APPENDIX

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Appendix A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17-7171

ARCHDIOCESE OF WASHINGTON, DONALD CARDINAL WUERL, A ROMAN CATHOLIC ARCHBISHOP OF WASHINGTON, A CORPORATION SOLE,

Appellant,

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY AND PAUL J. WIEDEFELD, IN HIS OFFICIAL CAPACITY AS GENERAL MANAGER OF THE WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,

Appellees.

Argued: March 26, 2018
Decided: July 31, 2018

Before: Rogers, Kavanaugh[1] and Wilkins, *Circuit Judges*

OPINION

Rogers, *Circuit Judge*: The Washington Metropolitan Transit Authority ("WMATA") was

[1]Circuit Judge Kavanaugh was a member of the panel at the time the case was argued but did not participate in this opinion.

established by compact between the State of Maryland, the Commonwealth of Virginia, and the District of Columbia to provide safe and reliable transportation services. *See* Pub. L. No. 89-774, 80 Stat. 1324 (1966). Like other transit authorities, it sells commercial advertising space to defray the costs of its services, and for years it had accepted ads on all types of subjects. In 2015 WMATA closed its advertising space to issue-oriented ads, including political, religious, and advocacy ads. This decision followed extended complaints from riders, community groups, business interests, and its employees, resulting in regional and federal concerns about the safety and security of its transportation services, vandalism of its property, and a time-intensive administrative burden reviewing proposed ads and responding to complaints about ads.

Since *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974), transit authorities have been permitted to accept only commercial and public service oriented advertisements because "a streetcar or bus is plainly not a park or sidewalk or other meeting place for discussion," but rather "is only a way to get to work or back home." *Id.* at 306 (Douglas, J., concurring). Under the Supreme Court's forum doctrine, WMATA, as a non-public forum, may restrict its advertising "[a]ccess . . . as long as the restrictions are 'reasonable and [are] not an effort to suppress expression merely because public officials oppose the speaker's view.'" *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985) (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983)). Based on experience that its approach to advertising was interfering with its ability to provide safe and

reliable transportation service, WMATA adopted *Guidelines Governing Commercial Advertising*, employing broad subject-matter prohibitions in order to maintain viewpoint neutrality and avoid *ad hoc* bureaucratic determinations about which ads are benign and which are not. Guideline 12 states: "Advertisements that promote or oppose any religion, religious practice or belief are prohibited."

The Archdiocese of Washington contends that Guideline 12 violates the First Amendment and the Religious Freedom Restoration Act ("RFRA") and seeks a mandatory preliminary injunction that would require WMATA to place an avowedly religious ad on the exteriors of its buses. The Archdiocese has not shown, however, that WMATA is impermissibly suppressing its viewpoint on an otherwise permitted subject, and its claim of discriminatory treatment is based on hypothesis. Following *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819, 831 (1995), WMATA may exclude religion as a subject matter from its advertising space. Notably, there is no principled limit to the Archdiocese's conflation of subject-matter restrictions with viewpoint-based restrictions as concerns religion. Were the Archdiocese to prevail, WMATA (and other transit systems) would have to accept all types of advertisements to maintain viewpoint neutrality, including ads criticizing and disparaging religion and religious tenets or practices. Because the Archdiocese has not demonstrated a likelihood of prevailing on the merits or that the equities weigh favorably, it has not met the demanding standard for a mandatory preliminary injunction. *See Dorfmann v. Boozer*, 414 F.2d 1168, 1173 (D.C. Cir. 1969).

I.

Until 2015, WMATA had accepted most issue-oriented advertisements, including political, religious, and advocacy ads. Beginning in 2010, WMATA began to reconsider its approach as a result of near-monthly complaints from its employees, riders, elected officials, and community and business leaders about its advertisements. *See* Decl. of Lynn M. Bowersox, WMATA Ass't Gen. Mgr., Cust. Serv., Comms. & Mktg., in support of Defs' Opp. to Mot. for TRO and Prel. Inj., ¶¶ 4-5 & Ex. A (Dec. 1, 2017) ("Bowersox Decl."). The complaints spanned objections to ads that were critical of the Catholic Church's position against use of condoms, to ads by People for the Ethical Treatment of Animals with graphic images of animal cruelty, to ads opposing discrimination based on sexual orientation. The condoms ad, for example, "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.* ¶ 25. An "anti-Islam ad . . . was also a factor in WMATA's decision to change its advertising space to a nonpublic forum." *Id.* ¶¶ 11, 26. The Metro Transit Police Department and the United States Department of Homeland Security "feared that certain ads would, due to world events, incite individuals to violence on the system and harm WMATA employees and customers." *Id.* ¶ 11. Specifically, they referred to events following "a contest to create a cartoon depiction of the Prophet Muhammad." *Id.* A cartoon that was submitted as an ad to WMATA "raised concerns, because some Muslims consider drawing the Prophet Mohammed so offensive that they have reacted violently to such depictions in the past." *Id.*

(differing spellings in original). "WMATA was aware that two gunmen were killed after they attempted to attack the building where the contest . . . was being held." *Id.* Additionally, a survey showed that "98% of the public was familiar with the types of ads found on buses, in trains, and in stations," that "58% opposed issue-oriented ads," and that "46% were extremely opposed to . . . issue-oriented ads." *Id.* ¶ 14.

On November 19, 2015, the WMATA Board of Directors, with representatives from Maryland, Virginia, and the District of Columbia, decided to narrow the subjects that it would accept in WMATA advertising space. Upon resolving that WMATA's advertising space is closed "to issue-oriented ads, including political, religious and advocacy ads," Res. 2015-55, the Board adopted *Guidelines Governing Commercial Advertising*, (Nov. 19, 2015) (eff. 30 days after adoption), including Guideline 12 prohibiting "[a]dvertisements that promote or oppose any religion, religious practice or belief." The Board concluded that any economic benefit derived from issue-oriented advertising was outweighed by four considerations: (1) complaints from its employees, community opposition and outcry, and adverse publicity for WMATA; (2) security concerns from the Metro Transit Police Department and the United States Department of Homeland Security; (3) vandalism of WMATA property; and (4) the administrative burden associated with the time-intensive process of reviewing proposed ads and responding to complaints about ads. Bowersox Decl. ¶¶ 9-13. Since the *Guidelines* took effect, WMATA has regularly rejected ads as non-compliant with its

Guidelines, including Guideline 12. *See id.* ¶ 17 & Ex. C.

The "Find the Perfect Gift" ad that the Archdiocese seeks to have WMATA place on the exterior of its buses depicts a starry night and the silhouettes of three shepherds and sheep on a hill facing a bright shining star high in the sky, along with the words "Find the Perfect Gift." The ad includes a web address and a social media hashtag. Its website, although still under construction when the ad was submitted to WMATA, "contained substantial content promoting the Catholic Church," including "a link to 'Parish Resources,' . . . a way to 'Order Holy Cards,' and . . . religious videos and 'daily reflections' of a religious nature." *Id.* ¶ 19. The Archdiocese explains that "[t]he 'Find the Perfect Gift' campaign is an important part of [its] evangelization efforts," Decl. of Dr. Susan Timoney, S.T.D., Sec'y for Pastoral Ministry and Social Concerns, Archdiocese of Wash., ¶ 4 (Nov. 27, 2017) ("Timoney Decl."), "welcoming all to Christmas Mass or . . . joining in public service to help the most vulnerable in our community during the liturgical season of Advent," Decl. of Edward McFadden, Sec'y of Commns., Archdiocese of Wash., serving Cardinal Donald Woerl, ¶ 3 (Nov. 27, 2017) ("McFadden Decl."). Dr. Timoney advises: "It is critically important for the goals of the . . . campaign that the Archdiocese begin spreading its message before the Advent season" 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." Timoney Decl. ¶ 5.

When the Archdiocese sought to purchase space for the "Find the Perfect Gift" ad on the exterior of Metrobuses, WMATA declined on the ground that it was impermissible under Guideline 12 "because it depicts a religious scene and thus seeks to promote religion." McFadden Decl. ¶¶ 7, 12, 16 (internal quotations omitted). On November 28, 2017, the Archdiocese filed a complaint for 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. The Archdiocese sought a declaration that Guideline 12 was unconstitutional under the First and Fifth Amendments and violated RFRA, and an injunction preventing WMATA from enforcing Guideline 12 to reject the Archdiocese's ad.

The district court denied the Archdiocese's motion for a temporary restraining order ("TRO") and preliminary injunction. 281 F. Supp. 3d 88 (D.D.C. 2017). Concluding the Archdiocese was not likely to succeed on the merits, the court ruled that Guideline 12 was consistent with the Free Speech Clause as a viewpoint neutral and reasonable regulation in a non-public forum, and that Guideline 12 did not burden the Archdiocese's right to free exercise as a neutral and generally applicable regulation not singling out religious activity for suppression. 281 F. Supp. 3d at 102-05, 107-14. The court also rejected the Archdiocese's arguments based on RFRA and the Fifth Amendment's Due Process and Equal Protection Clauses. *Id.* at 115-16. The court further concluded that the three other preliminary injunction factors did not weigh in favor of granting injunctive relief, including because the Archdiocese's "irreparable harm

argument rises and falls with its merits arguments." *Id.* at 116.

The Archdiocese appealed and filed an emergency motion for an injunction pending appeal, "preventing WMATA from denying the Archdiocese's 'Find the Perfect Gift' campaign," and an expedited appeal on the merits. This court denied the motion for a mandatory injunction pending appeal on December 20, 2017, but set an expedited briefing schedule. After initially maintaining the case is moot because Advent has passed, the government desisted once the Archdiocese indicated it "specifically intend[s] to ask to run this exact ad in the next Advent season," Oral Arg. Tr. 27 (Mar. 26, 2018) (counsel for WMATA).

II.

A preliminary injunction is an "extraordinary remedy," *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165 (2010) (citation omitted). The moving party must make a "clear showing that four factors, taken together, warrant relief: likely success on the merits, likely irreparable harm in the absence of preliminary relief, a balance of the equities in its favor, and accord with the public interest." *League of Women Voters v. Newby*, 838 F.3d 1, 6 (D.C. Cir. 2016) (citations omitted). This court "reviews the district court's legal conclusions as to each of the four factors *de novo*, and its weighing of them for abuse of discretion." *Id.* at 6-7 (citing *Davis v. Pension Benefit Guar. Corp.*, 571 F.3d 1288, 1291 (D.C. Cir. 2009)).

A.

On appeal, the Archdiocese contends that Guideline 12 "unconstitutionally abridges . . . free speech rights by suppressing *religious* viewpoints on subjects that WMATA otherwise allows on bus exteriors." Appellant's Br. 13 (emphasis in original). The Archdiocese also contends that WMATA enforces Guideline 12 "arbitrarily by permitting some religious speech while excluding the Archdiocese's," which "violates the First Amendment's free speech guarantee." *Id.* at 14. Further, the Archdiocese contends that Guideline 12 "raises problems under the Religion Clauses and RFRA" because "WMATA's exclusion of all religious speech from bus exteriors and its interference with the Archdiocese's religious exercise violates the Free Exercise Clause and RFRA, and WMATA's arbitrary enforcement puts it in the position of a religious censor . . . favor[ing] some religions over others in violation of the Establishment Clause (and equal protection principles)." *Id.*

1. To determine whether the Archdiocese has shown that it is likely to prevail on the merits requires a threshold determination of the nature of the forum at issue. The Supreme Court recently reaffirmed its "'forum-based' approach for assessing restrictions that the government seeks to place on the use of its property." *Minn. Voters Alliance v. Mansky*, 138 S. Ct. 1876, 1885 (2018) (quoting *Int'l Soc. For Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992)). The Supreme Court has long recognized that "[e]ven protected speech is not equally permissible in all places and at all times" and that the government is not "require[d] . . . freely to grant access to all who wish to

exercise their right to free speech on every type of [g]overnment property without regard to the nature of the property or to the disruption that might be caused by the speaker's activities." *Cornelius*, 473 U.S. at 799-800.

Under the forum doctrine, the Supreme Court acknowledges that "[t]he existence of a right of access to public property and the standard by which limitations upon such right must be evaluated differ depending on the character of the property at issue." *Perry Educ. Ass'n*, 460 U.S. at 44. The Court identified three categories of property. First, public forums are "places which by long tradition or by government fiat have been devoted to assembly and debate," such as sidewalks or parks, where "the rights of the state to limit expressive activity are sharply circumscribed." *Id.* at 45. To enforce a content-based exclusion in a public forum, the regulation must satisfy strict scrutiny. *Id.* (citing *Carey v. Brown*, 447 U.S. 455, 461 (1980)). Second, designated public forums are those in which the government has "opened" public property "as a place for expressive activity." *Id.* "Although [the government] is not required to indefinitely retain the open character of the facility, as long as it does so it is bound by the same standards as apply in a traditional public forum." *Id.* at 46. Third, a non-public forum is public property which is not by tradition or designation a public forum, and "the [government] may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." *Id.* (citing *U.S. Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 131 n.7

(1981)). In this third category, policy or practice may establish that the property is not held open to the public for general debate because "the [government], no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated." *Id.* (quoting *U.S. Postal Serv.*, 453 U.S. at 129; citing *Greer v. Spock*, 424 U.S. 828, 836 (1976); *Adderley v. Florida*, 385 U.S. 39, 48 (1966)).

The Archdiocese fails to show that the advertising space on WMATA's buses is not properly treated as a non-public forum. Indeed, the Archdiocese conceded as much in the district court, affirming in response to questions that it was "conceding at this point that it's not a public forum" and that the district court "[did not] have to address that [contrary] argument anymore." 2017 Motion Hg. Tr. at 4-5. The Archdiocese further stipulated that the legal standard for nonpublic forums requires there be "no viewpoint discrimination and the restrictions that are applied are reasonable in the context and based on the purposes of the forum," *id.* at 3-4, the standard to which its briefs to this court have conformed. Its attempt to backtrack now comes too late, *see United States v. Olano*, 507 U.S. 725, 733 (1993); *Singleton v. Wulff*, 428 U.S. 106, 120 (1976), because other than pointing to the emergency nature of the TRO proceeding, the Archdiocese offers no explanation why this court should depart from the usual practice of deeming concessions in the district court waived for the purposes of appeal, *see, e.g.*, *Flynn v. Comm'r*, 269 F.3d 1064, 1068-69 (D.C. Cir. 2001).

Even absent the Archdiocese's concession, it is clear that WMATA's advertising space is a non-public forum. Having treated its advertising space as an open forum, WMATA's Board of Directors in 2015 made a considered decision based on experience to "close[]" its advertising space to specific subjects. Res. 2015-55. The Supreme Court's has recognized that "a state is not required to indefinitely retain the open character of [a designated public forum]," *Perry Educ. Ass'n*, 460 U.S. at 46, and that it may instead choose to convert a designated public forum back into a non-public forum because "the government retains the choice" regarding the status of its forum, *Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 680 (1998); *see Cornelius*, 473 U.S. at 802, 803-04; *Lehman*, 418 U.S. at 304 (plurality opinion). Previously, this court concluded that by accepting political advertising WMATA had designated its subway stations public forums. *Lebron v. WMATA*, 749 F.2d 893, 896 (D.C. Cir. 1984); *see also Am. Freedom Def. Initiative v. MTA*, 109 F. Supp. 3d 626, 628 (S.D.N.Y. 2015), *aff'd*, 815 F.3d 105 (2d Cir. 2016). Having plainly evinced its intent in 2015 to close WMATA's advertising space to certain subjects, the Board of Directors converted that space into a non-public forum in the manner contemplated by the Supreme Court. *See Cornelius*, 473 U.S. at 803-04.

Treatment of WMATA's advertising space as a non-public forum is consistent with longstanding Supreme Court precedent. In *Lehman*, the First Amendment challenge arose with respect to prohibiting political advertising on city buses. The Court held that advertising space on public transit was properly treated as a non-public forum because a

"bus is plainly not a park or sidewalk or other meeting place for discussion" but rather "only a way to get to work or back home." *Lehman*, 418 U.S. at 306 (Douglas, J., concurring); *see also Cornelius*, 473 U.S. at 803-04. The Court drew on its precedent distinguishing between "traditional settings where First Amendment values inalterably prevail," and "commercial venture[s]," where "[p]urveyors of goods and services saleable in commerce may purchase advertising space." *Lehman*, 418 U.S. at 302-04 (plurality opinion) (internal quotation marks and citation omitted); *id.* at 305-06. (Douglas, J. concurring). In view of concerns about jeopardizing advertising revenues and "lurking doubts about favoritism, and sticky administrative problems [that] might arise in parceling out limited space," the Court concluded "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." *Id.* at 304 (plurality opinion); *see also id.* at 305-06 (Douglas, J., concurring). A contrary conclusion would mean "display cases in public hospitals, libraries, office buildings, military compounds, and other public facilities immediately would become Hyde Parks open to every would-be pamphleteer and politician." *Id.* at 304 (plurality opinion).

The Archdiocese attempts to distinguish WMATA's bus exteriors from the public transit advertising space in *Lehman* because they "reach[] an audience in a quintessential public forum." Appellant's Br. 17 n.1. But it points to no precedent that visibility from a quintessential public forum, like a park or street, renders a non-public forum public or

alters its status for the purposes of First Amendment analysis; were that the law, then the mere visibility of the Supreme Court plaza from the sidewalk, or of a military installation to passersby, might convey a constitutional obligation to host expression. The Archdiocese also attempts to distinguish *Lehman* because bus exteriors are "unlike the interiors with their distinct captive audience problems addressed in [*Lehman*]." *Id*. The rationale in *Lehman* was not so limited. The Supreme Court concluded that a city does not "by selling advertising space . . . turn[] its buses into free speech forums." *Lehman*, 418 U.S. at 305-06 (Douglas, J., concurring); *cf. Marks v. United States*, 430 U.S. 188, 193 (1977) (citation omitted).

The Supreme Court, in citing *Lehman* with approval in *Cornelius*, 473 U.S. at 803-04, underscored that transit systems, unlike spaces like parks and sidewalks that have historically been used for congregation and discussion, have a utilitarian purpose that governments are entitled to maintain, at least where they have provided a non-speech-suppressive rationale for regulation. City buses, by contrast, enjoy no historical tradition like parks and sidewalks because transit was a private enterprise in most American cities until the second half of the twentieth century. *See* George M. Smerk, *Urban Mass Transportation: From Private to Public to Privatization*, 26 Transportation J. 83, 83-84 (1986); Jay Young, *Infrastructure: Mass Transit in 19th- and 20th-Century Urban America*, Oxford Research Encyclopedia of American History, 5 & n. 30 (Mar. 2015) (citing David E. Nye, *Electrifying America: Social Meanings of a New Technology, 1880-1940* at 90-91 (Cambridge: MIT Press 1992)).

