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 District of Columbia Circuit

REPLY BRIEF FOR PETITIONERS

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Respondents claim that "[t]he Petition fails to identify any issue warranting review by this Court." They are mistaken. And it is incorrect to assert that "Petitioner has challenged a policy that is no longer in effect." Resp. Br at 1. The D.C. Circuit correctly held that this challenge is not moot, App. 7-10, and Respondents have confirmed that they will continue to refuse to display Petitioners' ads based upon Guidelines 9 and 12 of WMATA's existing policy, *see* Pet. at 7-8; Resp. Br. at 29 ("WMATA contended below, and continues to believe that because the previous and current policies both contain the same prohibition on issue-oriented advertising, the polices are sufficiently similar that the prospective claims are not moot."). Mootness is not a bar to review.

Moreover, there is no need to remand this case to conclude that WMATA's guidelines at issue here are viewpoint based and unreasonable as a matter of law. Contrary to Respondents' view, these guidelines are not subject matter or "topic" restrictions. Resp. Br. at 16. Rather, they are viewpoint restrictions. *See* Pet. at 26-32. Just as *Matal v. Tam*, 137 S. Ct. 1744 (2017), provided much needed guidance on what constitutes viewpoint discrimination, this case would serve as an excellent vehicle to further educate litigants and the lower courts on this important aspect of First Amendment jurisprudence.[1]

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[1] As noted in the Petition, there is conflict as to the application of *Matal v. Tam* in the very context presented by this case: the application of transit authority adverting guidelines. The D.C. Circuit finds no application for *Matal*, *see* App. 13, whereas the

And finally, Petitioners do contend that this Court needs to revisit its "nearly-50-year-old precedent" because it fails to provide the necessary guidance from this Court on contentious and often repeated issues, as all of the case law cited by the parties illustrates. Indeed, much has changed since the 1970's, "specifically including the vastly different and evolving advertising environment, including the politicization of advertising." *See* Pet. at 11. Accordingly, it would be appropriate, and necessary, for this Court to revisit *Lehman v. Shaker Heights*, 418 U.S. 298 (1974).

We turn now to address Respondents' objections in further detail, but before doing so, we pause briefly to review a few preliminary and salient points.

First, WMATA's existing guidelines do not limit advertising to just commercial ads; WMATA also permits non-commercial ads, including ads from religious organizations such as the Salvation Army that seek financial contributions to support their religious-based missions. *See Archdiocese of Wash. v. Wash. Metro. Area Transit Auth.*, 897 F.3d 314, 329 (D.C. Cir. 2018) ("WMATA accepted the ad of the Salvation Army, a religious organization whose ad exhorted giving to charity but contained only non-religious imagery.").

Ninth Circuit found it dispositive, *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.").

Second, the two guidelines that serve as the basis for rejecting Petitioners' ads are as follows:

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

See Pet. at 7; App. at 29 ("AFDI focuses this attack in particular upon Guideline 9. . . ."); 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").

Third, 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.

And fourth, 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. *See Am. Freedom Def. Initiative v. Mass. Bay Transp. Auth.*, 781 F.3d 571, 593 (1st Cir. 2015) (Stahl, J., dissenting).

We turn now to the forum question, and, in particular, why this Court should address this issue in light of *Lehman*.

I. The Court Should Grant Review to Reconsider *Lehman*.

Lehman v. Shaker Heights, 418 U.S. 298 (1974), is not a compelling case to provide the legal foundation for the issues presented, as a long line of cases that continue to grapple with its application has demonstrated. *See* Pet. at 10-15. This Court should reconsider *Lehman*.

Petitioners agree with Justice Brennan and the other three dissenting justices (Stewart, Marshall, and Powell) who resolved the forum question in *Lehman* as follows:

> [T]he city created a forum for the dissemination of information and expression of ideas when it accepted and displayed commercial and public service advertisements on its rapid transit vehicles. Having opened a forum for communication, the city is barred by the First and Fourteenth Amendments from discriminating among forum users solely on the basis of message content.

Lehman v. Shaker Heights, 418 U.S. 298, 310 (1974) (Brennan, J., dissenting, joined by Stewart, J., Marshall, J., and Powell, J.).[2]

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[2] The dissent's view of the forum issue more closely comports with this Court's recent forum precedent. Per this Court, a public forum exists when the government intentionally opens its property

In *Lehman*, 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 because the government "limit[ed] car card space to innocuous and less controversial commercial and service oriented advertising." *Id*. at 304. As noted, four justices dissented. And while five members of the Court agreed that the judgment upholding the city's speech restriction should be affirmed, a majority did not agree on an opinion.

