NO. _____

In the Supreme Court of the United States

AMERICAN FREEDOM DEFENSE INITIATIVE, *et al.*,
Petitioners,

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY (WMATA) and PAUL J. WIEDEFELD, in his official capacity as General Manager for WMATA,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ditrict of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The D.C. Circuit's opinion conflicts with this Court's precedent on an issue of exceptional importance: the freedom to express a viewpoint free from government censorship. Additionally, there is conflict in the United States courts of appeals regarding the application of the First Amendment to the display of public-issue advertisements on government transit authority property. This Court's review is warranted.

1. Is the Washington Metropolitan Area Transit Authority's advertising space a public forum for Petitioner's "Support Free Speech" ads such that Respondents' rejection of the ads violates the First Amendment?

2. Regardless of the forum question, is Respondents' rejection of Petitioners' "Support Free Speech" ads unreasonable and viewpoint based in violation of the First Amendment?

PARTIES TO THE PROCEEDING

Petitioners are American Freedom Defense Initiative (AFDI), Pamela Geller, and Robert Spencer (collectively referred to as Petitioners).

Respondents are the Washington Metropolitan Area Transit Authority (WMATA) and Paul J. Wiedefeld, General Manager and Chief Executive Officer for WMATA (collectively referred to as WMATA or Respondents).

RULE 29.6 STATEMENT

Petitioner AFDI is a non-stock, nonprofit corporation. Consequently, it has no parent or publicly held company owning 10% or more of the corporation's stock.

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JURISDICTION

The opinion of the court of appeals affirming in part and reversing in part the judgment of the district court was entered on August 17, 2018. App. 1. A petition for rehearing en banc was denied on October 29, 2018. App. 61, 62. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Free Speech Clause of the First Amendment provides, "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I.

INTRODUCTION

This civil rights lawsuit arises out of Respondents' refusal to display Petitioners' "Support Free Speech" ads on WMATA's advertising space—a forum wholly compatible with Petitioners' form of speech. The principal issue presented is whether Respondents' rejection of Petitioners' ad copy on the basis of the message it conveys is permissible under the First Amendment.

Currently, there is a split in the federal appellate courts regarding the nature of the forum at issue (transit advertising space). The last and only time this

Court addressed the right to freedom of speech in this context was *Lehman v. City of Shaker Heights,* 418 U.S. 298 (1974). Yet, there remains conflict among the circuit courts as to how the forum should be addressed and thus how the First Amendment should apply in this context.

Given the exceptional importance of the free speech rights at stake and the conflict among the circuit courts, review by this Court is warranted.[1]

STATEMENT OF THE CASE

On July 1, 2015, Petitioners filed their Complaint challenging WMATA's speech restrictions under the First and Fourteenth Amendments. Petitioners alleged that WMATA's restrictions are content- and viewpoint-

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[1] Petitioners are not new to legal disputes involving the display of ads on government transit advertising space. *See, e.g., Am. Freedom Def. Initiative v. King Cnty.*, 136 S. Ct. 1022, 1025 (2016) (Thomas, J., joined by Alito, J.) (dissenting from the denial of the petition for writ of certiorari); *Am. Freedom Def. Initiative v. King Cnty.*, 904 F.3d 1126 (9th Cir. 2018) (holding that the County's rejection of AFDI's "Faces of Global Terrorism" ad based on its transit authority's disparagement and disruption standards violated the First Amendment); *Am. Freedom Def. Initiative v. Mass. Bay Transp. Auth.*, 781 F.3d 571, 593 (1st Cir. 2015) (affirming denial of preliminary injunction); *Am. Freedom Def. Initiative v. Suburban Mobility Auth. for Reg'l Transp.*, 698 F.3d 885 (6th Cir. 2012) (reversing grant of preliminary injunction); *Am. Freedom Def. Initiative v. Wash. Metro. Area Transit Auth.*, 898 F. Supp. 2d 73, 78-79 (D.D.C. 2012) (granting injunction for violating the First Amendment); *Am. Freedom Def. Initiative v. Metro. Transp. Auth*., 880 F. Supp. 2d 456 (S.D.N.Y. 2012) (granting injunction for violating the First Amendment); *Am. Freedom Def. Initiative v. Se. Pa. Transp. Auth.*, No. 2:14-cv-5335, 2015 U.S. Dist. LEXIS 29571, (E.D. Pa. Mar. 11, 2015) (granting injunction for violating the First Amendment).

based and that the transit authority' true purpose for adopting the restrictions at issue was to silence the viewpoint expressed by Petitioners' ads in violation of the First Amendment. App. 5.

Additionally, Petitioners alleged that WMATA deprived them of the equal protection of the law by preventing them from expressing a message based on its content and viewpoint, thereby denying the use of a forum to those whose views WMATA finds unacceptable in violation of the Fourteenth Amendment. App. 5. Petitioners sought declaratory and injunctive relief and nominal damages.

On March 28, 2017, the district court granted WMATA's motion for summary judgment and denied Petitioners' cross-motion for summary judgment. App. 44-60. Petitioners appealed.

On August 17, 2018, the D.C. Circuit issued its opinion, affirming in part and reversing in part the district court's decision. The panel held that the forum was a nonpublic forum, it rejected Petitioners' viewpoint discrimination claim, and it remanded the case for the lower court to determine if WMATA's restriction on Petitioners' speech was "reasonable" in light of this Court's ruling in *Minnesota Voters Alliance v. Mansky*, 138 S. Ct. 1876 (2018). App. 1-33.

Upon remand, WMATA moved the district court to stay all proceedings until all appeals are exhausted in the related case of *Archdiocese of Washington v. Washington Metropolitan Area Transit Authority* (D.C.

Cir. Case No. 17-7171).[2] On January 17, 2019, the district court granted WMATA's motion, staying all proceedings "until the final disposition of all appellate proceedings, including of any timely petitions for a writ of certiorari, in *Archdiocese of Washington v. WMATA* (D.C. Cir. No. 17-7171)." (Minute Order of Jan. 17, 2019). Presumably, the Archdiocese of Washington intends to seek review in this Court as well.

