No. 18-1455

In The Supreme Court of the United States

ARCHDIOCESE OF WASHINGTON, a corporation sole,

Petitioner,

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY; PAUL J. WIEDEFELD, in his official capacity as General Manager of the Washington Metropolitan Area Transit Authority,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia

BRIEF OF CHRISTIAN LEGAL SOCIETY, AMERICAN ASSOCIATION OF CHRISTIAN SCHOOLS, THE ANGLICAN CHURCH IN NORTH AMERICA, ASSOCIATION OF CHRISTIAN SCHOOLS INTERNATIONAL, COUNCIL FOR CHRISTIAN COLLEGES & UNIVERSITIES, GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS, THE LUTHERAN CHURCH – MISSOURI SYNOD, QUEENS FEDERATION OF CHURCHES, AND WORLD VISION, INC. (U.S.), AS *AMICI CURIAE* IN SUPPORT OF THE PETITION

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QUESTION PRESENTED

The questions presented are:

1. Whether WMATA's policy of refusing to accept advertisements that promote or oppose religion or reflect a religious perspective violates the First Amendment.

2. Whether that discrimination against religious speech violates the Religious Freedom Restoration Act.

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INTEREST OF *AMICI CURIAE*[1]

Amici are religious organizations that have long worked to protect the right of all Americans to engage in religious speech in the public square without fear of government censorship. The ability to express publicly its religious ideas, values, and perspectives to its fellow citizens is essential to each organization's ability to carry out its mission. Detailed statements of interest for each *amicus* are found in the Appendix.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Washington Metro Area Transit Authority (WMATA) accepted a variety of advertisements for the exterior of its buses—including, during the winter holiday season, ads exhorting readers to shop for gifts and an ad exhorting readers to give to the Salvation Army's charitable work. But WMATA rejected a Christmas ad from the Roman Catholic Archdiocese of Washington ("Archdiocese") exhorting readers to "Find the Perfect Gift" and directing them to a website with information about opportunities to give to *Catholic* charitable

[1] Pursuant to Rule 37.2(a), *amici* gave all parties' counsel of record timely notice of their intent to file this brief. Counsel for Petitioner has filed a letter granting blanket consent with the Clerk. Counsel for Respondent gave written consent to the filing of this brief. In accordance with Rule 37.6, no counsel for a party authored this brief in whole or in part, and no person or entity other than the *amici*, their members, or their counsel made a monetary contribution intended to fund the brief's preparation or submission.

work, as well as opportunities to attend Mass. WMATA rejected the Archdiocese's ad on the ground that it contained religious language and an image of shepherds and a star, and thereby allegedly violated WMATA's policy excluding advertisements that "promote or oppose any religion, religious practice or belief."

Remarkably, a court of appeals panel held that WMATA had not discriminated against the religious perspective reflected in the Archdiocese's ad. The judges who dissented from the denial of rehearing *en banc* summarized this case succinctly: "[T]he panel opinion conflicts with Supreme Court precedent on an issue of exceptional importance: the freedom to speak from a religious viewpoint." App-52 (Griffith, J., joined by Katsas, J.).

I. In three key decisions, this Court has made clear that when government targets religious speech to exclude it from a government forum, the exclusion unconstitutionally discriminates against religious viewpoints. See *Lamb's Chapel v. Center Moriches School Dist.*, 508 U.S. 384 (1993); *Rosenberger v. Rector and Visitors of Univ. of Virginia*, 515 U.S. 819 (1995); *Good News Club v. Milford Central School*, 533 U.S. 98 (2001). As the dissent to the rehearing *en banc* showed, "WMATA's policy against religious ads is indistinguishable from the restrictions" in these decisions. App-58.

The petition for certiorari describes this Court's viewpoint-discrimination rulings and how the court of appeals' decision flouts them. *Amici* agree with those

descriptions.[2] We trace in greater detail two ways in which the court of appeals' decision is irreconcilable with this Court's rulings.

A. In holding that WMATA's exclusion rested on subject matter rather than viewpoint, the court of appeals reasoned that the Archdiocese would have been able to place an ad urging charitable donations if its ad, like that of the Salvation Army, "contained only non-religious imagery"—for example, an ad simply saying "Please Give to Catholic Charities." App-25. This argument is irreconcilable with *Lamb's Chapel*, *Rosenberger*, and *Good News Club*. In each of those cases the presentation of a religious perspective involved explicit religious language, not mere reference to a religious identity or the religious nature of a belief. A restriction on "religious imagery" cripples the ability of speakers to present religiously grounded, and only religiously grounded, perspectives.

