No. _____

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

As the 2017 Advent season was approaching, the Archdiocese of Washington sought to advertise its "Find the Perfect Gift" campaign on the exterior of the public buses operated by the Washington Metropolitan Transit Authority ("WMATA"). Its proposed advertisement depicted the silhouette of three shepherds and sheep accompanied by the simple text: "Find the Perfect Gift." While WMATA accepts a wide variety of advertisements for display on its buses—including all manner of "secular" advertisements addressing Christmas and charitable giving—it refused to run the Archdiocese's advertisement because it has an express policy prohibiting advertisements that promote or oppose religion or reflect a religious perspective.

This Court has three times rejected comparable government efforts to suppress speech addressing otherwise-permissible topics from a religious perspective. *See Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993). Yet the D.C. Circuit nonetheless concluded that WMATA's no-religious-speech policy violates neither the First Amendment nor the Religious Freedom Restoration Act.

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.

PARTIES TO THE PROCEEDING

Petitioner Archdiocese of Washington was plaintiff in the district court and appellant in the court of appeals. While petitioner was identified in the proceedings below as the Archdiocese of Washington, Donald Cardinal Wuerl, a Roman Catholic Archbishop of Washington, a corporation sole, the Archdiocese is currently without an archbishop, with the new archbishop scheduled to be installed on May 21, 2019. Respondent Washington Metropolitan Transit Authority was defendant in the district court and appellee in the court of appeals.

CORPORATE DISCLOSURE STATEMENT

No publicly held company owns any stock in the Archdiocese of Washington.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authority

PETITION FOR WRIT OF CERTIORARI

The Washington Metropolitan Area Transit Authority ("WMATA") accepts a wide variety of advertisements for display on the exterior of public buses, but it does not accept advertisements that promote (or oppose) religion or reflect a religious perspective. In this case, WMATA applied that policy to reject an advertisement from the Archdiocese of Washington ("Archdiocese") depicting the silhouette of three shepherds and sheep accompanied by the simple text: "Find the Perfect Gift." That advertisement was part of a larger campaign to encourage individuals to engage in service projects to assist those in need; to give charitably; and to learn of Mass schedules and other devotional activities during the season of Advent leading to Christmas. If Amazon or Macy's had wanted to run an advertisement with the same text and graphics or with reindeer instead of shepherds, there is no question that WMATA would have readily accepted the advertisement. Indeed, WMATA has candidly explained that it views Christmas as having "a religious half" and "a secular half," and that it will accept advertisements that address the latter, but not the former.

There is a word for that—two words, in fact. It is called viewpoint discrimination, and the First Amendment forbids it. Indeed, this Court has three times considered and three times rejected no-religious-speech policies materially indistinguishable from WMATA's. *See Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995); *Lamb's Chapel v. Cent. Moriches Union Free Sch. Dist.*, 508

U.S. 384 (1993). In each of those cases, the Court considered government policies that purported to exclude all religious speech from a forum open to secular views on a variety of subjects. Each time, this Court invalidated the policy, admonishing that religion provides "a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered," and that prohibiting speech on otherwise-permissible topics just because it reflects a religious perspective is viewpoint discrimination. *Rosenberger*, 515 U.S. at 831. Just so here.

The court below nonetheless endorsed WMATA's no-religious-speech policy on the theory that it permissibly excluded the entire "subject of religion" instead of prohibiting speech from a religious viewpoint. That theory is neither legally nor factually tenable. WMATA allows secular speech on the same topics—Christmas, operating hours, and charitable giving—that the Archdiocese's proposed advertisement addressed. WMATA refused to accept the Archdiocese's advertisement solely because it spoke on those topics from a religious perspective, encouraging viewers to find the perfect gift in a church rather than in a department store. That is precisely what this Court has repeatedly declared impermissible viewpoint discrimination. In concluding otherwise, the decision below squarely conflicts with those precedents—not to mention the many lower court cases following them.

Viewpoint discrimination is always a matter of grave concern, but viewpoint discrimination against religious speech is particularly pernicious. Under the

Constitution, religious speech is entitled to special protection, not singled out for special disabilities. And under the Religious Freedom Restoration Act ("RFRA"), governmental entities in the District must accommodate religious exercise, not substantially burden it. Yet the decision below allows WMATA to discriminate against religious speech with impunity—as it has done to other religious speakers as well. Worse still, the decision below embraces reasoning that would effectively allow the government to eradicate religious speech from public and nonpublic forums alike. The Court should grant certiorari and reverse the D.C. Circuit's profoundly mistaken departure from the clear teachings of this Court's precedents.

OPINIONS BELOW

The opinion of the D.C. Circuit is reported at 897 F.3d 314 and reproduced at App.1-49. The D.C. Circuit's order denying rehearing en banc, as well as Judge Griffith's statement dissenting from that order, is reported at 910 F.3d 1248 and is reproduced at App.50-63. The opinion of the District Court for the District of Columbia is reported at 281 F. Supp. 3d 88 and reproduced at App.64-114.

JURISDICTION

The D.C. Circuit issued its panel opinion on July 31, 2018. It denied rehearing en banc on December 21, 2018. Chief Justice Roberts granted motions to extend the time for filing a petition of certiorari on March 1, 2019 and March 21, 2019. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment and the Religious Freedom Restoration Act, 42 U.S.C. §§2000bb-1 *et seq.*, are reproduced at App.115-117.

STATEMENT OF THE CASE

A. WMATA's Advertising Program

WMATA operates, among other things, the District of Columbia's bus system. To help defray the costs of that system, WMATA sells advertising space on the exterior of public buses that traverse the public streets. For years, WMATA allowed advertising from religious and non-religious groups alike. For example, as recently as 2015, WMATA ran advertisements for the Archdiocese's Lenten campaign, "The Light Is On For You," on the backs of 85 buses throughout the D.C. metropolitan area without reported complaint. C.A.App.12 ¶20.[1]

In 2015, however, WMATA imposed new restrictions on how its advertising space may be used. After conducting a survey that indicated that about 58% of riders oppose "issue-oriented advertising," C.A.App.206, WMATA adopted several new guidelines that purported to address that concern. For example, Guideline 9 prohibits "[a]dvertisements intended to influence members of the public regarding an issue on which there are varying opinions." C.A.App.208. Guideline 13 prohibits "[a]dvertisements that support or oppose an industry position or industry goal without any direct commercial benefit to the

[1] "C.A.App." refers to the joint appendix filed with the District of Columbia Circuit.

advertiser." C.A.App.209. Guideline 14 prohibits "[a]dvertisements that are intended to influence public policy." C.A.App.209. In conjunction with these changes, WMATA also adopted Guideline 12, which prohibits "[a]dvertisements that promote or oppose any religion, religious practice or belief." C.A.App.209.