STATEMENT OF FACTS

Petitioners are free speech advocates who are challenging WMATA's restraint on their non-commercial, public-issue speech. App. 3.

On May 20, 2015, Petitioners submitted for display on WMATA's advertising space—which was admittedly a public forum at the time[3]—the following advertisements:

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[2] On August 30, 2018, the Archdiocese of Washington filed a petition for rehearing *en banc*, seeking review of the panel's decision upholding WMATA's rejection of the Archdiocese's "Find the Perfect Gift" ad campaign. *See* Pet. for Reh'g En Banc, *Archdiocese of Wash. v. Wash. Metro. Area Transit Auth.,* No. 17-7171, (D.C. Circuit, Aug. 30, 2018). In its petition, the Archdiocese similarly argued that WMATA's speech restriction (Guideline 12) is viewpoint based and unreasonable under this Court's precedent. *See id*. On December 21, 2018, the D.C. Circuit denied the Archdiocese's petition, over the dissent of Circuit Judge Griffith, with whom Circuit Judge Katsas joined. *See* Order Denying Pet. for Reh'g En Banc, *Archdiocese of Wash. v. Wash. Metro. Area Transit Auth.,* No. 17-7171, (D.C. Circuit, Dec. 21, 2018).

[3] *See, e.g., Am. Freedom Def. Initiative v. Wash. Metro. Area Transit Auth.*, 898 F. Supp. 2d 73, 78-79 (D.D.C. 2012) (granting injunction for violating the First Amendment and stating that "WMATA conceded that it provides a public forum for advertising").

App. 46, 47.

The ads contain the slogan "Support Free Speech," and they depict the winning entry of an art contest sponsored by Petitioners.[4] The ads also contain a disclaimer explaining that they are sponsored by AFDI and do "not imply WMATA's endorsement of any view expressed." The first ad was designed for display on WMATA's buses and the second ad was designed for display on WMATA's dioramas. *Id.*; JA-42, 43.

[4] Under the revised guidelines, WMATA permits ads "promoting contests." JA-32, 33, 37 ("2. Advertisers promoting contests shall insure the contest is being conducted with fairness to all entrants and complies with all applicable laws and regulations.").

The ads are not commercial ads, they are not political campaign ads, and they do not mention religion nor are they sponsored by a religious organization. On their face, they advocate for free speech. *See supra*.

To prevent the display of these ads, on May 28, 2015, WMATA hastily passed a moratorium on "issue-oriented" advertising, thereby claiming to close the forum to Petitioners' ads. JA-43, 44, 90. The moratorium "direct[ed] management to close WMATA's advertising space to any and all issue-oriented advertising, including but not limited to, political, religious, and advocacy advertising until the end of the calendar year." JA-32, 34.

WMATA formalized the ongoing rejection of Petitioners' ads by way of a resolution passed on November 19, 2015. This resolution permanently changed the advertising guidelines, and it did so consistent with the moratorium.[5] JA-32, 33, 35-38.

[5] The November 19, 2015 resolution and its guidelines are at issue in this litigation. Not only is the passage of the resolution and its guidelines the continuation of the constitutional harm caused initially by the temporary "moratorium," WMATA itself introduced the resolution into this litigation, making it part of its motion for summary judgment and arguing that it is the basis for denying Petitioners prospective relief. R-19-1 (Defs.' Mem. at 8-11). The D.C. Circuit correctly concluded that Petitioners' challenge is not moot as a result of WMATA's adoption of these guidelines, which are simply a continuation of the harm. App. 7-10.

The revised advertising guidelines prohibit advocacy ads and provide, in relevant part, as follows:

> 9. Advertisements intended to influence members of the public regarding an issue on which there are varying opinions are prohibited.
>
> * * *
>
> 11. Advertisements that support or oppose any political party or candidate are prohibited.
>
> 12. Advertisements that support or oppose any religion, religious practice or belief are prohibited.
>
> 13. Advertisements that support or oppose an industry position or industry goal without any direct commercial benefit to the advertisers are prohibited.

App-5, 6. The guidelines permit both commercial and non-commercial messages.

As argued further below, these are not subject restrictions, they are viewpoint restrictions. The panel improperly conflates the two.

Per the testimony of WMATA's designated witness under Rule 30(b)(6) of the Federal Rules of Civil Procedure, WMATA's basis for rejecting Petitioners' ad copy was because it "advocates free speech and does not try to sell you a commercial product." App. 26; JA-90. There is no express prohibition on "free speech" as a subject matter.

Following remand to the district court, Respondents made it clear that in addition to Guideline 9, WMATA will rely upon Guideline 12 to reject Petitioners' ad copy. *See, e.g.*, App. 66, 67 (stating that "the facts of

this case clearly demonstrate that AFDI's proposed advertisements would be rejected under Guideline 12" and "[t]he advertisements therefore are impermissible under Guideline 12").

We turn now to our argument demonstrating that review is necessary to correct the appellate court's decision in an important First Amendment case and to resolve the circuit split regarding the forum question.

REASONS FOR GRANTING THE PETITION

The D.C. Circuit's decision misapprehends the concept of viewpoint discrimination and is thus contrary to this Court's precedent, including *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993), *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819 (1995), and *Matal v. Tam*, 137 S. Ct. 1744, 1763 (2017). Because WMATA's speech restrictions are viewpoint based, they fail as a matter of law. WMATA's restriction on issue-oriented ads, that is, ads "intended to influence members of the public regarding an issue on which there are varying opinions" also fails as a matter of law under *Minnesota Voters Alliance v. Mansky*, 138 S. Ct. 1876 (2018).

Additionally, there is a split among the federal courts of appeals regarding the application of the First Amendment to the display of public-issue advertisements on government transit authority property.

A split among the federal courts of appeals is among the most important factors in determining whether certiorari should be granted. *See* Sup. Ct. R. 10(a).

