

## Brooklyn Law Review

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Volume 85

Issue 1 *Symposium: Incitement at 100-and  
50-and Today*

Article 7

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12-27-2019

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Leslie Gielow Jacobs

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#### Recommended Citation

Leslie G. Jacobs, *"Incitement Lite" for the Nonpublic Forum*, 85 Brook. L. Rev. (2019).

Available at: <https://brooklynworks.brooklaw.edu/blr/vol85/iss1/7>

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# “Incitement Lite” for the Nonpublic Forum

*Leslie Gielow Jacobs*<sup>†</sup>

## INTRODUCTION

The incitement exception just celebrated its hundredth birthday, or its fiftieth in its modern version.<sup>1</sup> Forged amidst the turmoil of political protest, the exception articulated in *Brandenburg v. Ohio*, defines the circumstances in which protected abstract advocacy of unlawful conduct crosses the constitutional line and becomes unprotected “incitement” of it.<sup>2</sup> Regulation of speech to avoid the persuasive effect of its message on listeners presumptively violates the Constitution.<sup>3</sup> The exception permits the government to do so in circumstances where the speaker intends, by means of speech that urges action, to persuade listeners to engage in unlawful conduct, and the listeners’ move from receipt of the speech to action

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<sup>†</sup> Justice Anthony M. Kennedy Endowed Professor of Law and Director, Capital Center for Law & Policy, University of the Pacific, McGeorge School of Law. Thanks to Brooklyn Law School and the *Brooklyn Law Review* for hosting the Symposium: Incitement At 100—And 50—And Today: Free Speech and Violence in the Modern World. Thanks to Caroline Mala Corbin, David Han, Genevieve Lakier, and Rodney Smolla for helpful comments on the presentation and on drafts. Thanks also to Paul Howard for quick and useful research assistance, and to Emma Woidtke for helpful research and cite-checking assistance.

<sup>1</sup> See *Schenck v. United States*, 249 U.S. 47, 52 (1919) (articulating the clear and present danger test); *Debs v. United States*, 249 U.S. 211, 216–17 (1919); *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam) (articulating the current incitement exception).

<sup>2</sup> See *Brandenburg*, 395 U.S. at 445, 449.

<sup>3</sup> See, e.g., *McCullen v. Coakley*, 573 U.S. 464, 481 (2014) (noting a law is not content-neutral if it is “concerned with undesirable effects that arise from ‘the direct impact of speech on its audience’ or ‘[l]isteners’ reactions to speech’” (alteration in original) (quoting *Boos v. Barry*, 485 U.S. 312, 321 (1988))).

is both likely and imminent.<sup>4</sup> In this modern form, the Court has never found speech to fit within the definition.<sup>5</sup>

The Court crafted the multiple elements of the *Brandenburg* exception to rigorously protect advocacy of ideas in the realm of public communication while preserving some scope of authority of the government, acting in its sovereign capacity, to fulfill its delegated function of ensuring public safety by means of restricting speech that persuades listeners to commit specific crimes.<sup>6</sup> The narrow exception continues to do good work in the context in which it was born, and has developed, where the alleged calls to action occur within collective public speech activities and the consequence of falling within the exception is criminal punishment.<sup>7</sup> Outside the realm of public communication, and particularly where the heavy threat of criminal punishment for speaking within the definition of the exception does not exist, some form of “incitement lite,” with elements adjusted to fit the different balance of government authority and individual speech rights and impacts, may better implement the spirit that animates and explains the exception.

Management by government agencies of private speech on nonpublic forum property is one circumstance far outside the realms of public communication and criminal punishment.<sup>8</sup> Government entities operate nonpublic forums inside their institutions in the course of fulfilling specific delegated functions.<sup>9</sup> Nonpublic forums include intra-agency mail

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<sup>4</sup> *Brandenburg*, 395 U.S. at 447 (noting a state cannot “proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action”); *Bible Believers v. Wayne County*, 805 F.3d 228, 246 (6th Cir. 2015) (en banc) (“The *Brandenburg* test precludes speech from being sanctioned as incitement to riot unless (1) the speech explicitly or implicitly encouraged the use of violence or lawless action, (2) the speaker intends that his speech will result in the use of violence or lawless action, and (3) the imminent use of violence or lawless action is the likely result of his speech.” (footnote omitted)).

<sup>5</sup> *Am. Freedom Def. Initiative v. Metro. Transp. Auth.*, 70 F. Supp. 3d 572, 581 (S.D.N.Y.) (“[T]he Supreme Court has rarely applied the *Brandenburg* incitement standard, and never explicitly found speech to be on the proscribable side of the standard.” (citing ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW* 1328 (4th ed. 2013)), *vacated on other grounds*, 109 F. Supp. 3d 626 (S.D.N.Y. 2015)).

<sup>6</sup> See *infra* notes 61–68 and accompanying text.

<sup>7</sup> Rodney A. Smolla, *Should the Brandenburg v. Ohio Incitement Test Apply in Media Violence Tort Cases?*, 27 N. KY. L. REV. 1, 29 (2000).

<sup>8</sup> *Minn. Voters All. v. Mansky*, 138 S. Ct. 1876, 1885 (2018) (noting a nonpublic forum is not a “space . . . for public communication” (internal quotation marks omitted)); *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2250 (2015) (“We have previously used what we have called ‘forum analysis’ to evaluate government restrictions on purely private speech that occurs on government property.”).

<sup>9</sup> See *Int’l Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992) (stating a nonpublic forum exists when the role of the government, when it regulates access to its property, is “as a proprietor, managing its internal operations, rather than acting as [a] lawmaker with the power to regulate or license”).

systems,<sup>10</sup> chat rooms, and social media channels;<sup>11</sup> the grounds of military bases,<sup>12</sup> and other government entities, such as a post office<sup>13</sup> or airports,<sup>14</sup> which are not open to public speakers generally; advertising platforms located inside transit vehicles or facilities,<sup>15</sup> or on websites that serve agency clients;<sup>16</sup> and bulletin boards, display cases, and literature distribution kiosks aimed at employees or members of the public who form the clientele for a government agency, such as library patrons.<sup>17</sup>

By contrast to the government when it manages property dedicated to public communication among citizens, nonpublic forum managers have substantial authority to distinguish among types of outside speech they invite onto their properties to ensure that the speech content is compatible with the properties and does not provoke listener reactions that disrupt the operations of their enterprises.<sup>18</sup> They may restrict access so long as their judgments are “reasonable and not an effort to suppress expression merely because public officials oppose the speaker’s view.”<sup>19</sup> Speakers engaging in nonpublic forum speech face much less severe impacts than criminal punishment. These impacts range from requests that they modify the form or content of their speech to exclusion from the single speech channel. And, notably, exclusion of speakers from nonpublic forums is limited to that speech channel alone and all other channels of public communication remain open for the speakers to spread their ideas and points of view.

The government’s institutional interest in restricting both persuasive speech and the form of communication typical of nonpublic forums also differs from those that explain the *Brandenburg* exception elements. The persuasive speech that nonpublic forum managers predict to be most threatening to their abilities to fulfill their delegated functions is not speech

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<sup>10</sup> *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 46 (1983).

<sup>11</sup> Electronic communication channels directed at an agency’s internal audience, and which are not generally open to speakers from outside the agency, should be classified as nonpublic forums like the physical school mail system in *Perry*. See *Perry*, 460 U.S. at 46.

<sup>12</sup> *Greer v. Spock*, 424 U.S. 828, 830–31 (1976).

<sup>13</sup> *United States v. Kokinda*, 497 U.S. 720, 730 (1990).

<sup>14</sup> *Lee*, 505 U.S. at 681.

<sup>15</sup> *Lehman v. City of Shaker Heights*, 418 U.S. 298, 300–01, 304 (1974).

<sup>16</sup> *Putnam Pit, Inc. v. City of Cookeville*, 221 F.3d 834, 844 (6th Cir. 2000).

<sup>17</sup> *Gay Guardian Newspaper v. Ochopee Reg’l Library Sys.*, 235 F. Supp. 2d 1362, 1375, 1379 (S.D. Ga. 2002), *aff’d*, 90 F. App’x 386 (11th Cir. 2003) (unpublished table decision).

<sup>18</sup> *Minn. Voters All. v. Mansky*, 138 S. Ct. 1876, 1885 (2018) (“[T]he government has much more flexibility to craft rules limiting speech [on nonpublic forum property].” (citing *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 46 (1983))); *Perry*, 460 U.S. at 45 (“For the State to enforce a content-based exclusion [in a traditional public forum,] it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.”).

<sup>19</sup> *Perry*, 460 U.S. at 46.

that advocates unlawful conduct, but rather speech that severely disrupts their operations by persuading their internal audience—employees or the members of the public they are charged with serving—to abandon the enterprise.<sup>20</sup> And, although some instances of private speech may specifically urge that listeners engage in this type of highly disruptive conduct and indeed the nonpublic forum's operations are disturbed, the private speech at issue rarely takes the form of face-to-face communication, in which the timing of the speech and response could possibly meet a strict definition of the *Brandenburg* exception's imminence requirement.<sup>21</sup>

Despite the very substantial differences in context, doctrine drawn from the realm of public communication seems to eliminate the ability of nonpublic forum managers to avoid hosting this type of highly disruptive speech. On the one hand, an unmodified application of the elements of the *Brandenburg* exception does not permit institutional government entities to exclude such speech as incitement. On the other hand, the prohibition against viewpoint discrimination in nonpublic forum management seems to make it impossible for these managers to exclude speech, or even request the most minor modifications of it, to avoid the result of the persuasive impact of its message outside the boundaries of the incitement exception.<sup>22</sup> This double bind requires these government agencies to make a choice: open their office mail systems, bulletin boards, websites, and internal display and advertising spaces to private speech and accept the damaging consequences or close these speech channels entirely.<sup>23</sup> More and more government entities are opting for the latter choice, thus restricting the free flow of information and ideas, and raising the question of whether applying the *Brandenburg* exception as the outer boundary of government authority to

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<sup>20</sup> See *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 804 (1985) (accepting the President's decision to exclude advocacy groups from participating in the Combined Charitable Campaign as reasonable, based on evidence in the record that including such groups caused employees to refuse to contribute).

<sup>21</sup> Government entities may sometimes permit outside speakers to come onto their property to address their internal audience, such as when the military invites occasional outside speakers onto its base. See *Greer v. Spock*, 424 U.S. 828, 830–31 (1976). More often, government entities permit outside speakers to be “present” on their property by “virtual” means, such as distributing literature, see *Perry*, 460 U.S. at 46–47, displaying advertisements, see *Lehman v. City of Shaker Heights*, 418 U.S. 298, 300–01, 304 (1974), or publishing content electronically. See *Putnam Pit, Inc. v. City of Cookeville*, 221 F.3d 834, 844 (6th Cir. 2000).

<sup>22</sup> See *Matal v. Tam*, 137 S. Ct. 1744, 1763 (2017) (plurality opinion) (describing the Court's cases as defining the concept of viewpoint discrimination “in a broad sense”).

<sup>23</sup> See *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 802 (1985) (“Of course, the government ‘is not required to indefinitely retain the open character of the facility.’” (quoting *Perry*, 460 U.S. at 46)).

regulate persuasive speech best balances constitutional values on nonpublic forum property.<sup>24</sup>

This piece proceeds in two parts. Part I sets out the background of the incitement exception in the context of criminal punishment. Its sections discuss the historical development of the incitement exception, lines of cases outside the *Brandenburg* paradigm, and recent applications. Part II explores the possibilities for incitement lite adjustments to fit the nonpublic forum. The first two sections explain the different balance of government authority and speaker rights and impacts on nonpublic forum property and describe a recent lower court's rejection of a transit agency's claim that the *Brandenburg* exception allowed it to exclude an advertisement as a means to show its poor fit in the nonpublic forum context. Its third section suggests incitement lite adjustments that better implement the spirit of the *Brandenburg* exception in nonpublic forum management.

## I. THE INCITEMENT EXCEPTION IN THE CONTEXT OF CRIMINAL PUNISHMENT

### A. *Historical Development*

The Court's initial discussions about the existence and scope of the current incitement exception also mark the origin of its modern, highly speech-protective Free Speech Clause jurisprudence.<sup>25</sup> The concept of an incitement exception began and evolved in response to government efforts to criminalize speakers because the content of their public advocacy strongly criticized that government's structure or actions and so, the government argued, risked persuading listeners to engage in conduct that would undermine the state.<sup>26</sup> In developing the exception, the Court identified and articulated the enduring principle that government censorship of ideas expressed by individual citizens is a fundamental constitutional evil and protection of the public expression of those ideas is a fundamental purpose of the First Amendment's free speech guarantee.<sup>27</sup> This principle underpins modern doctrine, whereby

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<sup>24</sup> See *infra* notes 182–185 and accompanying text.