Notwithstanding Guideline 12, WMATA has continued to run some advertisements touching upon religion and spirituality. For example, WMATA has run exterior bus advertisements for the Salvation Army's Christmas-related fundraising activities and charitable works. The Salvation Army is a Christian organization, and its advertisements depict its religiously focused name and logo. The advertisements link to the Salvation Army's website, which features its Mission statement:

> The Salvation Army, an international movement, is an evangelical part of the universal Christian Church. Its message is based on the Bible. Its ministry is motivated by the love of God. Its mission is to preach the gospel of Jesus Christ and to meet human needs in His name without discrimination.

C.A.App.141-42; C.A.App.305.

WMATA also has run advertisements for a Christian radio station, WGTS 91.9, that provides prayer and devotional resources for its listeners. C.A.App.374 ¶8. The advertisement features the radio station's channel number and its slogan, "Always Encouraging." C.A.App.347. And WMATA has run advertisements for CorePower Yoga, a yoga studio whose website describes yoga as "an inner

journey of self-discovery" leading to the "acknowledgment of one soul to another," "fully uniting the body, mind and spirit." C.A.App.142; C.A.App.257-66.

B. The Archdiocese's "Find the Perfect Gift" Campaign

Each year, the Roman Catholic Church observes Advent, a liturgical season that typically begins in late November and culminates in the festivities of Christmas. In spring 2017, the Roman Catholic Archdiocese of Washington ("Archdiocese") began planning for its annual Advent activities. As part of that planning, it prepared the "Find the Perfect Gift" campaign, which aimed to "share a simple message of hope, welcoming all to Christmas Mass or in joining in public service to help the most vulnerable during the liturgical season of Advent." C.A.App.25-26 ¶3.

In conjunction with that campaign, the Archdiocese prepared an advertisement depicting a minimalist scene: a starry night, the golden silhouettes of shepherds and sheep on a hill, and the words "Find the Perfect Gift." The advertisement also displayed the address of a web site that would connect visitors to schedules of local Masses and opportunities for charitable giving, as well as a social media "hashtag":

The Archdiocese successfully placed versions of this advertisement in parish bulletins and on bus shelters. But while parish bulletins reach parishioners already attending Mass, and stationary bus shelters convey a message to those who happen to pass by, the Archdiocese hoped to reach a broader audience. The exterior of WMATA's buses would be the perfect fit, as that space offered the Archdiocese a unique, dynamic opportunity to communicate its message to audiences on streets and sidewalks in parts of the District that may be underserved by other media.

The Archdiocese approached WMATA and sought to purchase space on the exterior of its buses. But it was rebuffed. According to WMATA's third-party advertising vendor, Outfront Media, the "Find the Perfect Gift" advertisement did not comply with WMATA's guidelines for permissible advertising. C.A.App.28-29. The Archdiocese requested an appeal, and Outfront Media responded after some delay that "WMATA denied the ad copy to run on buses unfortunately." C.A.App.29 ¶15. The Archdiocese then asked to meet with WMATA to discuss the rejection of the "Find the Perfect Gift" advertisement, explaining that WMATA's exclusion of its advertisement "raises serious questions under the

First Amendment and other applicable laws." C.A.App.11 ¶18. WMATA responded that "[t]he Archdiocese's advertisement for 'FindThePerfectGift.org' is prohibited by … Guideline 12 because it depicts a religious scene and thus seeks to promote religion." C.A.App.30 ¶16.

C. Proceedings Below

1. With Advent fast approaching, the Archdiocese turned to the courts to vindicate its constitutional rights. It filed a lawsuit seeking declaratory and injunctive relief under the First Amendment's Free Speech and Free Exercise Clauses, RFRA, and the Fifth Amendment's guarantees of due process and equal protection. As the Archdiocese explained, WMATA's policy against running advertisements on otherwise-permissible topics if they offer a religious perspective is exactly the kind of viewpoint discrimination that this Court has repeatedly held unconstitutional. *See, e.g.*, *Good News Club*, 533 U.S. at 106-07; *Rosenberger*, 515 U.S. at 829-30; *Lamb's Chapel*, 508 U.S. at 392-93.

2. The district court denied the Archdiocese's request for a preliminary injunction, concluding that its claims were not likely to succeed. Although the court acknowledged that WMATA routinely runs other advertisements relating to Christmas, it claimed that WMATA's no-religious-speech policy is viewpoint-neutral on the theory that Christmas advertisements that merely proclaim: "Shop here! Buy this!" convey no "*viewpoint* on the question of how Christmas should be observed." App.89. As for WMATA's seemingly arbitrary enforcement of Guideline 12, the court attempted to distinguish the

Salvation Army's advertisement as merely "promoting … the act of giving," despite the Salvation Army's "religious origin and affiliation." App.99. The court declared the CorePower Yoga advertisement "distant from the ancient Indian religious traditions that gave rise to yoga," App.102-03, and summarily dismissed the WGTS 91.9 Christian radio advertisement as "quite thin" evidence of arbitrary enforcement, App.105 n.20.

The district court found no merit to the Archdiocese's Free Exercise claim, concluding that WMATA's no-religious-speech policy is both neutral and generally applicable even though it specifically singles out religious speech, and that WMATA's rejection of the Archdiocese's advertisement did not burden the Archdiocese's exercise of religion at all. App.105-08. The court likewise found no merit to the Archdiocese's RFRA claim, as well as its other claims. App.108-13.

