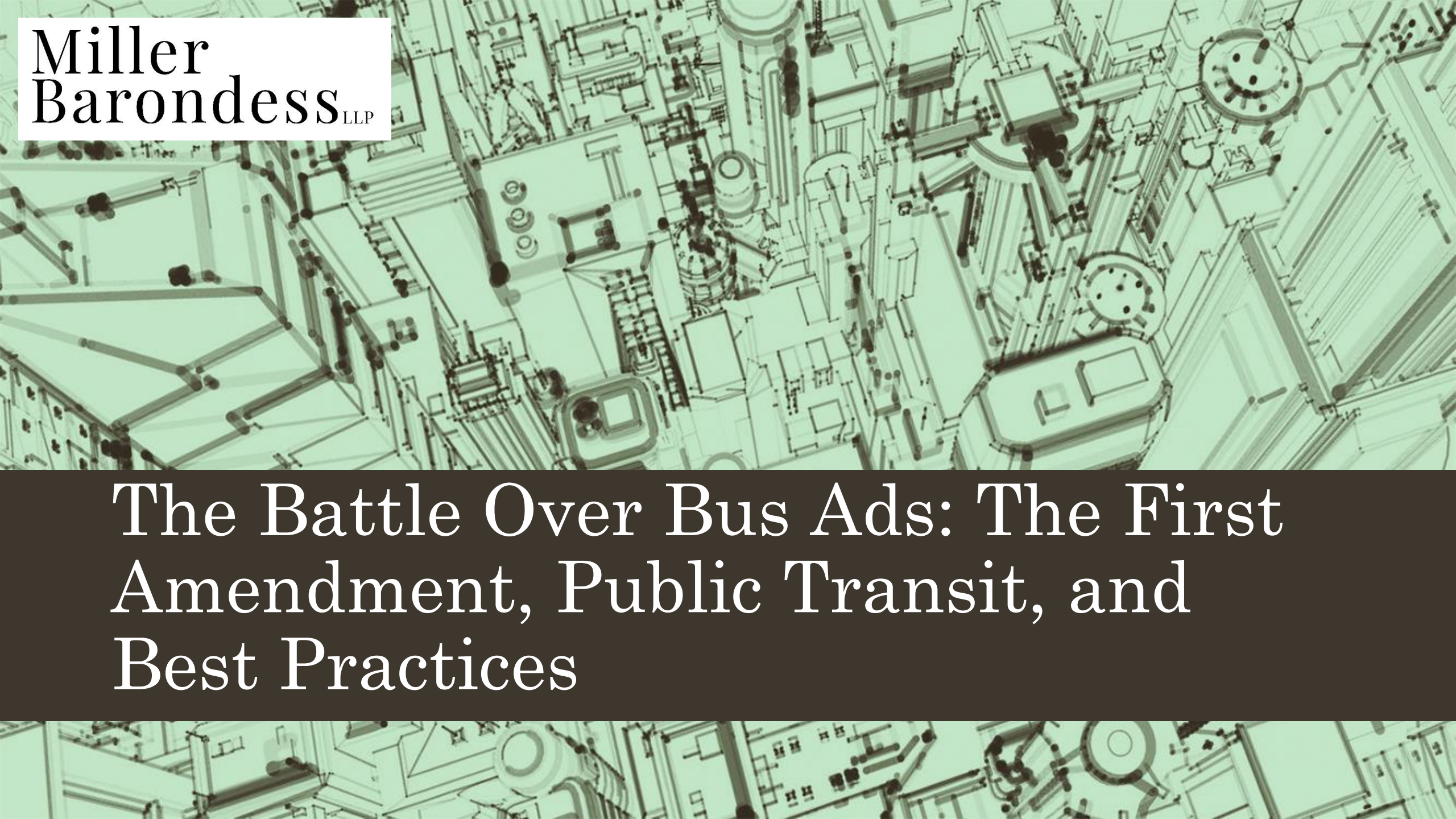
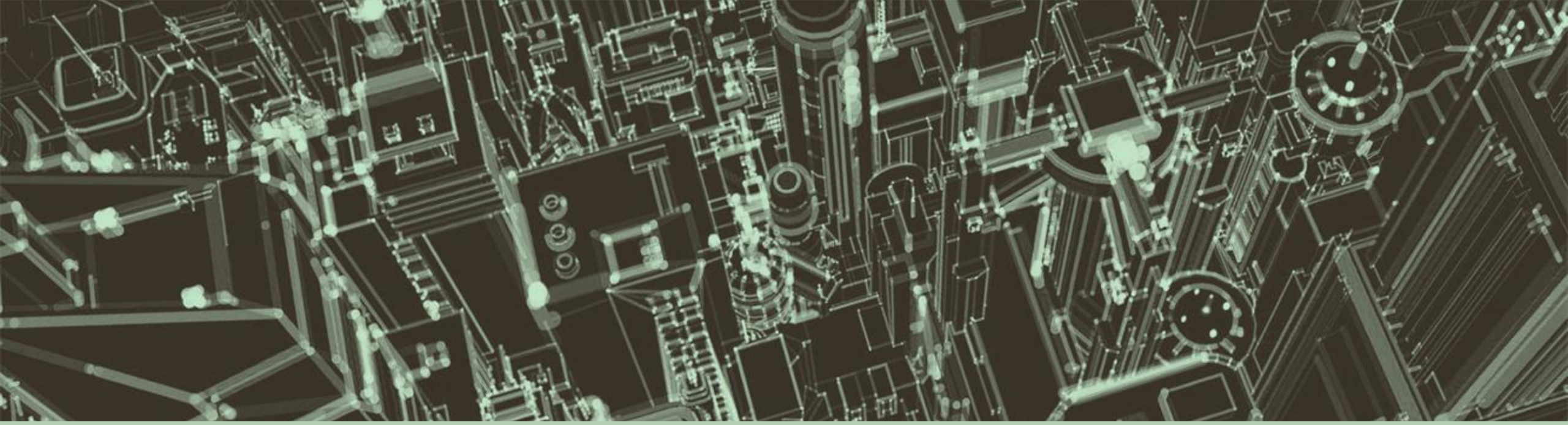


