

No.

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**In the Supreme Court of the United States**

OCTOBER TERM, 1997

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THE METROPOLITAN TRANSPORTATION AUTHORITY,  
*PETITIONER,*

v.

NEW YORK MAGAZINE, A DIVISION OF  
PRIMEDIA MAGAZINES, INC.,  
*RESPONDENT.*

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**On Petition for a Writ of Certiorari to the  
United States Court of Appeals  
for the Second Circuit**

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**PETITION FOR A WRIT OF CERTIORARI**

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## QUESTIONS PRESENTED

1. Whether, contrary to *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974), advertising space on public transit facilities is an unlimited public forum that must display any advertisement — even if illegal or detrimental to the transit agency’s regular operations — unless the transit authority is able to demonstrate that rejection of the advertisement is an action that is narrowly tailored to serve a compelling governmental interest.

2. Whether, contrary to *Central Hudson Gas & Elec. Corp. v. Public Service Comm’n*, 447 U.S. 557 (1980), a transit authority’s refusal to display a commercial advertisement on its vehicles is a prior restraint, so that the agency must receive prior judicial approval of the decision not to display the advertisement.

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## **OPINIONS BELOW**

The opinion of the court of appeals (App., *infra*, 1a-21a) is reported at 136 F.3d 123. The opinion of the district court (App., *infra*, 22a-49a) is reported at 987 F. Supp. 254.

## **JURISDICTION**

The judgment of the court of appeals was entered on January 22, 1998, and a timely petition for rehearing was denied on March 17, 1998. App., *infra*, 50a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## **CONSTITUTIONAL PROVISION INVOLVED**

The First Amendment to the United States Constitution provides in relevant part: “Congress shall make no law \* \* \* abridging the freedom of speech, or of the press.”

## **STATEMENT**

In this case, the court of appeals held that advertising space on Metropolitan Transportation Authority buses is an unlimited public forum and that the public transportation authority’s decision to reject a commercial advertisement is a form of prior restraint. Under this holding, the Authority’s subway, bus, and commuter rail systems may be required to display *any* advertisement, even if offensive or illegal; the Authority may remove the message only by going to court and establishing that its decision not to display the advertisement can survive strict First Amendment scrutiny. This remarkable ruling cannot be reconciled with the holdings of this and other courts, imposes a wholly unmanageable regime on public transit authorities, and is of immense practical importance to governments at all levels. Further review therefore is imperative.

1. Petitioner Metropolitan Transportation Authority (“MTA”) is a New York public benefit corporation that, with its affiliated agencies, operates the subways and a majority of the buses in New York City, and provides regional commuter rail service. To raise revenue that it uses in support of its transit operations, the MTA leases advertising space on the exteriors of its buses, on car cards inside transit and rail vehicles, and at subway and rail stations. The MTA solicits and accepts this advertising through contractors, including Transportation Displays Incorporated (“TDI”).

In 1994, the MTA promulgated Advertising Standards providing that the Authority would not accept commercial advertisements that are false, misleading, or deceptive; that promote illegal goods or services; that imply an endorsement by the MTA of a product or service; that depict activities harmful to minors under New York law; that contain obscene material; that contain an image that, if sold to a minor, would violate New York law; that would be libelous; that promote tobacco-related products; and — most important for present purposes — that violate New York Civil Rights Law § 50 (McKinney 1997). App., *infra*, 3a-4a. That statute makes it a criminal offense to use “for advertising purposes, or for purposes of trade, the name \* \* \* of any living person without having first obtained the written consent of such person.”<sup>1</sup> The MTA supplemented its list of inappropriate material in 1997, adding six additional categories, including advertisements that contain images of a person who appears to be a minor in sexually suggestive dress, pose, or context; that are adverse to the MTA’s commercial or administrative interests; that demean individuals or groups on account of race, color, religion, national origin, ancestry, gender, age, disability, or sexual orientation; that contain images so violent, frightening, or otherwise disturbing as to be harmful to minors; that promote sexually oriented businesses; and that contain images that a significant segment of the public would view as patently offensive.

2. In September 1997, respondent New York Magazine entered into a contract with TDI, MTA’s agent, to lease advertising space on MTA buses. The agreement provided that “[a]ll advertising copy is subject to approval of TDI and the Transportation Facility concerned as to character [and] text.” App., *infra*, 3a. Respondent agreed to pay \$85,000; for its part, the MTA would run a series of advertisements from late November through December 31, 1997, with the possibility of some additional time in January 1998. One of these advertisements (the “Advertisement”) displayed the New York Magazine logo and, in a reference to New York City Mayor

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<sup>1</sup> In addition, New York Civil Rights Law § 51 permits any person whose name is so used for commercial purposes to recover compensatory and, in certain cases, exemplary damages.

Rudolph Giuliani, carried the copy: “Possibly the only good thing in New York Rudy hasn’t taken credit for.” *Id.* at 1a.

After the Advertisement appeared on several buses, the Mayor’s office complained to the MTA, objecting to “the use of [Mayor Giuliani’s] name to promote a commercial product” and asserting that the advertisement violates New York Civil Rights Law § 50. App., *infra*, 3a. The MTA agreed and accordingly discontinued display of the Advertisement. New York Magazine responded by bringing this action in United States District Court for the Southern District of New York, arguing that removal of the advertisement violated its First Amendment rights and demanding preliminary injunctive relief.<sup>2</sup>

The district court ruled for New York Magazine. The court first concluded that the Advertisement falls within the category of commercial speech, noting that “[i]ts central purpose is to advertise NY Magazine and thereby encourage sales.” App., *infra*, 31a. The court next found that the exterior of MTA buses is a designated public forum (*id.* at 35a-38a), but reasoned that “strict scrutiny review is not applicable here because the Ad in issue involves commercial speech.” *Id.* at 39a. Against this background, the court reasoned that if Section 50 “applies to the Ad in issue, then the Mayor’s right of privacy/publicity must be balanced against Plaintiff’s First Amendment rights. If this section does not apply, then neither the MTA nor the City has a substantial interest in removing the Ad.” *Id.* at 39a. The court went on to conclude, as a matter of state law, that Section 50 does *not* apply to the Advertisement (since the advertisement “combines incidental use, public interest, and political satire”). *Id.* at 45a. The court accordingly held that the MTA was “unable to establish that [it] is

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<sup>2</sup> Respondent also sued the City of New York, maintaining that the City violated the First Amendment and tortiously interfered with New York Magazine’s contract. The district court found that respondent had not demonstrated a probability of success on the tort claim and respondent did not appeal that ruling. App., *infra*, 46a-48a. The Second Circuit subsequently held that respondent lacked standing to assert a First Amendment claim for injunctive relief against the City. *Id.* at 5a-6a. The propriety of that holding is not at issue here.

acting in the public interest” in discontinuing the Advertisement (*id.* at 46a), and enjoined the MTA to display it. *Id.* at 49a.

