No. _____

In the Supreme Court of the United States

AMERICAN FREEDOM DEFENSE INITIATIVE, *et al.*,
Petitioners,

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY (WMATA) and PAUL J. WIEDEFELD, in his official capacity as General Manager for WMATA,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ditrict of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The D.C. Circuit's opinion conflicts with this Court's precedent on an issue of exceptional importance: the freedom to express a viewpoint free from government censorship. Additionally, there is conflict in the United States courts of appeals regarding the application of the First Amendment to the display of public-issue advertisements on government transit authority property. This Court's review is warranted.

1. Is the Washington Metropolitan Area Transit Authority's advertising space a public forum for Petitioner's "Support Free Speech" ads such that Respondents' rejection of the ads violates the First Amendment?

2. Regardless of the forum question, is Respondents' rejection of Petitioners' "Support Free Speech" ads unreasonable and viewpoint based in violation of the First Amendment?

PARTIES TO THE PROCEEDING

Petitioners are American Freedom Defense Initiative (AFDI), Pamela Geller, and Robert Spencer (collectively referred to as Petitioners).

Respondents are the Washington Metropolitan Area Transit Authority (WMATA) and Paul J. Wiedefeld, General Manager and Chief Executive Officer for WMATA (collectively referred to as WMATA or Respondents).

RULE 29.6 STATEMENT

Petitioner AFDI is a non-stock, nonprofit corporation. Consequently, it has no parent or publicly held company owning 10% or more of the corporation's stock.

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JURISDICTION

The opinion of the court of appeals affirming in part and reversing in part the judgment of the district court was entered on August 17, 2018. App. 1. A petition for rehearing en banc was denied on October 29, 2018. App. 61, 62. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Free Speech Clause of the First Amendment provides, "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I.

INTRODUCTION

This civil rights lawsuit arises out of Respondents' refusal to display Petitioners' "Support Free Speech" ads on WMATA's advertising space—a forum wholly compatible with Petitioners' form of speech. The principal issue presented is whether Respondents' rejection of Petitioners' ad copy on the basis of the message it conveys is permissible under the First Amendment.

Currently, there is a split in the federal appellate courts regarding the nature of the forum at issue (transit advertising space). The last and only time this

Court addressed the right to freedom of speech in this context was *Lehman v. City of Shaker Heights,* 418 U.S. 298 (1974). Yet, there remains conflict among the circuit courts as to how the forum should be addressed and thus how the First Amendment should apply in this context.

Given the exceptional importance of the free speech rights at stake and the conflict among the circuit courts, review by this Court is warranted.[1]

STATEMENT OF THE CASE

On July 1, 2015, Petitioners filed their Complaint challenging WMATA's speech restrictions under the First and Fourteenth Amendments. Petitioners alleged that WMATA's restrictions are content- and viewpoint-

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[1] Petitioners are not new to legal disputes involving the display of ads on government transit advertising space. *See, e.g., Am. Freedom Def. Initiative v. King Cnty.*, 136 S. Ct. 1022, 1025 (2016) (Thomas, J., joined by Alito, J.) (dissenting from the denial of the petition for writ of certiorari); *Am. Freedom Def. Initiative v. King Cnty.*, 904 F.3d 1126 (9th Cir. 2018) (holding that the County's rejection of AFDI's "Faces of Global Terrorism" ad based on its transit authority's disparagement and disruption standards violated the First Amendment); *Am. Freedom Def. Initiative v. Mass. Bay Transp. Auth.*, 781 F.3d 571, 593 (1st Cir. 2015) (affirming denial of preliminary injunction); *Am. Freedom Def. Initiative v. Suburban Mobility Auth. for Reg'l Transp.*, 698 F.3d 885 (6th Cir. 2012) (reversing grant of preliminary injunction); *Am. Freedom Def. Initiative v. Wash. Metro. Area Transit Auth.*, 898 F. Supp. 2d 73, 78-79 (D.D.C. 2012) (granting injunction for violating the First Amendment); *Am. Freedom Def. Initiative v. Metro. Transp. Auth*., 880 F. Supp. 2d 456 (S.D.N.Y. 2012) (granting injunction for violating the First Amendment); *Am. Freedom Def. Initiative v. Se. Pa. Transp. Auth.*, No. 2:14-cv-5335, 2015 U.S. Dist. LEXIS 29571, (E.D. Pa. Mar. 11, 2015) (granting injunction for violating the First Amendment).

based and that the transit authority' true purpose for adopting the restrictions at issue was to silence the viewpoint expressed by Petitioners' ads in violation of the First Amendment. App. 5.

Additionally, Petitioners alleged that WMATA deprived them of the equal protection of the law by preventing them from expressing a message based on its content and viewpoint, thereby denying the use of a forum to those whose views WMATA finds unacceptable in violation of the Fourteenth Amendment. App. 5. Petitioners sought declaratory and injunctive relief and nominal damages.

On March 28, 2017, the district court granted WMATA's motion for summary judgment and denied Petitioners' cross-motion for summary judgment. App. 44-60. Petitioners appealed.

On August 17, 2018, the D.C. Circuit issued its opinion, affirming in part and reversing in part the district court's decision. The panel held that the forum was a nonpublic forum, it rejected Petitioners' viewpoint discrimination claim, and it remanded the case for the lower court to determine if WMATA's restriction on Petitioners' speech was "reasonable" in light of this Court's ruling in *Minnesota Voters Alliance v. Mansky*, 138 S. Ct. 1876 (2018). App. 1-33.

Upon remand, WMATA moved the district court to stay all proceedings until all appeals are exhausted in the related case of *Archdiocese of Washington v. Washington Metropolitan Area Transit Authority* (D.C.

Cir. Case No. 17-7171).[2] On January 17, 2019, the district court granted WMATA's motion, staying all proceedings "until the final disposition of all appellate proceedings, including of any timely petitions for a writ of certiorari, in *Archdiocese of Washington v. WMATA* (D.C. Cir. No. 17-7171)." (Minute Order of Jan. 17, 2019). Presumably, the Archdiocese of Washington intends to seek review in this Court as well.

STATEMENT OF FACTS

Petitioners are free speech advocates who are challenging WMATA's restraint on their non-commercial, public-issue speech. App. 3.

On May 20, 2015, Petitioners submitted for display on WMATA's advertising space—which was admittedly a public forum at the time[3]—the following advertisements:

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[2] On August 30, 2018, the Archdiocese of Washington filed a petition for rehearing *en banc*, seeking review of the panel's decision upholding WMATA's rejection of the Archdiocese's "Find the Perfect Gift" ad campaign. *See* Pet. for Reh'g En Banc, *Archdiocese of Wash. v. Wash. Metro. Area Transit Auth.,* No. 17-7171, (D.C. Circuit, Aug. 30, 2018). In its petition, the Archdiocese similarly argued that WMATA's speech restriction (Guideline 12) is viewpoint based and unreasonable under this Court's precedent. *See id*. On December 21, 2018, the D.C. Circuit denied the Archdiocese's petition, over the dissent of Circuit Judge Griffith, with whom Circuit Judge Katsas joined. *See* Order Denying Pet. for Reh'g En Banc, *Archdiocese of Wash. v. Wash. Metro. Area Transit Auth.,* No. 17-7171, (D.C. Circuit, Dec. 21, 2018).

[3] *See, e.g., Am. Freedom Def. Initiative v. Wash. Metro. Area Transit Auth.*, 898 F. Supp. 2d 73, 78-79 (D.D.C. 2012) (granting injunction for violating the First Amendment and stating that "WMATA conceded that it provides a public forum for advertising").

App. 46, 47.

The ads contain the slogan "Support Free Speech," and they depict the winning entry of an art contest sponsored by Petitioners.[4] The ads also contain a disclaimer explaining that they are sponsored by AFDI and do "not imply WMATA's endorsement of any view expressed." The first ad was designed for display on WMATA's buses and the second ad was designed for display on WMATA's dioramas. *Id.*; JA-42, 43.

[4] Under the revised guidelines, WMATA permits ads "promoting contests." JA-32, 33, 37 ("2. Advertisers promoting contests shall insure the contest is being conducted with fairness to all entrants and complies with all applicable laws and regulations.").

The ads are not commercial ads, they are not political campaign ads, and they do not mention religion nor are they sponsored by a religious organization. On their face, they advocate for free speech. *See supra*.

To prevent the display of these ads, on May 28, 2015, WMATA hastily passed a moratorium on "issue-oriented" advertising, thereby claiming to close the forum to Petitioners' ads. JA-43, 44, 90. The moratorium "direct[ed] management to close WMATA's advertising space to any and all issue-oriented advertising, including but not limited to, political, religious, and advocacy advertising until the end of the calendar year." JA-32, 34.

WMATA formalized the ongoing rejection of Petitioners' ads by way of a resolution passed on November 19, 2015. This resolution permanently changed the advertising guidelines, and it did so consistent with the moratorium.[5] JA-32, 33, 35-38.

[5] The November 19, 2015 resolution and its guidelines are at issue in this litigation. Not only is the passage of the resolution and its guidelines the continuation of the constitutional harm caused initially by the temporary "moratorium," WMATA itself introduced the resolution into this litigation, making it part of its motion for summary judgment and arguing that it is the basis for denying Petitioners prospective relief. R-19-1 (Defs.' Mem. at 8-11). The D.C. Circuit correctly concluded that Petitioners' challenge is not moot as a result of WMATA's adoption of these guidelines, which are simply a continuation of the harm. App. 7-10.

The revised advertising guidelines prohibit advocacy ads and provide, in relevant part, as follows:

> 9. Advertisements intended to influence members of the public regarding an issue on which there are varying opinions are prohibited.
>
> * * *
>
> 11. Advertisements that support or oppose any political party or candidate are prohibited.
>
> 12. Advertisements that support 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 advertisers are prohibited.

App-5, 6. The guidelines permit both commercial and non-commercial messages.

As argued further below, these are not subject restrictions, they are viewpoint restrictions. The panel improperly conflates the two.

Per the testimony of WMATA's designated witness under Rule 30(b)(6) of the Federal Rules of Civil Procedure, WMATA's basis for rejecting Petitioners' ad copy was because it "advocates free speech and does not try to sell you a commercial product." App. 26; JA-90. There is no express prohibition on "free speech" as a subject matter.

Following remand to the district court, Respondents made it clear that in addition to Guideline 9, WMATA will rely upon Guideline 12 to reject Petitioners' ad copy. *See, e.g.*, App. 66, 67 (stating that "the facts of

this case clearly demonstrate that AFDI's proposed advertisements would be rejected under Guideline 12" and "[t]he advertisements therefore are impermissible under Guideline 12").

We turn now to our argument demonstrating that review is necessary to correct the appellate court's decision in an important First Amendment case and to resolve the circuit split regarding the forum question.

REASONS FOR GRANTING THE PETITION

The D.C. Circuit's decision misapprehends the concept of viewpoint discrimination and is thus contrary to this Court's precedent, including *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993), *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819 (1995), and *Matal v. Tam*, 137 S. Ct. 1744, 1763 (2017). Because WMATA's speech restrictions are viewpoint based, they fail as a matter of law. WMATA's restriction on issue-oriented ads, that is, ads "intended to influence members of the public regarding an issue on which there are varying opinions" also fails as a matter of law under *Minnesota Voters Alliance v. Mansky*, 138 S. Ct. 1876 (2018).

Additionally, there is a split among the federal courts of appeals regarding the application of the First Amendment to the display of public-issue advertisements on government transit authority property.

A split among the federal courts of appeals is among the most important factors in determining whether certiorari should be granted. *See* Sup. Ct. R. 10(a).

Thus, the Court should grant review because this case presents important First Amendment issues that should be resolved definitively by this Court. *See* Sup. Ct. R. 10(c) (providing that review is appropriate when a lower court has "decided an important question of federal law that has not been, but should be, settled by this Court").

We begin with the forum question.

I. THIS COURT SHOULD ADDRESS THE FORUM QUESTION.

A. The Circuit Courts Are Divided on the Application of *Lehman*.

While the challenged restrictions are unlawful regardless of the forum's characterization (as argued further below), Petitioners maintain that the forum is a public forum for their speech. The forum properly characterized is WMATA's advertising space and not simply "public transportation," as the panel incorrectly stated. App. 26; *see Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 801 (1985) ("[F]orum analysis is not completed merely by identifying the government property at issue. Rather, in defining the forum we have focused on the access sought by the speaker.").

The D.C. Circuit disagreed with Petitioners on the forum question, relying on its prior decision in *Archdiocese of Washington* and stating, "AFDI and WMATA differ as to how WMATA's advertising space fits into the forum doctrine. We need not resolve this disagreement, however, because another panel of this circuit recently held the space is a nonpublic forum." App. 13 (citing *Archdiocese of Wash. v. Wash. Metro.*

Area Transit Auth., 897 F.3d 314 (D.C. Cir. 2018)); *see Archdiocese of Wash.*, 897 F.3d at 323 (stating, "[h]aving 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," and relying principally on *Lehman*). The D.C. Circuit is mistaken.[6]

In *Lehman v. City of Shaker Heights,* 418 U.S. 298 (1974), a case in which the city's advertising program had never permitted any political or public-issue advertising, the Court found that the consistently enforced, twenty-six-year ban on political advertising was consistent with the government's role as a proprietor precisely because the government "limit[ed] car card space to innocuous and less controversial commercial and service oriented advertising." *Id*. at 304; *see also Am. Freedom Def. Initiative v. Mass. Bay Transp. Auth.*, 781 F.3d at 591 (dissent) (rejecting the majority's forum analysis and noting that "*Ridley* also proclaimed that the MBTA's advertising program was 'indistinguishable' from the one described in *Lehman*, *id*. at 78, apparently ignoring the fact that the Shaker Heights advertising program in *Lehman had never*

[6] To make matters worse, the Archdiocese conceded the forum question below, making that case a poor vehicle to address this question. *See Archdiocese of Wash. v. Wash. Metro. Area Transit Auth.*, 897 F.3d 314, 322 (D.C. Cir. 2018) ("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.'").

accepted any political or public issue advertising") (emphasis added).

