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An Easy Sell: The Third Circuit Protects Religious Advertising in Colts v. Freethought

William Zachary Mineo

AN EASY SELL: THE THIRD CIRCUIT PROTECTS RELIGIOUS ADVERTISING IN *COLTS V. FREETHOUGHT*

WILLIAM ZACHARY MINEO

"Goebbels was in favor of freedom of speech for views he liked. . . . So was Stalin. If you're in favor of freedom of speech, that means you're in favor of freedom of speech precisely for views you despise, otherwise you're not in favor of freedom of speech."[1]

I. FORMING THE BIG IDEA: FREE SPEECH RIGHTS IN THE UNITED STATES

Americans generally esteem the "freedom of speech" that is secured in the First Amendment.[2] Nevertheless, one scholar has noted that societal attempts to silence unpopular views can call into question whether a society upholds, and not just esteems, the freedom of speech.[3] This concern becomes even more pressing when the government silences unpopular views to appease members of the public.[4]

There are three types of forums where speakers enjoy differing degrees of protection of free speech under the First Amendment.[5] First, public forums are government property where the public has customarily had the opportunity to express ideas freely, such as in a public park.[6] The Constitution generally bars the government from restricting free speech in public forums.[7] Second, designated public forums are government property where the public has not customarily expressed ideas but where the government has designated the property for free

1. Peter Wintonick, Manufacturing Consent: Noam Chomsky and the Media: The Companion Book to the Award-winning Film by Peter Wintonick and Mark Achbar 184 (Mark Achbar ed., 1994).

2. *See generally* Robert A. Sedler, *An Essay on Freedom of Speech: The United States Versus the Rest of the World*, 2006 MICH. ST. L. REV. 377, 378–79 (2006) (describing Americans' views on the First Amendment). The First Amendment applies to all "government entities." *See* Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 833 (1995).

3. *See* Wintonick, *supra* note 1, at 184 (asserting that free speech requires tolerance for opposing views).

4. *See* Ne. Pa. Freethought Soc'y v. COLTS, 938 F.3d 424, 428–30 (3d Cir. 2019) (describing a government-imposed restriction on speech out of concern for potential negative public reactions).

5. *See* Verlo v. Martinez, 820 F.3d 1113, 1129 (10th Cir. 2016) (citing Cornelius v. NAACP Legal Def. and Educ. Fund, Inc., 473 U.S. 788, 802 (1985)) (describing the "public forum," "designated public forum," and "nonpublic forum" frameworks).

6. *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983) (quoting Hague v. Comm. for Indus. Org., 307 U.S. 496, 515 (1939)) (noting that the right to free speech is greatest in public forums).

7. *See* Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez, 561 U.S. 661, 679 n.11 (2010) (quoting Pleasant Grove City v. Summum, 555 U.S. 460, 469 (2009)) (detailing the constitutional limits on government regulation of speech in public forums).

speech, such as in a university's free speech area.[8] The Constitution also generally bars restrictions on speech in designated public forums.[9] Third, nonpublic forums are government property where the public has not customarily expressed ideas and where the government has not designated the property for free speech, such as in a courthouse.[10] In nonpublic forums, the government may prohibit speech on one or more topics "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."[11]

When the government prohibits speech about a topic in a forum, the restriction is called a "subject matter prohibition."[12] For example, if a city government publishes its own newspaper, it could enact a subject matter prohibition on articles about politics in each edition.[13] The subjects that the city allows articles to be written about—perhaps the city school system, local businesses, or public health concerns—are called "permissible subjects."[14] Under the First Amendment, the city would not be allowed to prohibit any particular speaker from writing an article on a permissible subject based on the speaker's point of view.[15] Doing so would discriminate against the speaker in what is called "viewpoint discrimination."[16] In building off the previous example, if the city decided to begin accepting opinion pieces about politics but refused to run opinion pieces submitted by labor unions, the government would be committing unconstitutional viewpoint discrimination.[17]

In applying this case law, the Third Circuit recently ruled that the County of Lackawanna Transit System's ("COLTS") refusal to run an advertisement for a local religious organization was unconstitutional in *Northeastern Pennsylvania Freethought*

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8. *See id.* (quoting *Pleasant Grove City*, 555 U.S. at 469–70) (describing how the government establishes designated public forums); *see also* Bloedorn v. Grube, 631 F.3d 1218, 1234 (11th Cir. 2011) (concluding that a public university's free speech area was a designated public forum).

9. *See Martinez*, 561 U.S. at 679 n.11 (quoting *Pleasant Grove City*, 555 U.S. at 469–70) (detailing the constitutional limits on government regulation of speech in designated public forums).

10. *See Perry*, 460 U.S. at 46 (describing nonpublic forums); see also Huminski v. Corsones, 396 F.3d 53, 90 (2d Cir. 2005) (holding that a courthouse was a nonpublic forum).

11. Minn. Voters All. v. Mansky, 138 S. Ct. 1876, 1885 (2018) (internal quotation marks omitted) (quoting *Perry*, 460 U.S. at 46) (detailing the constitutional limits on government regulation of speech in nonpublic forums); see also Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 829 (1995) (noting that the government has the right to "preserve . . . [its] forum[s]") (alteration in original).

12. *See* Cornelius v. NAACP Legal Def. and Educ. Fund, Inc., 473 U.S. 788, 806 (1985) (citing *Perry*, 460 U.S. at 49) (discussing the constitutionality of subject matter prohibitions); Ne. Pa. Freethought Soc'y v. COLTS, 938 F.3d 424, 442 (3d Cir. 2019) (Cowen, J., dissenting) (referring to a government prohibition on religion as a "subject-matter prohibition"); R. George Wright, *Managing the Distinction Between Government Speech and Private Party Speech*, 34 QUINNIPIAC L. REV. 347, 365 (2016) (exploring how a "subject matter prohibition" can affect expressing viewpoints).

13. For a discussion of subject matter prohibitions, see *infra* Section II.B.

14. *See* Good News Club v. Milford Cent. Sch., 533 U.S. 98, 112 (2001) (noting that viewpoints can be expressed on permissible subjects in a forum).