B. The court of appeals also relied heavily on the fact that external advertising space on WMATA buses was a nonpublic rather than a public forum, and that WMATA categories of acceptable advertisements were selective. But as the dissent to the denial of rehearing *en banc* responded: "[I]n any First Amendment forum, no matter its scope, viewpoint discrimination always violates the First Amendment." App-60. The court of appeals' refusal to find viewpoint discrimination here

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[2] We also agree with the petition that WMATA's discrimination against religious advertisements violated the Religious Freedom Restoration Act.

flouted this Court's precedents, and the fact that the forum in question is nonpublic does nothing to change that.

II. Moreover, the specific subject matter involved in this case—the meaning and essence of Christmas and the winter holidays—itself presents important and recurring questions. There is an ongoing debate in society about the essence of the holiday, the priorities to observe in celebrating it, and the motivation for gift-giving. On these subjects, various religious and secular perspectives compete, and the government must not discriminate among expressions of these perspectives by private groups and individuals.

A. The court of appeals' decision here creates a circuit split on a question specifically concerning expression about the holidays. It conflicts with the Seventh Circuit's holding that the government commits viewpoint discrimination when it permits private groups to place secular holiday displays, but not religious displays, in a nonpublic forum. *Grossbaum v. Indianapolis-Marion County Building Authority*, 63 F.3d 581 (7th Cir. 1995).

B. Moreover, the various societal controversies show that there is a set of competing perspectives on the subjects of the holiday season and which elements of it are most important. Some of those controversies arise in contexts not applicable here, such as speech by employees of private businesses or displays sponsored by government. But this case involves a government restriction on private speakers expressing their religious perspective in a government forum. In that category of

cases, the government's proper course is clear: it must allow varying perspectives on a subject matter to be expressed, on equal terms. To accept ads emphasizing the commercial and charitable aspects of Christmas and gift-giving but refuse ads emphasizing religious perspectives on those subjects skews public debate—the fundamental harm to free expression from viewpoint discrimination.

ARGUMENT

I. The Decision Below Conflicts With This Court's Repeated Decisions That Excluding Religious Perspectives On A Permitted Subject Matter Is Unconstitutional Viewpoint Discrimination.

When a government discriminates against an organization's viewpoint, "vital First Amendment speech principles are at stake." *Rosenberger v. Rector and Visitors of Univ. of Virginia*, 515 U.S. 819, 835 (1995). Viewpoint discrimination is "an egregious form of content discrimination." *Id.* at 829; *accord McCullen v. Coakley*, 573 U.S. 464, 482 (2014). "When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is" particularly "blatant." *Rosenberger*, 515 U.S. at 829.

Here, the court of appeals' decision refusing to find viewpoint discrimination is irreconcilable with this Court's decisions in *Lamb's Chapel*, *Rosenberger*, and

Good News Club. As the dissenters from the denial of rehearing *en banc* explained:

> In all three [of those] cases, the government argued, as WMATA does here, that the restrictions were permissible because they prohibited all views on a discrete subject: religion. In all three cases, the Supreme Court rejected that argument because the restrictions did more than attempt to ban the discussion of religion; they also barred the expression of religious viewpoints on topics that were otherwise permitted to be discussed.

App-55.

This Court's decisions make clear that religion frequently operates not merely as a distinct subject matter, but as a viewpoint on other subject matters. As this Court stated in *Rosenberger*: "[R]eligion may be a vast area of inquiry, but it also provides, as it did here, a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered." 515 U.S. at 831. A government policy must not, either on its face or in its application, target religious perspectives "'on an otherwise includible subject'" permitted in the forum. *Lamb's Chapel v. Center Moriches Sch. Dist.*, 508 U.S. 384, 394 (1993) (quoting *Cornelius v. NAACP Legal Defense and Educ. Fund*, 473 U.S. 788, 806 (1985)). *Lamb's Chapel*, for example, unanimously held that a public school district policy prohibiting the use of school premises "for religious purposes" "was unconstitutionally applied in this case." 508 U.S. at 393. The school district committed viewpoint

discrimination in application by refusing rooms for a film series addressing family issues from a religious perspective when other groups addressing the subject matter of family would have been permitted to meet.

