No. 18-1455

IN THE

Supreme Court of the United States

ARCHDIOCESE OF WASHINGTON, a corporation sole,
Petitioner,

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

Brief in Opposition

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QUESTIONS PRESENTED

1. Whether the Court of Appeals correctly held that WMATA's advertising policy permissibly excluded speech on the subject of religion from its non-public forum advertising space.

2. Whether the Court of Appeals correctly held that WMATA's advertising policy did not violate the Religious Freedom Restoration Act.

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INTRODUCTION

The Washington Metropolitan Area Transit Authority (WMATA) has devoted considerable effort over the years to the policies that govern what advertisements it will accept for display on its Metrobuses and Metrorail trains, and in Metro stations. It previously imposed no subject matter restrictions on the advertising it would accept. But that approach proved to be incompatible with WMATA's lawfully dedicated purpose of providing safe and reliable transit services. On a regular basis, WMATA had to contend with the fallout generated by advertisements whose content focused on political, religious, or social advocacy—community complaints; demoralized employees; vandalism; heightened risks of terrorism; and the attendant administrative burdens of dealing with these problems.

After several years of wrestling with the issue, WMATA's Board of Directors decided in 2015 to limit the kinds of advertisements it would accept. In particular, it decided that it would close its advertising space "to issue-oriented ad[vertisement]s, including political, religious and advocacy ad[vertisement]s." Pet. App. 5. To implement that decision, the Board adopted guidelines, including one that states advertisements that "promote or oppose any religion, religious practice or belief are prohibited." Pet. App. 3; AJA 208-09.

The "Perfect Gift" advertisement that Petitioner sought to run in 2017—and that is the focus of this case—violated WMATA's policy because it was, as Petitioner described it, a core part of Petitioner's evangelizing message during the Advent season. So

WMATA declined the advertisement. Petitioner then sought a preliminary injunction, claiming that WMATA's decision constituted impermissible viewpoint discrimination against religious perspectives on the Christmas holiday season, and an unlawful burden on Petitioner's exercise of religion under the Religious Freedom Restoration Act (RFRA).

In denying the preliminary injunction, the district court and the court of appeals both concluded that WMATA's policy, and the decision it made to reject Petitioner's advertisement pursuant to that policy, were viewpoint-neutral and violated neither the First Amendment nor RFRA. That decision was correct under a straightforward reading of this Court's precedents. WMATA is entitled under the First Amendment to adopt viewpoint-neutral subject matter limitations to govern advertising in its transit system. WMATA's policy is neutral on its face and neutral in its application, and therefore entirely lawful as the court of appeals correctly held.

That holding, moreover, does not conflict with any decision of any other court of appeals. And the radical reworking of the law that Petitioner urges upon this Court would wreak havoc with the sound administration of transit advertising programs, effectively forcing transit authorities either to accept all advertising or forego advertising revenue altogether—precisely the kind of "all or nothing" choice that this Court has said public forum law should not force upon government bodies. Certiorari should be denied.

STATEMENT OF THE CASE

I. Statement of Facts

Respondent WMATA was established by an interstate compact between Maryland, Virginia, and the District of Columbia, to provide safe and reliable transit services. Pet. App. 1-2. It operates the Metrorail and Metrobus systems in the Washington, D.C. metropolitan area. Pet. App. 71. WMATA raises revenue in many ways, including by selling advertising space in Metrorail stations and on Metrorail trains and Metrobuses. Pet. App. 2, 71. Beginning in the 1970s, WMATA designated its advertising space as a public forum, and accepted most issue-oriented advertisements, including political, religious, and advocacy advertising. Pet App. 4; AJA 197.

In 2010, WMATA began to reconsider its policy. Pet. App. 4. WMATA repeatedly received complaints from employees, riders, and community leaders about advertisements run in WMATA's advertising space. *Id.* The advertisements that generated these complaints included advertisements critical of the Catholic Church's stance on condom usage (which Archdiocese officials objected to), advertisements by People for the Ethical Treatment of Animals (PETA) containing graphic images of animal cruelty, advertisements opposing discrimination based on sexual orientation, and advertisements addressing government healthcare policies and other public policy disputes. *Id.* The advertisement criticizing the Catholic Church, in particular, "generated hundreds of angry phone calls and letters and generated the second-largest negative response to any ad[] ever run

in WMATA advertising space." *Id.* (internal quotation marks omitted).

In 2015, after years of consideration and prompted by the submission of an advertisement featuring a cartoon depicting the Prophet Muhammad, WMATA decided to close its forum to all "issue-oriented ad[vertisements], including political, religious and advocacy ad[vertisements]." Pet. App. 4-5. WMATA concluded that any economic benefit derived from such ads was outweighed by four considerations:

First, these advertisements generated community opposition and outcry, complaints from employees who faced prolonged exposure to issue-oriented advertisements, adverse publicity for WMATA, and claims that WMATA was perpetuating discrimination through the advertising. Pet. App. 5; AJA 198.

Second, issue-oriented advertisements sparked security concerns. The Metro Transit Police Department and the U.S. Department of Homeland Security feared that certain political, religious, or advocacy advertisements could provoke terrorist or other violent attacks. Pet. App. 5. In this regard, WMATA was aware that two people had been killed in Texas in a violent attack on a contest focused on drawing cartoons of the Prophet Muhammad. *Id.* at 4-5. As one WMATA executive explained, "some Muslims consider drawing the Prophet Muhammad so offensive that they have reacted violently to such depictions." *Id.* at 4 (quoting AJA 198). Thus, when an advertisement featuring the cartoon that triggered the violent episode in Texas was submitted to WMATA, it "pushed WMATA to change its

guidelines." *AFDI v. WMATA*, 245 F. Supp. 3d 205, 212 (D.D.C. 2017).

Third, issue- and religious-oriented advertisements were frequently vandalized. Pet. App. 5; AJA 198.

Fourth, WMATA was forced to spend substantial time reviewing proposed advertisements and dealing with complaints, creating administrative burdens. Pet. App. 5, AJA 199.

These four concerns led WMATA's Board of Directors in May 2015 to impose a moratorium that changed WMATA's advertising space to a non-public forum, while the Board further evaluated the issue of running issue-oriented advertisements. AJA 197, 204.