15. *See id.* at 106–07 (citing *Rosenberger*, 515 U.S. at 829) (noting that the government cannot discriminate against anyone's point of view when restricting speech).

16. *See id.* at 107 (describing government viewpoint discrimination). The Supreme Court has also referred to policies that "constitute[] unconstitutional viewpoint discrimination" as being "viewpoint discriminatory." *See id.* at 107, 110.

17. For a discussion of viewpoint discrimination, see *infra* Section II.A.

Society v. COLTS.[18] The religious organization's advertisement contained the header "Atheists" and a web address to the organization's website.[19] Because several out-of-state businesses encountered boycotts and violence after running religious advertisements, COLTS refused the religious organization's request to display the advertisement.[20] The Third Circuit held that the refusal constituted viewpoint discrimination because COLTS allowed secular organizations to advertise about their presence in the area while refusing the same opportunity to religious organizations.[21] In addition, the Third Circuit held that the government cannot prohibit speech on religion, reasoning that all subject matter prohibitions on religion are unconstitutional based on the Supreme Court's ruling in *Good News Club v. Milford Central School*.[22] The Third Circuit concluded by holding that even if COLTS's policy did not constitute viewpoint discrimination, the policy was an unreasonable restriction in a nonpublic forum because COLTS ran religious advertisements in the past without encountering any negative public reactions.[23]

This Note argues that the Third Circuit correctly held that COLTS's policy constituted viewpoint discrimination and was unreasonable.[24] In addition, this Note argues that the Supreme Court has not held that subject matter prohibitions on religion are per se unconstitutional, unlike the Third Circuit, which found that the Supreme Court ruled all subject matter prohibitions on religion unconstitutional in Good News Club.[25] Nevertheless, the Third Circuit's ultimate ruling in favor of the religious organization was correct because the policy's viewpoint discrimination alone made the policy unconstitutional.[26] Moreover, public policy considerations further support the validity of the Third Circuit's ruling.[27]

Part II of this Note explores the Supreme Court cases that set the stage for the Third Circuit's analysis in *Freethought*. Part III recounts the history of COLTS's advertising policy and the facts that led to this case. Part IV discusses the Third Circuit's three holdings, while Part V argues for one alternative holding and expands

18. *See* 938 F.3d 424, 428–31, 442 (3d Cir. 2019) (finding the government's policy violated the First Amendment).

19. *See id.* at 429 (describing the religious organization's advertisement).

20. *See id.* at 429–30 (noting the reasoning behind COLTS's rejection of religious advertisements).

21. *See id.* at 434–35 (finding viewpoint discrimination because COLTS restricted the speech of religious organizations on a permissible subject).

22. *See id.* at 433 (asserting that the Supreme Court already ruled that subject matter prohibitions on religion are per se unconstitutional).

23. *See id.* at 429, 439 (detailing the lack of complaints from religious advertisements that COLTS ran). The court refrained from determining what forum COLTS's buses were because COLTS's policy was unconstitutional under the nonpublic forum framework, the least demanding of the forum analyses. *See id.* at 437 n.2.

24. For a complete argument on the Third Circuit's holding on COLTS's viewpoint discrimination and unreasonableness, see *infra* Sections V.A.1 and V.A.3.

25. *See Freethought*, 938 F.3d at 443 (Cowen, J., dissenting) (arguing that Supreme Court has not ruled all subject matter prohibitions on religion unconstitutional). For a complete argument on the Third Circuit's holding on the constitutionality of a subject matter prohibition on religion, see *infra* Section V.A.2.

26. *See* Good News Club v. Milford Cent. Sch., 533 U.S. 98, 107 (2001) (noting that all viewpoint discriminatory government policies are unconstitutional).

27. For a discussion of the public policy considerations of the Third Circuit's ruling, see *infra* Section V.B.

on the reasoning for the remaining two holdings. Lastly, Part VI details the practical and legal consequences of the Third Circuit's ruling in *Freethought*.

II. PERFORMING MARKET RESEARCH: FIRST AMENDMENT CASE LAW

The Third Circuit based its holdings off a number of cases that are instrumental to understanding the First Amendment.[28] This case law includes three Supreme Court cases about religious viewpoint discrimination and several Supreme Court cases about subject matter prohibitions in nonpublic forums.[29]

A. *Case Law Concerning Religious Viewpoint Discrimination*

The Supreme Court first invalidated a policy discriminating against religious viewpoints in *Lamb's Chapel v. Center Moriches Union Free School District*.[30] In this case, a New York public school allowed organizations holding public meetings on subjects relating to the community's well-being to use school space after school hours.[31] However, the board refused one religious organization the opportunity to teach about parenting because the organization planned to show films that recommended making use of religion to raise children.[32]

The Court recognized that the First Amendment prohibits the government from silencing viewpoints on permissible subjects and that parenting was a permissible subject under the board's policy.[33] Consequently, the Court held that the board's policy discriminated against religious viewpoints because only nonreligious speech could be offered on parenting, a permissible subject in the forum.[34] Moreover, the Court held that it made no difference that all religions were equally prohibited from using school space because the policy still gave favor to nonreligious viewpoints over religious viewpoints.[35]

Two years later, the Supreme Court invalidated a second discriminatory policy in *Rosenberger v. Rector and Visitors of University of Virginia*.[36] The University of Virginia provided funding to student journalism organizations that covered topics applicable to the student body, but the university denied funding for student organizations that were engaged in "religious activities."[37] In particular, the university refused to fund

28. For a discussion of the Third Circuit's ruling, see *infra* Section IV.A.

29. For a discussion of the three Supreme Court cases about religious viewpoint discrimination, see *infra* Section II.A. For a discussion of the Supreme Court cases about subject matter prohibitions in nonpublic forums, see *infra* Section II.B.

30. 508 U.S. 384, 386–87, 393–94 (1993) (finding the policy to be viewpoint discriminatory).

31. *See id.* at 387 (describing the school board's policy).

32. See id. at 387–89 (recognizing that the religious organization planned to show religious films at its meetings).

33. *See id.* at 393–94 (quoting Cornelius v. NAACP Legal Def. and Educ. Fund, Inc., 473 U.S. 788, 806 (1985)) (detailing the unconstitutionality of viewpoint discrimination).

