

1 UNITED STATES COURT OF APPEALS

2 FOR THE SECOND CIRCUIT

3 August Term, 2002

4 (Argued: April 7, 2003

Decided: August 4, 2004)

5
6 Docket No. 02-7876

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10 MAKE THE ROAD BY WALKING, INC.,

11 Plaintiff-Appellant,

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14 IRANIA SANCHEZ AND EMILIO VEGA, on behalf of themselves and all
15 others similarly situated,

16 Plaintiffs,

17 - v. -

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21 JASON A. TURNER, as Administrator of the Human Resources
22 Administration of the City of New York,

23 Defendant-Appellee.

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29 B e f o r e: WALKER, Chief Judge, OAKES, and WINTER, Circuit
30 Judges.

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32 Appeal from the grant of summary judgment by the United States
33 District Court for the Southern District of New York (Allen G.
34 Schwartz, Judge). We hold that welfare office waiting rooms are
35 nonpublic fora because New York's Human Resources Administration
36 excludes all but those transacting official business. Plaintiffs'
37 exclusion was reasonable and viewpoint neutral. We therefore
38 affirm.
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1
2 LAURA K. ABEL (David S. Udell, on the
3 brief), Brennan Center for Justice,
4 New York, New York (Constance P.
5 Carden and Laura Davis, New York Legal
6 Assistance Group, New York, New York,
7 Thomas McGanney and David Hille, White
8 & Case LLP, New York, New York, Marc
9 Cohan, Rebecca Scharf, Welfare Law
10 Center, New York, New York, on the
11 brief), for Plaintiff-Appellant.
12

13 ELIZABETH I. FREEDMAN, Assistant
14 Corporation Counsel of the City of New
15 York (Michael A. Cardozo, Corporation
16 Counsel of the City of New York, and
17 Leonard Koerner and Janice Birnbaum,
18 Assistant Corporation Counsel of the
19 City of New York, on the brief),
20 Corporation Counsel's Office, New
21 York, New York, for Defendant-
22 Appellee.
23

24 WINTER, Circuit Judge:

25 Make the Road by Walking ("MRBW") appeals from Judge Schwartz's
26 grant of summary judgment to the Human Resources Administration
27 ("HRA"). The district court held that exclusion of MRBW from
28 welfare office waiting rooms (sometimes "Job Center waiting rooms")
29 when MRBW was not there to transact "official business" did not
30 violate appellant's First Amendment, due process, or equal
31 protection rights. Judge Schwartz also granted summary judgment to
32 MRBW on its claim that a portion of the HRA policy on admission to
33 Job Center waiting rooms was unconstitutionally vague. MRBW appeals
34 from only the district court's First Amendment ruling; HRA does not
35 cross-appeal.

36 The dispositive issue is whether the Job Center waiting rooms

1 are nonpublic fora or limited public fora for First Amendment
2 purposes. We hold that the waiting rooms are nonpublic fora and
3 that the exclusion of MRBW was reasonable and viewpoint neutral. We
4 therefore affirm, albeit on grounds different from those expressed
5 by the district court.

6 BACKGROUND

7 MRBW is an advocacy organization incorporated in 1998 and
8 located in Bushwick, Brooklyn. It seeks to provide "information,
9 assistance, and representation with respect to public assistance
10 benefits" to welfare claimants in Job Centers. Specifically, MRBW
11 advocates inform claimants of their rights, help them complete
12 application and recertification forms, translate for non-English-
13 speaking claimants, and represent individual claimants during
14 meetings with caseworkers. In addition, advocates may "quickly
15 encourage Welfare Center personnel to follow proper procedures so
16 that erroneous decisions are not made" and can "remain on site to
17 address any remaining ambiguities or resistance by the Welfare
18 Center employees." In the long run, according to MRBW, advocates
19 "can observe and identify chronic or systemic problems and request
20 that HRA employees rectify those problems."

21 MRBW is staffed by lawyers and non-lawyers, and its members are
22 community residents who volunteer for four hours or pay dues of two
23 dollars each month. MRBW employs four full time attorneys, one law
24 school graduate, and four staff organizers. One lawyer is assigned

1 to the project responsible for the MRBW programs at issue in this
2 case, the Equal Justice Project ("EJP"). The parties dispute
3 whether the two non-lawyer EJP staff advocates -- out of the three
4 EJP advocates in all -- are trained for their jobs. HRA claims that
5 one of the two non-lawyers has received no training, while the other
6 has attended only a day-long seminar about benefits. MRBW responds
7 that advocates perform only those tasks for which they have been
8 trained, and that this training consists of discussions at meetings,
9 one-on-one conversations, role-playing, and practicing. MRBW has
10 successfully advocated for numerous welfare claimants, mainly by
11 filing complaints with HRA.

12 The Job Center waiting rooms are operated by HRA, the social
13 services district charged with administering and dispensing benefits
14 to residents of New York City. The Family Independence
15 Administration ("FIA") is the largest division of HRA and
16 administers many welfare benefits programs, including public
17 assistance (cash subsidies to recipients), Medicaid, and food
18 stamps. Claimants apply for these benefits or are recertified to
19 receive them at Job Centers, which are operated by FIA, except that
20 claimants who are eligible only for Medicaid are referred to another
21 division of HRA. FIA is solely responsible for operating Job Center
22 waiting rooms.

23 Each Job Center has a waiting room, and each also has separate
24 areas containing "cubicles of eligibility specialists and financial

1 planners" who interview and process forms for claimants. The
2 business serving claimants at Job Centers takes place mainly in
3 these separate areas; the parties agree that the purpose of
4 providing waiting room access to claimants is "to facilitate the
5 Claimants' business with FIA."

6 In debating whether the Job Centers are limited public or
7 nonpublic fora, the parties have looked to HRA policies from the
8 1970s to the present date. During this period, federal and state
9 law have required HRA to allow claimants to select and bring an
10 advocate into Job Centers. 45 C.F.R. § 206.10(a)(1)(iii); 18 N.Y.
11 Comp. Codes R. & Reg. tit. 18, § 351.1(d). While accompanying a
12 claimant to a Job Center, an advocate can inform, assist, and
13 represent that claimant, and can help other claimants who ask for
14 the advocate's assistance. However, retained advocates may not
15 solicit new clients in Job Center waiting rooms. Advocates brought
16 by claimants need not have prior permission or training, or meet any
17 other criteria to gain entry. Id.

