No. 18-1000

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 D.C. Circuit

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QUESTIONS PRESENTED

1. Whether the Court of Appeals correctly held that WMATA's advertising space is a nonpublic forum.

2. Whether the Court of Appeals erred when it found that WMATA's speech restrictions were viewpoint neutral, and when it remanded the question of whether those restrictions were reasonable in light of this Court's decision in *Minnesota Voters Alliance v. Mansky*, 138 S. Ct. 1876 (2018).

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INTRODUCTION

The Petition fails to identify any issue warranting review by this Court. To start, Petitioner has challenged a policy that is no longer in effect. The Court would therefore need to decide whether the case is moot (as one judge below believed) before it could reach the merits of the dispute. Petitioner also asks this Court to review a question that the Court of Appeals did not itself decide, but instead remanded to the district court to be decided in the first instance, in light of an intervening decision by this Court. And although Petitioner claims that there is a conflict in the courts of appeals on the other question presented, there is in fact striking uniformity in the circuits. The cases cited in the Petition definitively establish that every court of appeals would come to the same result the D.C. Circuit did on the facts of this case. And finally, on the merits, Petitioner can prevail only if this Court overturns a nearly-50-year-old precedent, embraced repeatedly by this Court and the courts of appeals. It is thus abundantly clear that this Court should not grant review.

STATEMENT OF THE CASE

I. Statement of Facts

Respondent WMATA is an interstate compact agency and instrumentality of Maryland, Virginia, and the District of Columbia that operates the Metrorail and Metrobus systems in the Washington, D.C. metropolitan area. Pet. App. 2. One of the ways that WMATA raises revenues is by selling advertising space on Metrobuses, Metrorail trains, and on dioramas in Metro stations. Pet. App. 3.

When WMATA first began selling advertising space in the 1970s, it accepted a wide range of advertisements, including political, religious, and advocacy advertising. Pet. App. 4. Over subsequent decades, WMATA faced complaints regarding issue-oriented advertising. Pet. App. 4. That criticism intensified in the 2010s. By then, WMATA faced monthly complaints from members of the community regarding political, religious, and advocacy advertising. Appellate Joint Appendix ("AJA") at 126, AFDI v. WMATA, No. 17-7059 (D.C. Cir. July 24, 2017). Those advertisements addressed a wide range of topics, including, for example, advertisements depicting animal cruelty, taking positions on the legalization of marijuana, and criticizing federal healthcare policy. Pet. App. 4.

By 2015, WMATA's leadership, having spent "nearly [five] years of looking at the question of whether to permit issue-oriented advertisements," Pet. App. 4 (internal quotation marks omitted), "became concerned that the value of the commercial revenues being generated by controversial ads might be outweighed by other considerations that a public agency such as WMATA has and the role that we play in the community and the role we play with our riders and our employees." AJA 127. In particular, WMATA became concerned that issue-oriented advertising generated community and employee opposition, security risks, vandalism, and administrative burdens. AJA 129-32.

Petitioner AFDI routinely purchases advertising space on transit authority property in cities throughout the country in order to spread a message that one court described as "a combination of political speech in favor of Israel and hate speech directed to Mus-

lims." *AFDI v. WMATA*, 898 F. Supp. 2d 73, 76 (D.D.C. 2012). On May 20, 2015, AFDI and its officers Pamela Geller and Robert Spencer[1] submitted two advertisements with identical content (hereafter "advertisement"), to be placed on the outside of Metrobuses and on dioramas within WMATA stations. Pet. App. 3, 5.

The advertisement consists of a cartoon featuring an image of a turbaned, bearded, sword-wielding man meant to be the Prophet Muhammad, who states "YOU CAN'T DRAW ME!" Pet. App. 3. A disembodied, lighter-skinned hand holds a pen or pencil, and a speech bubble emanating from that hand states "THAT'S WHY I DRAW YOU." Pet. App. 3. The advertisement states in large letters at its top: "SUPPORT FREE SPEECH." Pet. App. 3. According to AFDI's complaint, the advertisement was meant to "make the point that the First Amendment will not yield to Sharia-adherent Islamists who want to enforce so-called blasphemy laws here in the United States." Pet. App. 3.

After AFDI submitted its Prophet Muhammad advertisement, but before WMATA had made any decision whether to run it, WMATA determined that it would impose a moratorium on issue-oriented advertisements. Pet. App. 4-5, 47. "[A]fter looking at all of the factors" relevant to WMATA's many "stakeholders," WMATA's Assistant General Manager for Customer Service, Communications, and Marketing "recommend[ed] to the board we ought to stop and review whether or not controversial ads and the value they

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[1] Petitioners are referred to together as "Petitioner" or "AFDI," as in the decision below.

generated were worthwhile in serving transportation for the agency." AJA 128; Pet. App. 4-5. The WMATA Board of Directors agreed. It made this decision based on its long-standing concerns regarding the effects of issue-oriented advertising on its customers, employees, and the community. *See* AJA 129; *id.* at 135 (noting that the decision was based on the "cumulative" effect of the "number of controversial ads that had come in through the pipeline"); Pet. App. 5 (noting that at the board meeting several advertisements, but not the AFDI advertisement, were mentioned). The WMATA official who oversaw the advertising program acknowledged that AFDI's advertisement played a role in the timing of the decision to impose the moratorium. In her words, the AFDI advertisement was "the straw that broke the camel's back," or the final impetus, for WMATA to make the change it had been contemplating as a result of the problems it experienced with issue-oriented advertisements over many years. Pet. App. 4.