<sup>25</sup> See *Dennis v. United States*, 341 U.S. 494, 503 (1951) (“No important case involving free speech was decided by this Court prior to *Schenck v. United States* . . .”).

<sup>26</sup> See, e.g., *id.* at 497 (World War I protest); *Gitlow v. New York*, 268 U.S. 652, 655 (1925) (distributing a “Left Wing Manifesto”); *Debs v. United States*, 249 U.S. 211, 213 (1919) (public speech praising Socialism).

<sup>27</sup> See, e.g., *Consol. Edison Co. of N. Y. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 530, 538 (1980) (“To allow a government the choice of permissible subjects for public debate would be to allow that government control over the search for political truth.”).

“[c]ontent-based laws—those that target speech based on its communicative content”—raise the presumption that the government has engaged in unconstitutional censorship.<sup>28</sup> To overcome the presumption, a content-based speech restriction must survive strict scrutiny review, meaning that the government must prove that it “is necessary to serve a compelling state interest and . . . [is] narrowly drawn to achieve [it].”<sup>29</sup> As an alternative to strict scrutiny review, the government may overcome the presumption of unconstitutional action by demonstrating that the speech it seeks to suppress falls within the precise definition of a category of speech determined by the Court to be within the power of the government to prohibit entirely.<sup>30</sup> Incitement exists today within free speech doctrine as one of these few *per se* exceptions.<sup>31</sup>

Evolution of the incitement exception began in the context of anti-war protest. In *Schenck v. United States*, the government charged and secured the conviction of two Socialist party officials under the federal Espionage Act of 1917 for conspiracy to cause insubordination in the Armed Forces and obstruct the recruitment and enlistment of services.<sup>32</sup> Their crime was printing and distributing pamphlets to draft-age men that argued that the war constituted involuntary servitude and a “monstrous wrong against humanity in the interest of Wall Street’s chosen few,” and urging them not to “submit to intimidation” and to “[a]ssert [their] [r]ights,” most apparently their right to petition for legislative change.<sup>33</sup> Although the Court unanimously upheld the conviction, Justice Holmes, in his opinion, planted the seeds of the current incitement exception by acknowledging that the Constitution limits the government’s ability to punish speakers engaged in public advocacy on the ground that their words may persuade listeners to engage in harmful conduct to circumstances under which a “clear and present danger” that such conduct will occur exists.<sup>34</sup>

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<sup>28</sup> *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015).

<sup>29</sup> *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 677 (1998) (citing *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 800 (1985)).

<sup>30</sup> *United States v. Stevens*, 559 U.S. 460, 468–69 (2010) (“[T]he First Amendment has permitted restrictions upon the content of speech in a few limited areas . . . . These historic and traditional categories long familiar to the bar—including obscenity, defamation, fraud, incitement, and speech integral to criminal conduct—are well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem.” (internal quotation marks and citations omitted)).

<sup>31</sup> *Id.*

<sup>32</sup> *Schenck v. United States*, 249 U.S. 47, 48–49 (1919).

<sup>33</sup> *Id.* at 51.

<sup>34</sup> *Id.* at 52.

The Court experimented with the incitement exception over the next number of decades. Its modern, narrow scope is most traceable to the opinions of Justices Holmes and Brandeis, dissenting from and concurring with the Court's decisions. In these opinions, they articulated principles that explain the narrow scope of the incitement exception and underpin the entire free speech jurisprudence. Their discussions include the purposes of free speech—to preserve a marketplace of ideas,<sup>35</sup> facilitate representative democracy,<sup>36</sup> and promote individual self-development.<sup>37</sup> They set root the understanding that for these purposes to be fulfilled, the Constitution must protect expression of even highly dangerous ideas,<sup>38</sup> and the doctrinal response that, almost always, the government must resort to the remedy of “more speech” rather than repression to avoid harmful listener responses to free expression.<sup>39</sup>

The exception evolved in response to speech that was critical of other war efforts, capitalism, and the United States system of government, as well as speech that advocated overthrow of the government.<sup>40</sup> In its brief per curiam decision in *Brandenburg v. Ohio*, the Court consolidated its doctrine and articulated the definition of the incitement exception that remains

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<sup>35</sup> See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (“[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market . . .”).

<sup>36</sup> See *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) (“Those who won our independence believed . . . that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones.”), *overruled in part by* *Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969) (per curiam); *Gitlow v. New York*, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting) (“Every idea is an incitement. . . . Eloquence may set fire to reason. . . . If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way.”).

<sup>37</sup> C. Edwin Baker, *Autonomy and Free Speech*, 27 CONST. COMMENT. 251, 254 (2011) (free speech facilitates “a person’s authority (or right) to make decisions about herself”).

<sup>38</sup> See *Virginia v. Black*, 538 U.S. 343, 358 (2003) (noting the government may not ban speech that even “a vast majority of its citizens believes to be false and fraught with evil consequence” (quoting *Whitney*, 274 U.S. at 374 (Brandeis, J., concurring))).

<sup>39</sup> *Whitney*, 274 U.S. at 377 (Brandeis, J., concurring) (arguing that “more speech” is a remedy which should only be stifled in instances of emergency).

<sup>40</sup> See *Dennis v. United States*, 341 U.S. 494, 516–17 (1951) (communist party literature); *Herndon v. Lowry*, 301 U.S. 242, 245 (1937) (communist party literature); *Whitney*, 274 U.S. at 360, 363 (communist labor party convention); *Gitlow*, 268 U.S. at 655 (distributing a “Left Wing Manifesto”); *Abrams*, 250 U.S. at 617–18 (Russian citizens printing and distributing leaflets and circulars to encourage resistance to the United States’ involvement in war); *Debs v. United States*, 249 U.S. 211, 212–13 (1919) (public speech praising Socialism); *Frohwerk v. United States*, 249 U.S. 204, 205–07 (1919) (criticizing the United States’ involvement in World War I); *Schenck v. United States*, 249 U.S. 47, 48–49 (1919) (World War I protest).



the law today.<sup>41</sup> At issue was the conviction of a Ku Klux Klan leader under an Ohio anti-syndicalism statute substantially similar to a California version, which the Court held to be consistent with the free speech guarantee forty years earlier.<sup>42</sup> The Ohio statute made it a crime to “advocat[e] . . . the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform” or to “voluntarily assembl[e] with any society, group, or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism.”<sup>43</sup> Clarence Brandenburg was convicted under the statute for speaking at a twelve-person Klan gathering in rural Ohio. Participants wore hoods, some carried weapons, and a news reporter’s film of the gathering was broadcast on local and national television.<sup>44</sup> His speech contained derogatory references to black and Jewish people, complained about the federal government’s treatment of Caucasians, and stated that if such treatment continued it was “possible that there might have to be some revengeance [sic] taken.”<sup>45</sup>

Without reviewing the application of the statute to the speech at issue, the Court overruled its prior decision and held the statute on its face to be invalid. The Court noted it had previously upheld the California statute “on the ground that, without more, ‘advocating’ violent means to effect political and economic change involves such danger to the security of the State that the State may outlaw it” but that the conclusion that the Constitution permits the government this broad a scope of authority had been “thoroughly discredited by later decisions.”<sup>46</sup> Those decisions, it explained, established a core constitutional distinction between “the mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence” and more concrete speech “preparing a group for violent action and steeling it to such action.”<sup>47</sup> The “principle” it drew from those decisions was that the government may only “forbid or proscribe advocacy of the use of force or of law violation” in circumstances “where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”<sup>48</sup> Because the Ohio statute, by its terms,

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<sup>41</sup> *Brandenburg*, 395 U.S. at 447.

<sup>42</sup> *See id.* at 444–45; *Whitney*, 274 U.S. at 371.

<sup>43</sup> *Brandenburg*, 395 U.S. at 444–45 (quoting OHIO REV. CODE ANN. § 2923.13).

<sup>44</sup> *Id.* at 445–46.

<sup>45</sup> *Id.* at 446.

<sup>46</sup> *Id.* at 447.

<sup>47</sup> *Id.* at 447–48 (quoting *Noto v. United States*, 367 U.S. 290, 297–98 (1961)).

<sup>48</sup> *Id.* at 447.

criminalized “mere advocacy,” it, like many similar statutes across the nation, could not constitutionally be the ground for convicting Clarence Brandenburg or any other speaker.<sup>49</sup>

The Court has considered application of the *Brandenburg* incitement exception in a range of other circumstances in which it could appear that the speaker engaged in “advocacy of the use of force or of law violation,”<sup>50</sup> but has never found the definition to be met.<sup>51</sup> In fact, the meaning of the multiple elements of the incitement exception remains unclear.<sup>52</sup> “[D]irected to inciting or producing” means that the speaker must intend that the listener’s reaction to the communication move beyond mere opinion change to action.<sup>53</sup> The Court has not explained the constitutional grounding for the intent requirement.<sup>54</sup> It appears to stem, at least in part, from concerns about the level of culpability that should be present for a speaker to qualify for criminal punishment.<sup>55</sup> Free speech concerns about the chilling effect on potential speakers who fear criminal punishment for unintentional speech likely explain the intent requirement as well.<sup>56</sup>

The occurrence of violent or unlawful conduct must be both likely and imminent. Together, these requirements are supposed to identify the circumstances in which the government’s need to suppress speech to protect from harm outweighs the value of the speech.<sup>57</sup> The likelihood requirement obviously sets some sort of

<sup>49</sup> *Id.* at 449.

<sup>50</sup> *Id.* at 447.

<sup>51</sup> *See, e.g.,* Texas v. Johnson, 491 U.S. 397, 399 (1989) (flag burning); NAACP v. Claiborne Hardware Co., 458 U.S. 886, 928 (1982) (civil rights boycott); Carey v. Population Servs. Int’l, 431 U.S. 678, 701–02 (1977) (contraceptive advertisements); Hess v. Indiana, 414 U.S. 105, 106–09 (1973) (per curiam) (Vietnam War protest); Cohen v. California, 403 U.S. 15, 18 (1971) (anti-draft message on the back of a jacket).

<sup>52</sup> Am. Freedom Def. Initiative v. Metro. Transp. Auth., 70 F. Supp. 3d 572, 581 (S.D.N.Y.) (noting that “[t]he Court’s subsequent substantive discussions of *Brandenburg* reveal no precise contours of the standard”), *vacated on other grounds*, 109 F. Supp. 3d 626, 635 (S.D.N.Y. 2015).

<sup>53</sup> *Hess*, 414 U.S. at 108–09 (finding the speech at issue not to meet the *Brandenburg* exception requirements because “there was no evidence or rational inference from the import of the language, that his words were intended to produce, and likely to produce, *imminent* disorder”); *see* Nwanguma v. Trump, 903 F.3d 604, 609 (6th Cir. 2018) (noting an element of the *Brandenburg* test is that “the speaker intends that his speech will result in the use of violence or lawless action”).

<sup>54</sup> Larry Alexander, *Reddish on Free Speech*, 107 NW. U. L. REV. 593, 596 (2013) (*Brandenburg*’s intent requirement “serves no obvious free speech value”).

<sup>55</sup> *See* Leslie Kendrick, *Speech, Intent, and the Chilling Effect*, 54 WM. & MARY L. REV. 1633, 1648 n.72 (2013) (noting, with respect to the origin of the intent requirement, that cases prior to *Brandenburg* “likened incitement to criminal attempt”).

<sup>56</sup> *See id.* at 1684–85, 1685 n.229 (citing commenters and noting that “the chilling effect is the only possible legitimate justification for speaker’s intent requirements” but demonstrating that “empirical difficulties” make it impossible to support the theory with respect to a particular legal rule).

<sup>57</sup> *See* Abrams v. United States, 250 U.S. 616, 628 (1919) (Holmes, J., dissenting) (combining the elements of likelihood and imminence to observe, with respect

probability threshold, but what that level is and what conduct must be probable is unclear.<sup>58</sup> The requirement that the move from speech to conduct also be imminent requires some level of immediacy. It certainly stems from a strong preference for discussion and deliberation, rather than suppression, as the antidote to speech that may spur dangerous conduct.<sup>59</sup> According to strict interpretations of the requirement, the listener's response must be almost instantaneous.<sup>60</sup>

The Court's few in-depth applications of the *Brandenburg* incitement exception provide some guidance as to the meaning of its elements. In *Hess v. Indiana*, the Court reversed the Indiana Supreme Court's holding that words uttered by a participant in an anti-war protest met the incitement standard.<sup>61</sup> In response to law enforcement orders to clear the street, Gregory Hess along with the 100–150 other protesters obeyed but Hess responded, "We'll take the [f-ing] street later [or again]."<sup>62</sup> According to the Court, the words "at worst, . . . amounted to nothing more than advocacy of illegal action at some indefinite future time" and so failed to meet the requirements that they be "intended to produce, and likely to produce, *imminent* disorder."<sup>63</sup>

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to the speech the government sought to criminalize in the case, that "nobody can suppose that the surreptitious publishing of a silly leaflet by an unknown man, without more, would present any immediate danger that its opinions would hinder the success of the government arms or have any appreciable tendency to do so"); Smolla, *supra* note 7, at 29 ("The immediacy requirement plays a vital role in the context of public demonstrations and protest, in which there is grave concern that police may engage in censorship of ideas in situations in which there may certainly be some *risk* of violence at some indefinite future time, but there is no immediate physical emergency.").