34. *See id.* (finding the school board's policy was unconstitutionally viewpoint discriminatory).

35. *See id.* at 393 (rejecting the appellate court's position that the policy was "viewpoint neutral").

36. 515 U.S. 819, 824–26, 831 (1995) (holding that the policy constituted religious viewpoint discrimination).

37. *See id.* at 824–26, 842 (detailing the public university's policy).

the printing costs of one organization's religious newspaper that covered a variety of topics, including philosophy, music, anxiety, and societal issues.[38] The Court recognized that the student organization covered topics that were permissible subjects under the university's policy.[39] In holding the policy unconstitutional, the Court noted that "*the University does not exclude religion as a subject matter* [for the journal to publish articles about] but selects for disfavored treatment those student journalistic efforts with religious editorial viewpoints."[40]

At the turn of the millennium, the Supreme Court expressed its distaste for religious viewpoint discrimination for a third time in *Good News Club*.[41] A public school board permitted organizations to use its school space for instruction on youth development, but the board refused a religious youth organization the opportunity to use its space for this purpose.[42] The board believed that the organization's desire to read the Bible, sing, and pray constituted a religious service.[43]

The Court began its analysis by recognizing that the religious organization's methodology for teaching youth development was "quintessentially religious."[44] The Court observed that this methodology could also express a viewpoint on youth development and achieve the developmental goals that the policy allowed.[45] The Court further reasoned that it made no difference if the methodology constituted a religious service or even communicated a religious message because the methodology still expressed a viewpoint on youth development.[46] Consequently, the Court found that the policy discriminated against religious viewpoints and was unconstitutional.[47]

B. *Case Law Concerning Subject Matter Prohibitions in Nonpublic Forums*

A series of Supreme Court cases established the case law on subject matter prohibitions in nonpublic forums, beginning with *Cohen v. California*.[48] In Cohen, the Court held that it was unconstitutional for the government to silence a person's

38. *See id.* at 826–27 (describing the religious newspaper and the university's refusal to pay for the newspaper's printing costs).

39. *See id.* at 831 (observing that the university's policy provided reimbursement for journalism on subjects that the student organization's newspaper covered).

40. *Id.* (emphasis added) (holding that the university's policy constituted viewpoint discrimination).

41. 533 U.S. 98, 102–03, 120 (2001) (holding the government's discriminatory policy unconstitutional).

42. *See id.* at 102–03, 108 (analyzing the school board's application of its policy).

43. *See id.* at 103 (discussing the reasoning behind the school board's denial of the religious organization's request to use school space).

44. *See id.* at 111 (quoting Good News Club v. Milford Cent. Sch., 202 F.3d 502, 510 (2d Cir. 2000)) (stating the appellate holding).

45. *See id.* (quoting *Good News Club*, 202 F.3d at 512 (Jacobs, J., dissenting)) (noting that religious viewpoints can speak to secular subject matters).

46. *See id.* at 112 n.4 ("[T]he [religious organization's] activities do not constitute mere religious worship, divorced from any teaching of moral values. . . . And we see no reason to treat the [organization's] use of religion as something other than a viewpoint merely because of any evangelical message it conveys.").

47. *See id.* at 112 (striking down the policy).

48. *See* 403 U.S. 15, 16, 26 (1971) (holding that the defendant's conviction for wearing a jacket sporting an inflammatory message while inside of a courthouse was unconstitutional).

speech based on an unsubstantiated "fear or apprehension of disturbance" that the speech could cause in the forum.[49] Several years later in *Perry Education Association v. Perry Local Educators' Association*,[50] the Court held that a town could constitutionally prohibit a competing teachers' union from using the town's interschool mail system where the mail system was meant for the teachers' official union and a history of hostility existed between the two unions.[51]

The Court upheld a similar restriction in *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*,[52] where a federal commission solicited funds from federal employees for various charities, but the commission refused to solicit donations for lobbyist organizations.[53] The Court stated that while a government restriction on speech must be reasonable, the restriction "need not be the most reasonable or the only reasonable limitation."[54] In view of this standard, the Court concluded that the restriction on speech was reasonable because revenues decreased and employees complained when the commission allowed the lobbyist organizations to participate in a prior year drive.[55] In addition, the Court recognized that the commission's exclusion of these organizations would prevent disturbances among employees, and "the Government need not wait until havoc is wreaked to restrict access to a nonpublic forum."[56]

Notably, the Supreme Court ruled against a religious organization in *International Society for Krishna Consciousness, Inc. v. Lee*,[57] where several public airports prohibited people from asking for money or handing out written materials in their terminals.[58] The members of a religious organization desired to undertake these activities, but the Court ruled that this restriction on speech was reasonable because the restriction prevented the forum's slow flow of traveler movement from becoming even slower.[59] For similar reasoning, the Court upheld a restriction on political speech in *Arkansas Educational Television Commission v. Forbes*,[60] where a public broadcasting organization prohibited a lesser known candidate from participating in a televised debate because accommodating anyone interested in public access would inhibit the

49. *Id.* at 22–23 (quoting Tinker v. Des Moines Indep. Cty. Sch. Dist., 393 U.S. 503, 508 (1969)) (noting the government's unfounded concern over the defendant's inflammatory message).

50. 460 U.S. 37 (1983).

51. *See id.* at 39–40, 50–53 (observing that the competing union lost a referendum it initiated to supplant the official union, that the speech restriction would assist the official union in its duties, and that the restriction would "insur[e] labor-peace within the schools").

52. 473 U.S. 788 (1985).

53. *See id.* at 790–93 (upholding the policy prohibiting lobbyists from soliciting funds from federal employees).

54. *Id.* at 808 (explaining the constitutionality of speech prohibitions in nonpublic forums).

55. *See id.* at 810 (observing the employee complaints and the decrease in donors when lobbyist organizations were allowed to participate).

56. *Id.* (citing Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 52 n.12 (1983)) (holding that the government can be proactive in restricting speech).

57. *See* 505 U.S. 672 (1992).