On May 28, 2015, the WMATA Board of Directors passed a motion "clos[ing] 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." Pet. App. 5; AJA 34. The motion further explained that during the remainder of 2015, "the Board will review what role such issue-oriented advertising has in WMATA's mission to deliver, safe, equitable and reliable transportation services to the Nation's Capital, and will seek public comment and participation for its consideration before making a final policy determination." AJA 34. Given the temporary pause on accepting issue-oriented advertisements while it

conducted this review, WMATA rejected AFDI's advertisement. Pet. App. 5.

II. Procedural History

In July 2015, AFDI brought this action against WMATA and its Interim General Manager and CEO Jack Requa,[2] alleging that WMATA has violated the First Amendment. According to AFDI, WMATA's "'restriction on [AFDI's] speech [was] content- and viewpoint-based in violation of the Free Speech Clause of the First Amendment' and WMATA's 'true purpose for adopting the [Moratorium] was to silence the viewpoint expressed by [AFDI's] speech.'" Pet. App. 5. AFDI sought declaratory and injunctive relief, as well as nominal damages. AJA 18. The parties engaged in limited discovery and filed cross-motions for summary judgment. AJA 144-45.

In November 2015, while the litigation was ongoing, the WMATA Board of Directors adopted a resolution permanently closing WMATA's advertising space to issue-oriented advertising. *See* Pet App. 5; AJA 35-36. The resolution explained that, consistent with the May 28, 2015 motion, WMATA had conducted a review of issue-oriented advertising, including a survey of the public. *See* AJA at 35. Based on that review, the Board determined that it would adopt commercial advertising guidelines to administer its new policy closing WMATA's commercial advertising space to issue-oriented advertisements. *See id.*

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[2] Paul J. Wiedefeld has since become General Manager and CEO of WMATA and was substituted as a defendant.

Among the Guidelines that the WMATA Board adopted are:

> 9. Advertisements intended to influence members of the public regarding an issue on which there are varying opinions are prohibited.
>
> …
>
> 12. Advertisements that promote or oppose any religion, religious practice or belief are prohibited.

Pet. App. 6; AJA 37-38. After WMATA adopted the resolution and the Guidelines to implement it, AFDI did not amend its complaint to challenge the new policy; its complaint challenged only the May 2015 moratorium, which is no longer in place. Pet. App. 6. Nor did AFDI resubmit its advertisement after the Guidelines were put in place. Pet. App. 6.

The district court granted WMATA's motion for summary judgment, finding no First Amendment violation. *See* Pet. App. 44-60. AFDI appealed. After the appellate briefs were filed, the Court of Appeals sought supplemental briefing regarding whether Petitioner's claims for relief are moot because the complaint challenged only the interim advertising ban, which had been superseded by the current Guidelines.

The Court of Appeals affirmed in substantial part the district court's grant of summary judgment. First, the Court determined that the case was not moot. The Court acknowledged that "at first blush"

the case appeared moot due to the fact that the temporary policy was no longer in effect, and that "[t]here seems little point in enjoining the enforcement of a moratorium that is no longer in place." Pet. App. 7. Nevertheless, the Court held that the new policy was substantively similar to the challenged temporary policy, such that Petitioner was disadvantaged in the same way. *See* Pet. App. 8-9. The Court held that the case should be treated as a challenge to the permanent policy now in force. Pet. App. 10.

Turning to the merits, the Court of Appeals first applied this Court's forum doctrine to determine the proper status of WMATA's advertising space. It noted that a different panel had recently resolved the question, holding that WMATA's advertising space was a nonpublic forum. See Pet. App. 13 (citing *Archdiocese of Washington v. WMATA*, 897 F.3d 314 (D.C. Cir. 2018)).

Because WMATA's advertising space is a nonpublic forum, its speech restrictions are permissible so long as they are viewpoint neutral and reasonable. *See* Pet. App. 14. The Court of Appeals began with the viewpoint neutrality analysis, rejecting each of Petitioner's three arguments that WMATA's Guidelines were not viewpoint neutral. *First*, the Court rejected Petitioner's contention that WMATA's decision to close its forum was an act of discrimination against Petitioner's speech. The Court assumed that such a claim would be viable, *see Ridley v. Massachusetts Bay Transportation Authority*, 390 F.3d 65 (1st Cir. 2004), but held that no reasonable jury could find that WMATA had changed its forum in order to discriminate against Petitioner. In particular, the Court of Appeals concluded that there was no direct evi-

dence that WMATA had intended to discriminate against Petitioner's viewpoint, no retrospective evidence from before the time of the decision that this was WMATA's motivation, and no evidence from after the decision that WMATA was not enforcing its ban against other parties. Pet. App. 15-20. The Court of Appeals found a clear fit between WMATA's goal of avoiding controversies and complications that attend issue-oriented speech in transit property and its ban on all issue-oriented advertising.

