

No. 15-141

IN THE
Supreme Court of the United States

AMERICAN FREEDOM DEFENSE INITIATIVE, ET AL.,
Petitioners,

v.

MASSACHUSETTS BAY TRANSPORTATION AUTHORITY,
ET AL.,
Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the First Circuit

**BRIEF FOR THE RESPONDENTS IN
OPPOSITION**

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QUESTION PRESENTED

In *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974), the Court concluded that a transit authority did not intend to create a designated public forum where the authority limited access to advertising spaces pursuant to an established policy that excluded ads that could interfere with its commercial objectives. The access limitation therefore did not violate the First Amendment. Like Shaker Heights, respondent Massachusetts Bay Transportation Authority (“MBTA”) restricts access to its advertising spaces pursuant to written guidelines designed to further its commercial objective of maximizing revenue from both ads and riders. Here, MBTA rejected two ads from petitioners for violating the guideline’s prohibition on “demeaning or disparaging” material, but MBTA accepted a third, non-disparaging ad from petitioners expressing the same viewpoint on the same issue. The courts below denied petitioners’ motions for preliminary injunction.

The questions presented are:

1. Did petitioners show that MBTA likely created a designated public forum by adopting and following an advertising policy that does not automatically exclude ads touching on political or otherwise controversial issues but requires all ads to comply with detailed, viewpoint-neutral guidelines?
2. Did the First Circuit err by concluding that petitioners were unlikely to succeed in their claim that MBTA’s rejection of two of their ads for violating the policy against “demeaning or disparaging” material was viewpoint-based?

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

Petitioners claim a circuit conflict on only one of their two questions presented, and the split they identify is illusory. There is no conflict on how to determine whether a public-transit agency has intentionally set up a “designated public forum” for advertising and thereby given up any power to regulate advertising content. The applicable legal principles are well established, and petitioners show only that different facts yield different outcomes.

Every circuit analyzes the public-forum question in the same manner. Advertising spaces within public trains, buses, and transit stations are not traditional public forums. Therefore, transit authorities may condition use of the ad spaces on compliance with reasonable, viewpoint-neutral guidelines *unless* the authority intentionally designated those places as public forums. In every circuit, that question of governmental intent turns on the same fact-intensive inquiry into the transit authority’s policies and practices, considering whether the authority has consistently limited use of the forum according to established guidelines.

In the decision below, the First Circuit correctly applied this common framework and held that petitioners failed to show that they were likely to succeed on their claim that respondent Massachusetts Bay Transportation Authority (“MBTA”) intended to create a public forum. To the contrary, the court explained, MBTA has long enforced detailed guidelines that not only exclude multiple ad categories (includ-

ing all ads for political candidates), but also restrict the mode of expression any advertiser may use on any topic, prohibiting, for example, ads with profanity, depictions of violence, sexually suggestive content, or “demeaning or disparaging” material. The First Circuit’s fact-bound conclusion that MBTA did not intend to create a public forum is consistent with other circuit decisions—including in cases brought by petitioners themselves—and does not warrant review.

No circuit applies the rule petitioners want—a rule that the “bare fact” that a transit authority accepts any controversial ads “automatically” creates a public forum, thereby subjecting any content guidelines to strict scrutiny. Pet. App. 17, 18. The decision below recognized that an authority’s decision to accept speech on political issues is *relevant* to determining the government’s intent. *Id.* at 17. But petitioners cite no circuit where it is *dispositive*.

Rather, the decisions petitioners rely on have all turned on the details of each transit authority’s advertising policies and practices, not categorical rules. None of the decisions on which petitioners rely involved application of a policy remotely like MBTA’s guidelines, which restrict the mode of expression that all ads may use, regardless of subject-matter. In the case closest to this one, the Ninth Circuit recently *upheld* the challenged guideline, even though petitioners contend (Pet. 10) that prior Ninth Circuit precedent supported their position.

Petitioners’ own attempts to convince various circuits to follow their all-or-nothing approach have failed for good reason. Nothing in this Court’s precedent suggests that once the government allows

speech on a topic, it loses the ability to apply reasonable, viewpoint-neutral ground rules on the mode of expression used on its property, and must therefore accept profane, lewd, or demeaning language so long as an ad's subject-matter is germane. The First Amendment may require a transit authority that runs an ad supportive of Israel to accept an ad critical of Israel, but it does not compel the authority to accept an ad with anti-Semitic slurs.

MBTA's guidelines operate in precisely this way. MBTA does not automatically reject ads on controversial issues, such as the Israeli-Palestinian conflict. But MBTA places strict conditions on the use of its property for ads on this or any other topic, to avoid imposing on MBTA passengers and possibly driving away passenger revenue. *No* advertisers may use profanity, disparaging or demeaning language (such as racial or religious slurs), nudity, or violent imagery in their ads. The First Circuit's conclusion that MBTA retained discretion to enforce these reasonable, viewpoint-neutral guidelines—and thus did not designate a public forum—is correct and does not warrant review.

Certiorari is also not warranted to review the First Circuit's conclusion that petitioners had not shown a likelihood of success on their viewpoint-discrimination claim. Petitioners do not even purport to identify a circuit conflict on the viewpoint-neutrality issue, and there is none. Instead, they simply challenge the First Circuit's decision on the merits. The First Circuit committed no error, and in any event their plea for error correction is not cert-worthy. MBTA rejected two ads for violating the "demeaning or disparaging" guideline by referring to

Israel's opponents as "The Savage," but accepted other ads supportive of Israel that complied with the guidelines—including a third ad *from petitioners* expressing the same viewpoint on the same topic without the disparaging epithet. As the First Circuit explained, the record supports MBTA's argument that it has consistently focused "on the directness of hostile language used" when making approval decisions, not on an ad's viewpoint. Pet. App. 29.

Finally, this interlocutory petition is a poor vehicle to consider either question presented. The court of appeals affirmed the denial of motions for preliminary injunction after limited fact development. And the policy at issue at this interlocutory stage is being revised: MBTA is in the process of changing its policy to reject all political and public-issue ads (not just political-campaign ads), and even petitioners' own constitutional theory would not entitle them to injunctive relief against that new policy. The absence of a final judgment is often a consideration against discretionary review, and it is a particularly strong consideration here given the fact-based nature of the issues presented, the undeveloped state of the record, and the impending change to MBTA guidelines.

The petition for certiorari should be denied.

