



Board of Directors | Executive Committee

Wednesday, June 9, 2021 at 3:30 p.m.

Zoom Attendee Link:

<https://us02web.zoom.us/j/89905019291?pwd=RldydFc5L1ZYSktUd0pLM1pWZjlhUT09>

By phone: +1-646-558-8656 Webinar ID: 899 0501 9291 Passcode: 415996

MEETING AGENDA

AGENDA ITEM	PRESENTER	ACTION or INFORMATION
1. Call Meeting to Order (3:30)	Hope Cahan, Board President & Committee Chair	N/A
2. Public Comment (3:30-3:35) The Executive Committee welcomes public comment. For items NOT listed on this agenda, the chair will recognize speakers at this point on the agenda. For items on the agenda, the chair will recognize public comment following the staff presentation. There is a 3-minute time limit per speaker.	Hope Cahan, Board President & Committee Chair	Information
3. Meeting Minutes (3:35-3:40) The committee will be asked to approve meeting minutes from the April 14, 2021 Executive Committee meeting.	Hope Cahan, Board President & Committee Chair	ACTION
4. Executive Session (3:40-4:10) The committee will vote to enter into executive session to discuss the annual evaluation of the Executive Director pursuant to 1 MRSA Section 405 (6) (A). Any action must be taken in public session.	Hope Cahan, Board President & Committee Chair	ACTION
5. Executive Session (4:10-4:40) The committee will vote to enter into executive session to discuss the possible acquisition of real property pursuant to 1 MRSA Section 405 (6) (C). Any action must be taken in public session.	Greg Jordan, METRO Executive Director	ACTION
6. Advertising Policy (4:40-5:25) Staff and legal counsel will provide an overview of the newly revised policy and flag for additional review, and possible changes, the section of the policy which allows Metro to grant endorsements to non-commercial organizations' proposed advertising.	Greg Jordan METRO Executive Director	Information and Possible Action
7. Future Agenda Items (5:25-5:30) Committee members may request future agenda items. <ul style="list-style-type: none"> • PACTS Initiatives and Reforms (Ongoing) • Agency Strategic Planning (Ongoing) • FTA Transit Agency Safety Plan (May) • Engaging New Stakeholders (TBD) 	Hope Cahan, Board President & Committee Chair	Information

8. Upcoming Meetings (5:25-5:30) <ul style="list-style-type: none"> • Ridership Committee – June 17, 2021 at 4:00 p.m. • Board of Directors – June 25, 2021 at 4:00 p.m. • Finance Committee – August 4, 2021 at 4:00 p.m. • Executive Committee – August 11, 2021 at 3:30 p.m. 	Hope Cahan, Board President & Committee Chair	Information
9. Adjournment (5:30)	Hope Cahan, Board President & Committee Chair	N/A

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**Board of Directors – Executive Committee – via Zoom
April 14, 2021 at 3:30 p.m.
DRAFT Meeting Minutes**

Draft Minutes of the Executive Committee Meeting of Wednesday, April 14, 2021 at 3:30 p.m. via Zoom
Attendee Link: <https://us02web.zoom.us/j/89905019291?pwd=RldydFc5L1ZYSktUd0pLM1pWZjlhUT09>
By phone: +1-646-558-8656 **Webinar ID:** 899 0501 9291 **Passcode:** 415996

Committee Members Present:

Hope Cahan, President
Mike Foley, Vice President
Nat Tupper, Secretary
Belinda Ray, Chair, Emerita

Staff and Guests:

Greg Jordan, Executive Director
Danielle Nemeth, Human Resources Director
Lauren Shaw, Executive Assistant

Committee Members not Present:

Paul Bradbury, Treasurer

Non-Committee Members Present:

Public:
None

- 1. With a quorum in place, the meeting was called to order at 3:32 p.m. by Hope Cahan, President.**
- 2. Public comment**
No members of the public were present.
- 3. Meeting Minutes of February 10, 2021**
Nat Tupper moved, seconded by Mike Foley, to accept the minutes of the February 10, 2021 Executive Committee meeting as written. A roll call vote was taken by Lauren Shaw, Executive Assistant. With approval by Mike Foley, Nat Tupper, Belinda Ray, and Hope Cahan, **the motion passed unanimously by all those present.**
- 4. PACTS Initiatives and Reforms**
Greg Jordan updated new committee members on PACTS Initiatives, Reforms, and Restructuring, as presented at the last Executive Committee meeting, to include any updates since that time.
 - A sub-study, Transit Together, has come out of Transit Tomorrow. It is a bus and paratransit redesign effort to make transit easier, create frequent connections. Make service easier. Includes a micro-transit study, an on-demand platform, to optimize mobility in our area in a cost-effective and more convenient way where full bus service is not feasible.
 - Rapid Transit is an 18-month study – RFP went out last month – hope to award in March. The first corridor to be analyzed will be Gorham to Portland. Brunswick to Biddeford will be second.
- 5. Meeting(s) of Regional Governing Boards/Councils**
Greg Jordan and Hope Cahan have been discussing how transit can be improved in the region through a collaborative effort between regional governing boards/councils and other transit agencies. Approach with, “How can we create a seamless transit experience for the rider?” and work to build collaboration and trust. In the past, meetings have included staff and not those at

