

[ORAL ARGUMENT NOT SCHEDULED]

No. 17-7171

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

ARCHDIOCESE OF WASHINGTON,
by and through Cardinal Donald Wuerl, Roman Catholic Archbishop of Washington,
Plaintiff-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,
Defendants-Appellees.

On Appeal from the United States District Court
for the District of Columbia

**BRIEF FOR UNITED STATES
AS AMICUS CURIAE SUPPORTING APPELLANT**

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), the undersigned counsel certifies as follows:

A. Parties and Amici

Plaintiff-Appellant is the Archdiocese of Washington, DC. Defendant-appellee is the Washington Metropolitan Area Transit Authority.

In district court, the First Liberty Institute and the Ethics and Public Policy Center participated as amici curiae in support of plaintiff. In this Court, the United States appears as amicus curiae supporting plaintiff-appellant. The First Liberty Institute, the Ethics and Public Policy Center, Senator Jeff Flake, and the Beckett Fund for Religious Liberty have also indicated that they intend to participate as amici curiae in this Court.

B. Rulings Under Review

The rulings under review are the Memorandum Opinion and accompanying Order issued by Judge Amy Berman Jackson on December 8, 2017, docket numbers 17 and 18. The opinion is not yet published.

C. Related Cases

This matter has not previously been before this Court or any other Court. We are unaware of any related cases pending in this Court or any other court.

/s/ Nicolas Y. Riley
NICOLAS Y. RILEY

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* Authorities upon which we chiefly rely are marked with asterisks.

INTRODUCTION AND INTERESTS OF THE UNITED STATES

In this case, the Washington Metropolitan Area Transit Authority (WMATA) violated the First Amendment by denying the Archdiocese of Washington's request to run an advertisement on WMATA buses as part of its "Find the Perfect Gift" Christmas campaign. The proposed ad conveys an implicit message that viewers should "seek spiritual gifts during this Christmas season" and directs them to a website which, in turn, encourages them to make charitable donations, attend church services, and pursue public service opportunities. JA 8. WMATA's sole basis for rejecting the proposed ad was that it "seeks to promote religion." JA 115. But WMATA, per its guidelines and by its own admission, has accepted or would accept advertisements that contain Christmas messages from commercial and charitable viewpoints, so long as they are not religious. In other words, it is fine, from WMATA's perspective, for an advertisement to declare that Christmas is a time for sharing gifts or for donating to charity—as long as the advertisement does not also suggest that Christmas is a time for worship or undertaking charitable activities for religious reasons.

WMATA's policy constitutes unconstitutional viewpoint discrimination. The policy directly contravenes Supreme Court precedents that preclude the government from disfavoring speech from a religious perspective. The result is that messages encouraging religious exercise—a right also protected by the First Amendment—are singled out as unacceptable.

The United States is the proprietor of various public, non-public, and limited public forums and therefore has an interest in the proper resolution of questions concerning the First Amendment's ban on viewpoint discrimination in these forums. At the same time, the United States also has an interest in preserving the constitutional right of free expression and regularly participates in cases to ensure that religious expression enjoys the same First Amendment protection as other forms of expression. *See, e.g.,* U.S. Amicus Br., *Lamb's Chapel v. Center Moriches Free Sch. Dist.*, 508 U.S. 384 (1993) (No. 91-2024); U.S. Amicus Br., *Child Evangelism Fellowship of Maryland, Inc. v. Montgomery Cty. Pub. Sch.*, 373 F.3d 589 (4th Cir. 2004) (No. 03-1534); U.S. Statement of Interest, *Uzuegbunam v. Preczewski*, No. 1:16-cv-04658 (N.D. Ga. Sept. 26, 2017). Accordingly, the United States has an interest in the resolution of this appeal and urges this Court to rule that WMATA engaged in unconstitutional viewpoint discrimination here.

