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

REPLY BRIEF FOR PETITIONER

PAUL D. CLEMENT
Counsel of Record
MICHAEL F. WILLIAMS
ERIN E. MURPHY
MEGAN M. WOLD
JOSEPH C. SCHROEDER
MICHAEL A. FRANCUS
KIRKLAND & ELLIS LLP
1301 Pennsylvania Ave., NW
Washington, DC 20004
(202) 389-5000
paul.clement@kirkland.com

Counsel for Petitioner

August 6, 2019

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

REPLY BRIEF

WMATA's no-religious-speech policy plainly discriminates against religious viewpoints. Indeed, that policy unmistakably bans religious viewpoints on otherwise permissible subjects, whether it be operating hours (permissible for malls; banned for churches), new locations (fine for a yoga studio; verboten for a parish hall), Christmas (secular half allowed; religious half unmentionable), transportation policy or anything else. In its efforts to weed out religious viewpoints, WMATA will apparently not limit its review to advertisement copy but will inspect websites and ban otherwise permissible advertisements that reference a website discussing mass times and the Holy Land. BIO.27. That extraordinary policy violates the First Amendment, the Religious Freedom Restoration Act (RFRA) and the unmistakable teaching of *Lamb's Chapel*, *Rosenberger*, and *Good News Club*.

WMATA's defense rests exclusively on its claim that it is banning the entirety of religion as a subject matter, rather than just precluding religious viewpoints. But that effort to obtain a volume discount for religious discrimination rests on a profound misreading of *Rosenberger*. The government can exclude religion as a subject incidentally by limiting a forum to subjects where religious viewpoints are inapposite. But the government cannot simply declare the entire subject of religion out of bounds, so a religious perspective on an otherwise permissible topic can be banned. The government can limit a forum to sports, but not forbid a mention of Touchdown Jesus. Unfortunately, WMATA is not

alone in misreading *Rosenberger* as allowing more-not-less religious discrimination, as the Circuits are split with the Ninth and D.C. Circuit adopting WMATA's view and the majority of circuits faithfully applying this Court's precedents.

WMATA's effort to defend its policy as consistent with RFRA just underscores that the D.C. Circuit has ignored both the plain text of RFRA and this Court's cases. And its claim to immunity is mistaken and underscores the importance of this case. Indeed, the importance of this case is the one issue on which both parties can agree. WMATA thinks it is very important that it be able to eliminate all religious speech in a forum, even on otherwise permissible topics. WMATA thinks it is justified in examining websites to ensure that no mass times or religious sites are mentioned. The framers had different ideas, as did this Court in *Lamb's Chapel*, *Rosenberger*, and *Good News Club*. It is vitally important that this Court grant plenary review and make clear that governments may not take the easy way out and ban all religious speech, even on otherwise permissible subjects.

I. WMATA's No-Religious-Speech Policy Discriminates Against Religious Viewpoints, Contrary To The Holdings Of This Court And Multiple Circuits.

WMATA's no-religious-speech policy embodies exactly the kind of viewpoint discrimination that this Court has repeatedly invalidated. This Court has considered not one but *three* cases in which the government established a forum for speech but excluded religious speech, just as WMATA has done here. *See Lamb's Chapel v. Ctr. Moriches Union Free*

Sch. Dist., 508 U.S. 384 (1993); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001). And each time, this Court struck down the no-religious-speech policy as viewpoint discriminatory, explaining that religion is not simply a subject matter, but "a specific premise, a perspective, a standpoint from which *a variety of subjects* may be discussed and considered." *Rosenberger*, 515 U.S. at 831 (emphasis added). In short, when the government excludes "speech discussing otherwise permissible subjects … on the ground that the subject is discussed from a religious viewpoint," it engages in impermissible viewpoint discrimination. *Good News Club*, 533 U.S. at 111-12.

WMATA makes the remarkable claim that the D.C. Circuit "scrupulously followed this Court's teachings in *Good News Club*, *Lamb's Chapel*, and *Rosenberger*. BIO.11. In reality, the D.C. Circuit followed the mistaken path of the lower courts in those cases, each of which was reversed. Indeed, Guideline 12 here is materially indistinguishable from "Rule 7," which was the basis for excluding the child-rearing films in *Lamb's Chapel*. In both cases, the proffered speech came within the forum's legitimate subject-matter limitations, but ran afoul of a rule prohibiting religious speech. Simply put, Guideline 12 is no more constitutional than Rule 7, which was struck down in *Lamb's Chapel*.