In November 2015, the Board decided to make its advertising space a non-public forum permanently, passing a resolution that closed its advertising space "to issue-oriented ad[vertisement]s, including political, religious and advocacy ad[vertisement]s." Pet. App. 5. Along with the resolution, the Board adopted amended Commercial Advertising Guidelines. *Id.* As relevant here, Guideline 12 reads: "Advertisements that promote or oppose any religion, religious practice or belief are prohibited." *Id.*; AJA 208-09. Since WMATA restricted its forum in 2015, it has regularly rejected advertisements under Guideline 12. Pet. App. 5-6.

On October 23, 2017, Petitioner, the Archdiocese of Washington (Petitioner or Archdiocese), sought to

place the following advertisement on WMATA Metrobuses:

AJA 375.

The link "FindThePerfectGift.org" led to a webpage with a banner stating "JESUS is the perfect gift. Find the perfect gift of God's love this Christmas." AJA 383. The webpage also contained links to religious content, including statements such as "God has prepared an amazing gift for you" and "take time to receive God's love for you at Christmas Mass." *Id.* In a declaration submitted by the Archdiocese, its Secretary for Pastoral Ministry and Social Concerns explained: "[t]he 'Find the Perfect Gift' campaign is an important part of [the Archdiocese's] evangelization efforts," in part "because '[t]he Roman Catholic Church teaches' that in 'sharing in the long preparation for the Savior's arrival with the first Christmas, we renew our ardent desire for Christ's second coming.'" Pet. App. 6 (quoting AJA 119).

In November 2017, WMATA rejected this advertisement under Guideline 12. Pet. App. 7.

II. Procedural History

On November 28, 2017, the Archdiocese filed a complaint and a motion for a temporary restraining order (TRO) and a preliminary injunction. *Id.* As relevant here, the Archdiocese contended that WMATA's Guideline 12 violated the Free Speech Clause of the First Amendment and the Religious Freedom Restoration Act (RFRA). The district court denied the Archdiocese's request for a TRO and preliminary injunction on December 8, 2017. Pet. App. 64-114. The Archdiocese sought an injunction pending appeal, which the court of appeals denied. *Archdiocese of Washington v. WMATA*, 877 F.3d 1066 (D.C. Cir. 2017).

After full briefing and argument, the D.C. Circuit once again rejected the Archdiocese's preliminary injunction request. Pet. App. 1, *Archdiocese of Washington v. WMATA*, 897 F.3d 314 (D.C. Cir. 2018).

The court first determined that WMATA had properly changed its forum from a public forum to a non-public forum by passing the Guidelines in 2015. Pet. App. 12-14. Applying this Court's settled test applicable to non-public forums, the court then held that WMATA's exclusion of "[a]dvertisements that promote or oppose any religion, religious practice or belief" was both viewpoint neutral and reasonable. Pet. App. 44.

With regard to viewpoint neutrality, the court held that, consistent with this Court's decisions in *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819 (1995), *Lamb's Chapel v.*

Center Moriches Union Free School District, 508 U.S. 384 (1993), and *Good News Club v. Milford Central School*, 533 U.S. 98 (2001), "Guideline 12 does not function to exclude religious viewpoints but rather proscribes advertisements on the entire subject matter of religion." Pet App. 18. The court noted that unlike the forum operators in *Rosenberger*, *Lamb's Chapel,* and *Good News*, WMATA had not invited "debate" on a subject and then excluded religious viewpoints from that debate. Pet. App. 26-28.

The court noted further that adopting the Archdiocese's approach would "undermine the forum doctrine" and "could have sweeping implications for what speech a government may be compelled to allow once it allows any at all." Pet. App. 17. It explained that the Archdiocese's position would "forc[e] a choice between opening non-public forums to almost any private speech or to none, which the Supreme Court acknowledged in *Arkansas Educational Television Commission [v. Forbes*, 523 U.S. 666, 680 (1998)], was not merely hypothetical." *Id.*

Next, the court held that WMATA's restriction was "reasonable in light of the purpose served by the forum." Pet. App. 27 (quoting *Cornelius v. NAACP Legal Defense and Educ. Fund*, 473 U.S. 788, 806 (1985)). Under this "forgiving test," *id. (*quoting *Minnesota Voters Alliance v. Mansky*, 138 S. Ct. 1876, 1888 (2018)), the court found that WMATA's decision, based on its own experience with religious advertisements, to avoid divisiveness and the "inflamed passions surrounding religion" was a reasonable one, Pet. App. 27-28.

Responding to Petitioner's contention that Guideline 12 was incapable of fair administration and had not been fairly applied, the court held that, consistent with the Supreme Court's recent decision in *Mansky*, WMATA's application of Guideline 12 provides "adequate guidance on what is prohibited" and therefore can be "fairly administered." Pet. App. 29. It rejected the Archdiocese's argument that WMATA's acceptance of an advertisement from the Salvation Army urging charitable giving, a Christian radio station stating only its slogan "Always Encouraging," and from the exercise company CorePower Yoga publicizing its yoga services evidenced arbitrary enforcement. Pet. App. 28-29. The court explained that the acceptance of the Salvation Army and Christian radio advertisements shows only that WMATA, as the law requires, distinguishes not between religious and non-religious speakers, but instead religious and non-religious subjects, while the court agreed with WMATA's conclusion that the slogan "Muscle + Mantra" for a yoga class was not a religious message. *Id.* It therefore held there was no evidence that Guideline 12 was incapable of fair administration or had not been fairly implemented.

The court of appeals also found that Petitioner's RFRA claim was not likely to succeed. Based on settled D.C. Circuit precedent, the court held that WMATA was an interstate compact between Maryland, Virginia, and the District of Columbia, and it retained the immunities to which those states are entitled. Because RFRA cannot constitutionally apply to the States, *see City of Boerne v. Flores*, 521 U.S. 507 (1997), the court of appeals held that it likely could not be applied to WMATA. Pet. App. 35-

36. In any event, the court held that the inability to advertise on WMATA's buses did not pose a substantial burden to the Archdiocese's exercise of its religious beliefs, particularly where the Archdiocese acknowledged it had several alternative ways in which to disseminate its message. Pet. App. 34-35.