3. The Archdiocese appealed, and a two-judge panel of the D.C. Circuit affirmed.[2] The panel acknowledged that this Court has repeatedly struck down as "unconstitutional viewpoint discrimination" regulations that "operated to exclude religious viewpoints on otherwise includable topics." App.18 (citing *Good News Club*, *Rosenberger*, and *Lamb's Chapel*). But it purported to distinguish those cases on the ground that WMATA's policy "does not function to exclude religious viewpoints but rather proscribes advertisements on the entire subject matter of

[2] Then-Judge Kavanaugh was originally assigned to the panel and participated in oral argument. He took no part, however, in the opinion issued in this case.

religion." App.18. The panel went on to suggest that this Court's cases have "blur[red] the line between religion-as-subject-matter and a religious viewpoint." App.21. It then concluded that those cases should be read as rendering no-religious-speech policies impermissible only if "the property had been opened to a wide range of subjects without excluding religion." App.21.

As for the problem that WMATA *has* opened its bus exteriors to the subjects of the Archdiocese's advertisement—*i.e.*, charitable giving, operating hours, and Christmas—the panel concluded that the "Find the Perfect Gift" advertisement does not really speak to the first two subjects because it is "not primarily or recognizably about charitable giving" or "primarily or recognizably about opening hours or places to visit." App.25. As for the topic of Christmas, the panel concluded that WMATA had not really opened its forum to that topic because "commercial ads for Christmastime sales of goods" do "not express[ ] a view on Christmas" and "say[] nothing about the sellers' viewpoints on how Christmas should be observed." App.26. The panel accordingly deemed WMATA's no-religious-speech policy viewpoint neutral. App.27.

The panel held that WMATA's no-religious-speech policy is reasonable in light of the purpose of its bus-exteriors forum because WMATA sought "specifically to avoid the [public's] inflamed passions surrounding religion." App.27. It rejected any argument that WMATA's inconsistent enforcement rendered its no-religious-speech policy unreasonable. In its view, allowing the Salvation Army and

Christian radio advertisements merely showed that WMATA "is consistently rejecting ads that have religious content rather than discriminating against ads submitted by religious speakers," and the CorePower Yoga advertisement was "not recognizably religious." App.28-29.

The panel also found no merit to the Archdiocese's Free Exercise claim, holding that WMATA's no-religious speech policy is a neutral law of general applicability, App.31, and that "religious speakers are not excluded because they are religious speakers," but rather are excluded because their speech is religious, App.33. The panel likewise held that the Archdiocese was not likely to succeed in its RFRA claim. First, the panel held that WMATA's rejection of the Archdiocese's advertisement was not "'a substantial burden' on its 'exercise of religion'" because "the Archdiocese has not alleged that its religion requires displaying advertisements on WMATA's buses promoting the season of Advent, much less the display of any advertisements at all." App.34. Second, it concluded that RFRA likely does not apply to WMATA because RFRA does not apply to the states, and WMATA is the result of a compact between Maryland, Virginia, and the District of Columbia. App.35. "Although adding Virginia and Maryland to the WMATA Compact may not free the District of Columbia from its own obligation to comply with RFRA," the panel nonetheless concluded that because the Archdiocese had challenged "*WMATA's* compliance with RFRA," not the District of Columbia's, the immunity held by Maryland and Virginia applies. App.35 (emphasis added).

Finally, the panel decided that the remaining preliminary injunction factors—irreparable injury, the balance of equities, and public interest—rise and fall with the Archdiocese's likelihood of success on the merits. App.37-38. Having found no likelihood of success, the panel concluded that the remaining factors did not warrant a preliminary injunction.

4. The Archdiocese petitioned for en banc review, which the D.C. Circuit denied over the dissent of Judges Griffith and Katsas, who concluded that "the panel opinion conflicts with Supreme Court precedent on an issue of exceptional importance: the freedom to speak from a religious viewpoint." App.52.

As the dissenters explained, "the Supreme Court has three times considered restrictions indistinguishable from the WMATA policy challenged here" and each time rejected the policies because they "barred the expression of religious viewpoints on topics that were otherwise permitted to be discussed." App.54. The dissenters found "WMATA's policy against religious ads … indistinguishable from the restrictions in *Rosenberger*, *Lamb's Chapel*, and *Good News Club*." App.58. "All four [policies] restrict speech based on its religious purpose," and "[s]uch restrictions … amount to viewpoint discrimination when they bar speech on an otherwise-permissible subject." App.58. WMATA's no-religious-speech policy does exactly that because it "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 allows "the Salvation Army to run ads encouraging people to donate to certain charities."

App.58. But WMATA's policy prohibits the Archdiocese from "express[ing] 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. The dissenters concluded that "WMATA's policy discriminates against religious viewpoints no less than the restrictions in *Rosenberger*, *Lamb's Chapel*, and *Good News Club*." App.58.

The dissenters explained why the panel's attempts to distinguish *Lamb's Chapel*, *Rosenberger*, and *Good News Club* were unpersuasive. While the panel emphasized the religious nature of the Archdiocese's advertisement, the dissenters noted that the same could have been said about *Good News Club* and *Rosenberger*, where the speech "was primarily about religion," yet still commented on issues otherwise included in the forum. App.59. The dissenters likewise found it irrelevant whether WMATA's forum serves educational purposes or invites debate, noting that in *Good News Club*, groups were free to use school property even if they "had no intention to engage in debate among themselves or with others." App.60. And far from being the type of "prohibition on religion as a subject matter" that the panel believed *Rosenberger* contemplated, the dissenters explained that both the *Rosenberger* and WMATA policies—"by their very terms—'do not exclude religion as a subject matter.'" App.61.

REASONS FOR GRANTING THE PETITION

This Court has three times considered and three times invalidated efforts to ban religious speech from

government-operated forums. In each case—*Lamb's Chapel*, *Rosenberger*, and *Good News Club*—a religious group challenged a policy that opened a government forum up to a wide variety of speech, but excluded all speech from a religious perspective. As the Court explained in each of those cases, religion is not just a topic, but a viewpoint. Prohibiting discussion of otherwise-permissible topics from a religious perspective is therefore classic impermissible viewpoint discrimination and is repugnant to the First Amendment's guarantee of freedom of speech.