2. WMATA's decision in Guideline 12 was consonant with recognition by the Supreme Court that the government has wide latitude to restrict subject matters—including those of great First Amendment salience, *see Minn. Voters Alliance*, 138 S. Ct. at 1885-86 (collecting citations on political speech); *Cornelius*, 473 U.S. 788 (political speech); *Rosenberger*, 515 U.S. at 831 (religious speech)—in a nonpublic forum as long as it maintains viewpoint neutrality and acts reasonably. Far from undermining First Amendment values, the Court has understood the latitude afforded the government in regulating a non-public forum to promote these values. The non-public forum preserves some speech where there is no constitutional obligation to do so. The Court explained:

> The *Cornelius* distinction between general and selective access furthers First Amendment interests. By recognizing the distinction, 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 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, 523 U.S. at 680. The government need not be forced into the choice between "the prospect of cacophony, on the one hand,

and First Amendment liability, on the other." *Id.* at 681.

In addition to preserving speech, the non-public forum doctrine, by requiring that the government prospectively and categorically set subject matter regulations, *see Rosenberger*, 515 U.S. at 829, 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. This constraint is especially important in the context of religious speech, given our cultural and constitutional commitment to religious liberty and the historic role of religiously motivated dissent from government orthodoxy in the development of free-speech rights. *See, e.g.*, *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). Because Guideline 12 prohibits religious and anti-religious ads in clear, broad categories, bureaucrats are not called upon to decide whether the ad criticizing the Catholic Church's position on condom usage, or the anti-Islam Muhammad ad, or the Find a Perfect Gift campaign ad is the more "offensive," or otherwise censor religious messages. WMATA's subject-based prohibition abides by the Supreme Court's recognition that "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion." *Barnette*, 319 U.S. at 642; *see Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1731 (2018).

The Archdiocese's position would eliminate the government's prerogative to exclude religion as a

subject matter in any non-public forum. It contends Supreme Court precedent prohibits governments from banning religion as a subject matter, and that Guideline 12 is unconstitutional for that reason. Not only is this position contrary to the Supreme Court's recognition that governments retain the prerogative to exclude religion as a subject matter, *see Rosenberger*, 515 U.S. at 831, it would also undermine the forum doctrine because the Archdiocese offers no principled reason for excepting religion from the general proposition that governments may exclude subjects in their non-public forums. Although religious speech might be an exception either because it is highly valuable or because it receives specific protection in the First Amendment, the same can be said of political speech on which the Supreme Court has upheld bans against constitutional challenges. *See, e.g.*, *Arkansas Educ. Television Comm'n*, 523 U.S. at 669; *Cornelius* 473 U.S. 788. The Archdiocese's position could have sweeping implications for what speech a government may be compelled to allow once it allows any at all, even forcing 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*, 523 U.S. at 680, was not merely hypothetical.

The Archdiocese contends also that, notwithstanding whether the exclusion of religion could ever be constitutional in any non-public forum, Guideline 12 is unconstitutional because, like the restrictions challenged in *Rosenberger*, *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993), and *Good News Club v. Milford Central*

School, 533 U.S. 98 (2001), it suppresses the Archdiocese's religious viewpoint on subjects that are otherwise includable in the forum. But far from being an abrogation of the distinction between permissible subject matter rules and impermissible viewpoint discrimination, each of these cases represents an application of the Supreme Court's viewpoint discrimination analysis, of which Guideline 12 does not run afoul. In each, the Court held that the government had engaged in unconstitutional viewpoint discrimination because the challenged regulation operated to exclude religious viewpoints on otherwise includable topics. An examination of each case demonstrates the contrast between the breadth of subjects encompassed by the forums at issue and WMATA's in which, unlike the restrictions struck down by the Court, Guideline 12 does not function to exclude religious viewpoints but rather proscribes advertisements on the entire subject matter of religion.

In *Rosenberger*, the University's Guidelines stated that "the purpose of the [Student Activities Fund ("SAF")]" was "to support a broad range of extracurricular student activities that 'are related to the educational purpose of the University,'" because "the University[] 'recogni[zed] that the availability of a wide range of opportunities' for its students 'tends to enhance the University environment.'" *Rosenberger*, 515 U.S. at 824 (quoting Appendix to Pet. for Cert. 26, 61a). Its Guidelines "recognize[d] 11 categories of student groups that may seek payment to third-party contractors because they 'are related to the educational purpose of the University of Virginia,'" including "student news, information, opinion,

entertainment, or academic communications media groups." *Id.* (quoting Appendix to Pet. for Cert. 61a-62a). The University denied funding for *Wide Awake: A Christian Perspective at the University of Virginia*, "invok[ing]" a Guideline "prohibit[ing] . . . funding on behalf of publications that primarily promot[e] or manifes[t] a particular belie[f] in or about a deity or an ultimate reality." *Id.* at 836 (internal quotation marks omitted). The Supreme Court found this Guideline to "effect[] a sweeping restriction on student thought . . . in the context of University sponsored publications" and held the Guideline was viewpoint discriminatory because "[b]y the very terms of the SAF prohibition, 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, 836 (emphasis added). The Court concluded that "[t]he prohibited perspective, not the general subject matter, resulted in the refusal to make third-party payments, for the subjects discussed [in *Wide Awake*] were otherwise within the approved category of publications." *Id.* at 831.

In *Lamb's Chapel*, the school property could be used for "the holding of 'social, civic and recreational meetings and entertainments, and other uses pertaining to the welfare of the community,'" but it could "not be used by any group for religious purposes." *Lamb's Chapel*, 508 U.S. at 386-87 (quoting New York Educ. Law § 414(1)(c) & Appendix to Pet. for Cert. 57a). When an evangelical church in the community and its pastor applied for permission to use school facilities to show lectures by Doctor James Dobson on his "views on the undermining influences

of the media that could only be counterbalanced by returning to traditional, Christian family values instilled at an early stage," that is, a "[f]amily oriented movie—from a Christian perspective," permission was denied. *Id.* at 387-89 (citation omitted). The Supreme Court, acknowledging that "[t]here is no suggestion from the courts below or from the [school] District or the State that a lecture or film about child rearing and family values would not be a use for social or civic purposes otherwise permitted," reasoned that because "[t]hat *subject matter is not one . . . off limits* to any and all speakers," the government had impermissibly "denie[d] access to a speaker solely to suppress the point of view he espouses on an otherwise includable subject." *Id.* at 393-94 (quoting *Cornelius*, 473 U.S. at 806) (emphasis added).

Similar circumstances were present in *Good News Club*, where the Milford Central School "enacted a community use policy" stating purposes "for which its building could be used after school," including that "district residents may use the school for 'instruction in any branch of education, learning or the arts'" and that "the school is available for 'social, civic and recreational meetings and entertainment events, and other uses pertaining to the welfare of the community, provided that such uses shall be nonexclusive and shall be opened to the general public." *Good News Club*, 533 U.S. at 102 (quoting Appendix to Pet. for Cert. D1-D3). When the "sponsors of the local Good News Club, a private Christian organization for children ages 6 to 12," sought to use the school's facilities "to have 'a fun time of singing songs, hearing a Bible lesson and memorizing scripture,'" the district's interim superintendent denied their request

on the ground that their proposed use "was 'the equivalent of religious worship.'" *Id.* at 103 (quoting Appendix to Pet. for Cert. H1-H2). The Supreme Court held that the school's "exclusion of the Good News Club based on its religious nature is indistinguishable from the exclusions in [*Rosenberger* and *Lamb's Chapel*]" and "that the exclusion constitutes viewpoint discrimination" because there was "no question that teaching morals and character development to children is a permissible purpose under Milford's policy" and "it is clear that the [Good News] Club teaches moral and character development to children," but was excluded from the use of school facilities "because Milford found the Club's activities to be religious in nature." *Id.* at 107-08.

The restriction in WMATA Guideline 12 is unlike those challenged in this trio of cases. In each case the property had been opened to a wide range of subjects without excluding religion and disallowing a religious viewpoint to be expressed in those forums was unconstitutional. To the extent those cases can be read to blur the line between religion-as-subject-matter and a religious viewpoint, the Supreme Court's analysis emphasizes the breadth of the forums involved: the "broad range" of activities in service of "educational purpose" contemplated in *Rosenberger*, 515 U.S. at 824, and the capacious range of "social, civic and recreational meetings and entertainments, and other uses pertaining to the welfare of the community" that might have been permitted in *Lamb's Chapel*, 508 U.S. at 386, and *Good News Club*, 533 U.S. at 102. By contrast, WMATA's forum—its advertising space on the exteriors of its buses—is not so broad, much less inviting through its

advertisements public debate on religion. Given the express boundaries and narrow character of WMATA's forum, 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," *Rosenberger*, 515 U.S. at 831; *see Lamb's Chapel*, 508 U.S. at 393.

The precedents from our sister circuits on which the Archdiocese relies do not disturb this understanding of the trio of Supreme Court cases. Although the Archdiocese maintains that *Rosenberger* does not permit the government to ban religion as a subject matter, Appellant's Br. 22-23, and that the circuit cases "interpret[] *Rosenberger* in just this way[,]" "reject[ing] arguments materially indistinguishable from WMATA's effort to defend the exclusion of religion and religious viewpoints," Appellant's Br. 23, in fact these cases underscore that precedent requires an evaluation of the forum the government has created in order to determine whether a challenged regulation discriminates on the basis of viewpoint, and are an application of that analysis, rather than an affirmation of the principle that religion as a subject may never be banned in a non-public forum.

Of the cases the Archdiocese cites, only the Second Circuit has directly addressed whether *Rosenberger* permits the exclusion of religion as a subject matter from a non-public forum. *Byrne v. Rutledge*, 623 F.3d 46 (2d Cir. 2010) concerned a forum much broader in

scope than WMATA's. Vermont's regulation of vanity license plates allowed motorists to place secular messages relating to their "personal philosophy, beliefs, and values . . . identity and affiliation . . . and statements of inspiration," but excluded religious messages "on matters of self-identity or . . . statements of love, respect, or inspiration." *Id.* at 57. The Second Circuit held that the State had engaged in viewpoint discrimination because it "distinguish[ed] between those who seek to express secular and religious views *on the same subjects*." *Id.* at 56-57 (emphasis in original). Although observing that "*Lamb's Chapel*, *Rosenberger*, and *Good News Club*, read together, sharply draw into question whether a blanket ban such as Vermont's on all religious messages in a forum that has otherwise been broadly opened to expression on a wide variety of subjects can neatly be classified as purely a 'subject matter' restriction for purposes of First Amendment analysis," the court declined to "address bans on religious speech in forums limited to discussion of certain, designated topics," *id.* at 58-59. The court's holding thus accords with WMATA's view that the government may in a non-public forum it has established for its advertising space proscribe religion as a subject matter consistent with the Supreme Court's precedent. This view also accords with that of the Ninth Circuit, which has held that *Rosenberger* permits a school district seeking to avoid "disruption" to proscribe display of religious messages in a non-public forum reserved for commercial messages. *See DiLoreto v. Downey Unified School Dist.*, 196 F.3d 958, 967-70 (9th Cir. 1999).

The other circuit cases that the Archdiocese cites aid it even less because they do not construe *Rosenberger*, but apply it to invalidate as viewpoint discriminatory government policies that sought to exclude religious viewpoints on otherwise includable topics in a non-public forum. The Seventh Circuit struck down the exclusion of religious "seasonal displays" where "comparable secular holiday displays by other private groups are permitted," *Grossbaum v. Indianapolis-Marion County Bldg. Auth.*, 63 F.3d 581, 588 (7th Cir. 1995), and prior to *Rosenberger* had struck down a policy prohibiting the distribution of religious literature in school where only "obscenity and libel" were similarly prohibited, *Hedges v. Wauconda Comm. Unit School Dist. No. 118*, 9 F.3d 1295, 1297-98 (7th Cir. 1993). The Eighth Circuit cited *Lamb's Chapel* in invalidating a school district policy permitting "any speech relating to moral character and youth development" but excluding a club that wished to speak on that topic from a religious perspective. *Good News/Good Sports Club v. School Dist. of Cty. of Ladue*, 28 F.3d 1501, 1506 (8th Cir. 1994). The Tenth Circuit simply reiterates the principle that "[i]f . . . the government permits secular displays on a nonpublic forum, it cannot ban displays discussing otherwise permissible topics from a religious perspective," *Summum v. Callaghan*, 130 F.3d 906, 918 (10th Cir. 1997).

The Archdiocese nonetheless contends that Guideline 12 suppresses its religious viewpoint to the extent it wishes to address topics such as charitable giving, Christmas, and opening hours on which WMATA allows non-religious but not religious messages. Similarly, the Franciscan Monastery USA,

one of the Archdiocese's amici, maintains that its ad exhorting viewers to visit the Franciscan Monastery of the Holy Land in America expresses its religious viewpoint on places to visit, on which WMATA allows secular but not religious messages. These contentions are unpersuasive because the subjects on which the Archdiocese and the Monastery claim they wish to speak through advertisements on WMATA buses are either not subjects within the forum or are not subjects on which they have shown they could not speak under Guideline 12.

The Archdiocese's "Find the Perfect Gift" ad is not primarily or recognizably about charitable giving, as it is not primarily or recognizably about opening hours or places to visit. Like the Monastery's ad, the Archdiocese's ad is a religious ad, an exhortation, repeatedly acknowledged by the Archdiocese to be part of its evangelization effort to attend mass at Catholic churches in connection with Advent. Timoney Decl. ¶ 4; McFadden Decl. ¶ 3. The imagery of the Archdiocese's "Find the Perfect Gift" ad is evocative not of the desirability of charitable giving, but rather the saving grace of Christ, which is not a subject included in the WMATA forum. Had the Archdiocese wished to submit an ad encouraging charitable giving, nothing in the record suggests it could not do so. WMATA accepted the ad of the Salvation Army, a religious organization whose ad exhorted giving to charity but contained only non-religious imagery. WMATA acknowledged in the district court, 2017 Mot. Hg. Tr. at 64, and again in this court that it would not reject as running afoul of Guideline 12 an ad from the Archdiocese that read "[P]lease [G]ive to Catholic Charities," Oral Arg. Tr. 31.

Nor has the Archdiocese pointed to an ad WMATA has accepted addressing Christmas except for commercial ads for Christmastime sales of goods. From these ads the Archdiocese concludes that Guideline 12 impermissibly excludes a religious viewpoint on Christmas while permitting a secular one. The Supreme Court, however, has rejected the view that accepting commercial advertising "create[s] a forum for the dissemination of information and expression of ideas" and "sanction[s] . . . [a] preference for . . . commercialism." *Lehman*, 418 U.S. at 310, 315 (Brennan, J., dissenting); *see id.* at 302 (plurality opinion) (citations omitted); *id.* at 305-06, 308 (Douglas, J., concurring) (citations omitted). So understood, ads promoting Christmastime sales are not expressing a view on Christmas any more than a McDonald's ad expresses a view on the desirability of eating beef that demands the acceptance of a contrary ad from an animal rights group, or than 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. Commercial advertisements are designed to sell products: As the district court observed in noting the Archdiocese's evidentiary shortcomings for its argument that WMATA accepts advertisements that promote the commercialization of Christmas, commercial advertisements "proclaim: Shop Here! Buy This!" while saying nothing about the sellers' viewpoints on how Christmas should be observed. 281 F. Supp. 3d at 104. Or in terms used by the Supreme Court, the ads imploring the purchase of products do not invite "debate," *Rosenberger* 515 U.S. at 831, about how Christmas should be celebrated. 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.

3. Because WMATA's Guideline 12 is viewpoint neutral, the question remains whether "the distinctions drawn are reasonable in light of the purpose served by the forum." *Cornelius*, 473 U.S. at 806 (citing *Perry Educ. Ass'n*, 460 U.S. at 49). The reasonability inquiry is not a demanding one, but rather is a "forgiving test." *Minn. Voters Alliance*, 138 S. Ct. at 1888. The challenged "restriction 'need not be the most reasonable or the only reasonable limitation,'" *Hodge v. Talkin*, 799 F.3d 1145, 1165 (D.C. Cir. 2015) (quoting *Cornelius*, 473 U.S. at 808), but the regulation must simply be reasonable as consistent with the government's legitimate interest in maintaining the property for its dedicated use, *Perry Educ. Ass'n*, 460 U.S. at 46, 51.

In 2015, WMATA decided to avoid the divisiveness caused by certain advertisements and specifically to avoid the inflamed passions surrounding religion. Its adoption of Guideline 12 reflected a considered judgment after study, and including examination of the views of the marketplace. WMATA had fielded security concerns arising from the controversial ad depicting the Prophet Mohammed, which had prompted an armed attack at the place where the cartoon was produced. It also had weathered controversy surrounding an ad

critical of the Catholic Church's position on condom usage. WMATA's closure of its forum to certain broad subjects is reasonable in light of its core purpose and experience, and is responsive to the very circumstances that prompted WMATA to reevaluate its advertising approach. The non-public forum WMATA created has a history not unlike that in *Cornelius*, 473 U.S. at 799-800, where the federal government redesigned a charity fundraising program in order to avoid workplace disruptions; so too WMATA's decision in 2015 to abandon a former approach to its advertising space that interfered with its ability to provide safe and reliable transportation "attractive to the marketplace," *Int'l Soc. For Krishna Consciousness*, 505 U.S. at 682.

Although a challenged regulation may be unreasonable, regardless of the reasons for its adoption, if it is inconsistently enforced, *see Minn. Voters Alliance*, 138 S. Ct. at 1888-90, the Archdiocese has not shown that "WMATA . . . appl[ies] [its] policy in arbitrary and unreasonable ways," Appellant Br. 30. The Archdiocese suggests WMATA has been inconsistent insofar as it has accepted advertisements from religious speakers like the Salvation Army and a Christian radio station while rejecting the Archdiocese's "Find the Perfect Gift" ad. In fact, 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. The Archdiocese's suggestion that WMATA has been inconsistent because it accepted an ad from a yoga studio containing the slogan "Muscle + Mantra," ignores that ad is not recognizably

religious as the Archdiocese's ad plainly is, by its own characterization. Although a restriction may also be unreasonable if it is unclear what speech would be swept in or otherwise seriously hamper consistent administration, *see Minn. Voters Alliance*, 138 S. Ct. at 1888-90, given the history and experience that prompted WMATA to adopt Guideline 12 and WMATA's enforcement of it, the Archdiocese has not shown that Guideline 12 has failed to give adequate guidance on what is prohibited, or created so many marginal cases that it cannot be fairly administered. On the contrary, WMATA has articulated a "sensible basis for distinguishing what may come in from what must stay out." *Id.* at 1888 (citing *Cornelius*, 473 U.S. at 80-09).

The Archdiocese at oral argument clarified its position is that Guideline 12 is unreasonable because it is never reasonable to discriminate against religion. Oral Arg. Tr. 20-21. If by discrimination the Archdiocese refers to animus, there is no record evidence of WMATA animus, nor does the Archdiocese point to any now. Given Supreme Court precedent in *Cornelius* and *Perry Education Association* rejecting First Amendment challenges to subject matter exclusions in a non-public forum, the Archdiocese cannot mean discrimination as in demarcation of a subject matter. Any regulation must name its subject, and such naming is not the kind of textual hook from which a court may infer animus. The Archdiocese's position is inconsistent with *Cornelius* and *Perry Education Association* where the Supreme Court instructs courts to analyze the reasonableness of the regulation in light of the purpose of the forum, not to

intuit whether a freestanding regulation seems objectionable in isolation.