the leadership level. Move away from agency-driven to regionally-driven. Forget about the past and focus on the future. Be clear that we have three different transit systems and we want to determine how they can best have the connectivity to benefit our ridership.

6. Agency Strategic Planning

Major Considerations:

- Recommendations stemming from Transit Together
- Pandemic Impacts, Response, and Adaptation
- Operations-Maintenance facility capacity (RTP leaving – can only add 6 more buses)
- Agency capacity and performance
- Continuous agency and operational improvement
- Long-term funding picture (will ridership improve to pre-pandemic level within two years?) – CARES Act funding will be gone then. Do we have the funding in place to be ready?
- Current initiatives (peninsula route redesign, electric bus project & 2040 zero emission fleet goal, Breez south, maximizing DiriGo TouchPass adoption and employer pass programs, capital replacement, bus stop improvements, facility needs assessment)

Option 1: Holding Pattern – defer major work on strategic planning until 2022. Let Transit Together and Rapid Transit studies come to conclusion.

Option 2: Move Forward

Most members would like to see a hybrid of the two options. After research and advance work are done, Greg suggested having a strategic planning workshop to revisit goals and timelines, with additional work being done by staff. CARES Act funding may be used for strategic planning. Greg expects this to be a year-long process.

7. Future Agenda Items: none added at this meeting

- PACTS Initiatives and Reforms (Feb. 2021)
- Strategic Planning “Metro 2025” (2021)

Hope has asked that all committees have vice chairs this year with the unknowns of COVID and to build leadership.

8. Upcoming Meetings

- Board of Directors – April 22, 2021 – 4:00 p.m.
- Ridership Committee – May 20, 2021 – 4:00 p.m. (April canceled)
- Finance Committee – May 5, 2021 – 4:00 p.m.
- Executive Committee – May 12, 2021 - 3:30 p.m.

9. Adjournment

Belinda Ray moved to adjourn, seconded by Nat Tupper. A roll call vote was taken by Lauren Shaw, Executive Assistant. With approval by Belinda Ray, Nat Tupper, Mike Foley, and Hope Cahan, **the motion passed unanimously by all those present, and the meeting adjourned at 4:32 p.m.**



EXECUTIVE COMMITTEE

AGENDA ITEM 6

DATE

June 9, 2021

SUBJECT

Advertising Policy

PURPOSE

Review possible changes to Metro's Advertising Policy for exterior advertising on the agency's buses and bus shelters.

BACKGROUND/ANALYSIS

At its December 17, 2020 meeting the Board of Directors approved a revised Advertising Policy (Attachment A) for exterior advertising on the agency's buses and bus shelters. The proposed policy limits allowable advertising to the following categories:

1. Commercial Advertising. The advertisement promotes or solicits a commercial transaction concerning the sale, distribution, or availability of goods, services, or events for an advertiser's commercial or proprietary interest.
2. Governmental Advertising. The advertiser is the United States government, the State of Maine, or any of the member municipalities of METRO and the advertisement furthers or supports a specific governmental purpose.
3. METRO-Endorsed Advertising. The advertisement is endorsed by the METRO Board of Directors pursuant to Article II.B. *Under this category, the Metro Board of Directors could give its endorsement to a non-commercial advertisement and allow it to run.*

The new policy prevents public service announcements and advertising requested by non-profit organizations on Metro's equipment unless the Metro Board of Directors offers its endorsement. Metro's endorsement of the advertisement allows the advertiser's message to effectively fall under Metro's rights under the governmental speech doctrine.

Since the new policy was approved, METRO's advertising contract (ATA Outdoor) has received requests from several agencies to continue or commence advertising all of which would require the board's endorsement.

METRO and ATA staff developed a process to conduct proper due diligence in order to determine that each agencies’ core mission and advertising messaging and/or creative content are not overtly inconsistent with METRO’s mission and values. This initial low-bar approach was guided by a standard that most non-profit organizations could generally meet.