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The Battle Over Bus Ads: The First Amendment, Public Transit, and Best Practices

Overview

- Forum analysis
- Content-based restrictions in a nonpublic forum
- Commercial vs. noncommercial speech
- Religious, political, and other public issue speech
- Ad review process and best practices



Forum Analysis



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The Forum Drives The First Amendment Analysis

- The First Amendment does not require the government to provide a forum for protected speech. *Cornelius v. NAACP Legal Defense and Educational Fund,* 473 U.S. 788, 799-800 (1985).
- The nature of the forum, not the nature of the speech, controls.
- Selective access can further First Amendment interests. *Arkansas Educ. Television Com'n v. Forbes*, 523 U.S. 666 (1998).



Three Types:

- **Traditional Public Forum**
- **Designated Public Forum**
- **Limited Or Nonpublic Forum**





Traditional Public Forum

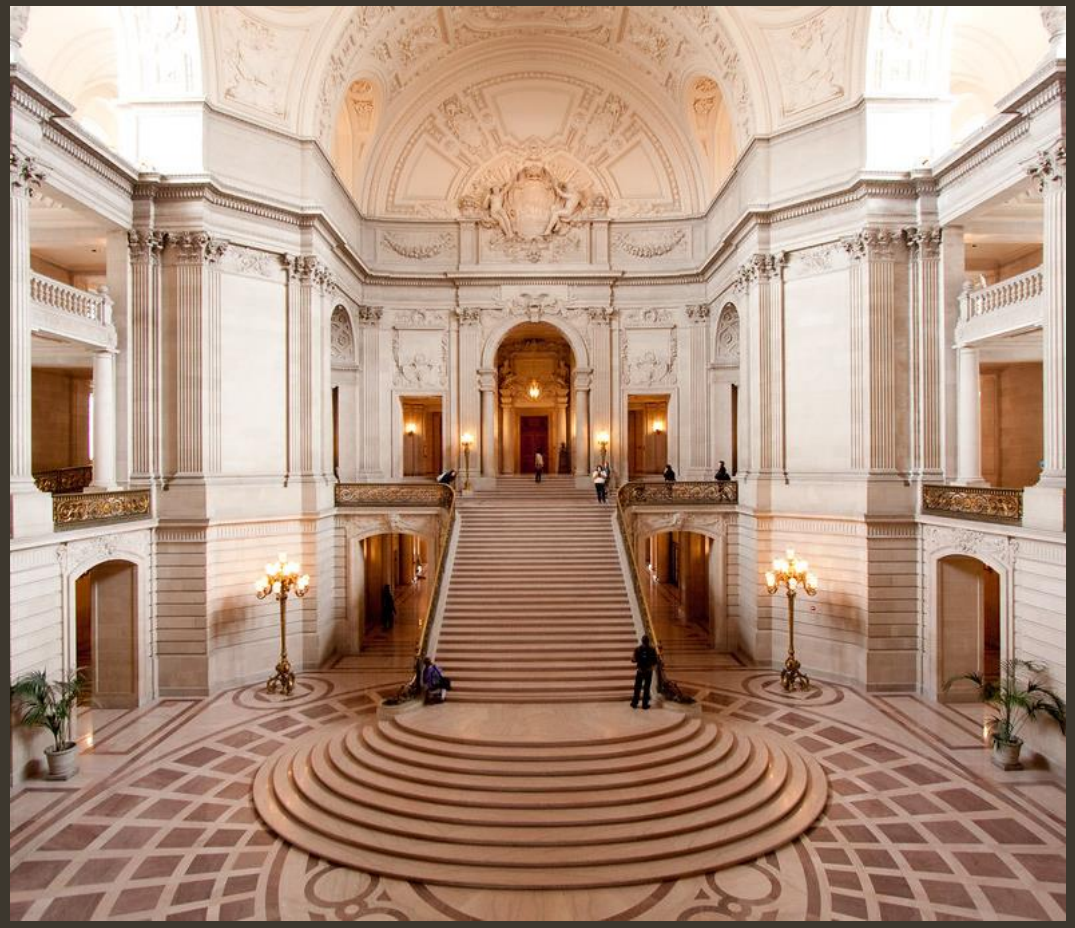
Public parks, sidewalks, the “town square”

Designated Public Forum

- Created by purposeful action; government opens property for expressive activity.
- Examples: Open school board meetings, municipal auditorium
- Where there is no policy at all, or transit agency broadly accepts political and public issue ads, several circuits have determined bus ad space is a designated public forum.



