues for solicitation or other expressive activities.⁹⁶

⁹¹ The Supreme Court first sought to resolve the issue in 1987, but in the end the Court's opinion failed to reach the issue. *Bd. of Airport Comm'rs of L.A. v. Jews for Jesus, Inc.*, 482 U.S. 569 (1987).

⁹² 505 U.S. 672 (1992).

⁹³ *Id.* With respect to solicitation, Justice Rehnquist wrote an opinion for Justices White, O'Connor, Scalia, and Thomas finding that the airport terminal was a nonpublic forum and that a ban on solicitation in such a setting was reasonable. *Id.* at 672–84. With respect to leafleting, Justice Kennedy wrote an opinion for Justices Blackmun, Stevens, and Souter that found that leafleting could not be banned because the airport was a public forum, but also ruled that such a rule would not survive even in a nonpublic forum. *Id.* at 693–703. Justice O'Connor rejected Justice Kennedy's forum classification by concluding that the terminal was a nonpublic forum, but she nevertheless served as the fifth vote for the position that leafleting could not be banned in such a setting. *Id.* at 685–93. See *Lee v. Int'l Soc'y for Krishna Consciousness, Inc.*, 505 U.S. 830, 831 (U.S. 1992) (per curiam).

⁹⁴ *Lee*, 505 U.S. at 680 (citations omitted).

⁹⁵ *Id.* at 680–81.

⁹⁶ *Id.* at 682–83. The Court added that even if it were to look beyond the intent of the Port Authority to reach the manner in which the terminals were operated, the terminals had never

Since *Lee*, courts have continued to recognize that airport terminals are not public fora.⁹⁷ As one court of appeals put it, “*Lee’s* determination that airports are not public fora was not limited to the particular airports at issue, but constituted a categorical determination about airport terminals generally.”⁹⁸ No case decided since *Lee* has held that an airport terminal is a public forum, and the law on this point now seems to be settled.

B. The Classification of Bus, Subway, and Train Stations

In *Lee*, the Supreme Court was careful to distinguish airports from other “transportation nodes,”⁹⁹ suggesting that different types of transportation terminals might fall into different categories under the public forum doctrine. In the years since, however, the Supreme Court has not clarified the classification of other transit facilities.

Earlier cases suggested that other types of transit stations might constitute traditional or designated public fora.¹⁰⁰ For example, long before *Lee*, the Second Circuit held that a bus terminal is a traditional public forum, by analogy to a city street.¹⁰¹ As the court put it:

been dedicated to expression in the form sought here—the distribution of literature and the solicitation of contributions.

⁹⁷ See, e.g., *Multimedia Publ’g Co. of S.C. v. Greenville-Spartanburg Airport Dist.*, 991 F.2d 154, 158–59 (4th Cir. 1993); *Atlanta Journal & Constitution v. Atlanta Dep’t of Aviation*, 322 F.3d 1298, 1307 (11th Cir. 2003); *Jews for Jesus, Inc. v. Port of Portland*, 172 F. Appx. 760, 763 (9th Cir. 2006); *Grutzmacher v. County of Clark*, 33 F. Supp. 2d 896, 902 (D. Nev. 1999).

⁹⁸ *ISKCON Miami, Inc. v. Metro. Dade County*, 147 F.3d 1282, 1288 (11th Cir. 1998).

⁹⁹ *Lee*, 505 U.S. at 681–82 (“To make a category of ‘transportation nodes,’ therefore, would unjustifiably elide what may prove to be critical differences of which we should rightfully take account...To blithely equate airports with other transportation centers, therefore, would be a mistake.”). The principal reason for the possible distinction between airports and other types of facilities seems to be the higher level of security that has been typical of airports as compared to such other facilities. *Id.* However, the separation of those facilities from the streets and roads that are traditional public fora also appears to be an important factor. See *infra* note 99.

¹⁰⁰ *Lebron v. Wash. Metro. Area Transit Auth.*, 749 F.2d 893, 896 (D.C. Cir. 1984) (finding “WMATA has converted its subway stations into public fora”); *Aids Action Comm. of Mass., Inc. v. Mass. Bay Transp. Auth.*, 849 F. Supp. 79, 83 (D. Mass. 1993) (“Commonwealth of Massachusetts intended to permit public discourse throughout its transit system”). *But see* *Gannett Satellite Info. Network, Inc. v. Metro. Transp. Auth.*, 745 F.2d 767, 773 (2d Cir. 1984) (public areas of commuter rail stations are nonpublic fora); *Young v. N.Y. City Transit Auth.*, 903 F.2d 146, 162 (2d Cir. 1990) (“TA never intended to designate sections of the subway system, including platforms and mezzanines, as a place for begging and panhandling.”); *Ridley v. Mass. Bay Transp. Auth.*, 390 F.3d 65, 80 (1st Cir. 2004).

¹⁰¹ *Wolin v. Port of N.Y. Auth.*, 392 F.2d 83 (2d Cir. 1968).

The terminal, with its many adjuncts, becomes something of a small city—but built indoors, with its “streets” in effect set atop one another, and vehicles operating under, above, and to the side, not unlike some futuristic design for urban living.

Thus, we cannot accept the argument that the mere presence of a roof alters the character of the place, or makes the Terminal an inappropriate place for expression.¹⁰²

Later, however, in a decision that was upheld by the Supreme Court in *Lee*, the Second Circuit both questioned and distinguished this analysis:

Wolin’s rationale regarding the right to reach particular audiences seems undermined by the Supreme Court’s analysis concerning traditional public fora, designated fora and nonpublic fora...[in] *Kokinda*. However, the Port Authority bus terminal, or portions thereof, contains various commercial establishments that serve non-traveling pedestrians off adjoining streets, and is arguably like a public street. In contrast, commercial establishments in the air terminals at issue in the instant matter are not realistically used by persons not connected with air travel.¹⁰³

Since *Lee*, the few courts to address the question have held that rail and subway stations are not traditional public fora.¹⁰⁴ As one district court recently explained:

WMATA subway stations are, like buses and airport terminals, nonpublic forums. A subway station does not have as “a principal purpose...the free exchange of ideas,” the hallmark of a traditional public forum. Nor can plaintiffs make the argument that subway stations “have historically been made available for speech activity.”¹⁰⁵

Of course, even if a bus or rail station is not a traditional public forum, transit officials must act with caution to ensure that they do not inadvertently designate the terminal, or a portion of it, as a public forum

¹⁰² *Id.* at 89.

¹⁰³ *Int’l Soc’y for Krishna Consciousness, Inc. v. Lee*, 925 F.2d 576, 579 n.3 (2d Cir. 1991), *aff’d*, 505 U.S. 672 (1992) (citations omitted). The circuit court added:

Like the sidewalk in *Kokinda*, the Port Authority’s terminals are remote from pedestrian thoroughfares and are intended solely to facilitate a particular type of transaction—air travel—unrelated to protected expression. Persons using the passageways in terminals are not there primarily to meet a friend for lunch, windowshop, take the air, or engage in any of the multitude of other purposes for which typical downtown streets are used. They are there solely as air travelers, persons connected with air travelers, or employees of businesses serving air travelers.

Id. at 581.

¹⁰⁴ *Storti v. Se. Transp. Auth.*, No. Civ. A. 99-2159, 1999 U.S. Dist. LEXIS 14515, at *24, 1999 WL 729266, at *7 (E.D. Pa. 1999) (“If SEPTA ever designated the paid areas or platforms of its stations as public fora (which the record does not support), it has now clearly and effectively revoked that designation.”); *ACLU v. Mineta*, 319 F. Supp. 2d 69, 82 (D.D.C. 2004); *Sanders v. City of Seattle*, 156 P.3d 874, 884–85 (2007) (easement providing ingress and egress to monorail platform is not public forum).

¹⁰⁵ *Mineta*, 319 F. Supp. 2d at 82 (citations omitted).

through their policies or practices. For this reason, policies governing access to a terminal should be carefully crafted to align with the facility's transit-related functions.

C. The Classification of Advertising Displays at Transit Facilities

The fact that a terminal or station does not constitute a public forum does not necessarily end the analysis under the public forum doctrine. In fact, numerous courts have recognized that even if a transit facility or terminal itself is not a public forum, there can nevertheless be public fora *within* such a facility. This is because, in defining the relevant forum, the Supreme Court has “focused on the access sought by the speaker.”¹⁰⁶ If a speaker only seeks access to a specific portion of a transit facility, such as its advertising space, it is only that portion of the facility to which the court will apply the public forum doctrine.

For many years, the leading case on advertising in a transit system has been *Lehman v. City of Shaker Heights*,¹⁰⁷ in which the Supreme Court ruled that there was no public forum in the car card space in the interior of a city bus. The City of Shaker Heights, acting through a management company, had barred political advertisements on its transit system, but accepted advertising from a wide range of businesses, as well as churches and civic groups.¹⁰⁸ When a candidate for political office challenged the policy, the Court recognized that the car card space was not a traditional public forum:

Here, we have no open spaces, no meeting hall, park, street corner, or other public thoroughfare. Instead, the city is engaged in commerce. It must provide rapid, convenient, pleasant, and inexpensive service to the commuters of Shaker Heights. The car card space, although incidental to the provision of public transportation, is a part of the commercial venture. In much the same way that a newspaper or periodical, or even a radio or television station, need not accept every proffer of advertising from the general public, a city transit system has discretion to develop and make reasonable choices concerning the type of advertising that may be displayed in its vehicles.¹⁰⁹

¹⁰⁶ See, e.g., *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 801 (1985); *Christ's Bride Ministries, Inc. v. Se. Pa. Transp. Auth.*, 148 F.3d 242, 248 (3d Cir. 1998); *Air Line Pilots Ass'n Int'l v. Dep't of Aviation*, 45 F.3d 1144, 1151 (7th Cir. 1995); *Planned Parenthood Ass'n/Chicago Area v. Chicago Transit Auth.*, 767 F.2d 1225, 1231 (7th Cir. 1985).

¹⁰⁷ 418 U.S. 298 (1974).

¹⁰⁸ *Id.* at 300.

¹⁰⁹ *Lehman*, 418 U.S. at 303. One of the key reasons that the Court upheld the restriction was concern for passengers as a “captive audience.” The recognition that individuals who may not want to be subject to the exercise of free speech by others, in situations where they cannot avoid such speech, has been relied upon to uphold restrictions on speech in a variety of contexts. See, e.g., *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 768 (1994).

Lehman thus stands for the principle that advertising space in a transit facility does not constitute a traditional public forum.¹¹⁰ As a result, one key question in advertising cases after *Lehman* has been whether the public authority has designated its advertising spaces as a public forum.¹¹¹

Various decisions since *Lehman* have considered this question.¹¹² To avoid such a designation, transit facilities must maintain a system of control over their advertising space. For example, the Seventh Circuit found that the Chicago Transit Authority (CTA) had created a public forum in its advertising space because it had no such controls.¹¹³ The only restriction was a provision in the CTA's contract with its advertising agent directing the agent to refuse “vulgar, immoral, or disreputable advertising.”¹¹⁴ In essence, CTA had no policy, because access was effectively guaranteed to any person willing to pay for the space, and the CTA's advertising space had been used for a wide range of ads, including political ones.¹¹⁵

A written policy stating that a facility is not a public forum is not sufficient in itself, however. For example, the Sixth Circuit found that the Southwest Ohio Regional Transit Authority (SORTA) had created a public forum on its buses, bus shelters, and billboards even though SORTA's advertising policy explicitly stated that such locations were not public fora and that any

¹¹⁰ In *Lehman*, because the city had “not accepted or permitted any political or public issue advertising on its vehicles” during its 26 years of operation, the Court also found that the city had not created a “designated” public forum for political speech. 418 U.S. at 300-01. The *Lehman* Court concluded, “No First Amendment forum is here to be found.” 418 U.S. at 304. Note that this does not mean that the government can create a designated forum only by allowing political speech; allowing other forms of speech could result in creating a designated public forum. See *supra* note 30. The facts in *Lehman*, however, concerned the right to engage in political advertising.

¹¹¹ See *supra* pts. I.C., I.I.A, and Practice Aid-Public Fora discussing stricter standard of review for speech restrictions if a facility is treated as a public forum.

¹¹² To determine whether an airport authority has created a public forum, a court will examine the government's intent in establishing and maintaining the property, an inquiry that considers two factors: 1) “the policy and practice of the government with respect to the underlying property”; and 2) “the nature of the property and its compatibility with expressive activity.” *Air Line Pilots*, 45 F.3d at 1152 (citing *Cornelius*, 473 U.S. at 802-03).

¹¹³ *Planned Parenthood*, 767 F.2d 1225.

¹¹⁴ *Id.* at 1232.

¹¹⁵ *Id.* The court ruled that *Lehman* was not controlling because 1) CTA did not have a blanket policy of rejecting all political ads; 2) CTA actually had no policy; and 3) CTA had accepted political ads. *Id.* at 1233. Ten years later, the Seventh Circuit revisited the issue in considering whether the Department of Aviation of the City of Chicago had created a public forum in the advertising space at its airport. *Air Line Pilots*, 45 F.3d 1144. The court found that it “was CTA's willingness to accommodate all advertisers that distinguished *Planned Parenthood* from *Lehman*....” *Id.* at 1153.

ads that were “controversial” and that were not “aesthetically pleasing” were not permitted.¹¹⁶ The court determined that SORTA’s statement that its facilities were not public fora was not controlling because the court was required to look to both “the policy *and practice*” of the government.¹¹⁷ Turning to SORTA’s practice, the court found that SORTA had accepted “a wide array of political and public-issue speech,” and SORTA had thereby demonstrated its intent to create a public forum in its advertising spaces.¹¹⁸ The court explained, “Acceptance of political and public-issue advertisements, which by their very nature generate conflict, signals a willingness on the part of the government to open the property to controversial speech....”¹¹⁹

On the other hand, transit facilities that have coupled their written policies with prior practices demonstrating an intent to limit a forum have enjoyed more success. For example, the Massachusetts Bay Transportation Authority’s (MBTA) guidelines for its advertising space in transit facilities and vehicles expressly stated that the MBTA’s facilities constituted nonpublic forums, subject to certain viewpoint-neutral restrictions.¹²⁰ While the First Circuit noted that this statement would not be sufficient to support a finding that the MBTA’s advertising spaces were a nonpublic forum if it were “contradicted by consistent actual policy and practice,”¹²¹ the court found that MBTA had used its policy to reject at least 17 different advertisements in the preceding 5 years.¹²² The court concluded that MBTA clearly intended to maintain control over the forum and, thus, had not created a public forum.¹²³

¹¹⁶ *United Food & Commercial Workers Union, Local 1099 v. Sw. Ohio Reg’l Transit Auth.*, 163 F.3d 341, 346, 352 (6th Cir. 1998).

¹¹⁷ *Id.* at 352. The court noted that were it to hold otherwise, “the government could circumvent what in practice amounts to open access simply by declaring its ‘intent’ to designate its property a nonpublic forum in order to enable itself to suppress disfavored speech.” *Id.* at 353; *see also* *New York Magazine v. Metro. Transp. Auth.*, 136 F.3d 123, 129–30 (2d Cir. 1998) (“[I]t cannot be true that if the government excludes any category of speech from a forum through a rule or standard, that forum becomes ipso facto a non-public forum, such that we would examine the exclusion of the category only for reasonableness.”). However, the Ninth Circuit has recognized that a forum can be considered nonpublic (limited) if it is not “open for indiscriminate use” or if it is only open to “certain groups or to certain topics.” *Ariz. Life Coalition v. Stanton*, 515 F.3d 956, at 970 (9th Cir. 2008) (citing *Faith Ctr. Church Evangelistic Ministries v. Glover*, 480 F.3d 891, 909 (9th Cir. 2007) and *Cogswell v. City of Seattle*, 347 F.3d 809, 814 (9th Cir. 2003)).

¹¹⁸ *SORTA*, 163 F.3d at 355.

¹¹⁹ *Id.* (citing *Lehman*, 418 U.S. at 303–04).

¹²⁰ *Ridley v. Mass. Bay Transp. Auth.*, 390 F.3d 65, 77 (1st Cir. 2004). Because the guidelines contained standards that had “reasonably clear meanings” describing the types of advertising that would be permitted, the court also concluded that the regulations were not excessively vague. *Id.* at 95.

¹²¹ *Id.* at 77.

¹²² *Id.* at 78.

¹²³ *Id.* at 82.

To assess a transit facility’s past practices, many courts have considered whether a transit facility has previously acted in a proprietary capacity in making choices about what advertising to allow. In cases in which the transit facility has done so by excluding speech for purposes of the facility’s own financial benefit, courts have often ruled that no public forum was created. For example, a recent district court decision concluded that the Norfolk Airport Authority had not created a public forum in its advertising space:

The principal purpose of the advertising display cases is to generate revenue for the Authority. There is no evidence that the current advertisement space is geared towards promoting any particular type of business or venture, or aimed at any particular type of traveler.

Furthermore, there is no evidence that the Authority has intended to make the space available for public expression, as is required to find that it is a designated public forum.¹²⁴

Similarly, the Ninth Circuit determined that the Phoenix transit system had not created a designated public forum by accepting advertising on the exterior panels of buses, because the city had consistently enforced a policy of allowing only commercial advertising.¹²⁵

Even if profit is a transit facility’s primary motivation, however, a court may still examine whether a decision regarding a particular advertisement is consistent with the facility’s past practices in determining whether a facility is a public forum. For example, the Third Circuit found that the past practices of the Southeastern Pennsylvania Transportation Authority (SEPTA) created a public forum in its advertising space, even though the main function of the advertising space was to earn a profit, and a secondary goal was to promote awareness of social issues.¹²⁶ SEPTA’s written policies specifically provided for the exclusion of only a very narrow category of ads, and SEPTA had accepted a broad range of advertisements, including ads similar to those at issue.¹²⁷

As a general rule, when a transit facility has permitted the display of political or policy issue ads in its advertising space, courts tend to conclude that the transit facility has created a public forum. For example, the Second Circuit ruled that the Metropolitan Transportation Authority (MTA) of the City of New York had created a public forum with respect to the advertising space on city buses based on its treatment of political speech:¹²⁸

¹²⁴ *Park Shuttle N Fly, Inc. v. Norfolk Airport Auth.*, 352 F. Supp. 2d 688, 705 (E.D. Va. 2004) (citation omitted).

¹²⁵ *Children of the Rosary v. City of Phoenix*, 154 F.3d 972, 978 (9th Cir. 1998).

¹²⁶ *Christ’s Bride Ministries, Inc. v. Se. Pa. Transp. Auth.*, 148 F.3d 242 (3d Cir. 1998).

¹²⁷ *Id.* at 252.