In the course of these evaluations, Metro staff flagged potential risks to the agency related to both the process and board decision-making associated with approving advertising requests pursuant to section A (3) of the new policy (“Metro Endorsed Advertising”). In short, future decisions by the board to endorse advertising by certain non-profit organizations and not others may expose the agency to legal challenges, create public relations concerns, and create the kind of political controversy the board intended to avoid with the general prohibition of non-commercial advertising.

These risks can be managed with fair and effective processes and even-handed decision-making by the board, but they cannot be wholly prevented. As a result, before proceeding with this provision of the new policy, staff believe it is prudent to revisit this issue with the Executive Committee and determine if the scale of revenue generation from non-profit advertising (see financial analysis below) outweighs the potential risks and the administrative/legal cost in terms of staff and attorney time administering the process.

As part of this review, it is important to note there are categories of non-profit organizations for which the risks are very low, such as credit unions and universities. Other types of non-profit organizations may be guided by missions that are more or less political in nature, even if the specific advertising content is uncontroversial.

FISCAL IMPACT

Prior to the pandemic, Metro received approximately \$264,000 in annual revenue from advertising on buses and bus shelters in 2019, and averaged \$214,000 per year over the preceding five years. This amount equates to about 2.5-3.0% of the agency’s total bus operating budget (excluding ADA paratransit).

As the table below reports, advertising revenue from non-profit agencies made up about 19% of total revenue for 2015-2019 (2020 is excluded due to major reductions in advertising as a result of the COVID-19 pandemic).

Ad Category	2015-2019	Annual Average	Percentage
Political	\$ 875	\$ 175	0.1%
Alcohol	\$ 4,813	\$ 963	0.4%
Non-Profit	\$ 207,732	\$ 41,546	19.4%
Commercial	\$ 859,798	\$ 171,960	80.1%
Total	\$ 1,073,217	\$ 214,643	100%

RECOMMENDATION

Staff's recommendation is to retain the existing policy as written but strictly limit Metro's endorsement to those organizations/advertising campaigns that Metro specifically wants to support. There should be a high bar for meeting this standard such that the mission of the organization and messaging contained in the advertising directly aligns with and advances Metro's mission and goals.

CONTACT

Greg Jordan
Executive Director
(207) 517-3025
gjordan@gpmetro.org

ATTACHMENTS

Attachment A – Metro Advertising Policy (Amended 12/2020)
Attachment B – Legal Analysis in Support of 2020 Policy Change



METRO ADVERTISING POLICY

Article I. Applicability; Purpose

This Advertising Policy applies to all advertisements proposed to be displayed in or on any METRO buses, vans, shelters, bus stops, and other transit facilities (collectively, “METRO Transit Facilities”) on or after the Effective Date.

The operations of Greater Portland Transit District (METRO) are funded by a combination of federal, state, and local funds, including fare revenues. Advertising revenues are an important supplemental source of revenue that is a part of METRO’s operating budget and supports its transit operations. Revenues derived from advertising also reduce the local assessments for its member municipalities. METRO’s purpose in allowing paid advertising to be displayed on or in METRO Transit Facilities is to maximize such supplemental revenue to support its operations without adversely affecting its ridership numbers or quality.

The purpose of this Advertising Policy is to establish uniform, reasonable, and viewpoint-neutral standards and procedures that are consistently applied in determining the acceptability of proposed advertising on or in METRO Transit Facilities.

Article II. Nonpublic Forum; METRO as Proprietor; METRO’s Speech Not Restricted

A. Nonpublic Forum; METRO as Proprietor.

METRO Transit Facilities constitute nonpublic forums that are subject to the viewpoint-neutral restrictions set forth in this Advertising Policy. Nothing contained in this Advertising Policy or its implementation by METRO, its employees, officers, or agents (including without limitation its Advertising Contractor) is intended or shall be construed to create, designate, or use METRO Transit Facilities as a public forum for expressive activities or general discourse.

By accepting advertising for display in or on METRO Transit Facilities, METRO is acting in a proprietary capacity as a provider of public transportation seeking to maximize advertising revenue to support its operations. In furtherance thereof, METRO limits the advertisements it will accept for display in or on METRO Transit Facilities in accordance with the provisions of this Advertising Policy.

B. METRO’s Speech Not Restricted.

Notwithstanding the Advertising Standards in Article III, METRO has the unqualified right to display in or on METRO Transit Facilities, and to prioritize the display of, (i) informational notices concerning METRO operations, services, or promotions; (ii) cross-promotional material;¹ and (iii) any advertisement that is procured or endorsed by the METRO Board of Directors, including without limitation commercial advertising, governmental advertising, and public service announcements. For purposes of this Advertising Policy, a vote by a majority of the METRO Board

¹ “Cross-promotional material” means an advertisement that concerns a cooperative partnership in which one or more entities works together with METRO with the goal of jointly promoting their respective goods, services, events, or messages.

of Directors present and voting to approve or support an advertisement constitutes an endorsement.