This Court should revisit *Lehman*, a case decided in 1974, in light of the changed circumstances, specifically including the vastly different and evolving advertising environment and the politicization of advertising in general. Moreover, the circuit courts have differed on how *Lehman* should apply in light of the Court's forum jurisprudence. We turn now to these decisions.

A majority of the circuit courts have interpreted *Lehman* to conclude that transportation advertising space was not a public forum when the government "consistently promulgates and enforces policies *restricting advertising on its buses to commercial advertising*." *Children of the Rosary v. City of Phoenix*, 154 F.3d 972, 978 (9th Cir. 1998) (emphasis added).

As the Ninth Circuit observed in *DiLoreto v. Downey Unified School District Board of Education,* 196 F.3d 958 (9th Cir. 1999):

> Government policies and practices that *historically have allowed commercial advertising*, but have excluded political and religious expression, indicate an intent not to designate a public forum for all expressive activity, but to reserve it for commercial speech. . . . However, where the government *historically* has accepted a wide variety of advertising on commercial and non-commercial subjects, courts have found that advertising programs on public property were public fora.

Id. at 965-66 (citing, *inter alia*, *Lehman*) (emphasis added).

Despite this circuit precedent, the Ninth Circuit recently joined the First Circuit in its approach to the forum question. In *Seattle Mideast Awareness Campaign v. King County*, 781 F.3d 489, 498 (9th Cir. 2015), a divided panel held that the County's bus advertising space was a limited public forum[7] even where the transit authority accepted controversial political and public-issue ads. In doing so, the Ninth Circuit acknowledged the circuit split. *See id*. ("We recognize that other courts have held that similar transit advertising programs constitute designated public forums.").

Other federal appeals courts that have addressed this forum question have reached different conclusions, as noted by the Ninth Circuit. *See id*.

The Second Circuit, for example, holds that "[d]isallowing political speech, and *allowing commercial speech only*, indicates that making money is the main goal. Allowing political speech, conversely, evidences a general intent to open a space for discourse, and a deliberate acceptance of the possibility of clashes of opinion and controversy that the Court in *Lehman* recognized as inconsistent with sound commercial practice." *N.Y. Magazine v. Metro. Transp. Auth.*, 136 F.3d 123, 130 (2d Cir. 1998) (holding that the transit authority's advertising space was a designated public forum) (emphasis added); *see also*

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[7] In *American Freedom Defense Initiative v. King County*, 796 F.3d 1165, 1169 n.1 (9th Cir. 2015), the Ninth Circuit stated that in light of this Court's decision in *Walker v. Texas Division, Sons of Confederate Veterans, Inc*., 135 S. Ct. 2239 (2015), "the proper term likely is 'nonpublic forum.' . . . For that reason, we use the term 'nonpublic forum.'"

Am. Freedom Def. Initiative v. Metro. Transp. Auth., 880 F. Supp. 2d 456, 466 (S.D.N.Y. 2012) ("[T]he Court agrees with AFDI that this space is a designated public forum, in which content-based restrictions on expressive activity are subject to strict scrutiny.").

In *Christ's Bride Ministries, Inc. v. Southeastern Pennsylvania Transportation Authority,* 148 F.3d 242, 253 (3d Cir. 1998), the Third Circuit concluded that the transit authority's advertising space was a designated public forum, noting that "the purpose of the forum does not suggest that it is closed, and the breadth of permitted speech points in the opposite direction." *See also Am. Freedom Def. Initiative v. Se. Pa. Transp. Auth.*, No. 2:14-cv-5335, 2015 U.S. Dist. LEXIS 29571, *16 (E.D. Pa. Mar. 11, 2015) (finding "that SEPTA's advertising space constitutes a designated public forum").

In *Planned Parenthood Ass'n/Chicago Area v. Chicago Transit Authority*, 767 F.2d 1225 (7th Cir. 1985), the Seventh Circuit concluded that the transit authority's advertising space was a designated public forum because the transit authority permitted "a wide variety" of commercial and non-commercial advertising.

The Sixth Circuit similarly concluded that a transit authority's property is a designated public forum when it is open to political and public-issue advertisements, observing as follows:

> Acceptance of political and public-issue advertisements, which by their very nature generate conflict, signals a willingness on the part of the government to open the property to

> controversial speech, which the Court in *Lehman* recognized as inconsistent with operating the property solely as a commercial venture.

United Food & Commercial Workers Union, Local 1099 v. Sw. Ohio Reg'l Transit Auth., 163 F.3d 341, 355 (6th Cir. 1998) (hereinafter "*United Food*").

Indeed, in *Lebron v. Washington Metropolitan Area Transit Authority*, 749 F.2d 893, 896 (D.C. Cir. 1984), the court stated, "There is no doubt that the poster at issue here conveys a political message; nor is there a question that WMATA has converted its subway stations into public fora by accepting other political advertising." *See also Am. Freedom Def. Initiative v. Wash. Metro. Area Transit. Auth.*, 898 F. Supp. 2d 73, 78-79 (D.D.C. 2012) ("Since WMATA conceded that it provides a public forum for advertising, the Court considers that aspect of the standard satisfied."). Thus, *historically*, WMATA accepted a wide array of commercial and non-commercial ads, demonstrating that these ads are compatible with the forum.

The First and the Ninth Circuits support their forum conclusion based upon a faulty rationale. As stated by the Ninth Circuit: "Municipalities faced with the prospect of having to accept virtually all political speech if they accept any—regardless of the level of disruption caused—will simply close the forum to political speech altogether. First Amendment interests would not be furthered by putting municipalities to that all-or-nothing choice. Doing so would 'result in less speech, not more'—exactly what the Court's public forum precedents seek to avoid." *Seattle Mideast Awareness Campaign*, 781 F.3d at 499 (citation

omitted); *see also Ridley*, 390 F.3d at 81 (stating that "the MBTA is not to be put to an 'all-or-nothing choice'") (citation omitted).

This reasoning is fundamentally flawed because it permits the government to pick and choose which "political speech" it deems acceptable, thereby doing more harm to the First Amendment and its role as a brake on the government's power to censor speech than closing the forum altogether. In short, the First Amendment is not concerned about the quantity of speech (*i.e.*, "result in less speech, not more"). Rather, its objective is to prevent government officials from being the arbiters of acceptable speech. The First and Ninth Circuits' reasoning thus opens a forum for certain non-commercial speech (and speakers) which the government favors by permitting government officials to make content-based restrictions based on nothing more than "reasonableness." Thus, rather than restricting government censorship of speech (the goal of the First Amendment), these decisions grant the government broader powers of censorship. *Southeastern Promotions, Ltd. v. Conrad,* 420 U.S. 546, 553 (1975) ("[T]he danger of censorship and of abridgment of our precious First Amendment freedoms is too great where officials have unbridled discretion over a forum's use.").

In the final analysis, the circuit courts are split on the question of whether a government transit authority creates a public forum for speech when it opens its advertising space to non-commercial ads. This Court should resolve this circuit split—a division that has serious implications for the First Amendment.

B. WMATA's Advertising Space Is a Public Forum for Petitioners' Speech.

A public forum exists when the government intentionally opens its property for expressive activity. *Perry Educ. Ass'n v. Perry Local Educators*, 460 U.S. 37, 45 (1983). "[A] public forum may be created by government designation of a place or channel of communication for use by the public at large for assembly and speech, *for use by certain speakers*, or *for the discussion of certain subjects*." *Cornelius*, 473 U.S. at 802 (emphasis added).

Under this definition and accepting, *arguendo*, that WMATA's moratorium and subsequently revised guidelines are constitutional, its advertising space remains a public forum for Petitioners' speech. The advertising space remains open for certain speakers, such as Petitioners (persons willing to pay for advertising). And, as demonstrated below, the subject (or "topic") of Petitioners' ads (support free speech) is not excluded. Consequently, to restrict Petitioners' ads based on content requires WMATA to satisfy strict scrutiny, *id*. at 800, which it cannot, and WMATA never argued that it could.[8]

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[8] The restrictions on Petitioners' speech also operate as a prior restraint and thus WMATA must carry a "heavy burden of showing justification for the imposition of such a restraint," as demonstrated by the opinion of then-Circuit Judge Bork in *Lebron v. Washington Metropolitan Area Transit Authority*, 749 F.2d 893, 896 (D.C. Cir. 1984) (holding that the refusal to display the poster "because of its content is a clearcut prior restraint"; therefore, "WMATA carries a heavy burden of showing justification for the imposition of such a restraint") (internal quotations and citation omitted); *Am. Freedom Def. Initiative v. Wash. Metro. Area Transit Auth*., 898 F. Supp. 2d 73, 79 (D.D.C. 2012) ("WMATA imposed a

While speech restrictions in traditional[9] and designated public forums are subject to the same heightened level of scrutiny,[10] it is a mistake to conflate the two forums. *See Am. Freedom Def. Initiative v. Mass. Bay Transp. Auth.*, 781 F.3d 571, 593 (1st Cir. 2015) (dissent) ("Building a constitutional framework around a category as rigid as 'traditional public forum' leaves courts ill-equipped to protect First Amendment expression in times of fast-changing technology and increasing insularity."). Indeed, the D.C. Circuit's approach to the forum analysis essentially does away with the designated public forum as a category and replaces it with the nonpublic forum.

In a nonpublic forum, speech restrictions need only be reasonable and viewpoint neutral, *Perry Educ. Ass'n*, 460 U.S. at 46, thereby granting the government "almost unlimited authority to restrict speech on its property." *See Am. Freedom Def. Initiative v. Mass.*

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prior restraint because it prevented Petitioners from displaying their ad in WMATA stations; a prior restraint 'bear[s] a heavy presumption against its constitutional validity.'") (citation omitted).

[9] Public streets, sidewalks, and parks are typical examples of traditional public forums. *See Hague v. CIO*, 307 U.S. 496, 515 (1939).

[10] *Cornelius*, 473 U.S. at 800 ("[S]peakers can be excluded from a public forum only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest. . . . Similarly, when the government has intentionally designated a place or means of communication as a public forum speakers cannot be excluded without a compelling government interest.").

Bay Transp. Auth., 781 F.3d at 592 (dissent) (quoting *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 695 (1992) (Kennedy, J., concurring in the judgments)).

But a forum analysis should not end simply because the government transit authority has adopted some restrictions on speech or employed these restrictions to reject certain advertisements. As stated by the Second Circuit:

> [I]t cannot be true that if the government excludes any category of speech from a forum through a rule or standard, that forum becomes *ipso facto* a non-public forum, such that we would examine the exclusion of the category only for reasonableness. This reasoning would allow every designated public forum to be converted into a non-public forum the moment the government did what is supposed to be impermissible in a designated public forum, which is to exclude speech based on content.

N.Y. Magazine, 136 F.3d 129-30.

Additionally, it is incorrect to conclude that WMATA's restrictions are restrictions on an ad's subject matter (such as restrictions on advertisements for alcohol, tobacco, or political candidates) which might reasonably lead a court to conclude that this forum is closed to non-commercial speech. Rather, the restrictions, particularly as applied in this case, are viewpoint restrictions. *See infra*. At a minimum, they certainly *allow for* viewpoint discrimination, as evidenced here, and this alone is sufficient to render the advertising guidelines unconstitutional. *See*

Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 829 (1995) (observing that "[v]iewpoint discrimination is thus an egregious form of content discrimination" that is prohibited "even when the limited public forum is one of [the government's] own creation"); *Perry Educ. Ass'n,* 460 U.S. at 46 (stating that in a nonpublic forum, 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"). This argument is set forth more fully below in Section II.

In sum, it is without question that the nature of the property is compatible with Petitioners' expressive activity. *See Ridley*, 390 F.3d 76-77 ("As to the nature of the property, the MBTA does run advertisements and so there is nothing inherent in the property which precludes its use for some expressive activity."). And it is undisputed that the advertising guidelines do not prohibit non-commercial speech, as evidenced by the fact that the Salvation Army was permitted to run its ad campaign. *See Archdiocese of Wash.*, 897 F.3d at 329 ("WMATA accepted the ad of the Salvation Army, a religious organization whose ad exhorted giving to charity but contained only non-religious imagery."). Because the forum is wholly suitable for Petitioners' speech, including its subject matter, it is a public forum for Petitioners' ads.[11]

[11] Concluding that the forum is a public forum does not necessarily mean that WMATA is without any authority to make certain subject matter restrictions, such as restrictions on advertisements for tobacco sales, pornography, or political campaigns. *Cornelius*, 473 U.S. at 802 ("[A] public forum may be created . . . for use by

C. The Court's Forum Analysis Framework Is Unworkable for Transit Advertising Space.

At times, the courts have described transit advertising space as a "limited public forum." *See*, *e.g.*, *Seattle Mideast Awareness Campaign*, 781 F.3d at 498. Unfortunately, nonpublic and limited public forums are often used interchangeably since the same standard is typically applied to both. This blurred and confused distinction, which results in the blending of the two forums, is a mistake, and it operates in a way that favors the government and disfavors the First Amendment. For example, a federal courtroom is clearly a nonpublic forum—its characteristics are significantly different and thus distinguishable from a government transit authority's advertising space in which the government allows private speakers to express an array of messages.

To argue that the two forums should be treated the same under the law is to treat the First Amendment as a simple inconvenience for the government rather than a fundamental liberty interest that is the foundation of our constitutional Republic. A limited public forum (a forum in which the government allows some speech), such as a transit authority's advertising space, should be treated as a subcategory of a designated public forum, applying the heightened standard for that

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certain speakers, or for the discussion of certain subjects."). However, "if the concept of a designated open forum is to retain any vitality whatever, the definition of the standards for inclusion and exclusion must be unambiguous and definite." *Gregoire v. Centennial Sch. Dist.*, 907 F.2d 1366, 1375 (3d Cir. 1990). WMATA's advertising guidelines do not meet this standard.

forum, rather than as a nonpublic forum in which free speech takes a back seat (pun intended).