STATEMENT

A. MBTA Regulates Advertisements In Its Facilities With The Goal Of Maximizing Total Revenue

MBTA operates the public-transit system in the greater Boston area. MBTA serves more than a million paying customers every day, providing transpor-

tation to school children, business people, and tourists of all races, ethnicities, and religions. For many—including the thousands of public-school students who ride MBTA—“MBTA is the only transportation option available.” *Ridley v. MBTA*, 390 F.3d 65, 72 (1st Cir. 2004).

Through an advertising agent, MBTA leases space in its buses, trains, and transit stations for advertising. MBTA’s “Advertising Program Guidelines” (“guidelines”) articulate the goals for the program as:

- (1) maximizing advertising revenue;
- (2) maximizing additional revenue by “attracting, maintaining and increasing ridership”;
- (3) maintaining “safe and orderly” operations;
- (4) maintaining a “safe and welcoming environment” for all passengers; and
- (5) avoiding identifying MBTA or Massachusetts with particular ads.

Pet. App. 68. To achieve these objectives, MBTA has long placed limits on the use of its advertising space and has “consistently maintained” that “its advertising program constitute[s] a nonpublic forum.” Pet. App. 13. The guidelines create a screening process, with MBTA’s agent directed to submit arguably non-compliant ads to MBTA for review. Pet. App. 68-69. If MBTA determines that a submission violates its guidelines, MBTA notifies the prospective advertiser, which has an opportunity to revise the ad before MBTA issues a final rejection notice. *Ibid.*

The guidelines impose numerous content limitations on what ads may run. For example, the guidelines exclude: ads for tobacco, alcohol, or firearms; any political-campaign speech; and ads that contain

profanity, depictions of graphic violence, obscenity, nudity, or prurient sexual suggestiveness. Pet. App. 68. Most relevant here, the guidelines prohibit advertisements that are “[d]emeaning or disparaging.” Pet. App. 71. The guidelines define that prohibited category as follows:

Demeaning or disparaging. The advertisement contains material that demeans or disparages an individual or group of individuals. For the purposes of determining whether an advertisement contains such material, the MBTA will determine whether a reasonably prudent person, knowledgeable of the MBTA’s ridership and using prevailing community standards, would believe that the advertisement contains material that ridicules or mocks, is abusive or hostile to, or debases the dignity and stature of, an individual or group of individuals.

Id. at 71-72. Over time, MBTA has expanded the “substantive and procedural limitations” on the ads it will accept. *Ridley*, 390 F.3d at 77. MBTA added the restrictions on using profanity or depicting violence in 1999, and it barred political-campaign ads in 2003. *Ibid.* MBTA first adopted a “demeaning or disparaging” guideline in 1999, and then amended the guideline in 2003. *Id.* at 74-75, 77.

MBTA has repeatedly rejected nonconforming advertisements. In a 2004 case, the First Circuit reported that, in the five years preceding the litigation, MBTA had rejected “at least seventeen advertisements that were not in conformance with different aspects of its policy.” *Ridley*, 390 F.3d at 78. Since 2004, MBTA has rejected approximately thirteen ad-

ditional ads (not counting those at issue in this case).
Pet. App. 69.

B. MBTA Applied Its Guidelines To Petitioners' Submissions

Petitioner American Freedom Defense Initiative (“AFDI”) is a nonprofit organization with the self-described goal of acting against those who “capitulat[e] to the global jihad and Islamic supremacism.” *AFDI v. Suburban Mobility Auth. for Reg'l Transp.* (“*AFDI v. SMART*”), 698 F.3d 885, 889 (6th Cir. 2012) (alteration in original). AFDI pursues this goal in part by submitting “anti-jihad” ads to public-transit facilities. *Ibid.* In October 2013, petitioners (AFDI and two of its officers) submitted an ad to MBTA’s advertising agent. Pet. App. 4. The ad read:



Id. at 5, 53. Petitioners indicated that their ad was a response to an earlier ad from the “Committee for Peace in Israel and Palestine,” which had run in several MBTA stations the previous month. Pet. App. 4-5. The Committee for Peace ad displayed four maps corresponding to different points in time (from 1946 to 2010) captioned “Palestinian Loss of Land,” while also stating “4.7 Million Palestinians are Classified by the U.N. as Refugees.” *Id.* at 4, 52.

MBTA determined that petitioners' ad violated its guideline against "demeaning or disparaging" material. Pet. App. 5-6. MBTA informed petitioners of its decision, and petitioners filed suit. While that suit was pending, petitioners submitted a revised ad on the same topic. Petitioners' second ad retained most of the same content as the original ad, but replaced "The Savage" with "Those Engaged In Savage Acts," added the adjective "Violent" before jihad, and changed the placement of "Support Israel."



Pet. App. 7-8, 54.

MBTA accepted petitioners' second submission and informed petitioners that the ad could begin running within a week. Pet. App. 8. But rather than take "yes" for an answer, petitioners withdrew the ad and submitted a revised version. *Ibid.* The third ad retained the word "Violent" and kept the same placement of "Support Israel," but it reverted back to the first ad's use of "The Savage."



Pet. App. 8, 54. MBTA rejected the revised submission as inconsistent with its guidelines, but it reiter-

ated to petitioners that MBTA “remain[ed] willing to display the second ad if AFDI so requests.” *Id.* at 62. Instead, petitioners filed a second lawsuit. *Ibid.*

During this same period, MBTA accepted four ads from a pro-Israel group that, like petitioners’ ads, were put forward in response to the Committee for Peace ad. Pet. App. 72-73. One of the ads mirrored the Committee for Peace ad’s use of maps: it included the heading “Jews Are Indigenous to Israel” and had three maps spanning “[o]ver 3,000 [y]ears of [h]istory” that purported to show how the comparatively small size of modern Israel compares to the Ancient Jewish Kingdom. Pet. App. 30 n.5, 55, 72.

C. Proceedings Below

In their complaints, petitioners contended that MBTA had turned its advertising space into a designated public forum, which subjected MBTA’s advertising judgments to “the same strict scrutiny” that applies to content regulations in a traditional public forum. *Pleasant Grove City v. Summum*, 555 U.S. 460, 469-70 (2009). Petitioners also argued that even if strict scrutiny does not apply, MBTA’s decisions to reject petitioners’ ads were unreasonable and viewpoint-based. The district court held that petitioners were unlikely to succeed on either theory and denied their motions for preliminary injunction. The First Circuit affirmed.