<sup>58</sup> At one point, the Court weighed the level of probability against the severity of the harm. *Dennis v. United States*, 341 U.S. 494, 509–10 (1951). But the firm likelihood requirement seems to require that the probability of conduct occurring must exceed fifty percent. The number or percentage of listeners that must be likely to react by means of conduct is also uncertain.

<sup>59</sup> See, e.g., *Abrams*, 250 U.S. at 630–31 (Holmes, J., dissenting) ("Only the emergency that makes it immediately dangerous to leave the correction of evil counsels to time warrants [suppressing speech]."); *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) ("[N]o danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion."), *overruled in part by* *Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969) (per curiam).

<sup>60</sup> Some commentators insist that the move from speech to conduct must be impulsive, rather than rational. See, e.g., S. Elizabeth Wilborn Malloy & Ronald J. Krotoszynski, Jr., *Recalibrating the Cost of Harm Advocacy: Getting Beyond Brandenburg*, 41 WM. & MARY L. REV. 1159, 1169 (2000) (noting *Brandenburg's* imminence requirement "demands that the speech cause an individual to act without rational thought"); David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334, 339 (1991) (arguing *Brandenburg's* imminence element requires that the speech "brings about the violation [of law] by bypassing the rational processes of deliberation").

<sup>61</sup> *Hess v. Indiana*, 414 U.S. 105, 106–09 (1973) (per curiam).

<sup>62</sup> *Id.* at 106–07.

<sup>63</sup> *Id.* at 108–09.

In *NAACP v. Claiborne Hardware Co.*, the Court invalidated an award of damages against black participants in a seven year boycott of white-owned businesses.<sup>64</sup> Its incitement discussion focused on speeches given by Charles Evers, one of the leaders of the boycott, in which he used “strong language” to urge listeners in the crowd to comply with the boycott.<sup>65</sup> One speech included a statement that “boycott violators would be ‘disciplined’ by their own people” and another threatened, “If we catch any of you going in any of them racist stores, we’re gonna break your damn neck.”<sup>66</sup> Nevertheless, in the Court’s evaluation, the “emotionally charged rhetoric . . . did not transcend the bounds of protected speech set forth in *Brandenburg*.”<sup>67</sup> The Court continued to opine that “[s]trong and effective extemporaneous rhetoric cannot be nicely channeled in purely dulcet phrases” and “[a]n advocate must be free to stimulate his audience with spontaneous and emotional appeals.”<sup>68</sup> The Court further stated that “[w]hen such appeals do not incite lawless action, they must be regarded as protected speech.”<sup>69</sup>

### B. *Lines of Cases Outside the Brandenburg Paradigm*

Several other lines of cases qualify the constitutional standard used to gauge the government’s authority to punish harm-causing speech under the *Brandenburg* incitement exception. These three lines of cases address hostile audience reaction, intentional efforts to persuade someone to commit crimes, and true threats.

The first line of cases precludes the government from suppressing speech to protect listeners from “offense,” or from enforcing a “heckler’s veto” to avoid violence or other harmful conduct by listeners hostile to the message.<sup>70</sup> Extreme offensive

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<sup>64</sup> *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 915–20 (1982) (damages awarded for the tort of malicious interference with business relations).

<sup>65</sup> *Id.* at 928.

<sup>66</sup> *Id.* at 902.

<sup>67</sup> *Id.* at 928.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *See Matal v. Tam*, 137 S. Ct. 1744, 1763 (2017) (plurality opinion) (“[P]ublic expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.” (quoting *Street v. New York*, 394 U.S. 576, 592 (1969))); *see also Snyder v. Phelps*, 562 U.S. 443, 460–61 (2011) (speech can “inflict great pain” but the speaker cannot be punished for this); *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134–35 (1992) (“Speech cannot be financially burdened, any more than it can be punished or banned, simply because it might offend a hostile mob.”); *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (“If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”); HARRY KALVEN, JR., *THE NEGRO AND THE FIRST AMENDMENT* 140 (1965) (“If the police can

and hurtful hate speech is constitutionally protected when uttered in the public sphere.<sup>71</sup> Government actions to suppress speech that demeans on the basis of race, religion, sex, or other group traits unconstitutionally discriminate on the basis of viewpoint.<sup>72</sup> The pre-*Brandenburg* case, *Feiner v. New York*, stands as the possible example of the Court interpreting the Constitution to allow punishment of a speaker because of the predicted reactions of hostile listeners.<sup>73</sup> But the facts of the case make this reading one of several possibilities and in later cases, “the Supreme Court appears to have eviscerated *Feiner* of whatever authority it had.”<sup>74</sup> More recent cases limit the government’s ability to rely on the incitement exception as the ground for imposing criminal punishment for instances of public advocacy to those where the conduct it seeks to avoid occurs because listeners may be persuaded by the speaker’s message rather than react with hostility to it.<sup>75</sup>

Another line of cases makes clear that the *Brandenburg* incitement exception does not establish the limit to the government’s authority to suppress speech integral to criminal conduct.<sup>76</sup> Definitions of crimes such as aiding and abetting,<sup>77</sup>

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silence the speaker, the law in effect acknowledges a veto power in hecklers who can, by being hostile enough, get the law to silence any speaker of whom they do not approve.”)

<sup>71</sup> See *Matal*, 137 S. Ct. at 1764–65 (“Speech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express ‘the thought that we hate.’” (quoting *United States v. Schwimmer*, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting))).

<sup>72</sup> See *id.* at 1764.

<sup>73</sup> See *Feiner v. New York*, 340 U.S. 315, 319–21 (1951).

<sup>74</sup> *Bible Believers v. Wayne County*, 805 F.3d 228, 245 (6th Cir. 2015) (en banc) (“Supreme Court precedent illustrates that the speaker’s advocacy in *Feiner* itself could no longer be sanctioned as incitement.”); see Frederick Schauer, *The Hostile Audience Revisited*, KNIGHT FIRST AMEND. INST. AT COLUM. U. (Nov. 2, 2017), <https://knight.columbia.org/content/hostile-audience-revisited> [https://perma.cc/C2V2-F6MG] (asking “[w]as *Feiner* charged with provoking a hostile audience or with inciting a sympathetic one?” and reviewing the cases and concluding that one thing that is “settled” or probably settled when an audience threatens violence in hostile reaction to a speaker is that “the state may not prosecute on grounds of incitement the speakers whose speech has prompted the reactions”).

<sup>75</sup> See *Cohen v. California*, 403 U.S. 15, 20 (1971) (defining fighting words as a “direct personal insult”); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (words must “inflict injury or tend to incite an immediate breach of the peace”); *Bible Believers*, 805 F.3d at 246 (reviewing Supreme Court cases and concluding “[t]he hostile reaction of a crowd does not transform protected speech into incitement”; and explaining that the hostile reaction of an individual to speech delivered one-on-one may justify criminal punishment under the “fighting words” exception).

<sup>76</sup> See *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498, 504 (1949) (holding injunction against labor picketing did not violate free speech guarantee because the message on the signs and the activity of picketing were part of “a single and integrated course of [illegal] conduct”).

<sup>77</sup> CAL. PENAL CODE § 31 (criminalizing a person who has “advised and encouraged its commission”).

solicitation,<sup>78</sup> and obstruction of justice<sup>79</sup> criminalize intentionally persuading another to commit a crime. In *United States v. Williams*, the Court rejected the lower court's application of the incitement exception to limit the federal government's authority to criminalize speech soliciting the transfer of child pornography.<sup>80</sup> It distinguished "proposal[s] to engage in illegal activity," which it held to be "categorically excluded from the First Amendment," from "the abstract advocacy of illegality" protected by the *Brandenburg* incitement definition.<sup>81</sup> The Court specifically rejected the lower court's interpretation of the incitement exception as protecting noncommercial "promotion" of child pornography, distinguishing the statute's focus on speech aimed at inducing entry into a particular illegal transaction from "abstract advocacy, such as the statement 'I believe that child pornography should be legal' or even 'I encourage you to obtain child pornography.'"<sup>82</sup> Although the precise line between protected advocacy of unlawful action and unprotected persuasion to commit a crime blurs at the intersection,<sup>83</sup> the Court's firm placement of the common law crimes of complicity and encouragement outside First Amendment protection confirms that the constitutional protection for persuasive speech varies according to the balance of speaker rights and government authority in the circumstances of delivery and that even when the speaker faces criminal punishment, words of persuasion alone may form the basis for liability.

In a third line of cases, lower courts have held that the incitement exception does not mark the limit of government authority to criminalize persuasive speech uttered in the public realm when the speech falls within the definition of a "true threat," another categorical exception.<sup>84</sup> The same speech may persuade some listeners to engage in harmful conduct, and other listeners that the harmful conduct will befall them.<sup>85</sup> The Ninth

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<sup>78</sup> 18 U.S.C. § 373(a) (criminalizing a person who intentionally "solicits, commands, induces, or otherwise endeavors to persuade [an] other person to engage in [a crime of violence]").

<sup>79</sup> 18 U.S.C. § 1512(b) (criminalizing a person who knowingly "corruptly persuades another person [to engage in acts that obstruct justice]).

<sup>80</sup> *United States v. Williams*, 553 U.S. 285, 289, 298–99 (2008) (rejecting an overbreadth challenge to statutory language that criminalizes a person who knowingly "advertises, promotes, presents, distributes, or solicits" child pornography).

<sup>81</sup> *Id.* at 298–99.

<sup>82</sup> *Id.* at 299–300.

<sup>83</sup> *See United States v. Sineneng-Smith*, 910 F.3d 461, 485 (9th Cir. 2018) (holding statute that allows conviction for encouraging or persuading violation of immigration laws to be overbroad on its face), *cert. granted*, No. 19-67, 2019 WL 4889927 (Oct. 4, 2019).

<sup>84</sup> *See Virginia v. Black*, 538 U.S. 343, 359 (2003) (citing *Watts v. United States*, 394 U.S. 705, 708 (1969) (per curiam)).

<sup>85</sup> *Id.* at 360 ("[A] prohibition on true threats 'protect[s] individuals from the fear of violence' and 'from the disruption that fear engenders,' in addition to protecting

Circuit's en banc decision upholding a civil damages award and an injunction against the "Nuremberg Files" website provides an early example of such speech.<sup>86</sup> The American Coalition of Life Activists (ACLA) maintained an anti-abortion website on which it published "WANTED" posters of physicians who performed abortions along with identifying information.<sup>87</sup> As physicians identified by the posters were murdered, their names were struck through on the website.<sup>88</sup> The content and the circumstances of ACLA's expression did not seem to satisfy the incitement exclusion's requirement that there be a sufficiently tight link between intentional persuasion and sympathetic listener action.<sup>89</sup> Viewed from the perspective of different listeners, however, the court held the persuasive content of the speech to link sufficiently tightly to the different harm addressed by the true threat exception, which the Court has held that the government may suppress speech to prevent.<sup>90</sup> Other courts have reached similar conclusions.<sup>91</sup> The precise means by which to distinguish circumstances in which speech should be analyzed as presenting true threats as well as, or as opposed to, incitement remains subject to dispute, and the Court has not weighed in. These cases remain significant to the scope of the government's discretion to suppress persuasive speech; however, because they illustrate that perceptions of different listeners to a single communication may differ, those different perceptions may result in harms outside the incitement exception that the government may also restrict speech to prevent.

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people 'from the possibility that the threatened violence will occur.'" (second alteration in original) (quoting *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (1992))).

<sup>86</sup> See *Planned Parenthood of Columbia/Willamette, Inc. v. Am. Coal. of Life Activists*, 290 F.3d 1058, 1063 (9th Cir. 2002). The court remanded for consideration of whether the punitive damages awarded comported with due process. *Id.*

<sup>87</sup> *Id.* at 1062.

<sup>88</sup> *Id.* at 1065.

<sup>89</sup> *Id.* at 1072 ("If ACLA had merely endorsed or encouraged the violent actions of others, its speech would be protected. However, while advocating violence is protected, threatening a person with violence is not.").

<sup>90</sup> *Id.* at 1077 (defining a true threat as "a statement which, in the entire context and under all the circumstances, a reasonable person would foresee would be interpreted by those to whom the statement is communicated as a serious expression of intent to inflict bodily harm upon that person"). The Ninth Circuit later adjusted its definition of true threat. See *United States v. Bagdasarian*, 652 F.3d 1113, 1116–18 (9th Cir. 2011).