The dissenting Circuit Judge in *American Freedom Defense Initiative v. Massachusetts Bay Transportation Authority*, 781 F.3d 571 (1st Cir. 2015), "highlights [this] weakness in the current forum analysis framework,

> in that it can allow the government's own self-serving statements about its intended use for a public place to outweigh the forum's inherent attributes. As Justice Kennedy has observed in the past, if "public forum jurisprudence is to retain vitality, we must recognize that certain objective characteristics of Government property and its customary use by the public may control the case." *United States v. Kokinda*, 497 U.S. 720, 737-38 (1990) (Kennedy, J., concurring in the judgment). By relying primarily on "the government's defined purpose for the property" rather than on "the actual, physical characteristics and uses of the property," the mode of forum analysis embraced in *Ridley* "leaves the government with almost unlimited authority to restrict speech on its property by doing nothing more than articulating a nonspeech-related purpose for the area." *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 695 (1992) (Kennedy, J., concurring in the judgments). Building a constitutional framework around a category as rigid as "traditional public forum" leaves courts ill-equipped to protect First Amendment expression "in times of fast-changing technology and

> increasing insularity." *Id*. at 697-98 (observing that "our failure to recognize the possibility that new types of government property may be appropriate forums for speech will lead to a serious curtailment of our expressive activity").
>
> *Ridley* exemplifies Justice Kennedy's concerns, in that its analysis relied heavily on the MBTA's attempts to control speech on its property through its advertising guidelines, 390 F.3d at 76-82, but only cursorily examined the forum's characteristics and compatibility with expressive activity, *id*. at 77. By doing so, the *Ridley* majority ignored the indisputable fact that, like an airport, a public transit system is "one of the few government-owned spaces where many persons have extensive contact with other members of the public." *Int'l Soc'y for Krishna Consciousness*, 505 U.S. at 698 (Kennedy, J., concurring in the judgments). Such unique suitability for open discourse between citizens is indicative of a public, rather than a private, forum. *Cf. McCullen*, 134 S. Ct. at 2529 (observing that public streets "remain one of the few places where a speaker can be confident that he is not simply preaching to the choir" because members of the public cannot avoid "uncomfortable message[s]," which the First Amendment regards as "a virtue, not a vice").

Am. Freedom Def. Initiative, 781 F.3d at 592-93 (Stahl, J., dissenting).

In short, a proper forum analysis—one that protects the First Amendment and does not undermine its protections—would conclude that WMATA's

advertising space is a public forum for Petitioners' speech. "[T]he actual, physical characteristics and uses of the property" support this conclusion.[12]

This argument leads further to the conclusion that treating the forum at issue as a nonpublic forum to exclude Petitioners' speech is unreasonable.

D. It Is Unreasonable to Exclude Petitioners' Speech from this Forum.

Reasonableness is evaluated "in light of the purpose of the forum and all the surrounding circumstances." *Cornelius*, 473 U.S. at 809. "Consideration of a forum's special attributes is relevant to the constitutionality of a regulation since the significance of the governmental interest must be assessed in light of the characteristic nature and function of the particular forum involved." *Christ's Bride Ministries, Inc. v. Se. Pa. Transp. Auth.*, 148 F.3d 242, 255 (3d Cir. 1998) (block quotation and citation omitted). Thus, "the reasonableness of the government's restriction on speech depends on the nature and purpose of the property for which it is barred." *Id.*; *see NAACP v. City of Phila.*, 39 F. Supp. 3d 611, 630 (E.D. Pa. 2014) (holding that the prohibition on non-commercial ads at the Philadelphia International Airport—a nonpublic forum—was "unreasonable" in that displaying such ads was "perfectly compatible" with the forum); *NAACP v. City of Phila.*, 834 F.3d 435 (3d Cir. 2016) (same).

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[12] Indeed, the government could convert a public forum into a nonpublic forum by shutting down all private speech, but that is not what WMATA is trying to do here.

WMATA's forum was unquestionably a public forum at the time Petitioners' ads were submitted, App. 51, and there is no dispute that Petitioners' form of speech (their ads) is perfectly compatible with this forum, JA-75, 76 (conceding that at the time Petitioners' ads were submitted, there was "no reason to reject" them). WMATA has previously displayed Petitioners' ads on their property, and these ads generated $65,200 in revenue for the transit authority. JA-109.

Thus, it is unreasonable to argue that an "issue-oriented" ad displayed on the outside of a bus traveling through our nation's capital (or posted on a diorama at a bus station in the city) where passengers and outside observers are confronted daily with expressive, and quite often political and controversial, media would somehow interfere with the operation of WMATA's transit system. For many decades WMATA displayed controversial, public-issue ads. *See Lebron*, 749 F.2d at 896. And, as WMATA notes, since Washington, D.C. is the seat of our federal government, its "market is distinct in the amount of issue-oriented advertising." JA-79. Moreover, it is an "indisputable fact that, like an airport, a public transit system is one of the few government-owned spaces where many persons have extensive contact with other members of the public" and thus there is "unique suitability" for the speech that WMATA seeks to censor here. *Am. Freedom Def. Initiative*, 781 F.3d at 592-93 (Stahl, J., dissenting). In sum, even if it were a nonpublic forum, WMATA's advertising space is the very place these types of ads should be (have been and can be) displayed—it is unreasonable to say otherwise. *See NAACP v. City of Phila.*, 834 F.3d at 437.

Finally, the government's ability to allegedly "close" a forum for protected speech should not be without constitutional limits. *Cornelius*, 473 U.S. at 811 ("The existence of reasonable grounds for limiting access to a nonpublic forum . . . will not save a regulation that is in reality a facade for viewpoint-based discrimination."); *United States v. Griefen*, 200 F.3d 1256, 1265 (9th Cir. 2000) ("Should it appear that the true purpose of . . . an order [closing a forum] was to silence disfavored speech or speakers . . . , the federal courts are capable of taking prompt and measurably appropriate action."); *Coleman v. Ann Arbor Transp. Auth.*, 947 F. Supp. 2d 777, 788 (E.D. Mich. 2013) ("It is true that changes to a forum motivated by actual viewpoint discrimination may well limit the government's freedom of action."); *see also Ridley v. Mass. Bay Transp. Auth.*, 390 F.3d 65, 77 (1st Cir. 2004) (upholding policy change regarding the forum, noting that "the MBTA acted in response to expressed constitutional concerns about its prior guidelines" and finding that "[t]here is no evidence that the 2003 changes were adopted as a mere pretext to reject plaintiff's advertisements").

WMATA didn't issue its "moratorium" or adopt new guidelines in response to any expressed constitutional concerns. Rather, the evidence demonstrates that WMATA acted in response to the submission of Petitioners' ads—ads which WMATA officials were determined to prevent from running in their advertising space.

At the end of the day, WMATA's advertising space is a public forum for Petitioners' speech, and any restriction on the content of Petitioners' speech should

be subject to strict scrutiny. *Cornelius*, 473 U.S. at 800. Regardless, WMATA's restrictions on Petitioners' speech are viewpoint-based and unreasonable and thus unlawful under the First Amendment irrespective of the forum's characterization.

We turn now to the viewpoint and reasonableness arguments.

II. WMATA'S SPEECH RESTRICTIONS ARE VIEWPOINT BASED AND UNREASONABLE.

A. Viewpoint Discrimination.

Viewpoint discrimination is an egregious form of content discrimination that is prohibited in all forums. *See Rosenberger*, 515 U.S. at 829; *Lamb's Chapel*, 508 U.S. at 394 ("[T]he First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.") (internal quotations and citation omitted); *see also Pitt. League of Young Voters Educ. Fund v. Port Auth. of Allegheny Cnty.*, 653 F.3d 290, 296 (3d Cir. 2011) ("Regardless of whether the advertising space is a public or nonpublic forum, the coalition is entitled to relief because it has established viewpoint discrimination.").

Viewpoint discrimination occurs when, as here, the "rationale for the restriction" is "the specific motivating ideology or the opinion or perspective of the speaker." *Rosenberger*, 515 U.S. at 829 (emphasis added). Thus, the government acts unconstitutionally even when it adopts an apparently evenhanded rule excluding expression on its property if it acts with a motive to discourage or suppress a particular opinion. *See id.* And "[t]he existence of reasonable grounds for limiting access to a nonpublic forum . . . will not save a

regulation that is in reality a facade for viewpoint-based discrimination." *Cornelius*, 473 U.S. at 811.

WMATA's restrictions on Petitioners' ads, first under the "moratorium" and then continuing as result of the revised guidelines, are facially viewpoint based. "When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant." *Rosenberger*, 515 U.S. at 829 (emphasis added). Silencing multiple viewpoints, whether religious or political or otherwise, does not make the restriction less viewpoint based; it makes it more so. *Id*. at 831-32 ("The dissent's assertion that no viewpoint discrimination occurs because the Guidelines discriminate against an entire class of viewpoints reflects an insupportable assumption that all debate is bipolar and that antireligious speech is the only response to religious speech. . . . The dissent's declaration that debate is not skewed so long as multiple voices are silenced is simply wrong; the debate is skewed in multiple ways.").

A simple example illustrates the point. An advertisement on an acceptable subject matter (the sale of contraception, for example) will be accepted so long as it does not express a religious, or political, or some other vague "advocacy" or "issue-oriented" viewpoint. Consequently, an advertiser may strongly promote the sale (and thus use) of contraception, but an ad that opposes the sale (and use) of contraception on religious grounds will be rejected. The subject matter of both ads is contraception. The rejection of the second ad is viewpoint based. As this Court's precedent makes plain, viewpoint discrimination occurs

when the government "denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject." *Cornelius*, 473 U.S. at 806.

Archdiocese of Washington further illustrates in a concrete way why the challenged guidelines are not permissible subject matter restrictions but impermissible restrictions on a speaker's viewpoint. Ads promoting charitable works are acceptable (WMATA accepted an ad from the Salvation Army), but not if the subject is from a religious viewpoint (WMATA rejected the Archdiocese's "Find the Perfect Gift" ad). *See Archdiocese of Wash.*, 897 F.3d 314.

The revised guidelines, which clarified what WMATA meant by an "issue-oriented" ad in its moratorium, are viewpoint-based restrictions on their face. Per these guidelines, "[a]dvertisements intended to influence members of the public regarding an issue on which there are varying opinions are prohibited." However, members of the public have varying opinions on gambling, contraception, and the military, among others. But these "subjects" are not excluded. Indeed, the guideline stating, "[a]dvertisements that support or oppose an industry position or industry goal without any direct commercial benefit to the advertisers are prohibited" is overtly viewpoint-based. One need not comprehend the subtleties of viewpoint discrimination to recognize that this restriction is blatant viewpoint discrimination. By this standard, an ad, the motivation for which is profit on a given subject, is permitted, but the same ad motivated by principle or morality is not. *Rosenberger*, 515 U.S. at 829 (explaining that viewpoint discrimination occurs when

"the specific motivating ideology or the opinion or perspective of the speaker" is determinative) (emphasis added).

Moreover, religion as a "subject" is not expressly excluded. However, "[a]dvertisements that support or oppose any religion, religious practice or belief are prohibited." Consequently, while religion as a "topic" is permitted, religious viewpoints are banned, as *Archdiocese of Washington* illustrates. And as Petitioners' argued below, a commercial advertiser could run an ad promoting a certain product, but not if the very same product is promoted because it is Kosher (the ad would then be promoting a religious practice or belief). This is viewpoint discrimination. *See 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."). The panel was wrong to conclude otherwise. App. 14-26 (finding no viewpoint discrimination).

WMATA rejected Petitioners' ad based on a claim that it was "issue oriented" — "it advocates free speech and does not try to sell you a commercial product." App. 26; JA-90. Consequently, under the revised guidelines, the only plausible restriction is number 9, which states, "[a]dvertisements intended to influence members of the public regarding an issue on which there are varying opinions are prohibited." Thus, because some undefined number of people oppose a particular opinion based solely upon the judgment of WMATA's censors, that is a sufficient reason to reject an ad that advocates that opinion. Per the guidelines,

if everyone agrees with the opinion, then there is no basis to reject the ad. And once again, this is not a subject matter restriction on its face—it is a patent viewpoint-based restriction. If the government believes an opinion or viewpoint is so fully accepted by the public that it is either undisputed or indisputable, it is acceptable ad copy. But if the censors believe it is a viewpoint in dispute, they reject it. In short, WMATA seeks to create for itself the ability to decide what is acceptable speech based upon its view of the acceptance of a given viewpoint. This is precisely the kind of government censorship the First Amendment was designed to prohibit. *See supra*.

Here is where *Matal v. Tam* becomes relevant.[13] In *Matal*, Simon Tam, the lead singer of the rock group, "The Slants," sought federal registration of the mark "THE SLANTS." The Patent and Trademark Office denied the application under a Lanham Act provision that prohibited the registration of trademarks that

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[13] The D.C. Circuit rejected the application of *Tam* in this context (transit advertising). *See* App. 13 ("The relevance of a case in which the Supreme Court did not engage in a forum analysis at all escapes us; *Matal* did not discuss forum doctrine in any depth because *Matal* dealt not with the Government permitting speech on government property but with government protection of speech from commercial infringement. Apart from the quoted statement cited above, all AFDI's references to *Matal* invoke Justice Kennedy's concurrence, which of course did not speak for the Court."). However, the Ninth Circuit expressly relied on *Tam* to conclude that a government transit authority violated the First Amendment by applying a viewpoint-based guideline to restrict the display of an ad. *See Am. Freedom Def. Initiative v. King Cty.*, 904 F.3d 1126, 1128 (9th Cir. 2018) ("Applying *Matal v. Tam*, 137 S. Ct. 1744 (2017), we hold that the County's disparagement standard discriminates, on its face, on the basis of viewpoint.").

may "disparage . . . or bring . . . into contemp[t] or disrepute" any "person, living or dead." 15 U.S.C. § 1052(a). Tam appealed the denial of the registration through the administrative appeal process, to no avail. He then filed an action in federal court, where the en banc Federal Circuit ultimately held that the disparagement clause was facially unconstitutional because the provision engages in viewpoint discrimination. The Court affirmed unanimously, stating: "We now hold that this provision violates the Free Speech Clause of the First Amendment. It offends a bedrock First Amendment principle: Speech may not be banned on the ground that it expresses ideas that offend." *Id*. at 1751.