Thus, the Court should grant review because this case presents important First Amendment issues that should be resolved definitively by this Court. *See* Sup. Ct. R. 10(c) (providing that review is appropriate when a lower court has "decided an important question of federal law that has not been, but should be, settled by this Court").

We begin with the forum question.

I. THIS COURT SHOULD ADDRESS THE FORUM QUESTION.

A. The Circuit Courts Are Divided on the Application of *Lehman*.

While the challenged restrictions are unlawful regardless of the forum's characterization (as argued further below), Petitioners maintain that the forum is a public forum for their speech. The forum properly characterized is WMATA's advertising space and not simply "public transportation," as the panel incorrectly stated. App. 26; *see Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 801 (1985) ("[F]orum analysis is not completed merely by identifying the government property at issue. Rather, in defining the forum we have focused on the access sought by the speaker.").

The D.C. Circuit disagreed with Petitioners on the forum question, relying on its prior decision in *Archdiocese of Washington* and stating, "AFDI and WMATA differ as to how WMATA's advertising space fits into the forum doctrine. We need not resolve this disagreement, however, because another panel of this circuit recently held the space is a nonpublic forum." App. 13 (citing *Archdiocese of Wash. v. Wash. Metro.*

Area Transit Auth., 897 F.3d 314 (D.C. Cir. 2018)); *see Archdiocese of Wash.*, 897 F.3d at 323 (stating, "[h]aving plainly evinced its intent in 2015 to close WMATA's advertising space to certain subjects, the Board of Directors converted that space into a non-public forum in the manner contemplated by the Supreme Court," and relying principally on *Lehman*). The D.C. Circuit is mistaken.[6]

In *Lehman v. City of Shaker Heights,* 418 U.S. 298 (1974), a case in which the city's advertising program had never permitted any political or public-issue advertising, the Court found that the consistently enforced, twenty-six-year ban on political advertising was consistent with the government's role as a proprietor precisely because the government "limit[ed] car card space to innocuous and less controversial commercial and service oriented advertising." *Id*. at 304; *see also Am. Freedom Def. Initiative v. Mass. Bay Transp. Auth.*, 781 F.3d at 591 (dissent) (rejecting the majority's forum analysis and noting that "*Ridley* also proclaimed that the MBTA's advertising program was 'indistinguishable' from the one described in *Lehman*, *id*. at 78, apparently ignoring the fact that the Shaker Heights advertising program in *Lehman had never*

[6] To make matters worse, the Archdiocese conceded the forum question below, making that case a poor vehicle to address this question. *See Archdiocese of Wash. v. Wash. Metro. Area Transit Auth.*, 897 F.3d 314, 322 (D.C. Cir. 2018) ("The Archdiocese fails to show that the advertising space on WMATA's buses is not properly treated as a non-public forum. Indeed, the Archdiocese conceded as much in the district court, affirming in response to questions that it was 'conceding at this point that it's not a public forum' and that the district court '[did not] have to address that [contrary] argument anymore.'").

accepted any political or public issue advertising") (emphasis added).

This Court should revisit *Lehman*, a case decided in 1974, in light of the changed circumstances, specifically including the vastly different and evolving advertising environment and the politicization of advertising in general. Moreover, the circuit courts have differed on how *Lehman* should apply in light of the Court's forum jurisprudence. We turn now to these decisions.

A majority of the circuit courts have interpreted *Lehman* to conclude that transportation advertising space was not a public forum when the government "consistently promulgates and enforces policies *restricting advertising on its buses to commercial advertising*." *Children of the Rosary v. City of Phoenix*, 154 F.3d 972, 978 (9th Cir. 1998) (emphasis added).

As the Ninth Circuit observed in *DiLoreto v. Downey Unified School District Board of Education,* 196 F.3d 958 (9th Cir. 1999):

> Government policies and practices that *historically have allowed commercial advertising*, but have excluded political and religious expression, indicate an intent not to designate a public forum for all expressive activity, but to reserve it for commercial speech. . . . However, where the government *historically* has accepted a wide variety of advertising on commercial and non-commercial subjects, courts have found that advertising programs on public property were public fora.

Id. at 965-66 (citing, *inter alia*, *Lehman*) (emphasis added).

Despite this circuit precedent, the Ninth Circuit recently joined the First Circuit in its approach to the forum question. In *Seattle Mideast Awareness Campaign v. King County*, 781 F.3d 489, 498 (9th Cir. 2015), a divided panel held that the County's bus advertising space was a limited public forum[7] even where the transit authority accepted controversial political and public-issue ads. In doing so, the Ninth Circuit acknowledged the circuit split. *See id*. ("We recognize that other courts have held that similar transit advertising programs constitute designated public forums.").

Other federal appeals courts that have addressed this forum question have reached different conclusions, as noted by the Ninth Circuit. *See id*.

The Second Circuit, for example, holds that "[d]isallowing political speech, and *allowing commercial speech only*, indicates that making money is the main goal. Allowing political speech, conversely, evidences a general intent to open a space for discourse, and a deliberate acceptance of the possibility of clashes of opinion and controversy that the Court in *Lehman* recognized as inconsistent with sound commercial practice." *N.Y. Magazine v. Metro. Transp. Auth.*, 136 F.3d 123, 130 (2d Cir. 1998) (holding that the transit authority's advertising space was a designated public forum) (emphasis added); *see also*

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[7] In *American Freedom Defense Initiative v. King County*, 796 F.3d 1165, 1169 n.1 (9th Cir. 2015), the Ninth Circuit stated that in light of this Court's decision in *Walker v. Texas Division, Sons of Confederate Veterans, Inc*., 135 S. Ct. 2239 (2015), "the proper term likely is 'nonpublic forum.' . . . For that reason, we use the term 'nonpublic forum.'"

Am. Freedom Def. Initiative v. Metro. Transp. Auth., 880 F. Supp. 2d 456, 466 (S.D.N.Y. 2012) ("[T]he Court agrees with AFDI that this space is a designated public forum, in which content-based restrictions on expressive activity are subject to strict scrutiny.").