That should have made this an exceptionally easy case, for WMATA's no-religious-speech policy discriminates against religious viewpoints in the exact same way as the policies invalidated in *Lamb's Chapel*, *Rosenberger*, and *Good News Club*. WMATA concedes that it would accept an advertisement providing a mall's opening hours, but not one providing a church's Mass times; an advertisement promoting a new yoga studio, but not one promoting a new parish hall; a message imploring viewers to find the perfect gift at macys.com, but not one imploring them to find it at FindThePerfectGift.org. Its policy is blatantly discriminatory and virtually indistinguishable from policies this Court has thrice invalidated: It forbids speech on otherwise-permissible topics if it reflects a religious perspective.

Remarkably, a two-judge panel of the D.C. Circuit nonetheless concluded that WMATA's policy passes constitutional muster. In its view, WMATA's policy is a permissible effort to ban speech on "the entire subject of religion," not an impermissible effort to ban speech from a religious perspective. That is precisely

the reasoning that this Court rejected in *Lamb's Chapel*, *Rosenberger*, and *Good News Club*. As the Court explained, religion is not just a "subject" or a "topic." It is "a perspective, a standpoint from which a variety of subjects may be discussed and considered." *Rosenberger*, 515 U.S. at 831. Accordingly, when the government permits speech on topics from any perspective but a religious one, it is engaged in impermissible viewpoint discrimination.

The D.C. Circuit's contrary conclusion is flatly irreconcilable both with this Court's decisions and with the many lower court cases that have followed them. Indeed, numerous circuits have rejected arguments just like the one the court below embraced here, correctly concluding that this Court's decisions foreclose efforts to discriminate against religious speech under the guise of banning the entire "subject" of religion. And rightly so, as such efforts not only discriminate against disfavored messages—a form of viewpoint discrimination that the Free Speech Clause forbids—but single out *religious* viewpoints for disfavored treatment, which the Free Exercise Clause and RFRA forbid. Simply put, 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). The Court should grant certiorari and restore to the people of the District of Columbia the rights that the First Amendment and RFRA guarantee.

I. The Decision Below Squarely Conflicts With Decisions From This Court And Others Holding That The Government May Not Ban Religious Speech From Its Forums.

A. This Court's Precedents Plainly Bar Governments from Prohibiting Speech Expressing Religious Viewpoints on Otherwise-Permissible Topics.

It is black letter law that the government may not exclude a speaker from expressing "[a] point of view he espouses on an otherwise includible subject." *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985). Indeed, such viewpoint discrimination is impermissible in public and nonpublic forums alike, for the government may not "single[] out a subset of messages for disfavor based on the views expressed." *Matal v. Tam*, 137 S. Ct. 1744, 1766 (2017). As a trilogy of this Court's cases makes crystal clear, government policies banning religious speech do exactly that.

This Court first confronted such a policy in *Lamb's Chapel*, a case in which a school district had opened its facilities for "social, civic and recreational meetings and entertainments, and other uses pertaining to the welfare of the community," but prohibited their use "for religious purposes." 508 U.S. at 386. Applying that policy, the school district refused to allow a church to use school facilities to show a video series on Christian family values. *Id.* at 388-89. This Court concluded that the district had engaged in impermissible viewpoint discrimination. As the Court explained, although the district's no-religious-speech policy applied to "all religions and all

uses for religious purposes … alike," it "permit[ted] school property to be used for the presentation of all views about family issues and child rearing except those dealing with the subject matter from a religious standpoint." *Id.* at 393. Because "child rearing and family values" were otherwise-permissible topics under the district's policy, the district's effort to exclude speech on those topics from a religious perspective was classic viewpoint discrimination. *Id.* at 393.

The Court reached the same conclusion in *Rosenberger*. There, the University of Virginia had a policy under which it refused to fund student speech that "primarily promotes or manifests a particular belie[f] in or about a deity or an ultimate reality." *Rosenberger*, 515 U.S. at 825. Invoking that policy, the university rejected a Christian student magazine's funding request. All sides in *Rosenberger* agreed that the university's prohibition on religious speech swept in all speech *on the subject matter of religion*: It applied "to Muslim and Jewish and Buddhist advocacy as well as to Christian," and "to agnostics and atheists as well as … to deists and theists." *Id.* at 895 (Souter, J., dissenting); *accord id.* at 836-37. But despite the comprehensiveness of the university's effort to banish religious speech, the Court held that in practical effect, the policy banned religious viewpoints on topics on which secular speech was permitted, rendering it impermissible viewpoint discrimination. *Id.* at 831. As the Court explained, religion is not just "a comprehensive body of thought," but rather provides "a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and

considered." *Id.* To exclude it is therefore to engage in forbidden viewpoint discrimination.

Finally, in *Good News Club*, this Court again confronted—and again struck down—a policy that allowed school facilities to be used for "social, civic and recreational meetings," but banned use "by any individual or organization for religious purposes." 533 U.S. at 103. There, the school district invoked its policy to deny the Good News Club's request to use school facilities for an afterschool program in which children would pray, memorize scripture verses, learn Bible lessons, and listen to religious stories. *Id.* Applying the "dispositive" precedents in *Lamb's Chapel* and *Rosenberger*, the Court found it "quite clear that [the district] engaged in viewpoint discrimination when it excluded the Club from the afterschool forum." *Id.* at 109. That the Club's activities were "quintessentially religious" made no difference because they could "also be characterized properly as the teaching of morals and character development from a particular viewpoint"—namely, a religious one. *Id.* at 109, 111. Because secular organizations were free to invoke "teamwork, loyalty, or patriotism" in afterschool lessons on school property, so too must organizations be permitted to provide morals and character instruction from a religious perspective. *Id.* at 111. The Court thus reaffirmed its "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.