The dissenters from the denial of rehearing *en banc* explained precisely how WMATA discriminated against religious viewpoints on "otherwise includible" subjects:

> WMATA allows entities like Walmart to speak on the subjects of the perfect Christmas gift (toys) and how to spend the Christmas season (buying gifts and visiting stores at specified hours). And WMATA permits the Salvation Army to run ads encouraging people to donate to certain charities. The Archdiocese would also like to express its views on the perfect Christmas gift (Christ), how to spend the holiday (caring for the needy and visiting churches for Mass at specified hours), and whether to contribute to charities (yes, and particularly to religious charities).

App-58. Accordingly, WMATA engaged in precisely the viewpoint discrimination condemned in *Lamb's Chapel*, *Rosenberger*, and *Good News Club*.

The petition describes this Court's rulings and how the court of appeals' decision flouts them. *Amici* agree with those descriptions; we now trace in greater detail two ways in which the court of appeals' decision is irreconcilable with this Court's rulings.

A. Permitting The Archdiocese To Urge Its Viewpoint But With "Only Non-Religious Imagery" Is Still Viewpoint Discrimination.

WMATA rejected the Archdiocese's "Find the Perfect Gift" advertisement; but it permitted the Salvation Army to run an advertisement urging people to give charitable donations during the holiday season. The court of appeals held that this differential treatment did not show viewpoint discrimination. But the court's reasoning merely confirms that its ruling validates viewpoint discrimination and flouts this Court's decisions.

In holding that WMATA's exclusion rested on subject matter rather than viewpoint, the court of appeals reasoned that WMATA would have allowed the Archdiocese to place an ad like that of the Salvation Army, "whose ad exhorted charitable giving but contained only non-religious imagery." App-25 (noting that WMATA said it would accept "an ad from the Archdiocese that read '[P]lease [G]ive to Catholic Charities'") (brackets in original; citation omitted). That is, the court of appeals said that when an ad exhorting charitable giving includes "religious imagery," it no longer presents a religious viewpoint on the includible subject matter of charitable giving; rather, it concerns religion as a distinct subject matter.

This argument is irreconcilable with *Lamb's Chapel*, *Rosenberger*, and *Good News Club*. In each of those cases the presentation of a religious perspective

on an includible subject matter included explicit religious language, not bare reference to a religious identity or the religious nature of a belief.[3]

For example, the film series in *Lamb's Chapel* did not merely present "traditional family values" and exhort the audience to follow them based on an unspecified "Christian perspective." Rather, the series included, among others, a film in which one of the chief subjects explicitly "recalls the influences which brought her to a loving God who saw her personal circumstances and heard her cries for help." 508 U.S. at 388-89 n.3. This Court unanimously held that the refusal of a room for the film series discriminated against a religious viewpoint.

Likewise, when the student magazine in *Rosenberger* "offer[ed] a Christian perspective on both personal and community issues," 515 U.S. at 826 (quotation omitted), it did not leave that Christian perspective implicit or unarticulated. Rather, the magazine's articles

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[3] The court of appeals also maintained that the "Find the Perfect Gift" advertisement did not fit within the subject matter of charitable giving because it did not, on its face, speak of such giving. App-25. But the ad did not speak explicitly of attending Mass either: it "displayed the address of a web site that would connect visitors to schedules of local Masses *and opportunities for charitable giving*." Pet. 6 (emphasis added). As the court of appeals itself recognized, testimony showed that the campaign's goals included " 'welcoming all to Christmas Mass *or in joining in public service to help the most vulnerable in our community during the liturgical season of Advent*.' " App-6 (emphasis added; record citations omitted). There is no apparent reason why the words "Find the Perfect Gift" should be interpreted to encourage giving any less than they encourage attending worship.

regularly included statements like "[t]he only way to salvation through Him is by confessing and repenting of sin," and "[r]acism is a disease of the heart, soul, and mind, and only when it is extirpated from the individual consciousness and replaced with the love and peace of God will true personal and communal healing begin." *Id.* at 865, 867 (Souter, J., dissenting) (quotation marks and citations omitted). Indeed, such statements led the dissent in *Rosenberger* to object that the magazine should be ineligible for state assistance because its contents were "core religious activities"—not "merely the expression of editorial opinion that incidentally coincides with Christian ethics and reflects a Christian view of human obligation," but rather "straightforward exhortation to enter into a relationship with God as revealed in Jesus Christ, and to satisfy a series of moral obligations derived from the teachings of Jesus Christ." *Id.* at 863, 867 (Souter, J., dissenting). Yet the Court held that the exclusion of this explicit religious language on personal and community issues was unconstitutional viewpoint discrimination.[4]

