

Judge rules controversial ad is allowed on NYC transit

by [Cristina Maza](#) in the [May 27, 2015](#) issue

*(The Christian Science Monitor)* A federal judge in Manhattan ordered the Metropolitan Transportation Authority to display a controversial ad from a pro-free-speech group on buses.

The MTA declined to run the ad last year, saying that its message could incite violence. But U.S. District Court judge John Koeltl ruled April 21 that the ad qualified as protected speech and granted a preliminary injunction ordering that the transportation authority run it.

The advertisement is paid for by the American Freedom Defense Initiative and was meant to parody a campaign by the Council on American Islamic Relations called My Jihad. CAIR's website states that the My Jihad campaign aims to "take back Islam from Muslim and anti-Muslim extremists alike." The AFDI ad, meanwhile, shows a man wearing a scarf around his head. A quote to the man's right attributed to " Hamas MTV " says, "Killing Jews is worship that draws us close to Allah." Below the quote the ad reads: "That's His Jihad. What's yours?"

MTA officials said that the ad could be misinterpreted as a call to violence against Jews and thus could be banned by an exception to the First Amendment that restricts speech inciting imminent violence.

In his ruling, Koeltl said that "there is no evidence that seeing one of these advertisements on the back of a bus would be sufficient to trigger a violent reaction. Therefore, these ads—offensive as they may be—are still entitled to First Amendment protection."

Civil liberties scholars largely agree that the court's decision is in line with First Amendment law.

"The city also argued that there was a risk of vandalizing or attacking the buses, but the court said there is no real evidence," said Eugene Volokh, professor of First Amendment law at UCLA's School of Law. "That is something most courts would agree on."

The Southern Poverty Law Center and the Anti-Defamation League have labeled the AFDI as promoting “anti-Islam hate.” But First Amendment lawyers point out that no matter how controversial the group’s message, it cannot be legally banned.

“There is a very strong principle in First Amendment law that protects against viewpoint discrimination,” said Vincent Blasi, Corliss Lamont Professor of Civil Liberties at Columbia Law School. “When a message is directed at a general audience, it is protected.”

He contrasted such speech with speech directed at specific people.

“If you are singling out a person or identifiable group, usually one of two things could lead to that being restricted: it’s done as a form of personal harassment or stalking, or it’s a sensitive environment, for example, in a classroom,” he said. “I could say as a professor ‘change your tone or your language’ in my classroom.”

The AFDI previously sued the MTA in 2012 over another ad the agency eventually had to run. That advertisement pictured Nazi dictator Adolf Hitler sitting with Haj Amin al-Husseini, a Palestinian nationalist and grand mufti of Jerusalem, who allied himself with the Third Reich during World War II. In that case, a federal judge ruled that the MTA had violated the AFDI’s First Amendment rights by banning the ad.

In March, a judge ruled that Philadelphia’s transit authority was legally required to run a different AFDI ad. In response, the city’s transit authority has banned all public issue, political, and noncommercial ads going forward.

In April, a federal appeals court upheld a lower court decision that the Massachusetts Bay Transportation Authority could prohibit any ad considered “demeaning or disparaging” to individuals or groups. The decision was made after the MBTA removed ads referring to Palestinians as “savages.” In that case, the court ruled that because the MBTA’s ban was related to the type of content and not to the viewpoint, it was permissible, Volokh said.

A content-based restriction, for example, would specify that the speech in an ad cannot mention politics at all. A viewpoint-based restriction would prohibit only those political ads that portray a specific viewpoint or ideology.

“Though courts agree that ad restrictions must be viewpoint-neutral, there is a disagreement between courts over whether ad restrictions must also be content-

neutral,” Volokh said. “In the case of the MBTA, the court said the restriction was fine because it bans all demeaning language, not, for instance, language that demeans based on race, or any other specific demeaning viewpoint.”

This ruling did not apply to the case in New York because the MTA has no restriction on content other than that which incites imminent violence. Pamela Geller, president of the AFDI, said she will pay for at least 50 MTA buses to carry the posters. An MTA spokesman, Adam Lisberg, said in a statement that the agency would review its options.

*This article was edited on May 11, 2015.*