Opening a nonpublic forum to expressive activity



- Govt. intentionally reserves forum for expressive activity for limited uses and topics.
- Examples: Public library meeting rooms, interior of city hall, transit advertising.
- Restrictions must be viewpoint neutral and reasonable in light of purposes served by the forum.

Courts Look at Three Factors

Terms of any policy government has adopted to govern access to forum

How government's policy has been implemented in practice

Nature of government property at issue

How do you designate the forum?

- Not created by inaction. Transit agencies must **define** the forum and rules in a **written policy**.
- De facto practices matter.
- Designations are not static.

The Circuits Are Split

- 2nd, 3rd, 6th , 7th Circuits: Ad spaces on buses are a designated public forum.
- 1st , 9th Circuits: Limited public forum.
- SCOTUS interest. Accepting a wide array of political and public issue ads demonstrates govt intent to create a designated, not a limited, public forum. *AFDI v. King County* (2016).



King County and CTA Transit Policy Goals & Objectives

- Maximizing advertising revenue
- Maintaining a position of neutrality
- Preventing the risk of harm on a captive audience
- Preserving value of ad space
- Maximizing ridership & maintaining safe environment
- Avoiding claims of discrimination
- Preventing harm and abuse
- Reducing diversion of resources
- Preserving transit agency's business reputation
- Make it explicit! Ad space is a nonpublic forum.





SEPTA Transit
Policy Goals & Objectives

- Ad standards are intended to confirm SEPTA's nonpublic forum status
- Acceptance of ads does not permit facilities or vehicles to be used for public discourse and debate.

- SEPTA's fundamental purpose and intent is to accept ads that enhance revenues without adversely affecting patronage of passengers.

- To further that purpose, SEPTA retains strict control over ads.



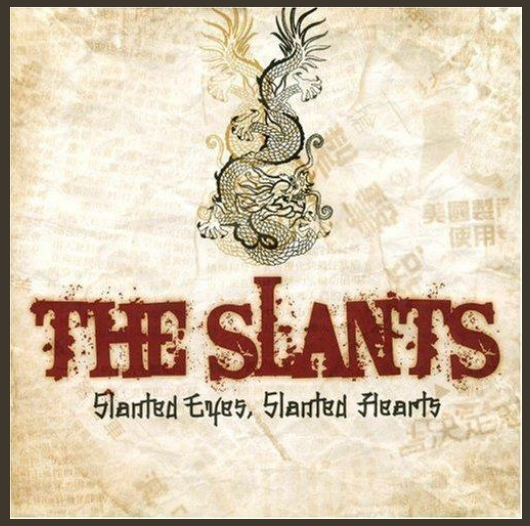
Viewpoint Neutrality



- You cannot exclude speech based on the viewpoint of the speaker. *Cogswell v. City of Seattle*, 347 F.3d 809 (9th Cir. 2003).
- The govt cannot "intervene in a way that prefers one particular viewpoint in speech over other perspectives on the same topic." *Ridley v. Mass. Bay. Transp. Auth.*, 390 F.3d 65 (1st Cir. 2004).
- A regulation cannot allow "one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules." *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377 (1992).

Viewpoint Neutrality: Borrowing from Trademark Law





- *Iancu v. Brunetti*, 139 S.Ct. 2294 (2019) & *Matal v. Tam*, 137 S.Ct. 1744 (2017): Bar on immoral, scandalous, disparaging trademarks is viewpoint discriminatory.
- Laws or policies that disfavor "ideas that offend" are viewpoint discriminatory.
- Does the right to express an "offensive" view give the right to express that view in whatever *manner* one chooses?

Reasonableness

01

(1) Standard/policy is reasonable in light of the purpose served by the forum

02

(2) Policy is sufficiently definite and objective to prevent arbitrary/ discriminatory enforcement

03

(3) Independent review of the record supports agency's conclusion that ad is prohibited

Reasonable Policy Purposes

- Protect a captive audience. *AFDI v. King Cty.*, 796 F.3d 1165 (9th Cir. 2015).
- Preserve aesthetics and promote safety. *Ctr. for Bio-Ethical Reform, Inc. v. City and County of Honolulu*, 455 F.3d 910 (9th Cir. 2006).
- Restrict speech "that will foreseeably disrupt the intended function of government property." *SeaMAC* v. *King Cty.*, 781 F.3d 489 (9th Cir. 2015).
- Restrict public issue and non-commercial speech reasonably related to purpose of running an efficient and profitable transit system. *Amalgamated Transit Union Local 1015 v. Spokane Transit Auth.*, 929 F.3d 643 (9th Cir. 2019).