Article III. Advertising Standards

- A. Permitted Advertising. METRO will accept for display on or in any METRO Transit Facilities paid or unpaid advertisement that falls within one or more of the following categories:
1. Commercial Advertising. The advertisement promotes or solicits a commercial transaction concerning the sale, distribution, or availability of goods, services, or events for an advertiser's commercial or proprietary interest.
 2. Governmental Advertising. The advertiser is the United States government, the State of Maine, or any of the member municipalities of METRO and the advertisement furthers or supports a specific governmental purpose.
 3. METRO-Endorsed Advertising. The advertisement is endorsed by the METRO Board of Directors pursuant to Article II.B.
- B. Prohibited Advertising. Notwithstanding Article III.A, METRO will not accept for display on or in any METRO Transit Facilities any advertisement that falls within one or more of the following categories, unless such advertisement is endorsed by the METRO Board of Directors pursuant to Article II.B:
1. Non-Commercial Matter. The advertisement does not promote or solicit a commercial transaction concerning the sale, distribution, or availability of goods, services, or events for an advertiser's commercial or proprietary interest.
 2. Adult Entertainment. The advertisement promotes or contains images, copy, or concepts associated with adult entertainment establishments or sexually oriented goods or services, including but not limited to adult book stores, video stores, dance clubs, telephone services, internet sites, films (including X-rated or NC-17 rated films), video games, and escort services.
 3. Alcohol, Tobacco, and Cannabis. The advertisement (i) depicts alcohol, tobacco or tobacco-related products, or cannabis or cannabis-related products; (ii) simulates drinking, smoking, vaping, or ingesting of alcohol, tobacco or tobacco-related products, or cannabis or cannabis-related products; (iii) promotes events related to alcohol, tobacco or tobacco-related products, or cannabis or cannabis-related products; or (iv) otherwise promotes the use or sale of alcohol, tobacco or tobacco-related products, or cannabis or cannabis-related products.
 4. Demeaning, Defamatory, or Disparaging Content. The advertisement contains images, copy, or concepts that demean or disparage any individual or group or is libelous.
 5. False, Misleading, or Deceptive Content. The advertisement is false, misleading, or deceptive.
 6. Firearms. The advertisement contains images, copy, or concepts of guns or firearms.
 7. Unlawful or Illegal Conduct, Goods, or Services. The advertisement contains images, copy, or concepts that promote or encourage, or appear to promote or encourage, unlawful or

illegal conduct (including without limitation infringement of copyright) or the use or possession of unlawful or illegal goods or services.

8. METRO's Endorsement. The advertisement contains images, copy, or concepts that inaccurately state or imply METRO's endorsement of the subject of the advertisement.
 9. METRO's Interests. The advertisement contains images, copy, or concepts that (i) encourage or depict unsafe behavior with respect to METRO's transit operations; (ii) are directly adverse to the commercial, administrative, or proprietary interests of METRO; or (iii) METRO reasonably foresees would incite or provoke violence or would otherwise result in harm to, disruption of, or interference with METRO's transit systems or services.
 10. Prurient Sexual Suggestiveness. The advertisement contains images, copy, or concepts that describe, depict, or simulate sexual activities, or aspects of the human anatomy in a way that the average adult, applying contemporary community standards, would find appeals to the prurient interest of minors or adults in sex.
 11. Violence. The advertisement contains images, copy, or concepts of graphic violence, including without limitation: (i) the depiction of human or animal bodies or body parts, or fetuses, in states of mutilation, dismemberment, decomposition, or disfigurement; or (ii) the depiction of weapons or other implements or devices used in the advertisement in an act of violence or harm on a person or animal.
 12. Vulgarity or Obscenity. The advertisement contains images, copy, or concepts that are obscene, vulgar, crude, sexually suggestive, indecent, profane, or scatological.
- C. Sponsorship Disclaimer. METRO reserves the right to require that any advertisement accepted for display on or in METRO Transit Facilities include a statement of sponsorship ("This message is sponsored by _____") and/or a disclaimer indicating that the advertisement is not sponsored by METRO and does not constitute an express or implied endorsement of its content, viewpoint, or the advertising sponsor.

Article IV. Review of Proposed Advertisement

For purposes of this Article IV, "Advertising Contractor" means the advertising agency or firm retained by METRO to solicit, review, and publish approved commercial advertising on METRO Transit Facility. "Contract Administrator" means the METRO General Manager or designee.