Together, this trilogy confirms beyond cavil that the government may not exclude religious speech on subjects on which secular speech would be allowed. Consistent with that understanding, numerous courts have struck down government policies that attempted to banish religious speech from public and nonpublic forums alike. *See, e.g.*, *Grossbaum v. Indianapolis-Marion Cty. Bldg. Auth.*, 63 F.3d 581 (7th Cir. 1995) (invalidating ban on religious Christmas displays in public building lobby); *Hedges v. Wauconda Cmty. Unit Sch. Dist. No. 118*, 9 F.3d 1295, 1296-97 (7th Cir. 1993) (striking down policy banning materials of "a religious nature" or "express[ing] religious beliefs or points of view"); *Good News/Good Sports Club v. Sch. Dist. of City of Ladue*, 28 F.3d 1501, 1503 (8th Cir. 1994) (striking down policy prohibiting "any speech or activity involving religion or religious beliefs"). In short, "[w]hatever its stated intent," a "ban on religious messages" that "in practice operates not to restrict speech to certain subjects but instead to distinguish between those who seek to express secular and religious views *on the same subjects*" is impermissible viewpoint discrimination. *Byrne v. Rutledge*, 623 F.3d 46, 56-57 (2d Cir. 2010).

B. The Decision Below Cannot Be Reconciled with this Court's Precedents.

WMATA's no-religious-speech policy is indistinguishable from the policies that this Court invalidated in *Lamb's Chapel*, *Rosenberger*, and *Good News Club*. Indeed, WMATA's prohibition on "[a]dvertisements that promote or oppose any religion, religious practice or belief," C.A.App.209, is virtually indistinguishable from the policy in *Rosenberger*,

which refused to fund any speech that "primarily promotes or manifests a particular belie[f] in or about a deity or an ultimate reality," 515 U.S. at 825. And just like the policy in *Rosenberger* (and those in *Lamb's Chapel* and *Good News Club*), WMATA's policy "operates not to restrict speech to certain subjects but instead to distinguish between those who seek to express secular and religious views *on the same subjects*." *Byrne*, 623 F.3d at 56-57.

To the extent there were any doubt about that, this case has laid it to rest. By WMATA's own telling, Macy's can advertise to implore the audience to find the perfect Christmas gift at Macy's, but the Archdiocese cannot implore the same audience to find the perfect Christmas gift at a local parish. And while Macy's is free to adorn its advertisements to "Shop here" (your local Macy's store) with reindeer and snowmen, the Archdiocese may not enhance a message to "Stop here" (your local parish) with shepherds and a star. Indeed, while Macy's could advertise its extended holiday hours, the Archdiocese could not advertise its own extended holiday hours. In short, as WMATA itself has put it, its policy allows advertisements promoting "the secular half" of Christmas, but not "the religious half." C.A.App.175-76. That is viewpoint discrimination, plain and simple.

The D.C. Circuit's contrary conclusion is impossible to reconcile with this Court's precedents. Indeed, the decision below has far more in common with the dissenting opinions in *Lamb's Chapel*, *Rosenberger*, and *Good News Club* than with the views that carried the day. According to the decision below,

the central lesson of those cases is not that government bans on religious speech are constitutionally suspect, but that government bans on speech "on the entire subject matter of religion" are permissible. App.18. The court even when so far as to claim that to interfere with the government's ability "to exclude religion as a subject matter" would "upend[]" *Lamb's Chapel*, *Rosenberger*, and *Good News Club*. App.34.

That is a blatant misreading of those cases. Not one of the trilogy stands for the proposition that the government must be able to ban speech on the "subject" of religion. Instead, the central lesson of those cases is that viewpoint discriminatory bans on religious speech *cannot* be reconceived and rescued as bans on the "subject" of religion, because religion is not just a subject, but a viewpoint. Indeed, that is the whole point that *Rosenberger* was making when it explained that religion is "a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered." 515 U.S. at 831. Thus, even where the government can narrow the discussion to a subject like sports or even sports icons, it cannot ban any mention of Notre Dame's Touchdown Jesus on the ground that it has foreclosed the subject of religion. Accordingly, when the government allows discussion of charitable giving, operating hours, and Christmas gifts from a secular perspective, a policy that operates to preclude "religious" speech on those topics is classic viewpoint discrimination, no matter how it is framed.

To be sure, *Rosenberger* noted that the policy at issue there did "not exclude religion as a subject

matter but select[ed] for disfavored treatment those student journalistic efforts with religious editorial viewpoints." *Id.* at 836. But that language cannot plausibly be read to mean that the policy would have survived had the university reframed it to exclude "all speech on the subject of religion" instead of all speech that "primarily promotes or manifests a particular belie[f] in or about a deity or an ultimate reality." *Id.* at 825. Instead, the Court was simply allowing for the possibility that a forum may be limited in such a manner as to make religious speech non-germane. For example, if WMATA allowed its buses to be used only for messages about transportation policy or emergency alerts, then it could reasonably prohibit speech on other topics, including religion. But what *Rosenberger* did not permit, and in fact expressly condemned, is a government policy that allows speech on a wide variety of topics, but excludes religious viewpoints on all of them. And that describes both WMATA's policy and the policy invalidated in *Rosenberger* to a tee.

In all events, the D.C. Circuit's argument fails even on its own terms, for WMATA's policy no more bans all speech "on the subject of religio[n]," App.44, than the policies in *Lamb's Chapel*, *Rosenberger*, and *Good News Club* did. Contrary to the court's claims, Guideline 12 does not "proscribe[] advertisements on the entire subject matter of religion." App.18. Instead, just as in *Rosenberger*, it prohibits advertisements that "*promote or oppose* any religion, religious practice or belief." C.A.App.209 (emphasis added); *compare Good News Club*, 533 U.S. at 103 (rejecting policy that banned use "by any individual or organization for religious purposes"), *with*

Rosenberger, 515 U.S. at 825 (rejecting policy that "primarily promotes or manifests a particular belie[f] in or about a deity or an ultimate reality"), *and Lamb's Chapel*, 508 U.S. at 386 (rejecting policy prohibiting use of facilities "for religious purposes"). By its plain terms, then, the policy takes issue not with "the subject" of religion as a whole, but with the "perspective" or "standpoint" of promoting or opposing religion, as plainly forbidden by this Court's precedents. *Rosenberger*, 515 U.S. at 831.