<sup>91</sup> See, e.g., *United States v. Turner*, 720 F.3d 411, 432–34 (2d Cir. 2013); see also Marc Rohr, "Threatening" Speech: *The Thin Line Between Implicit Threats, Solicitation, and Advocacy of Crime*, 13 RUTGERS J.L. & PUB. POL'Y 150, 155–67 (2015) (discussing cases).

### C. Recent Applications

Two recent decisions from the Sixth Circuit illustrate the modern context and scope of the incitement exception. The first case, *Bible Believers v. Wayne County*, arose from the effective removal of members of an evangelical Christian group from the 2012 Arab International Festival in Dearborn, Michigan.<sup>92</sup> Members of the group entered the grounds of the festival, which was open to the public, displaying banners, signs, and T-shirts with Christian conversion and anti-Muslim messages.<sup>93</sup> One member “carried a severed pig’s head on a spike,” to “ke[ep] [the Muslims] at bay.”<sup>94</sup> Although the activities of the Bible Believers group remained non-violent, a separate group of teenagers gathered around the group, jeered, shouted profanities, and threw bottles, eggs, and, at one point, milk crates, injuring at least one of the Bible Believers protesters. Although the group leader requested protection, the police refused, and instead asked them to leave, threatening arrest if they did not.<sup>95</sup> Members of the group brought a federal civil rights action against the police.<sup>96</sup> The Sixth Circuit held that police officers’ removal of the protesters without first making “bona fide efforts to protect the speaker from the crowd’s hostility by other, less restrictive means,” resulted in a “heckler’s veto” that violated the members’ free speech rights.<sup>97</sup>

Before reaching this conclusion, the court addressed the applicability of the incitement exception to justify the police action of restricting the members’ right to speak. The court restated the *Brandenburg* test to require that “(1) the [restricted] speech explicitly or implicitly encouraged the use of violence or lawless action, (2) the speaker intends that his speech will result in the use of violence or lawless action, and (3) the imminent use of violence or lawless action is the likely result of his speech.” It found the first two elements to be missing “simply because [the Bible Believers] did not utter a single word that can be perceived as encouraging violence or lawlessness”

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<sup>92</sup> *Bible Believers v. Wayne County*, 805 F.3d 228, 238–41 (6th Cir. 2015) (en banc). Police officers threatened members of the group with a disorderly conduct citation if they did not leave, then followed their van, stopped it, and cited them for removing a license plate. *Id.* at 240–41.

<sup>93</sup> *Id.* at 238. Slogans included, “Islam Is A Religion of Blood and Murder” and “Jesus Is the Way, the Truth and the Life. All Others Are Thieves and Robbers.” *Id.*

<sup>94</sup> *Id.* (alterations in original). The group leader explained that “unfortunately, they are kind of petrified of that animal.” *Id.*

<sup>95</sup> *Id.* at 239–41.

<sup>96</sup> *Id.* at 233.

<sup>97</sup> *Id.* at 252, 255 (“Simply stated, the First Amendment does not permit a heckler’s veto.”). The court also held that the removal violated the members’ rights to free exercise of religion and equal protection. *Id.* at 255–57.



and “there is absolutely no indication of the Bible Believers’ subjective intent to spur their audience to violence.”<sup>98</sup> As to the third element, even though unlawful violent action in fact occurred, the court concluded bluntly, “[t]he hostile reaction of a crowd does not transform protected speech into incitement.”<sup>99</sup>

The events addressed by the Sixth Circuit in *Nwanguma v. Trump* occurred at a presidential campaign rally at the Kentucky International Convention Center in Louisville.<sup>100</sup> In response to peaceful protest activities which occurred during his speech, candidate Donald Trump five times interjected “get ‘em out of here” followed at least once by the caveat, “Don’t hurt ‘em.”<sup>101</sup> Listeners responded by “assault[ing], push[ing] and shove[ing]” the protesters and punching one of them in the stomach.<sup>102</sup> The protesters filed suit against Trump, his campaign, and the supporters who engaged in the acts of violence, alleging, among other things, Trump’s words and conduct met the state law definition of incitement to riot.<sup>103</sup>

The court held that Trump’s words failed to meet the statutory definition but nevertheless continued to evaluate whether the Constitution protects his speech because the messages fall outside the *Brandenburg* definition of incitement.<sup>104</sup> The court applied the *Bible Believers* court’s summary of the *Brandenburg* requirements finding, as to the first element, that “not a single word [in Trump’s speech] encouraged violence or lawlessness, explicitly or implicitly.”<sup>105</sup> The court acknowledged that “[i]n the ears of some supporters, Trump’s words [‘get ‘em out of here’] may have had a tendency to elicit a physical response, in the event a disruptive protester refused to leave,” but concluded that because the words “did not specifically advocate for listeners to take

<sup>98</sup> *Id.* at 246 (footnote omitted).

<sup>99</sup> *Id.*

<sup>100</sup> *Nwanguma v. Trump*, 903 F.3d 604, 606–07 (6th Cir. 2018).

<sup>101</sup> *Id.* at 608.

<sup>102</sup> *Id.* at 606–07.

<sup>103</sup> *Id.* at 607. Plaintiffs filed their complaint in state court. The Trump defendants removed it to federal court. The district court dismissed all claims against the Trump defendants except incitement to riot. *Id.* at 607. Incitement to riot, KY. REV. STAT. § 525.040, is actionable in damages under KY. REV. STAT. § 446.070. Incitement to riot occurs when a person “incites or urges five (5) or more persons to create or engage in a riot.” KY. REV. STAT. § 525.040(1). A “[r]iot” is “a public disturbance involving an assemblage of five (5) or more persons which by tumultuous and violent conduct creates grave danger of damage or injury to property or persons.” KY. REV. STAT. § 525.010(5).

<sup>104</sup> *Nwanguma*, 903 F.3d at 609 (“The notion that Trump’s direction to remove a handful of disruptive protesters from among hundreds or thousands in attendance could be deemed to implicitly incite a riot is simply not plausible—especially where any implication of incitement to riotous violence is explicitly negated by the accompanying words, ‘don’t hurt ‘em.’”).

<sup>105</sup> *Id.* at 610.

unlawful action,” they fell outside the *Brandenburg* definition.<sup>106</sup> Additionally, the admonition, “don’t hurt ‘em[,] . . . undercut[] the alleged violence-inciting sense of [the] words.”<sup>107</sup>

The Sixth Circuit chastised the district court for relying on the second and third elements to attribute a message of encouragement of violence to the words. The court read Supreme Court doctrine to teach that the three elements of incitement must be met independently, meaning that “the speaker’s intent to encourage violence (second factor) and the tendency of his statement to result in violence (third factor) are not enough to forfeit First Amendment protection unless the words used specifically advocate[] the use of violence, whether explicitly or implicitly (first factor).”<sup>108</sup> So, the fact that some Trump supporters reacted to his words with violence was not dispositive as to the meaning of the words.<sup>109</sup> Emphasizing that the “actual words used by the speaker” must be the focus of the incitement inquiry, the court rejected the protesters’ claim that those words advocated, either explicitly or implicitly, the acts of violence perpetrated against them by Trump’s listeners.<sup>110</sup>

These modern cases demonstrate the very small slice of space the *Brandenburg* incitement exception currently occupies in free speech doctrine. The circumstances of both cases mirror those in which the concept of incitement as a mode of unprotected speech developed—words uttered as part of the broader advocacy of opinions and ideas about public issues, directed toward listeners in their status as citizens, in which criminal punishment is the consequence of speaking within the exception. Both cases involve in-person, ongoing communication between speakers and a crowd of listeners, in which members of the crowd threatened immediate violent action. The contemporaneous crowd-control context is the only one in the last number of decades in which the Court has seriously considered application of the *Brandenburg* exception and, if its elements are read strictly, the only one in which it could be found to apply.

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<sup>106</sup> *Id.* at 610, 612.

<sup>107</sup> *Id.* at 612.

<sup>108</sup> *Id.* at 611 (interpreting the Court’s statements in *Hess v. Indiana*, 414 U.S. 105 (1973) (per curiam)).

<sup>109</sup> *Id.* at 613 (“[T]he subjective reaction of any particular listener cannot dictate whether the speaker’s words enjoy constitutional protection.”).

<sup>110</sup> *Id.*

## II. THE INCITEMENT EXCEPTION OUTSIDE THE THREAT OF CRIMINAL PUNISHMENT: THE NONPUBLIC FORUM

### A. *Government Authority to Manage Speech to Avoid Disruption on Nonpublic Forum Property*

The *Brandenburg* incitement exception developed to implement the balance of government authority and individual speech rights in places where speakers and listeners engage in highly protected “public communication.”<sup>111</sup> Public communication occurs when speakers communicate with listeners in their capacities as citizens, pursuing their own individual purposes by means of receiving information and ideas, and participating in discussion and debate.<sup>112</sup> When public communication occurs on certain types of government property, which the Court has designated as traditional public forums, it receives the same level of heightened constitutional protection as when it flows through private speech channels.<sup>113</sup>

Streets, parks, and sidewalks are paradigmatic traditional public forum properties, which are defined and limited by a history of being dedicated, at least in part, to public speech.<sup>114</sup> The government manages traditional public forum property in its sovereign capacity. When it does so, it must “accommodate private speakers” and treat them equally regardless of its intent to do so, and despite its obligation to manage competing non-speech uses of the property.<sup>115</sup> The strict scrutiny review of limits on the free speech of private speakers guarantees both equal access and treatment with respect to the content and the viewpoints expressed in their speech.<sup>116</sup> The consequence of these guarantees is that the public must absorb the cost of protecting the right of all speakers and listeners to engage in communication of all types of information and ideas, however unwanted the

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<sup>111</sup> *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983) (distinguishing traditional public forum property from nonpublic forum property on the ground that the former is “a forum for public communication” and the latter is not).

<sup>112</sup> See Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713, 1715 (1987) (distinguishing traditional public forum property and nonpublic forum property according to the role of the government).

<sup>113</sup> *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 802 (1985) (“Because a principal purpose of traditional public fora is the free exchange of ideas, speakers can be excluded from a public forum only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest.”).

<sup>114</sup> *Walker v. Tex. Div., Sons of Confederate Veterans*, 135 S. Ct. 2239, 2250 (2015) (“The Court has rejected the view that traditional public forum status extends beyond its historic confines.” (quoting *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 678 (1998))).

<sup>115</sup> *Forbes*, 523 U.S. at 677–78.

<sup>116</sup> *Id.* at 677 (citing *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 802 (1985)).

speech may be to the government or to the majority of other citizens who frequent the property.<sup>117</sup>

The balance of government authority and individual speech rights differs substantially on nonpublic forum property.<sup>118</sup> The government as an institutional entity with a delegated responsibility to fulfill a discrete public mission other than hosting public speech creates and administers a nonpublic forum when it chooses to invite some group of private speakers onto its property.<sup>119</sup> In most instances, the property or program is a true “forum” in the sense that the government manager runs a channel of communication on its property or through its program,<sup>120</sup> and the speech that flows through it is nonpublic in the sense that it is broadcast solely within the institution or enterprise that hosts the

<sup>117</sup> *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134–37 (1992) (government may not charge speakers a fee measured by the cost of protecting them from a hostile audience); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 210–11 (1975) (“[T]he burden normally falls upon the viewer to ‘avoid further bombardment of [his] sensibilities simply by averting [his] eyes.’” (second and third alterations in original) (quoting *Cohen v. California*, 403 U.S. 15, 21 (1971))).

<sup>118</sup> See *Walker v. Tex. Div., Sons of Confederate Veterans*, 135 S. Ct. 2239, 2250 (2015) (“We have previously used what we have called ‘forum analysis’ to evaluate government restrictions on purely private speech that occurs on government property.”); *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45–46 (1983) (labelling and describing types of forums). Although the Court’s terminology has not been consistent, its most recent iteration uses the label of nonpublic forum to describe government property or programs that differ from traditional public forums and created, or designated, public forums in that they are not “space[s] . . . for public communication.” *Minn. Voters All. v. Mansky*, 138 S. Ct. 1876, 1885 (2018) (“Generally speaking, our cases recognize three types of government-controlled spaces: traditional public forums, designated public forums, and nonpublic forums.”); see *Am. Freedom Def. Initiative v. King County*, 136 S. Ct. 1022, 1022 (2016) (Thomas, J., dissenting from denial of certiorari) (“[A] limited public forum [is] [ ] also called a nonpublic forum[ ] . . . .”); *Walker*, 135 S. Ct. at 2250–51 (traditional public forum, designated public forum, limited public forum, nonpublic forum); *Christian Legal Soc’y Chapter of the Univ. of Cal., Hastings Coll. of Law v. Martinez*, 561 U.S. 661, 679 n.11 (2010) (traditional public forum, designated public forum, limited public forum); *Cornelius*, 473 U.S. at 800 (traditional public forum, designated public forum, nonpublic forum); *Perry*, 460 U.S. at 45–46 (listing the traditional public forum, the designated or limited public forum, and the nonpublic forum); see also *NAACP v. City of Philadelphia*, 39 F. Supp. 3d 611, 618 (E.D. Pa. 2014) (“[I]t is unclear what categories of fora even exist.”).