¹²⁸ *New York Magazine v. Metro. Transp. Auth.*, 136 F.3d 123, 130 (2d Cir. 1998). Note, however, that the acceptance of political speech, by itself, may not be enough to create a design-

Disallowing political speech, and allowing commercial speech only, indicates that making money is the main goal. Allowing political speech, conversely, evidences a general intent to open a space for discourse, and a deliberate acceptance of the possibility of clashes of opinion and controversy that the Court in *Lehman* recognized as inconsistent with sound commercial practice. The district court thus correctly found that the advertising space on the outside of MTA buses is a designated public forum, because the MTA accepts both political and commercial advertising.¹²⁹

Likewise, the D.C. Circuit has ruled that accepting political advertising in subway stations converts them into a public forum.¹³⁰ And the failure of the Metropolitan Atlanta Rapid Transit Authority (MARTA) to enforce consistently its written policy prohibiting advertising regarding “matter[s] of public controversy” was found to have created a designated public forum.¹³¹ As the court put it:

The evidence shows that MARTA has accepted advertising on subjects ranging from AIDS awareness to racial and religious tolerance to homosexual rights.... [I]t has permitted advertising for pregnancy counseling and adoption services. By permitting these various forms of public interest speech and speech by non-profit entities, MARTA has opened its advertising forum to such speech....¹³²

D. The Classification of Physical Space Within Transit Vehicles

Most recent cases hold that the physical space inside transit vehicles does not constitute a traditional or designated public forum.¹³³ Because of the *Lehman* decision, it is unlikely that a court would rule that the physical space within a transit vehicle constitutes a traditional public forum. As the Supreme Court said in *Lehman*, “[A] streetcar or bus is plainly not a park or sidewalk or other meeting place for discussion, any more than is a highway....”¹³⁴ The Court further noted,

nated public forum. *See, e.g.*, *Uptown Pawn & Jewelry, Inc. v. City of Hollywood*, 337 F.3d 1275, 1279 (11th Cir. 2003) (finding nonpublic forum despite acceptance of political speech because “the City has always had a policy of excluding certain categories of advertising from its bus benches.”).

¹²⁹ *New York Magazine*, 136 F.3d at 130.

¹³⁰ *Lebron v. Wash. Metro. Area Transit Auth.*, 749 F.2d 893, 896 (D.C. Cir. 1984); *see id.* at 896 n.6 (distinguishing *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974)). A post-*Lee* district court decision clarified that the WMATA advertising spaces are “non-public forums which WMATA over the years has chosen to designate as limited public forums.” *ACLU v. Mineta*, 319 F. Supp. 2d 69, 82 (D.D.C. 2004).

¹³¹ *Nat’l Abortion Fed’n v. Metro. Atlanta Rapid Transit Auth.*, 112 F. Supp. 2d 1320, 1326 (N.D. Ga. 2000).

¹³² *Id.*

¹³³ *Mineta*, 319 F. Supp. 2d at 81 (subway cars are nonpublic forum); *Sanders v. City of Seattle*, 156 P.3d 874, 883 (Wash. 2007) (monorail is not a public forum); *Anderson v. Milwaukee County*, 433 F.3d 975, 979 (7th Cir. 2006) (interior of transit vehicle is nonpublic forum).

¹³⁴ *Lehman*, 418 U.S. at 306.

“[I]f we are to turn a bus or a streetcar into either a newspaper or a park, we take great liberties with people who because of necessity become commuters and at the same time captive viewers or listeners.”¹³⁵

E. The Classification of Other Transit-Related Areas

The courts have classified numerous other transit-related spaces under the public forum doctrine. It is worth emphasizing, however, that the proper classification may be highly fact-specific, depending on the manner in which a facility is actually used, the purposes for which it was dedicated, and its physical relationship to traditional streets and parks.

1. Streets and Sidewalks

The public streets are the archetype of a traditional public forum.¹³⁶ Sidewalks will also generally be considered public fora without further inquiry.¹³⁷ The Supreme Court has ruled, however, that a sidewalk that runs only from a parking lot to a post office is not a traditional public forum.¹³⁸ The courts have not definitively decided whether public roadways in which there is vehicular traffic constitute traditional public fora.¹³⁹

2. Interstate Rest Areas

The Eleventh Circuit has ruled that an Interstate rest area is not a public forum.¹⁴⁰ The court first found it clear that such areas were not “traditional” public fora: “[A]s modern phenomena, rest areas have never existed independently of the Interstate System; they are optional appendages that are intended, as part of the Sys-

¹³⁵ *Id.* at 306–07. In theory, a transit agency or other state actor could “designate” the physical space in a transit vehicle as a public forum for certain speech purposes, but we are not aware of any decision discussing such a situation.

¹³⁶ *Frisby v. Schultz*, 487 U.S. 474, 480 (1988). Although we do not discuss these here because they are not typically used for transportation purposes, public parks are another archetype. *See, e.g.*, *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939); *Sumnum v. Pleasant Grove City*, 483 F.3d 1044, 1050–51 (10th Cir. 2007).

¹³⁷ *United States v. Grace*, 461 U.S. 171, 179 (1983).

¹³⁸ *United States v. Kokinda*, 497 U.S. 720, 727 (1990).

¹³⁹ *See, e.g.*, *ACORN v. City of Phoenix*, 798 F.2d 1260, 1266–67 (9th Cir. 1986) (declining to resolve public forum issue but suggesting that “streets continually filled with pulsing vehicle traffic” may not qualify as traditional public fora); *Houston Chronicle Publ’g Co. v. City of League City*, 488 F.3d 613, 622 (5th Cir. 2007) (ruling, without analysis, that busy traffic intersections were public fora); *ACORN v. St. Louis County*, 930 F.2d 591, 594 (8th Cir. 1991) (streets constitute public fora for solicitations). As discussed, *infra*, even if a street with vehicular traffic does constitute a traditional public forum, solicitation and other activities in such a street may be subject to time, place, and manner regulations.

¹⁴⁰ *Sentinel Commc’ns Co. v. Watts*, 936 F.2d 1189, 1203–04 (11th Cir. 1991).

tem, to facilitate safe and efficient travel by motorists along the System's highways."¹⁴¹

The court also rejected the claim that, because they are comparable to city parks, rest areas should be viewed as designated public fora.¹⁴²

3. Pier Owned by Government Agency

The First Circuit has considered whether a pier owned by a port authority was a traditional or designated public forum.¹⁴³ The pier was used for commercial activities related to the receiving, storing, and shipping of fish, and was also home to a conference center, restaurants, and several offices. The court found that the site was notable for its lack of "sidewalks or other design characteristics that might be viewed as welcoming the general public."¹⁴⁴ The public entered the pier for a variety of purposes, but the port authority took steps to restrict access to the site. The court concluded that the pier was neither a traditional nor a designated public forum; the government's "tolerance" of some members of the public was not tantamount to an affirmative decision to designate the pier as a public forum.¹⁴⁵

The Seventh Circuit has ruled that a renovated pier containing recreational and naval facilities also is not a public forum.¹⁴⁶ This decision is somewhat more difficult to explain, since the pier in that case was essentially a city park, with the exception of some indoor shops and meeting facilities, and parks are generally considered to be traditional public fora. Nevertheless, the court held that the entire facility was a nonpublic forum:

The pier itself is a discrete, outlying segment or projection of Chicago rather than a right of way. It is its own little world of delights and in this respect it is something like a major airport, which the Supreme Court in *International Society for Krishna Consciousness, Inc. v. Lee* refused to classify as a public forum. A major airport is both a transportation facility and a shopping mall; Navy Pier is an amusement park and a meeting and entertainment center. Whatever one calls such a complex—there doesn't seem to be a compendious term for it—neither it nor the concourses within it are a public forum as the cases use the term.¹⁴⁷

4. Bus Benches

The Eleventh Circuit has ruled that certain city bus benches were not traditional or designated public

fora.¹⁴⁸ The court held the city was permitted to refuse certain categories of advertising in order to protect the city's interest in generating revenue.¹⁴⁹

5. Bus Shelters

One court has stated that bus shelters are nonpublic fora,¹⁵⁰ finding that such shelters are more like subway stations and airports than city streets, because they serve as entry and exit points for a mass transit system.

6. Highway Overpasses

The Ninth Circuit has concluded that highway overpasses in the state of California are neither traditional public fora nor designated public fora.¹⁵¹ The state had not intentionally designated the overpasses as places of public discourse, and restricting access was justified as a safety measure, because messages on overpass fences would distract drivers.¹⁵² The Tenth Circuit found that highway overpasses are traditional public fora¹⁵³ that are subject to time, place, and manner restrictions.¹⁵⁴ Similarly, a Virginia district court found that a pedestrian overpass running over a highway was a traditional public forum, noting that "nothing in the record indicates that the overpass was built for anything other than for what is expected—to aid the general public in crossing over the highway, similar to a sidewalk which protects pedestrians from traffic."¹⁵⁵

7. Airport Tarmacs

At least one district court has ruled that an airport tarmac does not constitute a traditional or designated public forum.¹⁵⁶

III. THE SCOPE OF PERMISSIBLE REGULATION

As discussed in Part II, the first step in many cases involving restrictions on speech is to apply the public

¹⁴⁸ *Uptown Pawn & Jewelry, Inc. v. City of Hollywood*, 337 F.3d 1275, 1277–78 (11th Cir. 2003). The city's ordinance prohibited the advertising of liquor, tobacco, X-rated movies, adult bookstores, massage parlors, pawn shops, tattoo parlors, and check cashing enterprises. *Id.* at 1277.

¹⁴⁹ *Id.* at 1279.

¹⁵⁰ *ACLU v. Mineta*, 319 F. Supp. 2d 69, 82 n.3 (D.D.C. 2004). The Ninth Circuit declined to resolve the same question in *Metro Display Adver., Inc. v. City of Victorville*, 143 F.3d 1191, 1195 (9th Cir. 1998).

¹⁵¹ *Brown v. Cal. Dep't of Transp.*, 321 F.3d 1217, 1222 (9th Cir. 2003).

¹⁵² *Id.*

¹⁵³ *Faustin v. City & County of Denver ("Faustin I")*, 268 F.3d 942, 950 (10th Cir. 2001).

¹⁵⁴ *Faustin v. City & County of Denver*, 423 F.3d 1192, 1200 (10th Cir. 2005). "At the outset, there is no dispute—as it was previously decided in *Faustin I*—that highway overpasses are traditional public fora...." *Id.* at 1200 n.9.

¹⁵⁵ *Lytle v. Brewer*, 77 F. Supp. 2d 730, 736 (E.D. Va. 1999).

¹⁵⁶ *Wickersham v. City of Columbia*, 371 F. Supp. 2d 1061, 1088 (W.D. Mo. 2005).

¹⁴¹ *Id.* at 1203.

¹⁴² *Id.* at 1203–04.

¹⁴³ *New England Reg'l Council of Carpenters v. Kinton*, 284 F.3d 9 (1st Cir. 2002).

¹⁴⁴ *Id.* at 22.

¹⁴⁵ *Id.* at 23.

¹⁴⁶ *Chicago ACORN v. Metro. Pier and Exposition Auth.*, 150 F.3d 695, 700, 702 (7th Cir. 1998). The pier in this case is not primarily a transportation facility, but it is used to moor tourist boats. Portions of the pier were ruled to be public fora by the district court, but this finding was reversed on appeal.

¹⁴⁷ *Id.* at 702 (citation omitted).

forum doctrine and determine what kind of forum is involved. The next step is to apply the legal standard applicable to the particular forum—but many cases involve other doctrines, and the public forum doctrine may never come into play. For example, in cases that involve permissible time, place, and manner regulations, the forum classification is irrelevant, because the time, place, and manner doctrine applies whether or not a forum is public. Thus, the scope or nature of a particular regulation will affect the analytical model the courts will apply.

This part describes the standards of review used by the courts to evaluate restrictions on speech under different analytical approaches, and provides examples of some of the general types of regulations that the courts have upheld under these standards.

A. Legal Analysis After Forum Classification

1. Regulations in a Public Forum

Once a court has concluded that a particular forum is a public forum, whether traditional or designated, the next step is for the court to determine whether the regulation targets speech because of its content.¹⁵⁷ If it does, the court will apply “strict scrutiny.” Under this test, the government must be able to show that it has a compelling state interest for regulating the speech, and that the regulation is narrowly drawn to advance that interest. In practice, as mentioned earlier, this test is rarely met.¹⁵⁸ For example, in *United Food & Commercial Workers Union, Local 1099 v. Southwest Ohio Regional Transit Authority*, the transit authority had rejected a pro-union advertisement proposed to be carried on the outside of the authority’s buses, on the grounds that it was “aesthetically unpleasant and controversial.”¹⁵⁹ The court rejected this rationale without discussion, simply stating that it was “self-evident” that the authority’s decision did not survive strict scrutiny.¹⁶⁰

If a regulation of speech in a public forum does not target speech because of its content, the regulation will be analyzed under the time, place, and manner doctrine, as discussed in Part III.B.1.¹⁶¹

2. Regulations In a Nonpublic Forum

After a court has concluded that a particular forum is a nonpublic forum, the court will ask whether the

regulation of expressive activity is reasonable and viewpoint-neutral.¹⁶² Unlike in a public forum, a regulation of expression in a nonpublic forum *may* be based on the content of speech, so long as it is not aimed at a particular viewpoint and the court concludes it is reasonable.¹⁶³

To be reasonable, a regulation need only be supported by “common sense,” not by record evidence.¹⁶⁴ The *International Society for Krishna Consciousness, Inc. v. Lee*¹⁶⁵ case provides an important example of this doctrine. There, the Court concluded that, because of its disruptive effects, face-to-face solicitation was “incompatible with the airport’s functioning.”¹⁶⁶ Alternatively, the Court could not find “any problems intrinsic to the act of leafletting that would make it naturally incompatible with a large, multipurpose forum” such as the airport terminal at issue.¹⁶⁷ In another example, *Children of the Rosary v. City of Phoenix*,¹⁶⁸ the court, after finding that advertising panels on buses were a nonpublic forum, concluded that rejecting an anti-abortion advertisement was permissible because 1) limiting access to the advertising space was reasonable for one of the following reasons—as a means of preserving a revenue source, maintaining a neutral stance on political and religious issues, or protecting buses and passengers; and 2) a policy of rejecting noncommercial advertisements in order to protect its interests did not discriminate against particular points of view.

Though the time, place, and manner doctrine is also applicable to nonpublic fora, the doctrine has limited practical utility in such fora because it is less protective of regulations than the “reasonableness” standard.¹⁶⁹

¹⁶² *Davenport v. Wash. Educ. Ass’n*, 551 U.S. 177, 127 S. Ct. 2372, 2381 (2007) ([I]t is...black-letter law that, when the government permits speech on government property that is a nonpublic forum, it can exclude speakers on the basis of their subject matter, so long as the distinctions drawn are viewpoint neutral and reasonable in light of the purpose served by the forum.).

¹⁶³ See *supra* note 20.

¹⁶⁴ *United States v. Kokinda*, 497 U.S. 720, 734–35 (1990). Nonetheless, a transit authority would be ill-advised to rely on convincing a court that common sense should prevail in the absence of record evidence.

¹⁶⁵ 505 U.S. 672 (1992).

¹⁶⁶ *Id.* at 689 (O’Connor, J., concurring).

¹⁶⁷ *Id.* at 690 (O’Connor, J., concurring).

¹⁶⁸ 154 F.3d 972 (9th Cir. 1998).

¹⁶⁹ Some courts have blurred the doctrines into a single test. See, e.g., *Jacobsen v. Ill. Dep’t of Transp.*, 419 F.3d 642, 648 (7th Cir. 2005) (“So long as the regulations are viewpoint-neutral, ...the state may impose ‘reasonable’ time, place, or manner restrictions at nonpublic fora.”).

¹⁵⁷ See *supra* pt. I.B.

¹⁵⁸ See, e.g., *Christ’s Bride Ministries, Inc. v. Se. Pa. Transp. Auth.*, 148 F.3d 242, 255 (3d Cir. 1998); *United Food & Commercial Workers Union, Local 1099 v. Sw. Ohio Reg’l Transit Auth.*, 163 F.3d 341, 355 (6th Cir. 1998); *Planned Parenthood Ass’n/Chicago Area v. Chicago Transit Auth.*, 767 F.2d 1225, 1233 (7th Cir. 1985).

¹⁵⁹ 103 F.3d 341, 347, 355 (6th Cir. 1998).

¹⁶⁰ *Id.* at 355.

¹⁶¹ *Thomas v. Chicago Park Dist.*, 534 U.S. 316, 322 (2002) (“[L]icensing scheme at issue here is not subject-matter censorship but content-neutral time, place, and manner regulation of the use of a public forum.”).

B. The Courts May Apply Other Doctrines to Strike Down Specific Regulations, Regardless of the Nature of the Forum

Even if a particular regulation appears likely to survive under forum analysis, transit authorities must consider how other doctrines might come into play. These doctrines—particularly the overbreadth, vagueness, and unbridled discretion doctrines—tend to overlap. Which one a court applies will depend on the facts of the case, but in essence they all stand for the proposition that restrictions on speech should include clear and specific standards to both inform the public and to guide and limit the discretion of individual officials.

1. Time, Place, and Manner Regulations

The aptly-named “time, place, and manner” test addresses the “when,” “where,” and “how”—but never the “what”—of speech. A common type of time, place, and manner regulation is a requirement that one obtain a permit or license before engaging in expressive activity. Another example is a regulation that sets aside a portion of a facility for certain expressive activities. Such regulations are permissible if they “are justified without reference to the content of the regulated speech, ...they are narrowly tailored to serve a significant governmental interest, and...they leave open ample alternative channels for communication of the information.”¹⁷⁰

Courts have recognized that raising revenue is a significant governmental interest, and that the First Amendment does not guarantee a right to the least expensive means of expression.¹⁷¹

2. Regulations Should Not Be Overbroad

The First Amendment prohibits restrictions that are “substantially overbroad,” which means regulations that create a realistic danger that parties not before the court will suffer harm to their free speech rights.¹⁷² A regulation may in fact be constitutional as applied against a particular plaintiff, but if the plaintiff can show that the mere existence of the restriction is likely

¹⁷⁰ *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984) (citations omitted). Likewise, if the governmental interest at issue is unrelated to expression, the courts apply the essentially identical test under *United States v. O'Brien*, 391 U.S. 367, 377 (1968)

[A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest..

See *Clark*, 468 U.S. at 308 n.6 (Marshall, J., dissenting) (“I also agree with the majority that no substantial difference distinguishes the test applicable to time, place, and manner restrictions and the test articulated in *United States v. O'Brien*.”).

¹⁷¹ *Gannett Satellite Info. Network, Inc. v. Metro. Transp. Auth.*, 745 F.2d 767, 774–75 (2d Cir. 1984).