58. *See id.* at 675–76, 685 (quoting Int'l Soc. for Krishna Consciousness, Inc. v. Lee, 925 F.2d 576, 578–79 (2d Cir. 1991)) (detailing and upholding the airports' restriction on speech).

59. *See id.* at 685 (quoting *Krishna Consciousness*, 925 F.2d at 582) (noting that the forum's slow flow of travelers was a significant issue for the forum).

60. *See* 523 U.S. 666 (1998).

forum from functioning effectively.[61] Conversely, the Supreme Court struck down a restriction on political speech in *Minnesota Voters Alliance v. Mansky*,[62] where Minnesota prohibited its residents from wearing apparel containing political messages when voting.[63] In striking down the law, the Court reasoned that the statute did not adequately define what would constitute a political message, potentially causing the enforcers of the statute to administer the law unevenly based on their personal knowledge and beliefs.[64]

III. PREPPING THE VISION BOARD: HISTORY BETWEEN COLTS AND FREETHOUGHT

COLTS is a public busing company that runs buses in Lackawanna County, Pennsylvania.[65] Federal, state, and county governmental authorities provide COLTS with most of its funding because COLTS's revenue from bus fares "is negligible."[66] COLTS also earns less than two percent of its revenue from the advertisements it runs on the interior and exterior of its buses.[67] In 2011, COLTS implemented a policy to reject provocative advertisements that could lead to the "threats, boycotts, and vandalism" that five out-of-state businesses encountered after running divisive advertisements.[68] In 2012, the Northeastern Pennsylvania Freethought Society ("Freethought"), a religious organization, asked COLTS to run an advertisement that contained the header "Atheists" and a web address to Freethought's website.[69] Freethought hoped the advertisement would notify atheists of Freethought's presence in the area and also help non-atheists learn about the organization.[70] COLTS denied the advertisement under its 2011 policy, believing that Freethought intended the advertisement to "spark a debate on [the] buses."[71] Freethought submitted a second request to run a substantially similar advertisement, but COLTS again denied the request under its 2011 policy stating that the advertisement promulgated religious beliefs that could bother its riders.[72]

Following Freethought's second request, COLTS revised its policy in 2013 to stipulate that it would reject all advertisements that are "religious in nature" or that "promote the existence or non-existence of a supreme deity" to maintain peace on

61. *See id.* at 669–73, 682–83 (describing and upholding the restriction on speech).
62. 138 S. Ct. 1876 (2018).
63. *See id.* at 1882, 1892 (describing Minnesota's statute concerning voting at polling places).
64. *See id.* at 1888, 1890–91 (holding the ambiguous statute unconstitutional).
65. *See* Ne. Pa. Freethought Soc'y v. COLTS, 938 F.3d 424, 428 (3d Cir. 2019) (detailing COLTS's functions).
66. *Id.* at 428 (noting that government authorities provide COLTS with most of its funding).
67. *Id.* (detailing COLTS's advertising revenue).
68. *Id.* at 429, 439 (recounting the history of COLTS's advertising policy and noting that these businesses were not located in Pennsylvania).
69. *See id.* at 429 ("The proposed ad simply read 'Atheists,' and included Freethought's web address, superimposed on a blue sky with clouds.").
70. *See id.* (recognizing that Freethought desired to alert locals to Freethought's vicinity).
71. *Id.* (observing that COLTS was suspicious of Freethought's motives).
72. *See id.* (noting that COLTS denied Freethought's second advertisement because it could disturb riders and reduce ridership revenue).

its buses.[73] Importantly, Freethought's atheistic beliefs qualify as religious under the First Amendment and hence under COLTS's policy.[74] COLTS stated that it enacted the 2013 policy to help preserve or even increase its number of riders while also earning revenue.[75] In turn, COLTS denied Freethought's third request to have the "Atheists" advertisement run under the 2013 policy, reasoning that "the 'existence or non-existence of a supreme deity is a public issue'" and that the advertisement could threaten the peaceful environment inside the buses.[76]

COLTS eventually agreed to run Freethought's fourth request that replaced "Atheists" with "Freethought."[77] Despite this substitution, Freethought still desired to include "Atheists" as the header in its advertisement and sued COLTS to obtain an injunction to allow the advertisement to run as originally designed.[78] The United States District Court for the Middle District of Pennsylvania held for COLTS by denying the injunction, and Freethought subsequently appealed the decision to the Third Circuit.[79]

IV. MAKING THE PITCH: THE THIRD CIRCUIT'S HOLDINGS

The Third Circuit judges split into majority and dissenting opinions in issuing the ruling.[80] The majority believed that COLTS's policy discriminated against religious viewpoints while the dissent argued that the policy was instead a reasonable subject matter prohibition on religion that did not discriminate against religious viewpoints.[81]

A. *The Majority Opinion*

The Third Circuit began its viewpoint discrimination analysis by recognizing that secular organizations could advertise through COLTS to notify the public of their presence in the area, but COLTS refused the same opportunities to religious organizations because of the religious nature of their advertisements.[82] The court further reasoned that any connection between Freethought's original advertisement and religion was incidental to the subject matter of Freethought's speech: "organizational existence, identity, and outreach."[83] Because COLTS only permitted

73. *Id.* at 430 (detailing the 2013 policy).

74. *See* Kaufman v. McCaughtry, 419 F.3d 678, 682 (7th Cir. 2005) (concluding atheism is a religion under the First Amendment).

75. *See Freethought*, 938 F.3d at 430 (exploring COLTS's purpose behind its policy).

76. *Id.* (detailing COLTS's denial of Freethought's third advertisement).

77. *See id.* (recognizing that COLTS accepted a secularized version of Freethought's advertisement).

78. *See id.* (discussing Freethought's legal action).

79. *See id.* at 431 (quoting Ne. Pa. Freethought Soc'y v. COLTS, 327 F. Supp. 3d 767, 779–80 (M.D. Pa. 2018)) (detailing the district court's holding on COLTS's policy and the subsequent appeal).

80. *See id.* at 453 (Cowen, J., dissenting).

81. *See id.* at 435 (majority opinion) (holding that COLTS's policy was unconstitutional); *id.* at 447, 450, 453 (Cowen, J., dissenting) (arguing that COLTS's policy was constitutional).

