

A city owned and operated a municipal bus system. The city sold space on its buses for the posting of placards. Under the relevant city ordinance, the administrator of the bus system had sole discretion to decide which placards could be posted on the buses, and the administrator's decision was final. Although most of the placards that appeared on city buses were commercial advertisements, the administrator had often sold space on the buses for placards promoting various political, charitable, and religious causes.

After a circus bought space on the buses for placards advertising its upcoming performances, an animal rights organization asked to buy space for a placard with photographs showing the mistreatment of animals in circus shows.

The administrator denied the organization's request, stating that the proposed placard would be offensive to the circus, which had paid a substantial sum to place its placards on the buses, and that a circus employee had told her that none of the photographs on the organization's placard depicted animals belonging to this particular circus.

The organization sued the administrator in an appropriate court for a declaration that her denial of the organization's request for placard space for the reasons she gave violated the First Amendment as made applicable to the states by the Fourteenth Amendment.

Is the organization likely to prevail?

- A. No, because a public official may not allow the use of public facilities for the propagation of a message that he or she believes may create a false or misleading impression.
- B. No, because the administrator's denial of space to the organization was a reasonable time, place, and manner restriction of speech.
- C. Yes, because a public official may not refuse to allow the use of any public facility to publish a message dealing with an issue of public concern.
- D. Yes, because a public official may not refuse to permit the dissemination of a message in a public forum solely on the basis of its content unless that denial is necessary to serve a compelling government interest.

Explanation:

Forum-based regulation of speech

Types	Definition	Regulations
Traditional public forums	Public property historically used for, or associated with, public speech (eg, streets, sidewalks, parks)	Content-based regulations <i>prohibited</i>
Designated (limited) public forums	Public property opened for specific types of expression (eg, school classrooms, civic auditoriums)	
Nonpublic forums	All other public property	Content-based regulations <i>permitted</i> if viewpoint-neutral

The **First Amendment prohibits** the government from engaging in **content-based discrimination** against different categories of **speech** in public forums. Therefore, government censorship of speech **based solely on its message** (or what is said) will only be upheld if the government can satisfy **strict scrutiny**. This requires the government to prove that its actions are necessary and narrowly tailored to achieve a compelling government interest.

Here, the administrator for the municipal bus system denied the animal rights organization's request to buy space for placards with photos of mistreated circus animals. Her stated reasoning was that the content of the placard would offend the circus and the photos therein did not depict animals belonging to that circus. Since this constitutes content-based discrimination that is unlikely to pass strict scrutiny, the organization will likely prevail.

(Choice A) The government can limit the use of public facilities for *commercial* speech (eg, an advertisement placard) that creates a false or misleading impression since that speech is not protected by the First Amendment. But it cannot limit the use of public facilities for *noncommercial* speech—even if it is false or misleading—since that amounts to a content-based restriction subject to strict scrutiny.

(Choice B) The administrator's denial of space for bus placards was based on the content—not the time, place, or manner—of the organization's message. However, reasonable time, place, and manner restrictions are permitted in designated public forums. Here, the placard spaces likely qualify as designated public forums because the city opened this public property for expressive use—including political, charitable, religious, and commercial content.*

*In contrast, the bus likely would have been a nonpublic forum had the city permitted only commercial content or put comprehensive, restrictive guidelines in place for approving noncommercial content.

(Choice C) A public official engages in content-based regulation by refusing to allow the use of a public facility to publish a message that addresses a public concern. But this refusal is permitted in *nonpublic* forums so long as it is viewpoint-neutral—ie, denies discussion on all sides of the issue.

Educational objective:

The government can only impose content-based restrictions on speech in public forums if the government can satisfy the strict scrutiny test—ie, prove that the restriction is necessary to achieve a compelling government interest.

References

- *Lehman v. City of Shaker Heights*, 418 U.S. 298, 303–04 (1974) (holding that advertisement placards on a city-owned transit system are a nonpublic forum when the city permits commercial content only).
- *N.Y. Magazine v. Metro. Transp. Auth.*, 136 F.3d 128, 130 (2d Cir. 1998) (holding that a designated public forum exists when a city permits both noncommercial and commercial content on city-owned transit systems).

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