18 In 1974, we held that the Albany welfare office could not
19 totally prohibit peaceful leafletting about, and discussion of, the
20 legal rights of welfare recipients and the welfare rights movement
21 in welfare office waiting rooms by advocacy groups. Albany Welfare
22 Rights Org. v. Wyman, 493 F.2d 1319, 1322 (2d Cir.), cert. denied,
23 419 U.S. 838 (1974). We indicated that the waiting rooms were not
24 traditional public fora but that some expression was permissible.

1 Id. at 1324. In light of this decision, from 1974 through
2 approximately 1991, HRA allowed unretained advocates to enter Job
3 Centers and provide information, representation, and assistance to
4 claimants. New York City Unemployed & Welfare Council v. Brezenoff,
5 677 F.2d 232, 235 (2d Cir. 1982) (describing access policy). In
6 1977, HRA promulgated regulations allowing “[o]rganizations desiring
7 to converse with clients and distribute literature” to sit at tables
8 in Job Centers, id.; such “Community Tables” were referred to in the
9 HRA Procedure Manual as late as 1983. After the district court
10 decision in Brezenoff struck down regulations requiring advocates to
11 stay behind tables, HRA also began allowing one advocate from any
12 group present in a Job Center to walk around the waiting room. Id.
13 at 235 n.4.

14 Several advocacy organizations took advantage of this access to
15 Job Centers. During the 1970s, HRA admitted the Food Law Project;
16 in the 1980s, it admitted the New York City Unemployed and Welfare
17 Council; and in the late 1980s and early 1990s, HRA admitted other
18 advocates. Id. at 234; id. at 241 (Murphy, J., concurring in part
19 and dissenting in part).

20 In 1985, the Supreme Court decided Cornelius v. NAACP Legal
21 Defense and Education Fund, 473 U.S. 788 (1985), and in 1992 it
22 decided International Society for Krishna Consciousness, Inc. v. Lee
23 (Lee I), 505 U.S. 672 (1992). These cases built upon the tripartite
24 forum analysis developed in Perry Education Association v. Perry

1 Local Educators' Association, 460 U.S. 37 (1983), and clarified that
2 a designated public forum, including a limited public forum, arises
3 only where the government intends to create one. Lee I, 505 U.S. at
4 680; Cornelius, 473 U.S. at 802. This reliance upon governmental
5 intent substantially differed from the analysis used in Albany
6 Welfare and Brezenoff, and, beginning in the early 1990s, HRA began
7 enforcing a policy first enacted in its Code of Conduct in 1974, and
8 included in each subsequent Code of Conduct, that was at odds with
9 Albany Welfare and Brezenoff. That policy provided that

10 The Use of [HRA] Premises shall be limited to the
11 transaction of official business and such other
12 activities as may be specifically authorized by the
13 HRA/[Department of Social Services]
14 Administrator/Commissioner. . . . Distribution of
15 written material on Agency premises is limited to
16 releases issued or sponsored by [HRA], releases of
17 recognized staff organizations or clubs approved for
18 distribution by [HRA] . . . and releases of certified
19 labor organizations pursuant to collective bargaining
20 agreements.

21
22 HRA Code of Conduct.¹ According to HRA, its official business
23 "is delineated by federal and state law, as well as local law,"
24 and, under this policy, HRA limits "third party access to Centers
25 and their waiting rooms to those individuals who are part of the
26 transaction of HRA's official business." In recent years,
27 retained advocates, contractors providing managed health care and
28 homelessness intervention services, the U.S. Census Bureau, and

¹Four versions of the Code of Conduct have been enacted since 1974, see
HRA Executive Order Nos. 510, 618, 639, 651, but the paragraph about the use
of Job Center premises has been substantively identical in each version.

1 the New York State Department of Health have been admitted under
2 this policy. These entities, except for the homelessness
3 intervention contractors, may deal with claimants in the Job
4 Center waiting rooms. Academics and government officials also
5 occasionally tour the Job Centers by permission. The managed
6 care and homelessness intervention contractors operate in Job
7 Centers pursuant to contracts with HRA requiring compliance with
8 anti-discrimination laws and indemnification of the City for any
9 liability arising from their services, as well as insurance
10 coverage of \$1,000,000 per occurrence. HRA contracts with these
11 providers pursuant to federal and state law. N.Y. Soc. Servs.
12 Law §§ 364-j, 365, 369-ee (managed care); N.Y. Pub. Health Law
13 §§ 2510 et seq., 2520 (managed care for pregnant women and
14 children); N.Y. Soc. Servs. Law §§ 48-50 (homelessness
15 intervention). See also note 2, infra.

16 Members of the general public can enter Welfare Centers
17 freely, in the sense that anyone can walk in from the street to a
18 welfare office waiting room. However, three to four times a day
19 Job Center supervisors "patrol the Center waiting rooms to ensure
20 that everyone is being properly served and that people are not
21 waiting too long." These supervisors also ask those in the
22 waiting rooms for the purpose of their visit, and those who are
23 not there to conduct official business are asked to leave.
24 Claimants may bring friends, relatives, and retained advocates to

1 Job Centers. Unless already retained by a claimant, MRBW's
2 representatives are no longer allowed to enter Job Centers
3 because they lack authorization under the "official business"
4 policy. On August 19, 1998, MRBW, along with the Brennan Center
5 for Justice, the Legal Aid Society, the New York Legal Assistance
6 Group and the Welfare Law Center, requested access to the Job
7 Center waiting rooms to assist, inform, and represent claimants.
8 The City's counsel responded in a letter, stating that "HRA
9 declines to grant the access you seek in your letter, other than
10 for the purpose of providing representation to a specific
11 applicant or recipient, in accordance with 18 N.Y.C.R.R. §
12 351.1(d)."

13 This suit seeking access to Job Center waiting rooms
14 followed. MRBW's complaint claimed that HRA's access policy
15 violated the First and Fourteenth Amendments of the U.S.
16 Constitution because it was vague, constituted viewpoint
17 discrimination, and abridged MRBW's speech, press, petition, and
18 associational rights. MRBW also argued that the policy violated
19 the plaintiff welfare claimants' due process and equal protection
20 rights. Both parties moved for summary judgment.