Scrutinizing Reasonableness

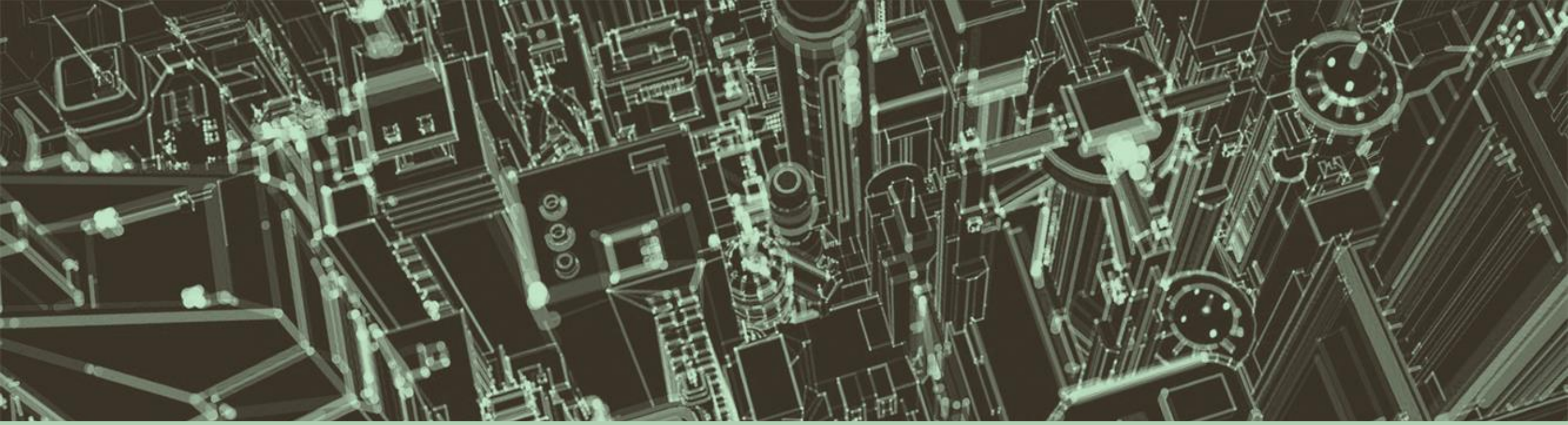
- More scrutiny after *Minnesota Voters Alliance v. Mansky*, 138 S. Ct. 1876 (2018). Policy must be "capable of reasoned application" with "objective, workable standards."
- "Perfect clarity and precise guidance" is not the standard. *Mansky*, 138 S.Ct. at 1891.



Will the Court Defer To Transit Agency's Application of its Policy?

- *Amalgamated Transit*, 929 F.3d 643 (9th Cir. 2019): No deference in 9th circuit to assessment made by transit officials.
- *AFDI v. SMART*, 698 F.3d 885 (6th Cir. 2012): More than one reasonable decision; agency entitled to some discretion in drawing fine lines in marginal cases, so long as policy is sufficiently definite & objective.





Content-Based Restrictions in a Nonpublic Forum



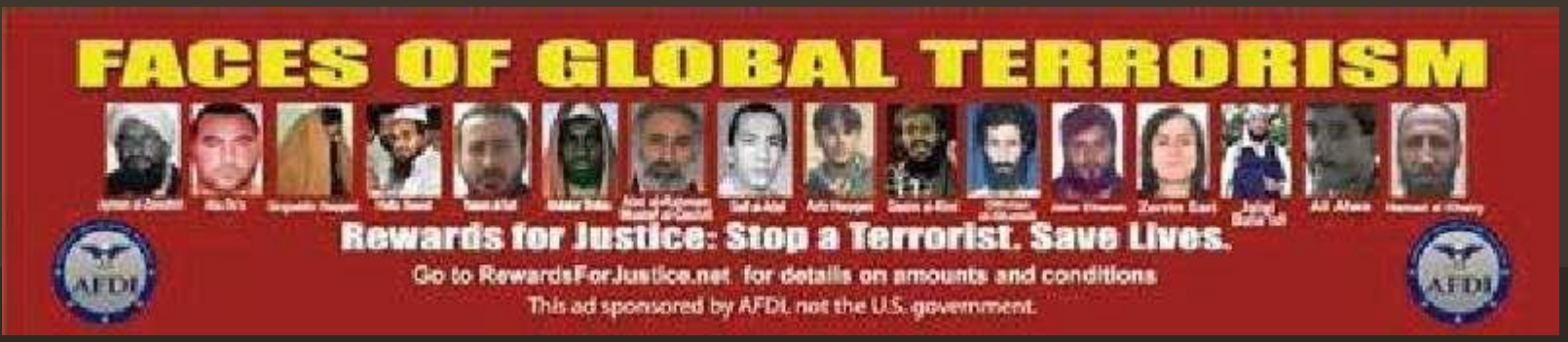
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Demeaning & Disparaging: *AFDI v. King County*, 904 F.3d 1126 (9th Cir. 2018):

Policy excluded advertising that "demeans or disparages an individual, group of individuals, or entity," applying reasonably prudent person standard.