1. In petitioners’ first case, the district court denied petitioners’ motion for a temporary restraining order or preliminary injunction. Pet. App. 66-88. The court concluded that petitioners had not established a reasonable likelihood of success on their

claims that MBTA violated their constitutional rights by rejecting their first ad. *Id.* at 74-87.

The district court also denied petitioners' motion for preliminary injunction in the second case following MBTA's rejection of the revised third ad. Pet. App. 58-65. The court did so "without a hearing" and relied on its reasoning from the first decision. *Id.* at 64. In addition, the district court held as an alternative ground that it would "declin[e] to enter injunctive relief in any event" because petitioners "acted in bad faith" by submitting the revised ad "as an excuse to file a second lawsuit against the MBTA rather than accepting its compromise offer." *Ibid.* "Such blatant gamesmanship," the court concluded, "d[id] not warrant the 'extraordinary and drastic remedy' of a preliminary injunction. *Ibid.* (citation omitted).

2. Petitioners' appeals from the two preliminary injunction denials were consolidated. The First Circuit affirmed. Pet. App. 1-36.

a. The First Circuit's opinion proceeded in several steps. First, the court held that MBTA had not intended to create a designated public forum. Pet. App. 12-19. Relying on its decision in *Ridley v. MBTA*, 390 F.3d 65, the court explained that MBTA "had not . . . opened itself up as a forum for the communication of ideas generally" and had instead consistently imposed limits on the ads it would accept in order to advance MBTA's "overriding commercial purpose," *i.e.*, "to maximize advertising revenue without . . . adversely affecting its ridership." Pet. App. 13-14.

The First Circuit rejected petitioners' argument that MBTA "transform[ed] the nature of the forum"

by accepting the Committee for Peace ad. Pet. App. 14-15. The court reasoned that the “bare fact” that a transit system “runs some controversial ads,” or even ads on the Israeli-Palestinian conflict, “does not mean that its advertising program becomes a designated public forum” that must “allow any and all discussion on that topic.” *Id.* at 18. The First Circuit acknowledged decisions from other circuits that “have held that transit systems’ advertising spaces constitute designated public fora . . . after noting that those transit systems have allowed controversial advertisements.” *Id.* at 16. But the court noted that *Ridley* “distinguish[ed]” each of those cases “on its facts.” *Id.* at 17.

Turning to petitioners’ other arguments, the First Circuit held that the “demeaning or disparaging” guideline was not viewpoint-based, either on its face or as applied to petitioners’ ads. Pet. App. 19-20, 25-31. The court reasoned that the guideline simply provides a “ground rule[]” to “advertisers on all sides of all questions” that does not “give one group an advantage over another in the marketplace of ideas.” *Id.* at 19-20 (internal quotation marks and citations omitted). And the court concluded that the record did not support petitioners’ claim that MBTA rejected their two ads due to their viewpoint, particularly because “MBTA did accept the second AFDI advertisement” as well as another pro-Israel ad that “purport[ed] to directly rebut the Committee for Peace advertisement.” *Id.* at 25, 29-30 & n.5.

The First Circuit also rejected petitioners’ arguments that MBTA’s guidelines provided officials with excessive discretion and were unreasonably applied here. Pet. App. 20-21, 31-36. Petitioners do not chal-

lenge those aspects of the decision in their petition. The First Circuit did not reach the district court’s alternative “bad faith” ground for denying the second preliminary-injunction motion. Pet. App. 36 n.6.¹

b. Judge Stahl concurred in the judgment in part and dissented in part. Pet. App. 36-52. He agreed with the majority’s holding that MBTA had not created a designated public forum but argued that the First Circuit should revisit its precedent on the issue. Pet. App. 41-44. Judge Stahl also would have held that MBTA’s application of its guidelines to petitioners’ ads was unreasonable and viewpoint-based. *Id.* at 45-52.

REASONS FOR DENYING THE WRIT

Petitioners are incorrect in asserting that the circuits are split on the designated-public-forum question. No court of appeals has adopted petitioners’ proposed rule and held that transit authorities *automatically* create designated public forums anytime they allow political or public-issue advertising, subjecting any content rules for ads to strict scrutiny. The circuits instead treat the issue as fact-intensive. And on the facts alleged, the First Circuit correctly rejected both of petitioners’ claims.

This case is also a poor vehicle to consider either fact-intensive issue presented, given the preliminary injunction posture and the undeveloped state of the record. Furthermore, MBTA has recently decided to

¹ Petitioners contend that “[b]oth the majority and the dissent rejected the district court’s ‘bad faith’ conclusion” (Pet. 5 n.2), but that is incorrect. The majority expressly stated that it “need not resolve” whether the district court abused its discretion by denying relief on that basis. Pet. App. 36 n.6.

change its advertising guidelines in an effort to reduce its litigation burden going forward. Although the specific revisions have not been finalized, MBTA plans to expand the existing restriction on political-campaign advertising to exclude all political or issues-based advertising. Although adoption of the new guidelines will not moot this case (*e.g.*, petitioners still cannot run the relevant ads), the revision will eliminate the predicate for petitioners' designated-public-forum theory and thus remove their asserted basis for prospective relief.

I. There Is No Circuit Conflict On Either Question Presented

The petition does not identify an actual circuit split. Petitioners do not even allege a split on their second question, and there is none. On their first question, petitioners do claim the circuits are divided over whether public-transit authorities create designated public forums by accepting political or public-issue ads on controversial topics. But the purported division is illusory.

Advertising space on mass transit facilities is not a traditional public forum, and it becomes a public forum only if the transit system designates it as such. *See Lehman v. City of Shaker Heights*, 418 U.S. 298, 303-04 (1974) (plurality opinion).² In all circuits, determining whether a public-transit au-

² The plurality opinion in *Lehman* is controlling because it provides the narrowest grounds to support the judgment in the case. *See Marks v. United States*, 430 U.S. 188, 192-93 (1977); *see also Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2252 (2015) (treating the *Lehman* plurality opinion as controlling).

thority made such a designation requires a fact-intensive inquiry into government intent. The answer depends on whether the authority's decision is tied to an established policy of restricting access to further the government's commercial goals for the forum. Differences in outcome are the product of differences in governmental policies and practices, not disagreements about legal principles.

A. The First Circuit Applied The Same Legal Test As Other Circuits To Determine Whether MBTA Created A Designated Public Forum

The circuits all apply the same fact-intensive test to decide whether a public-transit authority has created a designated public forum. Although petitioners assert that the First Circuit misapplied this test, that case-specific contention does not warrant review.