Second, the Court of Appeals held that WMATA's Guidelines were facially viewpoint neutral. It noted that *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974), was "almost directly on point." Pet. App. 21. The Court of Appeals explained that *Lehman* stands for the proposition that "it is not facially viewpoint discrimination to ban political advertising in a nonpublic forum," Pet. App. 22, and it further held that "a city transit system has discretion to develop and make reasonable choices concerning the type of advertising that may be displayed in its vehicles." Pet. App. 21 (quoting *Lehman*, 418 U.S. at 303). The Court of Appeals thus rejected Petitioner's argument that it was viewpoint discrimination to allow a company to advertise a commercial product but not to allow an advocacy organization to promote its cause. Pet. App. 22-23. It further held that were Petitioner correct that such distinctions were impermissible, it would erase the carefully constructed divide between content and viewpoint discrimination altogether. Pet. App. 23.

Third, the Court of Appeals rejected Petitioner's challenge to WMATA's Guideline 12, which bars "Advertisements that promote or oppose any religion, re-

ligious practice or belief are prohibited." It noted that Petitioner had never suggested before its reply brief that WMATA's rejection of its advertisement had anything to do with religious speech, and that it had adduced no evidence that WMATA had rejected the advertisements because they promoted or opposed religion. Pet. App. 25-26. As a result, the Court of Appeals concluded Guideline 12 was irrelevant to the case on the current record. Pet. App. 26.

The Court of Appeals next turned to the reasonableness of WMATA's speech restrictions. Noting that "[a] regulation is reasonable if it is consistent with the government's legitimate interest in maintaining the property for its dedicated use," the court found WMATA's issue-oriented advertising ban was consistent with WMATA's efforts to operate a transit system without the problems engendered by issue-oriented advertising that it had identified. Pet. App. 26-27 (citation omitted). The Court of Appeals observed, however, that after the case was argued but before it was decided, this Court decided *Minnesota Voters Alliance v. Mansky*, 138 S. Ct. 1876 (2018), which held that any government speech restrictions must be "guided by objective, workable standards." *Id.* at 1891. The Court noted that the parties' briefing had not taken into account this intervening precedent, and that evidence regarding how Guideline 9 had been applied would be relevant to this inquiry. The Court of Appeals thus remanded the case to the district court on the question of whether Guideline 9 was capable of reasoned application.

Judge Henderson dissented on jurisdictional grounds. She contended that Petitioner's claims for

prospective relief were moot because Petitioner did not amend its complaint to challenge the Guidelines after WMATA had replaced the temporary moratorium in November 2015. According to Judge Henderson, because those Guidelines are distinct from the moratorium, and because petitioner never challenged them, Petitioner's only challenge is to a policy no longer in effect, and is therefore moot. Pet. App. 33-43. Judge Henderson's mootness opinion addressed only petitioner's claims for injunctive and declaratory relief. She also would have held, on a question not addressed by either the district court or the majority, that petitioner's damages claim would have failed as to WMATA and its general manager, because WMATA was entitled to Eleventh Amendment immunity, and its manager was not a "person" for purposes of 42 U.S.C. § 1983 when acting in his official capacity. *See* Pet. App. 34 n.1.

Petitioner requested rehearing en banc, which the Court of Appeals denied. *See id.* at 61-62 (denying rehearing en banc in "the absence of a request by any member of the court for a vote").

REASONS FOR DENYING THE PETITION

I. The Court of Appeals' Decision was Correct and Does Not Warrant this Court's Review.

A. The Court of Appeals Correctly Held that WMATA's Advertising Space is a Nonpublic Forum.

The Court of Appeals correctly held that WMATA's advertising space is a nonpublic forum. In response,

Petitioner appears to contend that this Court's undisturbed 45-year old precedent is wrong and should be "revisit[ed]"; that WMATA should not have been allowed to alter the status of its forum; and that because WMATA allows *some* advertisements in its forum, it must be considered a designated public forum. Each of these contentions is wrong under this Court's precedents, and none warrants this Court's review.

Under the public forum doctrine, public property is divided into three categories: 1) traditional public forums, 2) designated public forums, and 3) nonpublic forums.[3] *See Cornelius v. NAACP Legal Def. and*

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[3] This Court has sometimes used the term "limited public forum" interchangeably with "nonpublic forum." But this Court has made clear that both terms refer to public property opened for limited use by particular groups or for particular purposes, and that the same test applies regardless of the term used. *Compare R.A.V. v. City of St. Paul*, 505 U.S. 377, 390 n.6 (1992) (noting that in "nonpublic forums," the government can engage in "reasonable and viewpoint-neutral content-based discrimination"), *with Christian Legal Soc'y Chapter of the Univ. of California, Hastings Coll. of the Law v. Martinez*, 561 U.S. 661, 679 n.11 (2010) (noting that in "limited public forums," the government "may impose restrictions on speech that are reasonable and viewpoint-neutral"). This Court found in *Lehman*, 418 U.S. at 299, that a government entity could limit political speech in the advertising space on city buses, and it has frequently described the city's policy in *Lehman* as creating a "nonpublic forum." *See Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2252 (2015); *R.A.V.*, 505 U.S. at 390 n.6. Regardless of the terminology used, in the transit context, "[t]he label ['limited' or 'nonpublic'] doesn't matter, because the same level of First Amendment scrutiny applies to all forums that aren't traditional or designated public forums." *Seattle Mideast Awareness Campaign v. King Cty.*, 781 F.3d 489, 496 n.2 (9th Cir. 2015).