Excluded "Faces of Global Terrorism" ad because it suggested all Muslims were terrorists.

Restriction was unconstitutionally viewpoint based. But exclusion of factually false ads constitutional, and ads can be excluded if evidence they caused disruption.



Demeaning & Disparaging: *AFDI v. SMART*, 978 F.3d 481 (6th Cir. 2020):

Excluded ad as political because "fatwa" refers to sharia law and website contains anti-Islamic messages, and because it was likely to hold Muslims up to scorn and ridicule b/c it suggested they might threaten family members.

Political ad ban, restricting political and campaign advertising, did not define political and was unevenly applied. Scorn/ridicule restriction discriminated based on viewpoint. Restrictions are "understandable," but must strike the balance in a way that permits reasoned application.



AFDI v. SMART, 978 F.3d 481 (6th Cir. 2020): Examples of selective enforcement











Public Issue Speech: *Ctr. for Investigative Reporting v. SEPTA*, 975 F.3d 300 (3d Cir. 2020)

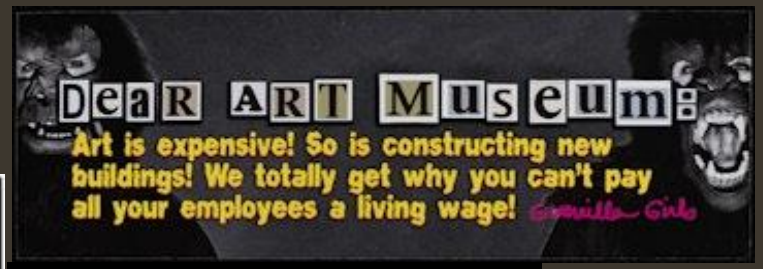


- "A Stacked Deck" comic strip re mortgage lending trends.
- SEPTA rejected b/c disparate lending is matter of public debate & litigation.

Public Issue Speech: *Ctr. for Investigative Reporting v. SEPTA*, 975 F.3d 300 (3d Cir. 2020)

- Not capable of reasoned application b/c no guidelines cabining discretion and erratically applied.









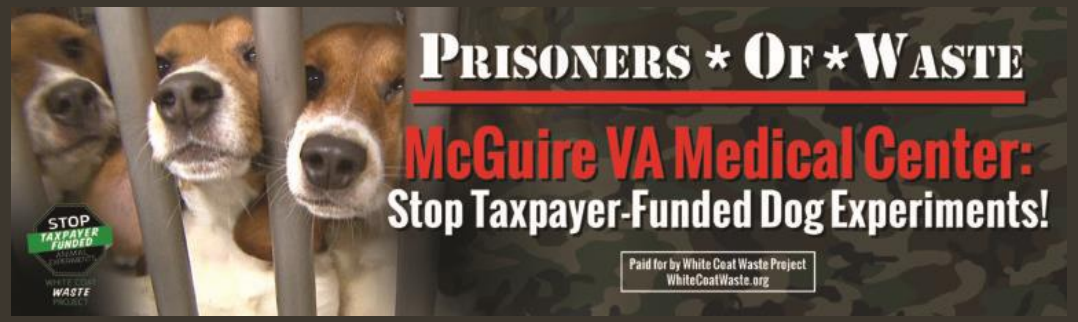


PSAs: *Women's Health Link, Inc. v. Fort Wayne Public Transportation Corp.*, 826 F.3d 947 (7th Cir. 2016)

- Ban on ads that express or advocate opinions re political, religious, or moral issues." Ad banned b/c website promotes adoption and "life affirming" care.
- Restrictions should be limited to the ad content, not the advertiser.
- Other ads "flavored" w/ the moral, religious, or political: crusade against crime, services for immigrant communities, promote vaccination, get-out-the-vote



Political Ad Bans



White Coat Waste Project v. Greater Richmond Transit Co., 35 F.4th 179 (4th Cir. 2022): Policy banning all "political" ads, without defining political, was not capable of reasoned application. Commercial/non-commercial distinction for rejecting political ads was not articulated by policy.

Ads with no political content by PACs were rejected. Vaguely defined rules and vaguer unwritten rules spell trouble.

Religion and Atheism: Content or Viewpoint?

Archdiocese of Wash. v. WMATA, 897 F.3d 314 (D.C. Cir. 2018): First Amendment allows transit agency to exclude religious advertising from non-public forum. Compelling interest in maintaining the attractiveness of its service to multi-cultural, multi-ethnic, and religiously diverse ridership.

SCOTUS dissent: WMATA may "close its buses to all advertisements" or "restrict advertisement space to subjects where religious viewpoints are less likely to arise . . . ."



