

FIRST AMENDMENT—FREE SPEECH CLAUSE—PUBLIC TRANSPORTATION AGENCY'S ADVERTISING SPACE IS A DESIGNATED PUBLIC FORUM AND, AS SUCH, REMOVAL OF ANTI-ABORTION GROUP'S POSTERS MUST MEET STRICT SCRUTINY—*Christ Bride's Ministries, Inc. v. Southeastern Pennsylvania Transportation Authority*, 148 F.3d 242 (3d Cir. 1998).

The Third Circuit Court of Appeals recently held that a public transportation agency's advertising space is a designated public forum and found that an anti-abortion group's advertising fell within the scope of that forum. *See Christ's Bride Ministries, Inc. v. Southeastern Pennsylvania Transportation Authority*, 148 F.3d 242 (3d Cir. 1998). In so holding, the court reasoned that the group's advertising did not amount to commercial speech and was entitled to full First Amendment protection. *See id.* at 247. The court concluded that because the advertising space provided by the public transportation authority is a designated public forum, any content-based restrictions must survive strict scrutiny. *See id.* The court also noted that even if a designated public forum had not been created, the transportation authority, in removing an anti-abortion group's posters, did not act reasonably under the First Amendment. *See id.* at 255. Ultimately, the court's holding limits a public agency's ability to regulate the content of advertising on its premises where the agency has not had a past practice of monitoring the content of that advertising thereby increasing the public's exposure to all types of advertising regardless of its appeal.

The plaintiff, Christ's Brides Ministries, Inc. (CBM), a non-profit organization, sought to inform the public about a correlation it believed existed between the occurrence of breast cancer in women who had previously had abortions. *See id.* at 244. CBM contacted the defendant, Southeastern Pennsylvania Transportation Authority (SEPTA), in November 1995 seeking access to the advertising space in SEPTA's transit system. *See id.* at 245. SEPTA referred CBM to the other defendant, Transportation Display's, Inc. (TDI), the licensee who handled the construction and sale of the transit system's advertising space. *See id.*

CBM sent a draft poster to both TDI and SEPTA for review. *See id.* The poster submitted by CBM stated that "Women Who Choose Abortion Suffer More & Deadlier Breast Cancer" and also included the toll-free phone number for an organization called the American Rights Coalition, which provided information about the perceived link. *See id.* Thereafter, SEPTA approved the posters for display only after CBM identified itself as the sponsor of the poster and added a description of its organization. *See id.*

The posters were hung for display in subway and railroad stations in Philadelphia and its environs on January 15, 1996. *See id.* When SEPTA immediately began receiving complaints about CBM's posters, SEPTA requested that CBM identify itself more boldly and clearly on the posters. *See id.* CBM cooperated with SEPTA's request and added decals to the posters identifying

CBM as the sponsor in bolder and larger print. *See id.* One week after the posters were hung, the parties executed a contract providing for the posters' display for one year. *See id.* The contract included a term, printed on the back that allowed TDI to remove any objectionable advertising and terminate the contract without notice. *See id.*

In February, SEPTA received a copy of a letter from the Assistant Secretary of Health, Dr. Philip Lee, stating that the posters were misleading and not scientifically accurate. *See id.* Dr. Lee wrote that he was not aware of any scientific study linking abortions to an increased risk of breast cancer. *See id.* He noted that the toll-free number advertised by CBM referred the caller to an article in a medical publication mentioning a study which suggested a positive correlation. *See id.* However, Dr. Lee found the toll-free number's reference misleading because it did not include the publication's follow-up editorial that stated that the study's results were not conclusive. *See id.* In light of Dr. Lee's letter, SEPTA removed CBM's advertising on February 16, 1996. *See id.* Nearly one month later, on March 13, 1996, TDI informed CBM that SEPTA decided to remove the posters based on the letter from Dr. Lee, the Assistant Secretary of Health. *See id.* at 246. Thereafter, TDI refunded the unused portion of the contract to CBM. *See id.*