In its petition (at 20), Petitioner admits that these terms are used interchangeably, but contends that this Court has made a

Educ. Fund., 473 U.S. 788, 800 (1985). The extent to which the government can permissibly regulate speech "depends on the nature of the relevant forum." *Id.* WMATA's advertising space is not a traditional public forum, as Petitioner concedes. *See* Pet. 17 n.9. The appropriate degree of First Amendment scrutiny therefore depends on whether that advertising space should be treated as a nonpublic forum or a designated public forum.

A nonpublic forum is public property that is "not by tradition or designation a forum for public communication." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983). For such property, "the state 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.'" *Id.* This standard for a nonpublic forum thus requires only that the government's restrictions on speech be viewpoint neutral and reasonable. By contrast, a designated public forum is "government property that has not traditionally been regarded as a public forum [that] is intentionally opened up for that purpose." *Pleasant Grove City v. Summum*, 555 U.S. 460, 469 (2009). The opening of a designated public forum must be intentional, and the government may alter the open nature of the forum. *See Cornelius*, 473 U.S. at 802. Re-

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"mistake" in its application of the forum doctrine. It suggests, absent any citation to applicable case law, that this Court should create a new subcategory including transit advertising space, and apply a stricter test than the Court's precedent dictates. *See id.* at 20-23. This insubstantial argument serves only to confirm that Petitioner's forum analysis runs counter to well-settled precedent.

strictions on speech in a designated public forum are subject to strict scrutiny if they are content-based. *See Summum*, 555 U.S. at 469-70.

As the Court of Appeals correctly held, when WMATA closed its advertising space to issue-oriented advertisements and adopted its Guidelines, it created a nonpublic forum. *See* Pet. App. 13 (citing *Archdiocese of Washington*, 897 F.3d at 322-24). The court below relied on its *Archdiocese* holding, in which another panel of the Circuit rightly concluded that WMATA "plainly evinced its intent in 2015 to close WMATA's advertising space to certain subjects," thereby "convert[ing] that space into a non-public forum in the manner contemplated by the Supreme Court." *Archdiocese*, 897 F.3d at 323 (citing *Cornelius*, 473 U.S. at 803-04). The *Archdiocese* Court also noted that this Court's decision in *Lehman*, which upheld a transit authority's ban on political speech on advertising in buses, forecloses any argument that WMATA had not established a nonpublic forum. *See id.* at 323.

Petitioner recognizes that *Lehman* forecloses its argument that WMATA's advertising space should be considered a designated public forum. In fact, its petition leads with a contention that this Court should "revisit" *Lehman* because the Court's forum analysis is "unworkable" for public transit advertising space. Pet. 11, 20. But this Court has repeatedly reaffirmed *Lehman*'s vitality, including as recently as last year, *see, e.g.*, *Mansky*, 138 S. Ct. at 1886; *United States v. Kokinda*, 497 U.S. 720, 726 (1990); *Cornelius*, 473 U.S. at 802-03, and the Court has *never* questioned its continued application. The

Court should not accept Petitioner's misguided invitation to revisit this well-established precedent.

Next, Petitioner suggests that because WMATA had previously designated its advertising space as a public forum, it was improper for WMATA to convert its space into a nonpublic forum in 2015. Pet. 10-11, 14. This argument also flies in the face of this Court's precedent. *See, e.g.*, *Cornelius*, 473 U.S. at 802 (a governmental body "is not required to indefinitely retain the open character of" its forum); *Perry*, 460 U.S. at 46 (same). WMATA's earlier decision to designate its advertising space as a public forum does not negate its current status as a nonpublic forum.

Finally, Petitioner contends, without citation, that WMATA would need to close its forum to "all private speech" in order to create a nonpublic forum. *See* Pet. 23 n.12. This lack of citation is telling, as Petitioner's "no-private-speech" rule for nonpublic forums is inconsistent with every articulation of the forum doctrine this Court has ever made. Instead, "selective access" to government property for private speakers is the hallmark of a nonpublic forum, and that "selective access does not transform government property into a public forum." *Perry*, 460 U.S. at 47; *see also*, *e.g. Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 679 (1998) (same); *Kokinda*, 497 U.S. at 730 (same). WMATA's decision to limit access to non-issue-oriented advertising is precisely the kind of restriction that this Court has found to establish a nonpublic forum since *Lehman*.

Put simply, the Court of Appeals correctly held that WMATA established a nonpublic forum in 2015. That decision does not warrant review.[4]

B. The Court of Appeals Correctly Held that WMATA's Speech Restriction was Viewpoint Neutral, and Its Narrow Remand on Whether the Restriction Was Reasonable Does not Warrant Review.

Speech restrictions in a nonpublic forum need only be viewpoint neutral and reasonable in light of the purpose that the forum serves. *See Perry*, 460 U.S. at 46, 49. The Court of Appeals properly held that Guideline 9 was viewpoint neutral. It also correctly found that the restriction was reasonable in light of WMATA's mission to provide safe and reliable public transit. Because *Mansky* was issued after briefing and argument in the Court of Appeals, the D.C. Circuit remanded for further briefing and factual development on the issue of whether Guideline 9 is capable of reasoned application. None of these holdings warrants review by this Court.