In addition to conflicting with *Lamb's Chapel*, *Rosenberger*, and *Good News Club*, the decision below is in considerable tension with the Court's recent decision in *Minnesota Voters Alliance v. Mansky*, 138 S. Ct. 1876 (2018). *Mansky* reaffirmed that even in a nonpublic forum, content-based prohibitions must be reasonable, must be capable of consistent application, and must "articulate some sensible basis for distinguishing what [speech] may come in from what must stay out." *Id.* at 1888. No "reasonable" or "sensible" line can be drawn under WMATA's policy, which allows government to "single out the religious for disfavored treatment" by excluding religious viewpoints precisely *because* they are religious. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2020 (2017); *see Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993) (The First Amendment forbids laws that "impose[] special disabilities on the basis of … religious status."). As Justice Scalia observed in his *Good News Club* concurrence, "[e]ven subject-matter limits must at least be" reasonable, and "'because it's religious' will not do." 533 U.S. at 122 (Scalia, J., concurring).

Moreover, just as in *Mansky*, the reality that certain groups, including "religious organizations," are better known than others creates the risk that the ban's application will "turn in significant part" on "background knowledge" of those enforcing it, which "only increases the potential for erratic application." 138 S. Ct. at 1890. That phenomenon seems to underlie WMATA's otherwise inexplicable differential treatment of the Archdiocese (whose religious viewpoint is well known) and the Salvation Army (whose undeniable religious viewpoint is less widely appreciated). WMATA claims that it accepted the Salvation Army's advertisement because it "ma[d]e no reference to religion," C.A.Appellee.Br.45, and the panel endorsed that decision because it believed that the "ad exhorted giving to charity but contained only non-religious imagery," App.25. But that ignores the group's name—the Salvation Army's object is the salvation of souls, not recycling—and website (which is referenced on its WMATA-approved advertisements). WMATA's inconsistent treatment of charitable advertisements underscores the unreasonableness of its policy.

C. The Decision Below Conflicts With Decisions of Other Courts.

The decision below not only squarely conflicts with this Court's decisions, but also breaks sharply with the many courts that have faithfully followed *Lamb's Chapel*, *Rosenberger*, and *Good News Club*, and struck down discriminatory policies like WMATA's.

For instance, in *Grossbaum v. Indianapolis-Marion County Building Authority*, 63 F.3d 581, the

Seventh Circuit invalidated the government's effort to separate Christmas speech into *religious* speech and *secular* speech and allow displays of only the latter in its public buildings. There, the building authority argued that its no-religious-displays policy "did not regulate viewpoints on a list of permitted subjects; it simply eliminated one subject, religion, from the subjects that could be discussed" in the forum. *Id.* at 590. The Seventh Circuit squarely rejected that argument as foreclosed by *Rosenberger*, which "dispelled" "[a]ny lingering doubts about whether" a ban on religious speech constitutes viewpoint discrimination. *Id.* As the court explained, religion provides "'a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered.'" *Id.* at 591 (quoting *Rosenberger*, 515 U.S. at 831). By permitting "secular" holiday displays while excluding "religious" ones, the government engaged in viewpoint discrimination. *Id.* at 588.

The Seventh Circuit reached the same conclusion in *Hedges v. Wauconda Community Unit School District No. 118*, 9 F.3d 1295, invalidating a school district's efforts to ban materials of "a religious nature" or "express[ing] religious beliefs or points of view" as plainly impermissible. In doing so, the court restated and followed the rule of *Lamb's Chapel*: "[N]o arm of government may discriminate against religious speech when speech on other subjects is permitted in the same place at the same time." *Id.* at 1297.

Other courts of appeals have applied that same principle to invalidate efforts to ban religious speech. The Eighth Circuit held in *Good News/Good Sports*

Club v. School District of City of Ladue, 28 F.3d 1501, that a school could not exclude a religious club while allowing scouting groups to use its facilities. As the court explained, allowing the scouts to use school facilities to speak on the subject of moral development but then prohibiting a religious club from doing the same was classic viewpoint discrimination. *Id.* at 1507. The Second Circuit has likewise explained that a "ban on religious messages" that "in practice operates not to restrict speech to certain subjects but instead to distinguish between those who seek to express secular and religious views *on the same subjects*" is impermissible. *Byrne*, 623 F.3d at 56-57. And the Tenth Circuit has recognized that "problems arise when the government allows *some* private speech on the property" but excludes religion. *Summum v. Callaghan*, 130 F.3d 906, 918 (10th Cir. 1997); *see also id.* ("If, for example, the government permits secular displays on a nonpublic forum, it cannot ban displays discussing otherwise permissible topics from a religious perspective.").

Just as with *Lamb's Chapel*, *Rosenberger*, and *Good News Club*, there is no material difference between the policies held unconstitutional in those cases and the WMATA policy that the D.C. Circuit sanctioned here. In each of those cases, the government created a forum broad enough to encompass speech on a variety of topics, yet purported to exclude *any* speech that was religious in nature. And in each of those cases, the court rightly rejected those no-religious-speech policies because they excluded religious speech that addressed a subject otherwise permitted in the forum. The D.C. Circuit's refusal to abide by this Court's clear teachings thus

has brought it into irreconcilable conflict not just with this Court's precedents, but with decisions of its sister circuits as well. The panel sought to extricate itself from the combined weight of these decisions by summarily rejecting them as "invalidat[ing] as viewpoint discriminatory government policies that sought to exclude religious viewpoints on otherwise includable topics." App.24. But of course, that is precisely what WMATA's no-religious-speech policy does too.

Unfortunately, the D.C. Circuit is not alone on that score. The Ninth Circuit has also erroneously read this Court's viewpoint-discrimination cases as giving the government free rein to discriminate against religious speech, so long as it purports to be excluding the whole "subject" of religion. In *DiLoreto v. Downey Unified School District Board of Education*, 196 F.3d 958 (9th Cir. 1999), the Ninth Circuit upheld a school's decision to exclude a Ten Commandments sign from advertising space at its ball field. The court held that the school had not "opened [its] forum to the subject of religion," but had justifiably "exclude[ed] that subject from the forum." *Id.* at 969. And the court purported to distinguish *Rosenberger* on the grounds that the *DiLoreto* policy excluded religion as subject matter, while in *Rosenberger*, the policy "selected for disfavored treatment those student journalistic efforts with religious editorial viewpoints." *Id.* at 970. This misreading of *Rosenberger* mirrors the D.C. Circuit's errors here. That religious speech should be unconstitutionally restricted once is bad enough; twice shows that this pernicious error warrants this Court's review.