Justice Kennedy's concurrence (joined by Justices Ginsburg, Sotomayor, and Kagan) is particularly relevant. Justice Kennedy begins by affirming the Court's decision and explaining his further treatment of the First Amendment issue. *See id*. at 1765 (Kennedy, J., concurring) ("This separate writing explains in greater detail why the First Amendment's protections against viewpoint discrimination apply to the trademark here. It submits further that the viewpoint discrimination rationale renders unnecessary any extended treatment of other questions raised by the parties."). The concurrence lays bare the Government's argument that the speech restriction is viewpoint neutral:

> The First Amendment's viewpoint neutrality principle protects more than the right to identify with a particular side. It protects the right to create and present arguments for particular positions in particular ways, as the speaker

> chooses. . . . The Government may not insulate a law from charges of viewpoint discrimination by tying censorship to the reaction of the speaker's audience.[14] The Court has suggested that viewpoint discrimination occurs when the government intends to suppress a speaker's beliefs, . . . but viewpoint discrimination need not take that form in every instance. The danger of viewpoint discrimination is that the government is attempting to remove certain ideas or perspectives from a broader debate. . . .

Id. at 1766-67 (Kennedy, J., concurring) (emphasis added). That is precisely what WMATA's restrictions do here. They discriminate on the basis of viewpoint by rejecting certain opinions (as opposed to subject matter).

B. Reasonableness.

In addition to the viewpoint-neutrality requirement, a speech restriction in a nonpublic forum must be reasonable. In *Minnesota Voters Alliance v. Mansky*, 138 S. Ct. 1876 (2018), the Court held that in order for a speech restriction in a nonpublic forum to satisfy the "reasonableness" requirement, government officials enforcing the restriction must be "guided by objective, workable standards." *Id*. at 1891. Because the unqualified ban on "political" apparel at issue in that case did not provide the requisite standards, it was unreasonable in violation of the First Amendment. *Id*.

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[14] WMATA's determination as to whether there are "varying opinions" on a subject is necessarily tying censorship to the reaction of the speaker's audience. *See* Guideline 9, *supra*.

As noted, the only plausible guideline applicable to restrict Petitioners' speech is WMATA's guideline that prohibits "[a]dvertisements intended to influence members of the public regarding an issue on which there are varying opinions." Similar to the restriction held unconstitutional in *Mansky*, this restriction is hopelessly vague and lacks any "objective, workable standard" to guide the discretion of WMATA's speech censors. A previous example suffices to make this point: a purely commercial ad seeking to influence the public to purchase contraception. This ad certainly seeks to influence the public on an issue on which there are varying opinions. If we modify the ad to promote the sale of a Toyota automobile, the same problem arises. What of the public's view that one should move away from fossil fuel products or that foreign imports have destroyed domestic manufacturing? What advertisement in today's highly politicized world would not run afoul of the literal prohibition against "advocacy" ads? And even without a politicized world, what of the public's view that a Toyota automobile is not a good value and that one should purchase a Honda instead? Indeed, all ads by their very nature are "advocacy" ads to some degree. Certainly, the Salvation Army ad already accepted by WMATA raises serious religious "advocacy" issues (*i.e.*, the public should consider donating to the Salvation Army notwithstanding the view by those who oppose organized religion in any form) and even policy issues relating to whether donations to religious charitable organizations should be allowed as a federal tax deduction.

In effect, what WMATA is attempting here is to assume the governmental authority to decide which

viewpoints are acceptable to the public and which are too contested to be given voice. As this Court has noted, "[a] government regulation that allows arbitrary application . . . has the potential for becoming a means of suppressing a particular point of view." *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 130 (1992). In this case, the potential is actual. WMATA's restriction on Petitioners' speech is unreasonable as a matter of law. *See Mansky*, 138 S. Ct. at 1891; *see also United Food,* 163 F.3d at 359 ("The absence of clear standards guiding the discretion of the public official vested with the authority to enforce the enactment invites abuse by enabling the official to administer the policy on the basis of impermissible factors.").

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued November 20, 2017 Decided August 17, 2018

No. 17-7059

AMERICAN FREEDOM DEFENSE INITIATIVE, ET AL.,
APPELLANTS

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY, WMATA AND PAUL J. WIEDEFELD, IN HIS OFFICIAL CAPACITY AS GENERAL MANAGER FOR WMATA,
APPELLEES

Appeal from the United States District Court
for the District of Columbia
(No. 1:15-cv-01038)

Robert J. Muise argued the cause for appellants. With him on the briefs was *David Yerushalmi*.

Donald B. Verrilli, Jr. argued the cause for appellees. With him on the briefs were *Chad I. Golder*, *Jonathan S. Meltzer*, *Patricia Y. Lee*, *Gerard J. Stief*, and *Rex S. Heinke*.

Before: HENDERSON and SRINIVASAN, *Circuit Judges*, and GINSBURG, *Senior Circuit Judge*.

Opinion for the Court filed by *Senior Circuit Judge* GINSBURG.

Dissenting opinion filed by *Circuit Judge* HENDERSON.

GINSBURG, *Senior Circuit Judge*: The American Freedom Defense Initiative (AFDI), Pamela Geller, and Robert Spencer,[1] sought to run advertisements in Metrorail stations and on Metrobuses in the Washington, D.C. area. The Washington Metropolitan Area Transit Authority (WMATA) refused the advertisements because they violated a then-recently adopted moratorium on issue-oriented advertising in the Metro system. AFDI sued both WMATA and its then-general manager, Jack Requa,[2] claiming WMATA's refusal to display its advertisements violated its rights to free speech and equal protection under the First and Fourteenth Amendments to the Constitution of the United States. The district court granted summary judgment on behalf of WMATA, which we affirm in part and reverse in part.

I. Background

WMATA, which was created by an interstate compact among the District of Columbia, Maryland, and Virginia, operates the Metrorail and Metrobus services that provide Washington-area residents with the majority of their public transit options. D.C. CODE

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[1] For the sake of brevity, we refer to the plaintiffs collectively as AFDI.

[2] Requa is no longer WMATA's general manager; Paul Wiedefeld, the new general manager, has taken his place as a defendant.

§ 9-1107.01. Relevant to this litigation, WMATA permits advertising throughout the Metro system; specifically, Metrobuses display advertisements on their exteriors, and the Metrorail stations contain advertising "dioramas."

AFDI describes itself as "a nonprofit organization ... dedicated to freedom of speech, freedom of conscience, freedom of religion, and individual rights." It "promotes its objectives by ... purchasing advertising space on transit authority property ... to express its message on current events and public issues, including issues involving the suppression of free speech by Sharia-adherent Islamists and complicit government officials." It was in furtherance of this mission that AFDI wanted to advertise in the Metro system in May 2015.

AFDI submitted two advertisements, identical in content, one to be displayed on the exteriors of Metrobuses and the other meant for Metrorail station dioramas. The advertisements depict a turbaned, bearded, sword-wielding man who is apparently meant to be the Prophet Muhammad. A speech bubble emerging from the man's mouth contains the sentence "YOU CAN'T DRAW ME!" Below the man is a disembodied hand, paler in color, holding either a pen or a pencil pressed to paper. From the hand comes a speech bubble reading "THAT'S WHY I DRAW YOU." The phrase "SUPPORT FREE SPEECH" appears at the top of the advertisements. According to AFDI's complaint, the advertisements "make the point that the First Amendment will not yield to Sharia-adherent Islamists who want to enforce so-called blasphemy laws here in the United States, whether through threats of violence or through the actions of complicit government officials."

When WMATA began accepting advertising in the 1970s, it accepted issue-oriented advertisements, including political, religious, and other advocacy. According to the uncontested testimony of Lynn Bowersox, WMATA's Assistant General Manager for Customer Service, Communications, and Marketing, WMATA had dealt with controversies surrounding issue-oriented advertisements for much of the 1980s and 1990s. In the early 2010s, however, the controversies grew, with monthly complaints over advertisements that disrespected President Obama, depicted animal cruelty, advocated the use of condoms to prevent sexually-transmitted diseases, and supported the legalization of marijuana. By the time AFDI submitted the advertisements at issue in this case, WMATA's leadership had spent "nearly 5 years of looking at" the question whether to permit issue-oriented advertisements.

AFDI submitted its advertisements in May 2015. Not long thereafter, Ms. Bowersox directed her staff to prepare a memorandum detailing WMATA's history with AFDI. Additionally, Mr. Mort Downey, then Chairman of WMATA's Board, sent Ms. Bowersox an email message to which he attached an article about a recent shooting in Garland, Texas linked to the advertisements AFDI wanted to run on the Metro system; he asked Ms. Bowersox to be prepared to discuss it at the May meeting of the Board. Ms. Bowersox also prepared for the executive session of the board meeting a memorandum advocating the closure of WMATA's advertising space to issue-oriented advertising. In her deposition, Ms. Bowersox allowed as how AFDI's submission was "the straw that broke the camel's back" and prompted her to recommend

WMATA temporarily refuse to run issue-oriented advertisements.

The consensus among members of the Board at the executive session was to accept Ms. Bowersox's recommendation of a temporary moratorium on issue-oriented advertisements, which by its terms "close[d] WMATA's advertising space to any and all issue-oriented advertising, including but not limited to, political, religious and advocacy advertising until the end of the calendar year." No member of the Board mentioned AFDI's advertisements; the only specific advertisements mentioned were either "talking about open skies agreements with certain Mid-East countries" or detailing "animal experimentation practices at some of our national science institutes." With the Moratorium in place, WMATA rejected AFDI's proposed advertisements.

In July 2015, AFDI sued, claiming WMATA's "restriction on [AFDI's] speech [was] content- and viewpoint-based in violation of the Free Speech Clause of the First Amendment" and WMATA's "true purpose for adopting the [Moratorium] was to silence the viewpoint expressed by [AFDI's] speech." For the same reasons AFDI claimed WMATA's actions deprived it of equal protection under the law, in violation of the Fourteenth Amendment.

WMATA did not sit idly by during the pendency of this litigation. In November 2015, it rescinded the Moratorium and adopted a series of "Guidelines Governing Commercial Advertising," the relevant parts of which provide:

> 9. Advertisements intended to influence members of the public regarding an issue on which there are varying opinions 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 direct commercial benefit to the advertiser are prohibited.

AFDI did not amend its complaint to take account of the new Guidelines; its complaint still challenges only the Moratorium, which is no longer in place. Neither did it resubmit to WMATA the previously rejected advertisements for reconsideration under the Guidelines.

The district court granted WMATA's motion for summary judgment. *AFDI v. WMATA*, 245 F. Supp. 3d 205 (D.D.C. 2017). First, the court determined WMATA's advertising space was a nonpublic forum once the Moratorium came into effect. *Id.* at 210-11. Speech-restrictive actions in a nonpublic forum must be both viewpoint neutral and reasonable, *see Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106-07 (2001), and the district court concluded WMATA's restrictions were both. *See WMATA*, 245 F. Supp. 3d at 211-13. The district court also held neither the Moratorium nor the Guidelines were unconstitutionally vague. *Id.* at 213-14.

II. Analysis

Because AFDI did not amend its complaint, we face at the outset a jurisdictional question: Did the repeal of the Moratorium moot this case? We conclude it did not. Though the district court did not address mootness, "we have an independent obligation to assure ourselves of jurisdiction." *Am. Council of Life Insurers v. D.C. Health Benefit Exch. Auth.*, 815 F.3d 17, 19 (D.C. Cir. 2016) (internal quotation marks omitted).

A. Justiciability

We are acutely aware that "Article III of the Constitution restricts the federal courts to deciding only actual, ongoing controversies, and a federal court has no power to render advisory opinions or decide questions that cannot affect the rights of litigants in the case before them." *Nat'l Black Police Ass'n v. Dist. of Columbia*, 108 F.3d 346, 349 (D.C. Cir. 1997) (cleaned up). Though a plaintiff's claim may be justiciable when filed, "a federal court must refrain from deciding it if events have so transpired that the decision will neither presently affect the parties' rights nor have a more-than-speculative chance of affecting them in the future." *Initiative & Referendum Inst.* (*IRI*) *v. USPS*, 685 F.3d 1066, 1074 (D.C. Cir. 2012) (internal quotation marks omitted). At first blush, that is what seems to have happened here. AFDI's complaint seeks injunctive and declaratory relief only against the Moratorium, but the Moratorium was replaced by the Guidelines in November 2015. There seems little point in enjoining the enforcement of a moratorium that is no longer in place.

Here, however, "[t]he intervening event . . . is of the [defendant]'s own doing." *IRI*, 685 F.3d at 1074. When this occurs, we examine whether the defendant's voluntary cessation of the challenged action truly renders the case moot. *Id.* Generally it does not unless "(1) there is no reasonable expectation that the alleged violation will recur, and (2) interim relief or events have completely or irrevocably eradicated the effects of the alleged violation." *Nat'l Black Police Ass'n*, 108 F.3d at 349 (cleaned up).

This, however, is not a mine-run case of voluntary cessation. WMATA did repeal the challenged Moratorium, but it replaced the Moratorium with a policy that is fundamentally similar; the Guidelines are in effect a particularization and finalization of the temporary Moratorium. It is not quite correct to say WMATA has ceased the challenged conduct; instead, WMATA has renewed the challenged conduct in a new form.

An analogous Supreme Court decision makes clear this case is not moot. *Northeastern Florida Chapter of Associated General Contractors of America* (*AGC*) *v. City of Jacksonville*, involved a challenge to a minority-owned business preference in the Jacksonville purchasing code. 508 U.S. 656, 658 (1993). Shortly after the Court had granted certiorari, Jacksonville repealed that portion of its purchasing code and replaced it with a new ordinance differing only in minor respects. *Id.* at 660-61. The Court held the case was not moot: "There [was] no mere risk that Jacksonville [would] repeat its allegedly wrongful conduct" for "it [had] already done so." *Id.* at 662. The voluntary cessation exception to mootness is not limited, however, to cases in which "the

selfsame statute will be [re]enacted"; "if that were the rule, a defendant could moot a case by repealing the challenged statute and replacing it with one that differs only in some insignificant respect." *Id.* The new ordinance in *AGC* "may [have] disadvantage[d] [the plaintiffs] to a lesser degree than the old one, but ... it disadvantage[d] them in the same fundamental way." *Id.* Therefore the case was not moot. *See also Global Tel*Link v. FCC*, 866 F.3d 397, 413-14 (D.C. Cir. 2017).