21 After entertaining cross-motions for summary judgment, the
22 district court granted each party's motion in part. It held that
23 the portion of HRA's access policy allowing entry for "other such
24 activities as may be specifically authorized" by the HRA

1 Administrator, as well as the portion allowing distribution of
2 literature "issued or sponsored" by HRA, to be unconstitutionally
3 vague. Sanchez v. Turner, No. 00 Civ. 1674 (AGS), 2002 U.S.
4 Dist. LEXIS 10911, at *15-16, *23-24 (S.D.N.Y. June 19, 2002).
5 The court severed those clauses and left the remainder of the
6 policy standing. Id. HRA has not appealed from this part of the
7 district court's decision.

8 The court also granted HRA's motion for summary judgment in
9 part, on two First Amendment grounds. First, the court
10 determined that limiting the use of HRA premises to "official
11 business" was not unconstitutionally vague because "HRA's
12 official business is clearly defined by state and local law,"
13 specifically the New York Social Services Law, the New York City
14 Charter, and state regulations. Id. at *17. Furthermore,
15 according to the court, HRA's inclusion of contractors --
16 Medicaid providers and homelessness intervention services -- as
17 well as advocates previously retained by claimants, the New York
18 State Department of Health, the U.S. Census Bureau, and academic
19 tours, did not demonstrate that HRA had unfettered discretion in
20 determining what constituted official business. Id. at *18-21.
21 Rather, each of these entities conducted official business
22 pursuant to the New York City Charter or the City regulations.²

² The City Charter allows heads of mayoral agencies such as HRA to contract with private parties to perform official duties, such as Medicaid provision and homelessness intervention services. N.Y.C. Charter § 389(c) ("Heads of mayoral agencies may . . . enter into contracts . . . to fulfill

1 The district court pointed out that "New York's Social
2 Services Law establishes New York City as a 'social services
3 district' and requires that each social services district 'shall
4 be responsible for the assistance and care of any person who
5 resides or is found in its territory and who is in need of public
6 assistance and care which he is unable to provide for himself.'
7 NY Soc. Serv. § 62(1); see also NY Soc. Serv. § 56. Under the
8 New York City Charter, HRA (referred to in the Charter as the
9 Department of Social Services) is the mayoral agency charged with
10 upholding the City's responsibilities under the social services
11 law. See NYC Charter §§ 601-604." Sanchez v. Turner 2002 U.S.
12 Dist. LEXIS 10911, at *17.

13 Second, the court held that the Job Center waiting rooms
14 were "public fora for the purposes of speech pertaining to
15 welfare issues" and that in 'limited public fora' restrictions on
16 speech need only be "reasonable and viewpoint neutral." Id. at

the duties assigned to them."). City regulations require HRA to grant access to Job Center appointments to retained advocates. 18 N.Y. Cong. Codes R. & Regs. tit. 18, § 351.1(d) ("An applicant or recipient shall be permitted to appear with an attorney or other representative at any interview or conference with a representative of a social services district."). The City Charter requires mayoral agencies to coordinate their activities with other government agencies, such as the Health Department or Census Bureau. See N.Y.C. Charter § 386(c) ("To the maximum extent feasible, heads of mayoral agencies shall coordinate the activities of their agencies with those of other city, state, and federal agencies and other organizations and institutions on matters within their jurisdiction by such means as the mayor may require and, when not inconsistent with mayoral directives, by such means as the agency head may deem appropriate.") Finally, tour groups escorted by HRA officials pass through waiting rooms, do not speak with claimants, do not engage in expressive activity, and remain for insubstantial periods of time. Sanchez, 2002 U.S. Dist. LEXIS 10911, at *18-20.

1 *26-27. According to the court, HRA policies satisfied this
2 requirement and were therefore constitutional. The court
3 reasoned that HRA's "interest is legitimate and its method for
4 achieving that interest is reasonable" and that "it is not the
5 Court's role to second guess the City and determine whether HRA's
6 policy represents the least restrictive means for achieving HRA's
7 interest." Id. at *32. Specifically, the court held that the
8 policy was a reasonable way to accomplish HRA's interest in
9 limiting congestion and disruption in Job Centers and in
10 preventing confusion on the part of claimants who might believe
11 that HRA endorsed statements made by non-official groups. Id. at
12 *28-32. According to the court, HRA's policy was viewpoint
13 neutral because it was not "an effort to suppress the speaker's
14 activity due to disagreement with the speaker's point of view."
15 Id. at *33 (internal citation and quotation omitted).³ MRBW's
16 appeal followed.

17 DISCUSSION

18 We review a district court's grant of summary judgment de
19 novo, "drawing all factual inferences and resolving all
20 ambiguities in favor of the nonmoving party." Tri-State
21 Employment Servs., Inc. v. Mountbatten Sur. Co., Inc., 295 F.3d
22 256, 260 (2d Cir. 2002). When considering cross-motions for

³ The court also held that HRA's policy did not violate the due process or equal protection rights of plaintiff-claimants. However, because no plaintiff-claimants remain in this case, we need not address this holding.

1 summary judgment, a court “‘must evaluate each party’s motion on
2 its own merits, taking care in each instance to draw all
3 reasonable inferences against the party whose motion is under
4 consideration.’” Hotel Employees & Rest. Employees Union Local
5 100 of N.Y. v. City of N.Y. Dep’t of Parks & Recreation (“HERE”),
6 311 F.3d 534, 543 (2d Cir. 2002) (citing Heublein, Inc. v. United
7 States, 996 F.2d 1455, 1461 (2d Cir. 1993)). Summary judgment is
8 appropriate if “there is no genuine issue as to any material fact
9 and . . . the moving party is entitled to judgment as a matter of
10 law.” Fed. R. Civ. P. 56(c).

11 HRA does not contest the fact that MRBW wants to engage in
12 speech protected by the First Amendment. However,
13 notwithstanding that “[f]reedom of expression . . . is a
14 fundamental right, essential to our democratic society and
15 accorded great weight by our courts,” Brezenoff, 677 F.2d at 236
16 (citing De Jonge v. Oregon, 299 U.S. 353, 365 (1937); NAACP v.
17 Button, 371 U.S. 415, 431 (1963)), “[n]othing in the Constitution
18 requires the Government freely to grant access to all who wish to
19 exercise their right to free speech on every type of Government
20 property without regard to the nature of the property or to the
21 disruption that might be caused by the speaker’s activities,”
22 Cornelius, 473 U.S. at 799-800. Restrictions on expression on
23 government property are generally subject to heightened scrutiny.
24 Perry, 460 U.S. at 45.