<sup>119</sup> *Walker*, 135 S. Ct. at 2251 (stating a nonpublic forum exists when the government invites private speakers onto its property in its role “as a proprietor, managing its internal operations.”).

<sup>120</sup> See *Christian Legal Soc’y*, 561 U.S. 661, 681–82 (students were audience for student group communications); *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 830–31 (1995) (students were audience for student publications); *Int’l Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 675–76 (1992) (private entities permitted access to airport terminals to engage in some forms of speech); *United States v. Kokinda*, 497 U.S. 720, 723 (1990) (private entities permitted access to sidewalk leading to entry to post office); *Cornelius*, 473 U.S. at 803 (discussing how to classify “instrumentalit[ies] used for communication” and participation in federal government’s Combined Charitable Campaign made available to defined class of private charities); *Perry*, 460 U.S. at 47 (school mail facilities made available to some outside groups); *Greer v. Spock*, 424 U.S. 828, 830–31 (1976) (some outside speakers permitted access to a military base); *Lehman v. City of Shaker Heights*, 418 U.S. 298, 300–01 (1974) (private entities participate in public transit advertising program). *But see Minn. Voters All.*, 138 S. Ct. at 1886 (polling place is a nonpublic forum).

speech, rather to the public generally.<sup>121</sup> Nonpublic forums evaluated by the Court include military authorities managing outside speakers present on base,<sup>122</sup> a school board operating an internal mail system,<sup>123</sup> a U.S. post office branch managing private speech activities on the sidewalk entry to its building,<sup>124</sup> and an airport managing speakers who want to communicate with travelers inside the terminals.<sup>125</sup>

Because hosting public communication is not a primary responsibility of nonpublic forum managers, the scope of their authority to restrict speech is greater than the authority of the government-as-sovereign when it manages access to traditional public forum property.<sup>126</sup> By contrast to traditional public forum property, private speakers have no constitutional right of access to nonpublic forum property.<sup>127</sup> When nonpublic forum managers choose to grant access to private speakers, they may limit access according to speaker identity and the content of the speech, grounds which are forbidden to traditional public forum managers. Specifically, the government manager may define the boundaries of the speech invited into the enterprise to avoid listener reactions to the content of the speech that may disrupt the nonspeech operations of the enterprise.<sup>128</sup> So, a school system may exclude a rival union's communications from its internal mail system to avoid transforming the schools into "battlefield[s] for inter-union squabbles" and disrupting "labor peace,"<sup>129</sup> the federal government may exclude advocacy nonprofits from participating in its annual charitable campaign because their advocacy for certain causes might cause employees not to

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<sup>121</sup> *Christian Legal Soc'y*, 561 U.S. at 681–82 (students were audience for student group communications); *Rosenberger*, 515 U.S. at 830–31 (students were audience for student publications); *Lee*, 505 U.S. at 675–76 (airplane passengers were audience for speech activities inside terminals); *Kokinda*, 497 U.S. at 723 (post office patrons were audience for solicitors on sidewalk leading to entry); *Cornelius*, 473 U.S. at 803 (employers were audience for the charitable campaign); *Perry*, 460 U.S. at 47 (mail system "facilitate[s] internal communication of school-related matters to the teachers"); *Greer*, 424 U.S. at 830–31 (outside speakers addressed members of the military); *Lehman*, 418 U.S. at 302, 305–07 (although location of all car cards was not clear, the plurality and concurring justice addressed the forum assuming that the audience for the advertising were bus patrons).

<sup>122</sup> *Greer*, 424 U.S. at 838.

<sup>123</sup> *Perry*, 460 U.S. at 46.

<sup>124</sup> *Kokinda*, 497 U.S. at 730.

<sup>125</sup> *Lee*, 505 U.S. at 680–81.

<sup>126</sup> *Minn. Voters All.*, 138 S. Ct. at 1885 (noting an institutional government entity, managing access to a nonpublic forum, "has much more flexibility to craft rules limiting speech" (citing *Perry*, 460 U.S. at 46)).

<sup>127</sup> *Perry*, 460 U.S. at 46 (school board may close internal mail system "to all but official business if it chooses" (quoting lower court decision in *Perry Local Educators' Ass'n v. Hohlt*, 652 F.2d 1286, 1301 (7th Cir. 1981))).

<sup>128</sup> See *Perry*, 460 U.S. at 49 (noting access distinctions may be for the purpose of "limiting a nonpublic forum to activities compatible with the intended purpose of the property").

<sup>129</sup> *Id.* at 52 (quoting *Haukedahl v. Sch. Dist. No. 108*, 75-C-3641 (N.D. Ill. 1976)).

donate,<sup>130</sup> a transit system may exclude revenue-generating political advertisements because of the possible adverse reactions of customers to its “controversial” content,<sup>131</sup> and a post office branch or an airport may exclude solicitation activity from their property because its effects on the flow of pedestrians “would prove quite disruptive.”<sup>132</sup> Like traditional public forum managers, however, nonpublic forum managers may not discriminate among private speakers according to the viewpoints expressed in their speech.<sup>133</sup>

The impact on private speakers of nonpublic forum regulation also differs substantially from the speaker impact of traditional public forum regulation. The most severe impact of nonpublic forum regulation is exclusion from the forum, as opposed to criminal punishment and other sanctions that apply to regulation of public communication. So, the risk that such speech regulation would create a chilling effect that would deter potential speakers seeking access to the forums should not exist.<sup>134</sup> Nonpublic forum management operates through a process of review and permission,<sup>135</sup> which often includes the alternative of granting access

<sup>130</sup> *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 809 (1985) (noting that “the President could reasonably conclude” that the public services performed by the excluded advocacy organization were less “beneficial” than those of the organizations of the type included in the charity campaign forum, or he could have excluded the group as means of “avoiding the appearance of political favoritism” and “avoiding controversy that would disrupt the workplace” and the fundraising campaign).

<sup>131</sup> *Lehman v. City of Shaker Heights*, 418 U.S. 298, 304 (1974) (plurality opinion) (upholding “the managerial decision to limit car card space to innocuous and less controversial commercial and service-oriented advertising”); *id.* at 306–07 (Douglas, J., concurring) (relying on the captive audience theory).

<sup>132</sup> *Int’l Soc’y for Krishna Consciousness v. Lee*, 505 U.S. 672, 684–85 (1992); *see United States v. Kokinda*, 497 U.S. 720, 732–33 (1990) (plurality opinion) (“[S]olicitation is inherently disruptive of the Postal Service’s business.”).

<sup>133</sup> *Christian Legal Soc’y Chapter of the Univ. of Cal., Hastings Coll. of Law v. Martinez*, 561 U.S. 661, 679 (2010) (recognizing that nonpublic forum managers may exercise their authority to define entry and exclude speech so long as they act reasonably in light of the purpose of the forum and provide equal access to viewpoints within the types of invited speech (citing *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995))).

<sup>134</sup> *See Michael Coenen, Of Speech and Sanctions: Toward a Penalty-Sensitive Approach to the First Amendment*, 112 COLUM. L. REV. 991, 1032 (2012) (“[G]overnments ‘chill’ protected speech by restricting some other form of speech that, while unprotected, is similar to the speech getting chilled.”).

<sup>135</sup> *See, e.g., Walker v. Tex. Div., Sons of Confederate Veterans*, 135 S. Ct. 2239, 2251 (2015) (a practice of requiring permission signals that the program is not a public forum); *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 679 (1998) (“[T]he 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.” (citation omitted)); *Cornelius*, 473 U.S. at 804–05 (“The Government’s consistent policy has been to limit participation in the CFC to ‘appropriate’ voluntary agencies and to require agencies seeking admission to obtain permission from federal and local Campaign officials. Although the record does not show how many organizations have been denied permission throughout the 24-year history of the CFC, there is no evidence suggesting that the granting of the requisite permission is

to the speech, with content modifications, as opposed to excluding the speech from the forum entirely. This type of middle ground is not available in the regulation of public communication.<sup>136</sup> And, even when the speech is excluded entirely from a nonpublic forum, the exception applies to that venue only, with all channels of public communication still open and available to host the speech.

A final difference between nonpublic and traditional public forum regulation is that a nonpublic forum manager may choose to close its forum entirely to public speakers to avoid hosting speech it predicts will be harmful. The Court has explicitly noted that its deferential review of distinctions drawn by nonpublic forum managers in granting access to private speakers fulfills free speech values by “encourag[ing] the government to open its property to some expressive activity in cases where, if faced with an all-or-nothing choice, it might not open the property at all.”<sup>137</sup>

### B. *The Brandenburg Exception in the Nonpublic Forum*

A recent attempt by the New York Metropolitan Transit Authority (MTA) to exclude speech from its advertising program illustrates the difficulties forum managers face when they attempt to frame their predictions that speech will provoke listeners to engage in harmful conduct within the *Brandenburg* incitement definition.<sup>138</sup> MTA posts advertisements in and around its

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merely ministerial. . . . Such selective access, unsupported by evidence of a purposeful designation for public use, does not create a public forum.”); *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 47 (1983) (“Permission to use the system to communicate with teachers must be secured from the individual building principal. There is no court finding or evidence in the record which demonstrates that this permission has been granted as a matter of course to all who seek to distribute material.”).

<sup>136</sup> Content-based exclusions from a traditional public forum must survive strict scrutiny. See *Perry*, 460 U.S. at 45.

<sup>137</sup> *Forbes*, 523 U.S. at 680.

<sup>138</sup> See *Am. Freedom Def. Initiative v. Metro. Transp. Auth.*, 70 F. Supp. 3d 572, 574–75 (S.D.N.Y.), *vacated on other grounds*, 109 F. Supp. 3d 626, 627–28 (S.D.N.Y. 2015) (dismissing access challenge after transit authority changed its policy to exclude all public issue advertisements). Circuit courts differ on the proper classification of transit advertising programs. See *Am. Freedom Def. Initiative v. King County*, 136 S. Ct. 1022, 1024–025 (2016) (Thomas, J., dissenting from denial of certiorari) (pointing out the split among the circuits and opining that the Court should grant certiorari to resolve it). The original Southern District decision classified the MTA program as “a designated public forum under binding Second Circuit precedent.” *Am. Freedom Def. Initiative*, 70 F. Supp. 3d at 580 (citing *N.Y. Magazine v. Metro. Transp. Auth.*, 136 F.3d 123, 130 (2d Cir. 1998)). Although the standard of review of exceptions from designated public forums differs from that which applies to nonpublic forums, the rule against viewpoint discrimination, which is the basis for the difficulties forum managers face in framing their exceptions, applies to each in the same way. See *Cornelius*, 473 U.S. at 800 (“[W]hen the Government has intentionally designated a place or means of communication as a public forum, speakers cannot be excluded without a compelling governmental interest. Access to a nonpublic forum, however, can be restricted as long as the restrictions are ‘reasonable and [are] not an effort to suppress expression merely because public officials

transportation facilities and vehicles for the purpose of raising revenue to fund its operations.<sup>139</sup> MTA attempted to rely on the incitement exception as its ground for refusing to post an advertisement on its buses.<sup>140</sup> The advertisement, submitted by the American Freedom Defense Initiative (AFDI), a pro-Israel advocacy organization, “portrayed a menacing-looking man whose head and face [were] mostly covered by a head scarf” with a quote from “ Hamas MTV”: “Killing Jews is Worship that draws us close to Allah.”<sup>141</sup> “Underneath the quote, the ad[vertisement] stated: ‘That’s His Jihad. *What’s yours?*’”<sup>142</sup> The MTA claimed that the advertisement would incite viewers to commit unlawful acts of violence.<sup>143</sup> A federal district court in the Southern District of New York reviewed MTA’s claim.

Consistent with the definition of the exception, the court sought “evidence or rational inference from the import of the language” to show that the advertisement was “intended to produce, and likely to produce, imminent lawless action.”<sup>144</sup> The transit authority acknowledged that the advertisement’s sponsors did not subjectively intend to incite violence.<sup>145</sup> It argued, however, that the advertisement’s objective intent, interpreted through the perspective of “a subset of Islamic extremists” was “an implicit command to follow the Hamas quote and commit violent acts

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oppose the speaker’s view.” (second alteration in original) (quoting *Perry*, 460 U.S. at 46)). The format of the MTA advertising forum is typical of nonpublic forums and the doctrinal barriers it faced are the same as a nonpublic forum manager would face. Therefore, it illustrates the difficulties that nonpublic forum managers would face if they sought to exclude the same type of speech on the same basis.