So too here. WMATA does not contend the change to the Guidelines has remedied AFDI's alleged injury; clearly AFDI's proposed advertisements are just as unacceptable to WMATA under the Guidelines as they were under the Moratorium; the Moratorium banned issue-oriented advertisements, and so do the Guidelines. AFDI, in other words, is still disadvantaged in the same fundamental way. Indeed, AFDI's briefs are best read to say it would resubmit its advertisements but for their certain rejection under the Guidelines.[3]

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[3] Our dissenting colleague believes the case is moot because the Guidelines "do not differ[] only in some insignificant respect" from the Moratorium, Diss. Op. at 7 (quoting *AGC*, 508 U.S. at 662); the Guidelines and the Moratorium, in her view, ask "different questions." The Moratorium simply asks whether an advertisement is "an issue-oriented ... political, religious, [or] advocacy advertisement" while the Guidelines ask whether an advertisement violates Guideline 9, 11, 12, 13, or 14. *Id.* at 6. To this end, she cites several cases for the proposition that substantial changes between an old, repealed law and a new law enacted during the course of litigation can moot a case.

The changes here, however, were not material to the case at hand. Both the Moratorium and the Guidelines sought to ban issue-oriented advertising, in all its forms, from WMATA's advertising

One further question remains: Should we decide the constitutionality of the Moratorium or the constitutionality of the Guidelines? "A change in the law between a nisi prius and an appellate decision requires the appellate court to apply the changed law." *Ziffrin, Inc. v. United States*, 318 U.S. 73, 78 (1943). Though the present situation is slightly different, for the policy here changed prior to rather than after the district court's decision, precedent and practicality direct us to deal with the world as it is now, not as it was when the case was filed. As for precedent, we note the Supreme Court routinely considers agency regulations that had superseded the originally challenged regulation during the course of the litigation. *See, e.g.*, *Cal. Bankers Ass'n v. Shultz*, 416 U.S. 21, 53 (1974) ("We, of course, must examine the statute and the regulations as they now exist"); *Thorpe v. Housing Auth. of Durham*, 393 U.S. 268, 281-82 (1969) (noting the "general rule" that "an appellate court must apply the law in effect at the time it renders its decision").[4] As for practicality, we see no advantage to either of the parties in our ruling upon a policy that has no continuing bite.

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space, the only difference being the degree of detail in which they do so. That the Guidelines are more specific does not alter the harm to AFDI; they "disadvantage [it] ... in the same fundamental way" as did the Moratorium. *AGC*, 508 U.S. at 662.

[4] In *Global Tel*Link* this court evaluated the original FCC order, which had arguably been superseded by the order on reconsideration. *Global Tel*Link*, 866 F.3d at 414. There, however, the more recent order was "not before [the court]," *id.*, whereas here the Guidelines have been put before us by AFDI's briefs.

B. Merits

Having concluded this case remains justiciable, we move to the merits. We classify WMATA's advertising space as a nonpublic forum and hold WMATA's restrictions are viewpoint-neutral; we remand to the district court the question whether the restrictions are reasonable, which that court should reexamine in light of *Minnesota Voters Alliance v. Mansky*, 138 S. Ct. 1876 (2018).

Our review of a district court's grant of summary judgment is *de novo. Bank of N.Y. Mellon Trust Co. NA v. Henderson*, 862 F.3d 29, 32 (D.C. Cir. 2017). Summary judgment should issue "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). "[T]here is such a 'genuine issue' if 'a reasonable jury could return a verdict for the nonmoving party.'" *Galvin v. Eli Lilly & Co.*, 488 F.3d 1026, 1031 (D.C. Cir. 2007) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). There are no disputed facts in this case. The only dispute concerns application of the law to the agreed facts.

AFDI challenges only Guidelines 9, 11, 12, and 13. We note at the outset that Guidelines 11 (banning "[a]dvertisements that support or oppose any political party of candidate") and 13 (prohibiting "[a]dvertisements that support or oppose an industry position or industry goal without any direct commercial benefit to the advertiser") are obviously inapplicable to this litigation; AFDI's advertisements are not partisan,

and they are not related to any industry. We discuss Guidelines 9 and 12 in further detail below.[5]

1. Forum classification

Our analysis of a restriction on speech on government property begins with the forum doctrine. *IRI*, 685 F.3d at 1070. Under *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37, 45-46 (1983), a governmentally controlled forum that could potentially be used for speech may be a traditional public forum, a designated public forum, or a nonpublic forum. Traditional public forums — sidewalks, parks, and the like — are not implicated here. A designated public forum is "public property which the state has opened for use by the public as a place for expressive activity." *Id.* at 45. A designated public forum need not remain open "indefinitely," but so long as it is open the Government may put in place only reasonable time, place, and manner regulations and narrowly drawn content-based prohibitions. *Id.* at 45-46. Nonpublic forums are, essentially, other Government-owned property where some speech is permitted — for example, an inter-school mail system. *Id.* at 46. It is important here to note that "[t]he government does not create a public forum by ... permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse."

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[5] There is some overlap between Guideline 9, which bans advertisements "intended to influence members of the public regarding an issue on which there are varying opinions," and Guideline 14, which bans advertisements "intended to influence public policy." Because AFDI does not challenge Guideline 14, however, we do not address it here.

Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 802 (1985). In sum, a designated public forum is a nontraditional public space the Government has opened to speech without restriction; a nonpublic forum is a nontraditional public space the Government has opened to speech with restrictions. *See id.*

AFDI and WMATA differ as to how WMATA's advertising space fits into the forum doctrine. We need not resolve this disagreement, however, because another panel of this circuit recently held the space is a nonpublic forum. *Archdiocese of Washington v. WMATA*, No. 17-7171, slip op. at 9-14 (D.C. Cir. July 31, 2018), and we are bound to follow that decision. *LaShawn A. v. Barry*, 87 F.3d 1389, 1395 (D.C. Cir. 1996) (en banc).

The status of Metro advertising as a nonpublic forum renders a large part of AFDI's brief irrelevant, including its claim to special protection of its speech based upon *Matal v. Tam*, 137 S. Ct. 1744 (2017) (holding a ban on federal registration of disparaging trademarks violated the First Amendment). To that end, it quotes the anodyne statement that "[s]peech may not be banned on the ground that it expresses ideas that offend." *Id.* at 1751. The relevance of a case in which the Supreme Court did not engage in a forum analysis at all escapes us; *Matal* did not discuss forum doctrine in any depth because *Matal* dealt not with the Government permitting speech on government property but with government protection of speech from commercial infringement. Apart from the quoted statement cited above, all AFDI's references to *Matal* invoke Justice Kennedy's concurrence, which of course did not speak for the Court.

AFDI also spills much ink on characterizing WMATA's restrictions as a "prior restraint." Accepting AFDI's characterization *arguendo*, it is of no moment: A nonpublic forum is by definition a place where the Government may disallow certain types of speech.

Finally, AFDI complains WMATA's restrictions are content-based, as indeed they are. Content-based restrictions, however, are permissible in a nonpublic forum: "[A]ccess to a nonpublic forum can be based upon subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral." *Cornelius*, 473 U.S. at 806.

2. Viewpoint neutrality and reasonableness

We move, then, to AFDI's arguments concerning viewpoint neutrality and reasonableness. We conclude the Guideline properly before us is viewpoint-neutral, but we remand the case to the district court to reconsider the question of reasonableness.

A. Viewpoint neutrality

Though its briefs are confused, from what we can discern AFDI offers three separate arguments to support its claim that the Guidelines are not viewpoint-neutral. First, it brings what amounts to an as-applied challenge, contending that, even if the Guidelines are facially neutral, adopting the Moratorium and the Guidelines bespeak an intent to discriminate specifically against the views of AFDI. Second, it contends the ban on issue-oriented advertising is facially viewpoint-discriminatory. Third, it gestures at an argument that Guideline 12, which bans

"[a]dvertisements that promote or oppose any religion, religious practice or belief," effectively closes the forum to its antireligious speech, which it argues must be permitted under various Supreme Court cases. We find merit in none of the arguments.

i. As-applied challenge

The parties point to no case in the Supreme Court or in this circuit in which a change in the status of a forum was challenged on the ground that it was intended *sub silentio* to suppress the views of a particular party. Nevertheless, we assume such a claim is viable, as exemplified by *Ridley v. Massachusetts Bay Transportation Authority*, 390 F.3d 65 (1st Cir. 2004), which dealt with a similar claim of seeming viewpoint neutrality masking insidious bias.

At the outset, we note that as a general rule "[t]he government is free to change the nature of any nontraditional forum as it wishes." *Ridley*, 390 F.3d at 77. But the rule is not without an exception: For the Government to change the nature of a forum in order to deny access to a particular speaker or point of view surely would violate the First Amendment. Here, if WMATA adopted the Moratorium and subsequent Guidelines with the intent of suppressing the views of AFDI, then we would hold the Guidelines unconstitutional as applied to AFDI. Therefore, "[t]he [WMATA]'s mere recitation of viewpoint-neutral rationales (or the presentation of a viewpoint-neutral guideline) for its decisions to reject the [advertisements at issue] does not immunize those decisions from scrutiny." *Id.* at 86.

The question is how to identify the Government's intent. Of course, direct evidence of viewpoint discrimination would be highly probative, but "the government rarely flatly admits it is engaging in viewpoint discrimination." *Id*. That leaves two types of evidence. The first is retrospective, that is, evidence from before the decision was taken to close the forum insofar as it may show whether the Government acted in order to suppress a disfavored view. The second is prospective, namely evidence of what happened once the forum was closed. AFDI focuses its argument upon what happened in the lead up to closing the forum, whilst WMATA focuses its argument upon the lack of evidence of viewpoint discrimination once access to the forum was restricted.

Retrospective evidence begins with "statements by government officials on the reasons for" closing the forum. *Id.* at 87. Assuming those statements provide a legitimate reason, the plaintiff may attempt to show "the viewpoint-neutral ground is not actually served very well by the specific governmental action at issue ... in other words, the fit between means and ends is loose or nonexistent." *Id.*; *see also United States v. Griefen*, 200 F.3d 1256, 1265 (9th Cir. 2000) ("Should it appear ... that the order [closing the forum] was not narrowly tailored to the realities of the situation ... the federal courts are capable of taking prompt and measurably appropriate action"). If, for example, the Government had said it wished to close a forum to political speech but passed regulations banning only anti-abortion messaging, then its action would undermine its claim of viewpoint neutrality.

Other, less probative types of retrospective evidence might also play a role. We are guided here by the test the Supreme Court has used to unearth tacit discrimination on the basis of race. "The historical background of the decision" is relevant; if the Government had repeatedly been found to have engaged in viewpoint discrimination, especially against the plaintiff, then courts should look skeptically at its seemingly viewpoint-neutral rationale. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267 (1977). "The specific sequence of events leading up to the challenged decision," such as "[d]epartures from the normal procedural sequence" and "[s]ubstantive departures" from "the factors usually considered important" may also be relevant. *Id.*

In terms of prospective evidence, most relevant is a lack of evenhandedness in the Government's actions after the forum is closed. "[W]here the government states that it rejects something because of a certain characteristic, but other things possessing the same characteristic are accepted, this sort of underinclusiveness raises a suspicion that the stated neutral ground for action is meant to shield an impermissible motive." *Ridley*, 390 F.3d at 87 (footnote omitted); *see also, e.g.*, *Pittsburgh League of Young Voters Educ. Fund v. Port Auth. of Allegheny Cty.*, 653 F.3d 290, 297-98 (3d Cir. 2011) (accepting a "comparator analysis" between the plaintiff's rejected advertisement and several similar accepted advertisements as evidence of viewpoint discrimination). Also relevant is any post-hoc rationalization for the change in the forum; if the Government proffers one reason when closing the forum but another when it later defends the closing,

then that in itself is evidence of pretext. *Cf. Coleman v. Ann Arbor Transp. Auth.*, 947 F. Supp. 2d 777, 788 (E.D. Mich. 2013) (noting in dicta that "post-hoc rationalization" could be evidence of viewpoint discrimination).

Applying this framework to AFDI's claims, it is clear they fall short, indeed, so far short that no reasonable jury could uphold them. First, AFDI has provided no prospective evidence whatsoever; it cites no example of an issue-oriented advertisement being run on Metrobuses or in Metrorail stations once the Moratorium was adopted, nor has AFDI pointed to any inconsistency in WMATA's explanation for its decision to close the forum. Neither has AFDI shown any mismatch between WMATA's stated reason for closing — to avoid being involved in further controversies arising from issue-oriented advertisements — and its decision to end the problem by banning all issue-oriented advertisements. In other words, there is a fit between WMATA's means and its stated ends.

Indeed, AFDI's own assumptions speak to the lack of mismatch here. AFDI emphasizes the importance of advertising to WMATA's budget and hints WMATA would not have reduced its advertising revenue unless it was to discriminate against AFDI. That would counsel banning the fewest advertisements consistent with excluding AFDI's. Yet there is no question the Moratorium and the Guidelines sweep out far more than just AFDI's advertisements. If WMATA wished to keep out these particular advertisements, then it could have banned, as one example, advertisements "with a demonstrated link to violence," which would have sufficed given the events in Garland, Texas. That

WMATA put in place a much broader ban, even though it resulted in a larger potential loss of revenue, strongly suggests it was not discriminating against the views of AFDI.