A divided panel of the Second Circuit affirmed on grounds quite different from those relied upon by the district court. App., *infra*, 1a-21a. Unlike the district court, the court of appeals found it unnecessary to determine whether the Advertisement violates Section 50.<sup>3</sup> Instead, it held that *even if the Advertisement is illegal under New York law*, the MTA is required to display it.

The court held that MTA advertising space is an *unlimited* designated public forum and thus that content-based restrictions on transit system advertising are constitutional only if they are “narrowly drawn to achieve a compelling [governmental] interest.” App., *infra*, 8a (citation omitted). The court rejected petitioner’s argument that the advertising space is either a *limited* public forum, the contours of which are defined by the Advertising Standards, or a nonpublic forum, solely on the ground that the MTA accepts political advertising and “[a]llowing political speech \* \* \* evidences a general intent to open a space for discourse.” *Id.* at 11a. Petitioners argued that this conclusion was foreclosed by *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974) (plurality), which held that advertising space on public transit is *not* a “First Amendment forum” (*id.* at 304), and that a public transit agency “has discretion to develop and make reasonable choices concerning the type of advertising that may be displayed in its vehicles.” *Id.* at 303. The court of appeals declined to follow the authority of *Lehman*, however, distinguishing that case on the ground that the transit agency in *Lehman* had disallowed political advertising. App., *infra*, 11a-12a.

The court went on to hold that the MTA’s decision not to accept an advertisement is a form of prior restraint — even when the advertisement is commercial speech. As a consequence, the court held that any such rejection must be accompanied by “procedural safeguards” that “require, inter alia, that ‘the burden of instituting

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<sup>3</sup> For present purposes, it therefore must be assumed that the Advertisement *does* violate Section 50; if certiorari is granted and the judgment below reversed, that issue would remain to be decided on remand.

judicial proceedings, and of proving that the material is unprotected, \* \* \* rest on the censor,' and that 'a prompt final judicial determination must be assured.'" App., *infra*, 13a (quoting *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 560 (1975)). This holding means that the MTA is presumptively obligated to display *every* proposed advertisement even if it has a reasonable basis for exclusion; if the Authority finds an advertisement objectionable, its apparent recourse is to go to court (presumably in a declaratory judgment action), where it must attempt to satisfy the strict scrutiny standard and obtain judicial permission to cease running the offensive display. While the Second Circuit acknowledged this Court's decision in *Central Hudson Gas & Elec. Co. v. Public Service Comm'n*, 447 U.S. 557, 571 n.13 (1980), which observed "that commercial speech may qualify as one of the exceptions to the bar on prior restraints," the court of appeals saw "no reason why the requirement of procedural safeguards should be relaxed whether speech is commercial or not." App., *infra*, 13a. The court therefore declined to decide whether the Advertisement "is actually commercial speech." *Id.* at 14a.

Judge Cardamone dissented. App., *infra*, 15a-21a. Noting that the MTA "operates its bus system as a commercial venture," he reasoned that the MTA "signaled its intent that the sides of buses were not to be considered public *fora* through its regulations, which, among other things, ban advertising that violates § 50 of the New York Civil Rights Law." *Id.* at 18a. He went on to find that, "[a]lthough bus placards have been dedicated to some First Amendment uses, and may therefore not be said to be a purely nonpublic forum, 'regulation of the reserved nonpublic uses would still require application of the reasonableness test.'" *Id.* at 18a-19a (quoting *United States v. Kokinda*, 497 U.S. 720, 730 (1990) (plurality opinion)). Pointing to this Court's decision in *Lehman*, he stated that "[w]hen a city is engaged in commerce \* \* \* it need not accept every advertisement offered, but may make reasonable choices with respect to the advertising displayed on its vehicles." App., *infra*, 19a. Because Judge Cardamone concluded that the Advertisement does violate Section 50, he found the MTA's decision to be reasonable and would have upheld the Authority's decision to reject the advertisement.

### REASONS FOR GRANTING THE PETITION

The Second Circuit’s decision in this case is of great practical and doctrinal significance. The court of appeals held that all public transportation agencies that sell space for both commercial and political advertising —and, for that matter, all other public entities that permit similar advertising in their facilities — have created general purpose public fora that are presumptively required to run *any* advertisement, even if the transit agency reasonably believes that the proposed advertisement is illegal, injurious to the public, or detrimental to the agency’s regular operations. Under this rule, the agency could be forced to display advertisements that are indecent, or that are frightening or harmful to children, or that vilify members of the public on racial or gender grounds, or that violate state law; the agency’s apparent recourse, according to the Second Circuit, is to go to court to try to establish that its restriction is narrowly tailored to achieve a compelling governmental purpose. See App., *infra*, 12a-13a. This standard imposes a wholly unmanageable regime on public authorities and renders unconstitutional the operating practices of virtually every public transportation agency.

The extraordinary rule adopted below cannot be reconciled with the decisions of this and other courts. The Second Circuit’s holding that the MTA established an unlimited public forum, and that its commercial advertising restrictions accordingly must be subjected to the highest level of First Amendment scrutiny, disregards this Court’s ruling in *Lehman v. City of Shaker Heights*, 418 U.S. 298, 304 (1974), that advertising space on public transit is not a “First Amendment forum,” and is flatly inconsistent with this Court’s repeated admonition that courts “will not find that a public forum has been created in the face of clear evidence of a contrary intent.” *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 803 (1985). The court of appeals’ conclusion that the MTA’s refusal to run a commercial advertisement constitutes a form of “prior restraint” likewise disregards this Court’s rulings in *Central Hudson Gas & Elec. Corp. v. Public Service Comm’n*, 447 U.S. 557, 571 n.13 (1980), and other cases, that commercial speech is not subject to the ban on prior restraints. The court of appeals simply rejects this Court’s teaching that public agencies must be permitted to exercise the business judgment that their clientele legitimately expect

from any vendor of advertising space, whether public or private. See *Lehman*, 418 U. S. at 303-304.