Religion and Atheism

Northeastern Pennsylvania Freethought Society v. County of Lackawanna Transit System, 938 F.3d 424 (3d Cir. 2019): Excluding religious/atheistic messages was viewpoint discriminatory and unreasonable because it distinguishes between those who seek to express secular and religious views on the same subjects.







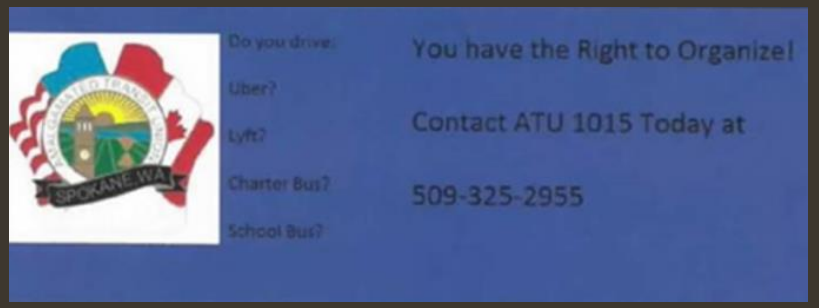
Non-commercial ad bans and viewpoint discrimination?

- Is a policy that allows ads encouraging the purchase of a product but bans ads that discourage the purchase of the same product viewpoint discriminatory?
- *PETA v. LACMTA*, __ F.Supp.3d __, 2022 WL 18776190 (C.D. Cal. 2022): "The prohibition on noncommercial messages does not turn on a speaker's viewpoint but only whether the message is commercial in nature."
- "Ads imploring the purchase of products do not invite debate." *WMATA*, 897 F.3d at 329.

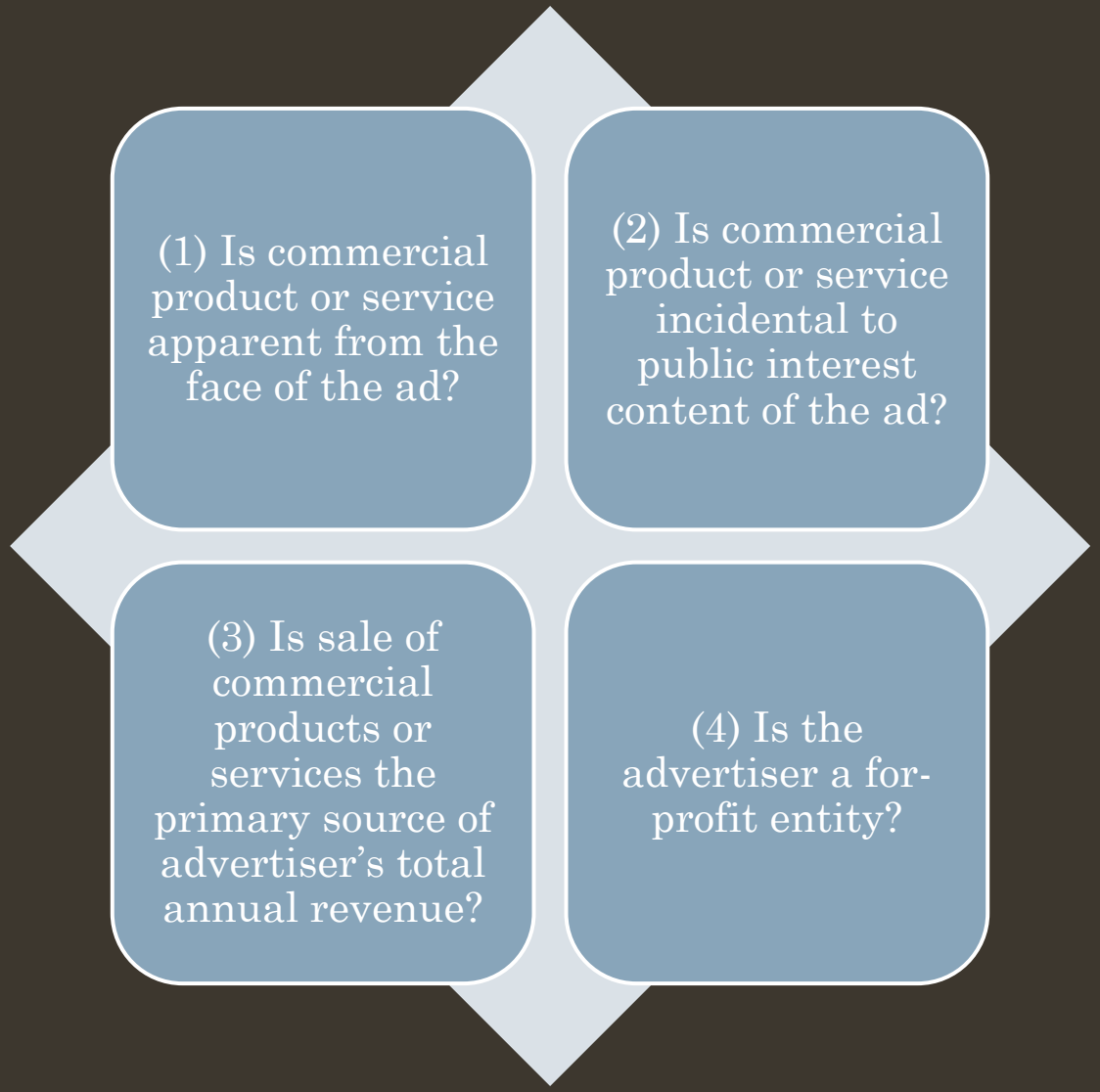
What is commercial speech?