1 a) Forum Analysis

2 The appropriate level of judicial scrutiny depends on the
3 nature of the forum subject to the regulation. The Supreme Court
4 has recognized three types of fora across a spectrum of
5 constitutional protection for expressive activity. "Traditional
6 public fora" are places such as "streets and parks which 'have
7 immemorially been held in trust for the use of the public and,
8 time out of mind, have been used for purposes of assembly,
9 communicating thoughts between citizens, and discussing public
10 questions.'" Perry, 460 U.S. at 45 (quoting Hague v. CIO, 307
11 U.S. 496, 515 (1939)). Speech finds its greatest protection in
12 traditional public fora, and government may not alter their
13 public status without completely changing the fora's use, e.g.
14 converting a public park to an office building. In public fora,
15 content-neutral time, place, and manner regulations of speech
16 must be narrowly tailored to serve a significant government
17 interest and leave open ample alternative channels of
18 communication. Id.; see also Travis v. Owego-Apalachin Sch.
19 Dist., 927 F.2d 688, 692 (2d Cir. 1991). Content-based
20 restrictions will be upheld only if they are "necessary to serve
21 a compelling state interest and . . . narrowly drawn to achieve
22 that end." Perry, 460 U.S. at 45 (citing Carey v. Brown, 447
23 U.S. 455, 461 (1980)).

24 Next on the spectrum is the "designated public forum," "a

1 place not traditionally open to assembly and debate," Cornelius,
2 473 U.S. at 802, "which the State has opened for use by the
3 public as a place for expressive activity," Perry, 460 U.S. at
4 45. "'The government does not create a [designated] public forum
5 by inaction or by permitting limited discourse, but only by
6 intentionally opening a nontraditional public forum for public
7 discourse.'" Ark. Educ. Television Comm'n v. Forbes, 523 U.S.
8 666, 677 (1998) (quoting Cornelius, 473 U.S. at 802)
9 (modification in Ark. Educ. Television Comm'n). Furthermore, the
10 government may decide to close a designated public forum. Perry,
11 460 U.S. at 46 (stating that government "is not required to
12 indefinitely retain the open character of" a designated public
13 forum). However, so long as a forum remains public, government
14 regulation of speech within it "is subject to the same
15 limitations as that governing a traditional public forum," Lee I,
16 505 U.S. at 678.

17 The limited public forum is a subset of the designated
18 public forum. It arises "'where the government opens a
19 non-public forum but limits the expressive activity to certain
20 kinds of speakers or to the discussion of certain subjects.'" HERE,
21 311 F.3d at 545 (quoting N.Y. Magazine v. Metro. Transp.
22 Auth., 136 F.3d 123, 128 n.2 (2d Cir.), cert. denied, 525 U.S.
23 824 (1998)). Restrictions on speech not within the type of
24 expression allowed in a limited public forum must only be

1 reasonable and viewpoint neutral. See, e.g., Fighting Finest v.
2 Bratton, No. 95-9042, 1996 U.S. App. LEXIS 28748, at *13-*14 (2d
3 Cir. Sept. 9, 1996) (corrected opinion).⁴

4 Finally, "nonpublic forum" is public property not
5 traditionally open to public expression or intentionally
6 designated by the government as a place for such expression.
7 General Media Communs. v. Cohen, No. 97-6029, 1997 U.S. App.
8 LEXIS 40571, *15 (2d Cir. Nov. 21, 1997) (corrected opinion)
9 ("all remaining public property" that is not traditional or
10 designated public forum is nonpublic forum). Restrictions on
11 speech in a nonpublic forum need only be reasonable and viewpoint
12 neutral. Lee I, 505 U.S. at 679. "[T]he State may reserve [a
13 nonpublic forum] for its intended purposes, communicative or
14 otherwise, as long as the regulation on speech is reasonable and
15 not an effort to suppress expression merely because public
16 officials oppose the speaker's view." Perry, 460 U.S. at 46.

17 b) The Distinction Between Limited Public and Nonpublic Fora

18 Governmental intent is the "touchstone of forum analysis,"

⁴ The parties dispute the level of scrutiny applicable to restrictions on speech that falls within the genre of speech allowed in a limited public forum. Compare General Media Communs. v. Cohen, No. 97-6092, 1997 U.S. App. LEXIS 40571, *14 n.6 (2d Cir. 1997) ("In designated public forums whose use is limited to particular purposes or speakers, restrictions on speech within those limits need only be reasonable and viewpoint neutral.") with Hotel Employees & Rest. Employees Union, Local 100 v. City of N.Y. Dept. of Parks and Recreation ("HERE"), 311 F.3d 534, 545 (2d Cir. 2002) ("In limited public fora, strict scrutiny is accorded only to restrictions on speech that falls within the designated category for which the forum has been opened."). Our holding obviates the need to resolve this dispute.

1 General Media, 1997 U.S. App. LEXIS 40571, at *15 (internal
2 quotations omitted), for determining whether property is a
3 limited public or nonpublic forum. Courts have "looked to the
4 policy and practice of the government to ascertain whether it
5 intended to designate a place not traditionally open to assembly
6 and debate as a public forum," Cornelius, 473 U.S. at 802, as
7 well as to the "nature of the property, and its compatibility
8 with expressive activity," General Media, 1997 U.S. App. LEXIS
9 40571, at *18. See also Perry v. McDonald, 280 F.3d 159, 167 (2d
10 Cir. 2001) (stating forum analysis factors). If these indicia
11 show that intent to create a public forum is absent, the forum is
12 generally nonpublic.⁵ Of course, the fact that "members of the
13 public are permitted freely to visit" a forum -- such as the
14 airport terminals held nonpublic in Lee I -- does not abrogate
15 its nonpublic status if the visitors are not permitted to express
16 themselves freely in that forum. Lee I, 505 U.S. at 680 (quoting
17 Greer v. Spock, 424 U.S. 828, 836 (1976)).