STATEMENT OF FACTS

WMATA was established through a congressionally approved interstate compact to operate the public rail and bus system that serves the Washington, D.C. metropolitan area. *See Lebron v. WMATA*, 749 F.2d 893, 894 (D.C. Cir. 1984). One way in which WMATA raises revenue is by selling advertising space on its trains and buses. *Id.* WMATA's guidelines concerning permissible advertisements nowhere prohibit the display of Christmas-related ads as a general matter.

In October 2017, the Archdiocese of Washington sought to purchase space on WMATA buses for an advertisement that would run beginning in early December. The ad would help promote the Archdiocese's "Find the Perfect Gift" campaign, which is intended to encourage people "to seek spiritual gifts during this Christmas season, and to offer members of the community public service opportunities." JA 8 (Compl.). The campaign aims "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," which ran from December 3 through December 24. JA 25-26 (McFadden Decl.).

The advertisement that the Archdiocese submitted to WMATA depicts a silhouette of three shepherds walking alongside their sheep beneath a starry night sky. The main text of the ad says, "Find the Perfect Gift," and features a web-address and social-media hashtag. JA 383 (Dist. Ct. Op.). The listed website states, "JESUS is the perfect gift" and urges visitors to "[f]ind the perfect gift of God's love this Christmas." *Id.* It also contains links to information about local services and events, Christmas traditions, charitable organizations, and other church-related resources. *See id.*

After WMATA's third-party vendor reviewed the proposed ad, it notified the Archdiocese that the design did not satisfy WMATA's guidelines. The vendor informed the Archdiocese that "if the advertisement had an explicitly commercial objective, such as selling tickets, then it might [be] more likely to comply with WMATA's guidelines." JA 29.

In late November, the Archdiocese appealed the denial of its proposed advertisement to WMATA's general counsel. WMATA's counsel responded with a formal letter denying the Archdiocese's request on the ground that the ad "depicts a religious scene and thus seeks to promote religion," in violation of a WMATA guideline prohibiting "[a]dvertisements that promote or oppose any religion, religious practice or belief." JA 115.

One week later, the Archdiocese filed this suit in district court and moved for a temporary restraining order and preliminary injunction. The district court, after expedited briefing and a hearing, denied the motion on December 8. In rejecting the argument that WMATA's denial of the Archdiocese's proposal amounted to viewpoint discrimination, the court dismissed the notion that "commercial advertisements during the holiday season . . . express a viewpoint promoting the commercialization of Christmas." JA 395.

The Archdiocese then moved for an injunction pending appeal. A panel of this Court denied the motion on December 20. In the panel's view, the Archdiocese was unlikely to succeed on the merits of its viewpoint-discrimination claim "at this early pre-discovery procedural stage" because there were no WMATA-approved ads in the record demonstrating "that WMATA has actually made Christmas or the holiday season a permissible subject of advertising." JA 577.

ARGUMENT

WMATA ENGAGED IN UNCONSTITUTIONAL VIEWPOINT DISCRIMINATION BY REJECTING THE ARCHDIOCESE'S PROPOSED CHRISTMAS ADVERTISEMENT.

A. “The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.” *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 829 (1995). Thus, when the government creates a forum for expressive activity—regardless whether it opens that forum to all members of the public or only some—it may not restrict a speaker’s access to the forum based solely on the speaker’s point of view. *Id.*

Relying on this viewpoint-neutrality principle, the Supreme Court has repeatedly held that the government may not suppress forms of expression that offer a religious perspective on subjects that would otherwise be permissible within a given forum. *See, e.g., Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001) (holding that a school that opened its facilities to the public after hours for recreational activities could not deny access to an afterschool club seeking a gathering space to share religious stories, songs, and prayer); *Lamb’s Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993) (holding that a school that opened its facilities to the public after hours for community discussions could not deny access to a church group seeking to screen a film series addressing family and child-rearing issues from a Christian perspective).