1. Applying this Court's precedent, the courts of appeals uniformly recognize that whether a public transit system's advertising space qualifies as a public forum turns on the government's intent. *See, e.g., N.Y. Magazine v. MTA*, 136 F.3d 123, 129 (2d Cir.), cert. denied, 525 U.S. 824 (1998); *Christ's Bride Ministries, Inc. v. SEPTA*, 148 F.3d 242, 248 (3d Cir. 1998), cert. denied, 525 U.S. 1068 (1999); *AFDI v. SMART*, 698 F.3d at 890; *Air Line Pilots Ass'n, Int'l v. Dep't of Aviation*, 45 F.3d 1144, 1152 (7th Cir. 1995); *AFDI v. King Cnty.*, 796 F.3d 1165, 1169 (9th Cir. 2015); *Stewart v. D.C. Armory Bd.*, 863 F.2d 1013, 1016-17 (D.C. Cir. 1988). Whether the government intended to open a forum is an "inherently factual inquiry." *Air Line Pilots Ass'n*, 45 F.3d at

1152. The circuits conduct that inquiry by applying a common set of factors.

First, the circuits each review the government’s policies and practices, along with any express statements of intent. *See AFDI v. SMART*, 698 F.3d at 890. Courts ask whether the policies and practices demonstrate that the government intended to grant general access to the forum (either for all speech or on particular subjects) or instead to limit access by imposing conditions that allow the government to further other goals, such as “raising revenue.” *N.Y. Magazine*, 136 F.3d at 129.

To conduct this analysis, the circuits each look to the government’s written guidelines. When the guidelines show that the government has retained “tight control over the advertising space” by setting “multiple rules governing advertising content,” courts are likely to conclude that the government’s intended use for the property is “incompatible” with the sort of uninhibited “public discourse, assembly, and debate that characterize a designated public forum.” *AFDI v. SMART*, 698 F.3d at 890; *see also Seattle Mideast Awareness Campaign v. King Cnty.*, 781 F.3d 489, 497-98 (9th Cir. 2012) (holding that a public-transit system’s advertising space was not a public forum where the county’s written guidelines established a screening process and set detailed content restrictions). By contrast, where guidelines impose few restrictions—or where there are no written guidelines at all—courts are more likely to hold that the government has created a designated public forum. *See, e.g., Christ’s Bride Ministries*, 148 F.3d at 251 (noting that the regional transit authority’s written policy specified only “a few areas in which [the

government] will not freely accept advertising,” none of which were applicable to the plaintiff); *Planned Parenthood Ass’n/Chicago Area v. CTA*, 767 F.2d 1225, 1229-30 (7th Cir. 1985) (transit authority “maintain[ed] no written standards”).

The circuits also consider how the government implements its guidelines in practice. Consistent rejection of non-conforming ads is evidence that the government has not designated a forum. *See, e.g., Seattle*, 781 F.3d at 498 (county “consistently rejected ads that were non-compliant”). On the other hand, “where the record indicates that [the government] has rejected few advertisements” over a sustained period of time, it suggests that the government intended to create a public forum. *United Food & Commercial Workers Union, Local 1099 v. Sw. Ohio Reg’l Transit Auth.*, 163 F.3d 341, 354 (6th Cir. 1998); *see also Hopper v. City of Pasco*, 241 F.3d 1067, 1078 (9th Cir. 2001) (designated public forum created where the city had not previously excluded any submissions, and thus in practice “retained no substantive control over the content of [its] arts program” despite a formal policy limiting controversial art).

Second, the circuits all consider “the nature of the [government] property and its compatibility with expressive activity.” *AFDI v. SMART*, 698 F.3d at 890 (internal quotation marks omitted). When “the property is used primarily as part of a government-run commercial enterprise, and the expressive activities the government permits are only incidental to that use, that fact tends to support finding” that the government did not create a public forum. *Seattle*, 781 F.3d at 497. Conversely, if the property is “de-

signed for and dedicated to expressive activities, courts will more readily infer the intent to create a designated public forum.” *Ibid.* (internal quotation marks and citation omitted). For example, courts will more readily find that the government intended to create a public forum on property that shares many of the characteristics of traditional public forums, such as open spaces on university campuses. *E.g.*, *Bowman v. White*, 444 F.3d 967, 977-79 (8th Cir. 2006); *Hays Cnty. Guardian v. Supple*, 969 F.2d 111, 116-18 (5th Cir. 1992); *see also Widmar v. Vincent*, 454 U.S. 263, 267-68 & n.5 (1981) (holding that a university created a designated public forum for its students)

2. The First Circuit applied this common framework to determine whether MBTA intentionally created a public forum, first in *Ridley* and then in the decision below. The First Circuit noted that MBTA’s guidelines expressly state that MBTA did not intend to create a public forum, but the court did not treat this fact as dispositive. Pet. App. 13. The court considered the nature of the forum, and acknowledged that MBTA’s advertising program shows “there is nothing inherent in the property which precludes its use for *some* expressive activity.” *Ridley*, 390 F.3d at 77. But the First Circuit ultimately concluded that MBTA’s guidelines and record of enforcement demonstrate that MBTA did not intend to create a designated public forum. Pet. App. 14-19; *Ridley*, 390 F.3d at 76-78.

In approaching the case in this manner, the First Circuit reasoned no differently than any other circuit would reason. Thus, even if the First Circuit erred in its application of the relevant legal test—and it

did not, *see infra* Part II.A-B—the fact-bound question of whether a particular transit system intended to create a public forum does not warrant review.

B. Other Circuits’ Decisions Have Turned On The Nature Of A Transit System’s Policies And Practices For Advertising

Contrary to petitioners’ assertion, other circuits have not established a bright-line rule that whenever a transit authority allows a political or otherwise “controversial” ad, it creates a public forum. In all circuits, consistent with this Court’s cases, the question is one of intent. *See, e.g., Cornelius v. NAACP Legal Defense Fund, Inc.*, 473 U.S. 788, 802 (1985). And intent is measured not only by whether some noncommercial speech is allowed, but also by whether the transit authority has enforced guidelines for the forum that are related to its commercial goals.

No circuit has held that a transit authority with policies and practices comparable to MBTA’s created a designated public forum. Indeed, in one recent case where the authority’s guidelines were very similar to MBTA’s—requiring screening for all ads and imposing multiple content restrictions including two “civility clauses”—the court came out the same way as the decision below. *Seattle*, 781 F.3d at 493, 497-98.