Like the D.C. Circuit, WMATA suggests that one line in *Rosenberger* allows the government to exclude the entire subject of religion from a forum such that religious speech on otherwise permissible topics may

be banned. BIO.16. But that is a blatant misreading of *Rosenberger*. Indeed, the central lesson of *Rosenberger* (and *Lamb's Chapel* and *Good News Club*) is that religious-speech bans *cannot* be saved by construing them as bans on "religion as a subject matter," because religion is not just a subject, but "a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered." *Rosenberger*, 515 U.S. at 831. It is thus one thing for the government to legitimately limit speech to subjects—be it sports, transportation policy, or tourist attractions—on which religious viewpoints will be rare. In that sense, there is no special protection that religion as a subject matter will be included. But once the metes and bounds of permissible subject matters are established, religious viewpoints cannot be prohibited even under the guise of banning religion as a subject matter. As Justice Scalia underscored in *Good News Club*, when the government seeks a "legitimate reason for excluding … speech from its forum—'because it's religious' will not do." *Good News Club*, 533 U.S. at 122 (Scalia, J., concurring).

WMATA protests that its additional exclusion of "other subject matters like political and advocacy-oriented advertisements," BIO.16, makes its bus-exteriors forum narrower than the fora in *Lamb's Chapel*, *Rosenberger*, and *Good News Club*, Pet.App.21-22. That is highly debatable, as the rules adopted by the school in *Lamb's Chapel* allowed "only 2 of the 10 purposes authorized by" state law. 508 U.S. at 387. But it is irrelevant in any event: "[I]n any First Amendment forum, no matter its scope, viewpoint discrimination always violates the First Amendment."

Pet.App.60; *cf. Iancu v. Brunetti*, slip op. 4 (U.S. June 24, 2019).

It is likewise irrelevant that, in the view of WMATA and the D.C. Circuit, the Archdiocese's advertisement is "not primarily or recognizably about charitable giving" because it is "a religious ad, an exhortation, repeatedly acknowledged by the Archdiocese to be part of its evangelization effort." Pet.App.25; *see* BIO.27 (Archdiocese's advertisement "focuses on evangelization"). The Archdiocese's advertisement was rejected not because it said too little "about charitable giving" but because it said too much about religion. If the complaint had been the former, the Archdiocese could have tweaked its copy (perhaps "***Give*** The Perfect Gift"). But because the real reason was Guideline 12, there is nothing the Archdiocese could do but attempt to vindicate its constitutional right to speak despite its religious perspective and despite the fact that its website references mass times.

Finally, even assuming WMATA's no-religious-speech policy were viewpoint neutral (and it is not), it would still need to be "reasonable" and it is not. Simply banning speech "'because it's religious' will not due," and raises Free Exercise Clause problems to boot. *Good News Club*, 533 U.S. at 122 (Scalia, J., concurring). WMATA claims its policy does not single out religious viewpoints for exclusion because it excludes them "on equal footing" with political and advocacy-oriented speech. But that is not true. If a policy-oriented group wants to advertise the operating hours of its gift shop or even a museum dedicated to the First or Second Amendment, WMATA would allow

it. But even if the Archdiocese avoids any discussion of politics or advocacy, it cannot escape the religious test that is Guideline 12.

WMATA's effort to defend its inexplicably differential treatment of religious advertisements under its no-religious-speech policy only underscores the threat to religious liberty and the need for this Court's review. WMATA claims that it denied the Franciscan Monastery's advertisement because the Franciscan Monastery's *website* encouraged attending mass and visiting replicas of Holy Land shrines. BIO.27. The Monastery is surely guilty as charged, but nothing could better illustrate the constitutional problems at the heart of this case. First, the prospect of the government going beyond advertisement copy to websites in search of religious content is not a happy one. Second, by explaining that the Monastery's advertisement was banned because its website "encourages visitors to … go to Mass and confession … or participate in a pilgrimage," *id.*, WMATA lays bare that it is the Monastery's religious viewpoint that caused its advertisement to be censored. Third, the Salvation Army's advertisement also contained a web address that linked to religious information, and so WMATA is not just trolling websites for religious information but making still-unexplained judgments about how much religious content is too much.