On the other hand, if the Archdiocese is objecting to the reasonableness standard itself where the subject of religion is barred in a non-public forum, this is either another attempt to backtrack from its concession in the district court or to undo long-standing precedent in *Lehman* as well as the forum doctrine. Addressing the argument on its own terms, the Archdiocese nowhere suggests that WMATA does not have a compelling interest in ensuring the safety and reliability of its transportation services and operating in a manner that maintains the attractiveness of its service to a multi-cultural, multi-ethnic, and religiously diverse ridership, including visitors to the Nation's capital and its *environs* from home and abroad, while simultaneously avoiding censorship in accord with the principles set forth in *Barnette*, 319 U.S. at 642. That is, even under a heightened standard, Guideline 12 is a management tool adopted in light of WMATA's experience that appropriately defines a limited forum for its advertising space.

B.

The Archdiocese's likelihood of success on its Free Exercise Clause and RFRA arguments is dubious at best. As a result, the Archdiocese's hybrid rights claim, *see* Appellant's Br. 37, fares no better because it requires independently viable free speech and free exercise claims, and "in law as in mathematics zero plus zero equals zero." *Henderson v. Kennedy*, 253 F.3d 12, 19 (D.C. Cir. 2001).

1. Generally, the Free Exercise Clause does not exempt individuals from complying with neutral laws of general applicability. *See Levitan v. Ashcroft*, 281 F.3d 1313, 1318 (D.C. Cir. 2002) (citing *Employment Div., Dep't of Human Resources v. Smith*, 494 U.S. 872, 878-79 (1990)). Non-neutral laws are impermissible because they have as their "object . . . to infringe upon or restrict practices because of their religious motivation." *Church of the Lukumi Babalu Aye v. Hialeah*, 508 U.S. 520, 533 (1993); *see also American Family Ass'n Inc. v. FCC*, 365 F.3d 1156, 1170-71 (D.C. Cir. 2004). As the Supreme Court explained in *Lukumi Babalu*, "[t]here are . . . many ways of demonstrating that the object or purpose of a law is the suppression of religion or religious conduct." *Lukumi Babalu*, 508 U.S. at 533. The Court "begin[s] with its text" and then considers whether there might be "governmental hostility which is masked, as well as overt." *Id.* at 533-34. The "[f]actors relevant to the assessment of governmental neutrality include 'the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body." *Masterpiece Cakeshop*, 138 S. Ct. at 1731 (quoting *Lukumi Babalu*, 508 U.S. at 540).

Nothing in the record indicates Guideline 12 was motivated by the "hostility" that motivated the city ordinance in *Lukumi Babalu*. The Archdiocese has made no showing, nor purported to make a showing, that the WMATA Board of Directors harbored any discriminatory intent or pro- or anti-religion bias in its decisionmaking process. Instead, there is ample

record basis from which WMATA could reasonably conclude in 2015 that controversial advertisements, including advertisements with religious messages, interfered with its ability to ensure rider safety and maintain employee morale, posed potential security risks, and fostered community opposition—all to the detriment of its attractiveness to ridership. Contrary to the Archdiocese's position that a discriminatory object is evident because WMATA's interests are not sufficient to support an exclusion of the subject of religion and because the District of Columbia allows similar advertisements on its stationary bus shelters, Guideline 12 evinces a level of means-and-ends fit that is inconsistent with the Archdiocese's contentions and generally with finding discrimination. In the face of experience that running religious ads caused controversy and even had the potential to cause violence, *see* Bowersox Decl. ¶¶ 9, 11, WMATA chose to exclude the subject of religion from its advertising space. It has also offered a secular purpose for doing so, which includes maximizing security of its transit system and minimizing vandalism of WMATA property. That rationale, and the secular basis for which there is no evidence of pretext, is inconsistent with finding discrimination.

Nor does the District of Columbia's approach to advertising on its stationary bus shelters evince any irrationality in WMATA's decisionmaking. The District government contracts with Clear Channel Outdoor to "provide[] and maintain[] bus shelters throughout the metropolitan area, and . . . sell[] advertising at or near the bus shelters." Compl. ¶ 12. WMATA contracts with a different company to administer its policy on advertising space of bus

exteriors. *Id.* ¶ 16; Bowersox Decl. ¶ 27. The Archdiocese provides no reason the District government's approach for stationary space it controls should dictate the degree to which WMATA, as an interstate compact, is entitled to manage advertising space on its buses.

Of course, WMATA may not target religious speakers for exclusion from a generally available benefit. In *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017), the state government offered reimbursement grants to qualifying nonprofit organizations that installed playground surfaces made from recycled tires, but it had an express policy of denying grants to churches and other religious entities. That is, the state "pursued its preferred policy to the point of expressly denying a qualified religious entity a public benefit solely because of its religious character." *Id.* at 2024. WMATA is not discriminating based on the status of the speaker. As is clear, for example, from WMATA's acceptance of the Salvation Army ad, religious speakers are not excluded because they are religious speakers. That alone is sufficient to distinguish *Trinity Lutheran*.

Moreover, unlike *Trinity Lutheran*, this is a forum case. *Trinity Lutheran* involved a series of criteria for eligibility for which the church had "fully qualified," *id.* at 2023. WMATA, by contrast, has by adopting *Guidelines* created a forum in which the benefit in question—its advertising space—can no longer be said to be "generally available." It would strain *Trinity Lutheran* to read its prohibition on discriminating against religious speakers or speakers because of religious speech to suggest that exclusion of religion

as a subject matter is necessarily discrimination against religious speakers. If that were the correct understanding of *Trinity Lutheran*, then it would have upended, *sub silentio*, *Rosenberger* and *Lamb's Chapel* as well as the forum doctrine because it would never be possible to exclude religion as a subject matter.

2. The Archdiocese is also unlikely to succeed on its RFRA claim for alternative reasons: not only has it failed to demonstrate a "substantial[] burden" on its "exercise of religion," 42 U.S.C. § 2000bb-1(a), that is, "substantial pressure on an adherent to modify his behavior and to violate his beliefs," *Kaemmerling v. Lappin*, 553 F.3d 669, 678 (D.C. Cir. 2008) (quoting *Thomas v. Review Bd.*, 450 U.S. 707, 718 (1981)), but also RFRA would appear to be inapplicable to WMATA.

The Archdiocese alleges that advertising on public buses provide a "unique and powerful format" for its evangelization campaign because it "offers high visibility with consistent daily views," including in "many areas of the metropolitan region that are otherwise underserved and that other, more static advertising campaigns might miss." Compl. ¶ 15; *see* McFadden Decl. ¶¶ 8-10. But 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. Instead, the Archdiocese has acknowledged that it has many other ways to pursue its evangelization efforts: in newspapers, through social media, and even on D.C. bus shelters. Compl. ¶¶ 11-12. Sincere religious beliefs are not impermissibly burdened by restrictions on

evangelizing in a non-public forum where a "multitude of means" remains for the same evangelization. *See Mahoney v. Doe*, 642 F.3d 1112, 1121 (D.C. Cir. 2011); *Henderson*, 253 F.3d at 17. In these circumstances, the Archdiocese has not demonstrated a likelihood of success on its RFRA claim.

Even so, there is a threshold question whether RFRA can be constitutionally applied to WMATA. WMATA is an interstate compact between two sovereign states and the District of Columbia. *See* D.C. Code § 9-1107.01(4); Md. Code Transp. § 10-204(4); Va. Code Ann. § 33.2-3100(4). The Supreme Court has held that RFRA cannot constitutionally apply to the states, *see City of Boerne v. Flores*, 521 U.S. 507, 511 (1997), because it would impermissibly "curtail[] their traditional general regulatory power" and impose "substantial costs" on the states, *id.* at 534. Although adding Virginia and Maryland to the WMATA Compact may not free the District of Columbia from its own obligation to comply with RFRA, *see Potter v. District of Columbia*, 558 F.3d 542, 544 (D.C. Cir. 2009), the District of Columbia's compliance with RFRA is not at issue. Rather the Archdiocese has challenged WMATA's compliance with RFRA, and WMATA is an instrumentality and agency of states to which the Supreme Court has concluded RFRA cannot constitutionally apply. Immunities conferred by Maryland and Virginia are not lost by the addition of the District of Columbia to the Compact. *See Morris v. WMATA*, 781 F.2d 218, 228 (D.C. Cir. 1986).

The Archdiocese responds that RFRA applies to WMATA because Section 76(e) the Compact provides that if WMATA rules violate the laws, ordinances,

rules, or regulations of a signatory, then the law of that signatory applies and the WMATA rule is void. *See* D.C. Code § 9-1107.01(76(e)). The Archdiocese's point would appear to cut against it, because the high degree of control each signatory retains over WMATA suggests the states did not cede their sovereignty by joining the Compact. In any event, it is unclear how RFRA could apply only to the District of Columbia as a Compact member when Maryland and Virginia have not ceded their sovereign prerogatives by joining the Compact, *see Tarrant Regional Water Dist. v. Herrmann*, 569 U.S. 614, 632 (2013); *Morris*, 781 F.2d at 227. The Archdiocese does not suggest that Section 76(e) could be judicially enforceable yet unconstitutional. Compacts generally have the status of federal law. *See Kansas v. Nebraska*, 135 S. Ct. 1042, 1053 (2015). To the extent enforcement in this context would "curtail[]" Maryland's and Virginia's "traditional general regulatory power," *City of Boerne*, 521 U.S. at 534, enforcing the Compact provision would produce an unconstitutional result, *see Texas v. New Mexico*, 462 U.S. 554, 564 (1983).

The immunity issue was not thoroughly briefed by the parties, however. Suffice it to say, the Archdiocese's RFRA challenge poses that question as an antecedent issue due to the presence of two sovereign states in the Compact. For now the court need only conclude that the Archdiocese has not demonstrated that it is likely to prevail on the merits of its RFRA challenge, either due to the paucity of the TRO record or the immunity issue underlying the Archdiocese's reliance on Section 76(e).

C.

The remaining preliminary injunction factors—irreparable injury, the balance of equities, and public interest—also do not weigh in the Archdiocese's favor. Although "[i]n First Amendment cases, the likelihood of success will often be the determinative factor in the preliminary injunction analysis," *Pursuing America's Greatness v. FEC*, 831 F.3d 500, 511 (D.C. Cir. 2016) (internal quotation marks and citation omitted), this court has not yet decided whether *Winter v. National Resources Defense Council*, 555 U.S. 7, 20-22 (2008), is properly read to suggest a "sliding scale" approach to weighing the four factors be abandoned, *see League of Women Voters*, 838 F.3d at 7 (citation omitted). The instant case likewise "presents no occasion for the court to decide whether the 'sliding scale' approach remains valid after *Winter*." *Id.*

Were the Archdiocese to show a likelihood of success on the merits, *see supra* Part II.A & B, it would prevail on the final three factors because "the loss of constitutional freedoms, 'for even minimal periods of time, unquestionably constitutes irreparable injury,'" *Mills v. District of Columbia*, 571 F.3d 1304, 1312 (D.C. Cir. 2009) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion)). This court has defined the irreparable injury analysis to "examine only whether [the constitutional] violation, if true, inflicts irremediable injury," *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 303 (D.C. Cir. 2006), because the harm both is "certain and great," "actual and not theoretical," and "imminen[t]," and also "beyond remediation," *id.* at 297 (citation omitted). Conversely, the deprivation of constitutional

rights constitutes irreparable injury only to the extent such deprivation is shown to be likely. *See League of Women Voters*, 838 F.3d at 8-9 (citing *Winter*, 555 U.S. at 22). The court has no occasion to decide whether, *see* Appellant's Br. 49, irreparable injury could weigh in favor of granting a preliminary injunction where there is no showing of a likelihood of success on the merits.

The same conclusion is true of the final two factors. *See Pursuing America's Greatness*, 831 F.3d at 511 (citing *Nken v. Holder*, 556 U.S. 418, 435 (2009)). The Archdiocese maintains there will be no corresponding harm to WMATA if it runs the Archdiocese's "Find the Perfect Gift" ad, and that WMATA will benefit because it will have gained advertising revenues. WMATA takes the opposite position, having concluded that the additional revenue from accepting such ads is outweighed by the impact on employee morale, community opposition, security concerns, vandalism, and administrative burdens that prompted WMATA to adopt the *Guidelines*. Resolution here hinges on the likelihood of success on the merits because while the costs that WMATA has identified associated with running political, religious, and advocacy ads may outweigh the marginal benefit of additional advertising revenue, the calculus would be different weighing WMATA's costs against the Archdiocese's suffering a constitutional violation.

Similarly, although the Archdiocese contends that the final factor weighs in its favor because the public interest favors the protection of constitutional rights, the strength of the Archdiocese's showing on public interest rises and falls with the strength of its showing

on likelihood of success on the merits. The public interest favors the protection of constitutional rights, *see, e.g.*, *Gordon v. Holder*, 721 F.3d 638, 653 (D.C. Cir. 2013), but the Archdiocese would need to show a likelihood of violation of its constitutional rights, and it has not done so.

In sum, religious speech and the free exercise of religion are of central First Amendment importance. Yet the Archdiocese presses an untenable position under Supreme Court precedent. By urging a capacious vision of viewpoint discrimination, it would effectively prevent the limitation of a non-public forum to commercial advertising, and upend decades of settled doctrine permitting governments to run transit companies without establishing forums for debate on the controversial issues of the ages and of the day, including not only the subject of religion but also politics and advocacy issues. Indeed, having allowed any speech, governments might be required to accept speech on all subjects because the Archdiocese offers no principled limit cabining its position to religion. Urging the finding of a free exercise violation based on no evidence of animus other than Guideline 12's naming of religion, the Archdiocese again invites the court to impute hostility on a heretofore unrecognized basis, and with no suggestion of how the proscription of the subject of religion might otherwise be effected in a non-public forum. This position not only finds no support in Supreme Court precedent, but would also upend it, something this lower court may not do. Accordingly, we affirm the denial of the preliminary injunction.

Wilkins, *Circuit Judge*: I join in the Court's opinion. I write 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.

A founding premise of our political system is that government is not a "competent judge" of truth. *See* James Madison, Memorial and Remonstrance Against Religious Assessments (1785). That responsibility belongs to the people, whose superior ability and authority in the marketplace of ideas is reflected and secured by the First Amendment. *See Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994) ("At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence.").

Yet the Constitution accommodates those limited circumstances in which government must be permitted some control over expressive content to carry out its proper functions. For instance, the government may "speak[] on its own behalf." *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2251 (2015). Additionally, the government may place speech-restrictive conditions on participation in its programs if those conditions are confined to the scope of the program. *See, e.g.*, *U.S. Agency for Int'l Development v. Alliance for Open Society Int'l, Inc.*, 570 U.S. 205, 215-17 (2013); *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 399-401 (1984). The government may also prohibit constitutionally unprotected speech, such as defamation or obscenity, so long as the restriction is

based on proscribable content and not "hostility—or favoritism—towards the underlying message expressed." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 386 (1992); *see also City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 763-65 (1988).

These doctrines apply in different contexts but embody the same core First Amendment values: "that more speech, not less, is the governing rule," *Citizens United v. FEC*, 558 U.S. 310, 361 (2010), and that "the danger of censorship . . . is too great where officials have unbridled discretion over a forum's use," *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553 (1975).

To preserve these values within the practical realities of government property, the Supreme Court has repeatedly held that the government may categorically limit the subject matter of private speech in nonpublic forums, provided the limitation is reasonably related to the forum's purposes and, as with restrictions on unprotected speech, not a cover for suppressing viewpoints with which the government disagrees. *See Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 799-800 (1985) ("Nothing in the Constitution requires the Government freely to grant access to all who wish to exercise their right to free speech on every type of Government property[.]"); *see also Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 49 (1983) (holding that the exclusion of communications from one union to potential members while allowing communications from another was not viewpoint discrimination because there was "no indication that the school board *intended* to discourage one viewpoint and advance

another" (emphasis added)); *Widmar v. Vincent*, 454 U.S. 263, 280 (1981) ("[T]he university . . . may not allow its agreement or disagreement with the viewpoint of a particular speaker to determine whether access to a forum will be granted.") (Stevens, J., concurring); *Greer v. Spock*, 424 U.S. 828, 838-39 (1976) (concluding a restriction on partisan speech was properly applied because "there is no claim that the military authorities discriminated in any way among candidates for public office based on the candidates' supposed political views"); *Initiative & Referendum Inst. v. U.S. Postal Serv.*, 685 F.3d 1066, (D.C. Cir. 2012) (A speech restriction in a nonpublic forum is permissible if "reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view."). Government must be able to prospectively set administrable subject-matter-based rules for its nonpublic forums if it is to allow any private speech at all. But because government favoritism in public debate is so pernicious to liberty and democratic decisionmaking, otherwise permissible subject-matter restrictions are rendered unconstitutional when the government chooses sides within the subject matter. *Matal v. Tam*, 137 S. Ct. 1744, 1766 (2017) ("[T]he test for viewpoint discrimination is whether—within the relevant subject category—the government has singled out a subset of messages for disfavor based on the views expressed."); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 112 (2001) ("[S]peech discussing otherwise permissible subjects cannot be excluded from a limited public forum on the ground that the subject is discussed from a religious viewpoint."); *Cornelius*, 473 U.S. at 806 (The government acts

unconstitutionally when prohibiting a speaker from expressing "[a] point of view he espouses on an otherwise includable subject.").

Properly understood, the distinction between subject matter and viewpoint is critical to forum doctrine's balance of the practical need to regulate private speech on nonpublic property, on one hand, with maximizing opportunities for speech and vigilance against unbridled administrative discretion, on the other. *See Cornelius*, 473 U.S. at 800. Without reasonable control over the content of private speech in nonpublic forums, government may elect to close a forum entirely rather than deal with the administrative burden or floodgate consequences of accepting private speech without effective subject-matter restrictions. Further, by requiring government to set prospective, categorical, subject-matter rules by which to evaluate private speech, forum doctrine provides public notice of what speech is permissible and constrains the discretion of government actors to pick favorites on an *ad hoc* basis. *See City of Lakewood*, 486 U.S. at 758 ("Only standards limiting the licensor's discretion will eliminate this danger [of chilling private speech] by adding an element of certainty fatal to self-censorship."); *id.* at 756-57 (collecting cases and explaining that "[a]t the root of this long line of precedent is the time-tested knowledge that in the area of free expression a licensing statute placing unbridled discretion in the hands of a government official or agency . . . may result in censorship").

Guideline 12 fits comfortably within this longstanding doctrinal framework. WMATA prohibits

"[a]dvertisements that *promote or oppose* any religion, religious practice or belief." J.A. 209 (emphasis added). Guideline 12 is thus a categorical subject-matter restriction by its own terms: It prohibits any advertisement whatsoever on the subject of religious or anti-religious advocacy, whether favoring or opposing religion in general, or any particular religion, belief, or practice. *Cf. Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 831 (1995) ("By the very terms of [its policy], the University does not exclude religion as a subject matter but selects for disfavored treatment those student journalistic efforts with religious editorial viewpoints."). It does not take sides; it restricts all speech on the topic equally, without discriminating within the defined category. *See Minn. Voter's Alliance v. Mansky*, 138 S. Ct. 1876, 1886 (2018) ("The text of the [ordinance] makes no distinction based on the speaker's political persuasion, so [plaintiff] does not claim that the ban [on 'political' apparel] discriminates on the basis of viewpoint."); *Good News Club*, 533 U.S. at 111-12; *see also R.A.V.*, 505 U.S. at 388 ("When the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable, no significant danger of idea or viewpoint discrimination exists.").