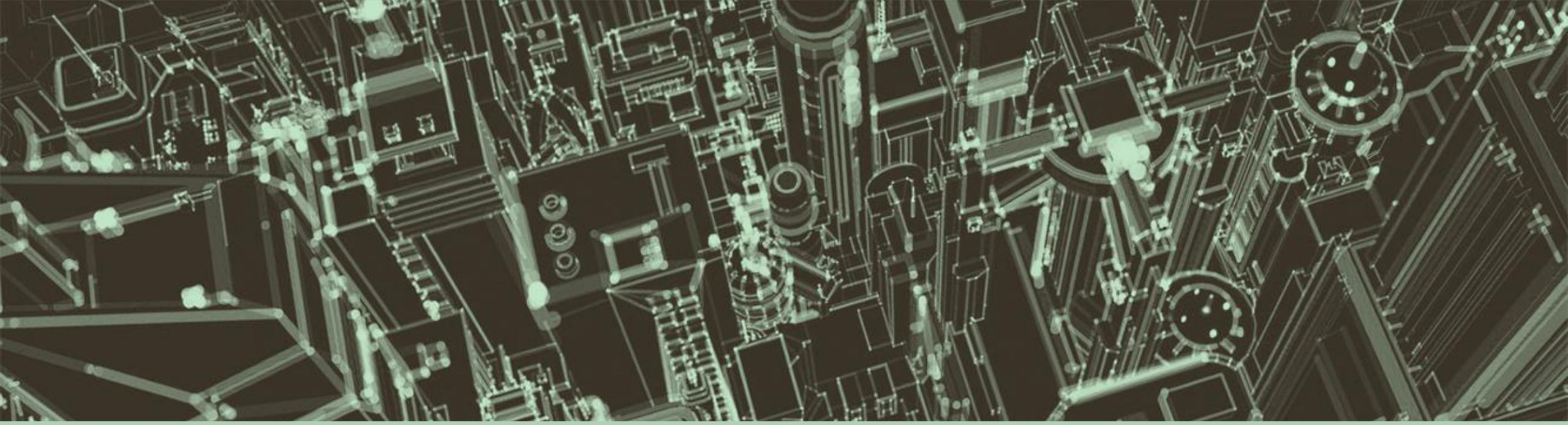




LACMTA's revised policy

The noncommercial ad ban applies whether the proponent is a commercial or nonprofit organization.

Commercial speech includes ads that generally promote entity engaged in commercial activity. Need not strictly propose a commercial transaction.



Government Speech



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Government Speech

- When the govt speaks for itself, the First Amendment does not demand that it do so neutrally, or give equal airtime for all views
- Can rely on private parties to convey a govt message, by giving them funds to articulate it, or adopting message as its own
- Establishment Clause, other statutory limitations