Most notably, in *Rosenberger*, the Court held that a public university engaged in impermissible viewpoint discrimination when it denied student-activity funding to a

student magazine based on the magazine’s Christian editorial perspective. 515 U.S. at 831. In reaching that conclusion, the Court rejected the university’s contention that its decision to withhold funds from the magazine was viewpoint-neutral because it rested on a general policy of refusing to fund activities that promote religion. As the Court explained, the university had not chosen to limit student-activity funding to certain “subject matter[s]” that neither included religion nor implicated religious perspectives; rather, it had “select[ed] for disfavored treatment those student journalistic efforts with religious editorial *viewpoints*” on permissible subject matters. *Id.* (emphasis added). The Court reasoned that because the “subjects discussed [in the magazine] were otherwise within the approved category of publications,” the university’s decision to withhold funding was necessarily based on the magazine’s “prohibited perspective, not the general subject matter.” *Id.*

By restricting student-activity funding in this way, the Court concluded, the university had effectively excluded religious perspectives from the forum it had created. *See Rosenberger*, 515 U.S. at 831. Such exclusion constituted viewpoint discrimination because it infringed the expressive freedoms of students who sought to espouse “a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered.” *Id.*

The fact that the university *also* discriminated against “antireligious speech” or an “atheistic perspective” made no difference. *Rosenberger*, 515 U.S. at 831. As the Court explained, the argument “that no viewpoint discrimination occurs . . . so long as

multiple voices are silenced is simply wrong”; instead, “the debate is skewed in multiple ways.” *Id.* at 831–32. In short, “the exclusion of several views” on a topic “is just as offensive to the First Amendment as exclusion of only one.” *Id.* at 831.

B. WMATA’s rejection of the Archdiocese’s proposed Christmas advertisement in this case falls squarely within the class of viewpoint discrimination that *Rosenberger* proscribed. In the context of Christmas advertising, WMATA’s guidelines permit messages which generally express commercial or charitable viewpoints, but exclude messages that express religious viewpoints. Had Macy’s, for example, sought to run a Christmas-themed ad stating, “Find the Perfect Gift,” and displaying an image of its jewelry, nothing in the guidelines would prohibit the company from doing so. But because the Archdiocese’s proposal arguably conveyed the implicit message that “JESUS is the perfect gift,” WMATA rejected it. JA 394 (quoting website). An ad proclaiming that the perfect Christmas gift is jewelry and another that the perfect Christmas gift is Jesus obviously offer competing perspectives on the meaning of the holiday, yet WMATA permits only the former. That application of WMATA’s guidelines is precisely the type of viewpoint discrimination that *Rosenberger* precludes.

Aside from the guidelines themselves, WMATA’s own statements make clear that it rejected the Archdiocese’s proposal based on the ad’s religious viewpoint, not on the ad’s general subject matter. In its brief to the district court, WMATA acknowledged that “[h]ere, WMATA has simply prohibited advertisements related to the religious half of Christmas, but not the secular half.” Dkt. No. 10, at 14 n.3. WMATA also suggested

that it could reliably distinguish between advertisements addressing Christmas’s “secular half” and ads addressing its “religious half” simply by examining the types of symbols an ad uses. *See id.* (distinguishing ads that feature reindeer and Christmas trees from those that feature shepherds and the Star of Bethlehem). Such line-drawing exercises only underscore that WMATA selects and rejects ads on the basis of viewpoint rather than subject matter. Indeed, under WMATA’s view, two otherwise identical advertisements with the same underlying message—for instance, two ads encouraging gift giving or charitable donations during the holiday season—could be construed as addressing entirely different “subjects” as long as they used different Christmas symbols reflecting different purposes for giving gifts or making charitable donations.¹

WMATA’s decision to accept a Christmas-themed advertisement from the Salvation Army further confirms that only secular perspectives on the holiday are tolerated. This ad features the words “Give Hope, Change Lives” in bold lettering, as well as an image of the organization’s “Red Kettle,” which WMATA refers to as “a

¹ In denying the Archdiocese’s motion for an injunction pending appeal, the panel discounted these statements by WMATA as “a footnoted legal argument made by counsel addressing an argument in the alternative.” JA 577. But rather than disavow this reading of its guidelines on appeal, WMATA reiterated that “the distinction between Christmas’ two halves allows [it] to restrict [the] use of spiritual iconography, proselytizing messages, and other features of Christmas’ *religious* subject-matter.” JA 543. In any event, WMATA’s guidelines nowhere prohibit advertisements addressing the “secular half” of Christmas, which make WMATA’s consistent characterization of its policy an accurate one.