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[4] Because WMATA's advertising space is a nonpublic forum, Petitioner's reliance on *Matal v. Tam*, 137 S. Ct. 1744 (2017), Pet. 30-32 & n.13, is misplaced. As the Court of Appeals explained, *Matal* did not involve the forum doctrine, and in any event, its finding that the government policy at issue was not viewpoint neutral has no bearing on the entirely different policy at issue here. Pet. App. 13. Moreover, as the Court of Appeals noted, Petitioner's argument regarding *Matal* relies almost entirely on Justice Kennedy's concurring opinion, which did not garner a majority of the Court. *Id*.

1. WMATA's speech restriction is viewpoint neutral.

WMATA's ban on issue-oriented advertising is viewpoint neutral. In a nonpublic forum, "a speaker may be excluded … if he wishes to address a topic not encompassed within the purpose of the forum, or if he is not a member of the class of speakers for whose especial benefit the forum was created," so long as the speaker is not denied access "solely to suppress the point of view he espouses." *Cornelius*, 473 U.S. at 806 (citation omitted). WMATA's policy makes no distinctions based on point of view; instead it restricts only a specific category—or "topic"—of speech: issue-oriented advertising. It makes no difference under WMATA's policy what political, religious, or advocacy viewpoint a speaker is supporting. So long as the speech addresses such a topic, *i.e.*, an issue on which there are varying opinions, WMATA will not accept the advertisement in its forum.

As the Court of Appeals held, Petitioner's challenge to this policy is "confused," Pet. App. 14, but Petitioner appears to contend that any restriction on a topic of speech, such as political speech, is viewpoint-based because it acts to silence "multiple viewpoints," Pet. 27-32. According to Petitioner, such a policy impermissibly favors commercial speech over non-commercial speech. Pet. 28-29.

As the Court of Appeals held, however, Petitioner's contention is foreclosed by *Lehman*, which upheld a ban on political advertisements by noting that "the managerial decision to limit car card space to innocuous and less controversial commercial and

service oriented advertising does not rise to the dignity of a First Amendment violation." 418 U.S. at 304; *see also id.* at 307 (Douglas, J., concurring); Pet. App. 21.

Equally to the point, as the Court of Appeals also held, Petitioner's argument would eviscerate the distinction between content- and viewpoint-based discrimination, allowing any categorical ban to be reframed as a bar on "multiple viewpoints." Pet. App. 22-23. If such a rule were adopted, it would force the very "all-or-nothing choice" that might lead governments to "not open the property at all" to speech, the result this Court's forum doctrine is designed to avoid. *Forbes*, 523 U.S. at 680. This holding, plainly supported by this Court's decisions, does not warrant review.

For this reason, numerous courts of appeals have upheld similar bans on issue-oriented advertising in transit authority advertising space as viewpoint neutral. *See, e.g.*, *AFDI v. SMART*, 698 F.3d 885, 895 (6th Cir. 2012) (finding that a policy barring political advertisements is viewpoint neutral); *Children of the Rosary v. City of Phoenix*, 154 F.3d 972, 974, 980-81 (9th Cir. 1998) (White, J., sitting by designation) (same); *Lebron v. Nat'l R.R. Passenger Corp. (Amtrak)*, 69 F.3d 650, 658 (2d Cir. 1995), *opinion amended on denial of reh'g,* 89 F.3d 39 (2d Cir. 1995) (same). As discussed below, *see* p. __, *infra*, no court has held to the contrary.

Petitioner also appears to make a fact-bound, as-applied challenge to WMATA's policy, contending that the policy was adopted *sub silentio* to suppress its viewpoint. *See* Pet. 25-26. But the Court of

Appeals also rejected this claim, both as a matter of law and fact. Although this Court has never affirmed that such a claim is viable, the Court of Appeals assumed for the sake of argument that it would be viable if Petitioner could show that the forum was changed in order to suppress its viewpoint. Adopting the test applied in *Ridley v. Massachusetts Bay Transportation Authority*, 390 F.3d 65 (1st Cir. 2004), the court below determined that Petitioner would need to show either direct evidence of viewpoint discrimination, "retrospective evidence" from before the forum was closed that shows that the forum was closed to suppress a disfavored viewpoint, or "prospective" evidence that the speech ban has been unevenly applied since it was adopted. *See* Pet. App. 15-18.

Examining the factual record, the Court of Appeals found that Petitioner's claims "fall short, indeed, so far short that no reasonable jury could uphold them." Pet. App. 18. Petitioner presented no prospective evidence at all, let alone evidence that would show that WMATA has not evenhandedly applied its Guidelines since they were adopted in 2015. Pet. App. 18. And the "weak" retrospective evidence proffered by Petitioner, shows only that Petitioner's Prophet Muhammad advertisement was "the last in a long line of controversial or potentially controversial advertisements" and "does not mean the closure of the forum was meant to keep out the views of AFDI in particular." Pet. App. 19. This decision was correct and is highly fact-bound. Review by this Court is therefore plainly unwarranted.

2. The Court of Appeals' narrow remand on whether WMATA's speech restriction is reasonable does not warrant review

A regulation of speech in a nonpublic forum is "reasonable" if "it is wholly consistent with the [government's] legitimate interest in preserv[ing] the property ... for the use to which it is lawfully dedicated." *Perry*, 460 U.S. at 50-51 (citation and internal quotation marks omitted). This standard does not impose a high bar: The restriction "need only be *reasonable;* it need not be the most reasonable or the only reasonable limitation." *Cornelius,* 473 U.S. at 808. In *Cornelius*, the Court specifically noted that "avoiding controversy that would disrupt the workplace and adversely affect" the forum was a weighty government interest, and that "the Government need not wait until havoc is wreaked to restrict access to a nonpublic forum." *Id.* at 809-10; *see also Lehman*, 418 U.S. at 304 (where a "city consciously has limited access to its transit system advertising space in order to minimize chances of abuse, the appearance of favoritism, and the risk of imposing upon a captive audience," such justifications "are reasonable legislative objectives").