CBM brought suit against SEPTA and TDI alleging a violation of CBM's rights under the First and Fourteenth Amendments and breach of contract in the District Court for the Eastern District of Pennsylvania. *See id.* CBM also sought damages as well as declaratory and injunctive relief pursuant to 42 U.S.C. §§ 1983, 1985(c), and 1986. *See id.*

The district court ruled for the defendants on all counts. *See id.* The court found that SEPTA's transit stations were not public fora. *See id.* Additionally, the court found that SEPTA acted reasonably in removing the posters based on the Assistant Secretary of Health's letter. *See id.* The district court heard expert testimony about the link between breast cancer and abortions and reasoned that a definitive causal link did not exist at that time. *See id.* Thus, the court found that Dr. Lee's letter was a reasonable basis for the removal of the advertising. *See id.*

Although CBM's reasoning was not explained, it did not appeal the district court's rejection of the § 1985 and § 1986 claims. *See id.* at 246, n.1. From the district court's decision, CBM appealed its First Amendment and breach of contract claims to the Third Circuit Court of Appeals. *See id.* at 247. On appeal, the Third Circuit Court of Appeals held that SEPTA violated CBM's First Amendment free speech rights finding that SEPTA's advertising space was a designated public forum and, as such, CBM's anti-abortion advertising fell within the scope of the forum. *See id.* at 244.

Judge Roth authored the third circuit opinion, and in a footnote, immediately rejected CBM's breach of contract claim. *See id.* at 246, n.1. The court simply stated that it found CBM's arguments that there was no meeting of the

minds and that the contract was unconscionable to be without merit. *See id.*

In addressing the First Amendment claim, the third circuit first established that as an appellate court, it had a duty to conduct an independent examination of the record as a whole, without deference to the trial court. *See id.* (citing *Hurley v. Irish-American Gay Group of Boston*, 515 U.S. 557, 115 S. Ct. 2338, 2344 (1995)). Then the court recognized that the First Amendment only protects against state action. *See id.* The circuit court noted that the parties conceded that SEPTA, a public transportation authority, was a state actor. *See id.*

The court disposed of SEPTA's argument that the speech involved was commercial speech and should receive less protection under the First Amendment. *See id.* The court reiterated SEPTA's argument that because the posters displayed a 1-800 phone number offering information about medical malpractice, the speech was commercial. *See id.* Rejecting this argument, the court noted that the speech did not constitute goods or services because CBM had no economic motive for the advertising, especially where no goods or services were advertised in the posters. *See id.* Instead, the court found that the posters, which displayed the toll-free number of another agency, merely sought to inform the public. *See id.*

The court then turned to the question of whether the forum was governmental or public. *See id.* The court declared that content-based restrictions on speech in public fora are examined under a strict scrutiny standard. *See id.* In determining whether a public forum had been created, the court examined the nature of the property and the extent of the property's use for speech. *See id.* at 247-48. The court found that SEPTA's advertising space, not the entire transit system, was the proper forum because CBM had only sought access to the transportation authority's advertising space on the walls of the stations, not to SEPTA's sidewalks and stations for the purposes of leafleting and solicitation. *See id.* at 248.

The circuit court agreed with the district court below and found that SEPTA's advertising space is not a traditional public forum. *See id.* The court recognized, however, that a designated public forum may be created where the government intends to open the forum to speech activity. *See id.* The court found that the government's intent will be gauged by its policies and practices in using the space and also the nature of the property and its compatibility with expressive activity. *See id.* at 249. The court cautioned, nevertheless, that governmental restrictions on the use of the property do not automatically indicate that a public forum has not been created. *See id.*