82. *See id.* at 434 (majority opinion) (analyzing COLTS's administration of its policy).

83. *Id.* at 435 ("It's true that Freethought's 'Atheists' ad relates to the 'subject' of religion writ large. But at its core, its message is one of organizational existence, identity, and outreach.").

secular organizations to speak about organizational existence, the court held that COLTS's 2013 policy constituted viewpoint discrimination.[84]

The Third Circuit also explored the constitutionality of a prohibition on religion as a subject matter, recounting how the Supreme Court in *Rosenberger* recognized that the university did not "exclude religion as a subject matter."[85] The court noted that this language might be read to imply that a subject matter prohibition on religion can be constitutional if there is no accompanying viewpoint discrimination.[86] However, the court asserted that the Supreme Court disavowed the possibility of a constitutional subject matter prohibition on religion in *Good News Club* where the Court held that the government could not prohibit the "'quintessentially religious' activities" at issue.[87]

Although the Third Circuit held that COLTS's policy constituted viewpoint discrimination, the court proceeded to analyze the reasonableness of the policy if in fact the policy did not discriminate against viewpoints.[88] The court began by noting that COLTS's policy does not accord with the First Amendment's aim of protecting unpopular viewpoints.[89] To the contrary, the court recognized that COLTS's policy incentivizes people to react disruptively to opposing viewpoints so that the government will silence the speech they find disagreeable as part of the government's efforts to preserve the forum.[90]

The court also observed that COLTS ran religious advertisements in the past without any negative public reaction.[91] In fact, the court noted that the only complaint COLTS received relating to its advertising stemmed from its denial of Freethought's advertisements.[92] When analyzing how the policy is administered, the court noted that COLTS employees draw on personal knowledge when determining what advertisements violate the policy, much like the enforcers of the political apparel policy in *Minnesota Voters Alliance*.[93] The court expressed concern that these employees could disproportionately apply the policy to major religions because

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84. *See id.* (holding COLTS's policy unconstitutional because the policy banned religious speech on a permissible subject).

85. *Id.* at 433 (detailing the Supreme Court's reasoning in *Rosenberger*).

86. *See id.* (recognizing that *Rosenberger* may have implied the possibility of a constitutional subject matter prohibition on religion).

87. *See id.* (quoting Good News Club v. Milford Cent. Sch., 533 U.S. 98, 103, 111 (2001)) (reasoning that *Good News Club* clarified the Court's holding in *Rosenberger*).

88. *See id.* at 437–38 (beginning the analysis to determine whether COLTS's policy was reasonable).

89. *See id.* at 438 (first quoting Bd. of Regents of Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 235 (2000); then quoting Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 118 (1991); and then quoting Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)) (discussing the purpose of the First Amendment).

90. *See id.* (citing Seattle Mideast Awareness Campaign v. King Cty., 781 F.3d 489, 504 (9th Cir. 2015) (Christen, J., dissenting)) (reasoning that people may be inclined to cause disturbances if it causes the government to silence disagreeable speech to maintain peace in the forum).

91. *See id.* at 429, 439 ("COLTS had routinely run religious ads in the past with no problem.").

92. *See id.* at 439 (observing the court record was bereft of complaints regarding COLTS's advertisements).

93. *See id.* at 440 (quoting Minn. Voters All. v. Mansky, 138 S. Ct. 1876, 1890 (2018)) (identifying the ambiguity in COLTS's policy).

major religions are more recognizable than lesser-known religions.[94] In finding the policy unreasonable, the court held for Freethought and ordered the district court to issue an injunction against COLTS.[95]

B. *The Dissenting Opinion*

Despite the majority's in-depth analysis, the dissent opposed the majority on all three of its holdings.[96] First, the dissent disagreed with the majority's interpretation of *Good News Club*, arguing that the Supreme Court did not take away the government's right to prohibit religion as a subject matter.[97] Rather, the dissent asserted that *Good News Club* holds that quintessentially religious activities can also communicate a viewpoint.[98] Additionally, the dissent recognized that *Good News Club* made no determination on the constitutionality of a prohibition on religious activities that do not "primarily" speak to a permissible subject.[99] Next, the dissent argued that COLTS constitutionally prohibited speech concerning "religion—the existence or non-existence of a deity."[100] The dissent concluded by arguing that COLTS's policy was reasonable because it would help to prevent the same problems encountered by other businesses that ran religious advertisements.[101]

V. GETTING CONSTRUCTIVE FEEDBACK: ANALYSIS OF THE THIRD CIRCUIT'S HOLDINGS

The Third Circuit correctly held that COLTS's policy constituted viewpoint discrimination because the policy allowed secular organizations to advertise about their presence while depriving religious organizations of this same opportunity.[102] Additionally, the Third Circuit correctly found that COLTS's policy was unreasonable because of the low likelihood that COLTS would experience the boycotts or violence that the five out-of-state businesses encountered.[103] Although the Third Circuit's holding on the unconstitutionality of subject matter prohibitions on religion was not critical to its ruling, the Supreme Court's holding in *Good News Club* was actually only limited to holding that subject matter prohibitions on religious

94. *See id.* at 441 (reasoning that COLTS's policy may disadvantage major religions).

95. *See id.* at 442 (concluding in Freethought's favor).

96. *See id.* at 443, 450, 453 (Cowen, J., dissenting) (arguing for alternative holdings).

97. *See id.* at 443 (arguing that *Good News Club* preserved the government's right to prohibit religion as a subject matter).

98. *See id.* (quoting Good News Club v. Milford Cent. Sch., 533 U.S. 98, 111 (2001)) (reasoning that the Supreme Court's holding in *Good News Club* was limited).

99. *See id.* (quoting Archdiocese of Wash. v. WMATA, 897 F.3d 314, 329 (D.C. Cir. 2018), *cert. denied*, 140 S. Ct. 1198 (2020)) (describing a question left open following *Good News Club*).

100. *See id.* at 450 (distinguishing COLTS's policy from viewpoint discrimination because COLTS prevented Freethought from speaking about a prohibited subject).

101. *See id.* at 453 (reasoning that COLTS's policy would help preserve the forum).