The evidence AFDI proffers is weak. It stakes much of its case upon Ms. Bowersox's depicting AFDI's advertisement as "the straw that broke the camel's back" with regard to issue-oriented advertisements in the forum. AFDI seems to misunderstand this metaphor. The point is that no particular straw shoulders all the blame. Each straw, on its own, contributed to breaking the unfortunate camel's back. The last straw was last by pure happenstance, not intent. So too here. That AFDI's advertisements were the last in a long line of controversial or potentially controversial advertisements does not mean the closure of the forum was meant to keep out the views of AFDI in particular.

AFDI also points to the confusion over how to place the Moratorium on the schedule for WMATA's Board meeting, Mr. Downey's request that Ms. Bowersox be prepared to discuss the violence surrounding AFDI's advertisements in Texas, and the haste with which the Moratorium was passed, but these events are consistent with WMATA's stated reason for restricting the forum. When AFDI submitted its advertisements, WMATA decided that it was no longer willing to tolerate the controversies advertisements like them engendered. It did act with haste to change its policies, but AFDI does not even suggest WMATA violated its own procedural rules. Regarding AFDI's point about Mr. Downey's email, we note that neither the violence in Texas nor AFDI itself was even mentioned at the

Board meeting and therefore seems irrelevant to the Board's decision adopting the Moratorium. AFDI is essentially asking us to infer WMATA harbored an illicit intent without proffering any evidence to that effect. No reasonable jury could do that.

The contrast between this case and *Ridley* is instructive. There the defendant transit authority's rationale for rejecting the advertisements was that they advocated the legalization of marijuana, and the head of the authority said bluntly that he would have published the advertisements if they had supported existing marijuana laws. 390 F.3d at 88. Such direct evidence of viewpoint discrimination is lacking here.

Moreover, the transit authority in *Ridley* also claimed, post hoc, it had rejected the advertisements because they might promote marijuana use among juveniles, a risk the court deemed "minimal and, indeed, probably nonexistent." *Id.* Not so here — the sole reason in the record for the advertisements' rejection was that they were political, not commercial (they "advocate[] free speech and do[] not try to sell you a commercial product"), so there is no doubt WMATA's reasons for rejection match the advertisements' actual content.

Finally, the plaintiff in *Ridley* pointed to advertisements promoting alcohol use that were "clearly more appealing to juveniles" than the marijuana legalization advertisements. *Ridley*, 390 F.3d at 88-89. This inconsistent application of the supposed rules of the forum was strong evidence of viewpoint discrimination. Here, however, AFDI has not even alleged, let alone provided evidence, that WMATA has applied its rules inconsistently.

ii. Facial viewpoint neutrality

Next, AFDI argues the ban on issue-oriented advertising is facially unconstitutional. The argument, again, is confused, but the main thrust appears to be that WMATA's restrictions favor commercial over noncommercial speech and therefore run afoul of the First Amendment.

We have no trouble rejecting this claim: There is Supreme Court precedent almost directly on point. In *Lehman v. City of Shaker Heights*, the Court confronted a ban on political advertising in streetcars. 418 U.S. 298, 299-300 (1974) (plurality opinion). Four Justices noted that "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. They then rejected the argument that banning political advertisements violated the First Amendment, which tracks AFDI's argument here concerning all controversial advertising:

> In these circumstances, 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. Were we to hold to the contrary, 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. This the Constitution does not require.

Id. at 304.

The plurality opinion, in sum, held it was not unconstitutional for a government to ban noncommercial advertising in a place that was not an "open space[], ... meeting hall, park, street corner, or other public thoroughfare." *Id.* at 303. In contemporary terms, it is not facially viewpoint discrimination to ban political advertising in a nonpublic forum. Justice Douglas, concurring in the judgment, emphasized the captive nature of streetcar passengers and the would-be political advertiser's "forced intrusions on their privacy." *Id.* at 307. That point, of course, applies equally to WMATA.

Given the holding in *Lehman*, it is no surprise that other circuits have turned away first amendment challenges to bans on political or noncommercial advertising. *See, e.g.*, *AFDI v. Suburban Mobility Auth. for Reg'l Transp.*, 698 F.3d 885, 888, 895 (6th Cir. 2012) (upholding ban on "[p]olitical or political campaign advertising"); *Children of the Rosary v. City of Phoenix*, 154 F.3d 972, 974, 980-81 (9th Cir. 1998) (White, Retired Justice) (upholding advertising policy limiting acceptable advertisements to "speech which proposes a commercial transaction"); *Lebron v. Nat'l R.R. Passenger Corp. (Amtrak)*, 69 F.3d 650, 654, 658 (2d. Cir.) (upholding Amtrak's unwritten policy of not allowing political advertising), *opinion amended on denial of reh'g en banc*, 89 F.3d 39 (2d Cir. 1995).

In any event, AFDI's argument makes no sense on its own terms. AFDI points out, as a way of showing WMATA's policy is flawed, that an advertiser could claim its product is the best value, most efficient, or best tasting, but a religious person could not promote his religion as the best, most truthful, or most

charitable. This is a correct description of what is and is not acceptable under WMATA's policy — an advertiser can say whatever it wants about a permissible subject but cannot say anything about an impermissible subject — but this is not viewpoint discrimination; to hold otherwise would, as WMATA points out, erase the distinction between content-based and viewpoint-based restrictions.

AFDI next argues WMATA's policy runs afoul of the Supreme Court's decision in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981). This is silly. The plurality opinion in *Metromedia* said that case "present[ed] the opposite situation from that in *Lehman*," which "turned on [a] unique fact situation[] involving [a] government-created forum[] and ha[d] no application here." *Id.* at 514 n.19. If *Lehman* had no application to *Metromedia*, then it stands to reason that *Metromedia* has no application to this case, which is closely analogous to *Lehman*.

Finally, AFDI complains that the Guidelines are somehow worse than the Moratorium and that it is not clear on what basis WMATA rejected its advertisements. How, asks AFDI, can advertisements advocating free speech not be permitted? AFDI has only itself to blame for any uncertainty as to why its specific advertisements were rejected because it neither included in the record WMATA's communication rejecting the advertisements nor resubmitted the advertisements once the Guidelines were adopted. As it is, all we have in the record before us is Ms. Bowersox's statement that the advertisements were rejected because they "advocate[] free speech and do[] not try to sell you a commercial product." In other

words, WMATA rejected the advertisements because they were political.[6]

iii. Antireligious speech ban

As noted above, AFDI's briefs also mention Guideline 12, which reads, in its entirety: "Advertisements that promote or oppose any religion, religious practice or belief are prohibited." Though AFDI does not expand much upon what it thinks problematic about Guideline 12, it does gesture toward the idea that Guideline 12 might be an unconstitutional prohibition of religious and antireligious views. In doing so, AFDI mentions obliquely three Supreme Court cases — *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993); *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995); and *Good News Club v. Milford Central School*, 533 U.S. 98 (2001) — that together might arguably call into question the constitutionality of Guideline 12.

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[6] AFDI also implies in its brief that it has constitutional objections to the open advertising policy WMATA had prior to the Moratorium. It is not clear what those claims might be, and AFDI's complaint appears to bring claims only against the Moratorium itself. Indeed it is a puzzle as to how AFDI could have claims against the pre-Moratorium policy, as its advertisements were rejected pursuant to the Moratorium. In any event, it is not our practice to address so undeveloped an argument. *See, e.g.*, *Schneider v. Kissinger*, 412 F.3d 190, 200 n.1 (D.C. Cir. 2005) ("It is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel's work ... a litigant has an obligation to spell out its arguments squarely and distinctly, or else forever hold its peace" (cleaned up)).

We need not venture into this particular thicket. To begin with, AFDI never mounts a full-on argument that *Lamb's Chapel*, *Rosenberger*, and *Good News Club* do indeed apply to this case; it only cites them for the general proposition that viewpoint discrimination is unconstitutional. Moreover, AFDI was extremely late in portraying its advertisement as antireligious speech, insofar as it has done so at all. In its complaint, for example, it stated its "advertisements make the point that the First Amendment will not yield to Sharia-adherent Islamists who want to enforce so-called blasphemy laws here in the United States, whether through threats of violence or through the actions of complicit government officials, such as Defendants in this case." When the case was filed, that is, AFDI represented the subject of its advertisements as the Free Speech Clause of the First Amendment. In AFDI's initial motion for summary judgment it made a vague reference to *Rosenberger* but came no closer to presenting its advertisements as religious speech. Indeed, it first and belatedly made this argument, such as it is, in its reply in support of its motion for summary judgment. Implying now that its speech is antireligious speech is a mere characterization of convenience.

Additionally, as far as the record shows, WMATA decided to refuse AFDI's advertisements only because of their political nature. As we said before, AFDI neglected to put in the record the actual communication from WMATA rejecting its proposed advertisements. (This failure of evidence is, of course, entirely attributable to AFDI, as it has the burden of proof.) All we have in the record is the testimony of Ms. Bowersox. When AFDI's counsel asked Ms. Bowersox

at her deposition why WMATA rejected the advertisements at issue, she said she "believe[d] that this ad would come under advocacy because it advocates free speech and does not try to sell you a commercial product." "The government's purpose is the controlling consideration" in speech cases, *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989), and here all we have is WMATA itself telling us it rejected the advertisements because they were political speech. Guideline 12, therefore, is entirely irrelevant to this appeal, and we express no opinion as to whether it violates the First Amendment. This leaves Guideline 9 as the only Guideline AFDI properly challenges that could apply to its proposed speech.

B. Reasonableness

We come, at last, to the reasonableness of WMATA's policy limiting access to its nonpublic forum, which "must be assessed in the light of the purpose of the forum and all the surrounding circumstances." *Cornelius*, 473 U.S. at 809. "The 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." *Id.* at 808. "A regulation is reasonable if it is consistent with the government's legitimate interest in maintaining the property for its dedicated use." *IRI*, 685 F.3d at 1073.

AFDI does not suggest the purpose for the forum is anything other than public transportation; instead, it posits that (1) controversial advertising had not disrupted WMATA's operations prior to AFDI's submission, *see* Appellant's Brief at 44 (noting that "[f]or decades WMATA had displayed controversial, public-issue advertisements" and questioning how any

"ad ... would somehow interfere with the operation of WMATA's bus system") and (2) WMATA's objective in selling advertising space must have been revenue maximization, so that losing any revenue by refusing AFDI's advertising was unreasonable.

AFDI's premise is incorrect. As related by Ms. Bowersox in her deposition, before the Moratorium WMATA had been plagued by problems stemming from issue-oriented advertisements. These problems included complaints from riders, community leaders, and employees; and vandalism, security threats, and the increased administrative burden of evaluating arguably obscene or otherwise unacceptable advertisements. All this testimony is uncontested; there is not the slightest hint in the record that WMATA in fact did not have to deal with these problems. Nor has AFDI contested Ms. Bowersox's assertion that the problems became more acute in the 2010s. In the face of all this, WMATA concluded the game was not worth the candle; better to lose some advertising revenue and avoid having to deal with the controversies they create. This seems eminently reasonable; it might have cut into WMATA's revenues, but it necessarily avoided the complaints, the vandalism, and the security threats that WMATA's open advertising policy had engendered.[7] No reasonable jury could conclude, therefore, that the Moratorium and the Guidelines were not reasonable efforts to avoid

[7] Indeed, owing to the deficient state of the record, it is not even clear WMATA lost money because of the restriction; it may have made up in saved staff time and diminished vandalism what it lost in payments for issue-oriented advertisements.

controversies engendered by advertising on Metrobuses and at Metro stations.

AFDI also cites two Third Circuit cases to support its position. The first held unreasonable a ban upon noncommercial advertisements in airports. *NAACP v. City of Philadelphia*, 834 F.3d 435 (2016). The City proffered as its objectives for the space "revenue maximization and controversy avoidance," *id.* at 445, but there was no record evidence either of pre-ban controversies or of how the ban could possibly help maximize revenue. *Id.* at 445-46. Here, WMATA has not offered revenue maximization as a justification, and there is ample record evidence of controversies before the Moratorium.

At issue in the second case was a designated public forum as to which the defendant was effectively engaging in censorship, permitting pro-abortion advertisements while excluding anti-abortion ones. *Christ's Bride Ministries, Inc. v. Se. Penn. Transp. Auth.*, 148 F.3d 242, 255-57 (3d Cir. 1998). Here, of course, we are dealing with a nonpublic forum, and WMATA has not discriminated among issue-oriented advertisements but rather closed the space to all of them.

This does not, however, end our inquiry. In a recent case, the Supreme Court analyzed a Minnesota statute banning voters from wearing a "political badge, political button, or other political insignia" at a polling place. *Minnesota Voters Alliance v. Mansky*, 138 S. Ct. 1876, 1883 (2018). The Court held that portion of the statute unconstitutional because the State failed to draw "a reasonable line." *Id.* at 1888. The statute did not define the term "political," which in the Court's

view was simply too broad; the State proffered as a limiting construction the idea that "political" meant "conveying a message about the electoral choices at issue in [the] polling place," but the Court noted this construction introduced line-drawing problems of its own. *Id.* at 1888-89. Indeed, at oral argument the State could not explain with any consistency why, for example, "a shirt displaying a rainbow flag" could be worn for some elections and not for others, or why a shirt displaying the text of the First Amendment was permissible but an identical shirt with the text of the Second Amendment was not. *Id.* at 1891. The crux of the Court's decision was that the State's discretion in enforcing the statute had to be "guided by objective, workable standards." *Id.* Because the unqualified ban on "political" apparel did not provide those standards, it was unreasonable.

At several points in its briefs, AFDI makes something approaching this argument, though it never explicitly argues the Guidelines are unreasonable because they lack objective, workable standards. Instead, AFDI at various points complains the Moratorium and Guidelines are "hopelessly vague", vest WMATA with "unbridled control over the use of the forum", and lack the precise and definite standards necessary to satisfy First Amendment scrutiny. AFDI focuses this attack in particular upon Guideline 9 — the only Guideline it can properly challenge — which bans "[a]dvertisements intended to influence the public regarding an issue on which there are varying opinions."

In essence, AFDI merges two variant, though closely related, Supreme Court doctrines to make this

claim. First, the Court has held, repeatedly, that the "danger of censorship and of abridgment of our precious First Amendment freedoms is too great where officials have unbridled discretion over a forum's use." *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553 (1975). Therefore, when government censors control access to a forum, but have no standards to govern their decisions, first amendment freedoms are abridged. *See, e.g.*, *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 756-57 (1988).