- A. Initial Review by Advertising Contractor. The Advertising Contractor will initially review each advertisement submitted for display on or in METRO Transit Facilities to determine whether the advertisement complies with the Advertising Standards in Article III. If the Advertising Contractor determines that advertisement complies with the Advertising Standards, the Advertising Contractor may display the advertisement pursuant to the separate terms of its agreement with METRO. If the Advertising Contractor determines that advertisement does not, or may not, comply with the Advertising Standards, the Advertising Contractor will promptly forward to the Contract Administrator the proposed advertisement, name of the advertiser, size and number of proposed advertisements, proposed dates and locations of displays, and the reason for the Advertising Contractor's determination that the proposed advertisement does not, or may not, comply with the Advertising Standards.

- B. Review by Contract Administrator. Upon the Contract Administrator's receipt of the advertisement and supporting information, the Contract Administrator will review the advertisement and supporting information to determine whether the advertisement complies with the Advertising Standards. In reaching this determination, the Contract Administrator may consider any materials submitted by the advertiser and may consult with the advertiser, Advertising Contractor, and METRO's general counsel. If the Contract Administrator determines that the advertisement does not comply with the Advertising Standards, the Contract Administrator will so advise the Advertising Contractor of the determination in writing, who will in turn notify the advertiser. The determination of the METRO Contract Administrator is final.
- C. Opportunity for Revision by Advertiser. If the Contract Administrator determines that the advertisement does not comply with the Advertising Standards, the Advertising Contractor may, in consultation with the Contract Administrator, discuss with the advertiser revisions to the advertisement to try to bring the advertisement into conformity with the Advertising Standards, and the advertiser may submit a revised advertisement for review.
- D. Removal of Non-Complying Advertisements. Notwithstanding the foregoing Sections A, B, and C, if the Contract Administrator determines at any time that an advertisement accepted for display by the Advertising Contractor does not comply with the Advertising Standards, the Contract Administrator will notify the advertiser in writing of the determination and direct the Advertising Contractor to remove the advertisement. Upon such instruction, the Advertising Contractor will promptly remove the advertisement, will provide the advertiser with a copy of this Advertising Policy, and may, with the Contract Administrator, discuss with the advertiser revisions to the advertisement which, if undertaken, would bring the advertisement into conformity with the Advertising Standards. The advertiser will then have the option of submitting a revised advertisement for review. If METRO and the advertiser do not reach agreement with regard to a revision of the advertisement, the METRO Contract Administrator will issue a final written notice of its decision, which will then be relayed to the advertiser. The determination of the Contract Administrator is final.

Article V. Miscellaneous

- A. Severability. If any portion of this Advertising Policy is declared invalid by a court of competent jurisdiction, such portion shall be deemed severable and shall not affect the validity of the remaining portions of this Advertising Policy, which shall continue in full force and effect.
- B. Effective Date. This Advertising Policy is effective as of December 18, 2020 in accordance with approval by the Board of Directors.

MEMORANDUM

October 8, 2020

To: Greg Jordan, General Manager
Greater Portland Transit District | METRO

From: Aga Dixon, Esq.
Drummond Woodsum

Re: METRO Advertising Policy Analysis

You have asked me whether Greater Portland Transit District (METRO) may amend its advertising policy to prohibit all political advertising on its buses, shelters, and transit facilities. As explained next, although the matter is not entirely free from doubt, in my view METRO may do so. Because such a policy would be very difficult to consistently implement in a manner that is both reasonable and viewpoint neutral, however, METRO should consider adopting a policy that eliminates all manner of advertising from its property.

METRO's Advertising Policy

As you know, METRO has an advertising policy that establishes standards and procedures to evaluate ads proposed for display in METRO facilities, including its buses and shelters. The policy excludes ads that are determined to fall within one or more of thirteen different categories, including ads containing materials that demean or disparage an individual or group of individuals; promotes the sale or use of tobacco; or contains profanity, obscenity, or nudity. I understand that METRO is considering adding a fourteenth category to that list to either exclude or limit ads determined to be "political." The policy also states that revenues from advertising are part of METRO's operating budget and serve to reduce the local assessments for its member municipalities. My understanding is that the revenues derived from advertising have historically constituted a small portion (approximately 3%) of METRO's total operating budget.