By contrast, the speech restrictions struck down in *Lamb's Chapel*, *Rosenberger*, and *Good News Club* each singled out religious viewpoints that otherwise fell within prospectively defined, permissible subject matter. Stated otherwise, those decisions involved rules that permitted private speakers to discuss categories A, B, and C, but when a speaker sought to discuss C from a pro-religious perspective, they were

improperly prohibited from doing so. Applying traditional forum doctrine, the Supreme Court held that these prohibitions unconstitutionally singled out a subset of views *within* the forum's permissible, previously established subject-matter categories. *Good News Club*, 533 U.S. at 109 ("Like the church in *Lamb's Chapel*, the Club seeks to address a subject otherwise permitted under the rule, the teaching of morals and character, from a religious standpoint."). This approach comports with the underlying purposes of forum doctrine: Practicality permits government to restrict content within its nonpublic forums in a prospective, administrable manner, but once the parameters of those restrictions are set, administrators cannot further discriminate against a disfavored view that falls within those predetermined parameters.

Here, the Archdiocese does not challenge the exclusion of speech that otherwise fits within a permissible subject matter category—it challenges the subject-matter category itself. *Cf. Rosenberger*, 515 U.S. at 831 ("[T]he University does not exclude religion as a subject matter but selects for disfavored treatment those student journalistic efforts with religious editorial viewpoints."). The Archdiocese argues that if commercial advertisements mentioning the holiday season are approved, its religious-advocacy advertisements must also be permitted because they share the same holiday-season "subject matter" and, therefore, any distinction would be based on "viewpoint." Appellant Br. 19-20. 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. This improperly inverts the forum-doctrine analysis, ignoring how the government prospectively defined permissible subject matter for its nonpublic forum in general, and instead focusing on how a stymied *speaker* wants to characterize the relevant "subject matter" in a particular case. 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.

At base, the Archdiocese asks us to erase the Supreme Court's critical distinction between permissible subject-matter restrictions and impermissible viewpoint discrimination. However, as the primary opinion notes, the Supreme Court has repeatedly upheld and applied the distinction between subject matter and viewpoint. *See, e.g.*, *Mansky*, 138 S. Ct. at 1885 ("[O]ur decisions have long recognized that the government may impose some content-based restrictions in nonpublic forums[.]"); *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2230 (2015) ("Government discrimination among viewpoints—or the regulation of speech based on the specific motivating ideology or the opinion or perspective of the speaker—is a more blatant and egregious form of content discrimination" than subject-matter restrictions. (quotation marks omitted)); *Rosenberger*, 515 U.S. at 830-31 (distinguishing between restricting religious subject matter and religious viewpoints). And for good reason: Forum doctrine's boundary between permissible

subject-matter restrictions and impermissible viewpoint discrimination is a load-bearing wall in the First Amendment's structure. Adopting 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.

Further, the lack of a principled limitation of the Archdiocese's rule to religious speech could have sweeping implications for what private expression government may be compelled to allow in nonpublic forums once it allows any at all. *See Matal*, 137 S. Ct. at 1763 (holding, in the context of commercial speech, that the Lanham Act's prohibition on registering offensive or disparaging trademarks constituted unconstitutional viewpoint discrimination analogous to that in a limited public forum); *Heffron v. Int'l Soc. for Krishna Consciousness, Inc.*, 452 U.S. 640, 652 (1981) ("[R]eligious organizations [do not] enjoy rights to communicate . . . superior to those of other organizations having social, political, or other ideological messages to proselytize."). In neither briefing nor at oral argument did the Archdiocese offer a cogent explanation of how such a rule could be restricted to religious speech. After all, *political* speech has frequently been designated as the most highly protected form of First Amendment expression. *See, e.g.*, *Pursuing America's Greatness v. FEC*, 831 F.3d 500, 508 (D.C. Cir. 2016) ("The First Amendment 'has its fullest and most urgent application to speech uttered during a campaign for political office.'" (quoting *Ariz. Free Enter. Club's Freedom Club PAC v.*

Bennett, 564 U.S. 721, 734 (2011))). And, in addition to naming the "free exercise of religion" as a fundamental right, the plain text of the First Amendment explicitly protects activities such as petitioning and the press. U.S. Const. amend. I. The Archdiocese's approach of collapsing subject matter and viewpoint might therefore reclassify the vast majority of what are now considered subject-matter restrictions as unconstitutional viewpoint restrictions, forcing government to choose between opening nonpublic forums to almost any private speech, or to none. Such a result is inimical to the First Amendment. *See Ark. Educ. Television Comm'n v. Forbes*, 52 U.S. 666, 680-81 (1998).

Of course, it is not enough to avoid viewpoint discrimination; a subject-matter restriction must also be reasonable, *i.e.*, "consistent with the government's legitimate interest in maintaining the property for its dedicated use." *Initiative & Referendum Inst.*, 685 F.3d at 1073. The Supreme Court recently provided further guidance on forum doctrine's "reasonableness" prong in *Minnesota Voters Alliance v. Manksy*, which struck down a ban on any "political badge, political button, or other political insignia" in the interior of a polling place as unreasonable in relation to the purposes of the forum. 138 S. Ct. at 1883. "Although there is no requirement of narrow tailoring in a nonpublic forum, the State must be able to articulate some sensible basis for distinguishing what may come in from what must stay out." *Id.* at 1888. The vagueness of the word "political," "combined with haphazard interpretations the State [] provided in official guidance and representations to [the] Court,"

led the Supreme Court to conclude that the ban did not survive the "forgiving" reasonableness test. *Id.*

As the primary opinion explains, both record evidence and common sense show a "sensible basis" for WMATA's conclusion that prohibiting religious or anti-religious advocacy advertisements avoids risks of vandalism, violence, passenger discomfort, and administrative burdens in a manner that serves the forum's stated purpose of providing "safe, equitable, and reliable transportation services." J.A. 204. Guideline 12 is also readily distinguishable from the ordinance struck down in *Mansky*. WMATA's prohibition on advertisements that "promote or oppose any religion, religious practice or belief," is narrower and more precise than simply a general ban on "religious" or "political" speech. *See Mansky*, 138 S. Ct. at 1891. Moreover, there is no indication that WMATA has promulgated anything like conflicting or confusing guidance that, "combined with" the vague term "political," rendered the Minnesota ordinance unreasonable. *Id.* at 1889.

Because Guideline 12 readily meets the longstanding doctrinal test for permissible subject-matter restrictions in nonpublic forums, and because the Archdiocese's novel analytical approach would both upend forum doctrine and undermine the First Amendment values that doctrine protects, I concur.

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17-7171

ARCHDIOCESE OF WASHINGTON, A CORPORATION SOLE,

Appellant,

v.

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

Appellees.

Filed: Dec. 21, 2018

On Petition for Rehearing En Banc

Before: Garland, *Chief Judge*; Henderson, Rogers, Tatel, Griffith,* Srinivasan, Millet, Pillard, Wilkins, and Katsas,* *Circuit Judges*

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* Circuit Judges Griffith and Katsas would grant the petition.

A statement by Circuit Judge Griffith with whom Circuit Judge Katsas joins, dissenting from the denial of rehearing en banc, is attached.

ORDER

Appellant's petition for rehearing en banc and the response thereto were circulated to the full court, and a vote was requested. Thereafter a majority of the judges eligible to participate did not vote in favor of the petition. Upon consideration of the foregoing, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken Meadows
Deputy Clerk

Griffith, *Circuit Judge*, with whom *Circuit Judge* Katsas joins, dissenting from the denial of rehearing en banc:

We ought to rehear this case en banc because the panel opinion conflicts with Supreme Court precedent on an issue of exceptional importance: the freedom to speak from a religious viewpoint. According to that precedent, the government in this case violated the First Amendment by prohibiting religious speakers from expressing religious viewpoints on topics that others were permitted to discuss.

The Washington Metropolitan Area Transit Authority (WMATA) is a governmental entity that operates the Metrobus public transportation system. During last year's Christmas season, the Roman Catholic Archdiocese of Washington, D.C., sought to run the following ad on the exterior of Metrobuses:

The proposed ad was part of the Archdiocese's "Find the Perfect Gift" campaign, whose purpose was "to share a simple message of hope, welcoming all to Christmas Mass or in joining in public service to help the most vulnerable in our community during the liturgical season of Advent." Decl. of Edward McFadden, Sec'y of Communications, Archdiocese of Wash., ¶ 3 (Nov. 27, 2017). The campaign "invite[d] the public to consider the spiritual meaning of Christmas, to consider celebrating Advent/Christmas

by going to Mass at one of our parishes and/or joining in one of our many outreach programs that care for the most vulnerable and poor during Advent and beyond." Decl. of Susan Timoney, Sec'y for Pastoral Ministry & Social Concerns, Archdiocese of Wash., ¶ 6 (Nov. 27, 2017). To that end, the proposed ad included the address for the campaign's website, which provided schedules for local Masses and described many opportunities for charitable service. *Archdiocese of Wash. v. WMATA*, 281 F. Supp. 3d 88, 97 (D.D.C. 2017).

WMATA rejected the ad, explaining to the Archdiocese that the ad violated a policy adopted by its Board of Directors prohibiting "[a]dvertisements that promote or oppose any religion, religious practice or belief." J.A. 115, 200. According to WMATA, the ad ran afoul of that ban "because it depicts a religious scene and thus seeks to promote religion." J.A. 115. During this litigation, WMATA further explained that its decision was based not on the ad alone, but also on the website referenced in the ad, which "contained substantial content promoting the Catholic Church," including "a link to 'Parish Resources,'" "a way to 'Order Holy Cards,'" and "videos and 'daily reflections' of a religious nature." Decl. of Lynn Bowersox, WMATA Assistant Gen. Manager for Customer Service, Communications & Marketing, ¶¶ 19-20 (Dec. 1, 2017).

When the Archdiocese challenged WMATA's decision, the district court upheld the decision, as did a panel of this court on appeal. *Archdiocese of Wash. v. WMATA*, 897 F.3d 314, 320-21, 335 (D.C. Cir.

2018).[1] The panel found that advertising space on a Metrobus is a non-public forum and held that WMATA's policy was permissible under the First Amendment. *Id.* at 322-23, 335.

Supreme Court precedent, however, instructs otherwise. In interpreting the First Amendment, the Court has long held that the government may place reasonable restrictions on the *subjects* discussed in a non-public forum, but the government may not impose restrictions based on a speaker's *viewpoint*. *See Minnesota Voters All. v. Mansky*, 138 S. Ct. 1876, 1885 (2018); *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 806 (1985). In the context of religious speech, the Supreme Court has three times considered restrictions indistinguishable from the WMATA policy challenged here. In all three cases, the government argued, as WMATA does here, that the restrictions were permissible because they prohibited all views on a discrete subject: religion. In all three cases, the Supreme Court rejected that argument because the restrictions did more than attempt to ban the discussion of religion; they also barred the expression of religious viewpoints on topics that were otherwise permitted to be discussed. This case is no different, for WMATA's policy barred the Archdiocese from speaking from a religious viewpoint on subjects others were permitted to discuss, such as charitable giving

[1] Judge Rogers authored the panel opinion, which Judge Wilkins joined. Then-Judge Kavanaugh was a member of the panel when the case was argued, but he did not participate in the opinion owing to his nomination to the Supreme Court. *See Archdiocese*, 897 F.3d at 318, 335.

and how best to spend one's time and money during the Christmas holiday.

In *Rosenberger v. Rector & Visitors of the University of Virginia*, the University of Virginia funded all sorts of extracurricular activities for students, but not the publication of a Christian magazine. 515 U.S. 819, 825-26 (1995). Such funding was prohibited by a university policy that excluded "religious activities," defined as any activity that "primarily promotes or manifests a particular belie[f] in or about a deity or an ultimate reality," which the University and the Supreme Court understood to bar not only speech that promoted religion but also speech that opposed religion. *Id.* at 825, 836-37. The University argued that a policy that excluded all discussion of religion was a permissible restriction in a non-public forum. *Id.* at 830-31. But the Court found that the policy's "very terms" did not simply "exclude religion as a subject matter." *Id.* at 831. Instead, the policy barred religious views on otherwise-permissible subjects. *Id.*

To be sure, much of the magazine's content was religious. According to the magazine's mission statement, its purpose was "to challenge Christians to live, in word and deed, according to the faith they proclaim and to encourage students to consider what a personal relationship with Jesus Christ means." *Id.* at 826. And the magazine published articles on such religious topics as prayer, sacred music, Christian missionary work, and the devotional writings of C.S. Lewis. *Id.* But importantly, the magazine also published commentary from a religious viewpoint on topics such as racism, and it was the restriction of such

expression that violated the First Amendment. "Religion," the Court explained, provides "a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered." *Id.* at 831. "If the topic of debate is, for example, racism, then exclusion of several views on that problem is just as offensive to the First Amendment as exclusion of only one. It is as objectionable to exclude both a theistic and an atheistic perspective on the debate as it is to exclude one, the other, or yet another political, economic, or social viewpoint." *Id.*

In two other cases, the Supreme Court likewise rejected governmental decisions that barred religious expression much like WMATA's policy does. In *Lamb's Chapel v. Center Moriches Union Free School District*, the Center Moriches, New York, school district made school facilities available for after-hours public use, specifically "social, civic, or recreational uses" and certain "use[s] by political organizations," but banned use "by any group for religious purposes." 508 U.S. 384, 387 (1993). Relying on this ban, the school district refused to permit Lamb's Chapel, an evangelical church, to use school facilities to show a film series by Dr. James Dobson on instilling "traditional, Christian family values" in one's children. *Id.* at 388. According to a unanimous Supreme Court, the school district's decision was impermissible viewpoint discrimination because the proposed film series "dealt with a subject otherwise permissible" in the forum: family issues and child rearing. *Id.* at 393-94; *see id.* at 397 (Kennedy, J., concurring in part); *id.* (Scalia & Thomas, JJ., concurring in the judgment). Even though the ban treated "all religions and all uses for religious purposes . . . alike" by excluding all of them, the

"critical" point remained that "it discriminates on the basis of viewpoint to permit 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.

A similar ban led to *Good News Club v. Milford Central School*, 533 U.S. 98 (2001). There, the Milford, New York, school district opened school facilities for after-hours public use, including for "social, civic and recreational meetings," but banned use "by any individual or organization for religious purposes." *Id.* at 102-03. Accordingly, the school district refused to allow the Good News Club, a local Christian organization for children, to use school facilities for meetings where the children would pray, memorize scripture verses, learn Bible lessons, and "cultivate their relationship with God through Jesus Christ." *Id.* at 103, 111. In the words of the school district, the Club's activities were "the equivalent of religious worship" and "the equivalent of religious instruction." *Id.* at 103. Despite the undeniable religious nature of these activities, the Supreme Court held that applying the ban to the Club was viewpoint discrimination because the Club also sought to address an otherwise-permissible subject—the teaching of morals and character—from a religious standpoint. *Id.* at 108-09. The Court explained, "[R]eligion is used by the Club in the same fashion that it was used by Lamb's Chapel and by the students in *Rosenberger*: Religion is the *viewpoint* from which ideas are conveyed." *Id.* at 112 n.4 (emphasis added). "We did not find the *Rosenberger* students' attempt to cultivate a personal relationship with Christ to bar their claim that religion was a viewpoint. And we see no reason to treat

the Club's use of religion as something other than a viewpoint merely because of any evangelical message it conveys." *Id.*

WMATA's policy against religious ads is indistinguishable from the restrictions in *Rosenberger*, *Lamb's Chapel*, and *Good News Club*. All four restrict speech based on its religious purpose: WMATA prohibits speech that "promote[s] or oppose[s] any religion, religious practice or belief," while the Supreme Court cases involve restrictions barring speech "for religious purposes" (*Lamb's Chapel* and *Good News Club*) and speech that "promotes or manifests a particular belie[f] [including non-belief] in or about a deity or an ultimate reality" (*Rosenberger*). Such restrictions, the Supreme Court has held, amount to viewpoint discrimination when they bar speech on an otherwise-permissible subject. That's what WMATA's policy does. WMATA allows entities like Walmart to speak on the subjects of the perfect Christmas gift (toys) and how to spend the Christmas season (buying gifts and visiting stores at specified hours). And WMATA permits the Salvation Army to run ads encouraging people to donate to certain charities. The Archdiocese would also like to express its views on the perfect Christmas gift (Christ), how to spend the holiday (caring for the needy and visiting churches for Mass at specified hours), and whether to contribute to charities (yes, and particularly to religious charities). By barring the Archdiocese from doing so, WMATA's policy discriminates against religious viewpoints no less than the restrictions in *Rosenberger*, *Lamb's Chapel*, and *Good News Club*.

I am not persuaded by the panel's efforts to distinguish these precedents. First, the panel emphasizes that the ad "is not primarily or recognizably about charitable giving, as it is not primarily or recognizably about opening hours or places to visit"; rather, it is "a religious ad, an exhortation, repeatedly acknowledged by the Archdiocese to be part of its evangelization effort to attend mass at Catholic churches in connection with Advent." *Archdiocese*, 897 F.3d at 329. The ad's imagery "is evocative not of the desirability of charitable giving, but rather the saving grace of Christ, which is not a subject included in the WMATA forum." *Id.* But the same could've been said in *Good News Club* and *Rosenberger*, where the restricted speech was "quintessentially religious" and "decidedly religious in nature" with an "evangelical message." *Good News Club*, 533 U.S. at 111-12 & n.4; *see Rosenberger*, 515 U.S. at 826. Even though the speech in those cases was primarily about religion, the Supreme Court rejected the restrictions for barring religious viewpoints on topics other than religion.[2]

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[2] Other circuits read these Supreme Court cases in the same way. *See Grossbaum v. Indianapolis-Marion Cty. Bldg. Auth.*, 63 F.3d 581, 588, 590-92 (7th Cir. 1995) (based on *Rosenberger*, holding that a purported ban on the subject of religion violated the First Amendment by barring religious views on an "otherwise includible subject"—the "holiday season"—while allowing "non-religious" views); *see also Byrne v. Rutledge*, 623 F.3d 46, 56-57 (2d Cir. 2010) (based on *Rosenberger* and *Good News Club*, rejecting a "ban on religious messages" because it "operate[d] 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*"); *Summum v. Callaghan*, 130 F.3d 906, 917-18 (10th Cir. 1997) ("In *Rosenberger*, the Court clarified the

The panel further attempts to distinguish the Supreme Court precedents as involving broader forums for "educational purposes" and "social, civic and recreational meetings." *Archdiocese*, 897 F.3d at 327. "By contrast, WMATA's forum—its advertising space on the exteriors of its buses—is not so broad, much less inviting through its advertisements public debate on religion." *Id.* But in any First Amendment forum, no matter its scope, viewpoint discrimination always violates the First Amendment. Limiting the scope of the forum does not make it more amenable to such discrimination. Nor must a forum serve broad "educational purposes" and "invite debate" in order to trigger constitutional protections from viewpoint discrimination. *Good News Club*, for example, involved a classroom in a public school that could be used by groups that had no intention to engage in debate among themselves or with others. *See* 533 U.S. at 103, 108.

