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Speech: Transit System Prohibition on Religious Ads is Viewpoint Discrimination

Northeastern Pennsylvania Freethought Society v. County of Lackawanna Transit System, No. 18-2743 (3d Cir. Sept. 17, 2019).

In a decision which sets up a circuit split potentially requiring resolution by the Supreme Court, the Third Circuit holds that a transit system's refusal to allow the word "atheist" on its buses is a form of viewpoint discrimination—in contrast to a recent DC Circuit case which found that a similar policy permissibly prohibited religion as a subject matter.

In 2012, Northeastern Pennsylvania Freethought Society ("Freethought")--an association of atheists, agnostics, secularists, and skeptics--applied to place an ad displaying the word "Atheists" and the group's name and website on public buses operated by the County of Lackawanna Transit System ("COLTS"). COLTS leased advertising space on the inside and outside of its buses, but declined to run the Freethought ad, relying on a policy it had adopted in 2011 that banned ads for tobacco products, alcohol, firearms, and political candidates. The policy also banned ads that in COLTS's "sole discretion" were "derogatory" to racial, religious, and other specified groups, and even those that were "objectionable, controversial[,] or would generally be offensive to COLTS'[s] ridership."

COLTS rejected the Freethought ad via a letter stating:

> COLTS does not accept advertisements that promote the belief that "there is no God" or advertisements that promote the belief that "there is a God" . . . . The existence or nonexistence of a supreme deity is a public issue. COLTS believes that your proposed advertisement may offend or alienate a segment of its ridership and thus negatively affect its revenue. COLTS does not wish to become embroiled in a debate over your group's viewpoints.

The 2011 COLTS policy was updated in a 2013 policy which still remains in effect. The 2013 policy continued to ban "disparaging" ads and ads for firearms, alcohol, and tobacco, and added new prohibitions on religious and political messages. The religion provision barred ads: "that promote the existence or non-existence of a supreme deity, deities, being or beings; that address, promote, criticize or attack a religion or religions, religious beliefs or lack of religious beliefs; that directly quote or cite scriptures, religious text or texts involving religious beliefs or lack of religious beliefs; or [that] are otherwise religious in nature." The politics provision barred partisan and electioneering ads, and ads that "involv[e] an issue reasonably deemed by COLTS to be political in nature in that it directly or indirectly implicates the action, inaction, prospective action, or policies of a governmental entity."

Freethought challenged COLTS's 2013 policy, seeking a declaratory judgment and a permanent injunction. The District Court ruled for COLTS, finding the 2013 policy to be viewpoint neutral, reasoning that the religious speech prohibition put the entire subject of religion out of bounds. It also deemed COLTS's ad space a limited public forum, grounding its conclusion in COLTS's statement of intent "not to become a public forum" and its "practice of permitting only limited access to the advertising spaces on its buses."

The district court found the 2013 restrictions to be reasonably related to the stated purpose of the ad space—to raise revenue by "maintaining or increasing COLTS'[s] ridership." The policy's restrictions were intended to "keep COLTS neutral on matters of public concern," and to preserve public safety: "Given the decrease in civil tolerance and the increase in social unrest and violence in today's society," controversial messages could "potentially lead to a dangerous situation for both passengers and drivers."

The Third Circuit reversed, looking to Supreme Court precedent: "Our task here is greatly simplified by a trilogy of Supreme Court decisions each addressing blanket bans on religious messages and each concluding that such bans constitute impermissible viewpoint discrimination. Those cases—*Rosenberger, Lamb's Chapel,* and *Good News Club*—govern this one."

In *Rosenberger*, the University of Virginia withheld subsidies from student groups whose activities "primarily promote[d] or manifest[ed] a particular belie[f] in or about a deity or an ultimate reality." The Court held the University had restricted viewpoint, not subject matter. "Religion may be a vast area of inquiry," the Court reasoned, "but it also provides, as it did here, a specific premise, a perspective, a standpoint from which a

variety of subjects may be discussed and considered." The policy was viewpoint based because it "select[ed] for disfavored treatment those student journalistic efforts with religious editorial viewpoints." Student news groups could write on racism, or stress, or pregnancy—but not if their faith informed the message.