Judge Wilkins concurred. He "wr[o]te separately to discuss the importance of traditional forum doctrine to protecting First Amendment values and to emphasize that WMATA's Guideline 12 conforms with those values." Pet. App. 40. He explained that "[a]dopting the Archdiocese's position would topple the careful balance struck by the Supreme Court of allowing government to manage expressive content in nonpublic forums, while cabining its discretion with administrable rules and encouraging it to keep these forums open to private speech." Pet. App. 47.

The Archdiocese filed for rehearing en banc, which the D.C. Circuit denied. Pet. App. 50-51. Judge Griffith, joined by Judge Katsas, dissented from the denial of rehearing. Pet. App. 52-63.

REASONS FOR DENYING THE PETITION

I. The Court of Appeals' Decision That WMATA's Policy Does Not Violate the Free Speech Clause Was Correct and Does Not Warrant this Court's Review.

The court of appeals decided this case correctly by faithfully applying this Court's settled First Amendment public forum law decisions in a straightforward manner. Under those decisions, WMATA's advertising space is a non-public forum.

See Pet. App. 11.[1] In a non-public forum, as this Court has made clear, the government may implement content-based restrictions that reserve a forum "for certain groups or for the discussion of certain topics," so long as its rules are viewpoint neutral and reasonable in light of the purpose served by the forum. *Good News Club*, 533 U.S. at 106 (citation omitted). WMATA's ban on "[a]dvertisements that promote or oppose any religion, religious practice or belief," comfortably complies with the principles this Court has set forth because it is both viewpoint neutral and reasonable, as the court of appeals correctly held.

In reaching that result, the court scrupulously followed this Court's teachings in *Good News Club*, *Lambs Chapel*, and *Rosenberger*. It recognized that this case differed in a dispositive respect from those cases because WMATA did not exclude religious speech on a subject that could otherwise be permissibly addressed in the forum. Rather, WMATA did what this Court said government may do: it excluded all speech about religion (pro, con, or neutral) as a subject from the forum.

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[1] After conceding in the district court that WMATA's advertising space was a non-public forum, the Archdiocese reversed course in the D.C. Circuit and contended that WMATA had instead designated its advertising space a public forum. Pet. App. 11. The Court of Appeals rightly rejected that argument as both forfeited and incorrect on the merits. *See* Pet. App. 11-12; *see also Lehman v. City of Shaker Heights,* 418 U.S. 298, 302 (1974). Although the Archdiocese does not explicitly address the status of WMATA's forum in its petition, it does not contest that the non-public forum standard applies, and argues only that Guideline 12 is inconsistent with that standard.

Nor is there any uncertainty or confusion about where this Court has drawn the line between permissible subject matter exclusions and impermissible viewpoint discrimination. Petitioner identifies no lack of clarity or need for further guidance on how to apply the principles set forth by this Court. It simply objects to the way those decisions were applied to the facts of this case. Even if there were some doubt on that score—and there is not—that would not come close to justifying plenary review. And in all events, the court of appeals was correct in its understanding of this Court's precedents and in its application of those precedents to resolve this case.

A. The Court of Appeals Correctly Held that WMATA's Guideline 12 Is Viewpoint Neutral.

WMATA's decision to close its advertising space to "political, religious and advocacy ad[vertisements]," and in particular, "[a]dvertisements that promote or oppose any religion, religious practice or belief," Pet. App. 5, is viewpoint neutral. A restriction discriminates on the basis of viewpoint "[w]hen the government targets not subject matter, but particular views taken by speakers on a subject." *Rosenberger*, 515 U.S. at 829. Put differently, a government has engaged in viewpoint discrimination when it "denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject." *Lamb's Chapel*, 508 U.S. at 394 (quoting *Cornelius*, 473 U.S. at 806).

WMATA did not engage in viewpoint discrimination by rejecting the Archdiocese's "Find

the Perfect Gift" advertisement. Its guidelines are entirely neutral with regard to the viewpoint expressed by a speaker on *the subject* of religion. WMATA's advertising space is closed to such speech whether the speech supports *or* opposes religion, religious practice, or religious belief, or seeks to express any other message on those subjects.[2] This type of restriction is quintessentially viewpoint neutral. As the court of appeals correctly held, "the Archdiocese's 'Find the Perfect Gift' ad does not represent an excluded viewpoint on an otherwise includable subject. The rejection of its ad instead reflects WMATA's implementation of a policy that the Supreme Court has deemed permissible in a non-public forum, namely the 'exclu[sion of] religion as a subject matter.'" Pet. App. 22 (quoting *Rosenberger*, 515 U.S. at 831).

The Archdiocese nevertheless contends that three decisions of this Court, *Good News Club*, *Rosenberger*, and *Lamb's Chapel*, require a finding that Guideline 12 impermissibly discriminates on the basis of viewpoint. Pet. 16-23. The court of appeals systematically reviewed the facts and holdings of these cases and explained in detail why the Archdiocese misapprehends those decisions. Pet. App. 17-22. Its analysis of these decisions is correct and does not warrant review.

In each of these three cases, the government chose to open its forum to discussion of a particular *subject*,

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[2] Petitioner alleges that the wording of WMATA's ban on the subject of religion somehow bans only religious viewpoints. Pet. 22-23. But WMATA's broadly worded ban is meant to—and indeed does—capture any speech on the subject of religion, religious practice, or religious belief.

but then barred discussion on that very subject from a religious *perspective*. In *Lamb's Chapel*, for example, a state law authorized holding "social, civic and recreational meetings . . . and other uses pertaining to the welfare of the community" on school grounds. 508 U.S. at 386. Similarly, in *Good News Club*, a school system allowed for "teaching morals and character development to children" on its property after school. 533 U.S. at 108. But in each case, the challenged policies did not allow for discussion of those subject matters from a religious perspective. This Court struck down the restrictions because they prevented groups from addressing precisely those "otherwise permissible subjects" from a religious perspective. *Id.* at 111-12; *Lamb's Chapel*, 508 U.S. at 393-94.