In addition, the panel reads *Rosenberger* as affirming WMATA's view that it "retain[s] the prerogative to exclude religion as a subject matter." *Archdiocese*, 897 F.3d at 325. *Rosenberger*, the panel points out, suggested that the University policy might have been constitutional if it had "exclude[d] religion as a subject matter." *Id.* at 325-26 (quoting *Rosenberger*, 515 U.S. at 831). The panel opinion asks

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distinction between content-based and viewpoint discrimination and adopted a broad construction of the latter, providing greater protection to private religious speech on public property": Accordingly, if "the government permits secular displays on a nonpublic forum, it cannot ban displays discussing otherwise permissible topics from a religious perspective." (citation omitted)).

too much of this phrase, for the Supreme Court later explained, "[I]n *Rosenberger* there was no prohibition on religion as a subject matter, [but] our holding did not rely on this factor." *Good News Club*, 533 U.S. at 110. In any event, as already discussed, the University policy in *Rosenberger* and the WMATA policy are indistinguishable, so both policies—by their "very terms"—"do[] not exclude religion as a subject matter." *Rosenberger*, 515 U.S. at 831. Therefore, even if the government could craft a different regulation that validly excludes all discussion on the subject of religion, WMATA did not do so here.

Finally, the panel fears that the Archdiocese's position "eviscerate[s] . . . the long-standing recognition that the government may limit a non-public forum to commercial advertising." *Archdiocese*, 897 F.3d at 329. That issue is not presented here, for WMATA permits both commercial and non-commercial ads. And the Archdiocese's position does not, as the panel states, "eviscerate the distinction between viewpoint-based and subject-based regulation on which the forum doctrine rests." *Id.* As I see it, this case does nothing more than present us with an issue already decided by the Supreme Court: whether the government can prohibit a religious viewpoint on subjects it allows others to discuss without restriction. Recognizing that the governmental entities in *Rosenberger*, *Lamb's Chapel*, *Good News Club*, and this case unlawfully restricted religious viewpoints says nothing about the

government's general ability to impose subject-based restrictions.[3]

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[3] In the alternative, the Archdiocese argues that a categorical ban on the subject of religion would still violate the First Amendment because it is unreasonable for WMATA to prohibit all religious speech based on concerns like avoiding community discord. *See* Pet. for Reh'g En Banc 15-17; Appellant's Br. 26-30; *Mansky*, 138 S. Ct. at 1885. WMATA was concerned about the public response to ads on controversial issues, but as the Archdiocese points out, WMATA's policies separately address issue-oriented ads without any need for its ban on religious speech. *See* Appellant's Br. 28; *Am. Freedom Def. Initiative v. WMATA*, 901 F.3d 356, 373 (D.C. Cir. 2018). And although WMATA had "security concerns" about a proposed ad depicting the Prophet Mohammed, as "some Muslims consider drawing the Prophet Mohammed so offensive that they have reacted violently . . . in the past," *Archdiocese*, 897 F.3d at 319-20, 330, the Archdiocese argues that WMATA could consider rejecting such an ad based on WMATA's other policies or on the ground that it could incite violence, *see* Appellant's Br. 28.

Relatedly, the Archdiocese argues that WMATA's ban violates the First Amendment by excluding religious speech simply because it is religious. *See id.* at 37-42; *Archdiocese*, 897 F.3d at 330-31. At oral argument, WMATA conceded that it could not ban speech promoting or opposing a *particular* religion. *See* Oral Arg. Tr. 34 (Mar. 26, 2018). Banning *all* religious speech may be equally unconstitutional. *See, e.g.*, *id.* at 34-35 **(**Judge Kavanaugh: "[H]ere's the problem which I see at the heart of this, which is it is believed that discriminating against all religions is okay, discriminating against individual religions [is] not okay, but the Supreme Court has said that's wrong, that to discriminate against Catholicism, Protestantism, Mormonism, Islam, Judaism as a class is discrimination against religion, and that[,] in the words of the Chief Justice last year for six Justices[,] is 'odious to our Constitution.'" (quoting *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2025 (2017))). Although the Archdiocese's alternative arguments are significant, I do not believe the en banc court needs to address

WMATA, like the University of Virginia and the New York school districts, violated the First Amendment by rejecting religious speech on otherwise-permissible subjects. I therefore respectfully dissent from the decision not to rehear this case en banc.

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them because *Lamb's Chapel*, *Rosenberger*, and *Good News Club* resolve this case.

Appendix C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

No. 17-2554

ARCHDIOCESE OF WASHINGTON,
Plaintiff,
v.
WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY, et al.,
Defendants.

Filed: Dec. 8, 2017

MEMORANDUM OPINION

This case, brought by the Archdiocese of Washington, Donald Cardinal Wuerl, Roman Catholic Archbishop of Washington, involves the plaintiff's desire to publish an advertisement that conveys a religious message on government property: the exterior of a public bus.

Plaintiff seeks to place the advertisement on buses operated by the Washington Metropolitan Transit Authority ("WMATA") as part of the Archdiocese's "Find the Perfect Gift" Christmas campaign. As the Secretary for Pastoral Ministry and Social Concerns for the Archdiocese, Dr. Susan Timoney, explains in her declaration to the Court:

> The Find the Perfect Gift campaign is an important part of the Archdiocese's evangelization efforts. . . . The campaign seeks to invite the public to consider the spiritual meaning of Christmas, to consider celebrating Advent/Christmas by going to Mass at one of our parishes and/or joining in one of our many outreach programs that care for the most vulnerable and poor during Advent and beyond.[1]

WMATA has rejected these ads on the basis that they are inconsistent with the agency's existing advertising Guidelines, in particular, the Guideline that prohibits "[a]dvertisements that promote or oppose any religion, religious practice or belief."[2]

The Archdiocese has filed a five count complaint that asks the Court to declare the Guideline to be unconstitutional, and because the advertising campaign is specifically tied to the liturgical season of Advent, which has already begun, it has moved for a

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[1] Decl. of Dr. Susan Timoney, S.T.D., Ex. 2 to Compl. [Dkt. # 1-2] ¶¶ 4-6 ("Timoney Decl.").

[2] WMATA, Guidelines Governing Commercial Advertising (2015), https://www.wmata.com/about/records/upload/Advertising_Guidelines.pdf. ("WMATA Guidelines")

temporary restraining order and preliminary injunction that would direct WMATA to immediately accept the advertisements. Emergency injunctive relief is an extraordinary remedy that may only be awarded based on a substantial showing that the plaintiff is likely to succeed on the merits of the claims in its lawsuit, so the Court must determine at this early stage whether plaintiff is likely to be able to prove that its constitutional or statutory rights are being violated.

Plaintiff cannot carry that burden. The Court recognizes that plaintiff's pursuit of the advertising campaign is a manifestation of its faith, but the case does not turn upon whether the message has value, or whether the Court anticipates that it will be well-received or it will offend. The dispute must be decided in accordance with Supreme Court precedent and the binding decisions of the D.C. Circuit, and the applicable constitutional principles are quite clear.

First, it is well-established that private religious speech is as fully protected under the Free Speech Clause as secular private expression. And when government property is fully open to the public as a place to express its views, the government may not discriminate among prospective speakers based upon the subject matter they wish to address or the viewpoint they intend to convey. But, when government property has not been designated or made available for broad public use for communicative purposes, different rules apply. Control over access to a nonpublic or limited forum may be based on the subject to be discussed as long as: the lines drawn are reasonable given the purpose of the forum involved,

they do not favor one viewpoint over another, and they are consistently applied.

It is also settled as a matter of law that the exterior of a bus is not a public forum open to anyone who wishes to address any topic. The Archdiocese conceded this at the hearing on the motion. WMATA determined two years ago, after polling the community, that it will not accept advertisements related to such potentially divisive topics as politics or religion. A government agency may restrict the use of its property based on the content of the message to be broadcast as long as the restriction is neutral and reasonable. This is not a high threshold to overcome. Since the restriction does not silence or restrict any particular viewpoint, and it grew out of well-founded concerns for the safety of the public and WMATA employees, as well as a desire to reduce vandalism and the administrative burdens involved with spending significant time reviewing proposed ads, the Guideline meets the test that it be neutral and reasonable.

Plaintiff suggests that its understated campaign, "a simple message of hope, welcoming all to Christmas Mass or in joining in public service,"[3] is hardly objectionable, but divisive is in the eye of the beholder, and if WMATA were to make distinctions based on its own judgment about which religious statements were likely to offend, it would be making the very sort of determination that plaintiff insists that the Constitution forbids. Thus, WMATA's decision comports with the law that this Court is bound to

[3] Pl.'s Mot. for TRO & Prelim. Inj. [Dkt. # 2] ("Pl.'s Mot.") at 10.

follow in interpreting the Free Speech Clause of the First Amendment.

Faced with this legal landscape, plaintiff attempts to reframe the issue by arguing that WMATA is not enforcing a neutral content-based prohibition at all, but that it is denying the Archdiocese the opportunity to express its particular religious viewpoint about a general topic that others are freely permitted to discuss on bus property: Christmas. Plaintiff does not point to any specific commercial advertisements that are currently appearing, but it posits that since WMATA would accept commercial advertising during the Christmas season, the agency has welcomed the expression of the secular "viewpoint" that the holiday should be commercialized, and therefore, it cannot exclude the opposing viewpoint that members of the public should connect with the spiritual origins of Christmas instead. While it is true that a governmental organization may not open its doors to the discussion of a certain subject and then exclude the expression of the religious perspective on that subject, that is not what is happening here, and WMATA's approach is, in fact, viewpoint-neutral.

Plaintiff's description of both sides of this hypothetical conversation is not persuasive. Commercial advertisements do not by definition express a viewpoint or perspective about the true meaning of Christmas or how it should be observed; they suggest to potential shoppers—who fall at every point along the religious spectrum, and who may choose to purchase gifts in December for a multitude of faith-based or secular reasons—where to shop or

what to buy.[4] And, the Archdiocese's proposed advertising campaign is not commentary about some other permissible topic—a topic other than religion—from a religious perspective; it is plainly a statement about *religion* from a religious perspective. Therefore, WMATA's decision did not violate the Archdiocese's First Amendment right to freedom of speech.

With respect to the Archdiocese's claim that its religious rights are being violated, it is axiomatic that the government cannot favor one religion over another without running afoul of the Establishment Clause. The government cannot specifically target or selectively burden a practice because of its religious motivation without violating the Free Exercise Clause, and the Religious Freedom Restoration Act ensures that the federal government cannot compel religious adherents to take actions that would violate their sincerely held religious beliefs, even if the regulation being resisted is neutral in its intent and broadly applied.

WMATA's policy does none of those things. Neither the Guideline nor its application in this case interferes with plaintiff's right to practice its religion in any way, and it does not compel the Archdiocese to take any action that burdens its sincere religious convictions. The Guideline does not establish any

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[4] Also, the record does not contain any examples of seasonal retail advertisements on Metrobuses, and it does not reveal what they might say or whether there are any that refer to Christmas. So it is difficult to determine whether they convey a viewpoint or what it might be, or to find that the predicate for plaintiff's claimed need to present a countervailing religious viewpoint has been established.

preference for or against one religion over another, and it is neutral and generally applicable, and therefore, WMATA's decision in this case does not violate either the Constitution or RFRA.

Plaintiff acknowledges that its advertisement promotes religion and sends a religious message, and therefore, it falls squarely within the prohibition in the Guideline.[5] But plaintiff maintains that the Guideline has been discriminatorily and arbitrarily enforced, favoring other religious advertisements over those sponsored by the Catholic Archdiocese, and that therefore, it is invalid on its face and as applied. But the record does not support this contention. None of the advertisements plaintiff highlights to make that point—neither the ads heralding the opening of another CorePower Yoga fitness studio in Clarendon,

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[5] At one point, plaintiff took pains to emphasize the understated nature of its proposed advertisement. *See* Compl. ¶ 11 (stating that "the advertisements depict, in minimalist style, a starry night, with silhouettes of a small group of shepherds and sheep standing on a hill"); *see also* McFadden Decl. ¶ 18 (stating that the advertisements "do not convey an overt religious message on their face"); Pl.'s Mot. at 16 ("The Archdiocese has sought to convey a message of hope and charity for the Christmas season and it has done so with a simple image of shepherds in the night."). But plaintiff could not have it both ways. The religious essence of the message is fundamental to plaintiff's claims that its First Amendment rights have been violated and that it has suffered irreparable harm. *See* Compl. ¶ 35 ("arbitrary enforcement of WMATA's policy violates the Archdiocese's First Amendment right by prohibiting it from emphasizing the religious reasons for the season"); *see also* Compl. ¶ 42 ("the prohibition . . . violates the Free Exercise Clause of the First Amendment by disfavoring religious speech"); Compl. ¶ 49 ("the prohibition . . . places a substantial burden on the Archdiocese's exercise of its religion").

Virginia ("Muscle + Mantra"), nor the ads soliciting contributions to the Salvation Army's Red Kettle effort ("Give Hope. Change Lives") "promote or oppose any religion." While the Salvation Army is a Christian organization, and its charitable efforts, like those of the Archdiocese and other religious organizations, may be motivated in some measure by religious beliefs, the ads it chose to display on the buses do not promote or advance religion. Therefore, WMATA's policy is not likely to be found to violate the First Amendment or the Equal Protection Clause on the grounds that it has been inconsistently applied. And plaintiff does not argue at this stage of the litigation that the prohibition could violate the Due Process Clause in some other way if it satisfies the First Amendment.

For all of these reasons, to be explained in more detail below, the Court finds that plaintiff is not likely to succeed on the merits of its claims, and it has not shown that it will be irreparably harmed by the violation of its rights, so the motion for injunctive relief will be denied.

BACKGROUND

Defendant WMATA operates the Metrorail and Metrobus systems in the Washington, D.C. metropolitan area pursuant to an interstate compact between Maryland, Virginia, and the District of Columbia. Compl. [Dkt. # 1] ¶ 7. To fund its operations, WMATA sells advertising space on its buses and trains. Decl. of Lynn M. Bowersox, Assistant General Manager for Customer Service, Communications, and Marketing at WMATA, in Supp. of Defs.' Opp. to Mot. for TRO & Prelim. Inj. [Dkt. # 10-

1] ("Bowersox Decl.") ¶ 3. Prior to May 2015, WMATA accepted paid advertisements that were religious and political in nature in addition to purely commercial ones. Compl. ¶ 20; Defs.' Opp. to Mot. for TRO & Prelim. Inj. [Dkt. # 10] ("Defs.' Opp.") at 5. On May 28, 2015, WMATA's Board of Directors adopted a motion by its Chair to temporarily suspend all issue-oriented advertising, including all "political, religious and advocacy advertising" until the end of that year while it conducted further review and solicited public comment. *See* Resolution, Ex. A to Defs.' Opp. [Dkt. # 10-3]. The complaint alleges that at the conclusion of that process, "WMATA staff recommended extending the ban because of concerns that issue-oriented advertising could provoke community discord, create concern about discriminatory statements, and generate potential threats to safety and security from those who [sought] to oppose the advertising messages." Compl. ¶ 22; *see also* Bowersox Decl. ¶ 9 ("[WMATA's] review ultimately concluded that the economic benefits of such issue-oriented ads, including ads promoting religion, were outweighed by four considerations: community and employee opposition, security risks, vandalism, and administrative burdens."). On November 19, 2015, WMATA's Board of Directors voted to make its prohibition on issue-oriented advertising permanent. Ex. B to Defs.' Opp. [Dkt. # 10-3]; Compl. ¶ 22.

The Guidelines that have been in force since that time prohibit advertisements on a number of topics. Of particular relevance here, Guidelines 9 through 14 provide:

9. Advertisements intended to influence members of the public regarding an issue on which there are varying opinions are prohibited.
10. Advertisements of tobacco products are prohibited . . . .
11. Advertisements that support or oppose any political party or candidate are prohibited.
12. Advertisements that promote or oppose any religion, religious practice or belief are prohibited.
13. Advertisements that support or oppose an industry position or industry goal without any direct commercial benefit to the advertiser are prohibited.
14. Advertisements that are intended to influence public policy are prohibited.

See WMATA Guidelines.

On October 23, 2017, the Archdiocese contacted WMATA's third-party vendor about buying advertising space on the taillights of public buses as part of its "Find the Perfect Gift" campaign. Compl. ¶ 16. According to the Archdiocese, "[t]he Find the Perfect Gift Campaign is an important part of the Archdiocese's evangelization efforts." Timoney Decl. ¶ 4. "The advertisements . . . encourage individuals to return to church during Advent and to give charitably in their communities." Pl.'s Mot. for TRO & Prelim. Inj. [Dkt. # 2] ("Pl.'s Mot.") at 6. That message is delivered through a number of platforms, "includ[ing] advertisements and materials for distribution in

parishes within the Archdiocese, advertisements for display in public places throughout the metropolitan area," including transit shelters not owned by WMATA, and an "integrated online campaign." Decl. of Edward McFadden, Ex. 1 to Compl. [Dkt. # 1-1] ("McFadden Decl.") ¶¶ 3, 6. On October 23, 2017, plaintiff submitted the following ad to WMATA's third-party vendor, which directs the public to the Find the Perfect Gift Campaign website and hashtag:

McFadden Decl. ¶ 7; Ex. D to McFadden Decl.

When one follows the link, the landing page of the website features a banner across the top of the page: "JESUS is the perfect gift. Find the perfect gift of God's love this Christmas." The homepage then offers a choice of links to "FIND" ("The Perfect Gift"); "DISCOVER" ("Advent and Christmas Traditions"), and "GIVE" ("The Perfect Gift."). *See* Find the Perfect Gift, https:// www.findtheperfectgift.org (last visited Dec. 8, 2017). The "FIND" page states:

> God has prepared an amazing gift for you. A place of peace, joy, and community with God and others. In the frenzy of buying gifts for others, take time to receive God's love for you at Christmas Mass. Find Christmas Mass times throughout the Archdiocese of Washington using the map below!

Id. The "DISCOVER" page describes ways to observe Christmas and Advent, and the "GIVE" page details many opportunities available through Catholic Charities in the Archdiocese of Washington to "[s]hare the joy of Christmas . . . by helping others." *Id.*

According to the plaintiff on October 24, 2017, WMATA's third-party vendor informed plaintiff that its proposed ad would not meet WMATA's Guidelines and could not run as submitted. McFadden Decl. ¶ 13; Ex. G to McFadden Decl. The Archdiocese responded that it did not "see a way to adjust the ad given its purpose and message" and asked whether there was a way to appeal the decision. Ex. G to McFadden Decl. The third-party vendor sent plaintiff's proposed ad to WMATA for further review, and upon review of the ad, WMATA concluded that the ad violated Guideline 12 and denied plaintiff's request on November 8, 2017. McFadden Decl. ¶ 5; Ex. G to McFadden Decl.[6] In response, plaintiff's counsel sent a letter to the general counsel of WMATA raising First Amendment concerns and urging the agency to reverse its decision quickly because the season of Advent was imminent. Compl. ¶ 18; Ex. H to McFadden Decl. On November 20, 2017, WMATA, through its counsel, again denied the request. Ex. I to McFadden Decl.