102. *See id.* at 434 (majority opinion) (identifying viewpoint discrimination in COLTS's policy).

103. *See id.* at 429, 439 (observing that COLTS received no complaints about the religious advertisements it ran before implementing its 2013 policy)

activities that *also* express a viewpoint on permissible subjects are unconstitutional.[104] Nevertheless, the Third Circuit's ruling in favor of Freethought was valid because all viewpoint discriminatory government policies are unconstitutional.[105] Additional public policy considerations further demonstrate the soundness—and importance—of the Third Circuit's ruling.[106]

A. *The Third Circuit's Holdings*

The Third Circuit could have strengthened its opinion in three ways. First, the court could have recognized that under *Good News Club*, the government cannot silence speech that speaks to both a permissible subject and religion.[107] Second, instead of concluding that subject matter prohibitions on religion are per se unconstitutional based on *Good News Club*, the court could have more closely scrutinized *Good News Club* to realize that the Supreme Court issued a more limited holding.[108] Lastly, the court could have further compared and contrasted COLTS's policy to nonpublic forum precedent to help establish the unreasonableness of the policy.[109]

1. *Viewpoint Discrimination of COLTS's Policy*

In determining whether COLTS's policy constituted viewpoint discrimination, the dissent identified the subject to which Freethought desired to speak as "religion—the existence or non-existence of a deity."[110] On the other hand, the majority considered the subject to be "organizational existence, identity, and outreach."[111]

Ultimately, both the majority and the dissent correctly identified subjects that Freethought's advertisement addressed. The advertisement's header of "Atheists" would surely alert readers to Freethought's organizational existence, identity, and outreach while also conveying Freethought's viewpoint on religion, *i.e.* the non-existence of a deity.[112] Nonetheless, organizational existence is a permissible subject under COLTS's policy, and the Supreme Court's holding in *Good News Club* makes

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104. *See id.* at 443 (Cowen, J., dissenting) (quoting *WMATA*, 897 F.3d at 329) (asserting that *Good News Club* had no holding on the constitutionality of prohibiting religious activities that do not primarily speak to a permissible subject).

105. *See* Good News Club v. Milford Cent. Sch., 533 U.S. 98, 107 (2001) (noting that viewpoint discrimination alone makes government policies unconstitutional).

106. For a further discussion of the public policy considerations regarding the Third Circuit's ruling, see *infra* Section V.B.

107. For a complete argument on the Third Circuit's holding on COLTS's viewpoint discrimination, see *infra* Section V.A.1.

108. For a complete argument on the Third Circuit's holding on the constitutionality of subject matter prohibitions on religion, see *infra* Section V.A.2.

109. For a complete argument on the Third Circuit's holding on the unreasonableness of COLTS's policy, see *infra* Section V.A.3.

110. Ne. Pa. Freethought Soc'y v. COLTS, 938 F.3d 424, 450 (3d Cir. 2019) (Cowen, J., dissenting) (describing the subject to which Freethought aimed to advertise).

111. *Id.* at 435 (majority opinion) (same).

112. *See Freethought*, 938 F.3d at 435 (reasoning that Freethought's advertisement spoke to its organizational existence while also touching on religion).

it clear that the government cannot prohibit a viewpoint on a permissible subject simply because the viewpoint also communicates a religious message.[113] Therefore, COLTS's rejection of Freethought's advertisement was unconstitutional viewpoint discrimination because the advertisement spoke to the permissible subject of organizational existence while also communicating a religious message.[114]

2. *Prohibiting Religion as a Subject Matter*

In *Good News Club*, the Supreme Court's holding was more limited than finding that all subject matter prohibitions on religion are unconstitutional.[115] The Court recognized that the religious organization's "'quintessentially religious' activities" expressed a viewpoint on youth development, a permissible subject.[116] Because these activities expressed a viewpoint on a permissible subject, the Court reasoned that the government could not prohibit these activities even if they also communicated a religious message.[117]

The *Freethought* dissent recognized this and asserted that *Good News Club* did not touch on the constitutionality of prohibiting religious activities when the activities do not "primarily" speak to a permissible subject.[118] This leaves open the possibility that the government can enforce a prohibition on religion when religious activities are not employed to primarily speak to a permissible subject.[119] However, the Supreme Court did not determine that the religious organization's activities in *Good News Club* primarily spoke to youth development.[120] Rather, the religious organization's quintessentially religious activities "recognizably" spoke to youth development, allowing the Supreme Court to recognize that the organization was expressing a viewpoint on a permissible subject.[121] Therefore, *Good News Club* is

113. *See* Good News Club v. Milford Cent. Sch., 533 U.S. 98, 112 n.4 (2001) (reasoning that it made no difference if the religious organization's methodology communicated a religious message because the methodology still expressed a viewpoint on a permissible subject).

114. *See Freethought*, 938 F.3d at 435 (holding that COLTS's policy constituted viewpoint discrimination).

115. *See id.* at 443 (Cowen, J., dissenting) (arguing that some subject matter prohibitions on religion may be constitutional following *Good News Club*).

116. *See id.* at 433 (majority opinion) (quoting *Good News Club*, 533 U.S. at 103, 111) (describing the holding in *Good News Club*).

117. *See Good News Club*, 533 U.S. at 112 n.4 ("[W]e see no reason to treat the [religious organization's] use of religion as something other than a viewpoint merely because of any evangelical message it conveys.").

118. *See Freethought*, 938 F.3d at 443 (Cowen, J., dissenting) (quoting Archdiocese of Wash. v. WMATA, 897 F.3d 314, 329 (D.C. Cir. 2018), *cert. denied*, 140 S. Ct. 1198 (2020)) (asserting that *Good News Club* focused on the constitutionality of prohibiting religious activities that primarily speak to a permissible subject).

119. *See id.* at 444 (arguing that the majority should have construed the holding in *Good News Club* more narrowly).

120. *See id.* at 437 (majority opinion) (quoting *Good News Club*, 533 U.S. at 111) (disagreeing with the D.C. Circuit that speech must primarily relate to a permissible subject following *Good News Club*); *see generally Good News Club*, 533 U.S. at 107–13 (holding that the religious organization spoke to a permissible subject but not stipulating that its speech *primarily* spoke to a permissible subject).