In *Christ's Bride Ministries, Inc. v. Southeastern Pennsylvania Transportation Authority,* 148 F.3d 242, 253 (3d Cir. 1998), the Third Circuit concluded that the transit authority's advertising space was a designated public forum, noting that "the purpose of the forum does not suggest that it is closed, and the breadth of permitted speech points in the opposite direction." *See also Am. Freedom Def. Initiative v. Se. Pa. Transp. Auth.*, No. 2:14-cv-5335, 2015 U.S. Dist. LEXIS 29571, *16 (E.D. Pa. Mar. 11, 2015) (finding "that SEPTA's advertising space constitutes a designated public forum").

In *Planned Parenthood Ass'n/Chicago Area v. Chicago Transit Authority*, 767 F.2d 1225 (7th Cir. 1985), the Seventh Circuit concluded that the transit authority's advertising space was a designated public forum because the transit authority permitted "a wide variety" of commercial and non-commercial advertising.

The Sixth Circuit similarly concluded that a transit authority's property is a designated public forum when it is open to political and public-issue advertisements, observing as follows:

> Acceptance of political and public-issue advertisements, which by their very nature generate conflict, signals a willingness on the part of the government to open the property to

> controversial speech, which the Court in *Lehman* recognized as inconsistent with operating the property solely as a commercial venture.

United Food & Commercial Workers Union, Local 1099 v. Sw. Ohio Reg'l Transit Auth., 163 F.3d 341, 355 (6th Cir. 1998) (hereinafter "*United Food*").

Indeed, in *Lebron v. Washington Metropolitan Area Transit Authority*, 749 F.2d 893, 896 (D.C. Cir. 1984), the court stated, "There is no doubt that the poster at issue here conveys a political message; nor is there a question that WMATA has converted its subway stations into public fora by accepting other political advertising." *See also Am. Freedom Def. Initiative v. Wash. Metro. Area Transit. Auth.*, 898 F. Supp. 2d 73, 78-79 (D.D.C. 2012) ("Since WMATA conceded that it provides a public forum for advertising, the Court considers that aspect of the standard satisfied."). Thus, *historically*, WMATA accepted a wide array of commercial and non-commercial ads, demonstrating that these ads are compatible with the forum.

The First and the Ninth Circuits support their forum conclusion based upon a faulty rationale. As stated by the Ninth Circuit: "Municipalities faced with the prospect of having to accept virtually all political speech if they accept any—regardless of the level of disruption caused—will simply close the forum to political speech altogether. First Amendment interests would not be furthered by putting municipalities to that all-or-nothing choice. Doing so would 'result in less speech, not more'—exactly what the Court's public forum precedents seek to avoid." *Seattle Mideast Awareness Campaign*, 781 F.3d at 499 (citation

omitted); *see also Ridley*, 390 F.3d at 81 (stating that "the MBTA is not to be put to an 'all-or-nothing choice'") (citation omitted).

This reasoning is fundamentally flawed because it permits the government to pick and choose which "political speech" it deems acceptable, thereby doing more harm to the First Amendment and its role as a brake on the government's power to censor speech than closing the forum altogether. In short, the First Amendment is not concerned about the quantity of speech (*i.e.*, "result in less speech, not more"). Rather, its objective is to prevent government officials from being the arbiters of acceptable speech. The First and Ninth Circuits' reasoning thus opens a forum for certain non-commercial speech (and speakers) which the government favors by permitting government officials to make content-based restrictions based on nothing more than "reasonableness." Thus, rather than restricting government censorship of speech (the goal of the First Amendment), these decisions grant the government broader powers of censorship. *Southeastern Promotions, Ltd. v. Conrad,* 420 U.S. 546, 553 (1975) ("[T]he danger of censorship and of abridgment of our precious First Amendment freedoms is too great where officials have unbridled discretion over a forum's use.").

In the final analysis, the circuit courts are split on the question of whether a government transit authority creates a public forum for speech when it opens its advertising space to non-commercial ads. This Court should resolve this circuit split—a division that has serious implications for the First Amendment.

B. WMATA's Advertising Space Is a Public Forum for Petitioners' Speech.

A public forum exists when the government intentionally opens its property for expressive activity. *Perry Educ. Ass'n v. Perry Local Educators*, 460 U.S. 37, 45 (1983). "[A] public forum may be created by government designation of a place or channel of communication for use by the public at large for assembly and speech, *for use by certain speakers*, or *for the discussion of certain subjects*." *Cornelius*, 473 U.S. at 802 (emphasis added).

Under this definition and accepting, *arguendo*, that WMATA's moratorium and subsequently revised guidelines are constitutional, its advertising space remains a public forum for Petitioners' speech. The advertising space remains open for certain speakers, such as Petitioners (persons willing to pay for advertising). And, as demonstrated below, the subject (or "topic") of Petitioners' ads (support free speech) is not excluded. Consequently, to restrict Petitioners' ads based on content requires WMATA to satisfy strict scrutiny, *id*. at 800, which it cannot, and WMATA never argued that it could.[8]

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[8] The restrictions on Petitioners' speech also operate as a prior restraint and thus WMATA must carry a "heavy burden of showing justification for the imposition of such a restraint," as demonstrated by the opinion of then-Circuit Judge Bork in *Lebron v. Washington Metropolitan Area Transit Authority*, 749 F.2d 893, 896 (D.C. Cir. 1984) (holding that the refusal to display the poster "because of its content is a clearcut prior restraint"; therefore, "WMATA carries a heavy burden of showing justification for the imposition of such a restraint") (internal quotations and citation omitted); *Am. Freedom Def. Initiative v. Wash. Metro. Area Transit Auth*., 898 F. Supp. 2d 73, 79 (D.D.C. 2012) ("WMATA imposed a

While speech restrictions in traditional[9] and designated public forums are subject to the same heightened level of scrutiny,[10] it is a mistake to conflate the two forums. *See Am. Freedom Def. Initiative v. Mass. Bay Transp. Auth.*, 781 F.3d 571, 593 (1st Cir. 2015) (dissent) ("Building a constitutional framework around a category as rigid as 'traditional public forum' leaves courts ill-equipped to protect First Amendment expression in times of fast-changing technology and increasing insularity."). Indeed, the D.C. Circuit's approach to the forum analysis essentially does away with the designated public forum as a category and replaces it with the nonpublic forum.