Second, the Court has condemned statutes that are too vague to give a "person of ordinary intelligence a reasonable opportunity to know what is prohibited." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). It is not entirely clear that the vagueness doctrine applies to the Guidelines, which do not, of course, impose criminal penalties on those whose advertisements are denied. *See, e.g.*, *Bryant v. Gates*, 532 F.3d 888, 893 (D.C. Cir. 2008) (noting "it is not clear whether the vagueness doctrine applies ... at all" to statutes that do not threaten criminal penalties). In any event, the overlap in analysis between unbridled discretion and vagueness is clear; both doctrines require a court to determine whether a decisionmaker's exercise of discretion in allowing or disallowing speech is based upon objective and clear standards.

To this we can now add a third related inquiry — the inquiry that *Mansky* seems to call for — whether the discretion vested in a government official to permit or prohibit speech is "guided by objective, workable standards." *Mansky*, 138 S. Ct. at 1891. These three seemingly inquiries all pose a single challenge: We must determine whether Guideline 9 is so broad as to

provide WMATA with no meaningful constraint upon its exercise of the power to squelch. If so, then it is not "reasonable," as that term is used in *Mansky*, and not constitutional because it provides WMATA with unbridled discretion. Put the other way around, if Guideline 9 is capable of reasoned application, as *Mansky* demands, then it does not confer unbridled discretion upon WMATA.

The parties' briefs predate the decision in *Mansky*. Yet *Mansky* invites arguments about whether Guideline 9 is capable of reasoned application. Moreover, WMATA's defense of the Guidelines against AFDI's unbridled discretion/vagueness challenge was that it banned AFDI's advertisements as "political" speech, which is not unconstitutional. That argument might be unavailing in light of *Mansky*.

In these circumstances, AFDI should be given an opportunity to refine its argument and to supplement the record accordingly. *See, e.g.*, *Belizan v. Hershon*, 495 F.3d 686, 692 (D.C. Cir. 2007) (remanding securities fraud claims to the district court to reconsider in light of intervening Supreme Court precedent). Guideline 9 has been in place for nearly three years, and information on how it has been applied would certainly be information as to whether it is capable of reasoned application. In addition, the district court may wish to clarify whether WMATA would have rejected AFDI's advertisements based upon Guideline 9 or some other Guideline.

We therefore reverse the grant of summary judgment to WMATA as to whether its policy is reasonable and remand that portion of this case to the district court.

3. Fourteenth amendment claim

As we noted at the outset of this opinion, AFDI also brought a claim under the Fourteenth Amendment, asserting that the "speech restriction ... unconstitutionally deprived [AFDI] of the equal protection of the law guaranteed under the Fourteenth Amendment ... in that [WMATA is] preventing [AFDI] from expressing a message based on its content and viewpoint." In support of this claim, AFDI cites *Police Department of Chicago v. Mosley* for the proposition that "under the Equal Protection Clause ... [the] government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views." 408 U.S. 92, 96 (1972). In other words, according to AFDI the Equal Protection Clause, like the First Amendment, prohibits the Government from engaging in viewpoint discrimination. As seen above, WMATA did not do that. AFDI does not contend, and *Mosley* does not suggest, that an unreasonable speech restriction violates the Fourteenth, as opposed to the First Amendment. This is fatal to AFDI's Fourteenth Amendment claim.

III. Conclusion

WMATA sought to end the controversy over the advertisements displayed in its forum. It has succeeded in eliminating complaints about the advertisements it accepts, but it has swapped those controversies for numerous lawsuits over the advertisements it rejects. While it is clear WMATA did not engage in viewpoint discrimination in rejecting AFDI's advertisement and adopting Guideline 9, *Mansky* provides enough uncertainty that it makes sense for the district court to

reexamine in the first instance whether WMATA's applicable restrictions are reasonable. The district court's grant of summary judgment to WMATA is therefore affirmed in part and reversed in part, and the case is remanded to the district court for further proceedings consistent with this opinion.

So ordered.

KAREN LECRAFT HENDERSON, *Circuit Judge*, dissenting: After the Washington Metropolitan Area Transit Authority (WMATA) rejected the American Freedom Defense Initiative's (AFDI) advertisement under an interim advertising policy (Moratorium), AFDI sued to enjoin that policy. Although WMATA later changed its advertising policy by adopting more specific, lucid and permanent provisions (Guidelines), the litigation posture did not catch up. AFDI never resubmitted its ad to WMATA and therefore WMATA did not reject AFDI's ad under its new permanent policy and has not specified which, if any, of the Guidelines AFDI's ad would violate. AFDI did not amend its complaint to challenge WMATA's Guidelines, which remain in effect today. Although the Guidelines attempt to serve the same goal as the interim policy—banning controversial ads from WMATA's advertising space—WMATA's speech restrictions' applicability to the plaintiff's speech is not clear and their contents changed significantly after the plaintiff sued to enjoin the earlier version. I believe the AFDI's claim for an injunction against the inoperative

Moratorium is moot[1] and, accordingly, I respectfully dissent.

We "lack jurisdiction to decide moot cases" because a moot case is no longer an actual case or controversy under Article III. *Iron Arrow Honor Soc'y v. Heckler*, 464 U.S. 67, 70 (1983). The basis of mootness is in WMATA's voluntary conduct: changing the Moratorium—under which WMATA rejected AFDI's ad and which is the only policy AFDI challenged in its complaint—to the Guidelines. A defendant's "voluntary cessation of a challenged practice" moots a case if "subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000) (internal quotation marks omitted). A claim for prospective relief against a law that is repealed or expired after the claim is initiated may moot the claim. *See Nat'l Black Police Ass'n v. District of Columbia*, 108 F.3d 346, 349–50 (D.C. Cir. 1997). In this case, we do

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[1] AFDI also sued for damages under 42 U.S.C. § 1983 but I believe that claim fails. The Supreme Court has held that "neither a State nor its officials acting in their official capacities are 'persons' under [section] 1983." *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989). This holding applies to "States or governmental entities that are considered 'arms of the State' for Eleventh Amendment purposes." *Id.* at 70. WMATA's general manager as named in the complaint is an "official[] acting in [his] official capacit[y]." *Id.* at 71. And we have held that WMATA is an arm of the state for sovereign immunity purposes. *See Morris v. WMATA*, 781 F.2d 218, 224 (D.C. Cir. 1986) (Maryland and Virginia "conferred their eleventh amendment immunities upon WMATA" by signing compact creating WMATA). Therefore, neither defendant is liable for damages.

not face a situation in which the government has outright repealed the challenged law with no evidence of intent to reenact it, *see Burke v. Barnes*, 479 U.S. 361, 363–65 (1987), nor do we face a situation in which the government has repealed the challenged law but has expressed an intent to reenact the same law, *see City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 & n.11 (1982). Instead, we face a situation in the middle of these two poles: the government has replaced the challenged regulation with a new regulation that differs in some respects. I believe three United States Supreme Court cases serve as guideposts.

In *Diffenderfer v. Central Baptist Church of Miami*, a state law "authorize[d] a tax exemption for church property used . . . as a commercial parking lot." 404 U.S. 412, 413 (1972). The plaintiffs sued for an injunction requiring government officials "to assess and collect taxes against such property." *Id.* During litigation, the state repealed the law and enacted a new statute providing that "church property is exempt from taxation only if the property is used predominantly for religious purposes." *Id.* at 414. The Court noted that the application of the statute to the parking lot in question likely changed and therefore concluded the case was therefore moot. "The only relief sought in the complaint was a declaratory judgment that the now repealed [statute] is unconstitutional as applied to a church parking lot used for commercial purposes and an injunction against its application to said lot. This relief is, of course, inappropriate now that the statute has been repealed." *Id.* at 414–15.

In another case in which the defendant repealed and replaced the challenged policy *pendente lite*, the

Supreme Court reached the opposite conclusion. *Ne. Fla. Chapter of Associated Gen. Contractors v. City of Jacksonville*, 508 U.S. 656 (1993). In *Northeastern Florida*, an ordinance required that 10 per cent of the amount spent on city contracts be "set aside" for minority businesses. *Id.* at 658. Non-minority contractors sued, arguing the ordinance violated the Equal Protection Clause and seeking declaratory and injunctive relief. *Id.* at 659. After the Supreme Court granted certiorari, the city repealed the challenged ordinance and "replaced" it with another ordinance that differed in a few minor ways but still treated minorities in certain identical overlapping ways: the first ordinance applied to women and seven minority groups and the second applied to women and blacks only; in addition, the first ordinance used only the "set aside" to achieve the quota but the second ordinance contemplated five possibilities, one of which was a plan that mirrored the "set aside." *Id.* at 660–61. The Court held the case was not moot, *id.* at 663, reasoning that, although the new ordinance "differs in certain respects" from the old ordinance, "insofar as it [duplicates the original law,] it disadvantages" the plaintiffs "in the same fundamental way," *id.* at 662.

A third case illustrates the principle that a significant change in the way a challenged law works can render a case moot. *Fusari v. Steinberg*, 419 U.S. 379 (1975). In *Fusari*, the plaintiffs challenged state procedures for determining continuing eligibility for unemployment compensation. The district court held the scheme violated the plaintiff's due process rights. The state amended the statutes to provide additional procedural protections. The Court held the claim was moot. "Although the precise significance of the

amendment to [the law] is unclear," the Court reasoned that the changes "may alter significantly the character of the system considered by the District Court." *Id.* at 386–87; *see also Nat'l Mining Ass'n v. U.S. Dep't of Interior*, 251 F.3d 1007, 1011 (D.C. Cir. 2001) (relying on *Fusari* to dismiss as moot claim against "old set of rules" replaced by "new system").

The resolution of these three cases, the Supreme Court tells us, turns on "whether the new ordinance is sufficiently similar to the repealed ordinance that it is permissible to say that the challenged conduct continues." *Ne. Fla.*, 508 U.S. at 662 n.3 In *Northeastern Florida*, the Supreme Court "believe[d] that the ordinance ha[d] not been sufficiently altered" and thus the claim was not moot. *Id.* (internal quotation marks omitted). In contrast, the "statutes at issue" in *Diffenderfer* and *Fusari* "were changed substantially" and thus the claim was moot. *Id.*

So the question here: how similar are the Moratorium and the Guidelines? WMATA points to a central similarity: the Moratorium prohibited "any and all issue-oriented advertising, including but not limited to, political, religious and advocacy advertising until the end of the calendar year," Joint Appendix (JA) 34, and the Guidelines "resolved" to "close[]" WMATA's advertising space "to issue-oriented ads, including political, religious and advocacy ads," JA 35. WMATA argues the carryover language means that WMATA's conduct "has not ceased." Appellee's Supp. Br. 5. My colleagues agree with this reasoning. Maj. Op. 8 ("[T]he Moratorium banned issue-oriented advertisements, and so do the Guidelines.").

If that were all the new policy said, I would agree. But WMATA's advertising decisions under the Guidelines are not governed by the language that WMATA relies on. Whereas the prohibition of "issue-oriented . . . political, religious and advocacy" ads was operative in the Moratorium, that same language in the Guidelines is more akin to a preamble or a statement of purpose; WMATA instead effects its intent via five specific inquiries that serve as the operative terms of the Guidelines.[2] *Compare* JA 34

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[2] As an example of how WMATA uses the November policy, WMATA rejected the Archdiocese of Washington's "Find the Perfect Gift" holiday advertisement under "Guideline 12"—the provision prohibiting advertisements that promote or oppose a religion, religious practice or belief. *Archdiocese of Washington v. WMATA*, No. 1:17-cv-02554 (D.D.C. Nov. 28, 2017), ECF No. 1 ¶ 19 (complaint citing WMATA letter stating it rejected Archdiocese's advertisement under "Guideline 12"); *see id.*, No. 17-7171, slip op. at 7 (D.C. Cir. July 31, 2018) ("When the Archdiocese sought to purchase space for the 'Find the Perfect Gift' ad . . . WMATA declined on the ground that it was impermissible under Guideline 12 'because it depicts a religious scene and thus seeks to promote religion.'"). As another example, WMATA rejected Milo Yiannopoulos's advertisements for his book *Dangerous* under "Guideline 9"—the provision prohibiting ads that are "intended to influence members of the public regarding an issue on which there are varying opinions"—and "Guideline 14"—the provision prohibiting ads that "are intended to influence public policy." *ACLU v. WMATA*, No. 1:17-cv-01598 (D.D.C. Sept. 5, 2017), ECF No. 21, Attachment 1 ¶ 25 (Declaration of Lynn Bowersox, stating ads were rejected under "Guidelines 9 and 14"). For a final example, WMATA rejected an American Civil Liberties Union (ACLU) advertisement for its annual conference under Guidelines 9 and 14. *ACLU v. WMATA*, No. 1:17-cv-01598 (D.D.C. May 27, 2018), ECF No. 37, Attachment 1 ¶ 6 (Declaration of Lynn Bowersox, stating ACLU's advertisement for its annual conference was rejected under Guidelines 9 and 14).

(Moratorium), *with* JA 35 (Resolution to revise Guidelines to prohibit issue-oriented ads), *and* JA 37–38 (Guidelines). Thus, under the Moratorium, WMATA asked: Is this advertisement an "issue-oriented . . . political, religious [or] advocacy" advertisement? Under the Guidelines, however, WMATA asks, *inter alia*: Is this advertisement (1) "intended to influence members of the public regarding an issue on which there are varying opinions"; (2) "support[ing] or oppos[ing] any political party or candidate"; (3) "promot[ing] or oppos[ing] any religion, religious practice or belief"; (4) "support[ing] or oppos[ing] an industry position or industry goal without any direct commercial benefit to the advertiser"; or (5) "intended to influence public policy"?