Constitutional Considerations

When transit agencies regulate speech by setting policies and practices that limit advertising on their buses and other transit properties, they risk running afoul of the constitutional protections that guarantee free speech. Most lawsuits against transit agencies that concern their advertising policies—and there are many such suits—are filed pursuant to 42 U.S.C. §§ 1983 and 1988, and plaintiffs typically assert that the agency's advertising policy offends the First and Fourteenth Amendments of the U.S. Constitution.¹ Plaintiffs in those cases usually seek injunctive relief

¹ Section 1983 provides a private right of action for a violation of constitutional rights by persons acting under the color of state law. 42 U.S.C. § 1983. Section 1988 directs district courts to exercise jurisdiction over civil and criminal matters alleging violations of civil rights "in conformity with the laws of the United States" and allows for an award of attorney's fees in such actions. 42 U.S.C. § 1988. The First Amendment states, in relevant part: "Congress shall make no law . . . abridging the freedom of speech . . ." U.S. Const. amend. I. The Fourteenth Amendment extended

which, if granted, force the transit agency to display the rejected advertisement and to also pay attorneys' fees and costs.

Forum Analysis

When a government entity such as a transit agency acts as a proprietor of its own property to regulate speech, courts afford such private speech different levels of protection depending on the “forum” in which the speech occurs.²

In a “traditional public forum” (for example, public streets or parks), speech restrictions must be narrowly tailored to serve a compelling government interest—an exceedingly difficult standard to meet.³ That same high standard governs speech restrictions within a “designated public forum,” which exists whenever government property that has not traditionally been regarded as a public forum is intentionally opened up for that purpose (for example, municipal theaters or school board meetings).⁴ But if an agency creates a “nonpublic forum” (also called a limited public forum)—that is, a space limited to use by certain groups or dedicated solely to the discussion of certain subjects—then speech restrictions need only be reasonable and viewpoint neutral.⁵

Courts usually distinguish between designated and nonpublic forums based on the transit agency's intent, as evidenced by its policies and practices as well as the “nature of the [transit agency's] property and its compatibility with expressive activity.”⁶ While a written statement by the transit agency on what type of forum it believes it is creating is not dispositive, it is often useful and relied on by courts in making the determination. For this reason, METRO's policy states that “METRO buses, vans, shelters, bus stops and transit facilities constitute nonpublic for[u]ms that are subject to viewpoint-neutral restrictions.”

Indeed, nearly every court to consider this question has concluded that advertising space that categorically prohibits political advertising on public transit systems is a nonpublic forum.⁷ Courts are divided, however, on what type of forum is created when transit authorities open their advertising spaces to political speech or other categories of “controversial” speech.⁸ In parts of the country, courts have held that transit authorities that open their advertising spaces to political messages have created a *designated* public forum and therefore must provide compelling

this prohibition to the states. *See, e.g., Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 44 (1983). The Fourteenth Amendment provides, in relevant part: “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States” U.S. Const. amend. XIV.

² *See Pleasant Grove City v. Sumnum*, 555 U.S. 460, 469-70 (2009).

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 473 U.S. 788, 802 (1985).

⁷ *See Lehman v. Shaker Heights*, 418 U.S. 298, 304 (1987); *see also Am. Freedom Def. Initiative v. Suburban Mobility Auth. for Reg'l Transp.*, 698 F.3d 885, 891 (6th Cir. 2012); *Ridley v. Mass. Bay Transp. Auth.*, 390 F.3d 65, 82 (1st Cir. 2004); *Uptown Pawn & Jewelry, Inc. v. City of Hollywood*, 337 F.3d 1275, 1278–79 (11th Cir. 2003); *Children of the Rosary v. City of Phoenix*, 154 F.3d 972, 977 (9th Cir. 1998).

⁸ *See American Freedom Defense Initiative v. King County, Wash.*, 136 S.Ct. 1022, 1024–25 (U.S., 2016) (J. Thomas, joined by J. Alito, dissenting from the denial of certiorari and enumerating the “especially stark divisions among federal courts of appeals” in identifying the type of forum implicated by advertising in public transit spaces).

justification for restricting the ads, and must narrowly tailor any restrictions to those justifications.⁹ In other jurisdictions, including in the First Circuit Court of Appeals—Maine’s federal court of appeals, these types of advertising spaces are considered *nonpublic* forums, and transit agency restrictions on advertising are upheld so long as those restrictions are viewpoint neutral and reasonable, as discussed next.¹⁰

Viewpoint Neutrality

Courts have long recognized that governmental agencies may impose content-based restrictions on speech in nonpublic forums so long as those restrictions are viewpoint neutral.¹¹ The legal test for viewpoint discrimination is “whether—within the relevant subject category—the government has singled out a subset of messages for disfavor based on the views expressed.”¹² In other words, transit agency policies and practices with respect to its advertising decisions must not discriminate on the basis of the viewpoint of the speaker.¹³

The difficulty in meeting this constitutional standard lies in defining what advertising content is “political” versus “not political” without disfavoring a particular political perspective or a particular group and in applying such a definition consistently over time.