1. Petitioners rely on multiple decisions in which the relevant transit authority had no advertising guidelines in place before the litigation. The “laissez-faire polic[ies]” at issue in those cases, *Planned Parenthood*, 767 F.2d at 1232, are not comparable to MBTA’s detailed, longstanding guidelines.

For example, the Seventh Circuit’s decision in *Planned Parenthood* turned on the completely post-hoc nature of the transit authority’s justification for rejecting Planned Parenthood’s ads. The Chicago Transit Authority (“CTA”) refused to run the ads under what CTA claimed was its policy of rejecting “controversial public issue advertisements.” 767 F.2d at 1227 (quotation marks omitted). But following a bench trial, the district court “found that CTA had no such policy,” that CTA had previously accepted similar ads, and that “the purported policy had been contrived for th[e] action.” *Id.* at 1228. Finding no clear errors in these findings, the Seventh Circuit affirmed the district court’s legal conclusion that CTA’s program was a designated public forum. *Id.* at 1229-33. As the court explained, CTA had “virtually guaranteed” access to “anyone willing to pay the fee.” *Id.* at 1232. The court reasoned that decisions like *Lehman* did not control, because in contrast to *Lehman*, the court was “not confronted . . . with a policy of exclusion,” but rather with “no policy at all.” *Id.* at 1233.

The Third Circuit applied the same reasoning in *Christ’s Bride Ministries*, where it held that a transit authority (“SEPTA”) created a designated public forum and thus violated the First Amendment by removing ads on the issue of abortion. 148 F.3d at 249-55. Invoking the Seventh Circuit’s *Planned Parenthood* decision, the Third Circuit relied on the fact that there was “no policy, written or unwritten, pursuant to which [the plaintiff’s] ads were removed.” *Id.* at 253-54. Rather, the record demonstrated that SEPTA had a practice of permitting “virtually unlimited access to the forum,” to “promot[e] ‘awareness’

of social issues and ‘provid[e] a catalyst for change.’” *Id.* at 249, 252.

SEPTA’s policies and practices bear no resemblance to MBTA’s approach. SEPTA did not screen ads and had few specific guidelines concerning ad removal. *Id.* at 250-51. SEPTA’s contract with its licensee only required exclusion of “libelous, slanderous, or obscene advertising,” while capping the percentage of advertising that could be devoted to alcohol or tobacco products. *Id.* at 250. SEPTA did reserve general authority to remove any ad it considered “objectionable,” but SEPTA rarely exercised that authority; prior to rejecting the abortion ad, “at least 99% of all ads [had been] posted without objection by SEPTA.” *Id.* at 251-52. Given these facts, the Third Circuit concluded that SEPTA’s generic reservation of authority to reject ads “*for any reason at all*,” *id.* at 251, could not overcome the indications that SEPTA had created a public forum.

Both the Seventh and Third Circuit decisions are consistent with the decision below. Unlike either CTA or SEPTA, MBTA has adopted and enforced a “policy of exclusion,” *Planned Parenthood*, 767 F.2d at 1233, by setting up a screening process to enforce ground rules for all advertisements—including a rule forbidding demeaning or disparaging ads. This guideline was not created after-the-fact to justify MBTA’s decision to exclude petitioners’ ad; it has been in place and enforced for more than a decade. *See* pp. 5-7, *supra*. There is thus no reason to believe that either the Seventh or Third Circuit would have reached a different conclusion than the First Circuit if confronted with the facts of this case.

2. Petitioners also cite (Pet. 11-12) a Second Circuit and a Sixth Circuit decision. But in those cases, the transit authority policies and practices were substantially more permissive than MBTA's. Moreover, in each case the court concluded that the guideline invoked by the transit authority to reject an ad was not tied to the government's commercial interests. By contrast, there is a clear connection between MBTA's interest in maintaining a welcoming environment for its rider-customers by restricting ads that demean or disparage individuals or groups (regardless of their topic). Neither the Second nor Sixth Circuit decisions suggest that either circuit has adopted a categorical rule that transit authorities create public forums whenever they accept noncommercial ads on potentially controversial issues.³

a. In *N.Y. Magazine*, the Second Circuit held that the Metropolitan Transit Authority ("MTA") likely violated the First Amendment when MTA re-

³ In the dissent below (Pet. App. 39), Judge Stahl referred to the D.C. Circuit's opinion in *Lebron v. Washington Metropolitan Area Transit Authority*, 749 F.2d 893 (D.C. Cir. 1984), though petitioners have not relied on it. In that case, the D.C. Circuit indicated that the Washington, D.C., regional transit authority created a public forum when it opened up its advertising space to political ads. *Id.* at 896. But the transit authority did not "[d]ispute[] . . . that the subway stations constitute public fora," *Lebron v. Wash. Metro. Area Transit Auth.*, 585 F. Supp. 1461, 1465 (D.D.C. 1984), and as a result the D.C. Circuit's reasoning on the non-litigated issue was very limited. The court did not discuss, for example, whether the scope of an authority's advertising guidelines could have made a difference. 749 F.2d at 896. Thus, it is not clear how the D.C. Circuit would apply its precedent to policies and practices like MBTA's that have long conditioned access to the forum on compliance with content-based advertising guidelines.

moved bus ads with a joke about then-Mayor Rudolph Giuliani after receiving complaints from the Mayor's Office. 136 F.3d at 125. To support its take-down decision, MTA invoked a provision in its advertising standards that prohibited ads that violated a state invasion-of-privacy law. *Id.* at 126. MTA's standards imposed few other restrictions and were mostly directed to removing unprotected expression (*e.g.*, libelous or obscene speech). *Id.* at 132 (Cardamone, J., dissenting) (discussing the standards). The standards "impose[d] no restriction on political speech." *Id.* at 126 (majority opinion).

The Second Circuit concluded that MTA created a designated public forum when it decided to permit political and other noncommercial advertising without meaningful restrictions. *Id.* at 130. The court focused on the fact that the "nature" of MTA's limited standards demonstrated that MTA was acting in a "regulatory" rather than a "proprietary" capacity when it excluded the plaintiff's ad. *Ibid.* As the Second Circuit explained, MTA's decision to remove the ad based on an alleged violation of state privacy law was premised on MTA's "general interest in upholding the law," not a "commercial" justification. *Ibid.*⁴ The Second Circuit relied on this feature of MTA's standards to distinguish *Lehman*, where the government had acted in a "proprietary capacity" to restrict speech in order to maximize revenue. *Ibid.*

⁴ The Second Circuit noted that MTA had articulated an interest in avoiding litigation, which "could be characterized as commercial," but the court discounted that interest because MTA's advertising contract required the plaintiff to indemnify MTA. *See N.Y. Magazine*, 136 F.2d at 130 & n.3, 132.