¹⁷² For a good discussion of overbreadth, see *Broadrick v. Oklahoma*, 413 U.S. 601, 611–18 (1973).

to inhibit others from exercising their rights of free expression, the court will strike down the restriction. In *Board of Airport Commissioners v. Jews for Jesus, Inc.*, for example, the Board of Airport Commissioners for Los Angeles International Airport adopted a resolution banning all “First Amendment activities” at the airport.¹⁷³ Without ruling on the forum classification of the airport (the decision predates *Lee*), the Supreme Court invalidated the resolution under the overbreadth doctrine:

The resolution...does not merely reach the activity of respondents at LAX; it prohibits even talking and reading, or the wearing of campaign buttons or symbolic clothing. Under such a sweeping ban, virtually every individual who enters LAX may be found to violate the resolution by engaging in some “First Amendment activit[y].” We think it obvious that such a ban cannot be justified even if LAX were a nonpublic forum because no conceivable governmental interest would justify such an absolute prohibition of speech.¹⁷⁴

Similarly, the Sixth Circuit struck down as overbroad a permitting scheme governing the use of the Ohio state capitol grounds that required anyone conducting “activity of broad public purpose” to obtain a permit.¹⁷⁵

A regulation will not be considered overbroad, however, if the court concludes that a limiting construction of the regulation is available.¹⁷⁶ Thus, the doctrine has a certain circularity to it, and its application can be difficult to predict.

3. Regulations Should Include Clear Standards

Transit officials should be mindful not to adopt requirements that contain vague standards. Vagueness is a problem first and foremost because vague rules do not adequately inform the public of what they can and cannot do. For example, the Fifth Circuit has determined that a rule providing that “no person shall...hamper or impede the conduct of any authorized business at the airport” was “too inscrutable” to withstand scrutiny.¹⁷⁷ The rules in that case could have been read in various ways, and the public could not be expected to tell what was intended.¹⁷⁸ The constitutional test for vagueness is whether “a person of ordinary intelligence” can tell what conduct is permitted or proscribed.¹⁷⁹

The second reason that vague standards are a problem is that such regulations do not adequately limit the discretion of individual government officials. Strictly speaking, unconstitutional vagueness is a different

¹⁷³ 482 U.S. 569 (1987).

¹⁷⁴ *Id.* at 574–75.

¹⁷⁵ *Parks v. Finan*, 385 F.3d 694, 701 (6th Cir. 2004).

¹⁷⁶ *Broadrick*, 413 U.S. at 613.

¹⁷⁷ *Int’l Soc’y for Krishna Consciousness of Atlanta v. Eaves*, 601 F.2d 809, 832 (5th Cir. 1979).

¹⁷⁸ *Id.*

¹⁷⁹ *United Food & Commercial Workers Union, Local 1099 v. Sw. Ohio Reg’l Transit Auth.*, 163 F.3d 341, 358–59 (6th Cir. 1998).

problem from the failure to limit official discretion, but, in practice, they may overlap.¹⁸⁰ For example, in *United Food & Commercial Workers Union, Local 1099 v. Southwest Ohio Regional Transit Authority*,¹⁸¹ the Sixth Circuit found that a policy that forbade ads that were “controversial” and those that were not “aesthetically pleasing” was unconstitutional on vagueness grounds because the policy was an open invitation to arbitrary or discriminatory enforcement. The court found that the regulation was not saved by the fact that the ban was limited to cases in which the advertisements adversely affected the transit authority’s image or ridership, because officials were free to reject ads if they “may” affect ridership even when such an effect could not be demonstrated.¹⁸²

The Sixth Circuit is not alone in blending the concepts of vagueness and unbridled discretion. A district court in Georgia has ruled that a regulation’s vagueness was not cured by an attempt to define the term “public controversy.”¹⁸³ The court ruled that many phrases within the definition—“widely reported,” “reasonably appears,” “arouses strong feelings,” and “substantial number of people”—were unconstitutionally vague and gave transit authority officials too much discretion.¹⁸⁴ Courts have recognized, however, that “some degree of interpretation, and some reliance on concepts like ‘prevailing community standards’ is inevitable.”¹⁸⁵

Vagueness and overbreadth can also heighten other concerns without being the basis for a finding of unconstitutionality. For example, in *Aids Action Committee v. Massachusetts Bay Transportation Authority*,¹⁸⁶ the First Circuit noted that an advertising guideline that forbade messages or representations “pertaining to sexual conduct” was “so vague and broad that it could cover much of the clothing and movie advertising commonly seen on billboards and in magazines.”¹⁸⁷ The

court did not hold that the rule was unconstitutionally vague or overbroad; instead, it held that the transit authority’s application of the rule amounted to content-based discrimination and added to the appearance of viewpoint discrimination.

4. Regulations Must Limit Individual Discretion

Licensing schemes and other regulations can amount to illegal prior restraints on speech if they reserve “unbridled” discretion for government officials.¹⁸⁸ One example of a requirement that failed to survive a facial challenge is a rule prohibiting the posting of signs and distribution of other written material at the Newark airport.¹⁸⁹ The airport’s rule stated:

No person shall post, distribute or display at an air terminal a sign, advertisement, circular, or any printed or written matter concerning or referring to commercial activity, except pursuant to a written agreement with the Port Authority specifying the time, place and manner of, and fee or rental for, such activity.¹⁹⁰

In a challenge brought by a newspaper publisher, the Third Circuit noted that while the rule did not refer to the distribution of newspapers, it could be read to do so. The court overturned the rule under the unbridled discretion doctrine, noting that the rule “fails adequately to set forth any standards by which the Port Authority is to exercise its discretion.”¹⁹¹

C. Permissible Forms of Regulation of Expressive Activities

Courts have recognized a number of forms of speech regulation that pass constitutional muster either as proper regulations in a nonpublic forum, or as time, place, and manner regulations in a public forum. This section discusses some general forms of regulation that courts have permitted.

1. Limiting Expressive Activity to Defined Areas or Locations

Transit officials can restrict expressive activities to certain portions of a transit facility, through the application of time, place, and manner restrictions. The transit facility cases addressing this practice have all

¹⁸⁰ *Ridley v. Mass. Bay Transp. Auth.*, 390 F.3d 65, 94 (1st Cir. 2004).

¹⁸¹ 163 F.3d at 359–60. *See also* *Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972).

¹⁸² *United Food & Commercial Workers Union*, 163 F.3d at 360.

¹⁸³ *Nat’l Abortion Fed’n v. Metro. Atlanta Rapid Transit Auth.*, 12 F. Supp. 2d 1320, 1327 (N.D. Ga. 2000); *see also* *Aubrey v. City of Cincinnati*, 815 F. Supp. 1100, 1104 (stating that the Cincinnati Reds’ ban on banners that are not in “good taste” is unconstitutionally vague and overbroad).

¹⁸⁴ *Id.* at 1327–28. The court also held that the policy reaches “too far” and noted as an example, that it could be read to allow rejection of ads promoting the Atlanta Braves, who, the court pointed out, certainly arouse strong feelings in a great number of people. *Id.* at 1328.

¹⁸⁵ *Ridley v. Mass. Bay Transp. Auth.*, 390 F.3d 65, 95 (1st Cir. 2004).

¹⁸⁶ 42 F.3d 1, 12 (1st Cir. 1994).

¹⁸⁷ The court, as discussed, *infra*, proceeded to note that

[i]n the end, the MBTA may well be entitled to exclude from the interiors of its cars speech containing a certain level of sexual innuendo and double entendre.... To do so constitutionally, however, it will, at the least, need to act according to neutral stan-

dards, and it will need to apply these standards in such a way that there is no appearance that “the [government] is seeking to handicap the expression of particular ideas.”

Id. at 13 (citation omitted).

¹⁸⁸ *City of Lakewood v. Plain Dealer Publ’g Co.*, 486 U.S. 750, 757, 772 (1988).

¹⁸⁹ *Gannett Satellite Info. Network v. Berger*, 894 F.2d 61, 68 (3d Cir. 1990).

¹⁹⁰ *Id.* at 69. Another rule provided that “No person shall carry on any commercial activity at any air terminal without the consent of the Port Authority.” The court rejected an unbridled discretion challenge to this rule after determining that the rule lacked “a close enough nexus to expression or expressive conduct to give rise to a substantial threat of undetectable censorship.” *Id.* at 68–69.

¹⁹¹ *Id.*

involved facilities that were determined to be nonpublic fora. First Amendment cases permitting the government to designate certain areas of a public forum for particular purposes are rare, since that would undermine the basic concept of a public forum.¹⁹²

In *International Society for Krishna Consciousness v. Lee*, a nonpublic forum case, Justice O'Connor noted that while leafleting could not be barred from the terminal entirely, it could be subject to time, place, and manner restrictions, citing the following example:

[D]uring the many years that this litigation has been in progress, the Port Authority has not banned *sankirtan* completely from JFK International Airport, but has restricted it to a relatively uncongested part of the airport terminals, the same part that houses the airport chapel. In my view, that regulation meets the standards we have applied to time, place, and manner restrictions of protected expression.¹⁹³

The Fifth Circuit has upheld a municipal ordinance that required solicitation at a city-owned airport to occur at designated solicitation booths.¹⁹⁴ The court found that the rule properly served the airport's interest in avoiding congestion and confusion.¹⁹⁵

More recently, the Ninth Circuit has upheld a similar permit requirement for leafleting in the Portland Airport, stating that "[t]he Port reasonably could conclude that its safety and congestion concerns are best addressed by limiting the locations for free speech activity."¹⁹⁶

The Eleventh Circuit has upheld Miami International Airport's creation of eight "First Amendment Zones."¹⁹⁷ Likewise, the Fifth Circuit has upheld a municipal ordinance that required solicitation at a city-owned airport to occur at designated solicitation booths.¹⁹⁸ The court found that the rule properly served

the airport's interest in avoiding congestion and confusion.¹⁹⁹

2. Requiring a Permit to Engage in Expressive Activity

It is well-established that the government may require members of the public to obtain a license before engaging in certain types of expressive activity, such as a parade or demonstration, provided the policy justifying the license requirement and the procedures for obtaining the license comply with the First Amendment.²⁰⁰

A permit or licensing requirement is a classic example of a time, place, and manner restriction.²⁰¹ Accordingly, transit authorities may adopt regulations or policies that require individuals to obtain permits before engaging in certain activities. For example, in *New England Regional Council of Carpenters v. Kinton*,²⁰² the court upheld regulations that allowed leafleting at a port facility only after obtaining a permit. Such requirements may be permissible in any kind of forum.²⁰³ Similarly, the Ninth Circuit has upheld a permit requirement for leafleting in the Portland Airport.²⁰⁴ The court of appeals found that the policy was viewpoint-neutral because it "applies equally to any party seeking to exercise free speech rights at the airport...."²⁰⁵ The court also ruled that the policy was reasonable in light of safety and congestion concerns.²⁰⁶ However, as the discussion of *Gannett Satellite Information* shows,²⁰⁷ transit officials must not reserve unbridled discretion to issue or revoke such permits.²⁰⁸

¹⁹⁹ *Id.*

²⁰⁰ See, e.g., *Thomas v. Chicago Park District*, 534 U.S. 316 (2002).

²⁰¹ See, e.g., *New England Reg'l Council of Carpenters v. Kinton*, 284 F.3d 9, 20 (1st Cir. 2002).

²⁰² 284 F.3d 9 (1st Cir. 2002).

²⁰³ *Id.* A court may analyze the scheme under the time, place, and manner doctrine, or under the test for regulations of nonpublic fora.

²⁰⁴ *Jews for Jesus, Inc. v. Port of Portland*, 172 F. App'x 760, 763 (9th Cir. 2006).

²⁰⁵ *Id.* at 764.

²⁰⁶ *Id.*

²⁰⁷ *Satellite Info. Network v. Berger*, 894 F.2d 61, 68–69 (3d Cir. 1990).

²⁰⁸ Various cases outside of the transit facility arena also address the use of permits involving expressive activities. For example, the Fourth Circuit ruled that a parade ordinance that required groups "as small as two or three" to secure a permit is not a proper time, place, and manner regulation because it "restrict[s] a substantial quantity of speech that does not impede [the City's] permissible goals." *Cox v. City of Charleston*, 416 F.3d 281, 285 (4th Cir. 2005) (quoting *Comty. for Creative Non-Violence v. Turner*, 893 F.2d 1387, 1392 (D.C. Cir. 1990)). The court found that the city had failed "to explain how a small demonstration that may become inflammatory would tax its police force any differently than, for example, a street fight between two individuals, so as to justify requiring advance warning of all small demonstrations." *Id.* See also *Berger v. City of Seattle*, 533 F.3d 1030 (9th Cir. 2008) (vacating and agreeing to hear en banc a decision that upheld the City of

¹⁹² The Ninth Circuit has agreed to rehear a case *en banc* concerning a rule confining street performances to designated areas within a public forum. *Berger v. City of Seattle*, 533 F.3d 1030 (9th Cir. 2008).

¹⁹³ 505 U.S. 672, 692–93 (1992) (citation omitted) (O'Connor, J., concurring). Citing *Lee*, the district court for the District of South Carolina has ruled that leafleting could not be banned from an airport tarmac during an airshow. *Wickersham v. City of Columbia*, 371 F. Supp. 2d 1061, 1089–90. While the court stated that leafleting could be subject to proper time, place, and manner restrictions, after examining the airport's justifications for banning leafleting at the air show, the court ruled that the leaflets could be distributed, subject to the permissible restrictions identified in the court's order. *Id.* at 1090–92.

¹⁹⁴ *Int'l Soc'y for Krishna Consciousness of Atlanta v. Eaves*, 601 F.2d 809, 829–30 (5th Cir. 1979).

¹⁹⁵ *Id.* at 829–30.

¹⁹⁶ *Jews for Jesus, Inc. v. Port of Portland*, 172 F. App'x 760, 764 (9th Cir. 2006); *Wilson v. Lexington-Fayette Urban County Gov't*, 201 F. App'x 317 (6th Cir. 2006) (upholding ban on peddling in certain areas near Rupp Arena before and after ticketed events).

¹⁹⁷ *ISKCON Miami, Inc. v. Metro. Dade County*, 147 F.3d 1282, 1290 (11th Cir. 1998).

¹⁹⁸ *Int'l Soc'y for Krishna Consciousness of Atlanta v. Eaves*, 601 F.2d 809, 829 (5th Cir. 1979).

3. Raising Revenue Based on Expressive Activity

A number of cases have allowed transit facilities to raise revenues by charging fees for expressive activities in transit facilities where special access is sought to the facility. For example, the Eleventh Circuit ruled that it was a reasonable regulation of a nonpublic forum for the Hartsfield Atlanta International Airport to charge a profit-conscious fee for use of the airport's newsracks.²⁰⁹

4. Banning Certain Expressive Activity

Courts have upheld total bans of some expressive activities in nonpublic fora. For example, in *Lee*, the court found that a total ban on solicitation was a reasonable way to deal with congestion and passenger disruption in a nonpublic forum, but concluded that banning leafletting was not.²¹⁰ Other cases have found that bans on other activities are reasonable regulations in nonpublic fora,²¹¹ or are proper time, place, and manner regulations.²¹²

Seattle's rules requiring street performers within a public forum to wear badges and secure permits as proper time, place, and manner regulations).

²⁰⁹ *Atlanta Journal & Constitution v. Atlanta Dep't of Aviation*, 322 F.3d 1298, 1308 (11th Cir. 2003); *see also Gannett Satellite Info. Network, Inc. v. Metro. Transp. Auth.*, 745 F.2d 767, 772 (2d Cir. 1984) (“[B]ecause licensing fees serve the significant governmental interest of raising revenue for the efficient, self-sufficient operation of the rail lines, we hold that they can be valid time, place and manner restrictions on Gannett's right to place its newsracks in those areas.”).

²¹⁰ 505 U.S. 672, 690. As discussed, the Court found that leafletting does not entail the same degree of disruption as face-to-face solicitation, and therefore ruled that only the latter is incompatible with the forum in question.

²¹¹ *See, e.g., United States v. Kokinda*, 497 U.S. 720, 737 (1990) (banning solicitation from postal office sidewalk is permissible regulation of nonpublic forum); *Storti v. Se. Transp. Auth.*, No. Civ. A. 99-2159, 1999 U.S. Dist. LEXIS 14515, 1999 WL 729266 (E.D. Pa. 1999) (reasonable to ban distribution of written materials in paid areas and platforms of nonpublic forum); *Children of the Rosary v. City of Phoenix*, 154 F.3d 972, 979 (9th Cir. 1998) (city may ban noncommercial advertising on nonpublic forum buses); *Ridley v. Mass. Bay Transp. Auth.*, 390 F.3d 65, 93 (1st Cir. 2004) (MBTA may ban demeaning or disparaging advertisements in nonpublic forum); *Uptown Pawn & Jewelry, Inc. v. City of Hollywood*, 337 F.3d 1275, 1280–81 (11th Cir. 2003) (City could ban advertisements of “less desirable” businesses on nonpublic forum bus benches); *Park Shuttle N Fly, Inc. v. Norfolk Airport Auth.*, 352 F. Supp. 2d 688, 706 (E.D. Va. 2004) (airport could exclude competitor's ads in nonpublic forum); *Anderson v. Milwaukee County*, 433 F.3d 975, 980 (7th Cir. 2006) (reasonable to ban handing out literature on nonpublic forum bus); *New England Reg'l Council of Carpenters v. Kinton*, 284 F.3d 9, 24–25 (1st Cir. 2002) (reasonable to ban leafletting on nonpublic forum pier); *Hawkins v. City and County of Denver*, 170 F.3d 1281, 1291 (10th Cir. 1999) (reasonable to ban leafletting and picketing in nonpublic forum walkway).

²¹² *See, e.g., ACORN v. City of Phoenix*, 798 F.2d 1260, 1268 (9th Cir. 1986) (ban on in-roadway solicitation is proper time, place, and manner regulation regardless of forum classification); *ACORN v. St. Louis County*, 930 F.2d 591, 594 (8th Cir.

5. Regulating the Manner of Expression

Under the time, place, and manner doctrine, courts have permitted state actors to regulate the manner in which speech is expressed. For example, courts have upheld uniform color and lettering requirements on newsracks²¹³ and sound amplification limitations.²¹⁴ It bears emphasizing that these types of restrictions must be content-neutral, aimed at serving a legitimate governmental interest, and tailored to those concerns.

IV. THE REGULATION OF SPECIFIC FORMS OF EXPRESSIVE ACTIVITY IN AND AROUND TRANSIT FACILITIES

This part elaborates on the regulation of specific forms of expressive activity—advertising, placement of newsracks, charitable solicitation, leafletting, panhandling, loitering, and street performance—in and around transit facilities. Each section begins with a brief “Practice Aid” summarizing the key principles emerging from the cases. In addition, Appendix A includes examples of particular ordinances and regulations adopted with the intent of regulating specific types of activity.

A. The Regulation of Advertising

Courts have rarely upheld the direct regulation of the content of advertising in facilities that have been determined to be public fora since the strict scrutiny test is very hard to meet.²¹⁵ In nonpublic fora, however,

1991); *Gresham v. Peterson*, 225 F.3d 899, 906 (7th Cir. 2000) (banning aggressive panhandling is proper time, place, and manner regulation); *Smith v. City of Fort Lauderdale*, 177 F.3d 954, 956 (11th Cir. 1999) (banning begging on 5-mi strip of beach, a public forum, is permissible time, place, and manner regulation).