<sup>139</sup> *Am. Freedom Def. Initiative*, 70 F. Supp. 3d at 575.

<sup>140</sup> *Id.* at 576.

<sup>141</sup> *Id.* at 574. Both sides agreed to refer to the submission as the “Killing Jews’ advertisement.” *Id.* at 575.

<sup>142</sup> *Id.* at 574. “The bottom of the ad included a disclaimer that it was sponsored by the plaintiff organization . . . and did not imply the [transit authority’s] endorsement of the views expressed by the ad.” *Id.*

<sup>143</sup> *Id.* at 577–78. The MTA amended their advertising standards and added language that “precluded any advertisement that ‘contains material the display of which the MTA reasonably foresees would imminently incite or provoke violence or other immediate breach of the peace, and so harm, disrupt, or interfere with safe, efficient, and orderly transit operations.’” *Id.* at 576. The transit authority also argued that the ad fell into the fighting words exception. The court quickly rejected this claim. *Id.* at 580–81 (questioning whether fighting words, which must be “directed to the person of the hearer,” could ever be communicated through advertising space and finding that even if they could, the particular Hamas-TV quote “would [not] tend to incite an ‘immediate breach of the peace’” (first quoting *Cohen v. California*, 403 U.S. 15, 20 (1971); and then quoting *Provost v. City of Newburgh*, 262 F.3d 146, 160 (2d Cir. 2011))).

<sup>144</sup> *Id.* at 581 (quoting *Hess v. Indiana*, 414 U.S. 105, 109 (1973) (per curiam)).

<sup>145</sup> *Id.* at 582, 582 n.7 (declining to decide whether the *Brandenburg* test requires a subjective or objective intent because it found the lesser, objective intent standard not to be met).



against Jewish people.”<sup>146</sup> The court rejected this interpretation as “thoroughly unpersuasive.”<sup>147</sup> Because the advertisement “clearly attribute[d] the ‘killing Jews’ quote to Hamas MTV and contain[ed] a visible attribution of the ad to [its sponsor], and not to Hamas,” the court found it did not advocate violence on its face.<sup>148</sup> As to the claim that the advertisement would incite a small subset to violence, the court reasoned that “if that group is as violent and radicalized as the [the transit authority] contend[s], presumably they would not need a bus advertisement to remind them of Hamas’s interpretation of the Quran.”<sup>149</sup>

The court also found that the transit authority had not sufficiently demonstrated that violence was likely or imminent. The transit authority could not produce any “evidence of any violent responses to [the] same advertisement when it ran in [other cities], or even to any similar ad in any city.”<sup>150</sup> The court rejected the transit authority’s attempt to distinguish the likely reactions of New York viewers from those in other cities.<sup>151</sup> The transit authority, the court said, “underestimate[d] the tolerant quality of New Yorkers and overestimate[d] the potential impact of [the] fleeting advertisements.”<sup>152</sup> The court also rejected the transit agency’s claim that “a generalized, heightened ‘potential’ for violent acts due to the city in which [an] ad would be shown” may qualify the speech as incitement.<sup>153</sup> Rather, to exclude speech as incitement, the government must show that the message of the particular advertisement, in that context, meets the elements of the category. The transit agency, the court concluded, had “made no such showing.”<sup>154</sup>

Through this reasoning, the court rejected MTA’s bid to exclude the speech as incitement. And, indeed, the assertion that each of the incitement elements are present in the single, stationary, and unattended communication “strains credulity.”<sup>155</sup> Intent is difficult to prove, even with face-to-face communications.

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<sup>146</sup> *Id.* at 582. The court conflated the inquiries into objective intent and the form of the communication, concluding after examining the import of the words to viewers that the transit agency could not “show the ad is ‘directed to’ inciting violence.” *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* at 582–83 (rejecting argument that a New York viewer would understand the advertisement as advocating violence because, unlike viewers in the other cities, they had not seen a prior advertisement that the current advertisement parodied, and because New York is a more prominent terrorism target than other cities).

<sup>152</sup> *Id.* at 583.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

The words were few, and did not explicitly urge action.<sup>156</sup> Most notably, the requirement that recipients will likely and imminently be persuaded to engage in conduct that carries with it criminal punishment is a high bar.<sup>157</sup> The requirement that they be likely to break the law immediately while in the status of a participant in an operational enterprise, such as an employee or bus passenger, is almost impossible to meet.<sup>158</sup> So, when compared to the requirements of the *Brandenburg* incitement exception, MTA's claims that listeners would react in a harmful manner to this speech appear exaggerated.<sup>159</sup>

It is not clear, however, that the threat of violence or other unlawful acts of terror was the true focus of MTA's concern. MTA is charged with providing safe, efficient, and cost-effective transportation, not preventing public harms.<sup>160</sup> Most likely, and appropriately, the harms MTA sought to avoid by excluding the advertisement were to its own operations, rather than to the public welfare more generally. MTA could have made the judgment that viewers upon which its existence depends—employees and patrons, current and potential—would react to the image of the menacing Muslim man, combined with an attributed intent to kill people, by avoiding buses on which the advertisement was posted, or avoiding MTA transit altogether.<sup>161</sup> In this scenario, MTA would

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<sup>156</sup> Cf. *Nwanguma v. Trump*, 903 F.3d 604, 611–12 (6th Cir. 2018) (interpreting incitement doctrine to require that “the words used specifically advocate[] the use of violence, whether explicitly or implicitly,” and finding that candidate Trump’s words “get ‘em out of here,” said to a crowd of supporters at a convention center campaign rally, referring to protesters, “may have had a tendency to elicit a physical response, in the event a disruptive protester refused to leave, but . . . did not specifically advocate such a response”).

<sup>157</sup> See *Am. Freedom Def. Initiative*, 70 F. Supp. 3d at 581 (“[T]he Supreme Court has rarely applied the *Brandenburg* incitement standard, and never explicitly found speech to be on the proscribable side of the standard.”).

<sup>158</sup> See *id.* at 583 (“[T]here is no evidence that seeing one of [the ‘Killing Jews’] advertisements on the back of a bus would be sufficient to trigger a violent reaction.”). Exterior transit advertising is directed to citizen listeners and does not fit the paradigm of a nonpublic forum. Presumably, this court would have found it even less likely that the same advertisement, displayed inside a bus or transit terminal, would trigger immediate unlawful conduct by viewers.

<sup>159</sup> Cf. *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 315 (1984) (Marshall, J., dissenting) (noting that “public officials have strong incentives to overregulate even in the absence of an intent to censor particular views,” which “stem[] from the fact that of the two groups whose interests officials must accommodate—on the one hand, the interests of the general public and, on the other, the interests of those who seek to use a particular forum for First Amendment activity—the political power of the former is likely to be far greater than that of the latter”).

<sup>160</sup> Cf. *N.Y. Magazine v. Metro. Transp. Auth.*, 136 F.3d 123, 130 (2d Cir. 1998) (noting that transit authority’s reason for excluding an advertisement to prevent privacy violations was the concern of the government-as-sovereign, not as a transit agency).

<sup>161</sup> See Carolyn Mala Corbin, *Terrorists Are Always Muslim but Never White: At the Intersection of Critical Race Theory and Propaganda*, 86 *FORDHAM L. REV.* 455, 458 (2017) (stereotypes of Muslims as terrorists influence the conduct of those who see them); Antske Fokkens et al., *Studying Muslim Stereotyping Through Microportrait Extraction*, in *LREC*

have sought to exclude the advertisement because the conduct its message would likely provoke would undermine its mission to provide the public service of transportation by convincing employees and patrons to stay away.

MTA attempted to use the incitement exception to justify its regulation of this speech; however, this framing was not successful due to doctrinal constraints that have been imported from the realm of public communication. These constraints effectively limited MTA's ability to regulate the speech from both sides. On one side, were it to characterize the conduct it sought to avoid as the result of listener "offense" at the hateful content of the advertisement, its move to exclude it would run up against the Court's "broad sense" of viewpoint discrimination.<sup>162</sup> In a recent decision invalidating application by the Patent and Trademark Office (PTO) of a federal statutory provision prohibiting registration of trademarks which, inter alia, disparage "racial or ethnic groups,"<sup>163</sup> the plurality, in reasoning echoed by the four concurring justices, held that even the most broadly stated exception, which "evenhandedly prohibits disparagement of all groups," is viewpoint discriminatory.<sup>164</sup> Although content discrimination is permissible in management of nonpublic forums, viewpoint discrimination is prohibited in all types of forums.<sup>165</sup>

On the other side, were MTA to characterize the conduct it sought to avoid as the result of persuasion—that viewers should understand that they are hated and unwelcome, and should stay away—<sup>166</sup> then the existing incitement exception presumptively

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2018 CONFERENCE PROCEEDINGS 3734 (Nicoletta Calzolari et al. eds., 2018) <https://www.aclweb.org/anthology/L18-1.pdf> [<https://perma.cc/WA24-3JRT>] ("Media coverage of different groups in society influences the perception people have about these groups and even increases distrust and polarization among different groups.").

<sup>162</sup> See *Matal v. Tam*, 137 S. Ct. 1744, 1763 (2017) (plurality opinion) ("Giving offense is a viewpoint."); *id.* at 1766 (Kennedy, J., concurring) (distinguishing positive from derogatory trademarks "reflects the Government's disapproval of a subset of messages it finds offensive," which is "the essence of viewpoint discrimination"). Because circuit precedent classified the MTA advertising program as a designated public forum, in which content discrimination is forbidden, the breadth of the Court's interpretation of the scope of viewpoint discrimination is of less significance than in other similar advertising and other forums that are classified as nonpublic.

<sup>163</sup> *Id.* at 1755; see 15 U.S.C. § 1052(a) (2006) (prohibiting registration of trademarks that may "disparage . . . or bring . . . into contempt, or disrepute" any "persons, living or dead"), *invalidated by Matal v. Tam*, 137 S. Ct. 1744, 1755 (2017) (plurality opinion) (interpreting the provision to include marks that disparage "non-juristic entities such as racial and ethnic groups").

<sup>164</sup> See *Matal*, 137 S. Ct. at 1763; *id.* at 1766 (Kennedy, J., concurring) ("To prohibit all sides from criticizing their opponents makes a law more viewpoint based not less so.").

<sup>165</sup> *Perry Educ. Ass'n v. Perry Local Educators Ass'n*, 460 U.S. 37, 46 (1983).

<sup>166</sup> See Shaima Hassan, *Islamophobia and Media Stigma Is Having Real Effects on Muslim Mothers in Maternity Services*, CONVERSATION (Dec. 10, 2018), [https://theconversation.com/amp/islamophobia-and-media-stigma-is-having-real-effects-on-muslim-mothers-in-maternity-services-101768?%20\(PhD%20study%20shows%20that%](https://theconversation.com/amp/islamophobia-and-media-stigma-is-having-real-effects-on-muslim-mothers-in-maternity-services-101768?%20(PhD%20study%20shows%20that%)

marks the limit of its authority to exclude the speech, because acting to avoid the persuasive effect of the message on viewers outside the boundaries of the exception would be viewpoint discriminatory.<sup>167</sup> Viewed in this way, MTA's awkward effort to fit its exception into the incitement category illustrates the lack of alternatives it, like other created forum managers, perceives under existing doctrine to host broad categories of outside speech but nevertheless exclude discrete instances of speech within those categories that they predict will cause severe harm to their abilities to carry out their core delegated functions by persuading enterprise participants, essential to their operations, to leave.

MTA's response to the court mandate that it publish the speech it viewed as dangerous to its operations serves as a harbinger of how other created forum managers may respond to this doctrinal squeeze. After AFDI won an injunction ordering MTA to run the "Killing Jews" advertisement,<sup>168</sup> MTA closed its advertising forum inside and outside all public transit to all public issue ads.<sup>169</sup> Other transportation agencies in Philadelphia, Chicago, Seattle, and Washington, D.C. have done the same thing, limiting the outside speech they permit to commercial advertising.<sup>170</sup> These agencies have lost millions of dollars in revenue yearly due to the change, and a wide range of public issue speakers have lost an outlet for their speech.<sup>171</sup> Outside transit

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20Muslim%20women%20avoid%20discussing%20health%20needs%20with%20doctors%20because%20of%20fear%20of%20negative%20perceptions%20created%20by%20media%20images);%20twitter\_impression=true [https://perma.cc/Z68C-8P3F] (PhD study showing that Muslim women avoid discussing health needs with doctors because of fear of negative perceptions created by media images); Melissa Fisher Paoni, *Understanding the Harm in Hate Speech*, ILL. TIMES (Nov. 8, 2018), https://illinoistimes.com/article-20600-understanding-the-harm-in-hate-speech.html [https://perma.cc/VF8P-L853] ("Hate speech leads to consequential harm, which persuades hearers to believe negative stereotypes and engage in harmful conduct while normalizing discrimination, and constitutive harm, which involves indirect effects related to power imbalances.").