With nothing else left to offer, WMATA resorts to doomsday predictions about the consequences of a decision in the Archdiocese's favor. Those claims are difficult to take seriously given that *Lamb's Chapel*, *Rosenberger*, and *Good News Club* have been the law of (most of) the land (save for the Ninth and D.C.

Circuits) for more than two decades, and government services certainly have not crumbled. That is so even though most jurisdictions fully respect and follow those seminal decisions. *See, e.g.*, *Grossbaum v. Indianapolis-Marion Cnty. Bldg. Auth.*, 63 F.3d 581, 590 (7th Cir. 1995); *Hedges v. Wauconda Comty. Unit Sch. Dist. No. 118*, 9 F.3d 1295 (7th Cir. 1993); *Good News/Good Sports Club v. Sch. Dist. of City of Ladue*, 28 F.3d 1501 (8th Cir. 1994); *Byrne v. Rutledge*, 623 F.3d 46, 56-57 (2d Cir. 2010); *Summum v. Callaghan*, 130 F.3d 906, 918 (10th Cir. 1997).

Indeed, WMATA's claims that allowing the Archdiocese's "Find the Perfect Gift" advertisement would require WMATA to accept *all* advertisements on its buses is refuted by 25 years of experience. As that experience reflects, most governments have placed reasonable limitations on government fora without needing to resort to blunderbuss religious bans akin to Guideline 12. Presumably that is why the federal government in an amicus brief filed below had no difficulty in identifying Guideline 12 as a threat to religious liberty, rather than a necessity for preserving the countless fora maintained by the federal government. Br. of United States as *amicus curiae*, *Archdiocese of Wash. v. Wash. Metro. Area Transit Auth.*, 897 F.3d 314 (D.C. Cir. Jan. 16, 2018), 2018 WL 447339. At the same time, most courts have had little trouble enforcing the First Amendment's prohibition on viewpoint discrimination in government-run fora *without* requiring those fora to accept all comers. Governments can restrict the subject matter allowed in their limited public fora, and they are free to continue excluding speech that is not germane to the subjects they allow in. The problem

here is that WMATA has taken the easy—and constitutionally prohibited—way out and banned any religious expression on any religious subject.

In reality, it is the breadth of WMATA's position that should trouble this Court. WMATA views the need to include an orthodox-Jewish view on transportation policy as the *reductio ad absurdum* of Petitioner's position. BIO.15. It is instead the basic guarantee of the First Amendment. And if WMATA really finds it intolerable to have any religious speech on any topic, it has an alternative. The Constitution mandates government neutrality toward religion, not that public buses generate revenue through advertising. There is no real tension between a sensible advertising policy and the First Amendment. But if we really must choose, and the cost of government neutrality toward religion is a loss of revenue and buses unadorned with exterior advertising, there is no serious question that the Framers were willing to incur that cost.

II. RFRA Applies To WMATA And WMATA's No-Religious-Speech Policy Violates RFRA.

WMATA has violated RFRA by excluding the Archdiocese's advertisement from its bus-exteriors forum. No one disputes that the Archdiocese sincerely seeks to spread its religious views through its "Find the Perfect Gift" campaign. Nor does anyone dispute that WMATA makes its bus-exteriors forum available to others. Yet WMATA refuses to allow the Archdiocese to participate in this unique and important advertising forum *because of* its sincere religious exercise. *See* 42 U.S.C. §2000bb-1(a). That

refusal is clearly a substantial burden on religious exercise; indeed, it is an outright ban.

According to the D.C. Circuit, there is no substantial burden because the Archdiocese's religion does not "require[]" advertising on buses, and the Archdiocese "has many other ways to pursue its evangelization efforts." Pet.App.34. But as this Court has made crystal clear, RFRA defines "religious exercise" to include *not* just that which is "compelled by, or central to, a system of religious belief," but *all* religious exercise. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 696 (2014) (quoting 42 U.S.C. §2000cc-5(7)(A)). And the availability of other avenues for religious expression does not eliminate the substantial burden WMATA has placed on *this one*. Indeed, to absolve governments of substantial burdens simply because other avenues of religious exercise still exist "improperly imports a strand of reasoning from cases involving … First Amendment rights." *Holt v. Hobbs*, 135 S. Ct. 853, 862 (2015).