18 Also, a policy allowing some speakers to use a forum does
19 not necessarily convert a nonpublic forum into a limited public
20 forum. A public forum "is not created when the government allows

⁵ MRBW incorrectly asserts that the "key question" in forum analysis "is whether the government's use of the property is compatible with various kinds of expressive activity," Appellant's Br. at 21 (internal quotation omitted). Compatibility with expressive activity is one relevant issue, usually emphasized when incompatibility with expressive activity is relied upon to hold that a forum is nonpublic. See Lee I, 505 U.S. at 681. However, compatibility with expressive activity is not sufficient to make a forum public. Rather, governmental intent is the "key question" in forum analysis.

1 selective access for individual speakers rather than general
2 access for a class of speakers." Ark. Educ. Television Comm'n,
3 523 U.S. at 679. See also Fighting Finest, 1996 U.S. App. LEXIS
4 28748, at *15 (some access to forum does not render it public).

5 There is a

6 distinction between "general access," which indicates
7 the property is a designated public forum, and
8 "selective access," which indicates the property is a
9 nonpublic forum. On one hand, the government creates a
10 designated public forum when it makes its property
11 generally available to a certain class of speakers . .
12 . . On the other hand, the government does not create
13 a designated public forum when it does no more than
14 reserve eligibility for access to the forum to a
15 particular class of speakers, whose members must then,
16 as individuals, "obtain permission," to use it. For
17 instance, the Federal Government did not create a
18 designated public forum in Cornelius when it reserved
19 eligibility for participation in [a fundraising drive
20 aimed at federal employees] to charitable agencies, and
21 then made individual, non-ministerial judgments as to
22 which of the eligible agencies would participate.

23 The Cornelius distinction between general and
24 selective access furthers First Amendment interests.
25 By recognizing the distinction, we encourage the
26 government to open its property to some expressive
27 activity in cases where, if faced with an
28 all-or-nothing choice, it might not open the property
29 at all. That this distinction turns on governmental
30 intent does not render it unprotective of speech.
31 Rather, it reflects the reality that, with the
32 exception of traditional public fora, the government
33 retains the choice of whether to designate its property
34 as a forum for specified classes of speakers.

35
36 Ark. Educ. Television Comm'n, 523 U.S. at 679-80 (internal
37 citations omitted). Whether the access policy is selective or
38 general is determined by reference to written policies and actual
39 practice. See Lebron v. Nat'l R.R. Passenger Corp. (AMTRAK), 69

1 F.3d 650, 656 (2d Cir. 1995) (noting that "a court must examine
2 the actual policy -- as gleaned from the consistent practice with
3 regard to various speakers -- to determine whether a state
4 intended to create a designated public forum") (internal
5 quotation omitted).

6 The distinction between selective and general access
7 policies applies with equal force when the limited public forum
8 is open only to the discussion of certain topics rather than to
9 certain speakers. On the one hand, when a forum is generally
10 available for the discussion of certain topics, it is a limited
11 public forum. On the other hand, when the government "reserves
12 eligibility for access" to particular topical discussions, but
13 those who wish to gain entrance must individually seek permission
14 to use the forum, it is nonpublic. For example, in determining
15 that a military base was a nonpublic forum, the Supreme Court
16 noted that

17 [t]he fact that other civilian speakers and
18 entertainers had sometimes been invited to appear at
19 Fort Dix did not of itself serve to convert Fort Dix
20 into a public forum The decision of the
21 military authorities that a civilian lecture on drug
22 abuse, a religious service by a visiting preacher at
23 the base chapel, or a rock musical concert would be
24 supportive of the military mission of Fort Dix surely
25 did not leave the authorities powerless thereafter to
26 prevent any civilian from entering Fort Dix to speak on
27 any subject whatever.

28
29 Greer, 424 U.S. at 838 n.10. Eligibility for entrance to express
30 oneself in Fort Dix was therefore validly limited to those

1 discussing topics that furthered the "military mission" of the
2 base, and then to only those potential speakers who were allowed
3 access on an individual basis.

4 As indicia of governmental intent, the purposes of access
5 limits can also be important in determining a forum's status.
6 Where the government's goal in granting selective access to a
7 forum is to further its own internal objectives, a forum is more
8 likely to be nonpublic.⁶

9 Finally, the physical characteristics of a forum can help
10 determine whether it is public or nonpublic. Courts will not
11 "infer that the government intended to create a public forum when
12 the nature of the property is inconsistent with expressive
13 activity." Cornelius, 473 U.S. at 803. The location of a forum
14 may be evidence of its status; "separation from acknowledged
15 public areas may serve to indicate that the separated property is
16 a special enclave, subject to greater restriction." Lee I, 505

⁶ In Cornelius, for example, the government allowed the fundraising drive to access the federal workplace for the purpose of minimizing disruption "by lessening the amount of expressive activity occurring on federal property." 473 U.S. at 805. Its anti-expressive purpose indicated that the fundraising drive was a nonpublic forum. As we have noted, the public school mail facilities in Perry were nonpublic because their "'normal and intended function . . . is to facilitate internal communication of school-related matters to the teachers.'" N.Y. Magazine, 136 F.3d at 129 (citing Perry, 460 U.S. at 47). In Fighting Finest, the purpose of granting some access to police precinct bulletin boards was to "promote [the police department's] own internal objectives." 1996 U.S. App. LEXIS 28748, at *17. Reasoning in part from this purpose, we held that the bulletin boards were nonpublic forums. Id. at *18. Finally, in Perry v. McDonald, we held that vanity plates were nonpublic forums because their purpose was to raise state revenue and "[n]othing about the revenue-raising aim of the vanity-plate regime suggests that Vermont intended to create a forum for unlimited public expression." 280 F.3d at 167 (internal quotation omitted).