A recent case out of Virginia, *White Coat Waste Project v. Greater Richmond Transit Co. (GRTC)*, is illustrative.¹⁴ In that case, the U.S. District Court of the Eastern District of Virginia held that a transit agency that adopted a policy banning “all political ads” engaged in viewpoint discrimination because it had no identifiable standards to apply the policy in a consistent way.¹⁵ The court found, for example, that GRTC had accepted ads promoting a vice presidential debate on grounds that it advertised a debate where “all sides” were invited to participate in a moderated public discussion, despite the debate’s overtly political nature and even though the debate restricted participation to the two majority political parties.¹⁶ The court noted that GRTC tended to view noncontroversial statements of a political nature as “public service announcements” while controversial statements were viewed as “political,” leading to the inclusion of mainstream views and the exclusion of more controversial or minority views.¹⁷

In short, the court concluded that GRTC had accepted political ads under the guise of public service announcements “based on a rather haphazard interpretation of [its advertising policy] by one person whose viewpoint affects decisions.”¹⁸ The court therefore held that GRTC’s advertising

⁹ *Id.*

¹⁰ *Id.*; see also *AFDI v. Massachusetts Bay Transp. Auth.*, 781 F.3d 571, 580 (1st Cir. 2015).

¹¹ *Minnesota Voters Alliance v. Mansky*, 138 S. Ct. 1876, 1885–86 (U.S. 2018); *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985).

¹² *Matal v. Tam*, 137 S. Ct. 1744 (U.S. 2017).

¹³ The policies and practices must also be reasonable in light of the purposes for which the forum was established—that is, a transit agency must select advertising content that reasonably serves its overriding purpose of generating revenue without adversely affecting ridership numbers or quality.

¹⁴ 2020 WL 22813402 (E.D.Va., 2020).

¹⁵ *Id.*, at *34.

¹⁶ *Id.*, at *32.

¹⁷ *Id.*

¹⁸ *Id.*, at *34.

policy was unconstitutional because it had been applied to the plaintiffs in a way that “discriminates not just on the perceived political nature of the advertisement, but on GRTC’s perceived political nature of the speaker.”¹⁹

Reasonableness

In addition to being viewpoint neutral, transit agency policies and practices must be reasonable in light of the purposes for which the forum was established²⁰—that is, for the purposes of generating revenue without adversely affecting ridership numbers or quality. For content-based policies and practices to be reasonable, they must be sufficiently clear and objective to avoid arbitrary or discriminatory application.²¹

As with viewpoint neutrality, drafting and implementing an advertising policy that meets this legal reasonableness standard is not easy.

In a recent case out of Washington State, *Amalgamated Transit Union Local 1015 v. Spokane Transit Authority* (STA), the Ninth Circuit Court of Appeals discussed this reasonableness requirement in light of an advertising policy amendment adopted by STA, a transit agency.²² After facing rider complaints and operational disruptions arising from controversial bus ads, STA adopted an advertising policy that limited ad space to only two categories of ads: “commercial and promotional advertising” and “public service announcements.”²³ The new policy expressly prohibited so-called “public issue” advertising, which STA defined as advertising “expressing or advocating an opinion, position, or viewpoint on matters of public debate about economic, political, religious or social issues” and which STA’s general manager interpreted as constituting subjects that would create a negative impression of the STA.²⁴ Under this policy, STA rejected proposed ads intended to promote the services of a local labor union on grounds that the ads were “public issue” advertising that could provoke responses from the “right to work” movement.²⁵ The court ultimately concluded that the STA unreasonably applied the policy to ban the labor union ads because STA had provided no written guidance on how to assess whether an ad is a “public issue” and its decisions seemed entirely driven by the general manager’s belief of what would reflect badly on STA.²⁶

Likewise, in a case hot off the presses in Pennsylvania, *Center for Investigative Reporting v. Southeastern Pennsylvania Transportation Authority* (SEPTA), the Third Circuit Court of Appeals struck down a transit agency’s policy prohibiting ads that are “political in nature.” In that case, SEPTA rejected a proposed ad for display on its buses that discussed a watchdog group’s investigation into mortgage lending trends because SEPTA had concluded that the ad violated its policy, which prohibited “advertisements that are political in nature or contain political messages,

¹⁹ *Id.*, at *33.

²⁰ *Minnesota Voters Alliance v. Mansky*, 138 S. Ct. 1876, 1885-86 (U.S. 2018).