Rosenberger is particularly instructive. There, the University of Virginia maintained a fund to reimburse printing costs for student publications, but it refused to reimburse the costs of a newspaper with a Christian editorial perspective. 515 U.S. at 827. In explaining why the university engaged in viewpoint discrimination, this Court stated: "the University *does not exclude religion as a subject matter* but selects for disfavored treatment those student journalistic efforts with religious editorial viewpoints." *Id.* at 831 (emphasis added). It continued: "The prohibited perspective, *not the general subject matter*, resulted in the refusal to make third-party payments, for the subjects discussed were otherwise within the

approved category of publications." *Id*. (emphasis added).[3]

The Archdiocese (Pet. 21-22) attempts to explain away *Rosenberger's* statement that the restriction there was invalid because it did not permissibly "exclude religion as a subject matter." 515 U.S. at 831. Petitioner contends that this Court was merely saying that religious speech could be banned as non-germane and states that one such permissible ban would be "if WMATA allowed its buses to be used only for messages about transportation policy or emergency alerts." Pet. 22. But even this example fails under the capaciousness of the Archdiocese's position. If WMATA adopted the Archdiocese's hypothetical policy and allowed an advertisement about the benefits of using Metro on Saturdays, it would have to allow any advertisement on the subject of "transportation on Saturday" from a religious perspective—including an advertisement from an orthodox Jewish

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[3] As Justice Kennedy subsequently explained, "the essential purpose of the limited forum [in *Rosenberger*] was to facilitate the expression of differing views in the context of student publications." *Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez*, 561 U.S. 661, 703 (2010) (Kennedy, J., concurring). In such a circumstance, singling out religious perspectives for exclusion, while allowing discussion from all other perspectives, was impermissible. But here, WMATA's forum has a nearly diametrically-opposed "essential purpose": it aims to prevent, instead of facilitate, "issue-oriented advertisements" that express differing views on divisive subjects. Far from being singled out, the subject matter of religion is being treated identically to the subject matters of politics and advocacy, all in pursuit of WMATA's permissible goal of preventing its buses and trains from becoming "Hyde Parks open to every would-be pamphleteer and politician." *Lehman*, 418 U.S. at 304.

organization urging Jews to keep the Sabbath and avoid WMATA on Saturdays. It is telling that the Archdiocese cannot even propose a hypothetical example that reconciles its position with the clear language of *Rosenberger*.

Notwithstanding the Archdiocese's contrary arguments, and as the court below correctly held, WMATA has done precisely what *Rosenberger* deemed permissible: WMATA excluded religion as a subject matter, along with other subject matters like political and advocacy-oriented advertisements. Pet. App. 21-22. In vivid contrast to *Rosenberger*, *Good News Club*, and *Lamb's Chapel*, WMATA has not singled out religious viewpoints on an "otherwise permissible subject" for restriction. *Good News Club*, 533 U.S. at 111-112; *see DiLoreto v. Downey Unified Sch. Dist. Bd. Of Educ.*, 196 F.3d 958, 967–69 (9th Cir. 1999) (rejecting the argument that "excluding religion as a subject or category from a forum always constitutes viewpoint discrimination" where a school district sold advertising space on the fence of its baseball field, but closed its forum to "certain subjects, such as religion"). Instead, WMATA excluded the entire subject of religion, from any viewpoint or perspective. Accordingly, there is no conflict between the D.C. Circuit's well-reasoned decision and any decision of this Court.

B. The Decision Below Does not Conflict with the Decision of Any Other Court of Appeals

Petitioner contends that the court of appeals' application of *Lamb's Chapel*, *Rosenberger*, and *Good News* conflicts with the application of those cases by

other courts of appeals. But no such conflict exists. As the court of appeals itself explained, Pet. App. 22-34, the decisions the Archdiocese has identified are fully consistent with the decision below. In each of those decisions, the government had, in fact, proscribed religious viewpoints on otherwise permissible subjects in the forum—not the general subject of religion itself, as WMATA has done here.

The Archdiocese first points to *Grossbaum v. Indianapolis-Marion County Building Authority*, 63 F.3d 581 (7th Cir. 1995). In that case, the government had an explicit policy that "recogniz[ed] the 'holiday season' as a topic of discussion." *Id.* at 588. Thus, the court found that, unlike WMATA's policy, the policy at issue did not exclude religious speech as a categorical matter, but instead established a "policy on seasonal displays," in which only religious displays were banned. *Id.* at 588-89.

Likewise, in *Hedges v. Wauconda Community Unit School District No 118*, 9 F.3d 1295 (7th Cir. 1993), the court considered a policy that broadly barred material containing speech from "religious . . . points of view" on otherwise permissible subjects. *Id.* at 1296. Anticipating *Rosenberger*, the court held that excluding religious viewpoints is impermissible under the First Amendment, but that excluding "a category of speech outright" was permissible. *Id.* at 1297-98. The school, the court held, could permissibly "treat[] religious speech the same way it treats political speech," and the school district in that case allowed political speech. *Id.* at 1299. The court below upheld WMATA's policy, which likewise treats religious and political speech alike, but instead excludes them both.

In *Good News/Good Sports Club v. School District of Ladue*, 28 F.3d 1501, 1506 (8th Cir. 1994), the school's policy allowed clubs to engage "in any speech relating to moral character and youth development," but banned such speech from a religious perspective. The court straightforwardly struck down the restriction under *Lamb's Chapel* as excluding religious viewpoints on an otherwise permissible subject. *See id.* at 1507.

The Archdiocese's reliance on *Byrne v. Rutledge*, 623 F.3d 46 (2d Cir. 2010), is similarly mistaken. *Byrne* relied on the fact that Vermont had opened its license plates to messages regarding "one's personal philosophy, beliefs, and values," but had excluded addressing those "subjects . . . from a religious viewpoint." *Id.* at 56. In striking down Vermont's restriction, the court explicitly distinguished its decision from those that "address bans on religious speech in forums," which, like WMATA's, are "limited to discussion of certain, designated topics." *Id*. at 59 (citing *DiLoreto*, 196 F.3d at 967-70).[4]

Thus, Petitioner has not identified any conflict that would warrant plenary review.