Finally, in *Good News Club* this Court held that a public school that allowed its students to participate in after-hours classes encompassing "moral and character instruction" could not exclude a club whose activities included "singing songs, hearing a Bible lesson and

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[4] Unlike the situation in *Rosenberger*, the placement of an advertisement on WMATA buses involves no subsidies to the expression in question. This is a pure case of access to a forum; it raises none of the Establishment Clause issues that concerned the dissenters in *Rosenberger*.

memorizing scriptures." *Good News Club v. Milford Central School*, 533 U.S. 98, 103 (record quotation omitted). The court of appeals there had ruled that because such activities explicitly "[taught] children how to cultivate their relationship with God through Jesus Christ," they were "quintessentially religious" and thus "f[e]ll outside the bounds of pure 'moral and character development.'" *Id.* at 111 (quoting *The Good News Club v. Milford Cent. School*, 202 F.3d 502, 510-11 (2d Cir. 2000)). But this Court reversed, saying:

> We disagree that something that is "quintessentially religious" or "decidedly religious in nature" cannot also be characterized properly as the teaching of morals and character development from a particular viewpoint. . . . [W]e can see no logical difference in kind between the invocation of Christianity by the Club and the invocation of teamwork, loyalty, or patriotism by other associations to provide a foundation for their lessons.

Id. at 111. This Court rejected the premise "that any time religious instruction and prayer are used to discuss morals and character, the discussion is simply not a 'pure' discussion of those issues"—in other words, the premise that explicit "reliance on Christian principles taints moral and character instruction in a way that other foundations for thought or viewpoints do not." *Id.* Thus, the Court concluded, the case was governed by "our holdings in *Lamb's Chapel* and *Rosenberger* that speech discussing otherwise permissible subjects cannot be excluded from a limited public forum on the

ground that the subject is discussed from a religious viewpoint." *Id.* at 111-12.

The court of appeals reasserted here the very position rejected in *Good News Club*, that is, the notion that a religious speaker has been given an equal right to express its viewpoint if it can express its ultimate conclusion (such as "Please Give to Catholic Charities") but not the religious reasoning underlying it. Agreeing that such a position reflects "blatant viewpoint discrimination," Justice Scalia in *Good News Club* observed that "[f]rom no other group does [the government] require the sterility of speech that it demands of" the religious speaker. *Id.* at 124 (Scalia, J., concurring).

A restriction on religious "imagery" cripples the ability of speakers to present religiously grounded, and only religiously grounded, perspectives. In many cases, it is hard to imagine how a religiously grounded perspective could be presented without reliance on religious imagery or language. Therefore, "[t]he right to present a viewpoint based on a religio[us] premise carrie[s] with it the right to defend the premise." *Id.* at 125 (Scalia, J., concurring). Denying the right to present the religious premise for giving to religious charities discriminates against religious viewpoints.

This case also exemplifies a related problem with excluding a perspective because it includes "religious imagery." In *Rosenberger*, this Court said that exclusion of religious viewpoints contravenes "vital First Amendment speech principles" by "granting the State

the power to examine publications to determine whether or not they are based on some ultimate idea and, if so, for the State to classify them." 515 U.S. at 835. Such arbitrary classification appears here. It is far from clear why the Archdiocese's ad, with the phrase "Find the Perfect Gift" and an image of shepherds, was deemed unacceptably religious—while the ad for the *Salvation* Army, an organization widely known to be religious and with a theological term in its name, was deemed acceptably non-religious.

B. Viewpoint Discrimination Is Impermissible Even In A Nonpublic And Selective Forum.

The court below also relied heavily on the premise that external advertising space on WMATA buses was a nonpublic forum, rather than a public forum, and that WMATA categories of acceptable advertisements were selective. The court insisted that the categorical exclusion of ads with religious content or imagery was important to "preserv[e] the government's ability to manage potentially sensitive non-public forums." App-16. And to distinguish *Lamb's Chapel*, *Rosenberger*, and *Good News Club*, the court of appeals relied on the asserted "breadth of the forums involved" in those cases compared with the asserted "narrow character of WMATA's forum." App-21-22.