Indeed, the court of appeals' opinion verges on deliberate evasion of this Court's precedents. The court of appeals distinguished *Lehman* on grounds that have nothing to do with the holding of that case (see pages 13-15, *infra*); it embraced the position of the *dissenting* opinion in *Cornelius* for its basic understanding of designated public forum doctrine (see page 16-17, *infra*); and it disregarded this Court's thrice-repeated distinction between commercial and noncommercial speech under prior restraint doctrine with the dismissive comment that it "s[aw] no reason why the requirement of procedural safeguards should be relaxed whether speech is commercial or not" (App., *infra*, 13a). Because the holding below defies this Court's prior rulings, throws an important area of First Amendment law into confusion, conflicts with decisions of state and federal courts, requires wholesale revision of the policies of countless public agencies, and imposes impracticable procedural and substantive requirements that will cause considerable public injury, review by this Court is warranted.

**I. THE SECOND CIRCUIT'S HOLDING THAT PUBLIC TRANSIT ADVERTISING SPACE IS AN UNLIMITED FORUM IGNORES ESTABLISHED PRECEDENT AND CREATES PRACTICAL PROBLEMS THAT WARRANT THIS COURT'S REVIEW**

It has long been settled that "nothing in the Constitution requires the Government freely to grant access to all who wish to exercise their right to free speech on every type of Government property without regard to the nature of the property or to the disruption that might be caused by the speaker's activities." *Cornelius*, 473 U.S. at 799-800. Instead, the Court has adopted "a 'forum based' approach to assessing restrictions that the government seeks to place on use of its property." *International Society for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992) ("*ISKCON*"). See *Arkansas Educ. Television Comm'n v. Forbes*, No. 96-779 (May 18, 1998), slip op. 9-10. Under this familiar analysis, speech on government property that has traditionally been available for public expression (a "traditional" public forum) is subject to the highest scrutiny. Other

government property — a “designated” public forum — may be intentionally opened either for general public expression (an “unlimited” public forum) or for specific types of speech, defined by speech content or by speaker identity (a “limited” public forum). Within this second category, any restrictions on speech that fall within the contours of the forum, as established by the government, is subject to strict scrutiny, just as in a traditional public forum; but the limitations on the forum itself, whether based on speech content or on speaker identity, need only be reasonable and viewpoint-neutral. Finally, property that has not been made generally accessible for the purpose of public expression is either a “nonpublic” forum or no forum at all. Within this category, the government is free to restrict speech on any reasonable and viewpoint-neutral ground. See *Forbes*, slip op. 10; *ISKCON*, 505 U.S. at 678-679; *id.* at 687 (O’Connor, J., concurring); *Cornelius*, 473 U.S. at 802.

In concluding that public transit advertising space is an “unlimited” public forum, the court below went fatally astray. The MTA has *never* opened its facilities for unlimited public expression. Indeed, its sole purpose in permitting advertising *at all* is to generate revenue, and the MTA has consistently restricted access, on a case-by-case basis, to paying customers who comply with its Advertising Standards. Even if this practice could be construed to create a designated public forum, that forum has never been unlimited. Its contours are set by the Advertising Standards. Contrary to the Second Circuit’s decision, those limitations on the forum are not properly subject to strict scrutiny, but must be upheld so long as they are reasonable and viewpoint neutral.

#### **A. The MTA’s Advertising Space Is Nonpublic**

1. At the outset, the MTA’s advertising space should not be regarded as a public forum *at all*. It is undisputed that advertising displays in public transit systems are not a *traditional* public forum. And under the standards articulated by this Court, the MTA cannot be thought to have transformed its advertising space into a *designated* public forum. The Court has explained that the government creates such a forum “only by *intentionally* opening a nontraditional forum *for public discussion*” (*Cornelius*, 473 U. S. at 802 (emphasis added)) in a manner that “make[s] the property ‘generally available’ \* \* \* to a class of speakers.” *Forbes*, slip op. 11 (citation omitted). See

*ISKCON*, 505 U.S. at 679-680. For several reasons, the Second Circuit's holding that MTA advertising space satisfies this test cannot be reconciled with this Court's decisions.

*First*, whether or not a facility is "generally accessible to the public," government property will be deemed to be a public forum only if it has as "a principal purpose promoting 'the free exchange of ideas.'" *ISKCON*, 505 U.S. at 675, 682 (quoting *Cornelius*, 473 U.S. at 809). And while a facility may have such a purpose when the government "makes its property generally available to a certain class of speakers," "the government does *not* create a designated public forum when it does no more than reserve eligibility for access to the forum to a particular class of speakers, whose members must then, as individuals, 'obtain permission' \* \* \* to use it." *Forbes*, slip op. 12 (emphasis added) (citation omitted). That is the case here. MTA space is not "generally available": it is open only to persons who pay for the privilege of access, and the MTA (or its agent) screens all advertisements in advance to assure compliance with the MTA's standards. No decision of this Court has treated such a governmental facility as a public forum.

To be sure, the MTA permits advertisers to use its advertising space for the purpose of communicating with potential customers. But the Court consistently has rejected the assertion that "simply because an instrumentality 'is used for the communication of ideas or information,' it thereby becomes a public forum. [The Court's] cases provide no support for such a sweeping proposition." *United States Postal Service v. Greenburgh Civic Ass'n*, 453 U.S. 114, 130 n.6 (1981). See *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 49 n.9 (1983) ("the mere fact that an instrumentality is used for the communication of ideas does not make it a public forum"). Indeed, addressing *Lehman v. City of Shaker Heights*, *supra*, a case in which a public transit authority permitted advertising on its vehicles but rejected advertisements displaying particular types of messages, the Court explained that "the advertising space made available in public transportation in the city of Shaker Heights [was] 'specifically used for the communication of information and ideas,' but that fact alone was not sufficient to transform that space into a 'public forum' for First Amendment purposes." *Greenburgh Civic Ass'n*, 453 U.S. at 130 n.6 (citation omitted). See also *Cornelius*, 473 U.S. at 803, 805.

Here, the purpose of making advertising space on MTA conveyances available for paid advertising is *not* to permit the free exchange of ideas. The MTA’s intent, instead, is to generate revenue for the public transportation system, in a manner consistent with — and subordinate to — the MTA’s primary mission of providing safe, efficient transportation in pleasant surroundings to a diverse public, including children. The MTA has no intention of opening its advertising space indiscriminately to all speakers, without regard to the effect of their messages on the quality of the transportation experience.