In a nonpublic forum, speech restrictions need only be reasonable and viewpoint neutral, *Perry Educ. Ass'n*, 460 U.S. at 46, thereby granting the government "almost unlimited authority to restrict speech on its property." *See Am. Freedom Def. Initiative v. Mass.*

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prior restraint because it prevented Petitioners from displaying their ad in WMATA stations; a prior restraint 'bear[s] a heavy presumption against its constitutional validity.'") (citation omitted).

[9] Public streets, sidewalks, and parks are typical examples of traditional public forums. *See Hague v. CIO*, 307 U.S. 496, 515 (1939).

[10] *Cornelius*, 473 U.S. at 800 ("[S]peakers can be excluded from a public forum only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest. . . . Similarly, when the government has intentionally designated a place or means of communication as a public forum speakers cannot be excluded without a compelling government interest.").

Bay Transp. Auth., 781 F.3d at 592 (dissent) (quoting *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 695 (1992) (Kennedy, J., concurring in the judgments)).

But a forum analysis should not end simply because the government transit authority has adopted some restrictions on speech or employed these restrictions to reject certain advertisements. As stated by the Second Circuit:

> [I]t cannot be true that if the government excludes any category of speech from a forum through a rule or standard, that forum becomes *ipso facto* a non-public forum, such that we would examine the exclusion of the category only for reasonableness. This reasoning would allow every designated public forum to be converted into a non-public forum the moment the government did what is supposed to be impermissible in a designated public forum, which is to exclude speech based on content.

N.Y. Magazine, 136 F.3d 129-30.

Additionally, it is incorrect to conclude that WMATA's restrictions are restrictions on an ad's subject matter (such as restrictions on advertisements for alcohol, tobacco, or political candidates) which might reasonably lead a court to conclude that this forum is closed to non-commercial speech. Rather, the restrictions, particularly as applied in this case, are viewpoint restrictions. *See infra*. At a minimum, they certainly *allow for* viewpoint discrimination, as evidenced here, and this alone is sufficient to render the advertising guidelines unconstitutional. *See*

Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 829 (1995) (observing that "[v]iewpoint discrimination is thus an egregious form of content discrimination" that is prohibited "even when the limited public forum is one of [the government's] own creation"); *Perry Educ. Ass'n,* 460 U.S. at 46 (stating that in a nonpublic forum, the government "may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view"). This argument is set forth more fully below in Section II.

In sum, it is without question that the nature of the property is compatible with Petitioners' expressive activity. *See Ridley*, 390 F.3d 76-77 ("As to the nature of the property, the MBTA does run advertisements and so there is nothing inherent in the property which precludes its use for some expressive activity."). And it is undisputed that the advertising guidelines do not prohibit non-commercial speech, as evidenced by the fact that the Salvation Army was permitted to run its ad campaign. *See Archdiocese of Wash.*, 897 F.3d at 329 ("WMATA accepted the ad of the Salvation Army, a religious organization whose ad exhorted giving to charity but contained only non-religious imagery."). Because the forum is wholly suitable for Petitioners' speech, including its subject matter, it is a public forum for Petitioners' ads.[11]

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[11] Concluding that the forum is a public forum does not necessarily mean that WMATA is without any authority to make certain subject matter restrictions, such as restrictions on advertisements for tobacco sales, pornography, or political campaigns. *Cornelius*, 473 U.S. at 802 ("[A] public forum may be created . . . for use by

C. The Court's Forum Analysis Framework Is Unworkable for Transit Advertising Space.

At times, the courts have described transit advertising space as a "limited public forum." *See*, *e.g.*, *Seattle Mideast Awareness Campaign*, 781 F.3d at 498. Unfortunately, nonpublic and limited public forums are often used interchangeably since the same standard is typically applied to both. This blurred and confused distinction, which results in the blending of the two forums, is a mistake, and it operates in a way that favors the government and disfavors the First Amendment. For example, a federal courtroom is clearly a nonpublic forum—its characteristics are significantly different and thus distinguishable from a government transit authority's advertising space in which the government allows private speakers to express an array of messages.

To argue that the two forums should be treated the same under the law is to treat the First Amendment as a simple inconvenience for the government rather than a fundamental liberty interest that is the foundation of our constitutional Republic. A limited public forum (a forum in which the government allows some speech), such as a transit authority's advertising space, should be treated as a subcategory of a designated public forum, applying the heightened standard for that

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certain speakers, or for the discussion of certain subjects."). However, "if the concept of a designated open forum is to retain any vitality whatever, the definition of the standards for inclusion and exclusion must be unambiguous and definite." *Gregoire v. Centennial Sch. Dist.*, 907 F.2d 1366, 1375 (3d Cir. 1990). WMATA's advertising guidelines do not meet this standard.

forum, rather than as a nonpublic forum in which free speech takes a back seat (pun intended).