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[4] Petitioner's last case, *Summum v. Callaghan*, 130 F.3d 906, 916-20 (10th Cir. 1997), found only that the district court had mischaracterized the proper forum and had consequently improperly granted summary judgment to the county on the Free Speech claim. In any event, that case merely restates *Lamb's Chapel's* premise that where a "government permits secular displays on a nonpublic forum, it cannot ban displays discussing otherwise permissible topics from a religious perspective." *Id.* at 918.

C. The Archdiocese's Position Would Upend This Court's Forum Doctrine, Eliminating Any Meaningful Distinction Between Content and Viewpoint Discrimination

In asking this Court to grant review and reverse the court of appeals, Petitioner never comes to grips with what the court below correctly identified as the "sweeping" deleterious consequences its position would create for government bodies to place reasonable restrictions on speech. Pet. App. 17. Indeed, if adopted, the Archdiocese's argument would erase any meaningful distinction between content and viewpoint discrimination, upending the guiding principles of this Court's forum doctrine over the past 50 years, and would make it virtually impossible for government bodies to administer non-public forums. Petitioner's unwillingness (or inability) to address these problems is reason enough to deny review.

The core of Petitioner's argument, as the court of appeals correctly recognized, is that WMATA discriminates against religious speech because it will accept holiday-themed advertisements for toys, beverages, or other commercial products, but will not accept advertisements that express a "religious viewpoint" about the Christmas holiday. But that argument depends on treating advertisements for toys or beverages not as what they are—efforts to sell commercial products—but as a form of social commentary on the meaning of Christmas. On that contrived view, however, *every* commercial advertisement can be recharacterized as the expression of a particular "secular" viewpoint about some subject, which would then be considered an allowable subject for communication

in the forum. And, in turn, anyone who wished to run an advertisement expressing a religious, political, or policy view on that same "subject" would have a valid claim of viewpoint discrimination.

That cannot be correct. Consider some examples. If a sports network advertised its weekly Saturday afternoon college football broadcast on a WMATA bus, the advertisement could be re-characterized as the expression of a "viewpoint" on the subject of playing or watching sports on Saturday; WMATA would then need to accept an advertisement from a religious organization asserting that sports should not be played on Saturdays or that watching television on the Sabbath violates God's law. Or, as the court of appeals noted, it is simply common sense that a McDonald's ad does not express "a view on the desirability of eating beef that demands the acceptance of a contrary ad from an animal rights group, or [that] a Smithsonian Air and Space Museum ad for a special stargazing event expresses a view on the provenance of the cosmos that demands a spiritual response." Pet. App. 26.[5]

As the court of appeals correctly understood, the Archdiocese's framing of commercial advertising as

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[5] *See also* Pet. App. 45-46 (Wilkins, J., concurring) ("But such alleged 'viewpoint' discrimination could always be reverse-engineered by comparing a prohibited statement with any permitted statement—real or hypothetical—and finding some kind of subject-matter commonality between the two. . . . Allowing an individual private speaker to retroactively redefine the relevant 'subject matter' whenever her speech is restricted, as the Archdiocese would have us do, is not only contrary to how the Supreme Court has structured forum analysis, it would make crafting administrable content categories for nonpublic forums nearly impossible.").

inherently expressing a "meta" viewpoint on a subject broader than or different from the desirability of the particular product or service being advertised would collapse content- and viewpoint-based First Amendment analysis. The court of appeals rightly understood this. *See* Pet. App. 26-27 ("Were a court to treat such commercial advertising as expressing a broader view, it would, furthermore, eviscerate the distinction between viewpoint-based and subject-based regulation on which the forum doctrine rests, and the longstanding recognition that the government may limit a non-public forum to commercial advertising.").[6] Petitioner has never denied this far-reaching effect, and indeed, has not even attempted to offer a limiting principle that would avoid upending 50 years of this Court's forum doctrine jurisprudence.

Petitioner's desired reframing of this Court's forum law would, moreover, put WMATA and other operators of non-public forums in an untenable position. If principles of viewpoint discrimination were to force WMATA to run the Archdiocese's "Perfect Gift" advertisement, then any decision to reject advertisements criticizing the Catholic Church's position on moral issues or the conduct of Church affairs would immediately be challenged as viewpoint discrimination. This concern is not hypothetical. In 2001, when WMATA's advertising space was a designated public

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[6] *See also* Pet App. 46 (Wilkins, J., concurring) ("At base, the Archdiocese asks us to erase the Supreme Court's critical distinction between permissible subject-matter restrictions and impermissible viewpoint discrimination."); *Children of the Rosary v. City of Phx.*, 154 F.3d 972, 981 (9th Cir. 1998) (White, J.) (finding a content-, and not viewpoint-based, distinction where "the city is merely requiring that an advertisement convey a commercial message").

forum, the organization Catholics for a Free Choice submitted an advertisement stating: "Catholic People Care. Do Our Bishops? . . . Banning Condoms Kills." AJA 201, 268. That advertisement led to substantial controversy, generating rider and community complaints, including vociferous complaints from Petitioner itself. AJA 201. But WMATA could not possibly run Petitioner's advertisement without also being forced to accept advertisements like the one to which Petitioner objected in 2001.

And it would not stop there. If WMATA were to run Petitioner's advertisement, the prohibition on viewpoint discrimination would leave WMATA with no choice but to run advertisements denigrating Islam as a religion that promotes violence, misogyny, or anti-Semitism (and WMATA has received requests to run such advertisements), and the responsive advertising that such advertisements would doubtless prompt in turn. No reasonable subject-matter limitations on transit advertising could survive what the Archdiocese's position would unleash.

Nor is it an answer, as the Archdiocese contended below, that WMATA could adopt policies that either ban offensive speech or incitement. *See* Appellate Reply Brief 16-17. As this Court explained just one month ago, a ban on speech that a government deems "offensive" or "derogatory" itself constitutes viewpoint discrimination. *Iancu v. Brunetti*, 139 S. Ct. 2294, 2299 (2019). Meanwhile, as WMATA and other transit authorities have experienced themselves in attempting to reject advertisements that denigrate religious faiths or national groups, the bar for what

constitutes incitement can be exceptionally high.[7] The Archdiocese has conspicuously omitted this argument in its petition, and with good reason; it offers no solution to operators of non-public forums like WMATA.