*Second*, the Court has indicated that the intent to create a public forum generally will be absent in cases where the government acts in a commercial or proprietary capacity. “When the government is acting as a proprietor, managing its internal operations, rather than acting as lawmaker with the power to regulate or license, its actions will not be subjected to the heightened review to which its actions as lawmaker may be subject.” *ISKCON*, 505 U.S. at 678. Pointing again to the mass transit advertising in *Lehman*, the Court explained that it had invoked this distinction to “uph[o]ld a ban on political advertising in city operated transit vehicles, \* \* \* even though the city permitted other types of advertising on those vehicles.” *Ibid.*; see *Kokinda*, 497 U.S. at 725 (plurality opinion) (“It is a long-settled principle that governmental actions are subject to a lower level of First Amendment scrutiny where ‘the governmental function operating ... [is] not the power to regulate or license, as lawmaker, ... but, rather, as proprietor, to manage [its] internal operation[s] ...’”) (quoting *Cafeteria & Restaurant Workers v. McElroy*, 367 U.S. 886, 896 (1961) (ellipses and bracketed material added by the Court)).<sup>4</sup> The conclusion in *Lehman* followed from the rationale for the public forum doctrine: an agency that sells space only to those who can pay surely has not dedicated its property to “‘public dis-

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<sup>4</sup> The Court has employed a similar understanding in cases involving First Amendment challenges brought against governments in their capacity as employer. See, e.g., *Connick v. Myers*, 461 U.S. 138, 146 (1983) (“government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment”).

course.”” *Forbes*, slip op. 10 (quoting *Cornelius*, 473 U. S. at 802).

Indeed, *Lehman* — the Court’s leading decision involving advertising on public property — clearly illustrates the governing principles. There, a municipal transit system sold advertising space on car cards in its vehicles. The advertising was managed by an agency hired by the city, which was authorized to disapprove advertisements that did not comply with the city’s standards. See 418 U.S. at 299-300 & n. 1 (plurality opinion). The city accepted all manner of commercial advertisements, as well as noncommercial messages from churches and “civic and public-service oriented groups,” but declined to carry political advertisements. *Id.* at 300. A political candidate brought suit to challenge this exclusion.

The Court rejected the claim, holding that advertising regulation was subject only to the scrutiny for reasonableness that is appropriate for a nonpublic forum. As the Court explained,

[T]he 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.

418 U.S. at 303 (plurality opinion).<sup>5</sup>

The Court accordingly held that

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<sup>5</sup> While there was no majority opinion in *Lehman*, Justice Blackmun’s opinion for the plurality has repeatedly been cited with approval by the Court. See, e.g., *ISKCON*, 505 U.S. at 678; *United States v. Kokinda*, 497 U.S. 720, 725 (1990) (plurality opinion); *Cornelius*, 473 U.S. at 803-804; *Perry*, 460 U.S. at 47, 49 n.9; *Greenburgh Civic Ass’ns*, 453 U.S. at 129, 130 n.6.

[n]o First Amendment forum is here to be found. The city consciously has limited access to its transit system advertising space in order to minimize chances of abuse, the appearance of favoritism, and the risk of imposing upon a captive audience. These are reasonable legislative objectives advanced by the city in a proprietary capacity.

418 U.S. at 304 (plurality opinion). The Court added that, “[w]ere we to hold to the contrary, display cases in public hospitals, libraries, office buildings, military compounds, and other public facilities immediately would become Hyde Parks open to every would-be pamphleteer and politician. This the Constitution does not require.” *Ibid.*

The Court has since confirmed that *Lehman* falls squarely into modern forum analysis, characterizing the case as one where the facility remained nonpublic because

the city intended to limit access to the advertising spaces on city transit buses. \* \* \* [I]ts management contract required the managing company to exercise control over the subject matter of the displays. \* \* \* Additionally, the Court found that the city’s use of the property as a commercial enterprise was inconsistent with an intent to designate the car cards as a public forum.

*Cornelius*, 473 U.S. at 803-804. See *Kokinda*, 497 U.S. at 725 (plurality opinion).

2. The Second Circuit should have regarded *Lehman* as controlling. Its failure to do so threatens to cause considerable confusion about the meaning of a decision that for some 25 years has been this Court’s only direct word on the rules governing the rental of advertising space by governmental entities. *Lehman* and this case are, in all essential respects, identical. In each, a public authority sold advertising space on its transit facilities, while barring certain types of offensive or controversial advertisements; in each, the agency “intended to limit access to the advertising spaces on city transit buses”; in each, the agency’s “management contract required the managing company to exercise control over the subject matter of the displays”; in each, the agency’s “use of the property as a commercial enterprise was inconsistent with an intent to dedicate the car cards as a public forum.” *Cornelius*, 473 U.S. at 803-804. It

could not be said in either case that the agency’s “principal purpose” in renting advertising space was “promoting the free exchange of ideas.” *ISKCON*, 505 U.S. at 682 (citation omitted). To the contrary, the rental was part of a “commercial venture” (*Lehman*, 418 U.S. at 303 (plurality opinion)) and was intended only to “raise[] revenue for [the agency’s] operation.” App., *infra*, 2a. And it could hardly be thought that the government in either case had “open[ed] a nontraditional forum for public discourse” (*ISKCON*, 505 U.S. at 680 (citation omitted)); in fact, MTA’s advertising space (like that in Shaker Heights) is *closed* to everyone who is unable or unwilling to pay the MTA’s prescribed rates.

In distinguishing *Lehman* and holding the MTA’s advertising space to be a public forum, the Second Circuit pointed to a single consideration: that the MTA accepts paid political advertisements. The court reasoned that “[d]isallowing political speech, and allowing commercial speech only, indicates that making money is the main goal,” while “[a]llowing political speech \* \* \* 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.” App., *infra*, 11a. The court of appeals therefore ruled that a public agency that accepts political advertisements is acting as a “regulator” and not as a “proprietor.” *Ibid.*<sup>6</sup>

This reasoning, however, is a non sequitur. The decision to accept *paid* political advertising is entirely consistent with MTA’s proprietary role and with the “main goal” of “making money”; after all, privately owned media (such as billboards) also typically display political advertising. See, e.g., *Ackerley Communications of Massachusetts, Inc. v. City of Cambridge*, 88 F.3d 33, 37 n.10 (1st Cir. 1996). Nowhere in *Lehman* (or in its more recent decisions discussing *Lehman*) has this Court suggested that it was Shaker Heights’ exclusion of political advertising that rendered the car cards

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<sup>6</sup> As we have noted, the court did not suggest that the MTA *actually* acted with the purpose of opening “a space for discourse”; it relied entirely on the fact that the MTA accepts political advertisements.

a nonpublic forum.<sup>7</sup> Instead, the Court found it crucial that the advertising space in *Lehman* was maintained for proprietary purposes and that the city “intended to limit access to advertising spaces on city transit buses.” *Cornelius*, 473 U.S. at 803 (emphasis added). Precisely the same is true here: that the MTA accepts political advertising in no way detracts from its intent to exclude other categories of speech (such as advertisements displaying sexually exploitative images of minors) that are, in the MTA’s business judgment, incompatible with the interests of the transit system and its passengers. “Such selective access, unsupported by evidence of a purposeful designation for public use, does not create a public forum.” *Forbes*, slip op. 13 (quoting *Cornelius*, 473 U.S. at 805).<sup>8</sup>

In fact, the Second Circuit’s decision would create a perverse system of incentives that would *reduce* the opportunities for political speech. The court of appeals’ decision imposes an “all-or-nothing

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<sup>7</sup> Indeed, the city in *Lehman* did not “allow[] commercial speech only,” as the court of appeals believed (App., *infra*, 11a); Shaker Heights accepted noncommercial “service oriented advertising” as well. 418 U.S. at 304 (plurality opinion).