The Court of Appeals properly rejected Petitioner's argument that WMATA's speech restriction is inconsistent with its goals for the forum. Petitioner argued below, as it does now, that WMATA had accepted issue-oriented advertisements before it closed its forum, and that passengers and observers see many issue-oriented advertisements around Washington, DC. Pet. 24.

But as the Court of Appeals explained, uncontested testimony established that, over time, WMATA became concerned that burdens stemming from issue-oriented advertising—including complaints from riders, community leaders, and employees; vandalism; security threats; and the increased administrative burden of evaluating potentially unacceptable advertisements—outweighed whatever additional revenue those advertisements raised. Pet. App. 27. WMATA's choice under these circumstances was "eminently reasonable; it might have cut into WMATA's revenues, but it necessarily avoided the complaints, the vandalism, and the security threats that WMATA's open advertising policy had engendered." *Id.* This fact-bound holding does not warrant review.

As noted above, p. 9, *supra*, after this case was argued in the court below, this Court issued its opinion in *Manksy*. As relevant here, *Mansky* held that in order for a forum-based speech restriction to be reasonable, the discretion given to government officials evaluating speech must be "guided by objective, workable standards." 138 S. Ct. at 1891. The Court of Appeals determined that Guideline 9 should be remanded to the district court to determine whether that Guideline was permissible under *Manksy*'s test. Pet. App. 30-31. The Court stated that the record should be supplemented, as "information as to how [Guideline 9] has been applied would certainly be information on whether it is capable of reasoned application." Pet. App. 31. The Court of Appeals also stated that WMATA should be able to clarify the reasoning for its rejection of the advertisement in light of the intervening adoption of the Guidelines. *Id.*

The Court of Appeals' decision to remand in light of that intervening decision is sound practice—one that this Court often follows when it grants, vacates, and remands cases after it issues a decision that might bear on the outcome of such a case. In particular, this remand will allow the district court to consider whether WMATA would reject AFDI's Prophet Muhammad advertisement under Guideline 12, which bars advertisements that promote or oppose any religion, religious practice or belief. The Court of Appeals' sensible decision to allow the district court to supplement the record and allow the parties to brief in the first instance how *Mansky* affects the reasonableness analysis does not warrant review by this Court. In sum, there is no reason for this Court to intercede *now* when the district court and Court of Appeals will engage in the very same analysis with the benefit of an expanded record and additional decisions evaluating *Mansky*.

II. There is No Conflict in the Circuit Courts on Either Question Presented

Petitioner contends that there is conflict in the circuits as to only the first question presented: whether WMATA's speech restrictions establish a nonpublic forum.[5] But no such conflict exists.

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[5] Although Petitioner does not argue that the Court of Appeals' holding on reasonableness is in conflict with other courts of appeals, it cites to two Third Circuit cases in which that court found speech restrictions unreasonable. *See* Pet. 23. But neither of those cases conflicts with the decision below. In *NAACP v. City of Philadelphia*, 834 F.3d 435 (3d Cir. 2016), the Third Circuit found a ban on noncommercial advertisements in an airport to be unreasonable, but did so because it found that the ra-

Petitioner does not clearly indicate the exact nature of the conflict it alleges. *See* Pet. 10-15. But the very cases that Petitioner cites make clear that no conflict exists. Indeed, the distinction in every case Petitioner cites resembles the very distinction drawn by WMATA: a transit authority policy that bars political and/or issue-oriented advertising establishes a nonpublic forum. That is precisely what the Court of Appeals held in this case. Pet. App. 13.

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tionales provided by the city, "revenue maximization and controversy avoidance," were not served by the ban. *Id.* at 445. Revenue maximization was not served because the restriction was costing the city money, while controversy avoidance was not served because the city provided no "record evidence," including in employee depositions, that this was a purpose of the airport's policy. *Id.* at 445-46. By contrast, the record in this case overwhelmingly supports the reasonableness of WMATA's justifications. WMATA provided detailed and undisputed testimony explaining why WMATA closed its forum and why that served WMATA's purposes. *See* pp. 2, 3-4, 18, *supra*. In the face of that record evidence, AFDI submitted nothing.

Similarly, in *Christ's Bride Ministries, Inc. v. Southeast Pennsylvania Transportation Authority*, 148 F.3d 242 (3d Cir. 1998), the transit authority removed anti-abortion advertisements that it believed to be misleading. But that case involved two features not present here. First, the transit authority's policy (and its implementation of that policy) made clear that it operated a designated public forum, and so rejection of the advertisements at issue in that case was subject to heightened scrutiny. Unlike this case, the transit authority presented no evidence that it had "rejected the ad pursuant to a new or previously existing policy to close the forum to debatable or misleading speech generally, or closed it to such speech on any particular topic of health." *Id.* at 253. Second, the transit authority had historically accepted advertisements that advocated in favor of legalized abortion, thereby rendering the decision at issue a clear form of viewpoint discrimination. *See id.* at 251-52.