In contrast to MTA (as of 1998), MBTA imposes numerous restrictions on advertising that are not premised on a “general interest in upholding the law,” *ibid.*, but instead can only be understood as efforts to “serve[] the agency’s overriding commercial purpose,” Pet. App. 17-18. Unlike MTA, MBTA places multiple restrictions on political ads, entirely excluding, for example, any “political campaign speech.” Pet. App. 68. Moreover, MBTA sets ground rules for all ads that extend beyond rejecting unlawful speech; MBTA prohibits, *inter alia*, the use of profanity, sexually suggestive speech, depictions of violence, and speech that is demeaning or disparaging. Pet. App. 68. These rules “were crafted to maximize advertising revenue without thereby adversely affecting [MBTA’s] ridership,” which might balk at having to endure rude, coarse, or insulting speech while captive waiting at a subway station or riding on public transit. Pet. App. 13-14; *Ridley*, 390 F.3d at 77-78.

b. The Sixth Circuit’s decision in *United Food* is distinguishable for similar reasons. There, the Sixth Circuit held that the Southwest Ohio Regional Transit Authority’s (“SORTA’s”) decision to reject a labor union’s bus ad as “controversial” likely violated the First Amendment. 163 F.3d at 349. The court reached its decision on alternative grounds, holding that SORTA’s restriction was likely unreasonable under any First Amendment standard, but also concluding that SORTA created a designated public forum. *Ibid.*

Much like the Second Circuit’s *N.Y. Magazine* decision, the Sixth Circuit’s public-forum holding was driven by the disconnect between SORTA’s policies

and practices and its claim that the restriction at issue furthered commercial objectives. SORTA's advertising guidelines allowed public-issue and political ads (including candidate advertisements) but the guidelines reserved to SORTA the discretion to reject ads it considered aesthetically unpleasant or "controversial." *Id.* at 352. The court noted, however, that SORTA "ha[d] rejected few advertisements since the Policy's inception" and, despite the nominal restriction on "controversial" ads, had "never refused an advertisement supporting a political or judicial candidate." *Id.* at 346 n.1, 354. Moreover, the Sixth Circuit concluded that the authority's "stated purpose for limiting advertising on buses"—attracting riders—was "only tenuously related, at best, to the greater forum's intended use" because there was no evidence that speech on "controversial" issues like union organizing would interfere with bus service. *Id.* at 354-55.

Once again, MBTA's policies and practices are materially different. MBTA has not reserved a general right to exclude speech that touches on controversial topics; rather, MBTA has made a reasonable commercial judgment that certain *modes* of expression—regardless of the topic—are incompatible with its goals for the forum. And whereas the Sixth Circuit concluded that allowing a supposedly "controversial" pro-union ad on the side of a bus was unlikely to drive away customers or disturb transit operations, it is far more likely that racial slurs, religious insults, and other demeaning or disparaging language barred by MBTA's guideline would have precisely that effect.

A subsequent decision involving petitioners themselves demonstrates that the Sixth Circuit does not require transit authorities to take an all-or-nothing approach to allowing controversial, non-commercial speech, but instead reviews transit-authority guidelines case-by-case. In *AFDI v. SMART*, AFDI argued that the transit authority created a designated public forum by accepting ads on controversial topics, including an ad that promoted atheism. 698 F.3d at 889. But the Sixth Circuit concluded that the authority’s “tight control over the advertising space and the multiple rules governing advertising content” was “incompatible” with public forum status. *Id.* at 890. In doing so, the Sixth Circuit favorably discussed the First Circuit’s “persuasive” *Ridley* opinion, *id.* at 892—a discussion hardly consistent with petitioners’ theory of a split.

To be sure, the guidelines in *AFDI v. SMART* were more restrictive than MBTA’s guidelines in one respect, because they barred “political” advertising despite allowing ads on other controversial topics like religion. *Id.* at 888. But MBTA’s guidelines show the absence of a designated public forum in ways not true of the guidelines in *United Food* (which expressly authorized candidate advertising, despite their general exclusion of “controversial” ads, and did not prohibit demeaning or disparaging language). 163 F.3d at 346 n.1, 352 & n.5. The fact that these guideline variations could shift the outcome simply confirms the exceptional “amount of weight” public-forum doctrine places “on the particulars of a given case.” *Air Line Pilots Ass’n*, 45 F.3d at 1153.

C. There Is No Split On Whether Restrictions On “Demeaning and Disparaging” Ads Are Viewpoint-Based

Petitioners do not identify any authority holding that the government’s decision to exclude all ads that are “demeaning or disparaging” of groups or individuals from a nonpublic forum is inherently viewpoint-based. Pet. 17-20. Instead, petitioners rely on decisions stating that the government may not deny speakers access to a forum to address a permissible subject because of the speakers’ viewpoint. *Id.* at 17-18. But the First Circuit’s decisions have uniformly recognized and applied this uncontroversial point of law. See Pet. App. 19-20, 24-31; *Ridley*, 390 F.3d at 82; *AIDS Action Comm. of Mass., Inc. v. MBTA*, 42 F.3d 1, 10-12 (1st Cir. 1994). The splitless and fact-driven question of whether the First Circuit correctly applied established law to MBTA’s exclusion decision here does not merit review.⁵

II. The Decision Below Is Correct

The First Circuit’s conclusion that petitioners are not entitled to preliminary injunctive relief is correct. The court’s holding that MBTA did not intend to create a designated public forum is well supported by this Court’s precedent. There is also no basis on this record to conclude that MBTA’s decision to reject two of petitioners’ advertisements—but not a third one

⁵ Petitioners refer to a Ninth Circuit appeal in which a transit system rejected an AFDI advertisement for violating “a similar ‘demeaning and disparaging’ advertising standard” (among other guideline provisions). Pet. 20 n.8. Since the petition was filed, the Ninth Circuit issued its decision and rejected petitioners’ viewpoint-discrimination argument. See *AFDI v. King Cnty.*, 796 F.3d at 1171-72.

expressing the same view on the same topic—was impermissibly viewpoint-based.