<sup>8</sup> The decisions of this Court that were relied upon by the Second Circuit (at App., *infra*, 10a), *Widmar v. Vincent*, 454 U.S. 263 (1981), and *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975), have no bearing here. In *Widmar*, which involved university facilities that were made available to student groups, the university “evidenced a clear intent to create a public forum”; moreover, “a university campus, at least as to its students, possesses many of the characteristics of a traditional public forum.” *Cornelius*, 473 U.S. at 802-803. See *Widmar*, 454 U.S. at 264-265. Neither of these considerations is present here. In *Southeastern Promotions*, “the Court found a public forum where a municipal auditorium and a city-leased theater were designed for and dedicated to expressive activities.” *Cornelius*, 473 U.S. at 803. Here, as we have explained, the MTA makes advertising space available for quite a different purpose. Indeed, the Court in *Southeastern Promotions* simply assumed without discussion that the facilities at issue were public fora. See 420 U.S. at 555. See also *Planned Parenthood Ass’n/Chicago Area v. Chicago Transit Auth.*, 767 F.2d 1225, 1231 (7th Cir. 1985) (*Southeastern Promotions* “appears to have been” a situation where facilities were “opened generally for all expressive activity”).

choice” (*Forbes*, slip op. 12) for public agencies: if they accept political as well as commercial advertisements, they lose their discretion to establish standards for their advertising space. Faced with this unpalatable prospect — in which an agency’s decision to display political messages means that it also must carry materials that, for example, are so violent that they disturb children — agencies can be expected to decline to allow political speech in their advertising space. As the Court recently observed in a related setting, the Second Circuit’s rule accordingly “would result in less speech, not more” (*id.* at 13 (internal quotation marks and citations omitted)). In these circumstances, recognizing a right of access “would create, in the name of the First Amendment, a disincentive for the Government to dedicate its property to [political] speech \* \* \* at all.” *Kokinda*, 497 U.S. at 733 (plurality opinion). Needless to say, “[a] First Amendment jurisprudence yielding these results does not promote speech but represses it.” *Forbes*, slip op. 14.

It should be added that, under the proper standard, there can be no doubt that the MTA’s exclusion of illegal advertisements should survive. “Control over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral.” *Cornelius*, 473 U.S. at 806. And the “restriction need only be *reasonable*; it need not be the most reasonable or the only reasonable limitation.” *ISKCON*, 505 U.S. at 683 (emphasis in original; citations and internal quotation marks omitted). See *Forbes*, slip op. 14-16. Here, the MTA’s rejection of respondent’s advertisement is grounded in an objective policy (compare, *e.g.*, *Forbes*, slip op. 8 (Stevens, J., dissenting)), is viewpoint-neutral, and is eminently reasonable. The State of New York has made it a criminal offense for advertisers to appropriate the names of living persons to facilitate the sale of commercial goods; it would be quite remarkable to suggest that any medium (whether a private billboard company or the MTA) acts improperly when it declines to run an advertisement for the purpose of complying with the law. See generally *Cornelius*, 473 U.S. at 808; *Kokinda*, 497 U.S. at 736 (plurality opinion).<sup>9</sup>

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<sup>9</sup> The court of appeals did make the peculiar suggestion that the MTA should be deemed to have acted in a regulatory rather than a proprietary capacity because “[t]here is no commercial reason why MTA has any special interest in the policy behind § 50; MTA’s interest is only the interest in upholding the law because it is the law.”

**B. Respondent’s Advertisement Is Outside The Scope Of Any Designated Public Forum That Has Been Created By The MTA**

The Second Circuit also must be understood to conflict with this Court’s precedents — and to create the same degree of doctrinal and practical confusion — if MTA advertising space is deemed to be a designated public forum. “Even conceding that the forum here has been dedicated to some First Amendment uses, and thus is not a purely nonpublic forum, \* \* \* regulation of the *reserved nonpublic uses* would still require application of the reasonableness test.” *Kokinda*, 497 U.S. at 730 (plurality opinion) (emphasis added). The court of appeals, however, read that test off the books whenever a designated public forum permits political speech.

Even assuming that the MTA created a designated public forum, the Authority expressly provided that certain types of expression — those identified in its Advertising Standards — fall outside the scope of the forum. In nevertheless holding that the MTA has created an *unlimited* public forum, the court of appeals (relying on the *dissenting* opinion in *Cornelius* (see App., *infra*, 11a)) reasoned that “it cannot be true that if the government excludes any category of

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App., *infra*, 12a. The court added that “[a]lthough the interest in avoiding litigation could be characterized as commercial, the indemnity clause of the Agreement, which provides that the advertiser bears full liability for any damages incurred in the litigation, fully protects that interest.” *Id.* at 12a n.3. This conclusion, however, flies in the face of the general proposition that all entities, private as well as public, are obligated to obey the law. If the State of New York expects private companies to comply with Section 50 (as it most assuredly does), a public instrumentality hardly can be thought to act as a regulator when it obeys the same law. Moreover, even apart from the obligation of all parties to comply with state criminal law, the court of appeals’ reliance on the indemnity agreement is chimerical. As Judge Cardamone noted, “indemnity agreements are not self-executing, and a party’s attempt to enforce their provisions often leads to extensive legal battles. In short, an indemnity agreement does not eliminate litigation.” App., *infra*, 20a. The MTA’s interest in avoiding this aggravation and expense provides an obvious “commercial” justification for its policy.

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. This reasoning would allow every designated public forum to be converted into a non-public forum the moment the government did what is supposed to be impermissible in a designated public forum, which is to exclude speech based on content.” *Ibid.* This reasoning, however, contradicts the very idea of a *limited* public forum, which is, by definition, a space in which the government excludes some types of speech and includes others. Contrary to the Second Circuit, such exclusions, which define the contours of the designated public forum, need only be reasonable and viewpoint neutral.