In contrast to Petitioner's claims of conflict, it is striking how unified the courts of appeals are in addressing policies like the one in this case. Where, as here, a government bars political or issue-oriented advertising, the cases Petitioner cites have held that such a policy established a nonpublic forum. *E.g.*, *Children of the Rosary*, 154 F.3d at 976 (finding that because "[t]he city has consistently restricted political and religious advertising," and instead allowed only commercial advertising, the forum was nonpublic); *DiLoreto v. Downey Unified School District Board of Education,* 196 F.3d 958, 965-66 (9th Cir. 1999) (same).

Alternatively, in those cases that Petitioner cites in which a forum has accepted a wide range of commercial *and* issue-oriented or political advertisements, the courts of appeals have consistently found that governments have designated the forum as public. In *N.Y. Magazine v. Metropolitan Transportation Authority*, 136 F.3d 123 (2d Cir. 1998), for example, the Second Circuit held that the forum had been designated as public because it allowed political speech in addition to commercial speech. *Id.* at 130.[6] Similarly, in *Christ's Bride Ministries*, the Third Circuit held that the lack of "specific restrictions on the type of advertising that SEPTA will accept" and its past acceptance of political, religious, and other issue-oriented advertisements made clear that the transit authority

[6] When the same transit authority later closed its advertising forum to advertisements that are "political in nature," like every other transit authority with a similar policy, its forum became a nonpublic. *See AFDI v. Metro. Transp. Auth.*, 109 F. Supp. 3d 626, 633 (S.D.N.Y. 2015), *aff'd,* 815 F.3d 105 (2d Cir. 2016).

had not closed its forum to any category of expression. 148 F.3d at 251-52. The Sixth Circuit likewise held that "[a]cceptance 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." *United Food & Commercial Workers Union, Local 1099 v. Sw. Ohio Reg'l Transit Auth.*, 163 F.3d 341, 355 (6th Cir. 1998). And before WMATA closed its forum, the D.C. Circuit found that WMATA's previous policy of accepting political advertisements had rendered its advertising space a designated public forum. *See Lebron v. WMATA*, 749 F.2d 893, 896 (D.C. Cir. 1984); *see also Planned Parenthood Ass'n/Chicago Area v. Chicago Transit Auth.*, 767 F.2d 1225, 1227 (7th Cir. 1985) (finding a designated public forum where a transit authority accepted a "wide variety of commercial, political-candidate, public-service, and public-issue advertising").

Petitioner's own cases thus show that the courts of appeals are consistent in their approach: if a transit authority imposes a general ban on issue-oriented or political advertising, it establishes a nonpublic forum. Where it instead allows such speech, it has established a designated public forum. Here, WMATA chose the former approach, creating a nonpublic forum by categorically excluding issue-oriented advertising. Consequently, the Court of Appeals correctly found that WMATA had created a *nonpublic* forum, and every case Petitioner has cited confirms that every other Court of Appeals would have made the exact same determination.

In an apparent effort to obscure this uniformity, Petitioner cites two cases in which transit authorities have adopted fundamentally different speech restrictions than those at issue in this case. Pet. 12-15. In *Ridley*, the First Circuit evaluated a policy that barred advertisements for tobacco, libelous, slanderous or obscene advertisements, advertisements "containing depictions of violent criminal conduct, firearms, profanity, ads harmful to children, and ads that denigrate groups based on gender, religion, race, ethnic, or political affiliation," and advertisements "that promote or appear to promote the use of unlawful goods or services or the commission of unlawful conduct, as well as political campaign ads." 390 F.3d at 77-78. This policy is different from the issue-oriented/non-issue-oriented divide at issue in this case and the cases discussed above. Still, given the presence of a ban on political advertising, the First Circuit found *Lehman* "indistinguishable" and held that these guidelines evinced an effort to create a nonpublic forum. *Id.* at 78-79. Nothing in that decision casts doubt on the decision below.

Petitioner also cites to *Seattle Mideast Awareness Campaign v. King Cty.*, 781 F.3d 489 (9th Cir. 2015), in which the Ninth Circuit evaluated a policy that

> prohibited ads for alcohol and tobacco products; ads for adult movies, video games rated for mature audiences, and other adult products and services; ads promoting illegal activity; depictions of minors or those who appear to be minors engaging in sexual activities; ads containing flashing lights or other features that might undermine safe operation of the buses or distract other drivers; and

> obscene, deceptive, misleading, or defamatory material.

Id. at 493. The policy also "prohibited material that would foreseeably result in disruption of the transportation system or incite a response that threatens public safety." *Id.*

The Ninth Circuit found that this policy created a nonpublic forum. *Id.* at 498-99. It acknowledged that other courts of appeals have determined that policies that ban disruptive speech or speech that is likely to incite violence do not create a nonpublic forum, *so long as* the government is otherwise "willing to accept political speech." *Id.* at 498-99 & n.3. But to the extent that any Circuit conflict exists, it is not implicated by this case—precisely because WMATA does not accept political advertisements. Indeed, as noted above, the Ninth Circuit has repeatedly held, in line with the decision below, that policies that exclude political or issue-oriented advertising establish a nonpublic forum. *See DiLoreto* 196 F.3d at 965-66; *Children of the Rosary*, 154 F.3d at 976. That was not the case in *King*, and so that decision has no bearing on this case.