But whether a forum is nonpublic and whether it is broad or narrow are irrelevant to the question whether viewpoint discrimination is permissible in

that forum. As the judges who dissented from the denial of rehearing *en banc* put it: "[I]n any First Amendment forum, no matter its scope, viewpoint discrimination always violates the First Amendment." App-60. See *Manhattan Community Access Corp. v. Halleck*, 139 S. Ct. ___, 2019 WL 2493902, at *10 (June 17, 2019) (Sotomayor, J., dissenting) ("But while many cases turn on which type of 'forum' is implicated, the important point here is that viewpoint discrimination is impermissible in them all."). *Lamb's Chapel* and multiple other decisions of this Court teach that "'[c]ontrol over access to a nonpublic forum can be based on subject matter and speaker identity,'" but only "'so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral.'" *Lamb's Chapel*, 508 U.S. at 392-93 (quoting *Cornelius*, 473 U.S. at 806; *Perry Educ. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 55 (1983)). For that reason, for example, the Court in *Lamb's Chapel* found impermissible viewpoint discrimination without ruling on the nature of the forum in that case. 508 U.S. at 391-92.

Once an argument from the nonpublic nature of the forum is set aside, the court of appeals' conclusion that WMATA committed no viewpoint discrimination falls apart, for reasons already given. Once WMATA permitted advertising exhorting charitable giving through the Salvation Army, it could not exclude the Archdiocese's ad exhorting charitable giving through religious charities. And it certainly could not single out exhortations for religious charitable giving by

demanding that the exhortation be couched in "only non-religious imagery." See *supra* pp. 8-13.

The court of appeals claimed that the categorical exclusion of religious speech in advertisements was warranted to "preserv[e] the government's ability to manage potentially sensitive non-public forums while cabining its discretion to censor messages it finds more or less objectionable." App-16. But to the extent that WMATA can legitimately worry about discord from advertisements, it had other means to head off such effects. As the dissenters from the denial of rehearing *en banc* noted, "WMATA's policies separately address issue-oriented ads without any need for its ban on religious speech." App-62 n.3.

Likewise, WMATA can maintain restrictions that truly act only to limit subject matter rather than viewpoint. For example, WMATA need not accept an ad urging donations to charity at the winter holiday season; but when it does, it must accept an ad urging donations to religious charities or donations for religious reasons. What WMATA cannot do is deem religious speech categorically divisive so that it should be categorically excluded. In Justice Brennan's words, "The State's goal of preventing sectarian bickering and strife may not be accomplished by regulating religious speech and political association." *McDaniel v. Paty*, 435 U.S. 618, 641 (1978) (Brennan, J., concurring in the judgment).

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The court of appeals' decision creates a roadmap for discrimination against religious viewpoints and for

disregard of this Court's rulings. Under the decision below, government officials can adopt policies singling out religious speech simply by asserting that religion is a subject matter not a viewpoint. Similarly, they can commit viewpoint discrimination by allowing religious speakers to assert religiously grounded conclusions but prohibiting them from articulating any of the religious reasons or imagery that support or inspire those conclusions. This Court should grant review to prevent evasion of the guidelines mapped out in *Lamb's Chapel*, *Rosenberger*, *Good News Club*, and other decisions.

II. The Equal Status Of Holiday-Related Private Speech That Is Religious Presents An Important And Recurring Question.

Review is warranted not merely to prevent general evasion of this Court's rulings on viewpoint discrimination. In addition, the specific subject matter involved in this case—the meaning and essence of Christmas and the winter holidays—presents important and recurring questions. The court of appeals claimed that the pattern of advertisements that WMATA accepted "do not invite 'debate' about how Christmas should be celebrated." App-26 (quoting *Rosenberger*, 515 U.S. at 831). This statement simply blinks reality. There is an ongoing debate in society about the essence of the holiday, the priorities to observe in celebrating it, and the motivation for giving gifts. That conflict has appeared both in courts of appeals' decisions involving

private individuals' speech in government forums (as in this case) and in a broader range of controversies.

A. The Decision Below Conflicts With The Seventh Circuit's Holding That It Is Viewpoint Discrimination To Permit Private Groups To Place Secular Holiday Displays, But Not Religious Displays, In A Nonpublic Forum.

The court of appeals' decision not only conflicts with this Court's decisions prohibiting discrimination against religious viewpoints. It also creates a circuit split on the specific question whether a nonpublic forum that allows speech on the subject of Christmas and other winter holidays may exclude religious perspectives on that subject.