The dissenting Circuit Judge in *American Freedom Defense Initiative v. Massachusetts Bay Transportation Authority*, 781 F.3d 571 (1st Cir. 2015), "highlights [this] weakness in the current forum analysis framework,

> in that it can allow the government's own self-serving statements about its intended use for a public place to outweigh the forum's inherent attributes. As Justice Kennedy has observed in the past, if "public forum jurisprudence is to retain vitality, we must recognize that certain objective characteristics of Government property and its customary use by the public may control the case." *United States v. Kokinda*, 497 U.S. 720, 737-38 (1990) (Kennedy, J., concurring in the judgment). By relying primarily on "the government's defined purpose for the property" rather than on "the actual, physical characteristics and uses of the property," the mode of forum analysis embraced in *Ridley* "leaves the government with almost unlimited authority to restrict speech on its property by doing nothing more than articulating a nonspeech-related purpose for the area." *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 695 (1992) (Kennedy, J., concurring in the judgments). Building a constitutional framework around a category as rigid as "traditional public forum" leaves courts ill-equipped to protect First Amendment expression "in times of fast-changing technology and

> increasing insularity." *Id*. at 697-98 (observing that "our failure to recognize the possibility that new types of government property may be appropriate forums for speech will lead to a serious curtailment of our expressive activity").
>
> *Ridley* exemplifies Justice Kennedy's concerns, in that its analysis relied heavily on the MBTA's attempts to control speech on its property through its advertising guidelines, 390 F.3d at 76-82, but only cursorily examined the forum's characteristics and compatibility with expressive activity, *id*. at 77. By doing so, the *Ridley* majority ignored the indisputable fact that, like an airport, a public transit system is "one of the few government-owned spaces where many persons have extensive contact with other members of the public." *Int'l Soc'y for Krishna Consciousness*, 505 U.S. at 698 (Kennedy, J., concurring in the judgments). Such unique suitability for open discourse between citizens is indicative of a public, rather than a private, forum. *Cf. McCullen*, 134 S. Ct. at 2529 (observing that public streets "remain one of the few places where a speaker can be confident that he is not simply preaching to the choir" because members of the public cannot avoid "uncomfortable message[s]," which the First Amendment regards as "a virtue, not a vice").

Am. Freedom Def. Initiative, 781 F.3d at 592-93 (Stahl, J., dissenting).

In short, a proper forum analysis—one that protects the First Amendment and does not undermine its protections—would conclude that WMATA's

advertising space is a public forum for Petitioners' speech. "[T]he actual, physical characteristics and uses of the property" support this conclusion.[12]

This argument leads further to the conclusion that treating the forum at issue as a nonpublic forum to exclude Petitioners' speech is unreasonable.

D. It Is Unreasonable to Exclude Petitioners' Speech from this Forum.

Reasonableness is evaluated "in light of the purpose of the forum and all the surrounding circumstances." *Cornelius*, 473 U.S. at 809. "Consideration of a forum's special attributes is relevant to the constitutionality of a regulation since the significance of the governmental interest must be assessed in light of the characteristic nature and function of the particular forum involved." *Christ's Bride Ministries, Inc. v. Se. Pa. Transp. Auth.*, 148 F.3d 242, 255 (3d Cir. 1998) (block quotation and citation omitted). Thus, "the reasonableness of the government's restriction on speech depends on the nature and purpose of the property for which it is barred." *Id.*; *see NAACP v. City of Phila.*, 39 F. Supp. 3d 611, 630 (E.D. Pa. 2014) (holding that the prohibition on non-commercial ads at the Philadelphia International Airport—a nonpublic forum—was "unreasonable" in that displaying such ads was "perfectly compatible" with the forum); *NAACP v. City of Phila.*, 834 F.3d 435 (3d Cir. 2016) (same).

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[12] Indeed, the government could convert a public forum into a nonpublic forum by shutting down all private speech, but that is not what WMATA is trying to do here.

WMATA's forum was unquestionably a public forum at the time Petitioners' ads were submitted, App. 51, and there is no dispute that Petitioners' form of speech (their ads) is perfectly compatible with this forum, JA-75, 76 (conceding that at the time Petitioners' ads were submitted, there was "no reason to reject" them). WMATA has previously displayed Petitioners' ads on their property, and these ads generated $65,200 in revenue for the transit authority. JA-109.

Thus, it is unreasonable to argue that an "issue-oriented" ad displayed on the outside of a bus traveling through our nation's capital (or posted on a diorama at a bus station in the city) where passengers and outside observers are confronted daily with expressive, and quite often political and controversial, media would somehow interfere with the operation of WMATA's transit system. For many decades WMATA displayed controversial, public-issue ads. *See Lebron*, 749 F.2d at 896. And, as WMATA notes, since Washington, D.C. is the seat of our federal government, its "market is distinct in the amount of issue-oriented advertising." JA-79. Moreover, it is an "indisputable fact that, like an airport, a public transit system is one of the few government-owned spaces where many persons have extensive contact with other members of the public" and thus there is "unique suitability" for the speech that WMATA seeks to censor here. *Am. Freedom Def. Initiative*, 781 F.3d at 592-93 (Stahl, J., dissenting). In sum, even if it were a nonpublic forum, WMATA's advertising space is the very place these types of ads should be (have been and can be) displayed—it is unreasonable to say otherwise. *See NAACP v. City of Phila.*, 834 F.3d at 437.

Finally, the government's ability to allegedly "close" a forum for protected speech should not be without constitutional limits. *Cornelius*, 473 U.S. at 811 ("The existence of reasonable grounds for limiting access to a nonpublic forum . . . will not save a regulation that is in reality a facade for viewpoint-based discrimination."); *United States v. Griefen*, 200 F.3d 1256, 1265 (9th Cir. 2000) ("Should it appear that the true purpose of . . . an order [closing a forum] was to silence disfavored speech or speakers . . . , the federal courts are capable of taking prompt and measurably appropriate action."); *Coleman v. Ann Arbor Transp. Auth.*, 947 F. Supp. 2d 777, 788 (E.D. Mich. 2013) ("It is true that changes to a forum motivated by actual viewpoint discrimination may well limit the government's freedom of action."); *see also Ridley v. Mass. Bay Transp. Auth.*, 390 F.3d 65, 77 (1st Cir. 2004) (upholding policy change regarding the forum, noting that "the MBTA acted in response to expressed constitutional concerns about its prior guidelines" and finding that "[t]here is no evidence that the 2003 changes were adopted as a mere pretext to reject plaintiff's advertisements").

WMATA didn't issue its "moratorium" or adopt new guidelines in response to any expressed constitutional concerns. Rather, the evidence demonstrates that WMATA acted in response to the submission of Petitioners' ads—ads which WMATA officials were determined to prevent from running in their advertising space.