In *Lamb's Chapel*, the Court invalidated a ban on the use of public-school property for "religious purposes" that had stymied a group's efforts to screen religious lectures on family issues and child rearing. It did not matter "[t]hat all religions and all uses for religious purposes are treated alike" because the lectures—though avowedly religious—discussed topics the policy otherwise permitted.

And in *Good News Club,* the Court held it was viewpoint discrimination to bar the use for religious purposes of a space otherwise available for "instruction in any branch of education, learning or the arts" and for "social, civic and recreational meetings and entertainment events, and other uses pertaining to the welfare of the community." The Good News Club, which wanted to offer after-school religious instruction, must have equal access to a forum that allowed others to speak on morals and character development. "If a forum is open to teaching morals through Aesop's Fables, it must be open to religious moral instruction too." In sum, "if government permits the discussion of a topic from a secular perspective, it may not shut out speech that discusses the same topic from a religious perspective."

Here, COLTS's policy allowed discussion of all topics not expressly prohibited--meaning that, while an issue of community concern could be addressed from a non-religious parameter, a religious entity could not comment on the same topic. Freethought could not post an ad that simply indicated to atheists "you are not alone, you have an organization," but secular entities would not be prohibited from sending the same message. In a similar vein, said the Circuit, a healthcare provider could tout its services on COLTS buses— so long as it didn't disclose that those services are (or once were) part of a religious tradition.

The Third Circuit explicitly rejected the recent decision of the D.C. Circuit in *Archdiocese of Washington v. Washington Metropolitan Area Transit Authority*, 897 F.3d 314 (D.C. Cir. 2018), petition for cert. filed, No. 18-1455 (May 20, 2019). The court there had upheld WMATA's ban on "[a]dvertisements that promote or oppose any religion, religious practice or belief" despite the rule announced in *Rosenberger, Lamb's Chapel,* and *Good News Club*. The D.C. Circuit, emphasizing the narrowness of the WMATA forum, held WMATA's policy permissibly excluded "religion as a subject matter."

The COLTS court's disagreement with *WMATA* decision started with the D.C. Circuit's choice to conduct a forum analysis before determining whether the policy discriminated on the basis of viewpoint. "That put the cart before the horse because the type of forum sheds no light on whether a policy or decision discriminates against a certain viewpoint. And viewpoint discrimination is impermissible in any forum."

As the Third Circuit sees it, religion is itself a viewpoint:

> Religion is not only a subject. It's a worldview through which believers see countless issues. It was so for our Nation's founders, whose moral thesis changed the world and conceived a new birth of freedom in the United States: "that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness." Is there room for our revolutionary creed on a COLTS bus? Apparently not. As COLTS's counsel admitted at oral argument, the word "Creator" would be a problem.

The COLTS approach would require officials to distinguish messages that are "about" religion from those that address a permitted topic from a religious perspective. Even if such a distinction was possible, the Third Circuit found that COLTS had not shown that shown that "extirpating religion from its forum was reasonable." Accordingly, the 2013 policy's ban on speech relating to religion discriminated on the basis of viewpoint, which was not permissible, however the forum was characterized. The Circuit reversed, instructing the district court to grant declaratory relief and issue an injunction barring enforcement of the 2013 policy's religious speech ban.

DISSENT: Circuit Judge Cowen dissented. He stated that COLTS policy "clearly implicates a subject matter prohibition" and that COLTS had satisfied its burden of showing that the policy was reasonable. The majority had incorrectly determined that Freethought's "Atheists" advertisement, although it related to the subject matter of religion, communicated a viewpoint on other subject matters permitted in the forum. And the trilogy of cases cited by the majority had properly singled out religious viewpoints that otherwise fell within prospectively defined, permissible subject matter. "Stated otherwise, those decisions involved rules that permitted private speakers to discuss categories A, B, and C, but when a speaker sought to discuss C from a pro-religious perspective, they were improperly prohibited from doing so."

But that was not the effect of WMATA's subject matter ban on advertisements that promote or oppose any religion, religious practice, or belief, and which prohibits any advertisement whatsoever on the subject of religious or antireligious advocacy, whether favoring or opposing religion in general, or any particular religion, belief, or practice. The same principles applied here:

> Applying the D.C. Circuit's approach, I see no meaningful difference between the advertisements and policies at issue in the WMATA proceeding and in this case. Accordingly, the District Court did not err by rejecting Freethought's claim of viewpoint discrimination.

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