²¹³ *Gold Coast Publ'ns, Inc. v. Corrigan*, 42 F.3d 1336, 1346 (11th Cir. 1994).

²¹⁴ *Housing Works, Inc. v. Kerik*, 283 F.3d 471, 482 (2d Cir. 2002).

²¹⁵ *See Planned Parenthood Ass'n/Chicago Area v. Chicago Transit Auth.*, 767 F.2d 1225, 1233 (7th Cir. 1985) (protecting captive audience insufficient to justify rejection of entire category of advertising); *United Food & Commercial Workers Union v. Sw. Ohio Reg'l Transit Auth.*, 163 F.3d 341, 355 (6th Cir. 1998) (aesthetics and avoiding controversy not compelling state interests); *Christ's Bride Ministries, Inc. v. Se. Pa. Transp. Auth.*, 148 F.3d 242, 255 (3d Cir. 1998) (transit authority made no effort to argue that rejection of abortion-related advertising should survive strict scrutiny); *Lebron v. Wash. Metro. Area Transit Auth.*, 749 F.2d 893, 896 (D.C. Cir. 1984) (rejection of ad to prevent deception impermissible because ad was not deceptive); *Nat'l Abortion Fed'n v. Metro. Atlanta Rapid Transit Auth.*, 112 F. Supp. 2d 1320, 1327 (N.D. Ga. 2000) (finding compelling governmental interest in protecting employees and passengers from violence, but ruling that rejection of ad did not serve such interest); *see also New York Magazine v. Metro. Transp. Auth.*, 136 F.3d 123, 131 (2d Cir. 1998) (actions constitute improper prior restraint even if speech is treated under commercial speech doctrine). While advertising in a public forum could also be subject to time, place, and manner regulations, *see, e.g., White House Vigil for ERA Cmty. v. Clark*, 746

courts have often upheld regulation of advertising that was reasonable in light of the purposes served by the forum, and that did not discriminate based on the viewpoint of the speaker.

Practice Aid—Advertising

Courts have upheld advertising restrictions in non-public fora that are “reasonable” and not based on the viewpoint of the speaker. The courts have recognized numerous legitimate governmental interests including: 1) raising revenue, 2) promoting an appearance of neutrality, 3) public safety, 4) avoiding offense to patrons of the facility, and (5) avoiding the use of the facility to promote illegal activity. Transit officials should strive to align any restrictions on advertising with a legitimate governmental interest, ideally an interest that has already been found legitimate by the courts. In addition, transit officials should ensure that neither their policies nor their enforcement of such policies result in discrimination based on the viewpoint of the speaker.

The commercial speech doctrine may benefit transit officials seeking to regulate advertisements that are clearly commercial in nature.

1. Reasonableness in Light of the Purposes Served By the Forum

To determine whether a regulation of advertising in a nonpublic forum is “reasonable,” a court examines the nature of the government’s interest and the nature and function of the particular forum.²¹⁶ While the Supreme Court has held that the reasonableness of a restriction in a nonpublic forum may be upheld if it is justified by “common sense,”²¹⁷ a transit facility would be well advised to develop a solid basis and a thorough rationale for any policy or regulation in advance of its adoption. In particular, a facility should consider whether the justification for treating a particular category of advertisement in one manner is consistent with treatment given to other advertising. Relying on a court’s view of “common sense” is often a risky proposition.

In *Lehman v. City of Shaker Heights*, the Supreme Court stated that minimizing “chances of abuse, the appearance of favoritism, and the risk of imposing upon

a captive audience” were legitimate justifications for limits on advertising in city buses.²¹⁸

The Ninth Circuit has found that each of the following governmental interests can justify a ban on non-commercial speech on city buses:

1. Maintaining a position of neutrality on political and religious messages;
2. A fear that buses and passengers could be subject to violence if advertising is not restricted; and
3. Preventing a reduction in income earned from selling advertising space because commercial advertisers would be dissuaded “from using the same forum commonly used by those wishing to communicate primarily political or religious messages[.]”²¹⁹

This last point, a transit agency’s interest in raising revenue, has been recognized as legitimate in a number of cases. Indeed, the courts seem to be prepared to give transit authorities quite broad latitude, even approving restrictions that in other contexts might well be deemed unconstitutionally vague. For example, the Eleventh Circuit has ruled that a city, acting in a proprietary capacity, may “limit ‘less desirable’ business’ access to bus bench advertising in hopes that the limitation will encourage ‘more desirable’ advertisers.”²²⁰ The Eastern District of Virginia has held that an airport authority had a legitimate interest in protecting its income from operating parking lots, and thus could bar competing businesses from advertising within the airport terminal.²²¹ The First Circuit has ruled that restricting “de-meaning or disparaging” ads properly serves the MBTA’s economic interests,²²² because permitting offensive advertising may reduce ridership, which would interfere with the goal of maximizing revenue.

Transit authorities must always ensure that their actions actually serve the governmental interests at stake. For example, the First Circuit has found that a transit agency has a legitimate interest in avoiding the promotion of illegal activity, especially among children, and in seeking not to offend riders.²²³ The court concluded, however, that those interests were not advanced by the rejection of ads calling for the legalization of marijuana that were not, in fact, phrased or designed so as to promote illegal drug use by children.²²⁴ On the other hand, in the same decision, the court held that the interest in avoiding offending riders was advanced

F.2d 1518, 1534 (D.C. Cir. 1984), we are not aware of any cases discussing such regulations in transit facilities. Courts have upheld ordinances regarding the placement of signs on private property along highways under the time, place, and manner doctrine. *See, e.g., Tex. Dep’t of Transp. v. Barber*, 111 S.W.3d 86, 105 (Tex. 2003).

²¹⁶ *Airline Pilots Assoc. v. Dep’t of Aviation of Chi.*, 45 F.3d 1144, 1159 (7th Cir. 1995).

²¹⁷ *United States v. Kokinda*, 497 U.S. 720, 734-35 (1990); *see Uptown Pawn & Jewelry Inc. v. City of Hollywood*, 337 F.3d 1275, 1280 (11th Cir. 2003) (court need only ask whether reasonableness of regulation is “intuitively obvious or common sensical.”). *See also infra*. pt. I.C.

²¹⁸ 418 U.S. 298, 304 (1974).

²¹⁹ *Children of the Rosary v. City of Phoenix*, 154 F.3d 972, 979 (9th Cir. 1998).

²²⁰ *Uptown Pawn & Jewelry*, 337 F.3d at 1281.

²²¹ *Park Shuttle N Fly, Inc. v. Norfolk Airport Auth.*, 352 F. Supp. 2d 688, 706 (E.D. Va. 2004). The court held that this was not viewpoint discrimination because the distinction was “based upon the identity of the speakers.” *Id.*

²²² *Ridley v. Mass. Bay Transp. Auth.*, 390 F.3d 65, 93 (1st Cir. 2004).

²²³ *Id.*

²²⁴ *Id.* at 88.

when MBTA rejected ads asserting certain religions were “false.”²²⁵

In another case, the Ninth Circuit struck down the California Department of Transportation’s requirement for a permit for the display of all signs and banners on highway overpasses except for American flags.²²⁶ The court found that the governmental interest in preventing distractions to drivers and keeping obstacles from falling on highways was reasonable, but it was not reasonable to exclude only American flags from the policy’s reach.²²⁷

2. Restrictions Must Not Discriminate Based Upon Viewpoint

Even if a government agency can show that it has an interest that justifies a particular regulation of advertising, the government cannot use that interest to suppress the expression of particular points of view. “The bedrock principle of viewpoint neutrality demands that the state not suppress speech where the real rationale for the restriction is disagreement with the underlying ideology or perspective that the speech expresses.”²²⁸

For example, a district court recently struck down a federal transit appropriations statute because it was not viewpoint neutral.²²⁹ The statute prohibited making federal transit grants to any entity “involved directly or indirectly in any activity that promotes the legalization or medical use” of a controlled substance.²³⁰ After the Washington Metropolitan Area Transit Authority rejected an ad advocating changes to marijuana laws because it was concerned about losing federal funding, the American Civil Liberties Union challenged the statute as unconstitutional viewpoint discrimination. The court agreed: “Just as Congress could not permit advertisements calling for the recall of a sitting Mayor or Governor while prohibiting advertisements supporting retention, it cannot prohibit advertisements supporting legalization of a controlled substance while permitting those that support tougher drug sentences.”²³¹

Moreover, the issue is not just how a regulation is written—a key issue is how the regulation is applied. The application of a regulation may be challenged even where the underlying regulation is lawful and facially neutral, and where the explanation given for rejecting an advertisement appears neutral. In *Ridley v. Massachusetts Bay Transportation Authority*,²³² for example,

²²⁵ *Id.* at 93.

²²⁶ *Brown v. Cal. Dep’t of Transp.*, 321 F.3d 1217 (9th Cir. 2003).

²²⁷ *Id.* The court also concluded that the policy was not viewpoint-neutral. *Id.* at 1224–25.

²²⁸ *Ridley*, 390 F.3d at 82.

²²⁹ *ACLU v. Mineta*, 319 F. Supp. 2d 69 (D.D.C. 2004).

²³⁰ *Id.* at 75.

²³¹ *Id.* at 86. The Justice Department elected not to appeal the decision. See J. McElhatton, *Metro Must Accept Pro-Marijuana Ads*, THE WASH. TIMES, Jan. 28, 2005.

²³² 390 F.3d 65 (1st Cir. 2004).

the First Circuit listed three situations in which the court would look beyond otherwise neutral justifications:

First, statements by government officials on the reasons for an action can indicate an improper motive. Second, where the government states that it rejects something because of a certain characteristic, but other things possessing the same characteristic are accepted, this sort of underinclusiveness raises a suspicion that the stated neutral ground for action is meant to shield an impermissible motive. Third, suspicion arises where the viewpoint-neutral ground is not actually served very well by the specific governmental action at issue; where, in other words, the fit between means and ends is loose or non-existent.²³³

The court found direct evidence that the reason for rejection of three ads calling for legalization of marijuana was not the protection of children but opposition to marijuana legalization. The court noted that the transit agency at one point had actually stated that one reason for rejecting the ads was that they promoted legalization.²³⁴ The court found this viewpoint discrimination was reinforced by the General Manager’s statement that “he would publish...[two of the ads] if they came to the opposite conclusion—one with which he agreed—expressing viewpoints which reinforced compliance with, but did not question, existing laws.”²³⁵ The court also found that its “suspicion of viewpoint discrimination is deepened by the fact that the MBTA has run a number of ads promoting alcohol that are clearly more appealing to juveniles than the ads here.”²³⁶

In a similar case, the First Circuit had previously stressed that it was important for a transit agency to apply its regulations in a manner that will avoid the “appearance” of viewpoint discrimination.²³⁷ In that case, MBTA had refused to run seven public service advertisements that promoted the use of condoms.²³⁸ MBTA’s advertising guidelines stated:

All advertising...must meet the same guidelines governing broadcast and private sector advertising with respect to good taste, decency and community standards as determined by the Authority. That is to say, the average person applying contemporary community standards must find that the advertisement, as a whole, does not appeal to a prurient interest. The advertisement must not

²³³ *Id.* at 87 (citations and footnote omitted).

²³⁴ *Id.* at 88.

²³⁵ *Id.*

²³⁶ *Id.* Cf. *Children of the Rosary v. City of Phoenix*, 154 F.3d 972, 980 (9th Cir. 1998) (concluding city’s standard was not a façade for viewpoint discrimination).

²³⁷ *Aids Action Comm. of Mass., Inc. v. Mass. Bay Transp. Auth.*, 42 F.3d 1 (1st Cir. 1994).

²³⁸ The ads each carried the picture of a condom and one of the following headlines: 1) “Haven’t you got enough to worry about in bed?”; 2) “Even if you don’t have one, carry one.”; 3) “Simply having one on hand won’t do any good.”; 4) “You’ve got to be putting me on.”; 5) “Tell him you don’t know how it will ever fit.”; and 6) “One of these will make you 1/1000th of an inch larger.” *Id.* at 4.

describe, in a patently offensive way, sexual conduct specifically defined by the applicable state law, as written or authoritatively construed. Advertising containing messages or graphic representations pertaining to sexual conduct will not be accepted.²³⁹

MBTA argued that the ads were rejected because they describe “sexual conduct in a patently offensive way and contain graphic representations pertaining to sexual conduct.”²⁴⁰ The court, however, noted that MBTA had previously neither rejected, nor attempted to remove, sexually suggestive movie ads.²⁴¹ Thus, MBTA had created at least the appearance of viewpoint discrimination.²⁴² The court concluded:

In the end, the MBTA may well be entitled to exclude from the interiors of its cars speech containing a certain level of sexual innuendo and double entendre. We do not reach that question at this time. To do so constitutionally, however, it will, at the least, need to act according to neutral standards, and it will need to apply these standards in such a way that there is no appearance that “the [government] is seeking to handicap the expression of particular ideas.” ...We recognize that this requires the government to apply its standards quite precisely. This is the burden the government assumes, however, when it undertakes to proscribe speech on the basis of its content.²⁴³

In light of this, it is clear that a neutral policy regarding expressive activities in or around transit facilities is a necessary but not a sufficient element in order to survive First Amendment scrutiny. How the policy is implemented is just as important. Furthermore, it is equally clear that it is difficult for a transit agency to know in advance when it is crossing the line: allowing a single advertisement to appear may create a precedent that could threaten the ability to make future distinctions.

This is not to say that a transit facility that has allowed certain viewpoints to be expressed on an issue is obligated to indefinitely allow further discussion of the issue. Just as courts have recognized that a transit facility can close a designated public forum,²⁴⁴ a transit facility can close a nonpublic forum to *both* viewpoints on a particular issue, provided that it does so in a viewpoint-neutral manner. In *Children of the Rosary v. City of Phoenix*,²⁴⁵ for example, the city had previously allowed noncommercial advertisements on a number of issues. After the city changed its policy to bar *all* non-

commercial ads, the court upheld the enforcement of the new policy to bar a noncommercial ad because the court concluded that the city’s change was not a “façade for viewpoint discrimination.”²⁴⁶ The court so held despite the fact that the city continued to honor its preexisting contracts for noncommercial ads.²⁴⁷ As the cases suggest, transit officials must exercise great care in establishing viewpoint-neutral policies, and in evaluating every proposed advertisement.

3. Advertising Under the Commercial Speech Doctrine

Transit officials dealing with First Amendment issues related to advertising should also be aware of the potential application of the commercial speech doctrine. As discussed in Part I above, the commercial speech doctrine is rooted in the notion that because the state can regulate commercial transactions with consumers, the regulation of speech connected with these commercial transactions should also be subject to regulation—and therefore should be subject to less exacting First Amendment scrutiny.²⁴⁸ However, because the regulation of advertising in transit facilities is not typically designed to preserve “a fair bargaining process” in the commercial interaction between consumers and advertisers, in practice the doctrine may not offer much protection.²⁴⁹ Indeed, the doctrine is rarely discussed in the cases arising in such settings. The Supreme Court has characterized the doctrine as comparable to the “time, place, and manner” doctrine.²⁵⁰

Nevertheless, one area in which the courts have applied the commercial speech doctrine is the regulation of alcohol and cigarette consumption. For example, the Fourth Circuit has concluded that a city’s regulation of outdoor advertising of alcoholic beverages may materially advance the city’s interest in promoting the welfare and temperance of minors.²⁵¹ In a separate decision, the court also concluded that the city could prohibit cigarette advertising on billboards located in designated zones.²⁵² These cases are unique because they appear to allow “content-based” and “viewpoint-based” distinctions without applying strict scrutiny—the ads are

²³⁹ *Id.* at 3–4.

²⁴⁰ *Id.* at 5.

²⁴¹ *Id.*

²⁴² *Id.* at 11.

²⁴³ *Id.* at 13 (citations omitted); see also *Metro Display Adver., Inc. v. City of Victorville*, 143 F.3d 1191, 1195 (9th Cir. 1998) (city could not require advertising company to remove pro-union ads).

²⁴⁴ See *Perry Educ. Assoc. v. Perry Local Educators’ Assoc.*, 460 U.S. 37, 45 (1983) (“a State is not required to indefinitely retain the open character of the facility”); *Storti v. Se. Transp. Auth.*, No. Civ. A. 99-2159, 1999 U.S. Dist. LEXIS 14515, at *17, 1999 WL 729266, at *7 (E.D. Pa. 1999).

²⁴⁵ 154 F.3d 972 (9th Cir. 1998).

²⁴⁶ *Id.* at 980.

²⁴⁷ *Id.*

²⁴⁸ See *supra* pt. I.F.

²⁴⁹ *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 501 (1996); see also *City of Cincinnati v. Discovery Network*, 507 U.S. 410 (1993), discussed *infra* pt. IV.B.1.

²⁵⁰ *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 554 (2001).

²⁵¹ *Anheuser-Busch v. Schmoke*, 63 F.3d 1305, 1314 (4th Cir. 1995). The decision was vacated by the Supreme Court and remanded based on *44 Liquormart*. 517 U.S. 1206 (1996). On remand, the Fourth Circuit again upheld the ordinance. 101 F.3d 325 (4th Cir. 1996).

²⁵² *Penn Advertising of Baltimore, Inc. v. Mayor and City Council of Baltimore*, 63 F.3d 1318, 1326 (4th Cir. 1995).

regulated *precisely* because of the pro-alcohol or pro-cigarette message that they convey.²⁵³

It is unclear whether such apparently viewpoint-based distinctions will continue to be upheld in the future, especially in light of the uncertain standing of the commercial speech doctrine.²⁵⁴ In *Lorillard Tobacco Co. v. Reilly*,²⁵⁵ the Supreme Court considered the constitutionality of Massachusetts regulations restricting the sale, promotion, and labeling of tobacco products. One regulation prohibited “smokeless tobacco or cigar advertising within a 1,000-foot radius of a school or playground.”²⁵⁶ While the Court found that the Attorney General had ample evidence that underage use of tobacco was a problem,²⁵⁷ the Court also found that there was not a “reasonable fit” between this interest and the state’s regulation.²⁵⁸ The Court also struck down a rule barring the indoor, point-of-sale advertising of smokeless tobacco and cigars that was placed “lower than five feet from the floor of any retail establishment which is located within a one thousand foot radius” of any school or playground.²⁵⁹ The Court found that the height limit did not advance the state’s interests, because children could still look up to see ads placed above the limit, but the Court did uphold rules barring self-service displays and requiring that tobacco products be accessible only to salespersons.²⁶⁰ The Court ruled that these restrictions were “narrowly tailored to prevent access to tobacco products by minors, are unrelated to expression, and leave open alternative avenues for vendors to convey information about products and for would-be customers to inspect products before purchase.”²⁶¹

The Third Circuit has struck down a Pennsylvania law that barred alcoholic beverage advertising in media outlets affiliated with colleges or universities.²⁶² The court stressed that the law imposed a content-based restriction on speech, and therefore had to be analyzed

²⁵³ The cases would presumably be decided differently if they involved not a commercial transaction, but a debate on the merits of smoking policy.