At bottom, the Archdiocese's position would require this Court to overturn the core holding of *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974), 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. But under the Archdiocese's contrary rule, any time a governmental body accepted commercial advertising on any topic, it would have no choice but to accept religious (or for that matter, political, advocacy, or any other) advertisements that could be characterized as touching on the same subject. This would interfere with the ability of WMATA and transit agencies across the country to provide safe and reliable transit service—"'the use to which it is lawfully dedicated.'" *Perry Educ. Ass'n v. Perry Local Educ. Ass'n*, 460 U.S. 37, 50 (1983) (quoting *United States Postal Service v.*

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[7] *See AFDI v. WMATA*, 898 F. Supp. 2d 73, 81 (D.D.C. 2012) (finding that WMATA's concern that an advertisement stating "IN ANY WAR BETWEEN THE CIVILIZED MAN AND THE SAVAGE, SUPPORT THE CIVILIZED MAN. SUPPORT ISRAEL. DEFEAT JIHAD." would incite violence was insufficient to prevent running the advertisement); *AFDI v. MTA*, 70 F. Supp. 3d 572, 574 (S.D.N.Y. 2015), *vacated on other grounds*, 109 F. Supp. 3d 626 (S.D.N.Y. 2015), *aff'd,* 815 F.3d 105 (2d Cir. 2016) (finding no violation of a ban on incitement where an advertisement featured a menacing man wearing a headscarf stating "Killing Jews is Worship that draws us close to Allah," and then stating "That's His Jihad. *What's yours?*").

Council of Greenburgh Civic Ass'ns, 453 U.S. 114, 132, 129-130 (1981)).

If that were not enough, other operators of non-public forums—such as military bases and newspapers, VA hospitals, and government charitable campaigns—would soon face these same challenges, challenges that up until this point have been unsuccessful precisely because courts have taken the approach of the court below.[8] They, too, would be forced to choose between accepting *no* commercial advertising at all, and accepting *all* advertisements that criticize a religion, candidate, or policy position.

This Court long ago rejected forcing operators of non-public forums into this unenviable position. It explained:

> By recognizing the distinction [between a public and nonpublic forum], we encourage the government to open its property to some expressive activity in cases where, if faced with an all-or-nothing choice, it might not open the property at all. That this distinction turns on governmental intent does

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[8] *See, e.g.*, *Cornelius*, 473 U.S. at 811 (holding that the Combined Federal Campaign's decision to "exclude all advocacy groups, regardless of political or philosophical orientation" so long as it was not a pretext for viewpoint discrimination); *Greer v. Spock*, 424 U.S. 828, 838-839 (1976) (upholding regulation preventing "political speeches" and campaigning on military base); *Bryant v. Gates,* 532 F.3d 888, 896-897 (D.C. Cir. 2008) (holding that prohibition on "political" advertisements in Civilian Enterprise Newspapers, distributed on military installations, was reasonable); *Preminger v. Secretary of Veterans Affairs*, 517 F.3d 1299, 1314-1315 (Fed. Cir. 2008) (upholding VA regulation applicable to Medical Center which prohibited VA visitors from engaging in "partisan activities").

> not render it unprotective of speech. Rather, it reflects the reality that, with the exception of traditional public fora, the government retains the choice of whether to designate its property as a forum for specified classes of speakers.

Arkansas Educ. Television Comm'n v. Forbes, 523 U.S. 666, 680 (1998). Adopting the Archdiocese's position would turn this commitment on its head. The decision below instead wisely "preserves the government's ability to manage potentially sensitive non-public forums while cabining its discretion to censor messages it finds more or less objectionable." Pet. App. 16.

D. Guideline 12 Is Reasonable and Has Been Applied Reasonably

WMATA's ban on advertisements that "promote or oppose any religion, religious practice or belief" is reasonable, and has been applied reasonably. It is telling that the Archdiocese devotes just two paragraphs to its contrary arguments, both of which present purely fact-bound challenges to the ruling below that do not remotely warrant this Court's review.

A speech restriction in a non-public forum is reasonable where "it is wholly consistent with the [government's] interest in preserving 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.

Petitioner claims that WMATA's restriction is not reasonable because it "single[s] out the religious for disfavored treatment." Pet. 23 (quoting *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2020 (2017)). This argument is wrong three times over. First, *Trinity Lutheran* stated that such conduct violated the *Free Exercise Clause*, and Petitioner has abandoned the free exercise challenge it brought below. This statement from *Trinity Lutheran* is inapposite in the context of a Speech Clause challenge to a restriction in a non-public forum. Second, and in any event, WMATA's policy does not single out the religious for disfavored treatment. WMATA's ban on "issue-oriented advertising" bars all political, religious, and advocacy-oriented advertisements. Speech on religious subjects is thus on equal footing with speech on political or advocacy matters. And finally, Guideline 12 itself does not single out religious *speakers* at all; it bans only the advertisements on the *subject of religion*, as is permissible under *Rosenberger*.

The Archdiocese also makes a half-hearted fact-bound argument (Pet. 24, 35) that WMATA has not applied Guideline 12 in a reasonable manner. Out of the thousands of advertisements WMATA has accepted, Petitioner has identified three that it claims demonstrate inconsistent application of Guideline 12: an advertisement urging charitable giving by the Salvation Army, an advertisement from a Christian radio station featuring its slogan "Always Encouraging," and an advertisement from CorePower Yoga featuring the slogan "Muscle + Mantra." Petitioner also points to WMATA's rejection of an advertisement from the Franciscan Monastery. But

even these cherry-picked examples do not come close to showing unreasonable administration of Guideline 12.

As the court of appeals explained, "running the Salvation Army's and the radio station's ads underscores that WMATA is consistently rejecting ads that have religious content rather than discriminating against ads submitted by religious speakers." Pet. App. 28. As WMATA confirmed at oral argument in the court of appeals, it would have no objection to running an advertisement from the Archdiocese that, like the Salvation Army's, did no more than urge that the public give to Catholic Charities. Pet. App. 25. But because, as the Archdiocese has repeatedly acknowledged, its advertisement is not principally an exhortation to give to charity, but instead focuses on evangelization, WMATA drew a reasonable line between its advertisement and that of the Salvation Army and the Christian radio station.