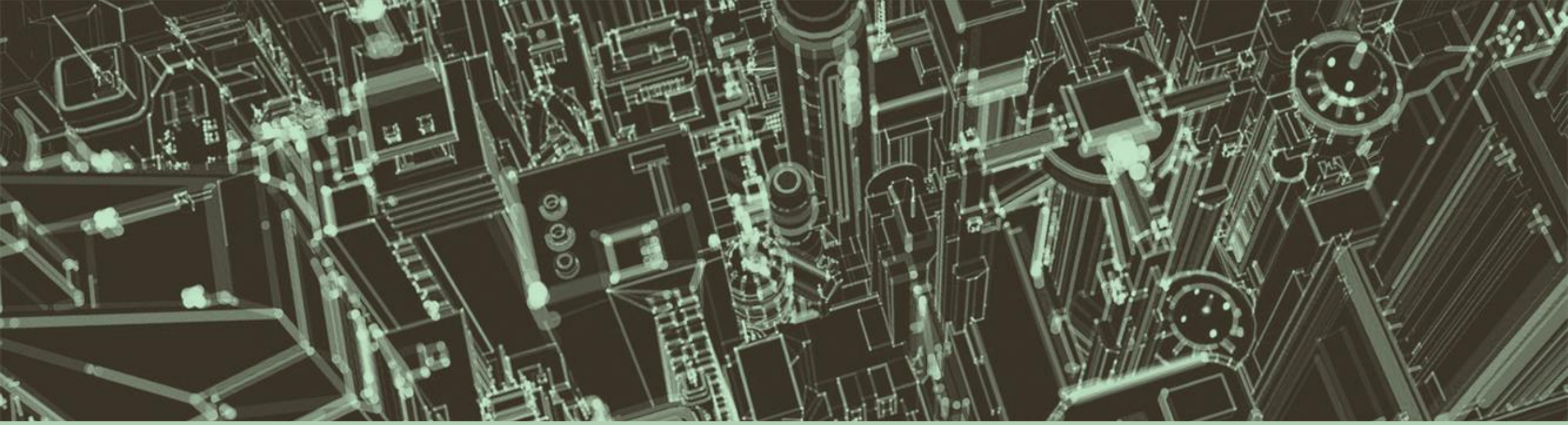


Public Transit & Government Speech

- Public transit ad space, unlike license plates, bears no indicia that speech is owned or conveyed by govt. Context traditionally available for private speech. *Walker v. Tex. Div., Sons of Confederate Veterans,* 576 U.S. 200, 218 (2015).
- Govt. entities can purchase ads to advance specific govt purposes.
- Exceptions to restricted categories (e.g., PSAs) if co-sponsored by govt entity may be construed as viewpoint discrimination

Shurtleff v. City of Boston, 142 S. Ct. 1583 (2022)

- City flag program did not express govt speech. Refusal to allow organization to fly Christian flag was impermissible viewpoint discrimination.
- Whether govt speech: (1) history of expression at issue; (2) public's likely perception as to who is speaking; (3) extent that govt has actively shaped or controlled expression.
- History of flag flying favored city & understood as sending message on govt's behalf. But city did not control or shape messages the flags sent, "most salient."



Ad Review Process and Best Practices



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Type of policies

- Commercial ads only
- Commercial plus PSA ads
- Commercial, political, and PSA ads



Policy Essentials

- Statement of intent: Nonpublic forum
- Identify goals and operational needs served by policy
- Subject matter allowed with unambiguous, objective criteria
- Clear content restrictions capable of consistent, reasoned application
- Robust review procedures (not in one person's discretion)

Commercial Only

Broadly define commercial speech

Identify criteria for distinguishing between commercial and noncommercial speech

Does not turn on identity of the speaker

Commercial plus PSAs

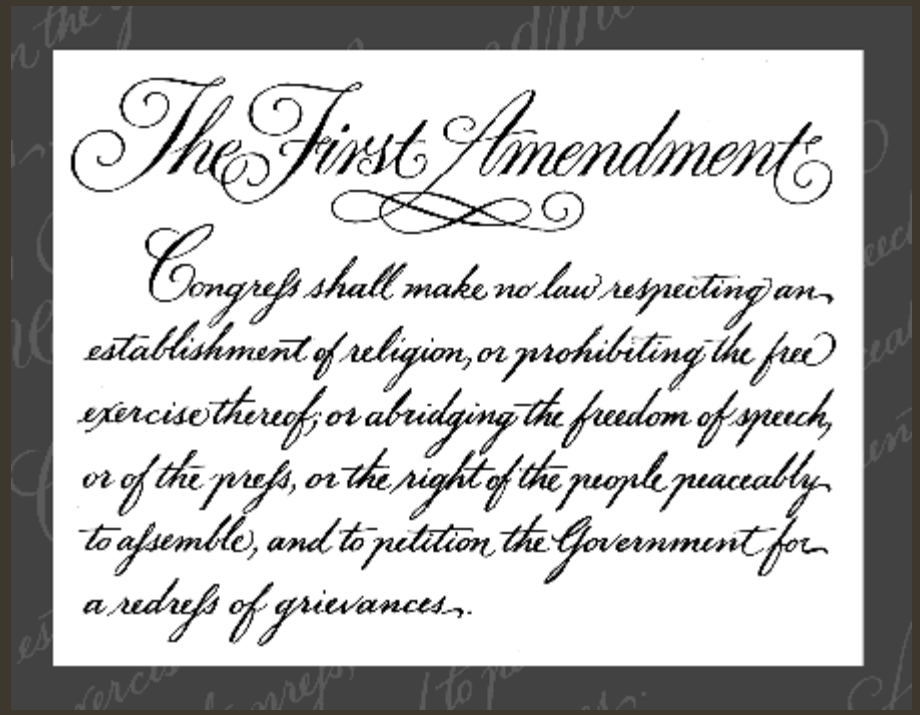
Example (NY Metro): PSAs not otherwise prohibited by content restrictions, sponsored by nonprofit, directed to general public and relate directly and exclusively to:

(1) Prevention or treatment of illnesses
(2) Promotion of safety or personal health
(3) Education/training programs
(4) Art/culture programs
(5) Provision of children and family services
(6) Provision of services to low income, senior, disabled citizens
(7) Public education that solely informs public of existence of laws or constitutional provisions, only quotes, accurately reflects, and identifies speaker

Ad Review Process

- Consistency, consistency, consistency
- Balanced decision-making that is truly agnostic on viewpoint
- Multi-level screening: ad contractor, ad panel, escalate when needed
- Work with advertiser to make corrections
- Establish viewpoint neutral record

Understanding Litigation Risk



- Follow trend lines in First Amendment litigation against transit authorities
- Repeat players
- Audit process

QUESTIONS?



THANK YOU



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