secular symbol of the holiday season.” JA 546 (Opp. Mot. Inj. Pending appeal) (quotation marks and brackets omitted). Like the Archdiocese’s proposal, the Salvation Army’s ad seeks to spread hope and encourages people to make charitable donations during the Christmas season. *See* JA 402; *compare* JA 402 (“Give Hope”), *with* JA 25-26 (explaining that the Archdiocese’s ad seeks “to share a simple message of hope” and encourages people to join “in public service to help the most vulnerable in our community”). If, as WMATA argues and the district court concluded, the Salvation Army’s ad addresses Christmas from a secular, charitable perspective rather than a religious one, that fact only demonstrates that WMATA favors secular viewpoints on Christmas but has singled out religious viewpoints as unacceptable.²

Rosenberger precludes WMATA from drawing lines in this way. Just as a university cannot subsidize secular speech on a given topic while refusing to subsidize religious speech on the same topic, WMATA cannot accept a secular Christmas advertisement encouraging charitable giving while rejecting religious Christmas ads that do the same. WMATA attempts to avoid this result by recasting the Archdiocese’s “Find the Perfect Gift” campaign as espousing a purely religious message of proselytization. But, as the Supreme Court recognized in *Good News*, the government is barred from restricting

² By contrast, if, as the Archdiocese contends, the Salvation Army’s ad addresses Christmas from a religious perspective, then WMATA has unconstitutionally discriminated against some religious viewpoints in favor of other religious viewpoints. The United States takes no position on whether this Salvation Army ad should be characterized as taking a religious or secular perspective.

even “quintessentially religious” speech if that speech addresses a subject that would otherwise be permissible in the same forum. 533 U.S. at 111 (rejecting the view that “something that is ‘quintessentially religious’ or ‘decidedly religious in nature’ cannot also be characterized properly” as speech addressing some other permissible subject). In other words, WMATA cannot overcome the constitutional prohibition on viewpoint discrimination simply by ignoring those elements of the Archdiocese’s religious message that address subjects not barred by WMATA’s guidelines.

Furthermore, *Rosenberger* teaches that one of the primary “danger[s] to liberty” wrought by viewpoint discrimination “lies in granting the State the power to examine publications to determine whether or not they are based on some ultimate idea and, if so, for the State to classify them.” 515 U.S. at 835. That is particularly true when it comes to religion, as “requir[ing] public officials to scan and interpret” ad submissions “to discern their underlying philosophic assumptions respecting religious theory and belief . . . would risk fostering a pervasive bias or hostility to religion” in contravention of “[t]he neutrality commanded of the State by the separate Clauses of the First Amendment.” *Id.* at 845–46. That danger is present here, given that WMATA applies its policy by determining whether an ad submission uses Christmas symbols the agency views as secular or religious. *See supra* pp. 7-9. Indeed, there is nothing inherently religious about the phrase, “Find the Perfect Gift,” but WMATA rejected the Archdiocese’s ad anyway because, based on its own reading of the ad’s symbols and affiliated website, it deemed the ad too religious to satisfy its guidelines. By contrast,

the Salvation Army's ad was accepted because its Christmas symbol and affiliated website were, in WMATA's view, sufficiently secular. *See, e.g.*, Dkt. No. 10, at 19 (noting that "red kettles . . . are secular symbols"); *id.* at 20 ("The website . . . contains no religious references besides the mission statement of the Salvation Army itself."). This alone is a good illustration of the perils *Rosenberger* identified. *See also Grossbaum v. Indianapolis-Marion Cty. Bldg. Auth.*, 63 F.3d 581, 583, 588–92 (7th Cir. 1995) (excluding a menorah from a display because it was a "religious symbol" while including a Christmas tree because it was a "secular . . . symbol" constitutes viewpoint discrimination).