Ignoring RFRA's text and this Court's precedent, WMATA doubles down on the D.C. Circuit's errors, insisting that the Archdiocese cannot be "substantially burdened" because its advertisement is not "part of its religious beliefs or an activity that Catholicism requires." BIO.33. But, tellingly, the only cases WMATA cites in support of that claim are the same D.C. Circuit cases that remain stubbornly out of step with RFRA's language and this Court's precedents. BIO.33-34.

As for its claim that "[o]ther courts of appeals have … 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," BIO.34, the cases to which WMATA points have nothing to do with a religious group's "preferred forum for spreading its message." WMATA first cites a RLUIPA case about zoning regulations for the location of a religiously affiliated hospital—as strained a conception of "forum" as one can imagine. BIO.34 (citing *San Jose Christian Coll. v. City of Morgan Hill*, 360 F.3d 1024, 1034 (9th Cir. 2004)). WMATA next invokes a case rejecting a RFRA challenge to the contraception mandate on the ground that the connection between the alleged burden and any government action purportedly was too attenuated. BIO.34-35 (citing *Real Alternatives, Inc. v. Sec'y Dep't of Health & Human Servs.*, 867 F.3d 338, 357 (3d Cir. 2017)). Putting aside the validity of that "attenuation" analysis, no such argument could plausibly be made here, as the burden on the Archdiocese's religious exercise stems directly from WMATA's discriminatory policy.

Ultimately, then, WMATA is left with no support other than the D.C. Circuit's persistent refusal to abide by RFRA as written and interpreted by this Court. That dogged denial of Congress' will only underscores the need for this Court's intervention.

WMATA fares no better in defending the D.C. Circuit's second rationale for denying the Archdiocese's RFRA claim—*i.e.*, its holding that RFRA does not apply to WMATA at all. As explained in the petition, that holding conflicts with a long line of this Court's Compact Clause cases. *See, e.g.*, *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 40 (1994); *Lake Country Estates, Inc. v. Tahoe Reg'l Planning*

Agency, 440 U.S. 391 (1979). In response, WMATA invokes a single D.C. Circuit decision holding that WMATA is entitled to Eleventh Amendment immunity. BIO.31 (citing *Morris v. WMATA*, 781 F.2d 218 (D.C. Cir. 1986)). But *Morris* is equally in tension with this Court's cases, some of which post-date it, and does not explain how the District can shed its undoubted obligations under RFRA by joining a compact that expressly directed that the signatories would continue to honor their legal obligations. D.C. Code §9-1107.01(76(e)).

III. WMATA Does Not Dispute That This Case Has Far-Reaching Consequences On Issues Of Exceptional Importance.

If there is one thing on which the Archdiocese and WMATA agree, it is that this case is exceptionally important. WMATA's strained defense of the D.C. Circuit's decision confirms as much. WMATA's opposition underscores that it views itself as empowered by the decision below to explore websites in search of undue religious content and to ban all religious speech on any topic whether it be transportation policy or operating hours. On the other side of the ledger, WMATA maintains that if the decision below does not stand, all public transportation advertising is at risk, and probably the existence of all other limited public fora too. BIO.23-25. WMATA's concerns are overstated, *cf*. Br. of United States as *amicus curiae* at 9, 2018 WL 447339, but its breathless claims underscore the far-reaching consequences of the question at hand, as the decision below empowers all manner of government entities to discriminate against speech that the First

Amendment protects twice over. *See also* Amicus Br. of Found. for Moral Law at 5; Amicus Br. of Christian Legal Soc'y, et al. at 15-16; Amicus Br. of Nat'l Assoc. of Evangelicals, et al. at ¶5.

Indeed, the decision below singles out for specially *disfavored* treatment speech that the First Amendment singles out for special *protection*. That inversion of the constitutional order cannot stand, especially not in the Nation's Capitol. While WMATA sends the message that religious speech has no place in its forum, this Court should send a clear message that Guideline 12 and its hostility to religion have no place in a constitutional system dedicated to religious liberty.

CONCLUSION

For the foregoing reasons, this Court should grant the petition.

Respectfully submitted,

PAUL D. CLEMENT
Counsel of Record
MICHAEL F. WILLIAMS
ERIN E. MURPHY
MEGAN M. WOLD
JOSEPH C. SCHROEDER
MICHAEL A. FRANCUS
KIRKLAND & ELLIS LLP
1301 Pennsylvania Ave., NW
Washington, DC 20004
(202) 389-5000
paul.clement@kirkland.com

Counsel for Petitioner

August 6, 2019