²⁵⁴ *Lorillard Tobacco*, 533 U.S. at 589 (Thomas, J., concurring) (“In effect, they seek a ‘vice’ exception to the First Amendment. No such exception exists. See *44 Liquormart*, 517 U.S. at 513–14 (opinion of Stevens, J., joined by Kennedy, Thomas, and Ginsburg, JJ)... “[A] ‘vice’ label that is unaccompanied by a corresponding prohibition against the commercial behavior at issue fails to provide a principled justification for the regulation of commercial speech about that activity.”).

²⁵⁵ 533 U.S. 525 (2001).

²⁵⁶ 533 U.S. at 556.

²⁵⁷ *Id.* at 561.

²⁵⁸ *Id.*

²⁵⁹ *Id.* at 566.

²⁶⁰ *Id.* at 567.

²⁶¹ *Id.* at 570. Before reaching the First Amendment issues related to cigars and smokeless tobacco, the Court found that Congress had preempted state cigarette advertising regulations through the passage of the Federal Cigarette Labeling and Advertising Act. *Id.* at 551.

²⁶² *Pitt News v. Pappert*, 379 F.3d 96, 113 (3d Cir. 2004).

accordingly.²⁶³ Rather than apply the public forum doctrine, the court reverted to the *Central Hudson* test under the commercial speech doctrine.²⁶⁴ The court found that the state had not shown that the statute was actually effective in meeting the governmental interest in protecting minors, and that the law was both over- and under-inclusive.²⁶⁵

While there is no question that recent decisions have brought the vitality of the commercial speech doctrine into question, transit officials should be aware that under the right circumstances the doctrine may still be used to tilt the scale of judicial scrutiny in favor of a particular regulation of commercial advertising.

B. The Regulation of the Placement of Newsracks

A number of cases have considered the regulation of the placement of newsracks on city streets and in or around transit facilities.

Practice Aid—Newsracks

Transit officials seeking to regulate the placement of newsracks in and around transit facilities should be particularly aware of three principles. First, to the extent that a permitting scheme is used to regulate the placement of newsracks, transit officials must ensure that the regulation does not vest any official with unbridled discretion to decide who may receive a permit. Instead, the permitting scheme must contain defined structural and procedural safeguards. Second, transit officials should ensure that any regulation is closely aligned with the governmental interest that it is designed to serve. Total bans on newsracks in transit facilities will likely require the clearest demonstration between the interest and the regulation. Finally, in most cases in which a transit facility is acting in a proprietary capacity, courts have allowed the facility to recover a permitting fee (even one that exceeds the facility’s costs), and to impose other content-neutral requirements under the time, place, and manner doctrine.

These cases have generally not applied the public forum doctrine in any detail, because the regulations in question have typically addressed the placement of newsracks in the public rights-of-way. Consequently, other First Amendment doctrines, principally the time, place, and manner doctrine, have been applied more often in this context. Cases involving airports, however, make it clear that the public forum doctrine can still be relevant.²⁶⁶

²⁶³ *Id.* at 106.

²⁶⁴ *Id.* As such, the court did not apply the public forum doctrine.

²⁶⁵ *Id.* at 107–08.

²⁶⁶ See, e.g., *Multimedia Publ’g Co. of S.C. v. Greenville-Spartanburg Airport Dist.*, 991 F.2d 154 (4th Cir. 1993); *Gannett Satellite Info. Network, Inc. v. Metro. Transp. Auth.*, 745 F.2d 767 (2d Cir. 1984).

1. The “Unbridled Discretion” Doctrine

The “unbridled discretion” doctrine has played an important role with respect to the placement of newsracks. In *City of Lakewood v. Plain Dealer Publishing Co.*,²⁶⁷ the Supreme Court considered a city ordinance that permitted the mayor to deny applications for annual newsrack permits for any reason, or to grant such permits on “terms and conditions deemed necessary and reasonable by the Mayor.”²⁶⁸ The Court rejected the notion that it should “presume” that the Mayor would only deny a permit for valid reasons: “The doctrine requires that the limits the city claims are implicit in its law be made explicit by textual incorporation, binding judicial or administrative construction, or well-established practice.”²⁶⁹ The Court thus concluded that the permitting scheme violated the First Amendment.²⁷⁰ The case is also significant because, while not ruling on the constitutionality of the issue, the Court recognized that it *might* be permissible for the city to ban newsracks from certain areas of the city altogether.²⁷¹ The fact that the newsracks could be banned altogether did not mean, however, that the city could grant or deny access selectively. Having established a newsrack licensing scheme, the city was obliged to apply it in a manner consistent with First Amendment principles—including the principle that the licensing decision could not be left to the unbridled discretion of an administrative official.

The Eleventh Circuit has been particularly active with respect to these issues. In 1991, the court ruled that the State of Florida’s scheme for regulating the placement of newsracks at its rest areas violated the unbridled discretion doctrine.²⁷² The court found: “[A]s it stands now in Florida, newspapers seeking permission to distribute their newspapers through newsracks at interstate rest areas appear to be subject to the completely standardless and unfettered discretion of one bureaucrat working for the [Division of Blind Services] in Tallahassee.”²⁷³

The court explained that the discretion of government officials must be guided by “minimal” procedures and standards.²⁷⁴ Similarly, in 2003, the Eleventh Circuit struck down the City of Atlanta’s fee requirement for use of newsracks in Hartsfield Atlanta International Airport, because airport personnel had broad power to

cancel specific licenses for any reason.²⁷⁵ The court held that this amounted to the power to censor based on viewpoint.²⁷⁶ The court also offered possible solutions, stating:

Structural and procedural safeguards can reduce the possibility that an official will use her power to corrupt the protections of the First Amendment. The official charged with administering the Plan should have clear standards by which to accept or reject a publisher’s request to use the newsracks at the Airport. Perhaps a first-come, first-served system, a lottery system, or a system in which each publisher is limited to a percentage of available newsracks would be appropriate vehicles for limiting the official’s discretion.²⁷⁷

On the other hand, in 1994, the Eleventh Circuit rejected an unbridled discretion challenge to the City of Coral Gables’s ordinance regulating the placement of newspaper racks in the city’s rights-of-way.²⁷⁸ This ordinance allowed a publisher to use specific types of newsracks, as well as newsracks that were “equivalent” to those specified in the ordinance.²⁷⁹ The district court had ruled that the term “equivalent,” without additional standards, would permit arbitrary decisionmaking by city officials. The court rejected this analysis. The court found that the ordinance was “qualitatively different” from licensing schemes struck down elsewhere and noted that, although the ordinance provided for the exercise of discretion, it also limited that discretion “through neutral criteria and procedural safeguards.”²⁸⁰

Although courts outside the Eleventh Circuit have not addressed these issues in as much detail, the Eleventh Circuit’s guidance seems likely to be followed elsewhere. Transit officials therefore should ensure that any permitting scheme related to the placement of newsracks contains some form of structural and procedural safeguards, in an effort to contain and guide the discretion of individual officials.

2. Reasonableness and Viewpoint-Neutrality Within Nonpublic Fora

Transit authorities have more discretion to control the placement of newsracks in a nonpublic forum than they do in a public forum, but even then at least one court, the Fourth Circuit, has ruled that a total ban on newsracks in an airport terminal is unreasonable.²⁸¹ In

²⁶⁷ 486 U.S. 750 (1988).

²⁶⁸ *Id.* at 769.

²⁶⁹ *Id.* at 770.

²⁷⁰ *Id.* at 772. The Court also distinguished content-neutral and viewpoint-neutral prohibitions on speech, which may be valid time, place, and manner regulations, from prior restraints arising out of an ordinance that confers unbridled discretion on a government official. *Id.* at 763–64.

²⁷¹ *Id.* at 762–66.

²⁷² *Sentinel Commc’ns Co. v. Watts*, 936 F.2d 1189 (11th Cir. 1991).

²⁷³ *Id.* at 1199 (footnote omitted).

²⁷⁴ *Id.*

²⁷⁵ *Atlanta Journal & Constitution v. Atlanta Dep’t of Aviation*, 322 F.3d 1298, 1311 (11th Cir. 2003) (en banc).

²⁷⁶ *Id.*

²⁷⁷ *Id.*

²⁷⁸ *Gold Coast Publ’ns, Inc. v. Corrigan*, 42 F.3d 1336, 1349 (11th Cir. 1994).

²⁷⁹ *Id.*

²⁸⁰ *Id.* For example, the public works director was required to state the “specific cause” for any denial, and the ordinance provided an opportunity for administrative appeals.

²⁸¹ *Multimedia Publ’g Co. of S.C. v. Greenville-Spartanburg Airport Dist.*, 991 F.2d 154 (4th Cir. 1993). *But see* *City of*

that case, the Greenville-Spartanburg Airport Commission had offered four governmental interests— aesthetics, revenue, convenience and safety, and security—in support of its ban.²⁸² The court noted that the Commission was not required to “adduce[] specific factual evidence that its interests were advanced by the ban or that the expressive activity banned did interfere with the forum’s intended use; it was entitled to advance its interests by arguments based on appeals to common sense and logic.”²⁸³ Despite this, the court ruled that the prohibition on newsracks did not advance any of the Commission’s interests.²⁸⁴ The court found that any aesthetic threat posed by newspapers was “unsubstantiated.”²⁸⁵ The court also dismissed the Commission’s argument that concessionary revenue would be reduced by the presence of newsracks because it was unsupported by the record, and because the Commission had other options available to it for the recovery of such revenue.²⁸⁶ The court next rejected the notion that newsracks posed a threat to safety, citing the district court’s finding that newsracks could be placed in many locations within the airport, and dismissing concerns regarding traveler congestion around newsracks.²⁸⁷ Finally, the court rejected the Commission’s reliance on its interest in airport security. The court cited the district court’s findings that “[t]he Airport has never experienced a terrorist incident or had a bomb exploded in it” and “[i]n the highly unlikely event that someone would choose this Airport as the target of a bombing, it is extremely unlikely that he would place the bomb in a newsrack.”²⁸⁸ While there is good reason to believe that a total ban based upon security concerns might be decided differently today,²⁸⁹ the case is a reminder that transit officials should carefully survey their interests before adopting a total ban on any form of expressive activity.²⁹⁰

Lakewood v. Plain Dealer Publ’g Co., 486 U.S. 750, 773 (1988) (White, J., dissenting) (suggesting total ban permissible).

²⁸² *Multimedia Publ’g*, 991 F.2d at 160.

²⁸³ *Id.*

²⁸⁴ *Id.* at 162.

²⁸⁵ *Id.* at 161.

²⁸⁶ *Id.*

²⁸⁷ *Id.* at 162.

²⁸⁸ *Id.*

²⁸⁹ We suspect that “common sense” may have shifted considerably on the security issue after the events of September 11, 2001. In this changed environment, if a transit facility can show any plausible connection to security concerns arising out of the placement of newsracks in a nonpublic forum, and articulate why a greater risk is presented by newsracks than is presented by the sale of newspapers and magazines at newsstands, a restriction on such placement in a nonpublic forum is much more likely to be upheld. In particular, the Fourth Circuit’s reference to whether the airport had ever experienced a terrorism incident seems unlikely to be a significant factor in future comparable cases.

²⁹⁰ See *Gold Coast Publ’ns, Inc. v. Corrigan*, 42 F.3d 1336, 1346 (11th Cir. 1994) (upholding ordinance while noting that it

The Supreme Court has stressed that there must be a discernible link between a regulation of newsracks and the governmental interest the regulation is designed to serve. In a 2003 case, the Supreme Court considered the City of Cincinnati’s ban on newsracks containing commercial handbills.²⁹¹ The ban did not extend to newsracks containing newspapers. The city justified this difference in treatment by noting the lower level of protection afforded to commercial speech.²⁹² The city also justified the ban based on “esthetic and safety interests.”²⁹³ The Court ruled against the city, finding:

Not only does Cincinnati’s categorical ban on commercial newsracks place too much importance on the distinction between commercial and noncommercial speech, but in this case, the distinction bears no relationship *whatsoever* to the particular interests that the city has asserted. It is therefore an impermissible means of responding to the city’s admittedly legitimate interests.²⁹⁴

The Court noted that each newsrack, whether containing “newspapers” or “commercial handbills,” is equally unattractive.²⁹⁵ In addition, the Court noted that the city was not claiming to regulate the information contained in the handbills as a way of preventing commercial harms, which is the usual justification for regulation of commercial speech.²⁹⁶

3. Reasonable Time, Place, and Manner Restrictions

Courts have also considered the regulation of newsracks in and around transit facilities under the time, place, and manner doctrine. For example, in the Cincinnati case mentioned in the preceding section, the Court ruled that the time, place, and manner doctrine did not save the city’s total ban on newsracks containing “commercial” speech, because the city’s distinction was not content-neutral and failed to advance legitimate governmental interests.²⁹⁷

The Eleventh Circuit has upheld a regulation requiring uniform color and size of lettering on newsracks on rights-of-way throughout the City of Coral Gables as a proper time, place, and manner restriction.²⁹⁸ The city justified the restrictions based on its interests in safety and aesthetics.²⁹⁹ The court noted that the regulation did not distinguish between publications based on content.³⁰⁰ The court accepted the city’s determination that

“does not completely ban newsracks from public rights-of-way”).

²⁹¹ *City of Cincinnati v. Discovery Network*, 507 U.S. 410 (1993).

²⁹² *Id.* at 415–19.

²⁹³ *Id.* at 419.

²⁹⁴ *Id.* at 424.

²⁹⁵ *Id.* at 425.

²⁹⁶ *Id.* at 426.

²⁹⁷ *Id.* at 427–30.

²⁹⁸ *Gold Coast Publ’ns Inc. v. Corrigan*, 42 F.3d 1336 (11th Cir. 1994).

²⁹⁹ *Id.* at 1339, 1345–46.

³⁰⁰ *Id.* at 1344.

the newsracks posed safety risks,³⁰¹ and found that the city's uniform color and size of lettering requirements were "not substantially broader than necessary."³⁰² Finally, the court found that the ordinance allowed for alternative channels of communication, because there were many places in the public rights-of-way where newsracks could be placed, and the restrictions did not apply to the name and logo of the newspapers.³⁰³

The Second Circuit has upheld the use of licensing fees for the placement of newspaper racks in train stations as reasonable time, place, and manner restrictions.³⁰⁴ The court found that the fees were content-neutral because they applied to any newspaper that wanted to install newsracks.³⁰⁵ The court also found that a newspaper publisher had adequate alternatives, including the use of newsracks near the stations, peripatetic news vendors, and existing newsstands.³⁰⁶ The court upheld the licensing fees because the government was acting in a proprietary, not a regulatory, capacity, and so had an interest in raising revenue:

Ordinarily, a government cannot profit by imposing licensing or permit fees on the exercise of a First Amendment right. Only fees that cover the administrative costs of the permit or license are permissible. In those cases in which licensing fees were prohibited, however, the government was acting in a governmental capacity and was raising general revenue under the guise of defraying its administrative costs. In imposing licensing fees, MTA is not acting in a traditional governmental capacity.... When a government agency is engaged in a commercial enterprise, the raising of revenue is a significant interest.... If Gannett were to place its newsracks on privately owned business property it undoubtedly would have to pay rent to the owner of the property. The fact that the business property in question is owned by the MTA should confer no special benefit on Gannett.³⁰⁷

Likewise, the Eleventh Circuit has upheld the City of Atlanta's requirement that sellers of newspapers from newsracks in the Hartsfield Atlanta International Airport pay a fee to the city, based in large part on the fact that the city operates the airport as a proprietor, not a regulator.³⁰⁸ An early decision in that circuit had

³⁰¹ *Id.* at 1345.

³⁰² *Id.* at 1346.

³⁰³ *Id.*

³⁰⁴ *Gannett Satellite Info. Network, Inc. v. Metro. Transp. Auth.*, 745 F.2d 767, 773 (2d Cir. 1984).

³⁰⁵ *Id.*

³⁰⁶ *Id.*

³⁰⁷ *Id.* at 774–75 (citations omitted).

³⁰⁸ *Atlanta Journal and Constitution v. Atlanta Dep't. of Aviation*, 322 F.3d 1298, 1308 (11th Cir. 2003) (en banc). The court noted the result might be different "if the Department set a prohibitively high fee for use of the newsracks." *Id.* Here, the court did not find that charges were unreasonable. It noted also that there was a history of such regulation, and that alternative distribution methods were available. *Id.*; see also *id.* at 1312 ("We hold that when a government acts in a proprietary capacity, that is, in a role functionally indistinguishable from a private business, then commercially reasonable, profit-

conscious contracts may be negotiated for distribution space in a non-public forum for First Amendment activities, subject to structural protections that reduce or eliminate the possibility of viewpoint discrimination."). As discussed, *supra*, however, the court struck down the regulations under the "unbridled discretion" doctrine.

found that the Florida Department of Transportation was not permitted to impose an insurance requirement for the placement of newsracks at Interstate rest areas, at least where the record did not support a need to protect the state from liability and operators of other types of vending machines were not required to carry liability insurance.³⁰⁹

The Eighth Circuit has upheld a city ordinance that required payment of a permit fee and insurance requirements for placement of newsracks on city property.³¹⁰ The court ruled that the city "has a legitimate interest in protecting itself from liability for injuries associated with the use of its property."³¹¹ Furthermore, the city had a policy of requiring all individuals using city property to carry insurance.³¹²

C. The Regulation of Organized Charitable Solicitation

Organized charitable solicitation is protected by the First Amendment. In *Village of Schaumburg v. Citizens for a Better Environment*,³¹³ the Supreme Court wrote that "charitable appeals for funds, on the street or door to door, involve a variety of speech interests—communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes—that are within the protection of the First Amendment."³¹⁴ Nevertheless, the Court recognized that such expression was subject to "reasonable regulation."³¹⁵

³⁰⁹ *Sentinel Commc'ns Co. v. Watts*, 936 F.2d 1189, 1206 (11th Cir. 1991). The decision also states that a government "may not profit by imposing licensing or permit fees on the exercise of first amendment rights...." *Id.* at 1205. This statement was effectively overturned by *Atlanta Journal and Constitution*, at least to the extent that a facility is operated by the government in its proprietary capacity. *Atlanta Journal and Constitution*, 322 F.3d at 1312.

³¹⁰ *Jacobsen v. Harris*, 869 F.2d 1172 (8th Cir. 1989).

³¹¹ *Id.* at 1174. While "a city cannot profit from the imposition of a permit fee on the exercise of a first amendment right," the court of appeals also upheld a cost-based permit fee that covered administrative costs. *Id.*

³¹² *Id.*

³¹³ 444 U.S. 620 (1980).

³¹⁴ *Id.* at 632.

³¹⁵ *Id.*

Practice Aid—Charitable Solicitation

The Supreme Court has clearly recognized that charitable solicitation is protected First Amendment activity. Nevertheless, numerous decisions, including *International Society for Krishna Consciousness v. Lee*, have recognized that solicitation may be regulated in transit facilities. Transit officials should take care to ensure that licensing schemes for solicitors do not permit the exercise of unbridled discretion, and that regulations are closely tied to the governmental interests at stake.