Establishing limits on the scope of a designated public forum does not “convert[] [it] into a non-public forum,” as the court of appeals believed. “[T]he State must respect the lawful boundaries it has itself set” (*Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819, 829 (1995)), and any exclusion of speech *within* the contours of the designated forum (as set by the state) therefore must be justified by a compelling government interest. At the same time, however, limits on the forum — and the exclusion of speech that falls *outside* of those limits — need only be reasonable and viewpoint-neutral to survive First Amendment scrutiny. See *id.* at 829-830; *Kokinda*, 497 U.S. at 730; *Cornelius*, 473 U.S. at 802.

Here, if MTA advertising space is a public forum at all, the scope of that forum is limited by the Advertising Standards to exclude speech that is inconsistent with the MTA’s function. The MTA has concluded that advertisements of the sort identified by the standards are incompatible with the MTA’s commercial or administrative interests, or with the welfare of its riders, in ways that are not true of other commercial or political speech. The court of appeals did not dispute that this judgment is reasonable. While the court of appeals blithely asserted that “[a]llowing political speech \* \* \* evidences \* \* \* a deliberate acceptance of the possibility of clashes of opinion and controversy that [is] \* \* \* inconsistent with sound commercial practice” (App., *infra*, 11a), that simply is not so. As we have noted, private advertising media generally display political advertising. And a sign that urges readers to “Vote for

Jones” surely is less offensive to the bulk of the MTA’s ridership than one that displays minors in sexually provocative poses, and is less problematic for the Authority than one (like the advertisement at issue in this case) that violates state law and is likely to embroil the MTA in extended litigation. It therefore is insupportable to conclude, as did the court of appeals, that the decision to accept paid political advertising necessarily is meant to surrender all discretion to exclude illegal and offensive advertisements.

**C. The Public Forum Holding of the Court Below Conflicts With Decisions of Other State and Federal Courts**

Given the ways in which the decision below departed from this Court’s teachings, it is no surprise that Second Circuit’s holding conflicts with the decisions of other courts. Indeed, the decision below cannot be reconciled with a recent ruling of New York State’s highest court, which held that New York City subway platforms are not an unlimited public forum — even though political speech is permitted on the platforms — and that the exclusion of specified types of speech therefore must be judged under a reasonableness test. *Rogers v. New York City Transit Auth.*, 680 N.E.2d 142 (N.Y. 1997). In *Rogers*, the New York City Transit Authority “opened limited access to its subway stations to a variety of nontransit expressive activities, including ‘public speaking; distribution of written noncommercial materials; artistic performances, including the acceptance of donations; solicitation for religious or political causes; [and] solicitation for charities.’” *Id.* at 147 (citation omitted). But the Transit Authority precluded “commercial activity” on subway platforms, and for that reason barred the plaintiff from selling his political literature in subway stations. See *id.* at 144-145, 147.

The New York Court of Appeals upheld this exclusion against First Amendment attack, finding that the Transit Authority’s restrictions on expression were subject to review only for reasonableness. The court acknowledged that “Rogers’ general right to sell books \* \* \* falls within First Amendment protection.” 680 N.E.2d at 145. But looking to this Court’s cases, the state court applied the principle that “allows government, when it acts as proprietor, to reserve property for its intended primary purpose, as

long as restrictive regulations on speech are reasonable and not an effort to suppress expression because of disagreement with the speaker's view." *Id.* at 146. In reaching this conclusion, the court expressly rejected the contention "that the Transit Authority's authorization of specified speech activities converts the subway system into a wholesale public forum." *Id.* at 149.

The decision below is in clear conflict with *Rogers*. While the Second Circuit found it dispositive that the MTA permits political advertisements, the New York Court of Appeals held that the Transit Authority did not create an unlimited public forum even though it expressly permitted political and other forms of noncommercial speech. This conflict between the Second Circuit and New York's highest court — on a subject of great practical importance to public transportation systems throughout that State — is intolerable and should be resolved by this Court.

The decision below also is in tension with the holdings of other federal courts of appeals. In *Planned Parenthood of Southern Nevada, Inc. v. Clark County School Dist.*, 941 F.2d 817 (9th Cir. 1991) (en banc), for example, a school sold advertising space in school publications but declined to run an advertisement submitted by Planned Parenthood. The Ninth Circuit held that the publications were not a public forum because school officials retained the right to disapprove particular advertisements (see *id.* at 825) and the evidence did not "suggest that the high schools were 'motivated by an affirmative desire to provide an open forum' for advertising \* \* \*; the schools did not accept advertising for any purpose other than to help defray the costs of this service." *Id.* at 824, quoting *Cornelius*, 473 U.S. at 805. And in *Hubbard Broadcasting, Inc. v. Metropolitan Sports Facilities Comm'n*, 797 F.2d 552 (8th Cir.), cert. denied, 479 U.S. 986 (1986), the Eighth Circuit held that advertising space in a public sports facility is not a public forum; the court found it dispositive that "[h]ere, as in *Lehman*, the city is engaged in commerce." *Id.* at 556. Accord *Christ's Bride Ministries, Inc. v. Southeastern Pennsylvania Transp. Auth.*, 937 F. Supp. 425, 431 (E.D. Pa. 1996) (although transit authority accepted political advertising, subway and rail systems are a nonpublic forum because the authority "is acting here as a proprietor and not as a lawmaker or regulator"). Review to clarify the governing standard therefore is in order.

## II. THE SECOND CIRCUIT'S HOLDING THAT REFUSAL OF COMMERCIAL ADVERTISING CONSTITUTES A PRIOR RESTRAINT WARRANTS REVIEW

The court of appeals thus committed a serious error in holding that the MTA's advertising space is a public forum. And the court greatly compounded its mistake by proceeding to rule, in open disagreement with opinions of this Court, that the MTA's refusal to display respondent's advertisement is a form of prior restraint, notwithstanding its commercial character. This holding has far-reaching and startling implications. It means that the MTA lacks the discretion to refuse advertisements in violation of its Standards, even assuming those Standards are substantively valid, without undertaking cumbersome judicial proceedings in which the MTA bears the burden of proof and the standard is strict scrutiny. Under the Second Circuit's application of prior restraint doctrine, it would appear that the MTA may decline to run an offending advertisement only by "instituting judicial proceedings" and "proving that the material is unprotected" in a forum where "a prompt final judicial determination [is] assured." *Id.* at 12a-13a (quoting *Southeastern Promotions*, 420 U.S. at 559). This impractical and intrusive requirement will radically alter the manner in which public transit authorities (and similar entities) carry out their business, while burdening courts and public agencies alike.

These unfortunate practical effects are a consequence of the Second Circuit's disregard for the limits on prior restraint doctrine. The court of appeals simply dismissed this Court's admonition that commercial speech is not entitled to the full protections of prior restraint doctrine. And the court below failed to recognize the utter inapplicability of prior restraint analysis in situations like this one, where the speaker necessarily must obtain advance approval from the government to make use of state facilities.