A week later, on November 28, 2017, plaintiff filed a complaint with this Court. The complaint raises five

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[6] A declaration submitted by WMATA in opposition to the motion stated that WMATA "reviewed the content of https://www.findtheperfectgift.org/ as it existed at the time" the ad was submitted and "based on the ad and the website," WMATA found that the ad violated Guideline 12 and rejected it. Bowersox Decl. ¶¶ 19-20.

constitutional and statutory claims:[7] Count I alleges that Guideline 12, on its face and as applied, violates plaintiff's right to freedom of expression under the Free Speech Clause of the First Amendment. Count II alleges that Guideline 12, on its face and as applied, violates the Free Exercise Clause of the First Amendment. Count III alleges that Guideline 12 substantially burdens plaintiff's right to exercise its religion in violation of the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb. Count IV alleges a violation of plaintiff's rights under the Equal Protection Clause of the Fifth Amendment, and Count V alleges a deprivation of life, liberty or property without due process in violation of the Due Process Clause. *See* Compl. ¶¶ 28-64. Based on these claims, plaintiff seeks the following relief:

1. A declaration that Guideline 12 "violates the rights of the Archdiocese under the Free Speech Clause of the First Amendment;"
2. A declaration that Guideline 12 "violates the rights of the Archdiocese under the

[7] Plaintiff's motion for a temporary restraining order and preliminary injunction also predicates its claim for relief on the Establishment Clause, but there is no Establishment Clause claim in the complaint, so the Court cannot rule on its likelihood of success. *See* Fed. R. Civ. P. 8(a)(2) ("A pleading that states a claim for relief must contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief."). In any event, plaintiff's Establishment Clause argument is identical to its Free Speech and Equal Protection claims based on the alleged inconsistent and/or discriminatory enforcement of the Guideline.

Free Exercise Clause of the First Amendment;"

3. A declaration that Guideline 12 violates the Religious Freedom Restoration Act;
4. A declaration that Guideline 12 "violates the rights of the Archdiocese under the Equal Protection principles of the Fifth Amendment;"
5. A declaration that Guideline 12 "violates the rights of the Archdiocese under the Due Process Clause of the Fifth Amendment;"
6. An "injunction preventing Defendants from enforcing" Guideline 12 "to reject the Archdiocese's request to purchase advertising space for the 'Find the Perfect Gift' campaign;"
7. An "award of attorney's fees and costs to the Archdiocese;" and
8. "[O]ther relief as the Court may deem just and proper"

Compl. at 16-17.

At the time plaintiff filed its complaint, it also filed a motion for a temporary restraining order and preliminary injunction asking that the Court order WMATA to run its proposed ad "as soon as possible" since the beginning of Advent, December 3, 2017, was only a few days away. Defendants filed their opposition to plaintiff's motion on December 4, 2017 and plaintiff replied on December 5, 2017. Reply to

Defs.' Opp. [Dkt. # 12] ("Pl.'s Reply"). On December 5, 2017, the Court held a hearing on the motion.[8]

STANDARD OF REVIEW

A preliminary injunction is an "extraordinary and drastic remedy" that is "never awarded as [a matter] of right." *Munaf v. Geren*, 553 U.S. 674, 689-90 (2008) (citations omitted). A party seeking a preliminary injunction must establish the following: 1) it is likely to succeed on the merits; 2) it is likely to suffer irreparable harm in the absence of preliminary relief; 3) the balance of equities tips in its favor; and 4) an injunction serves the public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

The manner in which courts should weigh the four factors "remains an open question" in this Circuit. *Aamer v. Obama*, 742 F.3d 1023, 1043 (D.C. Cir. 2014). The Court of Appeals has long adhered to the "sliding scale" approach, where "a strong showing on one factor could make up for a weaker showing on another." *Sherley v. Sebelius*, 644 F.3d 388, 392 (D.C. Cir. 2011). But because the Supreme Court's decision in *Winter* "seemed to treat the four factors as independent requirements," the Court of Appeals has more recently "read *Winter* at least to suggest if not to hold 'that a likelihood of success is an independent, free-standing requirement for a preliminary injunction.'" *Id.* at 392-93, quoting *Davis v. Pension Benefit Guar. Corp.*, 571 F.3d 1288, 1296 (D.C. Cir. 2009) (Kavanaugh, J.,

[8] The record has been supplemented with the Declaration of Robert O. Potts, in Support of Defendant's Opposition [Dkt. # 13], the Declaration of Michael F. Williams [Dkt. # 14], and the Declaration of Rex S. Heinke [Dkt. # 15].

concurring). Although the D.C. Circuit has not yet announced whether the "'sliding scale' approach remains valid after *Winter*," *League of Women Voters v. Newby*, 838 F.3d 1, 7 (D.C. Cir. 2016), the Court of Appeals has ruled that a failure to show a likelihood of success on the merits is sufficient to defeat a motion for a preliminary injunction. *See Ark. Dairy Co-op Ass'n, Inc. v. U.S. Dep't of Agric.*, 573 F.3d 815, 832 (D.C. Cir. 2009); *Apotex, Inc. v. FDA*, 449 F.3d 1249, 1253-54 (D.C. Cir. 2006). As another court in this district has observed, "'[i]t is particularly important for the movant to demonstrate a substantial likelihood of success on the merits,' because 'absent a substantial indication of likely success on the merits, there would be no justification for the Court's intrusion into the ordinary processes of administration and judicial review.'" *Navistar, Inc. v. EPA*, No. 11-cv-449, 2011 WL 3743732, at *3 (D.D.C. Aug. 25, 2011), quoting *Hubbard v. United States*, 496 F. Supp. 2d 194, 198 (D.D.C. 2007) (internal edits omitted).

Regardless of whether the sliding scale framework applies, it remains the law in this Circuit that a movant must demonstrate irreparable harm, which has "always" been "the basis of injunctive relief in the federal courts." *Sampson v. Murray*, 415 U.S. 61, 88 (1974), quoting *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 506 (1959) (internal edits omitted). A failure to show irreparable harm is grounds for the Court to refuse to issue a preliminary injunction, "even if the other three factors entering the calculus merit such relief." *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006).

ANALYSIS

I. Count One: The Freedom of Speech Clause of the First Amendment

A. Advertising space on a WMATA Metrobus is a nonpublic or limited forum.

Since the advertisement plaintiff wants to run is on a public bus, this case is governed by the case law concerning free expression on government property. It is well established that the "First Amendment does not guarantee access to property simply because it is owned or controlled by the government." *U.S. Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 129 (1981). When analyzing whether restrictions of speech on government property violate the First Amendment, courts apply the public forum doctrine. *Initiative & Referendum Inst. v. U.S. Postal Serv.*, 685 F.3d 1066, 1070 (D.C. Cir. 2012). The public forum doctrine divides government property into three separate categories: 1) traditional public forums, 2) designated public forums, and 3) nonpublic forums. *Id.* The categorical designation of the forum will determine the level of scrutiny courts apply to any restrictions on private speech. *See Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985).

"Traditional public forums" are "[p]laces which by long tradition or by government fiat have been devoted to assembly and debate." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). Streets and parks are "quintessential public forums" that "have immemorially been held in trust for the use of the public, and . . . have been used for purposes of

assembly, communicating thoughts between citizens, and discussing public questions." *Id.*, quoting *Hague v. CIO*, 310 U.S. 496, 515 (1939). "Designated public forums" come into being when, "government property that has not traditionally been regarded as a public forum is intentionally opened up for that purpose," *Pleasant Grove City v. Summum*, 555 U.S. 460, 469 (2009), in other words, for the purpose of "expressive activity." *Perry Educ. Ass'n*, 460 U.S. at 45.

Courts apply a strict scrutiny standard when evaluating speech restrictions imposed on the use of a traditional or designated public forum. *See Pleasant Grove City*, 555 U.S. at 469-70. Under this standard, restrictions "must be content-neutral, narrowly tailored to serve a significant governmental interest, and allow for sufficient alternative channels of communication." *Cmty. for Creative Non-Violence v. Turner*, 893 F.2d 1387, 1390 (D.C. Cir. 1990), citing *Ward v. Rock Against Racism*, 491 U.S. 781, 789 (1989). When that standard is applied, the Supreme Court "has generally struck down governmental discrimination among the 'proper' subjects for expressive activity." *U.S. Sw. Africa/Namibia Trade & Cultural Council v. United States*, 708 F.2d 760, 763 (D.C. Cir. 1983).

A different standard governs "nonpublic forums" which are "not by tradition or designation a forum for public communication." *Perry Educ. Ass'n*, 460 U.S. at 46. As the D.C. Circuit has observed, the Supreme Court has characterized "prisons, military bases, and buses" as nonpublic forums. *U.S. Sw. Africa/Namibia Trade & Cultural Council*, 708 F.2d at 763. "In these places the government may 'reserve the forum for its

intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view.'" *Initiative & Referendum Inst.*, 685 F.3d at 1070, quoting *Perry Educ. Ass'n*, 460 U.S. at 46; *see also U.S. Sw. Africa/Namibia Trade & Cultural Council*, 708 F.2d at 763 (courts have "sustained the use of subject matter restrictions provided that they are reasonably designed to limit expressive activities to uses compatible with the public facilities' intended purposes and not imposed to suppress expression simply because public officials oppose the speaker's particular point of view").

In other words, if the forum "is not a public forum, the regulation will be upheld as long as the restrictions are reasonable and are not directed at opposing the views of particular individuals." *Cmty. for Creative Non-Violence*, 893 F.2d at 1390.

As the Archdiocese acknowledged at the hearing on this motion, at the time it proposed to purchase advertising space, the exterior of a Metrobus was not a public forum or a designated public forum. In determining the forum designation of a particular government resource, a court must evaluate the government's intent for the forum as evidenced by its "policy and practice" and "the nature of the [government] property and its compatibility with expressive activity." *Cornelius*, 473 U.S. at 802. Thus, the history of WMATA's approach to advertising space on its buses and trains is relevant to this conclusion.

Prior to 2015, WMATA accepted a wide array of political, issue-oriented and religious ads. In light of

this practice and policy, the Court of Appeals ruled in 1984 that WMATA's advertising space was a public forum. *Lebron v. Wash. Metro. Area Transit Auth.*, 749 F.2d 893, 896 (D.C. Cir. 1984) ("There is no . . . question that WMATA has converted its subway stations into public fora by accepting . . . political advertising.").

In 2015, however, WMATA changed its policy. As the declarations and exhibits supplied in opposition to the motion for injunctive relief explain, WMATA became increasingly concerned that issue-oriented ads were disrupting its operations and undermining its core mission of providing safe and reliable public transportation. In May 2015, its Board of Directors adopted a motion by its Chair to temporarily suspend all issue-oriented advertising, including political and religious ads, pending review and public comment. *See* Resolution. After completing its review, the Board approved a new set of guidelines on November 19, 2015. *See* Guidelines. In addition to providing guidance concerning commercial advertisements, the Guidelines impose a permanent bar on all political, religious, and issue-oriented ads. *See* Guidelines 9, 11, 12, 14. With respect to religion in particular, Guideline 12 provides: "Advertisements that promote or oppose any religion, religious practice or belief are prohibited." *Id*. The adoption of this Guideline had the effect of transforming what was once a designated public forum into a nonpublic forum. *See Cornelius*, 473 U.S. at 805 (the "historical background indicates" that WMATA's Guidelines were "designed to minimize the disruption" caused by the prior ad policy and to "lessen[ ] the amount of expressive activity occurring on federal property").

This conclusion is consistent with the Supreme Court's ruling in *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974). In *Lehman*, petitioner challenged a policy that prohibited political advertising on city buses on First Amendment grounds. The Court ruled that advertising space on a public bus was not a public forum because the city had "consciously . . . limited access to its transit system advertising space in order to minimize chances of abuse, [and] the appearance of favoritism." 418 U.S. at 304.

> Here, were have no open spaces, no meeting hall, park, street corner, or other public thoroughfare. Instead, the city is engaged in commerce. It must provide rapid, convenient, pleasant, and inexpensive service to the commuters . . . . The [advertising] space, although incidental to the provision of public transportation, is a part of the commercial venture. . . . [A] city transit system has discretion to develop and make reasonable choices concerning the type of advertising that may be displayed in its vehicles.

Id. at 303.

This ruling is also consistent with a recent ruling of another court in this district and one in the Southern District of New York. *See Am. Freedom Def. Initiative v. WMATA*, 245 F. Supp. 3d 205, 209-211 (D.D.C. 2017) (holding that WMATA became a nonpublic forum once it amended its Guidelines in 2015); *Am. Freedom Def. Initiative v. Metro. Transp. Auth.*, 109 F. Supp. 3d 626, 628 (S.D.N.Y. 2015), *aff'd*, 815 F.3d 105 (2d Cir. 2016) (noting that, while the case before it was moot, since the New York Metropolitan

Transportation Authority "no longer accepts any political advertisements," it was "likely" no longer a "designated public forum," but rather, a nonpublic or limited public forum).[9]

Plaintiff maintains in its motion that at an "absolute minimum, WMATA's exterior bus displays constitute a limited public forum[.]" Pl.'s Mot. at 13. But both parties agree that the same test would apply to a "limited public forum" and to a "nonpublic forum." *Pleasant Grove City*, 555 U.S. at 470 (if "a forum . . . is limited to use by certain groups or dedicated solely to the discussion of certain subjects," then speech restrictions need only be "reasonable and viewpoint neutral").

Because the Court finds that WMATA's advertising space is a nonpublic or limited forum, it must go on to evaluate whether Guideline 12 is viewpoint neutral and reasonable. *Cornelius*, 473 U.S. at 800.

B. Guideline 12 is viewpoint neutral.

"[C]ontrol over access to a nonpublic forum can be based on subject matter and speaker identity so long

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[9] Plaintiff noted in its motion that the D.C. Circuit ruled in *Community for Creative Non- Violence* that subway stations are "public fora, either in traditional terms or by designation." Pl.'s Mot. at 13. It also argued, without citation, that because buses travel on public streets, and can be seen from the streets and the sidewalks, they qualify as traditional public fora. *Id.*; Pl.'s Reply at 2. By plaintiff's logic, all government property that can be seen from the street would become a public forum. But during the preliminary injunction hearing, plaintiff walked away from its position that the bus could be a public forum and agreed that the exterior of the public bus was a "limited public forum."

as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral." *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384, 392-3 (1993), quoting *Cornelius*, 473 U.S. at 806. ("Although a speaker may be excluded from a nonpublic forum if he wishes to address a topic not encompassed within the purpose of the forum or if he is not a member of the class of speakers for whose especial benefit the forum was created, the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject.") (internal citations omitted).

As the Supreme Court has explained:

> [I]n determining whether the State is acting to preserve the limits of the forum it has created so that the exclusion of a class of speech is legitimate, we have observed a distinction between, on the one hand, content discrimination, which may be permissible if it preserves the purposes of that limited forum, and, on the other hand, viewpoint discrimination, which is presumed impermissible when directed against speech otherwise within the forum's limitations.

Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829-30 (1995).

Plaintiff appears to recognize that the law governing anything other than a viewpoint restriction is unfavorable to its case—indeed, its memorandum does not even set out the low threshold that would apply in the case of a content-based restriction in a

limited public forum. It seeks to avoid the application of these principles by characterizing WMATA's action as a viewpoint based decision, but the viewpoint cases are not analogous.

Plaintiff relies heavily on *Rosenberger*. In that case, a university maintained a fund which could be used to defray the costs of printing student publications, but it denied a student organization publishing a newspaper with a Christian editorial viewpoint access to the fund. The Supreme Court condemned the action as an unconstitutional violation of the First Amendment, stating:

> [T]he University does not exclude religion as a subject matter but selects for disfavored treatment those student journalistic efforts with religious editorial viewpoints. . . . 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.

515 U.S. at 831.

But in this case, religion *is* excluded as a subject matter, and it was that general subject matter that led to the prohibition.

In *Lamb's Chapel*, the school district involved refused to permit a church to show a film on school property concerning child rearing and family values—an otherwise permitted topic—for the sole reason that the topic would be addressed from a religious perspective, and the Supreme Court found that to be unconstitutional. 508 U.S. at 394. Similarly, in *Good News Club v. Milford Central School District*, 533 U.S.

98 (2001), the school district had adopted a community-use policy. The Court found that since the policy opened school property to events "pertaining to the welfare of the community," and thereby made any group that "promote[s] the moral and character development of children" eligible to use the building, it could not deny meeting space for a club promoting moral character for children sponsored by a private Christian organization. *Id.* at 108-09. The Court observed that the organization intended to address permissible subject matter—moral character—from a religious perspective, and it found the school district's action to be impermissible viewpoint-based discrimination. *Id.* at 111-12.

But here, the boundaries of the forum are much more limited. The advertisement does not seek to address a general, otherwise permissible topic from a religious perspective—the sole purpose of directing the public to www.findtheperfectgift.org is to promote religion. The website declares: "JESUS is the perfect gift. [F]ind the perfect gift of God's love this Christmas" and "[T]ake time to receive God's love for you at Christmas Mass."[10] Indeed, plaintiff insists on this characterization in its own memorandum. *See* Pl.'s Mot. at 6 ("The advertisements are part of a larger campaign to encourage individuals to return to

[10] The Archdiocese agreed at oral argument that the complaint specifically incorporates the religious content of the website in its allegations concerning the content of the ad. *See* Compl. ¶¶ 11, 19. But plaintiff also acknowledged that the images of the shepherds and the star of Bethlehem are part of the iconography traditionally used to depict the night that Christ was born, and that the ad, notwithstanding its simplicity, telegraphs a religious message even before one takes the website into consideration.

church during Advent and to give charitably in their communities."); *id.* at 15 ("[T]he Archdiocese's campaign expresses the view that the 'perfect gift' during the Christmas season is devotion to God and service to others."); and *id.* at 23 (the campaign is a "uniquely effective means of transmitting [the Archdiocese's] message").

The Archdiocese argues nonetheless that WMATA has engaged in viewpoint-based discrimination when renting out advertising space. It maintains that since WMATA is willing to accept ordinary commercial advertisements during the holiday season, it publishes messages that express a viewpoint promoting the commercialization of Christmas. So, the rejection of the Archdiocese's spiritual message concerning Christmas is the suppression of a religious viewpoint on the same subject matter. But this is a strained analogy.

Plaintiff's argument is founded on a mischaracterization of what is happening on the side of the bus. Advertisements that meet the Guidelines' requirements for commercial advertisement are just that: commercial advertisements. They proclaim:

Shop here!

Buy this!