A number of cases have elaborated on the circumstances in which charitable solicitation may be regulated. In *Lee*, the Supreme Court found that a ban on solicitation—asking for money—in an airport terminal was reasonable because solicitation may disrupt the business of the airport.³¹⁶ Accosted individuals are forced to slow down or alter their paths; consequently, solicitation impedes the flow of foot traffic.³¹⁷ The Court noted that such delays could be especially costly in an airport setting since “a flight missed by only a few minutes can result in hours worth of subsequent inconvenience.”³¹⁸ The Court also found that regulation of face-to-face solicitation is reasonable because of the risk that solicitors will target vulnerable individuals, such as the physically impaired, or those traveling with children.³¹⁹ By contrast, leafleting was permitted because it does not create those problems: for example, a person handed a leaflet need not stop and immediately read the message.³²⁰

Nevertheless, courts have not upheld all regulations of solicitation. For example, the Ninth Circuit has struck down a Las Vegas ordinance that barred solicitation and leafleting at multiple city locations.³²¹ The ordinance defined “solicitation” broadly, as “ask[ing], beg[ging], solicit[ing] or plead[ing], whether orally, or in a written or printed manner, for the purpose of obtaining money, charity, business or patronage, or gifts of items of value for oneself or another person or organiza-

tion.”³²² The court declined to find that the regulation of handbills was a proper time, place, and manner regulation because it was not content-neutral:

The record is crystal clear that handbills containing certain language may be distributed...while those containing other language may not. In order to enforce the regulation, an official “must necessarily examine the content of the message that is conveyed.” Handbills with certain content pass muster; those requesting financial or other assistance do not. Even if this distinction is innocuous or eminently reasonable, it is still a content-based distinction because it “singles out certain speech for differential treatment based on the idea expressed.”

Although courts have held that bans on the *act of solicitation* are content-neutral, we have not found any case holding that separates out *words of solicitation* for differential treatment is content-neutral.³²³

The court also noted that even if it were content-neutral, the ordinance would not be a proper time, place, and manner regulation because it was too broad. The city was concerned with “aggressive” panhandling and solicitation, but the ordinance applied to all forms of solicitation.³²⁴

The D.C. Circuit has applied similar reasoning in concluding that a complete ban on soliciting signatures on a postal sidewalk is not a proper time, place, or manner regulation.³²⁵ While the court found that the government had advanced a significant, content-neutral interest in minimizing the disruption of postal business and providing unimpeded ingress and egress from postal offices,³²⁶ the court concluded that the broad ban in that instance was not narrowly tailored.³²⁷ The court noted that while the government was concerned with problems that arose only “occasionally,” the across-the-board ban on signature solicitation had the effect of banning much solicitation that did not affect the government’s interests.³²⁸ Furthermore, the court found that the same regulations adequately accomplished the Postal Service’s goals through prohibitions on disturbing patrons and employees and against impeding entry.³²⁹

In another decision, *ISKCON of Potomac, Inc. v. Kennedy*,³³⁰ the D.C. Circuit considered whether regulations prohibiting solicitation on the National Mall com-

³¹⁶ 505 U.S. 672, 683 (1992).

³¹⁷ *Id.* at 683–84.

³¹⁸ *Id.* at 684.

³¹⁹ *Id.* The Court also found that “[t]he unsavory solicitor can also commit fraud through concealment of his affiliation or through deliberate efforts to shortchange those who agree to purchase.” *Id.* In an earlier case, the Third Circuit had determined that the New Jersey Sports and Exposition Authority’s ban on solicitation was a legitimate means of protecting patrons from unwanted intrusions and protecting the Authority’s own sources of income. *Int’l Soc’y for Krishna Consciousness, Inc. v. N.J. Sports and Exposition Auth.*, 691 F.2d 155, 162 (3d Cir. 1982).

³²⁰ *Id.* at 690 (O’Connor, J., concurring).

³²¹ *ACLU v. City of Las Vegas*, 466 F.3d 784 (9th Cir. 2006).

³²² *Id.* at 793 (quoting LAS VEGAS MUN. CODE § 10.44.010(A)).

³²³ *Id.* at 794 (citations omitted). The court noted, however, that the “officer must read it” test is not always dispositive. *See id.* at 796, n.12.

³²⁴ *Id.* at 796, n.13.

³²⁵ *Initiative and Referendum Inst. v. U.S. Postal Serv.*, 417 F.3d 1299, 1306–07 (D.C. Cir. 2005). The court found that it need not classify the forum, and proceeded to apply the time, place, and manner doctrine. *Id.* at 1306.

³²⁶ *Id.* at 1307.

³²⁷ *Id.*

³²⁸ *Id.* at 1307–08.

³²⁹ *Id.* at 1308–09.

³³⁰ 61 F.3d 949 (D.C. Cir. 1995).

plied with the time, place, and manner doctrine.³³¹ The Park Service required permits for groups holding demonstrations or special events at the Mall, and also banned solicitation at such events. The rules also required permits for the sale of merchandise.³³² The court concluded that, as applied, the ban on solicitation of donations was unconstitutional, because it was not narrowly drawn:³³³

[W]e cannot see how allowing in-person solicitations within the permit area will add to whatever adverse impact will result from the special event itself. The effects of solicitation will be confined to the permit area, and those who wish to escape them may simply steer clear of the authorized demonstration or special event.³³⁴

The court upheld the prohibition on sales under the time, place, and manner doctrine.³³⁵

Courts have also examined whether the right to solicit includes the right to use tables. In the *Las Vegas* case discussed above, the Ninth Circuit found that portable tables were analogous to newsracks, and held that the city's prohibition on erecting tables in an outdoor pedestrian mall was unconstitutional as applied to plaintiffs who sought to erect a table for expressive activity.³³⁶

Courts have also addressed whether the solicitation of motorists in the streets can be regulated through time, place, and manner regulations. The Fifth Circuit,³³⁷ Seventh Circuit,³³⁸ Eighth Circuit,³³⁹ and the Ninth Circuit³⁴⁰ have each upheld such regulations under the time, place, and manner doctrine.

D. The Regulation of Leafleting

A handful of cases have considered the regulation of leafleting in and around transit facilities.

³³¹ *Id.* at 955.

³³² *Id.*

³³³ *Id.* at 956.

³³⁴ *Id.*

³³⁵ *Id.* at 959; see also *Friends of the Vietnam Veterans Mem'l v. Kennedy*, 116 F.3d 495 (D.C. Cir. 1997) (ban on sale of T-shirts on National Mall upheld since it “furthers significant interests, does not burden substantially more speech than necessary to achieve those interests, and leaves open ample alternative means of communication.”) *Id.* at 498.

³³⁶ *ACLU v. City of Las Vegas*, 466 F.3d 784, 799 (9th Cir. 2006). The court also found that the tabling ordinance violated the Equal Protection Clause because it provided an exception for labor-related speech. *Id.* at 800. The court refused, however, to find the city's ordinance facially unconstitutional without additional evidence. *Id.*

³³⁷ *Int'l Soc'y for Krishna Consciousness of New Orleans, Inc. v. City of Baton Rouge*, 876 F.2d 494, 498–99 (5th Cir. 1989).

³³⁸ *U.S. Labor Party v. Oremus*, 619 F.2d 683, 688 (7th Cir. 1980).

³³⁹ *ACORN v. St. Louis County*, 930 F.2d 591, 594–96 (8th Cir. 1991).

³⁴⁰ *ACORN v. City of Phoenix*, 798 F.2d 1260, 1267–71 (9th Cir. 1986).

Practice Aid—Leafleting

Transit agencies seeking to regulate leafleting in and around transit facilities should be aware of the Supreme Court's treatment of leaflets in *International Society for Krishna Consciousness v. Lee*. To the extent that a transit agency can demonstrate that its facility is a less appropriate setting for leaflets than an airport terminal, it may be able to ban leafleting altogether. Even in fora such as airport terminals where a total ban on leafleting is improper, leafleting can be subject to proper time, place, and manner restrictions. What is unlikely to stand is a scheme that permits some speakers to leaflet and not others. In addition, while permitting schemes with respect to leafleting have been upheld, transit officials should ensure that any regulations sufficiently limit the discretion of officials responsible for awarding or revoking permits.

1. Leafleting as Protected First Amendment Activity

Since at least 1938, the Supreme Court has recognized that leafleting is a protected First Amendment activity:

The liberty of the press is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets....

The ordinance cannot be saved because it relates to distribution and not to publication. “Liberty of circulating is as essential to that freedom as liberty of publishing; indeed, without the circulation, the publication would be of little value.”³⁴¹

The Supreme Court has also ruled that anonymous leafleting is protected speech, finding that “[a]nonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind.”³⁴²

2. Reasonableness and Viewpoint-Neutrality in Nonpublic Fora

A number of courts have considered whether the First Amendment permits the regulation of leafleting in a nonpublic forum. The leading decision is *Lee*, in which the Court held that a ban on leafleting in an airport terminal was not reasonable in light of the purposes served by the terminal.³⁴³ Unlike the ban on solicitation

³⁴¹ *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938) (quoting *Ex parte Jackson*, 96 U.S. 727, 733 (1877)); see also *Hawkins v. City and County of Denver*, 170 F.3d 1281, 1286 (10th Cir. 1999) (“It is well established that the picketing and leafleting at issue in this case are soundly within the scope of protected speech under the First Amendment”).

³⁴² *Talley v. California*, 362 U.S. 60, 64 (1960); see also *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 341–47 (1995).

³⁴³ 505 U.S. 672, 690 (1992 (O'Connor, J., concurring)). As discussed *supra* at note 93, there were multiple opinions in *Lee*, with split majorities deciding that solicitation could be banned but leafleting could not. Because Justice O'Connor's

upheld in that case, handing out leaflets does not significantly disrupt the flow of pedestrian traffic.³⁴⁴ Furthermore, the Port Authority had not offered any justification or record evidence to support the ban on leafleting; Justice O'Connor emphasized that the government must be able to explain why leafleting is inconsistent with the intended use of the forum.³⁴⁵

In *Storti v. Southeastern Pennsylvania Transportation Authority*,³⁴⁶ a district court found an adequate explanation for a ban on leafleting on the platforms and paid areas of SEPTA's rail and subway stations.³⁴⁷ The court had little trouble finding that the ban was viewpoint neutral and reasonable:

There can be no doubt SEPTA's Rule fulfills both requirements. Obviously it is viewpoint-neutral, as any type of distribution of written material is prohibited. It is also reasonable. SEPTA has articulated and offered evidence to support specific and important reasons for its view that the platforms and paid areas should be dedicated exclusively to transit use. These include SEPTA's interests in ensuring passenger safety and maintaining unhindered pedestrian traffic flow on the narrow and confined platforms, as well as its more general commercial interests in ensuring the perceived security and comfort of its customers and thus keeping and attracting new transit riders.³⁴⁸

The court found it significant that SEPTA allowed noncommercial leafleting in the portions of its stations to which the public had free access, which are comparable to the airport terminal in *Lee*.³⁴⁹ Similarly, in an unpublished 2006 decision, the Ninth Circuit upheld a permit requirement for leafleting in the Portland Airport.³⁵⁰

Other courts have also ruled that the regulation of leafleting in a nonpublic forum is permissible. In a case involving a ban on leafleting on a pier,³⁵¹ the First Circuit distinguished *Lee* and accepted the Massachusetts Port Authority's (Massport) determination that allowing leafleting would endanger the public safety, based on the particular characteristics of the space in ques-

tion.³⁵² The court of appeals noted: "What space is available serves primarily as a roadway and truck turnaround. In these cramped confines, pedestrian safety and traffic flow are vital concerns.... Thus, although there are few, if any, problems intrinsic to the act of leafleting, safety is a plausible concern here."³⁵³

The Third Circuit has suggested that it could be reasonable to bar leafleting on a postal sidewalk on a temporary basis.³⁵⁴ In *Paff v. Kaltenbach*, a police officer had arrested tax protesters, who were leafleting on April 15, for trespassing, because they were obstructing the sidewalk.³⁵⁵ The court of appeals explained that, unlike the permanent prohibition on leafleting in *Lee*, the ban in *Paff* was a one-time measure for an extraordinary situation.³⁵⁶

The Tenth Circuit has upheld a ban on leafleting in a large covered walkway, part of the Denver Performing Arts Complex, which the court had determined was a nonpublic forum.³⁵⁷ The court found that the ban was not viewpoint-based because the city consistently enforced a ban on all leafleting and similar activities.³⁵⁸ The court also found that the policy was reasonable because the forum at issue had "more limited purposes" than an airport:

The Galleria serves as the exclusive means of ingress to and egress from the adjacent performing arts complexes, and it also functions as an extended lobby area where patrons can congregate before performances and during intermission. Additionally, the Galleria is the main evacuation route for the performing arts complexes in the event of an emergency.³⁵⁹

On the other hand, the Seventh Circuit has ruled that leafleting had to be allowed on a publicly owned pier, because there was no relevant difference between the pier and an indoor shopping mall.³⁶⁰ The court of appeals added, however, that leafleting could be restricted in some of the interior walkways of the pier, where pedestrian traffic would be obstructed.³⁶¹

These cases underscore the importance of justifying any regulation of leafleting based on the specific harm that the activity would create in a particular forum. *Lee* concluded that leafleting did not present a traffic-flow problem in an airport, but *Storti*, *Hawkins*, and *Chicago ACORN* all ruled that restrictions on leafleting in other forums were justified for that reason. Courts appear to

concurrence is the narrowest ground for the decision with respect to leafleting, it is the most authoritative pronouncement on the standard applicable to leafleting in a nonpublic forum. See *New England Reg'l Council of Carpenters v. Kinton*, 284 F.3d 9, 20, n.5 (1st Cir. 2002).

³⁴⁴ *Lee*, 505 U.S. at 690.

³⁴⁵ *Id.* at 691–92.

³⁴⁶ No. Civ. A. 99-2159, 1999 U.S. Dist. LEXIS 14515, 1999 WL 729266 (E.D. Pa. 1999).

³⁴⁷ *Id.*, 1999 U.S. Dist. LEXIS at 25–26.

³⁴⁸ *Id.*

³⁴⁹ *Id.* at 26; see also *Hotel Employees & Rest. Employees Union v. N.Y. Dep't of Parks & Recreation*, 311 F.3d 534, 554 (2d Cir. 2002) (finding that barring leafleting in plaza in front of Lincoln Center is reasonable and not viewpoint-based).

³⁵⁰ *Jews for Jesus, Inc. v. Port of Portland*, 172 F. App'x 760 (9th Cir. 2006).

³⁵¹ *New England Reg'l Council of Carpenters v. Kinton*, 284 F.3d 9 (1st Cir. 2002).

³⁵² *Id.* at 24.

³⁵³ *Id.*

³⁵⁴ *Paff v. Kaltenbach*, 204 F.3d 425, 433 (3d Cir. 2000). The case actually concerned civil rights claims brought against the arresting officer.

³⁵⁵ *Id.* at 428–29.

³⁵⁶ *Id.* at 433–34.

³⁵⁷ *Hawkins v. City and County of Denver*, 170 F.3d 1281, 1288–89 (10th Cir. 1999).

³⁵⁸ *Id.*

³⁵⁹ *Id.* at 1290 (citations omitted).

³⁶⁰ *Chicago ACORN v. Metro. Pier and Exposition Auth.*, 150 F.3d 695, 703 (7th Cir. 1998).

³⁶¹ *Id.* at 703–04.

look at the specific facts of each case and judge whether the government's restrictions are appropriate in light of the nature of the location. Given the traditional role leafleting has played in our society, the justifications for absolute bans appear to be examined closely.

3. Time, Place, and Manner

Courts have recognized that leafleting can be subject to time, place, and manner restrictions in both public and nonpublic fora. In her concurrence in *Lee*, Justice O'Connor expressed the view that while leafleting could not be barred from the airport terminal entirely, it could be subject to time, place, and manner restrictions.³⁶²

As noted in the preceding section, courts have allowed permitting schemes for leafleting in congested areas. The First Circuit has considered whether a transportation authority's permitting scheme for a highly congested pedestrian traffic area was a proper time, place, and manner restriction.³⁶³ Under that scheme, permits were issued automatically upon the giving of notice by the applicant, but permits could be denied or revoked before leafleting began.³⁶⁴ The court found this process did not burden more speech than necessary,³⁶⁵ and was permissible because the forum in question tended to be congested, as a result of narrow sidewalks, a high volume of pedestrian and vehicular traffic, and frequent road construction.³⁶⁶

Courts have stressed that any time, place, and manner regulation of leaflets must be content-neutral. As discussed above, the Ninth Circuit struck down the City of Las Vegas's ban on any handbills that contained language that constituted solicitation.³⁶⁷ The court ruled that this was not a proper time, place, and manner restriction in a public forum because prohibiting words of solicitation was a content-based ban.³⁶⁸

4. Unbridled Discretion

In *New England Council of Carpenters v. Kinton*,³⁶⁹ the First Circuit considered whether Massport could impose a permitting scheme on leafleting on a sidewalk.³⁷⁰ The plaintiffs challenged two rules under the unbridled discretion doctrine. The first gave Massport's

director of public safety the power to deny or revoke a permit if the proposed activity would present "a danger to public safety or would impede the convenient passage of pedestrian or vehicular traffic."³⁷¹ The second authorized Massport to bar access to an area "for purposes of construction or to ensure safe and convenient travel to an event" by issuing a specific written directive explaining the extent of, and justification for, the closure.³⁷² The court held that the regulations would survive a facial challenge because the regulations could be construed to limit the discretion to revoke permits to cases of "substantial safety and access concerns."³⁷³

The Ninth Circuit has ruled that the permitting scheme at the Portland airport did not violate the unbridled discretion doctrine because permits are assigned strictly on a first-come, first-served basis.³⁷⁴

The Third Circuit, however, struck down the following rule at Newark Airport:

No person shall post, distribute or display at an air terminal a sign, advertisement, circular, or any printed or written matter concerning or referring to commercial activity, except pursuant to a written agreement with the Port Authority specifying the time, place and manner of, and fee or rental for, such activity.³⁷⁵

The court found that this rule was "standardless." The court noted that the rule did not preclude content-based judgments, and established no affirmative guidelines for determining which materials could be distributed at the airport.³⁷⁶

E. The Regulation of Panhandling

Unlike charitable solicitation and leafleting, the Supreme Court has never clarified whether panhandling constitutes speech that is protected by the First Amendment.³⁷⁷ Regardless of whether panhandling is classified as speech or conduct for First Amendment purposes, most courts have allowed panhandling to be regulated through properly tailored time, place, and manner regulations.

³⁶² *Int'l Soc'y for Krishna Consciousness v. Lee*, 505 U.S. 672, 692–93 (1992). Citing *Lee*, a district court has ruled that leafleting could not be banned from an airport tarmac during an air show. *Wickersham v. City of Columbia*, 371 F. Supp. 2d 1061, 1089–90 (D.S.C. 2005). See *supra* n.193.