121. *See Freethought*, 938 F.3d at 437 (quoting *Good News Club*, 533 U.S. at 111) (recognizing that the speech in *Good News Club* was "quintessentially religious" but still spoke to the forum's permissible subject of youth development); *WMATA*, 897 F.3d at 329 (asserting that speech must "primarily or recognizably" relate to a permissible subject to be protected as a viewpoint).

limited to holding that the government can enforce a prohibition on religion as a subject matter as long as religious activities are not employed to recognizably speak to the forum's permissible subjects.

3. *Unreasonableness of COLTS's Policy*

If in fact COLTS's policy did not constitute viewpoint discrimination, the policy would still need to be reasonable for it to be constitutional.[122] The Third Circuit could have strengthened its holding on the unreasonableness of the policy by considering the practical, peace driven, and financial considerations in nonpublic forum precedent. From a practical perspective, nonpublic forum precedent lends no support to the reasonableness of COLTS's policy. Unlike the speech restriction in *Krishna Consciousness* which addressed a significant, physical problem for the forum's efficiency, COLTS's policy was not meant to alleviate any existing physical problem on its buses.[123] Moreover, unlike the speech restriction in *Forbes* that limited the number of candidates in a debate, COLTS did not implement its policy because it had too many advertising requests.[124]

Nonpublic forum case law also demonstrates the unreasonableness of COLTS's effort to maintain peace on its buses.[125] *Cohen*, *Perry*, and *Cornelius* illustrate that the government can restrict speech when it is reasonable to expect speech will cause general hostility that inhibits the forum from functioning.[126] Unlike the history of hostility that preceded the policies in *Perry* and *Cornelius*, there was a lack of violence, complaints, or other hostility that resulted from COLTS's advertisements before its policy took effect.[127] Rather, COLTS's policy is similar to the unconstitutional restriction on speech in *Cohen* that silenced viewpoints out of an unsubstantiated fear of disturbance.[128] COLTS pointed to threats and boycotts that were encountered by five out-of-state businesses, but COLTS offered no basis as to why it too would encounter these isolated reactions or disturbances.[129] Therefore,

122. *See* Cornelius v. NAACP Legal Def. and Educ. Fund, Inc., 473 U.S. 788, 806 (1985) (citing Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 49 (1983)) (detailing the constitutionality of subject matter prohibitions).

123. *See Freethought*, 938 F.3d at 440 (first citing Int'l Soc. for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 689 (1992) (O'Connor, J., concurring); and then citing Erznoznik v. City of Jacksonville, 422 U.S. 205, 209 n.5 (1975)) (noting that COLTS's advertisements were not physically intrusive).

124. *See* Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 669–673, 683 (1998) (recognizing that the speech restriction was necessary to preserve the forum).

125. For a discussion of COLTS's effort to maintain peace in the forum, see *infra* notes 126–30 and accompanying text.

126. For a discussion of the holdings in *Cohen*, *Perry*, and *Cornelius*, see *supra* notes 49–56 and accompanying text.

127. *See Freethought*, 938 F.3d at 429, 439 (noting there was no history of conflict on COLTS's buses despite a history of running religious advertisements).

128. *See* Cohen v. California, 403 U.S. 15, 22–23 (1971) (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508 (1969)) (holding that an unsubstantiated "fear or apprehension of disturbance" is not a reasonable basis to restrict speech).

129. *See Freethought*, 938 F.3d at 429–30 (noting that COLTS restricted speech after learning of the disturbances that other businesses encountered).

COLTS's unsubstantiated fear of disturbance was insufficient reasoning for it to restrict speech.[130]

The financial considerations from nonpublic forum case law demonstrate additional unreasonableness in COLTS's policy.[131] In *Cornelius*, the government's restriction on lobbyist speech was reasonable because donations represented the entirety of the drive's revenue, and donations decreased when the restriction on lobbyists was lifted in a prior year drive.[132] In *Freethought*, COLTS restricted speech without citing a history of declining bus fares or advertising revenues, and these revenue sources only represented a minute portion of COLTS's funding.[133] Based on these financial considerations and the practical and peace driven considerations discussed earlier, COLTS's policy was far from "the most reasonable or the only reasonable limitation" on speech for the forum.[134] Instead, the policy wasn't reasonable at all.[135]

B. *Public Policy Considerations*

Public policy considerations offer further praise for the Third Circuit's ruling.[136] COLTS's policy of trading freedom of speech for security poses dangers for our society.[137] One commentator has noted that trading freedom for security today leads to a loss of both freedom and security tomorrow.[138] For example, the Weimar Republic enacted legislation that allowed the government to restrict the freedom of speech during turbulent times in the name of protecting the citizenry, but the Nazis used this law to eliminate opposition, consolidate power, and deprive many people of both liberty and security.[139] Additional scholars have noted that when the government restricts civil liberties during a time of turmoil, it is often difficult for citizens to have the restrictions repealed and to regain their freedoms once the

130. *See id.* at 439–40 (recognizing that there were no prior disturbances on COLTS's buses that a speech restriction could help to stop).

131. For a discussion of the financial considerations of COLTS's policy, see *infra* notes 132–34 and accompanying text.

132. *See* 473 U.S. 788, 808, 810 (1985) (noting that restrictions on speech reasonably prevented a decrease in the forum's revenue).

133. *See* 938 F.3d at 428 (noting that bus fares were "negligible" and that advertising revenue was less than two percent of COLTS's revenue).

134. *Cornelius*, 473 U.S. at 808 (explaining the constitutionality of speech prohibitions in nonpublic forums).

135. *See Freethought*, 938 F.3d at 442 (finding that COLTS's policy was unreasonable).

136. For a discussion of the additional policy considerations, see *infra* notes 137–45 and accompanying text.

137. For a further discussion of the dangers COLTS's policy offers, see *infra* notes 138–41 and accompanying text.

138. *See* Shlomit Yanisky-Ravid and Ben Zion Lahav, *Public Interest vs. Private Lives—Affording Public Figures Privacy in the Digital Era: The Three Principle Filtering Model*, 19 U. PA. J. CONST. L. 975, 975 (2017) (asserting that trading liberty for security yields a loss of both over time).