Justice Blackmun announced the judgment of the Court and, in an opinion joined by Justices Burger, White, and Rehnquist, expressed the view that the city's advertising policy did not violate the First or Fourteenth Amendments since (1) no First Amendment

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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 v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 802 (1985) (emphasis added). Compare the forum created by WMATA, which permits a wide array of commercial and non-commercial ads (a public forum), with "display cases in public hospitals, libraries, office buildings, military compounds, and other public facilities," such as the Supreme Court building (non-public forums), and the difference is stark. *See Lehman*, 418 U.S at 304 (providing examples of non-public forums). The standard for restricting speech in the former should not be the same as the standard applied to the latter. WMATA's forum is a designated public forum. And WMATA always has the choice of closing the forum altogether.

forum was present, and (2) the city reasonably limited access to the advertising space. *Id.* at 304.

However, Justice Douglas, concurring in the judgment, expressed the view that the commuters on the transit system had a right to be free from forced intrusions on their privacy. And based on this reasoning, he concluded that the city was precluded from transforming its transit vehicles into forums for the dissemination of ideas. *Id.* at 307. ("In my view the right of the commuters to be free from forced intrusions on their privacy precludes the city from transforming its vehicles of public transportation into forums for the dissemination of ideas upon this captive audience."). Thus, based on Justice Douglas's view, a transit advertising space could never be a designated public forum because the "right of the commuters" would trump any such designation.

In short, *Lehman* can hardly be viewed as establishing clear and convincing precedent for this highly contentious area of the law, particularly when there was no consensus opinion, no detailed forum analysis,[3] and it provides little, if any, guidance for the lower courts, which are typically faced with a myriad of

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[3] The Court's forum analysis was not developed at this time. In *Lehman*, the Court simply concluded that "[n]o First Amendment forum is here to be found." *Lehman*, 418 U.S. at 304. As we know, many "First Amendment forum[s]" have been found on government transit advertising space, including WMATA's advertising space, despite *Lehman*. *See, e.g., 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.").

advertising guidelines, many of which lack any clear and objective standards, such as WMATA's guidelines at issue here. *See, e.g., Gregoire v. Centennial Sch. Dist.*, 907 F.2d 1366, 1375 (3d Cir. 1990) ("[I]f 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."). *Lehman*'s time has come.

Aside from the scant analysis provided in *Lehman*, this Court has never addressed the important First Amendment issues presented by this Petition.[4] This Court should grant review, reconsider *Lehman*, and issue an opinion that will provide the clear and necessary guidance for advertisers, government transit agencies, and the lower courts.

II. The Court Should Grant Review to Resolve the Viewpoint Discrimination Issue in Order to Provide Guidance to Advertisers, Litigants, and the Lower Courts.

It is a mistake to conclude that WMATA's guidelines are restrictions on an ad's subject matter. Rather, the guidelines are impermissible viewpoint-based restrictions. Such restrictions are unlawful regardless of the nature of the forum. *See Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995) (observing that "[v]iewpoint discrimination

[4] Perhaps the closest this Court has come to granting review in a case like this was a case Petitioners brought in 2016. The petition for writ of certiorari was ultimately denied, but over the dissent of Justice Thomas, who was joined by Justice Alito. *See Am. Freedom Def. Initiative v. King Cnty.*, 136 S. Ct. 1022 (2016) (Thomas, J., dissenting).

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"). 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.

Viewpoint discrimination occurs when the "rationale for the restriction" is "the specific motivating ideology or the opinion or perspective of the speaker." *Rosenberger*, 515 U.S. at 829. Thus, "[w]hen 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. And 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.").

In their Petition, Petitioners provided a simple example to illustrate their 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.

Pet. at 27. Respondents are silent on this point. And the reason is clear: 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.

Similarly, Respondents have no answer to Petitioners' argument that the *Archdiocese of Washington* case further illustrates why the challenged guidelines are not permissible subject matter or "topic" restrictions, but impermissible viewpoint restrictions:

> 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).

Pet. at 28. Thus, Respondents have no answer to Petitioners' argument that

> 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.").

Pet. at 29.

Regarding Petitioners' ad copy, WMATA rejected it because "it advocates free speech and does not try to sell you a commercial product." App. 26; JA-90. However, "free speech" as a subject matter or "topic" is not excluded. Furthermore, Petitioners are not a religious organization. The ads do not mention religion. And the drawing depicted in the ad was a winning entry to an art contest hosted by Petitioners. WMATA permits ads about contests.[5] In sum, the rejection of Petitioners' ads was unreasonable and viewpoint based.

All of this points to the conclusion that WMATA's guidelines on their face lack clear, objective standards

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[5] 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.").

and in fact operate as viewpoint-based restrictions. Consequently, these restrictions are unlawful regardless of the nature of the forum. *See Minn. Voters Alliance v. Mansky*, 138 S. Ct. 1876, 1891 (2018) (holding 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"); *see also United Food & Commercial Workers Union, Local 1099 v. Sw. Ohio Reg'l Transit Auth.*, 163 F.3d 341, 359 (6th Cir. 1998) (stating that "[t]he 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," such as viewpoint).

In the final analysis, there are compelling and important reasons for this Court to grant review. And there are no procedural hurdles or bars that would preclude it.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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