There is nothing in the complaint beyond plaintiff's conclusory allegation that WMATA accepts ads that "promote" commercialism that suggests that these ads convey a *viewpoint* on the question of how Christmas should be observed—whether it should be more commercial, or more true to its spiritual origins instead. An ad for Macy's does not communicate the Macy's perspective on the matter; while messages

from retail establishments may be a manifestation of the commercialization and consumerism that characterize our society in general, and they may reflect the merchants' aim to profit from the gift-giving activity, all that they convey is: if you are buying a gift for any reason during the current season, bring your business to us. Plaintiff cannot dispute that similar advertisements "encouraging consumers to buy more goods and services," Compl. ¶ 24, appear all year round, and they are not inherently inconsistent with a religious perspective or with faith-based observance.[11]

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[11] Another problem with plaintiff's argument is that the complaint does not allege, nor do the exhibits to the motion for injunctive relief reveal, that any ads related to shopping are actually being displayed on the exterior of a Metro bus, or if they are, what they say or convey. So it is not clear whether the purported viewpoint ads mention Christmas at all, whether they are cast in terms of the broader holiday season, or whether they concern a different subject matter altogether. The problem created by the absence of such information in the record became quite clear at oral argument, when counsel's ability to articulate what the viewpoint of any ad might be depended in large part on how it was hypothetically worded or what it hypothetically depicted. Thus, the record does not support the Archdiocese's allegation that every commercial advertisement published in December can be presumed to communicate a viewpoint about Christmas, much less that it necessarily communicates one that is inimical to spirituality.

Counsel concluded his argument at the hearing by making the point that if WMATA accepts an advertisement seeking charitable donations—either "because" such donations are beneficial to the recipient, or without any stated reason—the Archdiocese must be able to publish an ad that expressly calls for contributions "because" the Church teaches that they are an expression of faith. This argument left the strong impression that the Archdiocese would argue that every commercial advertisement conveys a message about *some* secular topic, and

And on the other side of the supposed conversation, the Find the Perfect Gift campaign does not offer the Archdiocese's perspective on a subject that is addressed in commercial messages. As the representatives of the Archdiocese make abundantly clear in their declarations, what their ads were designed to do was to promote the Roman Catholic religion:

> The Find the Perfect Gift campaign is an important part of the Archdiocese's evangelization efforts. Advent and Christmas are some of the biggest evangelizing moments we have all year, as people are more open to questions of faith and spiritual experiences during these seasons . . .
>
> The Roman Catholic Church teaches that when we celebrate the liturgy of Advent each year, we recall the centuries and millennia when the world awaited the arrival of the Messiah. By sharing in the long preparation for the Savior's arrival with the first Christmas, we renew our ardent desire for Christ's second coming . . .
>
> It is also critically import for the goals of the Find the Perfect Gift campaign that the Archdiocese spread its message as broadly as possible within the metropolitan area. The

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therefore, WMATA's acceptance of any commercial advertisement would require it to broadcast a religious reply that could be said to bear on that topic. This approach obliterates the distinction between viewpoint-based and content-based restrictions, and it is not consistent with Supreme Court First Amendment case law.

> campaign seeks to invite the public to consider the spiritual meaning of Christmas, to consider celebrating Advent/Christmas by going to Mass at one of our parishes and/or joining in one of our many programs that care for the most vulnerable and poor during Advent and beyond.

Timoney Decl. ¶¶ 4-6.

Since plaintiff has failed to allege facts that would show that WMATA rejected its proposed advertisement solely to suppress a point of view that plaintiff sought to espouse on an otherwise includible subject, *see Cornelius*, 473 U.S. at 806, the complaint does not allege the existence of a viewpoint based restriction, and Count I rests on the validity of the broad prohibition against any religious advertising. Since the content-based restriction on promoting or opposing religion is neutral and reasonable, the Archdiocese is not likely to succeed on the merits of its Free Speech claim.[12]

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[12] The Archdiocese argued on page 15 of its memorandum that even if the policy could be construed as content-based discrimination and not viewpoint based, "it would still fail to satisfy the First Amendment's demands because such a wholesale banishment of religious content is contrary to our constitutional tradition." Pl.'s Mot. at 15. At the hearing, counsel argued that the *Good News Club* decision stands for this proposition.

While it is true that the Court announced at the start of the *Good News Club* opinion that it granted certiorari to resolve a conflict in the Circuits as to whether speech can be excluded from a limited public forum on the basis of the religious nature of the speech, 533 U.S. at 105, it did not reach the question of whether such a blanket content-based prohibition would be unlawful.

C. Guideline 12 is reasonable.

A restriction on private speech in a nonpublic forum is "reasonable if it is consistent with the government's legitimate interest in maintaining the property for its dedicated use." *Initiative & Referendum Inst.*, 685 F.3d at 1073. The Supreme Court has emphasized that "[t]he Government's decision to restrict access to a nonpublic forum need only be *reasonable*; it need not be the most reasonable or the only reasonable limitation." *Cornelius,* 473 U.S. at 808 (emphasis in original).

After undertaking a review process and accepting public comment, WMATA concluded that maintaining its advertising space as an open public forum was disruptive to WMATA's core mission of providing safe, reliable public transportation. In its opposition to plaintiff's motion, WMATA identifies the four reasons that motivated its decision: 1) community and employee opposition, 2) security risks, 3) vandalism, and the 4) administrative burdens tied to spending "substantial time" reviewing proposed ads. Bowersox Decl. ¶¶ 9-13. WMATA's survey of the public's view on issue-oriented ads found that: 1) 98% of the public was familiar with the types of ads featured on WMATA

Instead, it applied the principles set out in *Lamb's Chapel* and *Rosenberger* to strike down the school district's action as impermissible viewpoint discrimination. *Id.* at 106. In *Lamb's Chapel*, the Court was presented with a school district rule that excluded religious use of the property altogether, but it did not strike it down on the basis that the prohibition of religious content was unconstitutional; it held that the rule was impermissibly applied to block the petitioner from expressing its view on a subject that was otherwise permissible. 508 U.S. at 392-4.

buses, trains, and stations; 2) 58% opposed issue-oriented ads, while 41% supported such ads; and 3) 46% were extremely opposed to issue-oriented ads, compared to 20% that were extremely supportive of issue-oriented ads. *Id.* ¶ 14. Ultimately, WMATA concluded that these factors outweighed the "the economic benefits of [ ] issue-oriented ads." *Id.* ¶ 9.

Plaintiff supplied the Court with an alternative regulation from another jurisdiction as an example of a policy that did not exclude religion entirely and would therefore be more reasonable. Ex. A to Pl.'s Reply. But the Court is not being asked, nor is it authorized, to make its own judgment about what would be the most effective or the most appropriate approach to balancing all of the competing concerns. The Supreme Court has made it clear that the inquiry is not whether there might be another equally reasonable or even a more reasonable step to take, *Cornelius*, 473 U.S. at 808, and the fact that one county enacted a different policy that does not expressly mention religion does not make WMATA's decision unreasonable. WMATA had to take the area's diverse population and the many visitors who flock to the Nation's capital—often to express their strong political and religious views—into account. Moreover, the level of divisiveness and antagonism in our social discourse, and the potential for violence, has likely increased since 2012 when King County passed its policy.

Plaintiff contends that WMATA's reasons do not support the prohibition of religious ads because "[r]eligious viewpoints do not carry an inherently greater risk of provoking community discord, creating

discriminatory statements, and generating safety threats." Pl.'s Mot. at 16. It also asserts, "[m]essages encouraging individuals to attend mass or confession are not inherently more divisive than messages encouraging individuals to attend concerts or to shop." *Id.* That may well be the Archdiocese's position. But even if one puts aside the role that religious differences have played and continue to play in conflicts throughout history and across the globe, WMATA's experience with religious references on public transit gave it a reasonable basis to come to the opposite conclusion. For example, WMATA proffered evidence that in 2001, when a group of Catholics purchased an ad that was critical of the Church's position on the use of condoms, it received hundreds of complaints, including one from the plaintiff. Bowersox Decl. ¶ 25. WMATA also points to controversy generated by advertisements promoting Islam in subway stations in New York. Weisel Decl., Exh. L. to Def.'s Opp. By adopting Guideline 12, WMATA reasonably sought to reduce the number of complaints it received from employees and customers and to also reduce the vandalism that strong reactions could provoke.[13]

The WMATA Assistant General Manager for Customer Service, Communications, and Marketing also averred that she heard from the Metro Transit Police Department and the U.S. Department of Homeland Security that running certain issue-oriented ads could pose security risks on trains and

[13] This conclusion is reinforced by the fact that, as plaintiff emphasized, bus advertising is "big, bold, [and] in your face every day." McFadden Decl. ¶ 10.

buses. Bowersox Decl. ¶ 11. One of the factors that spurred WMATA to close its advertising forum was the submission of an ad featuring a cartoon depiction of the Prophet Mohammad. Def.'s Opp. at 17. Drawing the Prophet Mohammed is highly offensive to Muslims, and WMATA was aware that the ad was drawn at a contest where two gunmen were killed in an attempt to prevent the event. Bowersox Decl. ¶ 11; Weisel Decl., Exh. M to Def.'s Opp.

Given WMATA's concerns about the risks posed by issue-oriented ads, including ads promoting or opposing religion, its decision was reasonable. *See Am. Freedom Def. Initiative v. WMATA*, 245 F. Supp. 3d at 213 (holding that WMATA's prohibition on issue-oriented ads was reasonable). The regulation is reasonably aligned with WMATA's duty to provide safe, reliable transportation in the Nation's capital and surrounding areas, and it does not violate the First Amendment. *See, e.g.*, *Lehman*, 418 U.S. at 304 ("[T]he managerial decision to limit [bus advertising] space to innocuous and less controversial commercial and service oriented advertising does not rise to the dignity of a First Amendment violation.").

D. Guideline 12 does not invite discriminatory enforcement on its face and it is not being discriminatorily applied here.

The Archdiocese did not dispute at oral argument that its advertisement promotes religion and is therefore covered by Guideline 12. However, it claims that WMATA's use of its Guideline violates the First Amendment on its face and as applied because it is not consistently enforced.

The Guideline itself is short and clear and does not include the sort of subjective terminology that could invite arbitrary or discriminatory enforcement.[14]

The basis for plaintiff's claim that the Guideline is flawed on its face is the same as its argument that it is discriminatory as applied: other ads that allegedly promote or oppose religion have been accepted. Plaintiff argues that the Guideline must be facially invalid if the word "religion" has given rise to varying interpretations, and it complains that this discriminatory enforcement violates the Free Speech

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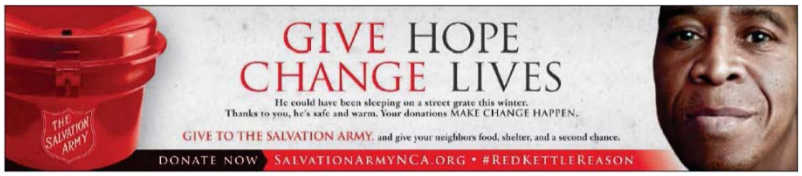
[14] The Court observes that this certainly cannot be said of the King County Department of Transportation Transit Advertising Policy, Ex. A to Pl.'s Reply, which plaintiff touted as an example of a reasonable policy. While the policy supplies, in excruciating detail, the specifics of what might contravene the ban on "Sexual and/or Excretory Subject Matter," *id.* § 6.2.3, it leaves a great deal of what might qualify as "Demeaning or Disparaging," *id.* § 6.2.8, or "Harmful or Disruptive to Transit System," *id.* § 6.2.9 up to the reviewer. *See id.* § 6.2.8 ("[F]or purposes of determining whether an advertisement contains such material, the County will determine whether a reasonably prudent person, knowledgeable of the County's ridership and using prevailing community standards, would believe that the advertisement contains material that ridicules or mocks, is abusive or hostile to, or debases the dignity or stature of any individual, group of individuals or entity.") and *id.* § 6.2.9 ("[T]he County will determine whether a reasonably prudent person, knowledgeable of the County's ridership and using prevailing community standards, would believe that the material is so objectionable that it is reasonably foreseeable that it will result in harm to, disruption of or interference with the transportation system."). While this purports to be an objective, reasonable man standard, the invocation of the county ridership's point of view and community standards leaves considerably more room for arbitrary application than the word "religion."

Clause, the Establishment Clause and the Equal Protection Clause. The problem with this argument is that while plaintiff's proposed advertisement, as plaintiff candidly acknowledges, promotes religion, the other ads do not.

Plaintiff directs the Court to two advertisements that were accepted for the exterior of Metro buses: one for the Salvation Army Red Kettle campaign and one for CorePower Yoga. Plaintiff argues that the Salvation Army is a religious organization, and that yoga is a religious practice or has religious origins, Pl.'s Mot. at 17-18, so WMATA was bound to accept the Archdiocese's ad as well.[15]

But the inquiry is whether the *advertisements* promote religion. The Salvation Army advertisement seeks charitable contributions and nothing more. Ex. E to Bowersox Decl.



[15] Plaintiff and the amici also argued that advertisements for performances of "The Book of Mormon" fell within the prohibition since the musical disparages, or at least, pokes fun at, a religion. Amicus Brief, Ethics and Pub. Policy Ctr. and First Liberty Inst. in Supp. of Pl. [Dkt. # 11] at 6. Putting aside the fact that this is a somewhat cursory summary of the show, the fact that there will be satire presented onstage does not transform a poster publicizing the existence of the performance or the availability of tickets into a communication that *itself* promotes or opposes a religion.

The Red Kettle may be a well-known symbol of the season, but there is nothing religious about it. The ad does not promote or oppose any religion or religious practice; while the Salvation Army has a religious origin and affiliation, what the ad is promoting is the act of giving and the practical effect on the recipient. While charitable giving is a fundamental tenet of many faiths, the advertisement does not advance or reject any religious imperative or spiritual inspiration for the activity it is seeking to encourage.

CorePower Yoga is a chain selling memberships to "yoga fitness studios" that offer "unique" hybrid workouts called "yoga-based fitness classes." *See* https://www.corepoweryoga.com/. The ad announcing the opening of a new location does not promote any religion or religious practice or belief.[16]

Exhibit F to Bowersox Decl.

Plaintiff urged the Court to look beyond the surface of the buses and to review the websites of each organization because the links appear in the ads, and

[16] The choice of the slogan "Mantra + Muscle" does not change that assessment just because the word mantra can mean a religious incantation.

because the content of the Archdiocese's Find the Perfect Gift website has come into play in considering this motion.[17] But neither link is as intrinsic to the message of the ad as it is in plaintiff's proposed ad, where the link *is* the message. And, in any event, the website for the National Capital Area Command identified on the Salvation Army's signs, http://salvationarmynca.org/, is focused on fundraising and service. Beyond the mission statement that it takes several clicks to reach, there is little content that is more overtly religious than the

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[17] It is important to note that the Find the Perfect Gift link does not connect to the general website for the Archdiocese of Washington, www.adv.org, but rather, it leads to a separate website created specifically for the Advent campaign that was to be advanced by the proposed advertisements. Thus, it is not analogous to the Salvation Army's general website, which is not what is being advertised in the Red Kettle ads.

Moreover, plaintiff's complaint and memorandum specifically refer to and incorporate the content of the website and emphasize the message it conveys to support the argument that the rejection of the ad suppresses a religious viewpoint, and that immediate injunctive relief is warranted. *See also* Pl.'s Mot. at 6 ("The advertisements are part of a larger campaign to encourage individuals to return to church during Advent and to give charitably in their communities."); *see also* Compl. ¶ 10 ("The goal of the campaign is to encourage individuals to seek spiritual gifts during this Christmas season."); *id.* ¶ 11 ("All of the advertisements refer to an Internet site, FindThePerfectGift.org, which contains links to Mass schedules, opportunities for charitable service, information about religious holiday traditions, and reflections on the meaning of the Advent and Christmas seasons."); and *id.* ¶ 26 ("The Find the Perfect Gift campaign has a purpose and meaning that is tied intrinsically to the liturgical season of Advent."). So it is hardly unfair to take the content of the plaintiff's website into consideration since that is the very content plaintiff seeks to disseminate.

ad, and therefore, even after accessing the website, it does not appear to the Court that the Salvation Army *ad* falls within the Guideline.[18]

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[18] The homepage has a banner displaying various donation and service opportunities, and it presents large links for "Volunteer," "Get Help," and "Events," as well as smaller links to "About," "Ways to Give," "Ways We Help," "Volunteer," etc. The Salvation Army, http://www.salvationarmynca.org (last visited Dec. 8, 2017). The "About" page emphasizes service: "The Salvation Army National Capital Area Command serves anyone in crisis in the District, Suburban Maryland, and Northern Virginia. Whether it's a hot meal, help paying a bill or a more long-term solution, every county in the region includes either a Salvation Army Corps or field office ready to help." *Id.* From the "About" page, there are several links to "Learn More," including one to "Our Mission and Vision." *Id.* The mission is plainly religious, while the vision is more ecumenical:

> Our Mission
>
> 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.
>
> Our Vision
>
> To have a Greater Washington, DC area be a place where people of all ages live in safe and sustainable communities in which differences are respected, and people are empowered to learn, work, and worship in freedom.

Id. Plaintiff's reply points out that counsel for the Archdiocese was able, after clicking from the home page to the "Find Us" page and then to the "Alexandria Corps" page, *see* Williams Decl. in Support of Pl.'s Mot. [Dkt. 12-1] ¶ 6, to land upon a page on the Salvation Army site that sets out the dates and locations for Spiritual Care and Worship in addition to describing the local corps's work in the community with homeless women. *See*

Similarly, a review of the CorePower Yoga website reveals that no matter what the religious origins of yoga may have been, or to what extent Hinduism, Buddhism, or any other spiritual elements remain incorporated in yoga practice in the United States, religion is not what is being offered at CorePower Yoga. The website is filled with references to "our version of yoga" and "our unique style of yoga," and it touts the potential physical benefits of its intensive cardiovascular workout "based on" yoga and set to energizing music. *See* https://www.corepoweryoga.com.[19] It is about as

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http://salvationarmynca.org/alexandria-va/. But that does not make the ad on the bus—which is a call for donations and not an exhortation to visit the website or to join the Salvation Army—an ad promoting religion.

[19] The CorePower homepage superimposes the words "CorePower Yoga—Live Your Power" over a video of a studio full of well-chiseled men and women pumping hand-held weights while assuming traditional yoga positions and stances. Choosing "The Experience" from the menu of choices available on the homepage brings up a page that announces, "Discover Your Most Powerful Inner Self: Inside our yoga fitness studios, something amazing is happening. With this high intensity workout, you'll push past physical boundaries with an open mind and a beating heart, turning doubt into security, strangers into friends, and stress into sweat." In addition to incorporating weights, the classes at CorePower's "yoga fitness studio" can further diverge from traditional yoga practice when they are "set to an energizing playlist" or "incredible music." As the website informs those who "already love yoga," "[w]e've held onto the magic of yoga, while upping the intensity factor for a more powerful, purposeful workout. Take your yoga practice up a notch with a renewed sense of focus and strength." To those who are new to yoga, CorePower explains that "[w]e believe in working every muscle and every emotion." In the Frequently Asked Question section, CorePower asks, "what are some of the benefits of yoga?" Answer:

distant from the ancient Indian religious traditions that gave rise to yoga as Black Friday at Best Buy is from Bethlehem.

Based on the record before it, then, the Court finds that plaintiff is not likely to succeed on its claim that its constitutional rights were violated by the inconsistent application of Guideline 12.[20]

"There are countless benefits to our style of yoga. You'll turn stress into sweat, rigid into fluid, and our community can turn strangers into friends. Plus, you'll increase circulation, flexibility and strength, while enhancing sleep quality. A regular yoga practice . . . has been shown to improve the symptoms of many chronic diseases . . ."