At the end of the day, WMATA's advertising space is a public forum for Petitioners' speech, and any restriction on the content of Petitioners' speech should

be subject to strict scrutiny. *Cornelius*, 473 U.S. at 800. Regardless, WMATA's restrictions on Petitioners' speech are viewpoint-based and unreasonable and thus unlawful under the First Amendment irrespective of the forum's characterization.

We turn now to the viewpoint and reasonableness arguments.

II. WMATA'S SPEECH RESTRICTIONS ARE VIEWPOINT BASED AND UNREASONABLE.

A. Viewpoint Discrimination.

Viewpoint discrimination is an egregious form of content discrimination that is prohibited in all forums. *See Rosenberger*, 515 U.S. at 829; *Lamb's Chapel*, 508 U.S. at 394 ("[T]he First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.") (internal quotations and citation omitted); *see also Pitt. League of Young Voters Educ. Fund v. Port Auth. of Allegheny Cnty.*, 653 F.3d 290, 296 (3d Cir. 2011) ("Regardless of whether the advertising space is a public or nonpublic forum, the coalition is entitled to relief because it has established viewpoint discrimination.").

Viewpoint discrimination occurs when, as here, the "rationale for the restriction" is "the specific motivating ideology or the opinion or perspective of the speaker." *Rosenberger*, 515 U.S. at 829 (emphasis added). Thus, the government acts unconstitutionally even when it adopts an apparently evenhanded rule excluding expression on its property if it acts with a motive to discourage or suppress a particular opinion. *See id.* And "[t]he existence of reasonable grounds for limiting access to a nonpublic forum . . . will not save a

regulation that is in reality a facade for viewpoint-based discrimination." *Cornelius*, 473 U.S. at 811.

WMATA's restrictions on Petitioners' ads, first under the "moratorium" and then continuing as result of the revised guidelines, are facially viewpoint based. "When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant." *Rosenberger*, 515 U.S. at 829 (emphasis added). Silencing multiple viewpoints, whether religious or political or otherwise, does not make the restriction less viewpoint based; it makes it more so. *Id*. at 831-32 ("The dissent's assertion that no viewpoint discrimination occurs because the Guidelines discriminate against an entire class of viewpoints reflects an insupportable assumption that all debate is bipolar and that antireligious speech is the only response to religious speech. . . . The dissent's declaration that debate is not skewed so long as multiple voices are silenced is simply wrong; the debate is skewed in multiple ways.").

A simple example illustrates the point. An advertisement on an acceptable subject matter (the sale of contraception, for example) will be accepted so long as it does not express a religious, or political, or some other vague "advocacy" or "issue-oriented" viewpoint. Consequently, an advertiser may strongly promote the sale (and thus use) of contraception, but an ad that opposes the sale (and use) of contraception on religious grounds will be rejected. The subject matter of both ads is contraception. The rejection of the second ad is viewpoint based. As this Court's precedent makes plain, viewpoint discrimination occurs

when the government "denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject." *Cornelius*, 473 U.S. at 806.

Archdiocese of Washington further illustrates in a concrete way why the challenged guidelines are not permissible subject matter restrictions but impermissible restrictions on a speaker's viewpoint. Ads promoting charitable works are acceptable (WMATA accepted an ad from the Salvation Army), but not if the subject is from a religious viewpoint (WMATA rejected the Archdiocese's "Find the Perfect Gift" ad). *See Archdiocese of Wash.*, 897 F.3d 314.

The revised guidelines, which clarified what WMATA meant by an "issue-oriented" ad in its moratorium, are viewpoint-based restrictions on their face. Per these guidelines, "[a]dvertisements intended to influence members of the public regarding an issue on which there are varying opinions are prohibited." However, members of the public have varying opinions on gambling, contraception, and the military, among others. But these "subjects" are not excluded. Indeed, the guideline stating, "[a]dvertisements that support or oppose an industry position or industry goal without any direct commercial benefit to the advertisers are prohibited" is overtly viewpoint-based. One need not comprehend the subtleties of viewpoint discrimination to recognize that this restriction is blatant viewpoint discrimination. By this standard, an ad, the motivation for which is profit on a given subject, is permitted, but the same ad motivated by principle or morality is not. *Rosenberger*, 515 U.S. at 829 (explaining that viewpoint discrimination occurs when

"the specific motivating ideology or the opinion or perspective of the speaker" is determinative) (emphasis added).

Moreover, religion as a "subject" is not expressly excluded. However, "[a]dvertisements that support or oppose any religion, religious practice or belief are prohibited." Consequently, while religion as a "topic" is permitted, religious viewpoints are banned, as *Archdiocese of Washington* illustrates. And as Petitioners' argued below, a commercial advertiser could run an ad promoting a certain product, but not if the very same product is promoted because it is Kosher (the ad would then be promoting a religious practice or belief). This is viewpoint discrimination. *See Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 112 (2001) ("[S]peech discussing otherwise permissible subjects cannot be excluded from a limited public forum on the ground that the subject is discussed from a religious viewpoint."). The panel was wrong to conclude otherwise. App. 14-26 (finding no viewpoint discrimination).

WMATA rejected Petitioners' ad based on a claim that it was "issue oriented" — "it advocates free speech and does not try to sell you a commercial product." App. 26; JA-90. Consequently, under the revised guidelines, the only plausible restriction is number 9, which states, "[a]dvertisements intended to influence members of the public regarding an issue on which there are varying opinions are prohibited." Thus, because some undefined number of people oppose a particular opinion based solely upon the judgment of WMATA's censors, that is a sufficient reason to reject an ad that advocates that opinion. Per the guidelines,

if everyone agrees with the opinion, then there is no basis to reject the ad. And once again, this is not a subject matter restriction on its face—it is a patent viewpoint-based restriction. If the government believes an opinion or viewpoint is so fully accepted by the public that it is either undisputed or indisputable, it is acceptable ad copy. But if the censors believe it is a viewpoint in dispute, they reject it. In short, WMATA seeks to create for itself the ability to decide what is acceptable speech based upon its view of the acceptance of a given viewpoint. This is precisely the kind of government censorship the First Amendment was designed to prohibit. *See supra*.