Petitioner likewise claims that WMATA's decision to reject an advertisement from the Franciscan Monastery USA encouraging individuals to visit Franciscan Monastery of the Holy Land in America could only have been because the Monastery was a religious speaker. Pet. 34-35. In fact, like the Archdiocese's website, the Monastery's website encourages visitors to the Monastery to visit replicas of Holy Land shrines, go to Mass and confession, enjoy quiet prayer, or participate in a pilgrimage to the Holy Land. *See* https://myfranciscan.org/. WMATA properly found that the advertisement from the Monastery violated Guideline 12, while the advertisements from the Salvation Army and WGTS,

which did not similarly promote religion, religious practice, or belief, did not.

Finally, the court of appeals correctly found that the CorePower Yoga advertisement, which was an advertisement for an exercise class, was, unlike the Archdiocese's advertisement, "not recognizably religious." Pet. App. 28-29; *see also* Pet. App. 102-103 & n.19 (district court discussing in detail the lack of religious content in the CorePower Yoga advertisement and website). In spite of Petitioner's contrary arguments, none of the advertisements it cites provides any evidence of arbitrary application of Guideline 12. This fact-bound question does not warrant review by this Court.

II. The Decision Below Properly Found That Guideline 12 Does Not Violate RFRA

Petitioner's second question presented does not warrant review. The court of appeals properly held that Petitioner's likelihood of success on its RFRA claim was "dubious at best." Pet. App. 30. Notably, Petitioner has not alleged that the decision below conflicts either with any decision of this Court or of any court of appeals. Instead, it merely asks this Court to reverse because it believes the decision below "departs from the clear teachings of this Court's RFRA precedents." Pet. 28. That characterization of the court of appeals' reasoning is simply wrong. But to even reach the substantive RFRA issue that Petitioner identifies, this Court would first have to resolve the threshold question of whether RFRA even applies to WMATA—a question that the D.C. Circuit has answered in the negative,

for the very good reason that RFRA plainly does not apply.

A. RFRA Does Not Apply to WMATA

The Archdiocese's RFRA's claim fails at the threshold because RFRA cannot constitutionally be applied to WMATA. WMATA is an "instrumentality and agency" of Maryland and Virginia. D.C. Code § 9-1107.01(4). RFRA's application to WMATA is therefore barred by *City of Boerne*, 521 U.S. 507 (1997).

In *City of Boerne*, this Court held that RFRA was unconstitutional as applied to the States because it exceeded Congress's enforcement powers under the Fourteenth Amendment. *Id.* at 511. The Court held that RFRA was a "considerable congressional intrusion into the States' traditional prerogatives and general authority to regulate for the health and welfare of their citizens." *Id.* at 534. It reasoned that RFRA inflicted "substantial costs" on States, both by "imposing a heavy litigation burden on the States" and in "curtailing their traditional general regulatory power." *Id.* The Court struck down RFRA as applied to the States to "maintain . . . the federal balance." *Id.* at 536.

As the court of appeals explained (Pet. App. 35-36), RFRA cannot apply to WMATA because if it did, RFRA would intrude on Maryland's and Virginia's "traditional prerogatives and general authority to regulate" transportation. *Id*. at 534. WMATA is "an instrumentality and agency of *each of* the signatory parties." D.C. Code § 9-1107.01(4) (emphasis added). Those parties include two States: Maryland and

Virginia. Maryland and Virginia have codified the WMATA Compact in their respective transportation codes. Md. Code, Transp. § 10-204; Va. Code Ann. §§ 33.2-3000, -3100. And Maryland and Virginia "exercise a high degree of control over WMATA" by "retain[ing] the power to void any WMATA rule or regulation." *Morris v. WMATA*, 781 F.2d 218, 227 (D.C. Cir. 1986) (citing to WMATA Compact §76(e)). Those States therefore did not cede their sovereignty by joining WMATA. To the contrary, WMATA became an instrumentality of those States through the Compact and receives similar protections afforded to States as sovereigns. *Tarrant Reg'l Water Dist. v. Herrmann*, 569 U.S. 614, 631 (2013) ("The background notion that a State does not easily cede its sovereignty has informed our interpretation of interstate compacts.").

The Archdiocese nevertheless contends that RFRA applies to WMATA because "the District of Columbia falls squarely within RFRA's ambit." Pet. 31. But Maryland and Virginia cannot be so easily airbrushed out of the WMATA Compact. As the D.C. Circuit explained more than three decades ago, WMATA does not lose any immunities conferred to it by Maryland and Virginia merely because the District of Columbia also joined the Compact. *See Morris*, 781 F.2d at 228. That court, after examining this Court's decision in *Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency*, 440 U.S. 391 (1979), explained that "had Maryland and Virginia created WMATA without the participation of the District of Columbia, we would conclude that WMATA enjoys eleventh amendment immunity as an instrumentality of the states." *Morris*, 781 F.2d at 228. As such, the court concluded that it could not accept the "mysterious arithmetic"

that "when three immunities are added together, all immunities disappear." *Id*. The same arithmetic bars the Archdiocese's RFRA's claim here, regardless of whether the District of Columbia is a member of WMATA.

Petitioner further argues that this Court should hold that Maryland and Virginia waived their sovereign immunity *sub silentio* "[u]nless there is good reason to believe that the States structured the new agency to enable it to enjoy the special constitutional protection of the states themselves, and that Congress concurred in that purpose." Pet. 32 (quoting *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 43-44 (1994)). But as the D.C. Circuit has noted, both Maryland and Virginia have made clear their intent to confer their immunity on WMATA. *Morris*, 781 F.2d at 224-25. Moreover, *Morris* applied this Court's standards from *Lake Country Estates* to determine whether Maryland and Virginia intended to waive their immunity, finding that they did not because, *inter alia*, the signatories did not intend to treat WMATA as a political subdivision, that Maryland and Virginia were obligated to pay WMATA operating expenses out of their own treasuries, and that both States exercise substantial control over WMATA. *Id.* at 225-227. Unlike in *Lake Country Estates* and *Hess*, and as the D.C. Circuit held, "every factor considered by the Supreme Court . . . points to the existence of immunity here." *Id.* at 228. Thus, "it is absolutely clear that Maryland, Virginia, and the Congress of the United States intended that WMATA should receive the eleventh amendment immunity of the states." *Id.* at 225.