You have to look quite hard to find any reference on the website to anything even arguably spiritual—CorePower's answer to "What does 'Yoga' mean?" is: "Yoga can be traced back to ancient India more than 5,000 years ago. Yoga is a Sanskrit word meaning to join, or yoke; a union. Conceptually, yoga is the practice of fully uniting the body, mind and spirit." The fact that plaintiff was able to put its finger on one of these lonely references to one's spirit or soul is not enough to make an ad announcing the opening of a new studio an ad that promotes religion.

[20] In its reply brief, plaintiff pointed to a third ad, supposedly purchased from WMATA by a Christian radio station, WGTS 91.9. *See* Declaration of Michael F. Williams, Dkt. # 12-1 ¶ 3 ("Attached as Exhibit B is a true and correct copy of a photograph of a WMATA public bus on a public thoroughfare displaying advertising for WGTS 91.1, a Christ-centered, nonprofit, listenersupported media ministry serving the Washington, DC region, accessed over the Internet on December 4, 2017 at http://columbiaunion.org/content/wgts-919s-history-timeline.")

Ex. B to Pl.'s Reply [Dkt. # 12-3]. But while the Declaration states the date that counsel discovered the photograph on the internet, neither the Declaration nor the link provides any information about where or when the picture was taken. And the bus did not appear to be a red and grey Metrobus. Defendant subsequently submitted a declaration from WMATA's Assistant General Manager of Bus Services stating that, "The bus in the picture [provided by plaintiff] is not a [WMATA] Metrobus. The number on the bus, "5359," is not a Metrobus number. The color scheme is not a Metrobus color scheme.") Decl. of Robert O. Potts, in Support of Def.'s Opp. [Dkt. # 13] ¶ 2.


See id.

Thereafter, the Court received another Declaration from Michael Williams, revealing that he had transmitted to counsel for WMATA a link to a different website from May of 2016 in which the writer congratulated WGTS for its "successful ad campaign in Washington, D.C." Decl. of Michael F. Williams [Dkt. # 14]. But the bus depicted on that webpage is also blue. http://www.billscottgroup.com/2016/05/17/radio-station-bus-campagins/.

II. Count Two: First Amendment Free Exercise of Religion

The First Amendment to the Constitution includes the prohibition that, "Congress shall make no law . . . prohibiting the free exercise" of religion. U.S. Const. amend. I. The Supreme Court has made clear that this constitutional right "does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." *Emp't Div., Dep't of Human Res. v. Smith*, 494 U.S. 872, 879 (1990), quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring). So according to the principles set out in *Smith*, a neutral and generally applicable law will survive a challenge under the Free Exercise clause. When assessing whether a law is neutral and generally applicable, the two inquiries tend to overlap and "failure to satisfy one requirement is a likely indication that the other has not been satisfied." *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531-32, 546 (1993). A court

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Counsel for WMATA, to his credit, endeavored to research whether WMATA had ever run the ad and informed the court in a declaration that "as best as WMATA has been able to determine given the tight time frame, the WGTS ad was carried on WMATA's buses in April 2017." Decl. of Rex Heinke [Dkt. # 15] ¶ 8. (The webpage is from a year earlier.) While this constitutes some evidence that WMATA may have accepted an advertisement from a religious oriented radio station after the policy was in place, the evidence is quite thin and somewhat contradictory, and since the advertisement itself provides no hint that it is coming from a religious source, the Court is not persuaded that this additional potential fact tips the balance and undermines any of the rulings set forth in this opinion.

is required to apply the strict scrutiny test only when a law is either not neutral or not generally applicable. *Id.* at 531-32, 546.

A. Guideline 12 is neutral.

"[I]f the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral." *Lukumi Babalu*, 508 U.S. at 533. Here the Guideline is not directed at any religious practice; it prohibits WMATA from publishing advertisements that promote or oppose religion. Even if one were to characterize Guideline 12 as a policy that "restricts" the "religious practice" of evangelization, because it makes buses unavailable for that purpose, there is no showing that WMATA closed off an avenue for that practice "because of" any religious motivation animating the ads. The policy relates to the ads' content, and it imposed an identical prohibition on advertisements that oppose religion, which are not likely to have a religious aim. And the Guideline is part of a larger set of restrictions on controversial topics; it does not single out religion. *Cf. Lukumi Babalu*, 508 U.S. at 545-46 (concluding that the city ordinance prohibiting ritual animal sacrifice targeted the Santeria religion).

Plaintiff complains that WMATA's advertising space is a "unique public benefit" that is being withheld from the Archdiocese on account of its religion, Pl.'s Reply at 6, and it points to *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 (2017), which prohibits the denial of a "generally available benefit solely on account of religio[n]." *See* Pl.'s Reply at 6. But its use of this authority is misplaced, not only because WMATA's

advertising space is not a "generally available benefit," but also because there is no evidence of discriminatory intent.[21]

B. Guideline 12 is generally applicable.

To be generally applicable, a regulation "cannot in a selective manner impose burdens only on conduct motivated by religious belief." *Lukumi Babalu,* 508 U.S. at 543. For the same reasons that the Court found the policy to be neutral, it finds that it is generally applicable. Guideline 12 applies across the board to advertisements that touch on the subject matter of religion from any perspective or motivation, and Guideline 12 is just one of several content-based restrictions placed on the nonpublic forum. Plaintiff's alleged examples of inconsistent and arbitrary enforcement are unpersuasive for the reasons discussed under Count I. And so, the Court finds that Guideline 12 is generally applicable.

C. Guideline 12 does not burden religious practice.

There is also a lack of evidence that the Guidelines actually restrict or substantially burden a

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[21] The Court also rejects plaintiff's contention that because the Guidelines implicate "both free speech and free exercise, it is a 'hybrid' restriction subject to heightened scrutiny" under *Employment Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. at 882. Pl.'s Mot at 20-21. For this argument to prevail, plaintiff would need viable claims on both the Free Speech and Free Exercise counts which it does not have. *Henderson v. Kennedy*, 253 F.3d 12, 19 (D.C. Cir. 2001) ("[T]he combination of two untenable claims" does not add up to a tenable one because "in law as in mathematics zero plus zero equals zero."). Accordingly, heightened scrutiny is not applicable here.

religious belief or practice. "[T]he First Amendment is implicated when a law or regulation imposes a substantial, as opposed to inconsequential, burden on the litigant's religious practice," and accordingly, "this threshold showing must be made" to sustain a Free Exercise claim. *Levitan v. Ashcroft*, 281 F.3d 1313, 1320 (D.C. Cir. 2002). Plaintiff has not satisfied this. The Archdiocese is free to spread its message throughout the Washington, D.C. metropolitan area, and its declaration reveals that it already utilized a number of private and public platforms, "includ[ing] advertisements and materials for distribution in parishes within the Archdiocese, advertisements for display in public places throughout the metropolitan area," including transit shelters not owned by WMATA, and an "integrated online campaign." McFadden Decl. ¶¶ 3, 6.

Because Guideline 12 is neutral and generally applicable and because plaintiff has not established that the Guidelines impose a substantial burden, the Court finds that plaintiff is unlikely to succeed on its Free Exercise count.

III. Count Three: Religious Freedom Restoration Act

"Congress enacted RFRA in 1993 in order to provide very broad protection for religious liberty." *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2760 (2014).[22] To this end, RFRA provides that the

[22] Congress responded to the Supreme Court's ruling in *Smith* that the Free Exercise clause did not constitutionally protect religious practices against burdens from neutral, generally applicable laws, by enacting RFRA which offered broader protections. *Hobby Lobby*, 134 S. Ct. at 2761 ("'Laws that are

government "shall not substantially burden a person's exercise of religion" unless it can demonstrate 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." 42 U.S.C. § 2000bb-1(a)-(b). The prohibition applies even if the burden results from a rule of general applicability. *Id.* § 2000bb-1(a). "As amended by the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), RFRA covers 'any exercise of religion, whether or not compelled by, or central to, a system of religious belief.'" *Hobby Lobby*, 134 S. Ct. at 2754, quoting 42 U.S.C. § 2000cc-5(7)(A).

The federal government and the District of Columbia are bound by RFRA. *See id.* § 2000bb-2(1); *Potter v. Dist. of Columbia*, 558 F.3d 542, 546 (D.C. Cir. 2009). However, because WMATA is an inter-state agency formed by the District of Columbia, Maryland, and Virginia, defendants argue that RFRA does not apply to WMATA based on the decision in *City of Boerne v. Flores*, 521 U.S. 507 (1997). Defs.' Opp. at 26-27. In that case, the Supreme Court ruled that the application of RFRA to the states exceeded Congress's enforcement power under the Fourteenth Amendment, and so RFRA could not constitutionally be applied to the states. *Flores*, 521 U.S. at 536. Therefore, defendants argue, RFRA cannot be applied to WMATA because it would "intrude upon Maryland's

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"neutral" toward religion,' Congress found, 'may burden religious exercise as surely as laws intended to interfere with religious exercise.'"), quoting 42 U.S.C. § 2000bb(a)(2) (internal edits omitted).

and Virginia's traditional state prerogatives over transportation." Defs.' Opp. at 27. In *Morris v. Wash. Metro. Area Transit Auth.*, the D.C. Circuit ruled that Maryland's and Virginia's sovereign immunity was conferred upon WMATA, but that was in the context of a suit for damages, and the Court has not yet ruled on whether the precedent would apply to a case involving injunctive relief. 781 F.2d 218, 219 (D.C. Cir. 1986). But the Court does not need to resolve this complicated issue because it finds for other reasons that the Archdiocese is not likely to succeed on its RFRA claim.

To successfully mount a RFRA challenge and subject government action to strict scrutiny, a plaintiff must meet the initial hurdle of establishing that the government has substantially burdened his religious exercise. *Henderson v. Stanton*, 76 F. Supp. 2d 10, 14 (D.D.C. 1999). Only if that predicate has been established will the onus then shift to the government to show that the law or regulation is the least restrictive means to further a compelling interest. 42 U.S.C. §§ 2000bb-1(b), 2000bb-2(3); *Hobby Lobby*, 134 S. Ct. at 2761. "A substantial burden exists when government action puts 'substantial pressure on an adherent to modify his behavior and to violate his beliefs.'" *Kaemmerling v. Lappin*, 553 F.3d 669, 678 (D.C. Cir. 2008), quoting *Thomas v. Review Bd.*, 450 U.S. 707, 718 (1981); *see also Holt v. Hobbs*, 135 S. Ct. 853, 862 (2015)[23] (finding such a burden where a

[23] *Holt* was brought under the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), *see* 42 U.S.C. § 2000cc *et seq*., but RLIUIPA is governed by the same standard

prisoner was forced to choose between shaving his beard and thereby engaging in conduct that seriously violated his religious beliefs or facing serious disciplinary action); *Hobby Lobby*, 134 S. Ct. at 2775 (2014) (concluding a substantial burden existed where employers were required, under threat of severe economic penalties, to provide insurance coverage for contraceptive methods that violated their religious beliefs).

Thus, RFRA decisions turn on an element of compulsion, and here plaintiff is under no pressure to do anything. The fact that plaintiff has a sincere belief in spreading the gospel is not in dispute, but the existence of that belief, and even the sincere desire to act in accordance with it, is not enough to sustain a claim. "[T]o make religious motivation the critical focus is to read out of RFRA the condition that only substantial burdens on the exercise of religion trigger the compelling interest requirement." *Mahoney v. Doe*, 642 F.3d 1112, 1121 (D.C. Cir. 2011), quoting *Henderson*, 253 F.3d at 17 (internal edits omitted). Plaintiff does not cite to any binding Supreme Court or Circuit precedent that would call for the invalidation of a law when plaintiffs are not compelled, under the threat of either punishment or the denial of a benefit, to act.

There is authority that points in the other direction, though. The D.C. Circuit has held that when a restriction merely prohibits one of a multitude of methods of spreading the gospel, and it does not

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set forth in RFRA, and plaintiff cites to this case in support of its RFRA claim. *See* Pl.'s Mot. at 23.

"force[ ] [parties] to engage in conduct that their religion forbids" or prevent "them from engaging in conduct their religion requires," those parties are not "substantially burdened." *Henderson*, 253 F.3d at 16; *see also Mahoney*, 642 F.3d at 1122. In *Henderson* and *Mahoney*, the plaintiffs challenged regulations that prevented individuals from selling t-shirts on the National Mall and regulations that prohibited "chalking" the sidewalk in a particular location in front of the White House. *See Henderson*, 253 F.3d at 13-14; *Mahoney*, 642 F.3d at 1115. Both sets of plaintiffs argued that these regulations violated RFRA because they prevented plaintiffs from following the religious requirement that they spread the gospel. *See Mahoney*, 642 F.3d at 1120; *Henderson*, 253 F.3d at 15. The Court ruled that neither regulation imposed a substantial burden because the regulations were, at most, "a restriction on one of a multitude of means" by which plaintiffs could proselytize, and other alternative means were still available. *Henderson*, 253 F.3d at 17; *see also Mahoney*, 642 F.3d at 1121-22. The Court specifically noted that neither case posed a situation where "the regulation force[d the plaintiffs] to engage in conduct that their religion forbid[]" or prevented "them from engaging in conduct their religion require[d]." *Henderson*, 253 F.3d at 16; *see also Mahoney*, 642 F.3d at 1121.

As in *Henderson* and *Mahoney*, the Archdiocese is not substantially burdened by WMATA's policy because it does not compel the Archdiocese to act in a way that violates its religion, nor does it prevent it from spreading the gospel through other means. Because plaintiff has not established that WMATA's

Guidelines substantially burdened its religious exercise, the Court finds that it is unlikely to succeed on this count.

IV. Count Four: Equal Protection

Plaintiff's Equal Protection claim is unlikely to succeed for the same reasons that its inconsistent and discriminatory enforcement claim fails under Count I. Plaintiff alleges that WMATA treated "similarly situated religious groups" differently in violation of Equal Protection principles by rejecting the Archdiocese's ad but accepting ads from the Salvation Army and CorePower Yoga. Compl. ¶ 54; Pl.'s Mot. at 12, 18, 20. As discussed in Count I of the Court's analysis, the ads by the Salvation Army and CorePower Yoga do not promote or oppose any religion, religious practice or belief. By contrast, plaintiff has made it abundantly clear in its briefs and in oral argument that its ad seeks to "bring the Catholic faith to more believers" by buying ads on government property. Pl.'s Mot. at 23. Therefore, it is not "similarly situated," and the Court concludes that plaintiff is unlikely to succeed on its Equal Protection count.

V. Count Five: Due Process

Plaintiff's complaint alleges that WMATA's Guideline 12 "deprives the Archdiocese of liberty and property without due process." Compl. ¶ 56. Neither the complaint nor the memorandum identifies a liberty or property interest that has been compromised other than the First Amendment rights plaintiff seeks to vindicate in Count I and Count II. At the hearing, plaintiff agreed that for the purpose of the preliminary injunction motion, the due process should

be viewed as alleging just a deprivation of those rights. Since the Court finds that the plaintiff is unlikely to prevail on Count I and II, it is also unlikely to prevail on the Due Process count.

VI. Irreparable Harm

Plaintiff argues in its motion that it will suffer irreparable harm if the Court does not issue the requested injunctive relief. Pl.'s Mot. at 25. Plaintiff's showing on this point is its assertion that the loss of First Amendment freedoms constitutes irreparable injury. *Id*. Since plaintiff alleges no other harm that it seeks to avert, its irreparable harm argument rises and falls with its merits arguments. Since the Court has concluded that plaintiff's constitutional and statutory rights have not been violated, plaintiff has failed to demonstrate that it would suffer irreparable harm in the absence of relief. Under those circumstances, it is not necessary for the Court to go on to the question of whether WMATA would be harmed by the proposed injunction or where the public interest lies.

CONCLUSION

Based on the information submitted by the parties, their representations made at the hearing on December 5, 2017, and for the reasons set forth above, an order will issue denying the motion for preliminary injunction.

[handwritten: signature]
AMY BERMAN JACKSON
United States District Judge

DATE: December 8, 2017

Appendix D

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. amend. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

42 U.S.C. §2000bb-1. Free exercise of religion protected

(a) In general

Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).

(b) Exception

Government may substantially burden a person's exercise of religion only if it 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.

(c) Judicial relief

A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to

assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

42 U.S.C. §2000bb-2. Definitions

As used in this chapter--

(1) the term "government" includes a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, or of a covered entity;

(2) the term "covered entity" means the District of Columbia, the Commonwealth of Puerto Rico, and each territory and possession of the United States;

(3) the term "demonstrates" means meets the burdens of going forward with the evidence and of persuasion; and

4) the term "exercise of religion" means religious exercise, as defined in section 2000cc-5 of this title.

42 U.S.C. §2000bb-3. Applicability

(a) In general

This chapter applies to all Federal law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after November 16, 1993.

(b) Rule of construction

Federal statutory law adopted after November 16, 1993, is subject to this chapter unless such law explicitly excludes such application by reference to this chapter.

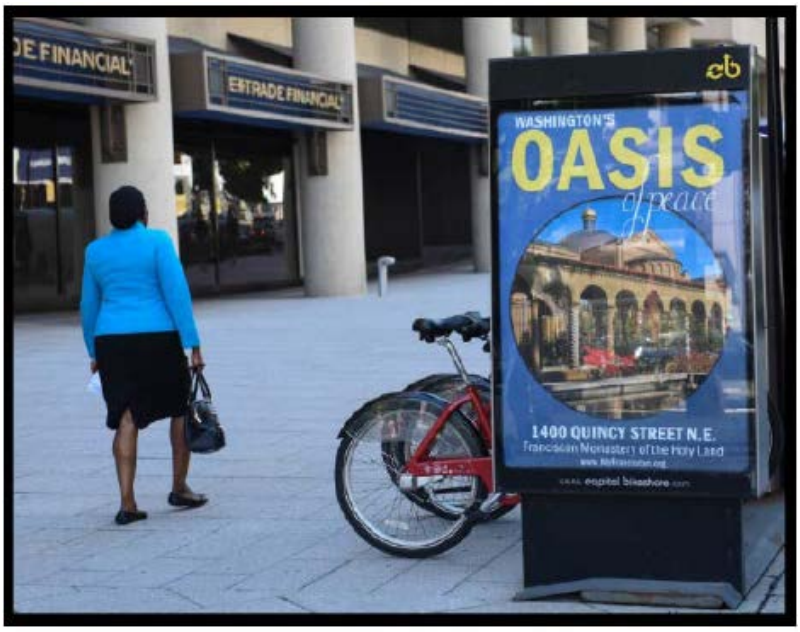
c) Religious belief unaffected

Nothing in this chapter shall be construed to authorize any government to burden any religious belief.

42 U.S.C. §2000bb-4. Establishment clause unaffected

Nothing in this chapter shall be construed to affect, interpret, or in any way address that portion of the First Amendment prohibiting laws respecting the establishment of religion (referred to in this section as the "Establishment Clause"). Granting government funding, benefits, or exemptions, to the extent permissible under the Establishment Clause, shall not constitute a violation of this chapter. As used in this section, the term "granting", used with respect to government funding, benefits, or exemptions, does not include the denial of government funding, benefits, or exemptions.

Appendix E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