³⁶³ *New England Reg'l Council of Carpenters v. Kinton*, 284 F.3d 9 (1st Cir. 2002).

³⁶⁴ *Id.* at 25.

³⁶⁵ *Id.* at 28.

³⁶⁶ *Id.* at 29.

³⁶⁷ *ACLU v. City of Las Vegas*, 466 F.3d 784, 794–97 (9th Cir. 2006); see *supra* text accompanying note 321.

³⁶⁸ *Id.*

³⁶⁹ 284 F.3d 9 (1st Cir. 2002).

³⁷⁰ *Id.* at 25.

³⁷¹ *Id.* at 25–26.

³⁷² *Id.* at 26.

³⁷³ *Id.*

³⁷⁴ *Jews for Jesus, Inc. v. Port of Portland*, 172 F. App'x 760, 764 (9th Cir. 2006).

³⁷⁵ *Gannett Satellite Info. Network v. Berger*, 894 F.2d 61, 69 (3d Cir. 1990).

³⁷⁶ *Id.*

³⁷⁷ *Gresham v. Peterson*, 225 F.3d 899, 903 (7th Cir. 2000) ("To this point, the Supreme Court has not resolved directly the constitutional limitations on such laws as they apply to individual beggars, but has provided clear direction on how they apply to organized charities, not-for-profits and political groups.").

Practice Aid—Panhandling

Transit officials seeking to regulate panhandling in and around transit facilities may do so by crafting regulations that satisfy the time, place, and manner doctrine, or by adopting proper regulations within nonpublic fora. A number of cities have adopted “aggressive panhandling” ordinances that would appear to survive this test.

1. Panhandling as Protected First Amendment Activity

Some courts have expressed skepticism about whether panhandling constitutes speech entitled to any First Amendment protection. This view is articulated most vehemently in *Young v. New York City Transit Authority*,³⁷⁸ in which the Second Circuit considered the validity of state regulations banning begging and panhandling in the New York City subway system. The court found that begging and panhandling are more akin to conduct than speech:

We initiate our discussion by expressing grave doubt as to whether begging and panhandling in the subway are sufficiently imbued with a communicative character to justify constitutional protection. The real issue here is whether begging constitutes the kind of “expressive conduct” protected to some extent by the First Amendment.

Common sense tells us that begging is much more “conduct” than it is “speech.”³⁷⁹

The court noted that panhandlers are typically not engaged in communicating political ideas, but trying to collect money.³⁸⁰ The court went on to find that because collecting money is the purpose of panhandling, and because what passengers experience is not an attempt at conveying a particular message, but more likely to be threats and intimidation, panhandling is not speech protected by the First Amendment.³⁸¹ The court also found that there was a clear difference between solicitation by organized charities and begging. As the court put it:

[T]he difference must be examined not from the imaginary heights of Mount Olympus but from the very real context of the New York City subway. While organized charities serve community interests by enhancing communication and disseminating ideas, the conduct of begging and panhandling in the subway amounts to nothing less than a menace to the common good.³⁸²

³⁷⁸ 903 F.2d 146 (2d Cir. 1990).

³⁷⁹ *Id.* at 153.

³⁸⁰ *Id.*

³⁸¹ *Id.* at 154.

³⁸² *Id.* at 156. A similar view was adopted by a California appellate court. See *Ulmer v. Municipal Court for the Oakland-Piedmont Judicial Dist.*, 55 Cal. App. 3d 263, 266 (Ct. App. 1976) (“Begging and soliciting for alms do not necessarily involve the communication of information or opinion; therefore, approaching individuals for that purpose is not protected by the First Amendment.”). But see *Church of the Soldiers of the Cross of Christ v. Riverside*, 886 F. Supp. 721 (C.D. Cal. 1995).

Three years later, the Second Circuit revisited this analysis in *Loper v. New York City Police Department*, which involved a challenge to a New York Penal Law provision that stated “a person is guilty of loitering when he...loiters, remains or wanders about in a public place for the purpose of begging....”³⁸³ The court distanced itself considerably from the reasoning in *Young*:

While we indicated in *Young* that begging does not always involve the transmission of a particularized social or political message, it seems certain that it usually involves some communication of that nature. Begging frequently is accompanied by speech indicating the need for food, shelter, clothing, medical care or transportation. Even without particularized speech, however, the presence of an unkempt and disheveled person holding out his or her hand or a cup to receive a donation itself conveys a message of need for support and assistance. We see little difference between those who solicit for organized charities and those who solicit for themselves in regard to the message conveyed. The former are communicating the needs of others while the latter are communicating their personal needs. Both solicit the charity of others. The distinction is not a significant one for First Amendment purposes.³⁸⁴

Other courts have also found that panhandling constitutes speech activity that is protected by the First Amendment. The Seventh Circuit found “little reason to distinguish between beggars and charities in terms of the First Amendment protection for their speech.”³⁸⁵ The court found that it could not separate a request for cash from the communication of ideas.³⁸⁶ Likewise, the Eleventh Circuit, citing *Loper* and *Schaumburg*, has noted without any further analysis that “begging is speech entitled to First Amendment protection.”³⁸⁷

2. Time, Place, and Manner Regulation

A number of courts have ruled that panhandling and begging can be regulated by proper time, place, and manner regulations. It is important, however, that bans on panhandling not extend beyond that which is necessary to serve the governmental interests at issue. *Loper* provides a good example. In that case, the Second Circuit rejected a total ban on begging in the city streets because it was not a valid time, place, and manner regulation.³⁸⁸ First, the court found that the ban was not content-neutral, “because it serves to silence both speech and expressive conduct on the basis of the mes-

³⁸³ 999 F.2d 699, 701 (2d Cir. 1993).

³⁸⁴ *Id.* at 704 (citation omitted); see also *Blair v. Shanahan*, 775 F. Supp. 1315, 1322 (N.D. Cal. 1991) (noting that “*Young* fails to recognize that begging implicates the very speech interests present in charitable solicitation cases”). This decision was vacated by 919 F. Supp. 1361 (N.D. Cal. 1996).

³⁸⁵ *Gresham v. Peterson*, 225 F.3d 899, 904 (7th Cir. 2000).

³⁸⁶ *Id.*

³⁸⁷ *Smith v. City of Fort Lauderdale*, 177 F.3d 954, 956 (11th Cir. 1999).

³⁸⁸ *Loper*, 999 F.2d at 705.

sage.³⁸⁹ Second, the court found that the ban did not advance substantial governmental interests because the city allowed solicitations by charitable organizations: “If individuals may solicit for charitable and other organizations, no significant governmental interest is served by prohibiting others for soliciting for themselves.”³⁹⁰ The court also found that the ban was broader than necessary to advance the government’s interest, because other statutes aimed at more specific types of conduct already existed.³⁹¹ The court seemed most concerned about the scope of the ban: “[T]he statute before us prohibits verbal speech as well as communicative conduct, not in the confined precincts of the subway system or in the crowded environment of a state fair, but in the open forum of the streets of the City of New York.”³⁹²

Panhandling ordinances that are more narrowly tailored have had more success. For example, in accordance with *Young*, panhandling continues to be banned in the New York City subway system.³⁹³ The Eleventh Circuit has upheld a rule barring begging on a portion of the City of Fort Lauderdale’s beaches.³⁹⁴ The plaintiffs, a class of homeless people, did not dispute that the rule was content-neutral or that it left open ample alternative channels of communication. They also conceded that the city had a significant government interest in “providing a safe, pleasant environment and eliminating nuisance activity on the beach.”³⁹⁵ The plaintiffs only alleged that the begging restriction was

not narrowly tailored to serve those interests.³⁹⁶ The court disagreed, finding the city had the discretion to determine that begging at the beach harmed tourism, and the court refused to second-guess that judgment.³⁹⁷ The court also noted that, even though the rule restricted expression on the beach, begging was still allowed on streets, sidewalks, and in many other places in the city.³⁹⁸ Quoting *Ward v. Rock Against Racism*, the court ruled that the restriction was not rendered unconstitutional, simply because there were “less-speech-restrictive” alternatives available, such as restricting begging to certain parts of the beach.³⁹⁹

The Seventh Circuit has noted that “[c]olorable arguments could be made both for and against the idea that the Indianapolis [aggressive panhandling] ordinance is a content-neutral time, place or manner restriction.”⁴⁰⁰ That ordinance only applied to panhandling conducted at night and in certain locations, such as at bus stops. The court stated that because both parties agreed that the regulations were content-neutral,⁴⁰¹ it would focus only on whether the ordinance was narrowly tailored to achieve a significant governmental purpose and left open alternative channels of communication.⁴⁰² The plaintiff conceded that the city had an interest in promoting public safety, but he argued that the ordinance was broader than necessary because it banned all panhandling at night.⁴⁰³ The court disagreed, finding that because the ordinance applied only to certain times and places in which citizens would tend to feel most insecure, the city had crafted a narrow regulation that did only what was needed “to promote its legitimate interest.”⁴⁰⁴ In the court’s view, the Indianapolis ordinance was “a far cry from the total citywide ban on panhandling overturned by the court in *Loper*, or the total ban on panhandling in a five-mile area of public beach upheld by the court in *Smith*.”⁴⁰⁵

The City of Rochester, New York, recently adopted an “Aggressive Panhandling Act” that was patterned after ordinances adopted in Atlanta, Baltimore, Cincinnati, New Haven, New York City, Philadelphia, Portland, San Francisco, Seattle, and Washington, D.C.⁴⁰⁶

³⁸⁹ *Id.* As discussed below, other appellate courts have not decided whether a ban on panhandling is inherently a “content-based” regulation. If this were true, panhandling could not be directly regulated under the time, place, and manner doctrine. Instead, it could only be regulated within nonpublic fora, under the applicable tests for such fora.

³⁹⁰ *Id.*

³⁹¹ *Id.*

³⁹² *Id.* at 706 (citations omitted). In contrast, in *Young*, alternative channels of communication existed, because begging was prohibited only in the subway, not everywhere in the city. The *Young* court found that the regulation barring panhandling in the subway survived the test for time, place, and manner regulations. The regulation served an important governmental interest of protecting passengers because “begging in the subway often amounts to nothing less than assault, creating in the passengers the apprehension of imminent danger...[and] creating the potential for a serious accident in the fast-moving and crowded subway environment.” *Young v. N.Y. Transit Auth.*, 903 F.2d 146, 158 (2d Cir. 1990). Furthermore, the court found no evidence that the prohibition was aimed at a particular idea or message. The court concluded that a complete ban was justified.

³⁹³ 21 NYCRR pt. 1050.6(b)(2) (2005) (“No person shall panhandle or beg upon any facility or conveyance.”); see also J. Schreiber, *Begging Underground? The Constitutionality of Regulations Banning Panhandling in the New York City Subway System*, 27 CARDOZO L. REV. 1517 (2006).

³⁹⁴ *Smith v. City of Fort Lauderdale*, 177 F.3d 954 (11th Cir. 1999).

³⁹⁵ *Id.* at 956.

³⁹⁶ *Id.*

³⁹⁷ *Id.*

³⁹⁸ *Id.* at 957.

³⁹⁹ *Id.* (quoting 491 U.S. 781, 788-89 (1989)).

⁴⁰⁰ *Gresham v. Peterson*, 225 F.3d 899, 905 (7th Cir. 2000).

⁴⁰¹ *Id.* at 906. The court noted, however, that there could be reasons to believe the ordinance was not content-neutral: “[H]ere, whether a solicitor violates the ordinance depends on whether he asked for cash rather than for something else... . Only by determining the specific content of a solicitor’s speech could authorities determine whether they violated the ordinance, which would seem to be a content-based restriction.” *Id.* at 905.

⁴⁰² *Id.* at 906.

⁴⁰³ *Id.*

⁴⁰⁴ *Id.*

⁴⁰⁵ *Id.* (citations omitted).

⁴⁰⁶ *People v. Barton*, 861 N.E.2d 75 (N.Y. 2006).

Section 44-4(H) of the Rochester City Code specifies that “[n]o person on a sidewalk or along a roadway shall solicit from any occupant of a motor vehicle that is on a street or other public place.” Section 44-4(B) defines “solicit” as “the spoken, written, or printed word or such other acts or bodily gestures as are conducted in furtherance of the purposes of immediately obtaining money or any other thing of value.”⁴⁰⁷ In 2006, the New York Court of Appeals found that the ordinance was constitutional under the time, place, and manner test.⁴⁰⁸ The court ruled that the ordinance was content-neutral because the ban applied to anybody asking motorists for immediate donations.⁴⁰⁹ The court next found that the government’s stated interests in eliminating a source of distractions for motorists and promoting the free and safe flow of traffic were significant.⁴¹⁰ Finally, the court determined that the ordinance was narrowly tailored because it focused on specific conduct within the scope of the city’s policy concern.⁴¹¹

Even if such panhandling ordinances are constitutional time, place, and manner regulations, the government is not permitted to enforce them in an unconstitutional manner. In a second challenge to the City of Rochester’s panhandling law, the ordinance was enforced against an individual that had not engaged in “aggressive” conduct; the defendant had not approached pedestrians or motorists, or impeded traffic, but simply stood on the sidewalk holding a sign.⁴¹² The court ruled that it would be unconstitutional to enforce the ordinance against such an individual.⁴¹³

Courts have upheld ordinances banning solicitation from vehicles as reasonable time, place, and manner regulations.⁴¹⁴

F. The Regulation of Loitering

The Supreme Court has held that a regulation of loitering, if properly crafted, will not violate the First Amendment.⁴¹⁵ It must be clear, however, that such a regulation does not prohibit conduct intended to convey a message. In rejecting a First Amendment claim against a Chicago loitering ordinance, the Supreme Court noted that the ordinance defined the term “loiter” as “to remain in one place with no apparent purpose.” Thus, it was clear that the ordinance did not apply to public assemblies designed to show support for or opposition to any particular point of view.

⁴⁰⁷ *Id.* at 81.

⁴⁰⁸ *Id.* at 80.

⁴⁰⁹ *Id.* at 80.

⁴¹⁰ *Id.*

⁴¹¹ *Id.* at 81.

⁴¹² *People v. Griswold*, 821 N.Y.S.2d 394, 402 (Rochester City Ct. 2006).

⁴¹³ *Id.*

⁴¹⁴ See *ACORN v. City of Phoenix*, 798 F.2d 1260 (9th Cir. 1986).

⁴¹⁵ *City of Chicago v. Morales*, 527 U.S. 41, 52 (1999).

Practice Aid—Loitering

A transit facility regulation that is narrowly tailored to regulate loitering should not raise First Amendment issues because loitering is not a protected First Amendment activity.

The Court noted, however, that the Due Process Clause of the Fourteenth Amendment protects “the freedom to loiter for innocent purposes.” The Court proceeded to rule that the ordinance violated the Due Process Clause prohibition on criminal laws that are so vague that the public cannot be certain of what conduct is prohibited.⁴¹⁶ The Court observed that it would be extremely difficult to apply the “apparent purpose” standard in particular cases.

While this holding does not apply directly to regulations that are not tied to criminal penalties, transit officials should nevertheless carefully define any regulations dealing with loitering to avoid any concerns about vagueness. For example, after the Supreme Court handed down its decision, the City of Chicago altered its definition of loitering to read: “remaining in any one place under circumstances that would warrant a reasonable person to believe that the purpose or effect of that behavior is to enable a criminal street gang to establish control over identifiable areas, to intimidate others from entering those areas, or to conceal illegal activities.”⁴¹⁷

G. The Regulation of Musicians and Amplification

The playing of music is protected by the First Amendment.⁴¹⁸

Practice Aid—Musicians and Amplification

In a nonpublic forum, it seems likely that a transit facility could ban the playing of music, provided that it could show that such a ban served some legitimate purpose in light of the nature of the facility, and was not based on the viewpoint of the performer. In addition, the playing of music can be subject to time, place, and manner restrictions in and around transit facilities.

As with other forms of expression, the government is not permitted to single out a particular form of music

⁴¹⁶ *Id.* at 56 (quoting *Giaccio v. Pennsylvania*, 382 U.S. 399 (1966)).

⁴¹⁷ CHI., ILL., MUN. CODE § 8-4-015(d)(1) (2000). For recent discussion of the issue, see J. Packebusch, *Gang Loitering Ordinances Post-Morales: Has Vagueness Been Remedied? Somerville, Massachusetts Says Yes*, 32 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 161 (2006); M. Rossi, *Striking a Balance: The Efforts of One Massachusetts City to Draft an Effective Anti-Loitering Law Within the Bounds of the Constitution*, 39 SUFFOLK U. L. REV. 1069 (2006).

⁴¹⁸ *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989).

because of its content. The Ninth Circuit has found that the City of Burbank could not deny performers of “hard rock” access to a public forum on the basis of the city’s view that “hard rock” had the potential to create a “public nuisance.”⁴¹⁹ The court found that such a distinction would not survive strict scrutiny.⁴²⁰

Under the time, place, and manner doctrine, however, the Supreme Court has recognized that regulating sound amplification in a public forum can be proper.⁴²¹ Likewise, the Second Circuit has ruled that a total ban on use of amplifiers by musicians in New York City subway platforms was a reasonable time, place, and manner restriction.⁴²² The court ruled that the amplifier ban was content-neutral because it was aimed at reducing noise on subway platforms, not at suppressing a particular kind of music.⁴²³ The court also ruled that the ban was narrowly tailored to serve the significant governmental interest of eliminating excessive noise.⁴²⁴ As the court put it:

[T]he interest in eradicating excessive noise is bolstered by the serious public safety concerns posed by the noise to both the riders and employees of the subway system. In particular, appellants’ affidavits state that amplified music is usually so loud that it interferes with police communications, the public address system on the subway platforms and the work of track crews. Excessively loud noise, according to appellants, can drown out train whistles, putting train workers at risk, and can prevent passengers from hearing routine and emergency announcements.⁴²⁵

The court also found that there were ample alternative channels for expression; other parts of the subway system were still open to amplified music.⁴²⁶ In a 2002 case in which a city sought to ban the use of amplifiers, the First Circuit ruled that the restriction was not a legitimate time, place, and manner restriction because the city did not explain why it could not rely on a less-restrictive alternative, such as a decibel limit.⁴²⁷ The court distinguished the Second Circuit’s opinion in *Carew-Reid* because the practical problems and administrative burdens of enforcing such a ban in a subway were not present in the record before it.⁴²⁸

⁴¹⁹ *Cinevision Corp. v. City of Burbank*, 745 F.2d 560, 571–72 (1984).

⁴²⁰ *Id.* at 572–73.

⁴²¹ *Ward*, 491 U.S. at 792–93.

⁴²² *Carew-Reid v. Metro. Transp. Auth.*, 903 F.2d 914, 919 (2d Cir. 1990). The Second Circuit has also held that, under the time, place, and manner doctrine, the City of New York could ban the use of amplified sound on the steps, sidewalk, and plaza in front of City Hall. *Housing Works v. Kerik*, 283 F.3d 471, 481–82 (2d Cir. 2002).