In deciding whether SEPTA had created a designated public forum, the court first reviewed SEPTA's policies and goals in renting out the advertising space. *See id.* The court found that SEPTA had two primary goals: producing revenue and promoting social awareness. *See id.* The court rejected SEPTA's argument that it did not create a public forum because it retained the

right to reject any objectionable advertising. *See id.* at 251. The court found that SEPTA's reservation of the right to reject objectionable advertising did not conclusively determine whether a public forum had been created. *See id.* In so doing, the court reasoned that SEPTA had written policies limiting its acceptance of alcohol and tobacco posters, but not abortion posters. *See id.*

Next, the court turned to SEPTA's past practices in accepting controversial advertising. *See id.* Referring to the numerous advertisements about sex, family planning, and AIDS that SEPTA had previously accepted, the court observed that SEPTA had only previously requested modification of three advertisements: a semi-nude woman in a hosiery ad, a personal injury law firm's ad that mentioned railroad accidents, and a safe sex ad showing a condom stretched over a gun. *See id.* at 252. The court recognized that although SEPTA had previously accepted two abortion advertisements, one offering counseling services and the other touting the health benefits of legalizing abortion, SEPTA had not requested modification of either advertisement. *See id.* at 251-52. Due to SEPTA's written policy and the virtually unrestricted access to its advertising, the court decided that a designated public forum had been created. *See id.* at 252.

Following its conclusion that SEPTA created a public forum, the court recognized that content-based restrictions on speech must pass strict scrutiny in order to pass muster under the First Amendment. *See id.* at 255. Recognizing that SEPTA did not argue that its restrictions survived this heightened level of scrutiny, the court summarily concluded that SEPTA's actions violated CBM's First Amendment rights. *See id.*

The court noted that SEPTA's actions were not reasonable and would not have passed constitutional muster even if a public forum had not been created. *See id.* Where the district court had found that SEPTA acted reasonably in removing CBM's posters, the third circuit disagreed. *See id.* at 256. Again, the court addressed the nature and purposes of the government's property in determining the reasonableness of its action. *See id.* at 255. The court found that SEPTA acted unreasonably in relying on the Assistant Secretary of Health's letter when SEPTA did not have a long-standing policy of protecting its consumers from debated and dubious speech. *See id.* at 257. Finally, the court criticized SEPTA's failure to ask CBM to defend the accuracy of the posters and subsequent removal of the posters. *See id.* Accordingly, the court found that SEPTA's actions were not reasonable. *See id.*

ANALYSIS

In *Christ Bride's Ministries v. Southeastern Pennsylvania Transportation Authority*, the third circuit found that a public transportation agency's advertising space is a designated public forum and, as such, any content-based restrictions must pass strict scrutiny in order to comport with the First Amend-

ment. *See id.* at 247. In so holding, the court limited a governmental entity's ability to have unfettered discretion to remove unpopular advertisements where it has had a long-standing policy of permitting virtually all types of advertising.

The court did not allow a public transportation agency to hide behind the curtain of lesser scrutiny. The First Amendment protects both popular and unpopular speech. The government should not be permitted to accept speech it finds appropriate and reject speech it finds inappropriate without giving any guidance and indication as to what it may do with that speech. The third circuit's decision sends a clear message to the government that it will not allow the government to keep us guessing whether or not an advertisement in its facility will be excluded.

However, this holding also mandates public exposure to advertising on all types of issues. Our city buses, train stations, and billboards could become platforms for virtually any idea. While we hold sacred the ideals of free speech and expression, do we want the sides of our buses advertising abortion information? The fact that these "platforms" may be disseminating inaccurate or false information is even more troubling. The government will be left with little control to redact false information based on the *Christ's Brides* precedent. This may lead to even more controversial groups using the city's transportation systems as a platform for circulating hostile and paramilitary messages.

While the decision upholds a basic tenant of our Constitution, the right to free speech and expression, it greatly limits the ability of a governmental body to eliminate misleading or untrue speech from its premises. Although we hold dear the ability of our citizens to express themselves freely and openly, we should not protect the dissemination of false and misleading ideas which may alarm the public.

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