139. *See* Reichstagsbrandverordnung [Reichstag Fire Decree], Feb. 28, 1933, RBBl I at 83 (Ger.), *translated in Reichstag Fire Decree*, UNITED STATES HOLOCAUST MEMORIAL MUSEUM, https://encyclopedia.ushmm.org/content/en/article/reichstag-fire-decree [https://perma.cc/PX9B-42UK] (last visited Jan. 30, 2021) (detailing Nazi efforts to undermine civil liberties shortly after gaining power).

turmoil subsides.[140] By refusing to enforce COLTS's policy, the Third Circuit helped to ensure that the long-term loss of liberty in the name of security does not materialize.[141]

Another good policy implication of the Third Circuit's ruling is that it refrains from rewarding intolerant behavior from the public.[142] The Third Circuit recognized that silencing the freedom of speech out of concern for boycotts or violence offers an incentive for citizens to engage in these activities.[143] When the government silences speech because people find it offensive, the aim of the First Amendment is not upheld: "protect[ing] unpopular individuals from retaliation—and their ideas from suppression—at the hand of an intolerant society."[144] The Third Circuit recognized this and upheld the aim of the First Amendment in its ruling.[145]

VI. COLLECTING MARKET FEEDBACK: *FREETHOUGHT*'S IMPACT

The Third Circuit's ruling will have many practical and legal effects, but the practical effects will be more immediate.[146] Other Third Circuit government entities will need to review their speech policies to ensure these policies are not viewpoint discriminatory, illustrated by AmTran's recent review of its policy.[147] In addition, these entities will need to modify their policies to allow for speech on religion as a subject matter.[148] COLTS has already modified its policy in the wake of *Freethought*, removing restrictions on religious advertisements.[149]

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140. *See, e.g.*, Kevin J. Barry, *Liberty Under Attack: Reclaiming Our Freedoms in an Age of Terror*, 54-SEP FED. LAW. 53, 54 (2007) (asserting that society does not always regain its liberties with ease once taken away, even when the underlying reasons for the deprivation ameliorate).

141. For a further discussion of the threat to liberty, see *supra* notes 137–40 and accompanying text.

142. For a further discussion of incentivizing intolerant behavior, see *infra* notes 143–45 and accompanying text.

143. *See* Ne. Pa. Freethought Soc'y v. COLTS, 938 F.3d 424, 438 (3d Cir. 2019) (citing Seattle Mideast Awareness Campaign v. King Cty., 781 F.3d 489, 504 (9th Cir. 2015) (Christen, J., dissenting)) ("It invites a heckler's veto by signaling that the government will suppress unpopular speech if the public behaves badly.").

144. McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 357 (1995) (describing constitutional freedoms); *Freethought*, 938 F.3d at 438 (arguing that COLTS's policy did not uphold the purpose of the freedom of speech).

145. For a further discussion of the Third Circuit's ruling, see *supra* Section IV.

146. *See* William Kibler, *Court Ruling Has Amtran Suspending Ad Program*, ALTOONA MIRROR (Nov. 3, 2019), https://www.altoonamirror.com/news/local-news/2019/11/court-ruling-has-amtran-suspending-ad-program/ [https://perma.cc/RBD4-SYX8] (recognizing that Altoona Metro Transit ("AmTran") began reconsidering its advertising policy within two months of the *Freethought* ruling).

147. *See id.* (recognizing AmTran's reasoning for reconsidering its policy).

148. *See Freethought*, 938 F.3d at 433 (quoting Good News Club v. Milford Cent. Sch., 533 U.S. 98, 103, 111 (2001)) (holding that government entities cannot prohibit speech on religion).

149. *See Policy Governing All Advertising in or upon County of Lackawanna Transit System Facilities and Vehicles*, CTY. OF LACKAWANNA TRANSIT SYS. AUTH., https://coltsbus.com/wp-content/uploads/2021/03/Advertising-Policy-Amended-11.18.2020.pdf [https://perma.cc/A4MF-N8F3] (last updated Nov. 18, 2020) (detailing COLTS's advertising policy adopted in November, 2020).

Concerning the legal effects of the Third Circuit's ruling, COLTS has announced it will not appeal the case to the Supreme Court.[150] In addition, the Third Circuit appears poised to continue its broad reading of First Amendment rights, as seen in the Third Circuit's 2020 ruling in *Center for Investigative Reporting v. Southeastern Pennsylvania Transportation Authority*.[151] In this case, the Third Circuit held that SEPTA's prohibition on political advertisements was unconstitutional because the policy was ambiguous as to what qualified as political speech under the policy.[152]

Freethought's impact demonstrates that the freedom of speech will continue to endure in strength throughout the Third Circuit.[153] This endurance isn't just for atheists or other religious people, but for all Americans who esteem the freedom of speech.[154] Fortunately, the Third Circuit recognizes that maintaining the freedom of speech means ruling in favor of tolerance.[155]

150. *See* Terrie Morgan-Besecker, *COLTS Won't Appeal Religious Ads Ruling*, SCRANTON TIMES-TRIB., https://www.thetimes-tribune.com/news/colts-wont-appeal-religious-ads-ruling/article_c526feb7-a3d1-5216-93c2-7c977a9ff2b5.amp.html (last updated June 9, 2020) (noting COLTS is not appealing the ruling).

151. *See* 975 F.3d 300, 303–04 (3d Cir. 2020) (holding Southeastern Pennsylvania Transportation Authority's ("SEPTA") speech prohibition unconstitutional).

152. *See id.* at 316–17 (comparing SEPTA's policy to the statute at issue in Minnesota Voters Alliance v. Manksy, 138 S. Ct. 1876 (2018)).

153. For a discussion of the Third Circuit's broad reading of the First Amendment, see *supra* notes 151–52 and accompanying text.

154. For a discussion of American esteem for free speech, see *supra* note 2 and accompanying text.

155. *See* Wintonick, *supra* note 1, at 184 (asserting that the freedom of speech requires tolerance for disagreeable views).