⁴²³ *Carew-Reid*, 903 F.2d at 917.

⁴²⁴ *Id.* at 917–19.

⁴²⁵ *Id.* at 917.

⁴²⁶ *Id.* at 919.

⁴²⁷ *Casey v. City of Newport*, 308 F.3d 106, 115–16 (1st Cir. 2002).

⁴²⁸ *Id.* at 116.

The playing of music can also be subject to permitting schemes, provided that such schemes do not vest decision makers with unbridled discretion.⁴²⁹ In a 2002 case, the Second Circuit considered whether the City of New York could require street musicians to obtain a permit before using sound amplification.⁴³⁰ The court ruled that the city’s guidelines and its policies for setting maximum volume limits were constitutional.⁴³¹

H. The Regulation of Media Access

Although the First Amendment is generally recognized as protecting the newsgathering tasks of professional media organizations, the First Amendment does not grant the media any greater right of access to transit facilities than that which is granted to the public.

Practice Aid—The Regulation of Media Access

The First Amendment does not require transit officials to grant the media any greater rights of access to their facilities than that which is granted to the general public.

As the Supreme Court explained in a 1972 case:

It has generally been held that the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally....

Despite the fact that news gathering may be hampered, the press is regularly excluded from grand jury proceedings, our own conferences, the meetings of other official bodies gathered in executive session, and the meetings of private organizations. Newsmen have no constitutional right of access to the scenes of crime or disaster when the general public is excluded....⁴³²

As the Court later added:

The First and Fourteenth Amendments bar government from interfering in any way with a free press. The Constitution does not, however, require government to accord the press special access to information not shared by members of the public generally. It is one thing to say that a journalist is free to seek out sources of information

⁴²⁹ *Ward v. Rock Against Racism*, 491 U.S. 781, 794 (1989); *Saia v. New York*, 334 U.S. 558, 560 (1948)

(To use a loud-speaker or amplifier one has to get a permit from the Chief of Police. There are no standards prescribed for the exercise of his discretion. The statute is not narrowly drawn to regulate the hours or places of use of loud-speakers, or the volume of sound (the decibels) to which they must be adjusted.)

⁴³⁰ *Turley v. Police Dep’t of N.Y.*, 167 F.3d 757, 762 (2d Cir. 1999).

⁴³¹ *Id.* at 762. The court also ruled that the city’s amplifier confiscation policy was constitutional. *Id.* at 763. *See also Berger v. City of Seattle*, 533 F.3d 1030 (9th Cir. 2008) (vacating and agreeing to hear en banc a decision that upheld the City of Seattle’s rules requiring street performers within a public forum to wear badges and secure permits as proper time, place, and manner regulations).

⁴³² *Branzburg v. Hayes*, 408 U.S. 665, 684–85 (1972).

not available to members of the general public, that he is entitled to some constitutional protection of the confidentiality of such sources, and that government cannot restrain the publication of news emanating from such sources. It is quite another thing to suggest that the Constitution imposes upon government the affirmative duty to make available to journalists sources of information not available to members of the public generally. That proposition finds no support in the words of the Constitution or in any decision of this Court.⁴³³

Thus, transit officials should not find themselves in violation of the First Amendment for excluding members of the press from transit facilities, so long as such treatment is consistent with the treatment of the general public.

V. KEY PRINCIPLES AND A NOTE ON THE FUTURE

As Section IV demonstrates, in regulating expressive activities, transit officials have often struggled to find the proper balance between free speech rights and the governmental interests that have motivated the issuance of regulations in and around transit facilities. We believe the cases can be reduced to two key principles: regulation of speech should address important governmental interests as closely as possible without targeting particular viewpoints, and those regulations must be properly enforced.

A. Regulations Should Be Tailored to Important (or Compelling) Governmental Interests

This digest has discussed numerous governmental interests that can justify the regulation of expressive activity in and around transit facilities. These interests include, among others:

1. Public safety;
2. Raising revenue;
3. Avoiding passenger disruption;
4. Reducing disputes;
5. Protecting captive audiences; and
6. Managing aesthetics.

The first of these interests—public safety—is worth special notice. After the events of September 11, 2001, courts are likely to be particularly deferential to transit agencies' findings with respect to public safety. Courts may even find that this interest amounts to a “compelling governmental interest” that would satisfy the first prong of the “strict scrutiny” test. It follows that the same interest would also justify time, place, and manner regulations, as well as regulations in nonpublic fora.

Nevertheless, most cases do not turn on the question of whether the government has a legitimate interest at

⁴³³ Pell v. Procunier, 417 U.S. 817, 834–35 (1974) (citations omitted); see also Saxbe v. Wash. Post, 417 U.S. 843, 850 (1974); Houchins v. KQED, 438 U.S. 1, 8–11 (1978). The Court has, however, recognized a First Amendment right to attend a criminal trial. See Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 580 (1980).

stake. Instead, most cases turn on what the courts refer to as “fit” or “tailoring”—does the regulation at issue actually *serve* the governmental interest without inhibiting too much unrelated expressive activity? It bears emphasizing that regulations that target a particular viewpoint will require very precise tailoring to only the most important of governmental interests; these regulations are rarely upheld. However, regulations that outlaw general classes of content in nonpublic fora may be upheld, provided that they are reasonable means to serve governmental interests in such a setting. Transit officials will enhance their chances of avoiding litigation and surviving judicial scrutiny by analyzing their policy goals closely and making their regulation as specific as possible so that they advance those goals without unduly affecting other activities or interests.

B. Regulations Should Be Properly Enforced

Even if a transit facility has succeeded in crafting regulations that comply with the First Amendment on their face, transit officials must ensure that enforcement of the rules does not create constitutional problems. This requires adherence to a few basic principles.

First, transit officials must be consistent in their enforcement. As shown above, inconsistent enforcement could lead a court to find that a facility is a designated public forum.

Second, while a proper permitting scheme should include time limits for the issuance of permits,⁴³⁴ transit officials must ensure that there are not lengthy delays in the issuance of permits pursuant to such regulations. Courts will view the failure to issue a permit on a timely basis as an illegal prior restraint.

Third, transit officials must be careful not to discriminate against particular viewpoints because of the message conveyed, or to create the *appearance* that they have done so.⁴³⁵ *Ridley v. Massachusetts Bay Transportation Authority*, discussed above, provides a clear example.⁴³⁶ In that case, one of the reasons the court found a First Amendment violation was because transit officials made statements suggesting that they had rejected an ad because of their disapproval of the speaker's viewpoint.⁴³⁷ Similarly, the City of Rochester's panhandling law was enforced against an individual that did not engage in “aggressive” conduct at all.⁴³⁸ The

⁴³⁴ FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 227 (1990) (noting that a “scheme that fails to set reasonable time limits on the decisionmaker creates the risk of indefinitely suppressing permissible speech.”). This case was *overruled in part* by City of Littleton v. Z. J. Gifts D-4, L.L.C., 541 U.S. 774, 781–782 (U.S. 2004).

⁴³⁵ See, e.g., Aids Action Comm. of Mass., Inc. v. Mass. Bay Transp. Auth., 42 F.3d 1 (1st Cir. 1994).

⁴³⁶ *Ridley v. Mass. Bay Transp. Auth.*, 390 F.3d 65, 88 (1st Cir. 2004).

⁴³⁷ *Id.*

⁴³⁸ *People v. Griswold*, 821 N.Y.S.2d 394, 397 (Rochester City Ct. 2006).

court ruled that it would be unconstitutional to enforce the ordinance against such an individual.⁴³⁹

Finally, it should go without saying that officials should ensure that the transit facility and local authorities are actually prepared to enforce the regulations as written. This has not always been the case.⁴⁴⁰

C. A Note on the Future: Issues Arising from the Regulation of New Technologies in Transit Facilities

This digest has focused on the issues that courts have already confronted with respect to the regulation of expressive activities in and around transit facilities. But, as always, technology does not wait for the law. Transit agencies have already begun to incorporate various new technologies into their facilities and vehicles, including: 1) large video screens broadcasting cable and broadcast networks in terminals; 2) lenticular advertising in subway systems; 3) personal video screens on passengers' seat-backs; and 4) wireless and wired Internet access in terminals and on transit vehicles. These technologies will force courts to confront a whole host of different (though not entirely new) questions related to the First Amendment.⁴⁴¹

A few examples will serve to illustrate the kinds of issues that may arise. It would be beyond the scope of this digest to speculate about how the courts might resolve these issues in particular cases—if this digest can say two things with any certainty about First Amendment jurisprudence, they are 1) that outcomes in particular cases are highly fact-dependent, and 2) the courts have a range of doctrinal tools at their disposal, and which ones a particular court chooses to apply can be difficult to predict. Nevertheless, the following illustrations may provide food for thought.

Perhaps the most obvious class of cases would concern efforts to restrict the images or types of material that passengers and other users of a transit facility may display on the screens of laptop computers and similar devices. Or, to put it another way, transit authorities may face pressure to protect some passengers from being exposed to unwanted content introduced into the facility by other passengers. This could take various forms, including the blocking of wireless signals from specific sources, but broader and more intrusive regulations can easily be imagined. These problems may prove difficult to resolve. Under current law, any regulation determined to be aimed at a particular point of view is almost certain to be invalidated, even in a nonpublic forum. On the other hand, the ability to introduce potentially offensive video material into a public space

(whether legally classified as a public forum or otherwise) creates a novel problem. One could see courts having a range of responses, from rejecting any controls aimed at content, to upholding restrictions based on governmental interests in protecting minors, protecting members of a captive audience, or preserving the ability to earn income. Much would depend on the precise facts at issue: who was the initial complainant or plaintiff; what was the nature of the transmission or material that was banned by the challenged rule; how effectively did the regulation serve the governmental interest compared to alternative methods; was the rule broad enough to affect other kinds of speech; did enforcement officials exercise discretion in deciding which transmissions to block; and so on.

Another class of cases could arise out of new forms of advertising. For example, traditional billboards and wall placards are relatively unobtrusive: they may contain potentially offensive or controversial material, but because they are flat and attached to walls and other surrounding surfaces they are relatively easy to ignore. New forms of video-based advertising, however, may raise new questions: video is more eye catching and therefore more intrusive than still photography, and three-dimensional, high definition video or lenticular advertising confronts transit facility patrons in ways unlike traditional advertising. Thus transit authorities may face new pressures—and perhaps be able to point to new rationales—for regulating advertising in their facilities. Again, outcomes would often depend on facts.

Regardless of the particular problems that may arise out of these and other technologies, we are confident that the core principles discussed in this digest will help resolve them. In any event, even as the law evolves to deal with new issues, the doctrines discussed throughout the digest are the best guide we have available for how the courts may view future developments.

VI. CONCLUSION

Transit officials seeking to regulate expressive activities in and around transit facilities should be mindful of the First Amendment principles at stake. Courts have generally classified transit facilities as nonpublic fora for purposes of the First Amendment. Regulation of speech and expression in a nonpublic forum is appropriate so long as the regulation is reasonable in light of the purposes served by the forum, and not based upon the viewpoint of speakers. A forum will be considered nonpublic, however, only so long as transit officials enact and consistently enforce policies to ensure that a facility is not open to all speakers. If a public forum has been created, the direct regulation of content will be subject to strict scrutiny. In that event, transit officials may still enact content-neutral time, place, and manner regulations.

The most important principle emerging from the cases appears to be this: transit officials must identify the important governmental interests served by the restriction at issue, and then ensure that any regula-

⁴³⁹ *Id.*

⁴⁴⁰ See, e.g., D. Helling, *Police Won't Enforce Panhandling Law*, KANSAS CITY STAR, Aug. 3, 2007.

⁴⁴¹ For example, the Supreme Court has already determined that a library does not create a public forum by providing its patrons with Internet access. *United States v. Am. Library Ass'n*, 539 U.S. 194, 205 (2003). We are not aware of any case that has extended this finding to a transit facility.

tions actually and clearly serve such interests without affecting substantial amounts of other expressive activity at the same time. In all but the most exceptional cases, officials must not attempt to regulate expressive activity based on the viewpoint or message of the speaker. In addition, while permitting schemes can be

appropriate time, place, and manner regulations, such schemes must be carefully crafted to ensure that they contain procedural protections that do not vest any official with unbridled discretion to award or revoke a permit.

APPENDIX A

ORDINANCES AND REGULATIONS

The following are examples of ordinances and regulations governing expressive activities in and around transit facilities, or on other City or State property. While transit officials may find it useful to consult these documents, the citation of the ordinances and regulations herein is not intended to serve as an endorsement of their legality or constitutionality. Transit officials should always consult an attorney and carefully review the law before adopting any similar ordinances or regulations.

Advertising

- New York, N.Y., R.C.N.Y. tit. 34, § 4-12(j) (“Commercial advertising vehicles”).
- New York, N.Y., Administrative Code § 16-132 (“Lease of advertising space on litter baskets”).
- Boston, Mass., Municipal Code, § 16-12.3 (“Advertising”).
- Boston, Mass., Municipal Code, § 22-64 (“Commercial advertising and display”).
- Atlanta, Ga., Code of Ordinances, § 138-43(i) (“Bus shelters – commercial advertisements”).
- Kansas City, Mo., Code of Ordinances, § 4-1 (“Placing signs or advertising material on public property”).
- Phoenix, Az., City Code, §§ 3-1 *et seq.* (“Advertising”).
- Tex. Transp. Code § 391.031 (“Unlawful Outdoor Advertising; Offense”).
- Wisconsin Highways Code, § 84.30 (“Regulation of outdoor advertising”).
- Washington Metropolitan Area Transit Authority (WMATA), Guidelines Governing Commercial Advertising (adopted Aug. 3, 1972) (amended Nov. 20, 2003) (available from WMATA upon request). http://www.wmata.com/about_metro/docs/Advertising_Guidelines.pdf
- WMATA, Guidelines for Public Service Advertising (adopted Dec. 12, 1996) (amended Nov. 20, 2003) (available from WMATA upon request). http://www.wmata.com/about_metro/docs/PSA_Guidelines_Nov_20_2003.pdf
- WMATA Use Regulations, § 100.9 (“Advertising on Metrobus and Metrorail Systems”).

Placement of Newsracks

- Seattle, Wash., Municipal Code, ch. 15.14 (“Newstands”).
- Portland, Or., Municipal Code, ch. 17.46 (“Newsracks”).

Charitable Solicitation

- New York, N.Y., R.C.N.Y. tit. 56, ch.1, § 1-04(s) (“Unlawful solicitation”).
- New York, N.Y., R.C.N.Y. tit. 68, ch.1, § 1-01–1-04 (“Granting of Licenses for Public Solicitation”).
- New York, N.Y., Administrative Code § 21-111 (“Soliciting of contributions in public”).
- Indianapolis, Ind., Revised Code, § 431-701 *et seq.* (“Solicitation in Roadways”).
- Charlotte, N.C., Code of Ordinances, § 4-66 *et seq.* (“Airport Charitable Solicitation and Demonstration Control”).
- N.Y. Executive Law, ch. 18, art. 7-A (“Solicitation and Collection of Funds for Charitable Purposes”).
- Ohio Rev. Code Ann. § 4511.51 (“Hitchhiking—soliciting employment, business, or contributions from occupant of vehicle”).
- Tex. Transp. Code § 552.007 *et seq.* (“Solicitation by Pedestrians”).
- Wis. Stat. Ann. § 440.41 *et seq.* (“Solicitation of Funds for Charitable Purposes”).

Leafleting

- Atlanta, Ga., Code of Ordinances, §§ 22-146 *et seq.* (“Distribution of literature and solicitation of funds”).
- San Diego, Cal., Municipal Code, art. VII, div. 00 § 57.16 (“Handbills-Defined-Distribution Regulated”). <http://docs.sandiego.gov/municode/MuniCodeChapter05/Ch05Art07Division00.pdf>
- Phoenix, Az., City Code, §§ 4-127 *et seq.* (“Conduct at City Airports Requiring a Permit”).
- Kansas City, Mo., Code of Ordinances, §§ 4-31 *et seq.* (“Handbills”).
- Hillsborough County Aviation Authority, Rules & Regulations No. R340, Tampa International Airport, § 4 (“First Amendment Activities”). http://www.tampaairport.com/airport_business/operations/rules_regulations/r340_rules_and_regulations.pdf
- Amtrak, Regulations Governing Exercise of First Amendment Activities on Amtrak Property, http://www.amtrak.com/pdf/First_Amendment012406.pdf.
- Clark County Department of Aviation, Rules and Regulations, § V,

http://www.hnd.aero/downloads/RR%2010_30_06_FINAL.pdf.

- WMATA Use Regulations, § 100.10 (“Free Speech Activities”).

Panhandling

- Cleveland, Ohio, City Code § 605.031 (“Aggressive Solicitation”).
- Boston, Mass., Municipal Code § 16-41 (“Prohibiting Aggressive Solicitation”).
- Atlanta, Ga., Code of Ordinances, § 43-1(d) (“aggressive solicitation”).
- Minneapolis, Minn., Ord. No. 2007-Or-042 (enacted June 15, 2007); Minneapolis, Minn., City Code, § 385-60 (“Aggressive solicitation”).
- San Diego, Cal., Municipal Code, art. II, div. 40 §§ 52.4001 *et seq.* (“Aggressive Solicitation”). <http://docs.sandiego.gov/municode/MuniCodeChapter05/Ch05Art02Division40.pdf>
- Kansas City, Mo., Code of Ordinances, § 50-8.5 (“Prohibitions in certain areas”).
- Indianapolis, Ind., Revised Code, § 407-102 (“Panhandling”).
- Phoenix, Az., City Code, § 23-7 (“Sec. 23-7. (“Aggressive solicitation in public areas; soliciting near banks, automated teller machines, on public transportation vehicles, at bus stops, or between sunset and sunrise.”)).
- Charlotte, N.C., Code of Ordinances, § 15-15 (“Public solicitation and begging regulated”). San Francisco, Cal., Police Code, art. II, § 120-2 (“Aggressive Solicitation Ban/Substance Abuse and Mental Health Diversion Program”).

Loitering

- New York, N.Y., R.C.N.Y. tit. 56, ch.1, § 1-04(m) (“Loitering for illegal purposes”).
- Atlanta, Ga., Code of Ordinances, § 22-115 (“Loitering prohibited”).
- Minneapolis, Minn., City Code, § 385-50 (“Loitering”).
- Indianapolis, Ind., Revised Code, § 407-103 (“Loitering, unlawful assemblies”).
- Phoenix, Az., City Code, § 23-8 (“Loitering”).
- Philadelphia, Penn., City Code, § 10-603 (“Loitering”).
- Boston, Mass., Municipal Code § 16-12.2 (“Loitering”).
- Kansas City, Mo., Code of Ordinances, § 50-161 (“Loitering”).
- N.Y. Penal Law, ch. 40, § 240.35 (“Loitering”).

Street Performance

- Seattle, Wash., Seattle Center Rules, *available at*:
http://www.seattlecenter.com/information/CampusRulesFinal_2007.pdf.

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