In *Grossbaum v. Indianapolis-Marion County Building Authority*, 63 F.3d 581 (7th Cir. 1995), the Authority permitted a variety of privately-erected displays in the lobby of the joint city-county building. But during the winter holidays, the Authority refused a Lubavitch Orthodox group's application to display a menorah, based on a new seasonal policy stating that "'Religious displays and symbols are not permitted in the City–County Building.'" *Id.* at 583. The Authority continued to permit a Christmas tree in the lobby on the ground that it was a secular symbol. *Id.* at 589 & n.10. The Authority adopted the policy against religious displays after complaints had been raised about the menorah,

which previously had been displayed during several Chanukah seasons. *Id.* at 582-83.

The district court rejected the Orthodox group's claim that the Authority had discriminated against the group's religious perspective on the holiday season. But the Seventh Circuit reversed, holding that because "[o]thers with non-religious messages remain free to apply for space in the City–County Building, . . . the prohibition of the menorah's message because of its religious perspective was unconstitutional under the First Amendment's Free Speech Clause." *Id.* at 591-92 (following *Rosenberger* and *Lamb's Chapel*).

The Seventh Circuit's decision in *Grossbaum* stands in flat contradiction to the court of appeals' decision here. Both cases involved private organizations' expression of a religious perspective on winter holidays, and both involved a government policy (adopted in response to controversy) that excluded expression on the ground that it was "religious." But the Seventh Circuit forbade the exclusion while the court of appeals here permitted it. The existence of the two decisions, therefore, is sure to produce different results on holiday-related private expression in the two circuits, and uncertainty in other parts of the nation over which approach should govern.

The Seventh Circuit's and D.C. Circuit's approaches conflict in at least two other ways:

1. Most importantly, the Seventh Circuit held that the "holiday season" constituted a subject matter, as to which the Authority had excluded religious perspectives.

The court said: "We cannot accept the view that such a subject category is too broad or amorphous to serve as a 'subject' for the purpose of forum analysis. The subject of the 'holiday season' is a conceptually well-defined subject." *Grossbaum*, 63 F.3d at 588.[5] In contrast, the D.C. Circuit here refused to treat the "holiday season" as a relevant subject matter—even though WMATA had accepted not only advertisements exhorting holiday shopping, but also the Salvation Army ad exhorting holiday giving to charity through the "Red Kettle" campaign. App-25-26.[6]

2. The city-county building in *Grossbaum* was a nonpublic forum, but that did not dissuade the Seventh Circuit from barring discrimination against a religious viewpoint in that forum. See *Grossbaum*, 63

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[5] Although the Authority's policy specifically mentioned the "holiday season," the conclusion that the season is "a conceptually well-defined subject" (*Grossbaum*, 63 F.3d at 588) cannot depend on whether the government's policy specifically mentions it. The policy in *Lamb's Chapel* did not specifically mention "family issues and child rearing" as the subject of the forum. Yet this Court held that permitting nonreligious views on that subject (as an example of "social or civic" purposes) but excluding views on it "from a religious standpoint" was impermissible viewpoint discrimination. 508 U.S. at 393.

[6] Among its mistakes here, the court of appeals ignored the holiday-related nature of the Salvation Army ad. The Army's website—confirming common knowledge—refers to the "Red Kettle Christmas campaign" and adds that it "kicks off on Thanksgiving Day" and "encourages charitable giving during the holiday season." *The Salvation Army Invites Americans to Share Their #RedKettleReason*, The Salvation Army (Nov. 17, 2014), https://www.salvationarmyusa.org/usn/news/salvation_army_invites_americans_to_share_their_redkettlereason/.

F.3d at 587 (" 'The first amendment's ban on discriminating against religious speech does not depend on whether the school is a 'public forum' and, if so, what kind. . . . Even when the government may forbid a category of speech outright, it may not discriminate on account of the speaker's viewpoint.' ") (ellipsis in original; quotation omitted). In contrast, as already noted, the D.C. Circuit here emphasized the nonpublic nature of the bus-advertisement forum, reasoning that "the government has wide latitude to restrict subject matters—including those of great First Amendment salience—in a nonpublic forum." App-15 (citations omitted); see *supra* pp. 13-16.

B. The Debate Over The Essence Of The Holidays, And Which Elements Should Be Most Prominent, Is An Important And Recurring One In Society.

The court of appeals claimed that the pattern of advertisements that WMATA accepted "do[es] not invite 'debate' about how Christmas should be celebrated." App-26 (quoting *Rosenberger*, 515 U.S. at 831). This statement simply ignores reality.