<sup>167</sup> The Court has not determined whether the *Brandenburg* incitement category authorizes the government to discriminate according to viewpoint. One lower court has done so. See *Gay, Lesbian, Bisexual All. v. Pryor*, 110 F.3d 1543, 1549 (11th Cir. 1997).

<sup>168</sup> See *Am. Freedom Def. Initiative v. Metro. Transp. Auth.*, 70 F. Supp. 3d 572, 575 (S.D.N.Y.), *vacated on other grounds*, 109 F. Supp. 3d 626 (S.D.N.Y. 2015).

<sup>169</sup> *The MTA's Advertising Policy: Frequently Asked Questions*, METRO. TRANSP. AUTH. (Nov. 15, 2018), <http://web.mta.info/mta/realestate/PDF/MTA-Advertising-FAQs.pdf> [https://perma.cc/N3GW-RUEQ].

<sup>170</sup> Allegra Kirkland, *The MTA's Ban on 'Political' Ads Has Turned It into the Free-Speech Police*, NATION (June 21, 2016), <https://www.thenation.com/article/the-mtas-ban-on-political-ads-has-turned-it-into-the-free-speech-police/> [https://perma.cc/Y6U4-95WX]; Emma G. Fitzsimmons, *M.T.A. Board Votes to Ban Political Ads on Subways and Buses*, N.Y. TIMES (Apr. 29, 2015), [https://www.nytimes.com/2015/04/30/nyregion/mta-board-votes-to-ban-political-ads-on-subways-and-buses.html?\\_r=0](https://www.nytimes.com/2015/04/30/nyregion/mta-board-votes-to-ban-political-ads-on-subways-and-buses.html?_r=0) [https://perma.cc/5YX6-YXAF].

<sup>171</sup> See WASH. METRO. AREA TRANSIT AUTH., *ADVERTISING AND RETAIL POLICY REVIEW*, at 9 (Nov. 5, 2015), <https://www.wmata.com/about/board/meetings/board-pdfs/>

advertising programs, the wide range of government agencies that could choose to open their property to broadcast some scope of private speech to their employees, clients, or patrons by means of mail systems, chatrooms, websites, and display boards and spaces, are certainly taking note of the widely publicized transit agency experience and likely either restricting, closing or not opening private speech opportunities within their enterprises.<sup>172</sup>

Perhaps these consequences are the inevitable result of fully protecting private speakers from the risk of dangerous government censorship.<sup>173</sup> It could be, however, that an impulse toward bright lines and uniform applications ignores constitutionally salient differences in government responsibilities, speakers' rights, and the impact of speech distinctions that underpin the incitement definition and that caused the Court to create the distinct category of the nonpublic forum in the first place.<sup>174</sup> A more nuanced definition of the government's authority to exclude speech, tailored to the circumstances of the nonpublic forum, could better implement constitutional values while preserving the spirit of the *Brandenburg* incitement exception.<sup>175</sup>

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upload/110515\_3AAAdvertisingandRetailPolicyReview.pdf [https://perma.cc/4H85-HVEX] (“Since the temporary ban on issue-oriented advertising was enacted, WMATA and our contractor have foregone approximately \$1.6 million in advertising sales that we would have otherwise shared. This includes \$500,000 in existing contracts that were refunded and approximately \$1.1 million in new business that was rejected upon review by a panel of attorneys from WMATA’s General Counsel’s Office. Some examples of the existing advertisers whose contracts were cancelled include the Airline Pilot Association, the D.C. Department of Public Health, Corn Farms, Alzheimer’s Association, Knights of Columbus and the American Association of Railroads, all of which were considered advocacy ads.”).

<sup>172</sup> See *Gay Guardian Newspaper v. Ohoopce Reg’l Library Sys.*, 235 F. Supp. 2d 1362, 1373–79 (S.D. Ga. 2002) (“Faced with a choice between possible First Amendment litigation regarding denial of access to an open forum for some persons and the ability to close the nonpublic forum completely, many prudent property managers may be expected to choose the legally safe harbor of closing the nonpublic forum altogether.” (quoting *Sefick v. United States*, No. 98-C5301, 1999 WL 778588, at \* 15 (N.D. Ill. May 6, 1999)), *aff’d*, 90 F. App’x 386 (11th Cir. 2003) (unpublished table decision). Whether closing a nonpublic forum in all circumstances is “legally safe” is unclear. See Stephen R. Elzinga, Note, *Retaliatory Forum Closure*, 54 ARIZ. L. REV. 497, 499–503 (2011) (collecting cases of forum closure and arguing that forum closure for a viewpoint-discriminatory purpose should be unconstitutional); Kerry L. Monroe, Note, *Purpose and Effects: Viewpoint-Discriminatory Closure of a Designated Public Forum*, 44 U. MICH. J.L. REFORM 985, 987 (2011) (same).

<sup>173</sup> See *Matal v. Tam*, 137 S. Ct. 1744, 1763 (2017) (plurality opinion) (“[A] bedrock principle underlying the First Amendment . . . is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.” (quoting *Texas v. Johnson*, 491 U.S. 397, 414 (1989))); *id.* at 1766 (Kennedy, J., concurring) (permitting the Patent and Trademark Office to exclude “disparaging” marks would risk “silenc[ing] dissent and distort[ing] the marketplace of ideas”).

<sup>174</sup> See Smolla, *supra* note 7, at 14 (“[A] doctrinal standard formulated to vindicate [free speech] values in one specific context is not necessarily appropriate when those values surface in tension with other social interests in other contexts.”).

<sup>175</sup> Leslie Gielow Jacobs, *The Public Sensibilities Forum*, 95 NW. U. L. REV. 1357, 1386 (2001) (“[W]hile the government may have little discretion to apply ‘risky’ standards in the context of speech regulations, which might excise certain speech entirely from the marketplace of ideas, slightly more risk may be tolerable in the context of a forum that

### C. *Incitement Lite in the Nonpublic Forum*

The *Brandenburg* incitement exception has as its threshold requirement that a speaker “advoca[te] . . . the use of force or . . . law violation.”<sup>176</sup> The common presumption is that this requirement defines the exclusive universe of speech that the government may restrict on the theory that its message may persuade listeners to engage in harmful conduct.<sup>177</sup> Another possibility, however, is that the particular elements of the *Brandenburg* incitement exception identify when speech that borders on criminal crosses the line so that the government-as-sovereign may punish it as a crime, but that other, or adjusted elements, may define when the government, acting in a different capacity, with different public responsibilities, may regulate in different ways speech that may persuade listeners to engage in different types of harmful conduct. Forum doctrine, and its articulation of the different scope of authority of institutional entities to manage the content of nonpublic communication by private individuals they invite into their operational domains, developed after the Court settled on the *Brandenburg* incitement exception.<sup>178</sup> The many differences that exist between the scope of government authority to restrict private speech, the impact on private speech opportunities from such regulation, and the effect on the broader free speech marketplace when the government-as-sovereign uses the heavy hammer of criminal punishment to remove persuasive speech entirely from all channels of public communication as opposed to when the government as a single institutional entity manages the private speech that it permits to be broadcast within its operational realm make nonpublic forum management ripe for application of some adjusted form of incitement lite.<sup>179</sup>

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occupies a limited space in the marketplace of ideas, that the government need not create and can close at will.” (footnote omitted).

<sup>176</sup> *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam).

<sup>177</sup> Scholars have addressed difficulties caused by this presumption in various contexts. See, e.g., David Franklyn, *Media Violence Tort Cases: Problems of Causation and the First Amendment*, 27 N. KY. L. REV. i, i–ii (2000) (introducing symposium); Andrew B. Sims, *Tort Liability for Physical Injuries Allegedly Resulting from Media Speech: A Comprehensive First Amendment Approach*, 34 ARIZ. L. REV. 231, 233, 233 n.4 (1992) (listing scholarly commentary on torts resulting from media-disseminated speech); Alexander Tsesis, *Foreword: Terrorist Incitement on the Internet*, 86 FORDHAM L. REV. 367, 367 (2017) (introducing symposium).

<sup>178</sup> See *Perry Educ. Ass’n v. Perry Local Educators Ass’n*, 460 U.S. 37, 45–46 (1983) (setting out forum analysis).

<sup>179</sup> Cf. David S. Han, *Managing Constitutional Boundaries in Speech-Tort Jurisprudence*, 69 DEPAUL L. REV. (forthcoming 2020) (arguing that the Court has erroneously presumed “that the risk of impermissible chilling effects and the potential for government abuse—the fundamental reasons for extending First Amendment

Although all elements of the definition must be reconsidered, the element most in need of adjustment to fit nonpublic forum management is the end the government may seek to achieve by restricting persuasive speech. The government-as-sovereign is charged with enforcing public laws to keep public order. Preventing illegal action is the end the government-as-sovereign may seek to achieve when it restricts speech because its message persuades listeners to engage in harmful conduct.<sup>180</sup> The government as institutional entity is charged with ensuring efficient operation of its enterprise to provide a public service. Preventing listener conduct that disrupts the efficient operation of the enterprise, or, more narrowly, disrupts the operations so severely that it undermines its ability to provide the public service, is more appropriately the end the government as institutional entity may seek to achieve according to the same theory of connection between speech and action.<sup>181</sup>

Again, transit advertising provides a more generally applicable example of the appropriate scope of nonpublic managers' authority to exclude speech that persuades viewers to engage in harmful conduct. Transit agencies widely believe that they have the authority to exclude advertisements that persuade their passengers to use alternate means of transportation.<sup>182</sup> This authority would allow transit agencies to exclude from the view

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protection to tort liability—are effectively identical in the speech-tort context as compared to the direct-regulation context,” that this error “has caused the Court to adopt a highly blunt, excessively prophylactic approach to speech-tort cases that threatens to overprotect speech interests at the expense of tort interests,” and that a “more modest, contextualized approach[.]” to assessing speech restrictions would better balance government authority and speaker interests in the speech-tort context).

<sup>180</sup> See *Brandenburg*, 395 U.S. at 447–48.

<sup>181</sup> See *supra* notes 149–153.

<sup>182</sup> See *Bus/Trolley Advertising Policy and Regulations*, HARBOR TRANSIT, <https://harbortransit.org/advertising-policy/> [<https://perma.cc/YD2V-GEAE>] (excluding “[a]dvertising that encourages persons to refrain from using Harbor Transit or public transit in general” and “[a]dvertising that explicitly and directly promotes or encourages the use of means of transportation in direct competition with public transit”); *Southern California Regional Rail Authority*, METROLINK, [https://www.metroinktrains.com/globalassets/customer-service/scrta\\_revenue\\_advertising\\_policy.pdf](https://www.metroinktrains.com/globalassets/customer-service/scrta_revenue_advertising_policy.pdf) [<https://perma.cc/EA54-KK8X>] (excluding advertising that “[c]ontains images, copy or concepts that actively denigrate public transportation or the services provided by Metrolink”); *MTA Advertising Policy*, METRO. TRANSP. AUTH., [http://web.mta.info/mta/realstate/PDF/MTA\\_Ad\\_Policy\\_April\\_2015.PDF](http://web.mta.info/mta/realstate/PDF/MTA_Ad_Policy_April_2015.PDF) [<https://perma.cc/9HDF-GFJF>] (excluding advertising that “[e]ncourages or depicts unsafe behavior with respect to MTA’s transportation operations, such as failure to comply with normal safety precautions in awaiting, boarding, riding upon or debarking from MTA vehicles, or is otherwise directly adverse to the commercial, administrative or operational interests of the MTA as a business”); *SFMTA Advertising Policy*, S.F. MUN. TRANSP. AGENCY, [https://www.sfmta.com/sites/default/files/reports-and-documents/2017/11/sfmta\\_advertising\\_policy.pdf](https://www.sfmta.com/sites/default/files/reports-and-documents/2017/11/sfmta_advertising_policy.pdf) [<https://perma.cc/SZAP-DBYZ>] (excluding “[a]dvertising, or any material contained in it, that is directly adverse to the commercial or administrative interests of the SFMTA, or that tends to disparage the quality of service provided by the SFMTA, or that tends to disparage public transportation generally”).

of their passengers advertisements like those broadcast by Uber (woman sadly eyeing a departing subway train next to the slogan, “You can’t miss an Uber”) and Lyft (slogan on closed subway doors: “we would’ve held the door for you”).<sup>183</sup> Obviously, these advertisements seek to persuade public transit passengers to abandon that mode of transportation and, in fact, they seem to successfully do so, severely undercutting the ability of the transit systems to perform their public functions effectively.<sup>184</sup> The conduct that the advertisements are designed to provoke strikes at the very heart of the transit agencies’ delegated authority, like unlawful action does to the responsibility of the government-as-sovereign to keep public order. Equally as obviously, excluding the advertisements because of listeners’ reactions to the persuasive messages would be viewpoint discrimination outside the boundaries of the *Brandenburg* incitement exception.<sup>185</sup> This dilemma thus poses the question succinctly: does the Constitution require public entities to broadcast commercial advertising that disparages their services and directly urges passengers to spend their money on a competing product as a condition to running the advertising program that helps fund their operations and defray the fares they charge their public constituency?<sup>186</sup>

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<sup>183</sup> Angie Schmitt, *Uber and Lyft Ads Are Really Annoying Us Lately*, STREETS BLOG, <https://usa.streetsblog.org/2018/10/31/uber-and-lyft-ads-are-really-annoying-us-lately/> [<https://perma.cc/J4U9-PGJW>].