1 U.S. at 680 (citing United States v. Grace, 461 U.S. 171, 179-80
2 (1983)).

3 c) Application

4 Applying the forum analysis outlined above, the Job Center
5 waiting rooms must be categorized as nonpublic forums. HRA
6 unequivocally evidenced its intent to render them nonpublic by
7 enforcing a written policy reserving them for "official business"
8 or for activities "specifically authorized" by the Administrator.
9 Neither the "official business" nor the "specifically authorized"
10 language evidences an intent to open the Job Centers to the
11 public. Nor is there evidence that the "specifically authorized"
12 clause has ever been used to allow anyone without official
13 business to enter the Job Centers or their waiting rooms for
14 expressive purposes,⁷ and that clause has now been excised by the
15 district court's order, an act from which HRA has not appealed.⁸

16 Like waiting rooms in airport terminals, medical clinics or
17 doctor's offices, or motor vehicle departments, welfare office
18 waiting rooms generate casual conversations. Such conversations
19 may involve family matters, the weather, sports, politics, or

⁷ Although the "specifically authorized" clause was held by the district court to be unconstitutionally vague, its use by HRA evidences the agency's intent in consistently declining to open the waiting rooms to expression. See Lebron, 69 F.3d at 656.

⁸ To the extent that academic tours are not official business, a debatable issue, the tour groups are not allowed to engage in expressive activity in the waiting rooms. They are in the waiting rooms for five minutes at most, and speak with no one.

1 many other subjects, including welfare policies or particular
2 welfare applications. While this expressive activity may take
3 place, it is entirely incidental to the purpose of the welfare
4 office waiting rooms, namely to ensure an orderly flow of
5 claimants to the interviewers.

6 Welfare advocacy organizations had access to welfare office
7 waiting rooms between 1974 and approximately 1991. However, this
8 prior access does not undermine our conclusion because it was
9 compelled by our decisions in Albany Welfare and Brezenoff and
10 was not a policy freely chosen by HRA. Those cases essentially
11 held that the waiting rooms were limited public fora open to
12 discussion of welfare issues by virtue of the fact that welfare
13 recipients waited in them. No consideration was given to
14 government intent. As discussed above, the Supreme Court has
15 since then held in Cornelius and Lee I that governmental intent
16 and access policy, as well as the purpose of a forum, are the
17 touchstones for differentiating between designated public fora
18 and nonpublic fora. In the aftermath of those decisions, HRA
19 began to enforce its Code of Conduct disallowing all but
20 "official business" and thereby demonstrated a clear intent to
21 convert the waiting rooms from limited public fora into nonpublic
22 fora. Moreover, even if the 1974 to 1991 policy had been freely
23 chosen by HRA, government may, without offending the First
24 Amendment, reverse policies regarding access to government

1 property. See Perry, 460 U.S. at 46 (government "is not required
2 to indefinitely retain the open character of" a limited public
3 forum).⁹

4 It is true of course that if anyone able to perform services
5 relevant to HRA's "official business" were free to enter HRA Job
6 Center waiting rooms, the Centers might lose their nonpublic
7 status. As noted above, where a forum is "generally available"
8 to certain speakers or for the discussion of certain issues, it
9 is a designated public forum. Ark. Educ. Television Comm'n, 523
10 U.S. at 679. Therefore, if the Job Center waiting rooms were
11 generally open to all those capable of transacting official
12 business -- e.g. all managed care providers, whether or not under
13 contract with HRA -- the Centers would likely be limited public
14 fora. However, the language of the Executive Order, as modified
15 by the district court, states that "[u]se of [HRA] Premises shall
16 be limited to the transaction of official business," HRA
17 Executive Order 651, and HRA makes admission determinations on an
18 individualized basis. For example, managed care providers cannot
19 walk in off the street to offer medical services in Job Center
20 waiting rooms, although providing such services is technically a
21 part of HRA's business. Rather, HRA investigates the providers,

⁹ Furthermore, the physical characteristics of the waiting rooms are also not particularly compatible with free expression. The waiting rooms are limited in size, occupied by people who have to be there to obtain benefits, set off from the public streets and sidewalks, and are open only during the Centers' business hours.

1 determines whether they are suitable and have insurance, and, if
2 so, enters into service contracts with them before admitting them
3 to Job Centers. A similar process is followed with regard to
4 homelessness intervention service providers, the Census Bureau,
5 and the Health Department.

6 Claimants and their statutorily permitted retained advocates
7 are freely admitted because they too are there on official
8 business. Neither claimants nor their retained advocates engage
9 in expressive activity in the Job Center waiting rooms except for
10 random, incidental discussions that are part of the kind of
11 casual conversations that occur in waiting rooms generally.
12 Rather, the purpose of admitting claimants and their retained
13 advocates to the waiting rooms is to ensure an orderly flow of
14 claimants to interviewers. Indeed, retained advocates may not
15 solicit other clients in the waiting rooms, and supervisors
16 periodically survey those in the waiting rooms to ensure that
17 everyone is a claimant, someone legitimately accompanying a
18 claimant, or otherwise on official business.

19 d) Reasonableness and Viewpoint Neutrality

20 Having determined that the Job Center waiting rooms are
21 nonpublic fora, we must now address whether exclusion of advocacy
22 groups in general and MRBW in particular is reasonable and
23 viewpoint neutral, as required for upholding restrictions on
24 expression in nonpublic fora. Cornelius, 473 U.S. at 811. We

1 conclude that it is.

2 1. Reasonableness

3 Restrictions on speech in nonpublic fora must "be reasonable
4 in light of the purpose of the forum . . . and reflect a
5 legitimate government concern." Perry v. McDonald, 280 F.3d at
6 169 (internal citation omitted) (alteration in original). See
7 also Cornelius, 473 U.S. at 809 (reasonableness of restriction
8 "must be assessed in light of the purpose of the forum and all
9 the surrounding circumstances"). A restriction will be
10 reasonable if "it is wholly consistent with the [government's]
11 legitimate interest in preserving the property . . . for the use
12 to which it is lawfully dedicated." Perry, 460 U.S. at 50-51
13 (internal citations and quotations omitted). However, such a
14 restriction "need not be the most reasonable or the only
15 reasonable limitation." Lee I, 505 U.S. at 683 (internal
16 quotations omitted).

17 With regard to property used to carry out specific
18 governmental functions, government may reasonably reserve
19 expression on that property exclusively for those conducting
20 official business. "[W]hen government property is not dedicated
21 to open communication the government may -- without further
22 justification -- restrict use to those who participate in the
23 forum's official business." Perry, 460 U.S. at 53. What
24 expression takes place in Job Center waiting rooms is in the

1 nature of casual conversation or in the course of official
2 business. To reiterate, claimants and their advocates, who are
3 present on official business, do not engage in expressive
4 activity other than incidental casual conversations in waiting
5 rooms. Authorized managed care organizations and the Health
6 Department provide information to claimants, the Census Bureau
7 takes surveys, and homelessness intervention contractors speak
8 with claimants.