A. MBTA Did Not Create A Designated Public Forum By Accepting Public Issue Advertising Subject To Numerous Viewpoint-Neutral Restrictions

The First Circuit correctly held that MBTA has not created a public forum. As set forth above, p. 14, *supra*, the government creates a designated public forum only when it intends to make its property “generally available” to the public or a class of speakers. *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 678 (1998). An allegation of such intent is belied by government restrictions on access through a screening policy and undercut by evidence that allowing unlimited expression would disrupt “use of the property as a commercial enterprise.” *Cornelius*, 473 U.S. at 803-04; *see also Int’l Soc. for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 682 (1992) (airport was not a public forum because its function was a “commercial enterprise[]” that “must provide services attractive to the marketplace”).

In *Lehman*, the Court applied these principles to uphold a transit authority’s decision not to run a political-campaign ad. 418 U.S. at 302. The Court held that the authority’s advertising space was not a public forum because it was “part of [a] commercial venture” and the transit system should have “discretion to develop and make reasonable choices concerning the type of advertising that may be displayed.” *Id.* at 303. The Court further reasoned that the city had, through longstanding policy, “consciously . . . limited access to its transit system advertising space in or-

der to minimize chances of abuse . . . and the risk of imposing upon a captive audience.” *Id.* at 304. The Court held that these were “reasonable legislative objectives,” which the city could pursue without offending the First Amendment. *Ibid.*

So too here. For decades, MBTA has “consciously . . . limited access” to its advertising space, *ibid.*, through guidelines designed to promote the agency’s commercial interest by securing ad revenue without alienating customers, Pet. App. 3, 13-14; *Ridley*, 390 F.3d at 72, 77-78. The current guidelines further this objective by accepting both commercial and non-commercial ads but regulating the mode of expression for all advertisers, thus sparing MBTA riders from confronting vulgar, demeaning, or insulting speech on their daily commute. By making access “selective” in this manner, MBTA has demonstrated that it did not intend to create a designated public forum. *Forbes*, 523 U.S. at 679; *see also Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2250 (2015) (no public forum is created where the government requires permission for speech and “exercises final authority” over content).

The fact that MBTA has run some political and public-issue ads should not change this result. Nowhere in *Lehman* did the Court state or even suggest that the government must “limit itself to . . . anodyne messages” to maintain a non-public forum. Pet. App. 15. To the contrary, even the transit authority in *Lehman* ran *noncommercial* advertising from “churches, and civic and public-service oriented groups.” 418 U.S. at 300. There is no basis in this Court’s precedent to hold that a transit authority automatically creates a public forum once it allows any

ads that are arguably “political” or “controversial.” Such a *per se* rule perversely “would result in less speech, not more,” *Forbes*, 523 U.S. at 680-81, by dissuading transit authorities from running *any* non-commercial ads.

B. MBTA Is Not Required To Accept Ads On Political Issues If The Mode Of Expression Used Violates Its Guidelines

Petitioners argue (Pet. 8, 14-15) that once MBTA accepted advertisements on political issues like the Israeli-Palestinian conflict, it necessarily created a designated public forum for speech on at least that topic and lost the ability to impose any content restriction on speech within the category. Petitioners would require MBTA to accept anti-Semitic slurs equally with criticisms of the Oslo Accords. The First Circuit correctly rejected that argument. Pet. App. 18-19.

The government’s decision not to exclude *all* speech on a particular topic from its property does not commit the government to accepting a free-for-all on that topic—complete with the insulting, lewd, and profane rhetoric that is protected in a traditional public forum. *See Snyder v. Phelps*, 562 U.S. 443, 456 & n.4, 458 (2011); *Nat’l Socialist Party v. Vill. of Skokie*, 432 U.S. 43, 44 (1977); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 209-210 (1975); *Cohen v. California*, 403 U.S. 15, 16 (1971). The government may allow speech on a topic while conditioning access to its property on content requirements that are viewpoint-neutral and reasonably related to the government’s purposes for the forum.

That is precisely what MBTA has done here. Under its guidelines, MBTA may accept an ad critical of law enforcement’s use of force and still refuse to run an ad that says “F*** the Police.” Likewise, MBTA could accept an ad promoting hunting and still reject an animal-rights ad featuring a nude model. And for the same reasons, MBTA could accept ads on the Israel-Palestine conflict—including petitioners’ second ad referring to “savag e acts”—while rejecting the versions of petitioners’ ads that violate MBTA’s policy against using “demeaning or disparaging” language by referring to people as “The Savage.”

C. MBTA’s Application Of Its Guidelines To Deny Two Of Petitioners’ Advertising Submissions Was Viewpoint-Neutral

1. The First Circuit correctly held that MBTA’s “demeaning or disparaging” guideline is not facially viewpoint based. Pet. App. 19-20; *Ridley*, 390 F.3d at 91. The guideline does not target “particular views taken by speakers on a subject,” *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995), but instead sets “a ground rule” for *all* speakers, *Ridley*, 390 F.3d at 91. Under the guideline, “all advertisers on all sides of all questions”—whether supporters of Israel or opponents—“are allowed to positively promote their own perspective and even to criticize other positions so long as they do not use demeaning speech in their attacks.” *Ibid.* Ads rejected under the policy are excluded from the forum because of the *mode* of their expression, not “to suppress the[ir] point of view . . . on an otherwise includible subject.” *Cornelius*, 473 U.S. at 806. Neither side of the debate may refer to the other as “The Savage”; both may complain of “savag e acts.”

Petitioners suggest (Pet. 19-20) that MBTA's guideline nonetheless discriminates against their viewpoint, because the guideline supposedly reduced the effectiveness of their message. But while the government may not "license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules," *R.A.V. v. City of St. Paul*, 505 U.S. 377, 392 (1992), it does not engage in viewpoint discrimination when it binds *both sides* to the same civility standards. Advertisers may believe (rightly or wrongly) that their message would be more effective if they could attack opponents with no holds barred. But in a nonpublic forum, the government is not required to privilege the rhetorical preferences of advertisers over other government interests—including the temporarily captive nature of the audience.

2. The First Circuit also correctly concluded that MBTA's application of the guideline to petitioners' submissions was not viewpoint-based. Pet. App. 25-31. Petitioners rely largely on the fact that MBTA accepted the Committee for Peace's pro-Palestinian ad. But that is not a proper comparison. As the First Circuit explained, MBTA reached its decision based "on the directness of the hostile language used" in the two AFDI ads that described Israel's opponents as "savage[s]." Pet. App. 28-29. The Committee for Peace's ads did not include any comparable "hostile label[s]," and thus did not violate the guideline, regardless of how offensive the ad's viewpoint may have been to supporters of Israel. *Id.* at 29.