²¹ *American Freedom Defense Initiative v. King County*, 796 F.3d 1165, 1170–71 (9th Cir. 2015).

²² 929 F.3d 643 (9th Cir. 2019).

²³ *Id.*, at 647.

²⁴ *Id.*

²⁵ *Id.*, at 650.

²⁶ *Id.*, at 654-56.

including advertisements involving political or judicial figures and/or advertisements involving an issue that is political in nature in that it directly or indirectly implicates the action, inaction, prospective action or policies of a government entity.”²⁷ The court found that the absence of guidelines in determining what constitutes a political ad under this policy left advertising decisions susceptible to SEPTA’s own politics to shape its views on what counts as “political.”²⁸ Accordingly, the court concluded that the advertising standards were not capable of reasoned application.²⁹

Conclusion and Recommendations

Litigation involving transit agency decisions accepting or rejecting proposed ads is quite common, and METRO is not immune from suit under either its current policy or any changes to that policy that would limit or ban political ads. In weighing this risk of litigation against its business interest in generating revenue from advertising, METRO should consider the following:

1. *A court is likely to classify METRO’s advertising space as a nonpublic forum, but this forum classification could change in the future.*

In evaluating any challenge to METRO’s advertising policy, a court would first need determine whether or not its advertising space—that is, its buses, shelters, and other transit property—should be characterized as a designated or a nonpublic forum. This would set the standard of review that a court would use to decide whether METRO’s policies and practices are unconstitutional.

As discussed, the leading case in the First Circuit—Maine’s federal circuit court—holds that a transit agency’s advertising space is a nonpublic forum, even if advertising on controversial issues is prohibited. There is, however, a circuit split over this classification, meaning the matter is ripe for consideration by the U.S. Supreme Court. Should the U.S. Supreme Court take up this question in a future case, it is not clear how it would resolve the inter-circuit conflict. If the Court were to adopt the classification of several other circuit courts, then METRO’s advertising spaces would be classified as a designated public forum and its advertising policy would need to be narrowly tailored to serve a compelling government interest—an exceedingly difficult constitutional standard to meet.

Relatedly, it bears mention that when a transit agency prohibits categories of advertising (much like METRO’s advertising policy does), the transit agency is said to be restricting speech on the basis of “content.” Such content-based restrictions within nonpublic forums have historically been upheld by the courts (so long as those restrictions do not discriminate on the basis of viewpoint or are unreasonable, of course). A recent U.S. Supreme Court case has raised new legal questions, however, as to whether all such content-based restrictions are constitutional per se.³⁰ Although the matter at this juncture is not clear, when taking into

²⁷ *Id.*, at *1.

²⁸ *Center for Investigative Reporting v. Southeastern Pennsylvania Transportation Authority*, --- F.3d ---, 2020 WL 5509709, at *9 (3d Cir. 2020).

²⁹ *Id.*

³⁰ See *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218 (2015) (holding that a sign ordinance that established different rules for commercial and non-commercial signs was not content-neutral).

account a long line of U.S. Supreme Court speech cases,³¹ it appears to me that an advertising policy that prefers commercial speech over noncommercial speech remains constitutional—at least so long as the advertising space is classified as a nonpublic forum.

In short, if METRO’s advertising space were characterized by a court as a designated public forum, its current advertising policy, as well as any contemplated policy amendment banning political advertising, would probably be unconstitutional.

2. *A court is likely to find that a METRO policy banning political advertising is facially constitutional, but METRO’s implementation of the policy must not result in viewpoint discrimination and must be reasonably applied.*

Based on my review of the relevant case law, a METRO policy amendment banning political advertising could be drafted in a way that would probably withstand a constitutional challenge. But a court could nonetheless conclude that METRO’s policies and practices are unconstitutional as applied to a particular individual or group attempting to use its advertising space if METRO’s *interpretation* of the policy is not viewpoint neutral or is unreasonable, as was the case for GRTC, STA, and SEPTA. To avoid a similar fate, METRO would need to clearly specify in its advertising policy—and then consistently carry out in its interpretations of that policy—exactly what is and what is not a “political ad.” As discussed above, this is not an easy task.

In sum, although the matter is not entirely free from doubt, in my view METRO could adopt an advertising policy banning political ads. Because such a policy would be very difficult to consistently implement in a manner that is both reasonable and viewpoint neutral, and in light of the small revenue stream that advertising provides, METRO might instead consider adopting a policy that eliminates all manner of third party advertising (this would not foreclose METRO’s ability to display its own ads and messages).

I trust this memo is responsive to your question. If you have any further questions, please don’t hesitate to contact me.

/AAD

³¹ See, e.g., *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981).