<sup>184</sup> See *id.* (asserting that Uber and Lyft advertising on New York City subway and other transit vehicles “worked” and citing “[a] study from Boston [that] found [forty-two] percent of Uber and Lyft users were substituting the services for transit[,] [and] [a]nother study [that] showed that vehicle miles traveled from Uber and Lyft increased the fastest in cities—like New York and Boston—that had relatively strong transit ridership, prior to their arrival”); Emma G. Fitzsimmons, *Subway Ridership Dropped Again in New York as Passengers Flee to Uber*, N.Y. TIMES (Aug. 1, 2018), <https://www.nytimes.com/2018/08/01/nyregion/subway-ridership-nyc-metro.html> [<https://perma.cc/Z7KF-YJEB>] (“[R]idership dropped for the second year in a row [on the New York subway system] as passengers flee the system for Uber and other ride-hailing services, draining the transit system of badly needed revenue.”).

<sup>185</sup> *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 831 (1995) (holding exclusion based on a “prohibited perspective, not the general subject matter” is viewpoint discriminatory).

<sup>186</sup> The standard of review of restrictions on advertising is not clear. The Court has not yet abandoned the “relaxed scrutiny” for commercial speech established in *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557 (1980). See *Matal v. Tam*, 137 S. Ct. 1744, 1764 (applying Central Hudson review to trademark registration requirement and finding the test not to be met). Nevertheless, as Justice Kennedy emphasized in *Matal*, the Court has held that even with commercial speech, “the First Amendment ‘requires heightened scrutiny whenever the government creates a regulation of speech because of disagreement with the message it conveys.’” 137 S. Ct. at 1767 (Kennedy, J., concurring) (citation omitted). Exception of advertisements urging patrons to go elsewhere is message-sensitive in this way, so, if pressed, the Court would almost certainly find “heightened scrutiny” of the type that applies to noncommercial speech restrictions rather than *Central Hudson* scrutiny to apply.



The *Brandenburg* incitement exception is designed to protect abstract criticism of the government and its policies while segregating speech that urges listeners to take specific action that directly subverts its public charge to maintain order. An adjusted nonpublic forum incitement exception could maintain the spirit of the *Brandenburg* distinction while still incorporating the different scope of conduct that most severely threatens the continued existence and effective functioning of an institutional government entity, which is the conduct of participants on which it depends to function abandoning the enterprise. In practice, this might mean that transit agencies would have to accept advertising that criticized their actions or policies, but that they could exclude advertising, like those of Uber or Lyft, which directly urges passengers to use competing services in lieu of those they offer. This scope of authority to restrict persuasive speech extends beyond the boundaries of the *Brandenburg* exception, but only somewhat, and in a narrow and defined way that mirrors the government-as-sovereign's scope of authority to act against speakers to avoid the conduct their speech may provoke.

An adjustment to what is considered a permissible end that a nonpublic forum manager may seek to achieve in this way could better balance government authority, speaker rights, and the speech market impact because it identifies the core harm that most likely would cause them to close the forum entirely, and so encourages them to open, or to continue to hold open, private speech opportunities on their properties.<sup>187</sup> The impact on speakers who want to urge nonpublic forum participants to abandon the enterprise may be as minimal as a modification in the manner in which they convey their messages. If it is complete exclusion, then the speakers have all other channels of public communication and likely other nonpublic forums hosted by different types of enterprises to convey their messages. A clear, narrow definition of the scope of the government's authority to restrict speech that will likely persuade participants to abandon the enterprise can limit the discretion of administrators to discriminate according to viewpoint outside the boundaries of the adjusted exception.<sup>188</sup>

Adjustments to other elements of the *Brandenburg* exception may be required to define the appropriate scope of a nonpublic forum incitement exception. With respect to the Uber and

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<sup>187</sup> See *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 680 (1998).

<sup>188</sup> See *Am. Freedom Def. Initiative v. King County*, 796 F.3d 1165, 1170 (9th Cir. 2015) (stating requirement of reasonableness in a nonpublic forum is that an exclusion standard "be 'sufficiently definite and objective to prevent arbitrary or discriminatory enforcement'" (quoting *Seattle Mideast Awareness Campaign v. King County*, 781 F.3d 489, 500 (9th Cir. 2015))).

Lyft advertisements, the requirement that the speaker intend to incite viewers to leave the enterprise is met. Whether this should be a requirement of an adjusted nonpublic forum incitement exception is much less clear, since the threat of criminal punishment, and the chilling effect that it may provoke in speakers who intend to engage in protected speech, is the best justification for it.<sup>189</sup> A strict interpretation of the imminence requirement would need to be relaxed to take into account the circumstances in which nonpublic forum speech is presented, which is frequently unattended displays such as the transit advertising forum. As part of the broader question of whether the conduct nonpublic forum managers predict is likely harmful enough to justify restricting speech, courts should apply an adjusted inquiry into imminence that requires a credible connection to harm. This would ensure that these entities have some scope of authority to restrict speech.<sup>190</sup>

Another example helps to explore the scope of an incitement lite exception that permits nonpublic forum managers to restrict speech submissions that urge participants in the enterprise to stay away. For a short time in Canada, General Motors (GM) tried to sell its cars by means of an advertisement featuring a large photo of a bus with a destination header titled “Creeps and Weirdos.”<sup>191</sup> The clear message, of course, was that bus riders are socially unequal and undesirable, and that viewers should abandon bus transportation for GM’s cars. The advertisement directly urges passengers to leave and market research presumably predicted that it would be effective, so on these grounds alone, it could fall within an adjusted incitement lite exception. The “Creeps and Weirdos” messaging, however, presents a variation. As a persuasive technique, to achieve its end, which in this instance was commercial, GM unambiguously attacked the social worth of necessary participants in the bus transit enterprise, labeling them as unfit for other participants to associate with on an equal basis. GM’s purpose was not to trigger action by the passengers it attacked, but rather to influence potential passengers who would not want to associate with them or, if they chose to stay on the bus, become like them. Still, the additional question that this example presents is the same: does the Constitution require public entities to broadcast commercial

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<sup>189</sup> See *Ridley v. Mass. Bay Transp. Auth.*, 390 F.3d 65, 94 (1st Cir. 2004) (“[In the nonpublic forum] there is no serious concern about . . . chilling effects, where there are no consequences for submitting a non-conforming advertisement and having it rejected.”).

<sup>190</sup> Alexander, *supra* note 54, at 599 (questioning the relevance of “imminence independent of its bearing on likelihood”).

<sup>191</sup> *Creeps Campaign Spurs Protest in Vancouver, B.C.*, METRO MAG. (Apr. 1, 2003), <https://www.metro-magazine.com/management-operations/article/210433/creeps-campaign-spurs-protest-in-vancouver-bc>. [<https://perma.cc/49UF-SQGB>]. These advertisements were not placed on buses. *Id.*

advertising that attacks the social worth of their participants, and which will persuade participants that they are unwelcome and may provoke them to leave, or, may persuade other viewers to treat them as unwelcome, which may also drive them away?

A narrow, but adjusted incitement lite exception could allow nonpublic forum managers some scope of authority to reject submissions that vilify their participants as a persuasive technique to sell a commercial product, or to require modifications to remove the message that viewers should abandon the enterprise. A transit agency could, for example, require modification of the GM advertisement to promote the cars without attacking the customers. A speaker's mode of communicating an idea, however hateful, is protected in public communication like the content of the idea itself.<sup>192</sup> The different balance of interests in the nonpublic forum could allow managers some scope of authority to require that speakers modify persuasive techniques that target abuse at employees or the members of the public the agency is charged with serving.

If an incitement lite exception were to permit nonpublic forum managers to exclude speech that targets hate at enterprise participants as an indirect means of persuasion to purchase a product, it could also permit some scope of authority to exclude such speech as a direct means of persuasion to participants in the enterprise that they should behave with hate toward other participants or, if they are its targets, that they should behave as if they are hated, and leave the enterprise. MTA's effort to exclude the "Killing Jews" advertisement raises this possibility.<sup>193</sup> MTA could have concluded that the image of the menacing Muslim man and accompanying text would prompt instant and visceral hate reactions in some viewers, either that they should hate or are hated, akin to the reflexive reaction in the *Brandenburg* paradigm, and that some number of viewers—passengers, prospective passengers, or employees—would move from opinion change to the action of abandoning public transportation, or at least the buses on which the advertisements were posted.

This is one of several meanings that the "Killing Jews" advertisement may send to viewers and, for this reason, it may not meet the requirement that it express hate in a way that is likely to persuade viewers to take action. More direct messaging identifies the issue more clearly. Consider a hypothetical submission of much

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<sup>192</sup> *Cohen v. California*, 403 U.S. 15, 16–18, 25 (1971) (invalidating disorderly conduct conviction for wearing a jacket with "Fuck the Draft" on the back in the lobby of a courthouse and noting that "one man's vulgarity is another's lyric").

<sup>193</sup> See *supra* Section II.A.2.

larger and much more numerous postings, of the same menacing-man photo with the simple and succinct text such as “Fear Men Like This!” or “Men Like This Not Welcome In Here!” inside vehicles occupying most or all of the advertising space or throughout bus or subways terminals as part of a “domination campaign.”<sup>194</sup> However infrequent such direct hate message submissions may be, or however unlikely that they will take the form of such overwhelming messaging, the extreme possibilities frame the question whether nonpublic forum managers must accept hate messages targeted at their internal audience if they accept other types of advertisements addressing the same subject matter.

The government-as-sovereign must tolerate these types of messages on public forum property and must address the consequences through means other than suppressing speech when it persuades viewers to act hatefully toward each other, or to leave public spaces because they are persuaded that they are unwelcome there. Nonpublic forum managers have a stronger, and more focused interest, in avoiding speech that will alienate participants in their enterprises. Nevertheless, the ever-tightening doctrinal constraints seem to make it impossible for them to exclude such speech from inside their operational domains in a way that escapes condemnation as viewpoint discriminatory. A tightly defined incitement lite exception that allowed nonpublic forum managers authority to exclude some narrowly drawn scope of hate messaging targeted at their employees, clients, or patrons, when that speech will likely persuade viewers to abandon the enterprise, might not be used often, but knowing that it could be, might provide these managers breathing space to fulfill free speech values by opening valuable speech channels that the Constitution permits them to close entirely.

## CONCLUSION

Over the decades, the incitement exception, which defines the line between protected advocacy of ideas and unprotected urging of unlawful action, has evolved, and narrowed, so that even in the realm of face-to-face public issue protests, demonstrations, and rallies that explain its evolution, it rarely justifies restriction

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<sup>194</sup> *Own the Station*, OUTFRONT, <https://www.outfrontmedia.com/media/additional-media/station-domination> [<https://perma.cc/NR93-R4PU>] (link to a media company that helps those seeking to “dominate” a subway station to surround commuters with brand messages).

of dangerous speech.<sup>195</sup> The narrow exception may, or may not,<sup>196</sup> appropriately balance free speech rights and government authority to restrict persuasive speech in the public realm, where the threat of falling within the definition is criminal punishment, and the result of doing so is that political and social issue speech is removed from the marketplace of ideas entirely. In the context of nonpublic forum management, however, where the heavy threat of criminal punishment does not hang over private speakers seeking access, an adjusted form of incitement lite, which defines a different, more nuanced and tailored, scope of government authority to regulate speech that persuades listeners to engage in harmful conduct may better implement constitutional values than the blunt, one-size-fits-all *Brandenburg* incitement category.

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<sup>195</sup> See *Am. Freedom Def. Initiative v. Metro. Transp. Auth.*, 70 F. Supp. 3d 572, 581 (S.D.N.Y.) (“[T]he Supreme Court has rarely applied the *Brandenburg* incitement standard, and never explicitly found speech to be on the proscribable side of the standard.”), *vacated on other grounds*, 109 F. Supp. 3d 626, 635 (S.D.N.Y. 2015).

<sup>196</sup> See generally Alexander, *supra* note 54 (reviewing and critiquing elements of the *Brandenburg* definition of incitement).