The fact that MBTA accepted other pro-Israel ads further rebuts petitioners' viewpoint-discrimination

allegations. Pet. App. 72-73, 82. Shortly after rejecting petitioners' first submission, MBTA accepted an ad from another "pro-Israel' organization" that, like AFDI, "purport[ed] to directly rebut" the Committee for Peace ad. Pet. App. 30 n.5. And most notably, MBTA accepted petitioners' second submission on the same topic, which urged readers to stand with Israel "against those engaged in savage acts." Pet. App. 29, 54. Petitioners criticize MBTA's distinction between using "savage" as an adjective (in their approved ad) rather than as a noun (in their rejected ads). Pet. 19 n.7. But whatever might be said for that linguistic critique, it has nothing to do with viewpoint discrimination.⁶

III. The Petition Is A Poor Vehicle

The interlocutory posture of this case makes the petition a poor vehicle to review the questions presented. The Court generally reviews final judgments rather than interlocutory orders. *See* S. Shapiro et al., *SUPREME COURT PRACTICE* 250 (10th ed. 2013); *see also Mount Soledad Mem'l Ass'n v. Trunk*, 132 S. Ct. 2535, 2536 (2012) (statement of Alito, J., respecting denial of certiorari) (certiorari was properly denied "[b]ecause no final judgment has been rendered"); *Va. Military Inst. v. United States*, 508 U.S. 946 (1993) (opinion of Scalia, J., respecting the denial of certiorari) ("We generally await final judgment in the lower courts before exercising our certiorari jurisdiction."). By doing so, the Court ensures that important legal questions are addressed on an adequate factual record.

⁶ The petition does not challenge the First Circuit's holding that MBTA's application of its guideline was reasonable.

In this case, the Court's ordinary caution against reviewing non-final judgments should be heightened. Both issues raised by the petition are fact-intensive, and the decision below rested on a limited record. Moreover, the case may look very different once MBTA formally revises its guidelines to exclude political and public-issue speech, which will fundamentally change petitioners' claims for prospective relief. Review by the Court would be premature.

A. Forum Analysis And Viewpoint Discrimination Are Fact-Intensive Inquiries That Should Be Determined On A Full Record

1. As discussed above, pp. 14-17, *supra*, this Court's public-forum precedents require "an inherently factual inquiry" into government intent, which courts have recognized "should not be resolved without due attention to an underlying record." *Air Line Pilots Ass'n*, 45 F.3d at 1152; *see also Stewart*, 863 F.2d at 1018 (determining whether the government intended to create a designated public forum "raises inherently factual issues"). Courts base their legal analysis on factual details about, for example, how policies "ha[ve] been implemented in practice," *Seattle*, 781 F.3d at 497, as well as the precise nature of the government property and whether it is compatible with unlimited expression, *see Searcey v. Crim*, 815 F.2d 1389, 1392-93 (11th Cir. 1987) ("Determining what type of public forum exists requires development of the relevant facts that bear upon the character of the property at issue.").

This Court's principal decisions applying the designated-public-forum doctrine have all reviewed final judgments following discovery. *See, e.g. Forbes*, 523

U.S. at 671-72; *Cornelius*, 473 U.S. at 796; *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 41 (1983); *Widmar*, 454 U.S. at 266. Review on a developed record permits the Court to evaluate the First Amendment implications of the government's actual practices, rather than merely to predict the plaintiffs' likelihood of success on issues that are susceptible to factual disputes. Cf. *Planned Parenthood*, 767 F.2d at 1228, 1230 (addressing forum question after a bench trial and relying on the district court's factual findings about the authority's advertising policy).

2. Petitioners' allegation that MBTA discriminated based on viewpoint entails a similarly fact-intensive inquiry. Petitioners rely entirely on how MBTA treated *one* other ad that they consider similar. But if petitioners wish to rely on such circumstantial evidence to challenge the First Circuit's holding that the decision was viewpoint-neutral, they must grapple with MBTA's *full* record of decision-making. Where litigants have succeeded on claims like petitioners', they have done so only after exhaustively documenting the transit authority's practices over time in order to demonstrate the authority's viewpoint-driven inconsistency. See, e.g., *Pittsburgh League of Young Voters Educ. Fund v. Port Auth.*, 653 F.3d 290, 297-99 (3d Cir. 2011) (affirming finding of viewpoint discrimination following a five-day bench trial where the plaintiff presented evidence of numerous comparator ads accepted by a transit authority over several years). A sparse record that just compares one apple to one orange is not enough.

B. The Record In This Case Is Undeveloped

The record in this case is particularly undeveloped, which would limit the Court’s ability to provide meaningful guidance to lower courts on the questions presented.

In petitioners’ first suit, the district court denied the request for a temporary restraining order or preliminary injunction less than two months after petitioners filed their complaint. The record was limited to a handful of declarations and supporting exhibits, and the court’s decision—particularly on the public-forum issue—relied heavily on the First Circuit’s *Ridley* decision (from 2004) concerning MBTA’s advertising program at that time. Pet. App. 73, 75-76. Although the district court cited a declaration stating that MBTA had rejected approximately thirteen ads since 2004, the record is silent on the content of these ads, aside from general references to the grounds for rejection (“at least one” was rejected for violating the “demeaning or disparaging” guideline). *Id.* at 69. Moreover, aside from ads concerning the Israeli-Palestinian conflict from around November 2013, there is no evidence in the record concerning other ads that MBTA has accepted.

Petitioners’ second suit did not develop the record any further. The district court denied the preliminary injunction “without a hearing,” Pet. App. 64, and relied on a non-merits ground—petitioners’ bad faith—as the “main reason for denying preliminary injunctive relief,” *id.* at 36 n.6. The First Circuit did not decide whether the district court abused its discretion by denying the motion for this reason. *Ibid.*; note 1, *supra*. But regardless of whether the district court’s alternative ground for disposing of the injunc-

tion request was sound, it left the record undeveloped in the second case as well.

As a result, the operation of the guidelines at issue has not been fully fleshed out in the record for the Court's review, and those guidelines are in the process of being modified in any event. There is no reason for this Court to take up an interlocutory petition with an undeveloped record.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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