"As observed in this Nation, Christmas has a secular, as well as a religious, dimension." *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 579 (1989) (opinion of Blackmun, J.). This situation has generated a variety of viewpoints on whether the religious and secular elements can coexist, and on which elements are most important and should have priority.

As one historian puts it, "the central conflict Americans experience in Christmas" is the perceived tension "between material and spiritual satisfaction." Penne L. Restad, *Christmas in America: A History* 155 (2007); see generally Gerry Bowler, *Christmas in the Crosshairs: Two Thousand Years of Denouncing and Defending the World's Most Celebrated Holiday* (2017) (hereinafter *Christmas in the Crosshairs*).

Responding to that tension, different groups have sought "in various ways to reform Christmas. In the last half of the twentieth century these reformers have sought to emphasize the spiritual aspect of the holiday," "purge it of its connections to the world of buying and selling," and "refocus attention on the manger rather than the pile of presents under the tree." *Christmas in the Crosshairs*, *supra*, at 128. The slogan "Put Christ Back in Christmas" "was adopted [in 1949] when the Milwaukee Archconfraternity of Christian Mothers, whose crusade attracted national attention" adopted it. *Id.* This and similar phrases and campaigns show that, on a regular basis, some Christians "have decried buying and selling commercial gifts as the central acts of a Christmas celebration and sought to resacralize the holiday, to move back to the Nativity and its magical stories." *Id.* at 138.

In recent years, debate over the relative priority of aspects of Christmas has engulfed private businesses who adopt holiday-related policies intended to be less religiously specific and more inclusive, and who then face pressure from people claiming that more specific religious language is being censored. See, e.g.,

Christmas in the Crosshairs, *supra*, at 231-34 (describing controversies over, for example, advertising, signage, and employee greetings in Macy's, Walmart, and other retail stores and decoration of cups at Starbucks shops). In addition, of course, debates regularly arise over the relative role of religious and secular elements in government-sponsored Christmas or holiday displays; this Court has decided two such cases under the Establishment Clause. *County of Allegheny*, 492 U.S. 573; *Lynch v. Donnelly*, 465 U.S. 668 (1984).

Plainly, this case falls outside the scope of many of those debates. It does not involve private businesses' guidelines for employee speech, which raise no First Amendment questions. Likewise, it does not involve "government-sponsored religious display[s]," a "categor[y] of cases [that] can pose difficult questions." *Morris County Board of Chosen Freeholders v. Freedom from Religion Foundation*, 139 S. Ct. 909, 910, 911 (2019) (statement of Kavanaugh, J., respecting denial of certiorari) (citing, among other cases, *County of Allegheny*, 492 U.S. 573).

Instead, this case involves the right of private speakers to express their religious perspectives in a government forum. In that category of cases, the government's proper course is clear: it must allow varying perspectives on a subject matter to be expressed, on equal terms. See *Morris County*, 139 S. Ct. at 909, 910, 911 (noting that cases challenging "discrimination against religious persons, religious organizations, and religious speech" involve the "bedrock principle of

religious equality" and thus "should not be as difficult" as other categories of cases).

The various controversies in society, however, do make it plain that there is a set of competing viewpoints on the meaning of Christmas and the winter holidays. Those viewpoints differ, some sharply, on the relative priority of various aspects of the holidays, or on whether one emphasis, like commercial gift-giving, can coexist with other emphases, like Jesus's birth. These viewpoints also differ on the central motivation for the practices of gift-giving, including charitable giving: that is, whether such practices arise as a response to Christ's birth (seen as God's gift to humanity), or whether they arise solely or primarily out of other motivations.

The government, of course, should take no position on these disputes. But the disputes are relevant to the question presented in this case: whether "the holiday season" is a subject matter such that the government must treat the expression of differing viewpoints and perspectives on it equally. It disregards reality to claim, as the court of appeals did, that different perspectives and priorities concerning the holiday season and gift-giving are irrelevant to this case.

Given the societal disputes over the meaning and priorities of Christmas, the winter holiday, and seasonal giving, the government skews debate when it accepts advertisements emphasizing the commercial and charitable aspects of Christmas and gift-giving but refuses an advertisement emphasizing the religious

aspects of these subjects. By thus skewing debate, the government commits the fundamental harm that viewpoint discrimination inflicts under the First Amendment. *Rosenberger*, 515 U.S. at 831.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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