1. This Court has indicated that the bar on prior restraints has no application to commercial speech. Noting that "commercial speech is such a sturdy brand of expression that traditional prior restraint doctrine may not apply to it," the Court in *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557, 571 n.13 (1980), indicated that a regulatory commission could impose "a system of previewing advertising campaigns" to ensure compliance

with state requirements. The Court made a similar point in *Virginia State Board of Pharmacy v. Virginia Citizens Council*, 425 U.S. 748, 771-772 n.14 (1976), observing that, “[s]ince advertising is the *sine qua non* of commercial profits, there is little likelihood of its being chilled by proper regulation and forgone entirely”; “the greater objectivity and hardiness of commercial speech \* \* \* may \* \* \* make inapplicable the prohibition against prior restraints.” Accord *Friedman v. Rogers*, 440 U.S. 1, 10 (1979).

The court below recognized that this Court “has indicated that commercial speech may qualify as one of the exceptions to the bar on prior restraints” (App., *infra*, 13a), but it declined to follow this Court’s teaching because it “s[aw] no reason why the requirement of procedural safeguards should be relaxed whether speech is commercial or not.” *Ibid.* The reasons, however, are those stated by this Court: “Commercial speech, because of its importance to business profits, and because it is carefully calculated, is \* \* \* less likely than other forms of speech to be inhibited by proper regulation.” *Friedman*, 440 U.S. at 10. Indeed, this conclusion is compelled by the nature of the Court’s commercial speech doctrine. While commercial speech doubtless is entitled to substantial protection under the First Amendment, the Court consistently has held that “[t]he Constitution \* \* \* accords a *lesser* protection to commercial speech than to other constitutionally guaranteed expression.” *Central Hudson*, 447 U.S. at 562-563 (emphasis added). The Court therefore has subjected restrictions on commercial speech to a scrutiny that is less searching than that accorded regulations of noncommercial expression. See, e.g., *Florida Bar v. Went For It, Inc.*, 515 U.S. 618 (1995); *United States v. Edge Broadcasting Co.*, 509 U.S. 418 (1993). For similar reasons, the full panoply of doctrines designed to assure expansive protection for political and other forms of noncommercial speech do not apply to commercial expression. See, e.g., *Friedman*, 440 U.S. at 11 n.9 (“overbreadth analysis [is] not applicable to commercial speech”); *Board of Trustees v. Fox*, 492 U.S. 469 (1988). Against this background, it would be anomalous for the Court to draw a dif-

ferent balance in this one setting by according commercial speech the full protection of the bar on prior restraints.<sup>10</sup>

In light of this principle, other courts of appeals have rejected application of the prior restraint doctrine to commercial speech. In fact, the courts of appeals routinely uphold agency orders that preclude specified types of advertising so as to prevent deceptive statements, rejecting the argument that such orders should be set aside as prior restraints. See, e.g., *Grolier, Inc. v. FTC*, 699 F.2d 983, 988 (9th Cir. 1983); *Sears, Roebuck & Co. v. FTC*, 676 F.2d 385, 399 (9th Cir. 1982); *American Home Products Corp. v. FTC*, 695 F.2d 681, 713-714 (3d Cir. 1983); *Beneficial Corp. v. FTC*, 542 F.2d 611, 619 (3d Cir. 1976); *Porter Dietsch, Inc. v. FTC*, 605 F.2d 294, 304 (7th Cir. 1979). These orders, which were entered to prevent deceptive advertising, surely would have been regarded as impermissible prior restraints in a noncommercial setting. Other courts also have recognized that, because “[i]n the domain of commercial speech \* \* \* the Supreme Court has issued repeated admonitions against the wholesale incorporation of the law of prior restraints,” courts must apply “a relaxed standard of scrutiny better suited to the hardiness of commercial speech.” *Kleiner v. First Nat’l Bank of Atlanta*, 751 F.2d 1193, 1205 (11th Cir. 1995). Accord *Fargo Women’s Health Org., Inc. v. Larson*, 381 N.W.2d 176, 180 (N. Dak. 1986) (“prior restraint on commercial speech is allowed

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<sup>10</sup> Noting that “the determination whether speech is commercial or not may be fraught with ambiguity” (App., *infra*, 13a), the court of appeals opined that it “need not decide whether the Advertisement is actually commercial speech or core-protected speech; the difficulty of the question alone convinces us that the requirement of procedural safeguards in a system of prior restraints should not be loosened even in the context of commercial speech.” *Id.* at 14a. But this judicial punt — in which the court applied prior restraint rules to all commercial speech because it is sometimes difficult to determine whether a given advertisement should be classified as commercial or noncommercial — is insupportable. This Court has itself often noted the difficulty of determining whether particular speech should be deemed commercial (see, e.g., *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 419 (1993)), but that has not led the Court to eliminate the well-established distinction in the level of scrutiny accorded commercial and noncommercial expression. The court of appeals offered no justification for taking a different approach here.

to an extent which would not be allowed toward other forms of protected speech”); *Stratton v. Sinks*, 741 P.2d 435, 439 (N.M. Ct. App. 1987) (“the prohibition against prior restraint does not apply to commercial speech”); *Opinion of the Justices to the Senate*, 366 N.E.2d 1220, 1223 (Mass. 1977) (“[i]t is likely that no rule against ‘prior restraint,’ such as applies to noncommercial discourse, will be thought relevant to [commercial] advertising”); *Puerto Rico Tele-Com, Inc. v. Ocasio Rodriguez*, 747 F. Supp. 836, 842 (D.P.R. 1990) (“the strong presumption against the validity of prior restraints does not apply in the commercial speech context”).<sup>11</sup> Further review by this Court to resolve this recurring and important issue plainly is in order.