The court of appeals thus properly found that the Archdiocese was not likely to succeed on the merits of its RFRA claim because RFRA does not apply to WMATA. Pet. App. 36. It noted in addition that the issue had not been substantially briefed, a development that has been repeated before this Court. *Id.* The lack of full discussion below due to the early stage of this litigation, and the fact that the Court must decide this threshold question of RFRA's applicability before reaching the merits, provides yet another reason why certiorari should be denied.

B. WMATA Has Not Substantially Burdened the Archdiocese's Exercise of Religion

Even if RFRA applied to WMATA, the Archdiocese's RFRA claim would fail because the Archdiocese cannot show that its exercise of religion has been "substantially burden[ed]." 42 U.S.C. § 2000bb-1(a). The Archdiocese contends (Pet. 29-30) that WMATA's guidelines substantially burden its religious exercise because it is not permitted to "participate in an important forum made available to others." Pet. 29. But Petitioner's RFRA argument, like its argument under the First Amendment, reaches well beyond this Court's precedents and offers no meaningful limits to those claiming sincere religious belief.

According to Petitioner (Pet. 29), WMATA violates RFRA because it prevents the Archdiocese from running its advertisement in the forum of its choice. But unlike the cases it cites from this Court, Petitioner never explains *how* being prevented from running advertisements on the outside of WMATA

buses substantially burdens its exercise of its religion. This Court has found such a burden to be present when an individual is forced to engage in conduct that violates his beliefs or prevented from engaging in conduct that his beliefs require. *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 724 (2014) (respondents contended "the coverage demanded by the HHS regulations is connected to the destruction of an embryo in a way that is sufficient to make it immoral for them to provide the coverage"); *Holt v. Hobbs*, 135 S. Ct. 853, 862 (2015) (forcing petitioner to shave his beard would require him to "engage in conduct that seriously violates [his] religious beliefs") (citation omitted).[9] Here, the Archdiocese has never explained or alleged how displaying the "Find the Perfect Gift" advertisement on the outside of WMATA's buses space is part of its religious beliefs or an activity that Catholicism requires.

Petitioner nonetheless claims the decisions on which the court of appeals relied are inconsistent with *Hobby Lobby* and *Holt*, but it can point to no court of appeals that has applied those cases in a contrary manner. Pet. 30 (citing *Mahoney v. Doe*, 642 F.3d 1112, 1121 (D.C. Cir. 2011), and *Henderson v. Kennedy*, 253 F.3d 12, 16 (D.C. Cir. 2001), *cert.*

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[9] To the extent that the Archdiocese alleges any burden, it relies on First Amendment precedents to claim that it is being denied access to "an important forum" because of its religious beliefs. Pet. 29. The court below properly rejected Petitioner's Free Exercise claim on this ground (Pet. App. 31-34), and the Archdiocese has not petitioned on that issue. In any event, the Archdiocese itself disclaims any reliance on Free Exercise doctrine for its RFRA claim. Pet. 30.

denied, 535 U.S. 986 (2002). What is more, those cases show precisely why the Archdiocese's position overreads RFRA. In *Henderson*, the D.C. Circuit found no substantial burden under RFRA where evangelical Christians were prevented from selling t-shirts on the National Mall due to a general Park Service policy preventing such sales. The court held that the Plaintiffs, like the Archdiocese here, had not contended that "selling t-shirts" in that particular forum was "central to the exercise of their religion." 253. F.3d at 16. The court further noted that they could "still distribute t-shirts for free on the Mall, or sell them on streets surrounding the Mall." *Id*. at 16-17.

Likewise, in *Mahoney*, the court found no substantial burden under RFRA where a priest was prevented from using chalk on the sidewalk in front of the White House to protest President Obama's position on abortion. 642 F.3d at 1121. And as in this case, other forums for spreading his message were available. *See id.* (emphasizing that the priest "may still spread his message through picketing, a public prayer vigil, or other similar activities in which he has previously engaged").

Other courts of appeals have likewise found that preventing a religious group from using its preferred forum for spreading its message does not, on its own, constitute a substantial burden under RFRA. *See, e.g.*, *San Jose Christian Coll. v. City of Morgan Hill*, 360 F.3d 1024, 1034 (9th Cir. 2004) (holding that a substantial burden under RLIUPA "must impose a significantly great restriction or onus upon [religious] exercise"); *Real Alternatives, Inc. v. Sec'y Dep't of Health & Human Servs.*, 867 F.3d 338, 357 (3d Cir.

2017) (a burden is substantial where it "coerce[s] the individuals to violate their religious beliefs or deny them the rights, benefits, and privileges enjoyed by other citizens") (internal quotation marks omitted).

Given this case law, the Archdiocese does not identify any circuit split. Indeed, its only argument for seeking review is that the cases relied upon by the court below are wrongly decided. That is not a sufficient basis for this Court's review.

In any event, the universal position of the lower courts is correct. The Archdiocese provides no limitations whatsoever on how RFRA should be applied by this Court or any other. According to the Archdiocese, although it has never alleged that WMATA buses provide it with any more than a preferred method of disseminating its religious message, WMATA nonetheless "substantially burdens" its religious exercise by not running its advertisements in a particular advertising space. Following that reasoning, limiting any individual's preference to place a particular religious message in a particular forum, whether selling a t-shirt on the Mall or writing a message on the street, would be a substantial burden subjecting the restriction to strict scrutiny, regardless of how unimportant that practice is to an individual's religious exercise. Such a rule would have no reasonable boundaries, vastly expanding RFRA's reach beyond any plausible reading of the statute and eviscerating the ability of local governments to enforce their general public and non-public forum policies. RFRA requires no such holding.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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