

D.C. Circuit Holds That Transit Authority Is Permitted to Reject Religious Advertisements

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The U.S. Court of Appeals for the District of Columbia Circuit ruled earlier this week that the Washington Metropolitan Area Transit Authority (WMATA) did not violate the First Amendment when it refused to run an advertisement from the Archdiocese of Washington. The court's decision—in particular, the reasoning it employed—may have significant ramifications for how government entities can regulate speech on government property.

Under well-established First Amendment doctrine, the government has significantly greater latitude to regulate speech on government property than it does on non-governmental property. For years, however, the practice of WMATA was to be open to advertisements on virtually any subject matter, including ads comprising political or religious advocacy. As a result, its advertising space was held to constitute a “designated public forum,” which meant that any decision it made to reject any particular ad was subject to strict scrutiny.

In 2015, after years of fielding complaints about controversial ads it had displayed, including ads criticizing particular religions or religious doctrines, WMATA changed its policies, closing its advertising space to all “issue-oriented ads.” This was done in part so that its advertising space would be reclassified as a “non-public forum,” which would give it leeway to regulate what ads it accepted, provided that its regulations were “reasonable” and “viewpoint neutral.” To codify its new policy, WMATA adopted a set of “Guidelines Governing Commercial Advertising.” As relevant here, those guidelines prohibit “[a]dvertisements that promote or oppose any religion, religious practice, or belief.”

In November 2017, the Archdiocese, in connection with the upcoming Advent season, sought to place an ad on the exterior of Washington, D.C., buses called “Find the Perfect Gift,” which WMATA interpreted as encouraging people to join the Church. WMATA rejected the ad, and the Archdiocese brought suit, contending that WMATA had impermissibly targeted its speech based on its religious message. The Archdiocese sought, among other relief, a mandatory injunction requiring WMATA to run the ad. The district court denied the Archdiocese's motion for a preliminary injunction in December 2017, and the Archdiocese immediately appealed to the D.C. Circuit.

On July 31, 2018, the D.C. Circuit affirmed the denial of the Archdiocese's motion for a preliminary injunction on the ground that the Archdiocese had not shown that it was likely to prevail on the merits

of its challenge to WMATA's decision. The decision was authored by Judge Judith W. Rogers and joined by Judge Robert L. Wilkins, who also filed a separate concurring opinion. Judge Brett Kavanaugh, who was on the original panel, did not participate in the decision.

The court held, as a preliminary matter, that WMATA's new guidelines had converted its advertising space from a designated forum to a non-public forum. It then held that a categorical ban on all ads on religious subjects was "reasonable" in light of "the divisiveness caused by certain advertisements . . . and specifically the inflamed passions surrounding religion," and that the ban was "viewpoint neutral" because it "proscribed religion as a subject matter," rather than permitting WMATA to make case-by-case judgments about which ads dealing with religion were divisive. As the court explained, "Because [the guidelines] prohibit religious and anti-religious ads in clear, broad categories, bureaucrats are not called upon to decide whether the ad criticizing the Catholic Church's position on condom usage, or the anti-Islam Muhammad ad, or the Find a Perfect Gift campaign ad is the more 'offensive,' or otherwise censor religious messages."

There are two particularly noteworthy aspects of the court's decision. First, while the court expressed sympathy for WMATA's desire to enact advertising guidelines that would help it "maintain the attractiveness of its service to a multi-cultural, multi-ethnic, and religiously diverse ridership," it nonetheless made clear that the tools the government has to create such an environment are, by necessity, blunt instruments that do not permit nuanced judgments about the intent or effects of different kinds of speech. Specifically, the court explained that "the non-public forum doctrine" permits government regulation of speech only through "prospective and categorical . . . subject matter regulations," and that those regulations must "cabin its discretion to censor messages it finds more or less objectionable." That suggests, for instance, that the court would reject guidelines that simply prohibited "demeaning" or "offensive" ads, as that would permit too much case-by-case discretion.

Second, at the same time that the court was concerned about cabining official discretion, it did not insist that WMATA apply its guidelines in a purely mechanical fashion. In particular, the court rejected the Archdiocese's argument that WMATA discriminated against its viewpoint because it accepted advertisements from commercial entities that referenced Christmas. The court explained that WMATA was permitted to treat such ads differently because they did not express any view about how Christmas should be celebrated, even if they did reference the holiday in the context of promoting a particular sale or product. That indicates that, going forward, the court will tolerate some imprecision in line-drawing, and will permit government entities to make common-sense distinctions in applying subject-matter based restrictions on advertising.

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