Finally, to the extent that Petitioner contends that there is a conflict over whether only a ban on noncommercial advertising establishes a nonpublic forum, no court of appeals has ever advanced that position. Indeed, *Lehman* directly refutes it. The policy in *Lehman* allowed for both "commercial and service oriented advertising," 418 U.S. at 304; *see Ridley*, 390 F.3d at 81 ("As a matter of law, under *Lehman,* the dividing line between a public forum and a non-public forum is not the dividing line

between commercial advertisements and paid advertisements from non-profit groups."). Given *Lehman*, it is unsurprising that no court has held that a transit authority must bar all noncommercial advertising to establish a nonpublic forum, and Petitioner has not even attempted to identify a case that contains such a holding. WMATA's policy, like the one in *Lehman*, disallows any advertisements that are not either commercial or service-oriented, and establishes a nonpublic forum. No conflict exists on this question.

III. The Posture of This Case Presents Additional Reasons to Deny Certiorari

This case does not warrant review because, as described above, the decision below was correct and the decision does not conflict with a decision by any other court of appeals. There are, however, two additional reasons to why this case is a particularly poor candidate for this Court's review. *First*, there is a close and difficult question, which drew a dissent in the court of appeals, as to whether Petitioner's claims for prospective relief are moot. *Second*, as discussed above, the Court of Appeals remanded the case to the district court, both to build a record regarding WMATA's implementation of its Guidelines, and to allow WMATA to clarify the basis for its rejection of Petitioner's Prophet Muhammad advertisement. Given that remand, there is no need for this Court to review this case now.

A. There is a close question whether Petitioner's claims for prospective relief are moot

WMATA rejected Petitioner's advertisement under its temporary moratorium, which was in place from May to November 2015. Pet. App. 4-5. In November of that year, WMATA adopted the Guidelines that are currently in effect. Pet. App. 5-6. Petitioner did not amend its complaint to challenge WMATA's Guidelines. Pet. App. 6. Before oral argument, the Court of Appeals requested supplemental briefing regarding whether Petitioner's claims for prospective relief were moot, given that it challenged only a policy no longer in existence. Ultimately, a majority of the Court determined that the claims for prospective relief were not moot, *see* Pet. App. 7-10, while Judge Henderson dissented, maintaining that they were, *see* Pet. App. 33-43.

Federal courts "lack jurisdiction to decide moot cases," because a moot case no longer presents a case or controversy under Article III. *Iron Arrow Honor Soc'y v. Heckler*, 464 U.S. 67, 70 (1983). In a case like this one, in which there is a voluntary change to the challenged conduct, this Court's voluntary cessation precedent governs. The "voluntary cessation of a challenged practice" moots a case if "subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000). There is, however, an exception to this general rule when a new policy "disadvantages [a plaintiff] in the same fundamental way" as the previous policy allegedly did. *Ne. Fla. Chapter of Associated Gen. Contractors*

of Am. v. City of Jacksonville, 508 U.S. 656, 662 (1993). The key question under this doctrine is "whether the new ordinance is sufficiently similar to the repealed ordinance that it is permissible to say that the challenged conduct continues." *Id.* at 662 n.3.

As WMATA stated below, this highly fact-bound question is a close one. WMATA contended below, and continues to believe that because the previous and current policies both contain the same prohibition on issue-oriented advertising, the policies are sufficiently similar that the prospective claims are not moot. The majority agreed, *see* Pet. App. 7-10, whereas the dissent believed that the addition of the Guidelines to the ban on issue-oriented advertising meant that the inquiry as to whether an advertisement could be run was fundamentally different. Pet. App. 38-42. That close question must be decided at the threshold because mootness is jurisdictional. *See DeFunis v. Odegaard*, 416 U.S. 312, 316 (1974).

Even after this Court decides the question of mootness, it will face yet another threshold inquiry: which policy to evaluate. Petitioner's complaint challenges only the temporary moratorium that is no longer in existence. The Court of Appeals determined that it should evaluate the current policy, even though that policy has not been challenged, both because of the "'general rule' that 'an appellate court must apply the law in effect at the time it renders its decision,'" Pet. App. 10 (quoting *Thorpe v. Housing Auth. of Durham*, 393 U.S. 268, 281-82 (1969)), and because it was more practical. Although WMATA does not disagree with this decision, there is no case

directly on point, and it would require a complicated threshold decision from this Court before it can reach the merits of the dispute.

B. The remand by the Court of Appeals counsels against this Court's review

As noted above, *see* pp. 9, 20-21, *supra*, the Court of Appeals remanded the question of whether WMATA's speech restrictions are reasonable in light of this Court's decision in *Mansky*. It did so to allow the parties to incorporate *Mansky* into their arguments, to allow for additional discovery regarding WMATA's implementation of the Guidelines, and to allow WMATA to clarify the basis for its decision to reject AFDI's Prophet Muhammad advertisement under the Guidelines. Pet. App. 31.

Given this posture, there is no reason for this Court to grant review at this time. On remand, the district court will consider these issues, and will be among the first courts to apply this Court's decision in *Mansky*. The parties will have the opportunity to appeal that decision, and if one does, the Court of Appeals will provide an opinion on these currently-undecided issues. At that point, with the benefit of opinions below on all issues in the case, this Court could decide whether certiorari review is appropriate. As such, there is no reason to grant review at this interim stage.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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April 26, 2019