9 Of course, the definition of official business used must
10 also be reasonable. See id. at 53 n.13. In that regard, HRA
11 reasonably determined that unlimited access for MRBW's
12 representatives would not be for the purpose of transacting
13 official business. HRA is required to provide, and provides, the
14 services MRBW purports to offer -- translation and help filling
15 out forms, for example -- and HRA has not contracted with MRBW to
16 provide those services.

17 It was also reasonable for HRA to exclude MRBW and other
18 advocacy organizations, independent of the official business
19 policy. The government can reasonably exclude expression that
20 undermines the purpose served by a nonpublic forum. The most
21 common reason for such an exclusion is that the excluded
22 expression is distracting or disruptive. Lee I, 505 U.S. at 683
23 (exclusion based on "disruptive effect" reasonable). See also
24 United States v. Kokinda, 497 U.S. 720, 732-34 (1990) (plurality

1 opinion) (same). Disruption can detract from a nonpublic forum's
2 use for its intended purpose. For example, solicitation of money
3 is disruptive in an airport terminal because it detracts from the
4 purpose of allowing passengers to move as efficiently as
5 possible. Such solicitation ``requires action by those who would
6 respond: The individual solicited must decide whether or not to
7 contribute (which itself might involve reading the solicitor's
8 literature or hearing his pitch), and then, having decided to do
9 so, reach for a wallet, search it for money, write a check, or
10 produce a credit card.''' Lee I, 505 U.S. at 683 (quoting
11 Kokinda, 497 U.S. at 734).

12 Avoiding other negative effects of expression can also
13 justify limits on speech in nonpublic fora. For example, in
14 Cornelius, the Court noted that it was harder to convince people
15 to donate to a fundraising drive when advocacy groups were
16 included because there was less universal agreement that such
17 groups were worthwhile charities; because raising funds was a
18 primary purpose of the drive, excluding controversial advocacy
19 groups was reasonable. 473 U.S. at 810-11. In Lee I, where a
20 purpose of the airport terminals was to transport passengers
21 safely and efficiently to their flights or ground transportation,
22 it was reasonable to exclude solicitors because "unsavory"
23 solicitors may take advantage of "the most vulnerable." 505 U.S.
24 at 684.

1 Also, where allowing private expression in a nonpublic forum
2 may imply government endorsement of that expression, limiting or
3 excluding speakers may be reasonable. Cornelius, 473 U.S. at 809
4 (“avoiding the appearance of political favoritism is a valid
5 justification for limiting speech in a nonpublic forum”);
6 Kokinda, 497 U.S. at 726.

7 The reasonableness of prohibiting expression by a certain
8 speaker cannot be determined by reference only to the effect
9 caused by that speaker alone. Lee I, 505 U.S. at 685. Whether a
10 restriction is reasonable must be determined with reference to
11 the disruption or distraction that would result if all groups
12 like the group at issue sought access. Where restrictions on
13 expression are aimed at crowd control, for example,
14 “[o]bviously, there would be a much larger threat to the State’s
15 interest in crowd control if all other religious, nonreligious,
16 and noncommercial organizations could likewise move freely.”
17 Lee I, 505 U.S. at 685 (quoting Heffron v. Int’l Soc. for Krishna
18 Consciousness, Inc., 452 U.S. 640, 653 (1987)).

19 Finally, although the government may restrict expression in
20 a nonpublic forum without ensuring the presence of adequate
21 alternative outlets, the existence of such outlets may be
22 considered in determining whether particular restrictions are
23 reasonable. Perry, 460 U.S. at 53 (“the reasonableness of
24 limitations on PLEA’s access to the school mail system is also

1 supported by the substantial alternative channels that remain
2 open for union-teacher communication"). In Lee I, the Port
3 Authority prohibited solicitation within airport terminals, but
4 allowed solicitation on the sidewalks outside the terminals. 505
5 U.S. at 675-76. The fact that the outdoor sidewalk access might
6 not be as desirable in all seasons as indoor terminal access did
7 not render the Lee I rule any less reasonable.

8 Applying these standards, the exclusion of MRBW and other
9 advocacy organizations was clearly reasonable, independent of the
10 official business policy. This exclusion ensured the success of
11 HRA's legitimate goals by limiting disruption in general, and
12 especially disruption resulting from the perceived endorsement by
13 HRA of MRBW's advice. It "rings of common sense," Kokinda, 497
14 U.S. at 734 (internal quotation omitted), to believe that if
15 untrained or minimally trained advocates advise claimants on the
16 spot and without prior knowledge of their cases, misinformation
17 with a disruptive effect may be disseminated. Moreover, prior
18 experience can provide grounds for restrictions on speech. Id.
19 at 735 (access limits imposed where "because of a continual
20 demand from a wide range of groups for permission to conduct
21 fundraising or vending on postal premises, postal facility
22 managers were distracted from their primary jobs by the need to
23 expend considerable time and energy fielding competing demands
24 for space and administering a program of permits and approvals").

1 HRA representatives testified from their own experience that
2 welfare advocacy organizations disrupted HRA activities when
3 operating community tables in the waiting rooms from 1974 through
4 1983 by incorrectly telling clients that they were entitled to
5 certain benefits. Disappointed claimants threw papers off desks,
6 overturned tables, and started fights. In at least one instance,
7 a claimant who had been told he would receive an emergency check
8 became angry and threatening when the check was not forthcoming.

9 Claimants themselves may also be disturbed by the presence
10 of advocacy organizations. Like those being solicited for money
11 in Lee I, claimants might feel pressured to talk to advocates,
12 read their literature, or join their organization. MRBW, for
13 example, tells claimants about its organization, gives them a
14 flier, and invites them to join. Even if advocates do not
15 solicit donations in welfare waiting rooms, welfare claimants
16 would have less of an ability to escape unwanted advances than
17 those being solicited in Lee I, who could simply walk away.
18 Welfare claimants are a captive audience in the Job Center
19 waiting rooms. HRA might therefore reasonably conclude that
20 claimants prefer not to be bothered or approached in the waiting
21 rooms or that vulnerable claimants might be taken advantage of by
22 unscrupulous organizations that posed as legitimate advocacy
23 groups.