* * *

The decision below directly contradicts this Court's precedents and upends decades of jurisprudence, permitting WMATA to "suppress expression merely because [it] oppose[s] the speaker's view." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983). Under WMATA's no-religious-speech policy, shopping hours, new yoga studios and FindThePerfectGift.com are permissible messages, but Mass times, new parish halls, and FindThePerfectGift.org are not. If *Lamb's Chapel*, *Rosenberger*, and *Good News Club* confirm anything, it is that the government cannot prohibit speech on an otherwise-permissible topic simply because it reflects a religious viewpoint. The D.C. Circuit's contrary conclusion squarely and egregiously conflicts with this Court's precedents, as well as with decisions from the many courts that have faithfully followed them.

II. The Decision Below Departs From The Clear Teachings Of This Court's RFRA Precedents.

The D.C. Circuit erred twice over in concluding that the Archdiocese is unlikely to prevail on its claim that WMATA's no-religious-speech policy violates RFRA. Indeed, the decision below embraces precisely the kind of unduly narrow conception of RFRA that Congress has rejected.

1. "Congress enacted RFRA in 1993 in order to provide very broad protection for religious liberty." *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 693 (2014). To that end, RFRA provides that the "Government shall not substantially burden a person's exercise of religion even if the burden results

from a rule of general applicability." 42 U.S.C. §2000bb-1(a). "If the Government substantially burdens a person's exercise of religion, under the Act that person is entitled to an exemption from the rule unless the Government 'demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.'" *Hobby Lobby*, 573 U.S. at 695.

There can be little doubt that the Archdiocese is likely to succeed in proving a substantial burden on its religious exercise. The Archdiocese sincerely seeks to spread its view of an important time for those of the Catholic faith: the birth of Jesus Christ and the longing for his arrival. App.6-7. But the Archdiocese is unable to participate in an important forum made available to others "without having to disavow its religious character," *Trinity Lutheran*, 137 S. Ct. at 2022, and it is singled out for "special disabilities on the basis of … religious status," *Church of the Lukumi Babalu Aye*, 508 U.S. at 533. The panel nonetheless concluded that the Archdiocese has not shown a substantial burden on its exercise of religion because it "has not alleged that its religion requires displaying advertisements on WMATA's buses promoting the season of Advent," and because the Archdiocese can "pursue its evangelization efforts[] in newspapers, through social media, and even on D.C. bus shelters." App.34. That reasoning cannot be reconciled with RFRA or with this Court's decisions interpreting it.

As this Court has explained, Congress in 2000 amended the definition of "religious exercise" under

RFRA to make clear that such exercise need not be "'compelled by, or central to, a system of religious belief.'" *Hobby Lobby*, 573 U.S. at 696 (quoting 42 U.S.C. §2000cc-5(7)(A)). To further underscore the point, Congress "mandated that this concept 'be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution.'" *Id.* (quoting 42 U.S.C. §2000cc-3(g)). Critically, RFRA mandates protections above and beyond those provided under this Court's Free Exercise jurisprudence. Under this Court's cases, for example, "the availability of alternative means of practicing religion is a relevant consideration, but [RFRA] provides greater protection." *Holt v. Hobbs*, 135 S. Ct. 853, 862 (2015). Accordingly, when courts absolve governments of substantial burdens merely because other avenues to religious exercise exist, they "improperly import[] a strand of reasoning from cases involving … First Amendment rights." *Id.*

The D.C. Circuit nonetheless continues to adhere to its precedent narrowly defining substantial burdens as only those that "force [plaintiffs] to engage in conduct that their religion forbids or … prevents them from engaging in conduct their religion requires." *Mahoney v. Doe*, 642 F.3d 1112, 1121 (D.C. Cir. 2011) (quoting *Henderson v. Kennedy*, 253 F.3d 12, 16 (D.C. Cir. 2001)). But those circuit precedents derive their holdings from constitutional cases, not from RFRA's text as amended in 2000. *See Henderson*, 253 F.3d at 16. The D.C. Circuit's dogged refusal to accept Congress' will is remarkable.

2. The decision below also suggests a troubling roadmap for the District of Columbia to evade its obligations under RFRA. While states are not bound by RFRA, the District of Columbia falls squarely within RFRA's ambit, and so do its officials. *See* 42 U.S.C. §2000bb-2. Yet the D.C. Circuit nonetheless suggested that the District's largest public transit system need not abide by RFRA because Virginia and Maryland are parties to the compact with the District creating WMATA. That decision, which allows the District to launder its RFRA obligations, is profoundly wrong.

Interstate compacts are contracts, *Texas v. New Mexico*, 482 U.S. 124, 128 (1987), and parties ordinarily cannot contract to escape federal law, 17A Am. Jur. 2d Contracts §223. Indeed, this Court has long recognized that interstate compacts derive their authority from the powers—and limits—of those who make them. *See Poole v. Fleeger's Lessee*, 36 U.S. (11 Pet.) 185, 198 (1837) ("The legislature of Tennessee, in appointing commissioners to make this compact, and in the subsequent ratification of it, and the commissioners themselves in making it, all acted by virtue of a delegated power; and no power was delegated to them, or could be, that was incompatible with the charter whence that power was derived."). Here, for the District of Columbia and its officers and instrumentalities, those limits include RFRA.

The panel correctly recognized that contracting via interstate compact "may not free the District of Columbia from its own obligation to comply with RFRA." App.35. Yet it nonetheless concluded that WMATA likely could avail itself of Maryland's and

Virginia's Eleventh Amendment sovereign immunity on the theory that requiring WMATA to abide by RFRA would somehow deprive Maryland and Virginia of their sovereign immunity. App.35. That makes no sense. To the extent requiring WMATA to comply with RFRA requires Maryland and Virginia to do so as well, that is not because RFRA is being applied to Maryland and Virginia. It is because Maryland and Virginia voluntarily agreed to join a compact with the District of Columbia, a party that they knew full well has different legal obligations.