C. The district court upheld WMATA's viewpoint discrimination on the theory that Christmas-related commercial advertisements do not express a message promoting the commercialization of Christmas. Instead, the court believed that the only viewpoint these ads convey is "if you are buying a gift for any reason during the current season, bring your business to us." JA 395-96. But Christmas-related commercial ads, like all commercial ads, are obviously not agnostic as to whether an audience should buy a gift in the first place: in addition to urging viewers to buy a particular product as a Christmas gift, the ads also encourage them to purchase Christmas gifts as a general matter. *Cf. Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 189 (1999) ("[I]t is no doubt fair to assume that more advertising would have some impact on overall demand for gambling."). And if a company can urge an ad's viewers to buy their loved ones material gifts for Christmas, the First Amendment requires that the Archdiocese be

allowed to encourage the same audience “to seek spiritual gifts during this Christmas season” instead. JA 8.

More importantly, nothing in WMATA’s guidelines would preclude an ad that more explicitly addresses Christmas from a material perspective rather than a religious one. For example, an ad proclaiming, “This Christmas, the perfect gift for your family is a particular product,” is facially and fundamentally at odds with the Archdiocese’s view on what constitutes the perfect Christmas gift (and the meaning of the holiday), yet wholly permissible under WMATA’s guidelines. *See supra* p. 7. That state of affairs is indistinguishable from the viewpoint discrimination *Rosenberger* condemned.

Indeed, the Supreme Court has specifically cautioned against upholding speech restrictions that privilege commercial messages over non-commercial messages. *See Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 513 (1981) (plurality opinion) (“Insofar as the city tolerates billboards at all, it cannot choose to limit their content to commercial messages; the city may not conclude that the communication of commercial information concerning goods and services connected with a particular site is of greater value than the communication of noncommercial messages.”); *National Ass’n of Mfrs. v. S.E.C.*, 800 F.3d 518, 521 n.8 (D.C. Cir. 2015) (discussing commercial speech in general). It would be especially odd to privilege commercial speech over religious expression, which may be protected by both the Free Speech Clause and Free Exercise Clause. These overlapping constitutional safeguards underscore the need for courts to

be especially vigilant in policing viewpoint discrimination in contexts such as this one, where religious expression is threatened.

D. The panel that denied the motion for an injunction pending appeal concluded that the Archdiocese was unlikely to succeed on the merits, given the absence of an approved Christmas-related advertisement in the record. JA 577. But there is no need to comb through WMATA’s ads to uncover the constitutional violation here. As discussed, WMATA’s guidelines already permit ads that address Christmas from a non-religious perspective and WMATA throughout this litigation has never denied that it would allow such ads. Discovery on this issue is therefore unnecessary.

In any event, the Salvation Army ad confirms that WMATA has already accepted Christmas-related advertisements. Although the panel apparently concluded that this ad did not show that “WMATA has actually made Christmas or the holiday season a permissible subject of advertising,” JA 577, the Red Kettle featured on that advertisement is a symbol of the Christmas season, as both the district court and WMATA acknowledged. *See* JA 402 (referring to the Red Kettle as “a well-known symbol of the season”); JA 546 (describing the Red Kettle as “a secular symbol of the holiday season”) (quotation marks and brackets omitted). And even the panel itself acknowledged that this ad “encourag[es] donations to [the Salvation Army’s] *seasonal* Red Kettle campaign,” JA 577 (emphasis added), which is simply another way of saying that the ad tells viewers that Christmas is a season for charitable giving. Thus, while WMATA permits messages stating that “Christmas is a time for helping the poor,” it

does not allow the message that “Christmas is a time to worship” or “Christmas is a time during which Catholics are called to serve the poor.” That is enough to establish viewpoint discrimination here.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court’s order denying the Archdiocese’s motion for a preliminary injunction.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rules of Appellate Procedure 29 and 32(a)(7) because it contains 3,330 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2013 in 14-point Garamond font, a proportionally spaced typeface.

/s/ Nicolas Y. Riley

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CERTIFICATE OF SERVICE

I hereby certify that on January 16, 2018, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

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