24 Providing access to waiting rooms to advocates or others

1 without official business would also lead to increased HRA
2 processing and supervision costs. For example, if MRBW had
3 access, all similarly situated (in a broad sense) groups would be
4 entitled to equal access as well. Determining which
5 organizations were similar to MRBW might require significant
6 investigative efforts. Furthermore, Job Center waiting rooms do
7 not have unlimited space. The number of advocates allowed in at
8 any one time might have to be limited, and HRA employees might be
9 forced to spend time scheduling those seeking access. HRA might
10 then be accused of favoritism or suppression of speech based on
11 these choices. Finally, HRA would have to expend more resources
12 policing its waiting rooms to ensure that organizations were
13 complying with scheduled access times, unapproved organizations
14 were not operating in the waiting rooms, and approved
15 organizations were not engaging in unapproved activities.¹⁰

16 Moreover, advocacy organizations can obtain access to
17 welfare claimants in other venues. Specifically, like the
18 solicitors in Lee I, advocates can speak to claimants on the

¹⁰ MRBW has argued that excluding unretained advocates because of the disruption they cause is unreasonable, because retained advocates can enter. We disagree for several reasons. Most importantly, retained advocates are admitted to waiting rooms to wait with their clients for interviews, not to engage in expressive activity (other than incidental, casual conversation). They are not allowed to solicit other clients. It is reasonable for HRA to conclude that unretained advocates soliciting clients are potentially more disruptive than retained advocates who cannot solicit clients. Furthermore, retained advocates serve one claimant at a time and have dealt with that claimant prior to arrival at a Job Center. All things being equal, retained advocates are likely to understand their clients' cases more fully, to be more prepared, and to be less likely to provide incorrect information and advice.

1 public sidewalks outside the Job Centers. We also note that MRBW
2 operates an office in the community where claimants can seek
3 assistance.

4 Finally, as discussed above, restrictions "need not be the
5 most reasonable or the only reasonable" limitations conceivable
6 to pass constitutional muster. Lee I, 505 U.S. at 683 (internal
7 quotations omitted). For example, one may well believe that it
8 would be more reasonable to allow access to all organizations
9 that provide "direct benefits" to welfare claimants, rather than
10 only to those that have "official business" in the Job Centers.
11 However, any greater reasonableness of that "direct benefits"
12 policy compared to the "official business" policy considered here
13 is irrelevant as long as the latter policy meets the minimum
14 standard for reasonableness, which we conclude it does.

15 2. Viewpoint Neutrality

16 Even if a restriction on speech in a nonpublic forum is
17 reasonable, it will be struck down if it "is in reality a facade
18 for viewpoint-based discrimination." Cornelius, 473 U.S. at 811.
19 Viewpoint discrimination is a "subset or particular instance of
20 the more general phenomenon of content discrimination,"
21 Rosenberger v. Rector and Visitors of Univ. of Va, 515 U.S. 819,
22 831 (1995), in which "the government targets not subject matter
23 but particular views taken by speakers on a subject," id. at 829.
24 Because of this overlap, the distinction between content

1 discrimination -- permissible in a nonpublic forum -- and
2 viewpoint discrimination -- impermissible -- is somewhat
3 imprecise. Id. at 831.

4 One thing is clear, however. It is permissible for
5 government itself to use its property to express its own
6 viewpoint on a subject without allowing others to express
7 contrary viewpoints. See Rosenberger, 515 U.S. at 833 ("we have
8 permitted the government to regulate the content of what is or is
9 not expressed when it is the speaker or when it enlists private
10 entities to convey its own message"). When the government is the
11 sole speaker, it need not ensure viewpoint diversity and can
12 simply express its own viewpoint. Only where the government
13 allows private parties to express their personal views in a
14 nonpublic forum is it required to avoid viewpoint discrimination.

15 Therefore, if HRA is the only entity that expresses itself
16 in the Job Center waiting rooms -- i.e. if third parties with
17 authorized official business are contractual agents speaking for
18 HRA -- there is no actionable viewpoint discrimination, because
19 there is no discrimination. On the present record, we conclude
20 that the parties allowed into the waiting rooms for expressive
21 purposes -- i.e. individuals other than claimants and those
22 legitimately accompanying them -- were conducting official
23 business and were speaking for HRA, rather than for themselves.
24 The managed care and homelessness intervention providers were

1 providing services that HRA was required or allowed to offer.
2 The Census Bureau officials, who were present to ensure accurate
3 census representation of welfare recipients, and academics and
4 government officials who viewed Job Centers were within HRA's
5 official business and/or were in any event not engaged in
6 expressive activity. Furthermore, as noted, the City Charter
7 requires mayoral agencies to coordinate their activities with
8 other government agencies. N.Y.C. Charter § 386(c). See note 2,
9 supra.

10 Even if HRA were not the sole speaker in the waiting rooms,
11 no viewpoint discrimination resulted from excluding those without
12 official business generally or MRBW in particular. Speakers were
13 not excluded because of this point of view; speakers were
14 excluded if they did not have official business at the Job
15 Center.

16 Of course, a facially neutral restriction may operate as a
17 facade for excluding speakers expressing certain viewpoints while
18 allowing those expressing other viewpoints to enter. In such a
19 case, the restriction is not viewpoint neutral and is
20 impermissible. Cornelius, 473 U.S. at 812 (valid and reasonable
21 justifications for a restriction "cannot save an exclusion that
22 is in fact based on the desire to suppress a particular point of
23 view"); Kokinda, 497 U.S. at 736; General Media, 1997 U.S. App.
24 LEXIS 40571, at *25 n.11 (law's gender neutrality did not

1 conclusively establish its viewpoint neutrality). However, MRBW
2 has offered no evidence that HRA's access policy was based on
3 bias against its viewpoint rather than on preserving the Job
4 Centers for their intended purposes.

5 CONCLUSION

6 For the foregoing reasons, we hold that Job Center waiting
7 rooms are nonpublic fora, and that excluding those without
8 official business, including MRBW, is reasonable and viewpoint
9 neutral. We therefore affirm.

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