Here is where *Matal v. Tam* becomes relevant.[13] In *Matal*, Simon Tam, the lead singer of the rock group, "The Slants," sought federal registration of the mark "THE SLANTS." The Patent and Trademark Office denied the application under a Lanham Act provision that prohibited the registration of trademarks that

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[13] The D.C. Circuit rejected the application of *Tam* in this context (transit advertising). *See* App. 13 ("The relevance of a case in which the Supreme Court did not engage in a forum analysis at all escapes us; *Matal* did not discuss forum doctrine in any depth because *Matal* dealt not with the Government permitting speech on government property but with government protection of speech from commercial infringement. Apart from the quoted statement cited above, all AFDI's references to *Matal* invoke Justice Kennedy's concurrence, which of course did not speak for the Court."). However, the Ninth Circuit expressly relied on *Tam* to conclude that a government transit authority violated the First Amendment by applying a viewpoint-based guideline to restrict the display of an ad. *See Am. Freedom Def. Initiative v. King Cty.*, 904 F.3d 1126, 1128 (9th Cir. 2018) ("Applying *Matal v. Tam*, 137 S. Ct. 1744 (2017), we hold that the County's disparagement standard discriminates, on its face, on the basis of viewpoint.").

may "disparage . . . or bring . . . into contemp[t] or disrepute" any "person, living or dead." 15 U.S.C. § 1052(a). Tam appealed the denial of the registration through the administrative appeal process, to no avail. He then filed an action in federal court, where the en banc Federal Circuit ultimately held that the disparagement clause was facially unconstitutional because the provision engages in viewpoint discrimination. The Court affirmed unanimously, stating: "We now hold that this provision violates the Free Speech Clause of the First Amendment. It offends a bedrock First Amendment principle: Speech may not be banned on the ground that it expresses ideas that offend." *Id*. at 1751.

Justice Kennedy's concurrence (joined by Justices Ginsburg, Sotomayor, and Kagan) is particularly relevant. Justice Kennedy begins by affirming the Court's decision and explaining his further treatment of the First Amendment issue. *See id*. at 1765 (Kennedy, J., concurring) ("This separate writing explains in greater detail why the First Amendment's protections against viewpoint discrimination apply to the trademark here. It submits further that the viewpoint discrimination rationale renders unnecessary any extended treatment of other questions raised by the parties."). The concurrence lays bare the Government's argument that the speech restriction is viewpoint neutral:

> The First Amendment's viewpoint neutrality principle protects more than the right to identify with a particular side. It protects the right to create and present arguments for particular positions in particular ways, as the speaker

> chooses. . . . The Government may not insulate a law from charges of viewpoint discrimination by tying censorship to the reaction of the speaker's audience.[14] The Court has suggested that viewpoint discrimination occurs when the government intends to suppress a speaker's beliefs, . . . but viewpoint discrimination need not take that form in every instance. The danger of viewpoint discrimination is that the government is attempting to remove certain ideas or perspectives from a broader debate. . . .

Id. at 1766-67 (Kennedy, J., concurring) (emphasis added). That is precisely what WMATA's restrictions do here. They discriminate on the basis of viewpoint by rejecting certain opinions (as opposed to subject matter).

B. Reasonableness.

In addition to the viewpoint-neutrality requirement, a speech restriction in a nonpublic forum must be reasonable. In *Minnesota Voters Alliance v. Mansky*, 138 S. Ct. 1876 (2018), the Court held that in order for a speech restriction in a nonpublic forum to satisfy the "reasonableness" requirement, government officials enforcing the restriction must be "guided by objective, workable standards." *Id*. at 1891. Because the unqualified ban on "political" apparel at issue in that case did not provide the requisite standards, it was unreasonable in violation of the First Amendment. *Id*.

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[14] WMATA's determination as to whether there are "varying opinions" on a subject is necessarily tying censorship to the reaction of the speaker's audience. *See* Guideline 9, *supra*.

As noted, the only plausible guideline applicable to restrict Petitioners' speech is WMATA's guideline that prohibits "[a]dvertisements intended to influence members of the public regarding an issue on which there are varying opinions." Similar to the restriction held unconstitutional in *Mansky*, this restriction is hopelessly vague and lacks any "objective, workable standard" to guide the discretion of WMATA's speech censors. A previous example suffices to make this point: a purely commercial ad seeking to influence the public to purchase contraception. This ad certainly seeks to influence the public on an issue on which there are varying opinions. If we modify the ad to promote the sale of a Toyota automobile, the same problem arises. What of the public's view that one should move away from fossil fuel products or that foreign imports have destroyed domestic manufacturing? What advertisement in today's highly politicized world would not run afoul of the literal prohibition against "advocacy" ads? And even without a politicized world, what of the public's view that a Toyota automobile is not a good value and that one should purchase a Honda instead? Indeed, all ads by their very nature are "advocacy" ads to some degree. Certainly, the Salvation Army ad already accepted by WMATA raises serious religious "advocacy" issues (*i.e.*, the public should consider donating to the Salvation Army notwithstanding the view by those who oppose organized religion in any form) and even policy issues relating to whether donations to religious charitable organizations should be allowed as a federal tax deduction.

In effect, what WMATA is attempting here is to assume the governmental authority to decide which

viewpoints are acceptable to the public and which are too contested to be given voice. As this Court has noted, "[a] government regulation that allows arbitrary application . . . has the potential for becoming a means of suppressing a particular point of view." *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 130 (1992). In this case, the potential is actual. WMATA's restriction on Petitioners' speech is unreasonable as a matter of law. *See Mansky*, 138 S. Ct. at 1891; *see also United Food,* 163 F.3d at 359 ("The absence of clear standards guiding the discretion of the public official vested with the authority to enforce the enactment invites abuse by enabling the official to administer the policy on the basis of impermissible factors.").

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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