2. Next, and perhaps more fundamentally, the prior restraint doctrine can have no logical application in a case of this kind, where the speaker must, of necessity, obtain advance permission to gain access to scarce government resources. The bar against prior restraints makes sense when, for example, the government is seeking to stop publication of a newspaper (e.g., *New York Times v. United States*, 403 U.S. 713 (1971) (per curiam)) or of a book (e.g., *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963)), or attempts to prevent exhibition of a film in a private theater (e.g., *Vance v. Universal Amusement Co.*, 445 U.S. 308 (1980)), or tries to preclude a march in a traditional public forum (e.g., *National Socialist Party*

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<sup>11</sup> The decisions from other circuits cited by the court of appeals (App., *infra*, 14a) do not support its position. In *Desert Outdoor Advertising v. City of Moreno Valley*, 103 F.3d 814 (9th Cir. 1996), the Ninth Circuit did not hold that restrictions on commercial advertising are unconstitutional unless they are authorized in advance by judicial proceedings. The court decided only that issuance of billboard construction permits may not be left to the “unbridled discretion” of government officials. *Id.* at 818. Indeed, *Desert Outdoor* is inconsistent with the Second Circuit’s decision, since it presupposes that the government may impose a permit requirement (a form of prior restraint) if the governing standards are objective and satisfy the *Central Hudson* test. See *id.* at 818-819. The Tenth Circuit’s decision in *In re Kitty’s East*, 905 F.2d 1367 (10th Cir. 1990), simply held that the district court had “equitable jurisdiction” to review the seizure of “adult” books and videos; the case did not involve commercial speech at all. See *id.* at 1371.

v. *Village of Skokie*, 432 U.S. 43 (1977)). In such cases, the speaker has an essentially absolute entitlement to speak then and there, and a prior restraint accordingly imposes “an immediate and irreversible sanction.” *Nebraska Press Ass’n v. Stuart*, 427 U.S. 539, 559 (1976). The importance of “the element of time” makes the restraint impermissible. *Id.* at 561.

But entirely different considerations apply in the circumstances of this case, where the speaker, of necessity, must apply to the government *in advance* for permission to use state facilities. This is not a situation where all the government must do is stand aside and allow the speaker to have its say; instead, the state must act affirmatively to make its property available, and must choose between competing applicants for the space. Here, delay is inevitable: a putative advertiser must apply for advertising space (or wait to be solicited by TDI), must negotiate contract terms (since even the Second Circuit did not suggest that the MTA is obligated to make its display space available *gratis* to persons who cannot pay), and must wait for the limited advertising space to open up. Because the advertiser thus cannot have an entitlement to speak whenever it would like, the immediacy that underlies the prior restraint doctrine is wholly absent. There accordingly can be no justification for subjecting the government to the extraordinary requirement that it obtain prior judicial approval when it makes its prospective allocations of advertising space.

This Court’s decision in *Southeastern Promotions*, relied upon by the court of appeals (App., *infra*, 12a-13a), does not support extension of prior restraint doctrine to the circumstances here. That case involved the exclusion of a dramatic production from a municipal auditorium that otherwise would have been empty, solely on the ground that the production would violate obscenity laws. 420 U.S. at 548. The Court held that the city had to comply with the procedural safeguards ordinarily applicable to determinations that artistic productions are obscene. *Id.* at 559-561. The case did not involve the allocation of scarce space among competing uses, and did not address the question whether the necessity of seeking advance approval for use of government facilities affected the prior restraint analysis; to the contrary, the Court has since left open the question —analogous to the one in this case —“whether a municipality which owns a bandstand or stage facility may exercise, in some circumstances, a proprietary right to select performances and control

their quality.” *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989) (citing *Southeastern Promotions*, 420 U.S. at 570-574 (Rehnquist, J., dissenting)). *Southeastern Promotions* accordingly has no application here.

If read broadly — as the Second Circuit did — to impose strict scrutiny and prior restraint procedures on the government whenever it selects among potential speakers in government fora, *Southeastern Promotions* is in considerable tension with modern precedents. See, e.g., *Forbes*, slip op. 6 (“Much like a university selecting a commencement speaker, a public institution selecting speakers for a lecture series, or a public school prescribing its curriculum, a broadcaster by its nature will facilitate the expression of some viewpoints instead of others. Were the judiciary to require, and so to define and approve, pre-established criteria for access, it would risk implicating the courts in judgments that should be left to journalistic discretion”). It is difficult to see why the selection of a play to be performed in a municipal theater would stand on a different footing than selection of a speaker for a government-sponsored lecture series or of programming for a government-owned television station. The Second Circuit’s decision in this case shows that *Southeastern Promotions* is a source of misunderstanding and mischief in the law. This case would give the Court the opportunity to explain and confine the holding of *Southeastern Promotions*.

3. Finally, the extraordinary practical implications of the decision below — in both its public forum and prior restraint aspects — bear emphasis. *First*, the Second Circuit’s holding may require the MTA to display advertisements that the Authority reasonably regards as harmful. Indeed, the MTA developed the Advertising Standards precisely because advertisers sought to display messages (such as ones promoting tobacco products or depicting persons who appeared to be minors in sexually provocative poses) that are, quite understandably, upsetting to the MTA’s passengers and detrimental to its primary mission of providing safe and efficient transportation in pleasant surroundings. The MTA should not be forced to impose on its riders — a captive audience, including thousands of children — whatever messages advertisers may wish to disseminate. Privately

owned companies regularly exercise discretion in such matters, in the interest both of their customers and of themselves; after all, riders who are offended by what they see will avoid the forum altogether. See *Kokinda*, 497 U.S. at 736 (plurality opinion). There is no reason public transit has to be turned into a no-holds-barred pit of frightening, offensive, degrading, unhealthful, or illegal images. Yet if the exclusion of inappropriate advertisements is subjected to strict scrutiny, such images can be expected to reappear in New York's trains and buses, and in facilities owned by other public agencies that are subject to the Second Circuit's rule.

*Second*, the court of appeals' holding, which effectively forbids advance determinations of who may purchase advertising space on MTA transit facilities (or, what is practically the same thing, which requires judicial proceedings prior to such determinations) — and which mandates that any exclusion of advertising survive the rigors of strict scrutiny — essentially renders any system of advertising regulation impossible. Every year, the MTA's advertising contractor must process hundreds of proposed advertisements, many of which run for only relatively brief periods. The expense of instituting judicial proceedings whenever a proposed advertisement is inconsistent with the Advertising Standards would make enforcement prohibitively burdensome. The MTA might well be forced to stop carrying political messages so as to shed its character as a public forum, an outcome that surely does not advance First Amendment values.

*Third*, no public transportation agency in the country operates in the manner now required by the Second Circuit. In one stroke, the court of appeals rendered unconstitutional the standard operating practices of virtually every agency in the Circuit — and if followed by other courts, in the country. Modern transit systems typically accept political or other arguably controversial noncommercial advertising, and under the decision below all such facilities are now unlimited public fora. At the same time, all of these transit systems exclude certain categories of offensive advertisements. If the Second Circuit is right, all must now either forgo their political advertising, or operate under the regime of prior restraints and strict scrutiny announced by the court of appeals. If the Constitution requires such a massive disruption of settled government practices, it should be this Court, and not a divided panel of the court of appeals, that says so.

**CONCLUSION**

The petition for a writ of certiorari should be granted.

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