Indeed, even in contexts involving only states, this Court has explained that "[s]uit in federal court is not an affront to the dignity of a Compact Clause entity," because states forming compacts necessarily have "agreed to the power sharing, coordination, and unified action that typify Compact Clause creations." *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 41, 56 (1994). This Court thus "presume[s] the Compact Clause agency does not qualify for Eleventh Amendment immunity '[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.'" *Id.* at 43-44.

Here, far from evincing any such intention, WMATA's governing compact expressly preserves each signatory's legal obligations. The compact provides that though WMATA may "adopt rules and regulations for the safe, convenient, and orderly use of the Transit facilities," "[i]n the event that any such rules and regulations contravene the laws, ordinances, rules, or regulations of a Signatory," the "laws … of

the Signatory … shall apply and the conflicting rule or regulation" created by WMATA "shall be void." D.C. Code §9-1107.01(76(e). The governing compact thus acknowledges the parties' agreement that WMATA must abide by the laws of each of the signatories—an acknowledgment that would be meaningless should WMATA in fact be shielded from all suits to enforce those laws. Accordingly, while the District could not shed its RFRA obligations even had that been its intention, the compact itself refutes any intention to do so. The D.C. Circuit's conclusion that the Archdiocese is unlikely to succeed on its RFRA claim thus is fatally flawed twice over.

III. The Decision Below Has Far-Reaching Consequences On Issues Of Exceptional Importance.

The decision below is not just wrong, but gravely wrong on issues of exceptional importance that will have effects far beyond this case.

Because "[v]iewpoint discrimination is censorship in its purest form," *R.A.V. v. City of St. Paul*, 505 U.S. 377, 430-31 (1992), and everywhere "threatens the continued vitality of 'free speech,'" *Perry*, 460 U.S. at 62, it is *always* an issue of exceptional importance. Here, however, WMATA's viewpoint discrimination is particularly pernicious, for WMATA has singled out *religious* speech for censorship. While it is always verboten for the government to "discriminate on account of [a] speaker's viewpoint," the government most especially cannot do so "on account of a religious subject matter, which the free exercise clause of the first amendment singles out for protection." *Hedges*, 9 F.3d at 1298. Under the Constitution, religious

speech is entitled to special protection; it is not singled out for special disabilities. Accordingly, when a 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). Yet so long as the decision below remains the law, the Archdiocese will be subject to impermissible viewpoint discrimination *because of its religion*, a more pernicious violation of the freedom of speech than viewpoint discrimination standing alone.

The consequences of the decision below also reach far beyond the Archdiocese and its "Find the Perfect Gift" advertisement. As it stands, WMATA can apply its no-religious-speech policy to exclude any and all religious speech from its bus-exteriors forum. That of course includes advertisements of a most obviously religious nature, like printed prayers or depictions of the Ten Commandments. But WMATA's policy likewise excludes even the most innocuous religious speech from its bus exteriors—advertisements that merely communicate the existence, location, or service times of a particular religious group. That type of communication embodies the primary purpose of advertising in general: to inform the public about the availability and means of accessing the thing being advertised. WMATA's no-religious-speech policy prohibits religious groups from making even this most harmless kind of statement in its bus-exteriors forum even as any secular group remains free to do so.

That WMATA's policy operates in this way is beyond doubt. When the Franciscan Monastery sought to run an advertisement merely depicting its

name, location, a photograph, and the tagline "Washington's Oasis of Peace," WMATA refused. App.118; Franciscan Monastery C.A.Amicus.Br.5-6. The monastery's advertisement was aimed at generating tourism for the monastery, not evangelizing, and it contained no overtly religious content. Its only fault was conveying basic information—location, hours of operation—simply while *being religious*. *See also* C.A.App.211 (depicting another denied advertisement, which merely displayed the name and location of a church with the date and time of particular events to be held there).

While WMATA has sometimes allowed religious advertisements to run on its buses, that does not make its policy better; it just makes it arbitrary to boot. The Salvation Army's advertisements for its annual Christmas appeal, WGTS's advertisements for Christian radio programming, and CorePower Yoga's advertisements for experiencing transcendence through yoga are no less religious than the Franciscan Monastery's advertisements of its location. Indeed, those advertisements are likely *more* religious than the Franciscan Monastery's. That WMATA discriminated *among* these religious advertisements rather than only *against* them shows that its no-religious-speech policy is a vehicle for viewpoint discrimination against messages WMATA disfavors, not a reasonable restriction tailored to a legitimate public objective. The arbitrariness of WMATA's policy compounds the seriousness of its constitutional violations and ensures that WMATA's policy not only will explicitly reject advertisements proposed by religious groups, but will chill religious groups from proposing them in the first place.

This case is particularly important because it signals to other jurisdictions that there is a shortcut for keeping public buses and other forums free of potentially divisive speech. Rather than working hard to establish viewpoint-neutral limits on a forum, jurisdictions can simply ban religious speech. But the framers understood that some religious speech could be perceived by the government as divisive and promulgated the First Amendment as a constraint on the government. When it comes to speech, banning it "'because it's religious'" is not a shortcut the First Amendment permits. *Good News Club*, 533 U.S. at 122 (Scalia, J., concurring).

In short, the decision below gets matters of exceptional importance egregiously wrong, sanctioning not only viewpoint discrimination, but viewpoint discrimination premised on *religion*, which the First Amendment separately and specifically protects. As a result of that decision, WMATA may effectively ban religious speech from its bus-exteriors forum with impunity, inflicting an ongoing injury on anyone who would seek to communicate a religion-related message there. Worse still, the reasoning employed by the decision below effectively sanctions the elimination of religion from the public square. The Court should grant certiorari and reject the D.C. Circuit's profoundly mistaken view that prohibiting *more* religious speech somehow makes an effort to exclude religious speech from a forum *more* constitutional.

CONCLUSION

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

Respectfully submitted,

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