The two versions ask very different questions. And the textual difference between the Moratorium and the Guidelines is not purely semantic. As WMATA acknowledges, the Guidelines "elaborate" on and "add meaningful content" to the Moratorium's policy. Appellee's Supp. Br. 11 n.5. The Guidelines give contours to the line WMATA draws between what ads to accept and what ads to reject. The new boundaries matter under the First Amendment. *See, e.g.*, *Bd. of Airport Comm'rs of L.A. v. Jews for Jesus, Inc.*, 482 U.S. 569, 574–75 (1987) (constitutionality of forum speech restriction turns on construction of government prohibition's text); *Shuttlesworth v. City of Birmingham*, 382 U.S. 87, 91–92 (1965) (constitutionality of conviction under ordinance subject to First Amendment challenge differs based on construction of ordinance's text). Although my colleagues believe the Guidelines merely "particulariz[e] and finaliz[e]" the Moratorium, Maj.

Op. 7, the addition of "meaningful content" to guide government officials' decision-making, Appellee's Supp. Br. 11 n.5, can make all the difference in whether a nonpublic forum speech restriction survives constitutional scrutiny.

A recent United States Supreme Court case illustrates why. A nonpublic forum speech restriction must provide "objective, workable standards" to constrain government officials' "discretion" in deciding what speech comes in and what speech stays out. *Minn. Voters All. v. Mansky*, 138 S. Ct. 1876, 1891 (2018). The Supreme Court stated that "broad[]," "indeterminate" restrictions, *id.* at 1888–89, are more difficult to uphold than narrower, more "lucid" restrictions, *id.* at 1891. For example, the Supreme Court suggested, the First Amendment nonpublic forum "reasonableness" analysis of a law that prohibits wearing "political" apparel likely differs from the analysis of a law that prohibits displaying "information that advocates for or against any candidate." *Id.* (internal quotation marks omitted). Moreover, the Supreme Court noted that state guidance prohibiting "issue oriented material designed to influence or impact voting" is problematic because it "raises more questions than it answers." *Id.* at 1889 (internal quotation marks and brackets omitted). Accordingly, it is possible that the answer to whether a restriction on "issue-oriented" "political" or "religious" or "advocacy" advertisements is viewpoint-neutral and reasonable may differ from the answer to whether a restriction on advertisements that "support or oppose any political party or candidate" or "promote or oppose any religion, religious practice or belief" or "support or oppose an industry position or industry goal without any direct

commercial benefit" or attempt to "influence public policy [or] the public regarding an issue on which there are varying opinions" is viewpoint-neutral and reasonable.

The Guidelines, then, do not "differ[] only in some insignificant respect." *Ne. Fla.*, 508 U.S. at 662. They may replicate the Moratorium in spirit. But the Guidelines do not replicate the Moratorium in substance. I believe the "significantly revised" Guidelines "significantly" "alter" the character of the system WMATA uses to assess advertisements, *Fusari*, 419 U.S. at 380, 386, thereby rendering AFDI's claim for injunctive relief against the now-defunct and textually transformed Moratorium moot. *See Princeton Univ. v. Schmid*, 455 U.S. 100, 103 (1982) (dismissing appeal of First Amendment challenge to government campus-speech regulations that were "substantially amended" "while the case was pending on appeal"); *Nat'l Black Police Ass'n*, 108 F.3d at 350 (claim for injunctive relief against campaign contribution limits moot after enactment of new law that significantly raised but did not eliminate contribution limits); *AFDI v. Metro. Transp. Auth.*, 815 F.3d 105, 110 (2d Cir. 2016) (claim for injunctive relief against part of transit authority's advertising restriction moot after transit authority revised restriction and changed basis for rejection because restriction on speech was "consequence of [the transit authority's] new advertising policy, not a relic of its old one").

Not only are the questions WMATA must ask different. We also do not know WMATA's answer. WMATA's general manager answered in a deposition that AFDI's ad qualified as an "advocacy" ad "because

it advocated free speech and it does not try to sell you a commercial product." JA 90. Denying AFDI's ad because it is an "advocacy" ad may work under the Moratorium's prohibition on "advocacy" ads. It does not suffice under the Guidelines. The generic restriction on "advocacy" ads is gone from the operative portions of the Guidelines. And WMATA never specified—to AFDI or to us—under which of the particular Guidelines it would reject AFDI's ad. That runs contrary to WMATA's decisions on accepting or rejecting other ads submitted after the Guidelines were promulgated. *See supra* n.2.

The majority recognizes the lack of "clari[t]y" regarding the specific Guideline WMATA believes bars AFDI's ad from its metro stations and its buses. Maj. Op. 29 (stating that district court on remand "may wish to clarify whether WMATA would have rejected AFDI's advertisements based upon Guideline 9 or some other Guideline").[3] In my view, that uncertainty counsels not remand but dismissal. *See Fusari*, 419 U.S. at 387 (dismissing challenge to law that changed during litigation because Court was "unable meaningfully to assess the issues in this appeal on the present record"); *AFDI*, 815 F.3d at 111 (dismissing plaintiff's claim seeking injunction against transit authority's old advertising policy that changed during litigation and holding that plaintiff "must" challenge new policy

[3] My colleagues make some of WMATA's decisions for it. *See* Maj. Op. 10–11, 24 (determining that Guidelines 11, 12 and 13 are inapplicable or irrelevant). Although I do not necessarily disagree with their conclusions, I prefer to let WMATA first determine what Guideline justifies restricting AFDI's speech and assess the constitutionality of that determination once it is made.

through "amended complaint"). Given the absence of WMATA's assessment under the Guidelines and the material changes between the Moratorium and the Guidelines, "we can only speculate how the new system might operate" on the record before us. *Fusari*, 419 U.S. at 388–89. Because I would hold AFDI's claim moot, I respectfully dissent.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 15-1038 (GK)

[Filed March 28, 2017]

AMERICAN FREEDOM DEFENSE INITIATIVE, et. al.,

Plaintiffs,

v.

WMATA, et. al.,

Defendants.

MEMORANDUM OPINION

Plaintiffs, American Freedom Defense Initiative, Pamela Geller and Robert Spencer, (collectively, "Plaintiffs," or "AFDI") , bring this action against the Washington Metropolitan Area Transit Authority, et. al., (collectively, "Defendants," or "WMATA"), alleging violations of their First Amendment rights. This dispute arose when Plaintiffs submitted an ad to WMATA to display on its property. After Plaintiffs submitted the ad, WMATA changed its policy to close its advertising space to all "issue-oriented" advertising. WMATA then rejected Plaintiffs' ad under the new

policy. Plaintiffs claim that WMATA's denial is a prior restraint on Plaintiffs' speech in violation of their First Amendment rights.

This matter is before the Court on the Parties' Cross-Motions for Summary Judgment [Dkt. Nos. 19, 20]. Upon consideration of the Motions, Oppositions [Dkt. Nos. 20, 25], and Replies [Dkt. Nos. 25, 29], and the entire record herein, and for the reasons stated below, Defendants' Motion for Summary Judgment is **granted,** and Plaintiffs' Motion for Summary Judgment is **denied.**

I. BACKGROUND

A. Factual Background

Plaintiff AFDI is a nonprofit organization incorporated under the laws of New Hampshire. Compl. ¶ 7 [Dkt. No. 1] . Plaintiff Pamela Geller is the President of AFDI. Id. ¶ 10. Plaintiff Robert Spencer is the Vice President of AFDI. Id. ¶ 11. AFDI is dedicated to promoting and protecting the right to freedom of speech under the First Amendment. Plaintiffs' Statement of Material Facts ¶¶ 3-4 ("Pls.' SMF") [Dkt. No. 20-1]. Plaintiffs frequently purchase advertising space on transit authority property in major cities throughout the United States to run ads promoting its message on current events and political issues. Pls.' SMF ¶¶ 5-6. Plaintiffs have also frequently litigated transit authorities' rejection of those ads.

WMATA is a government agency that was established through a congressionally approved interstate compact to provide public transportation in the Washington, D.C. metropolitan area. See D.C. Code § 9-1107.01(80). WMATA operates the Metrorail and

Metrobus systems in the Washington, D.C. metropolitan area. Defendants' Motion for Summary Judgment at 3 ("Mot.") [Dkt. No. 19-1].

WMATA leases advertising space on its buses and on free-standing dioramas in its subway stations. Pls.' SMF ¶ 9. Before May 28, 2015, "WMATA had a policy of accepting a broad range of issue-oriented ads." Mot. at 5. WMATA leased advertising space for issue-oriented and political advertisements under its earlier policy. Id. ¶¶ 29-30; Defendant's Reply to Plaintiff's Statement of Material Facts ¶¶ 29-30 (Defs.' Rep. to Pls.' SMF") [Dkt. No. 25-1].

On or about May 20, 2015, Plaintiffs submitted two proposed ads to WMATA's advertising agent for display on WMATA's buses and free-standing dioramas. Pls.' SMF ¶ 23. The proposed ads appear as follows:

Id. ¶ 24.

Id. ¶ 25.

On May 22, 2015, WMATA' s advertising agent responded to Plaintiffs' submission stating, "The copy has been submitted to the transit authority. We are also looking into available inventory. I will let you know about both as soon as I hear back." Id. ¶¶ 26-27.

On May 28, 2015, WMATA' s Board of Directors unanimously adopted a motion ("May 28 Moratorium" or "Restriction") closing "WMATA's advertising space to any and all issue-oriented advertising, included but not limited to, political, religious, and advocacy advertising until the end of the calendar year." Id. ¶¶ 44, 50. The motion also stated that the Board would "review what role such issue-oriented advertising has in WMATA's mission . . . and will seek public comment and participation for its consideration before making a

final policy determination." Bowersox Decl., Ex. A [Dkt. No. 19-3].

WMATA rejected Plaintiffs' ads after the May 28 Moratorium was enacted. Pls.' SMF ¶¶ 59-60; Defs.' Rep. to Pls.' SMF ¶¶ 59-60.

On November 19, 2015, the WMATA Board of Directors adopted Resolution No. 2015-55 closing "WMATA's Commercial Advertising Space to issue-oriented ads, including political, religious, and advocacy ads. . ." Id., Ex. B. The Resolution included further "Guidelines Governing Commercial Advertising," which specified that,

> 9. Advertisements intended to influence members of the public regarding an issue on which there are varying opinions are prohibited. . . 11. Advertisements that support or oppose any political party or candidate are prohibited. 12. Advertisements that support or oppose any religion, religious practice or belief are prohibited . . . [and] 13. Advertisements that support or oppose an industry position or industry goal without any direct commercial benefit to the advertisers are prohibited.
>
> Id.

B. Procedural Background

On July 1, 2015, Plaintiffs filed their Complaint. On August 5, 2016, Defendants filed their Motion for Summary Judgment. On September 5, 2016, Plaintiffs filed their Cross-Motion for Summary Judgment ("Cross-Mot.") [Dkt. No. 20]. On October 3, 2016, Defendants filed their Opposition to Plaintiffs' Cross-

Motion for Summary Judgment and Reply (Defs.' Rep.") [Dkt. No. 25]. On October 31, 2016, Plaintiffs filed their Reply ("Pls.' Rep.") [Dkt. No. 2 9]

II. STANDARD OF REVIEW

Summary judgment should be granted only if the moving party has shown that there is no genuine dispute of material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56, see also Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Johnson v. Perez, 823 F.3d 701, 705 (D.C. Cir. 2016). A dispute of material fact is "'genuine' . . . if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

In a summary judgment motion, the moving party has the responsibility for "informing the district court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact." Celotex, 477 U.S. at 323 (internal quotation omitted).

The court should view the evidence in favor of the nonmoving party and draw all reasonable inferences in favor of that party making credibility determinations or weighing the evidence, Johnson, 823 F.3d at 705. "However, the nonmoving party may not rely solely on allegations or conclusory statements. Rather, the nonmoving party must present specific facts that would enable a reasonable jury to find in its favor." Krishnan v. Foxx, 177 F. Supp. 3d 496, 503 (D.D.C. 2016) (citing Greene v. Dalton, 164 F.3d 671, 675 (D.C. Cir. 1999)).

III. ANALYSIS

A. Forum Analysis

The Parties do not dispute that Plaintiffs' ads are protected speech. Courts analyze restrictions on protected speech on government property for compliance with the First Amendment under the public forum doctrine. Initiative & Referendum Inst. v. U.S. Postal Serv., 685 F.3d 1066, 1070 (D.C. Cir. 2012). Under the public forum doctrine, government property is divided into three categories: 1) traditional public forums, 2) designated public forums, and 3) nonpublic forums. Id. "[T]he extent to which the Government can control access [to its property] depends on the nature of the relevant forum. Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 800 (1985).

Traditional public forums, such as streets and parks, "have immemorially been held in trust for the use of the public, and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." Id. (quoting Hague v. CIO, 307 U.S. 496, 515 (1939)) (internal quotation marks omitted).

A designated public forum is government property "which the state has opened for use by the public as a place for expressive activity." Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983) "The Constitution forbids a state to enforce certain exclusions from a [designated public forum] even if it was not required to create the forum in the first place." Id. "[W]hen the Government has intentionally designated a place or means of communication as a public forum speakers cannot be excluded without a

compelling governmental interest." Cornelius, 473 U.S. at 800.

A nonpublic forum "is not by tradition or designation a forum for public communication," Perry, 460 U.S. at 46, and the First Amendment does not guarantee unlimited expression in this forum. Rather, 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. Access to a nonpublic forum can be restricted as long as the restrictions are viewpoint neutral and reasonable. Cornelius, 473 U.S. at 800.

Plaintiffs contend that WMATA's advertising space was a designated public forum at the time they submitted their ads. Cross-Mot. at 13-20. WMATA does not dispute this assertion. See Defs.' Rep. at 3-4. Plaintiffs argue that this Court should therefore analyze WMATA' s rejection of AFDI' s ads by using the higher standard that applies to designated public forums. WMATA contends that its advertising space was a nonpublic forum when it rejected AFDI's ad, and therefore the rejection should be analyzed under the standard that applies to nonpublic forums. This Court agrees with WMATA. WMATA's new guidelines must therefore be viewpoint neutral and reasonable. Pleasant Grove City v. Summum, 555 U.S. 460, 470 (2009).

1. WMATA's Restriction is Viewpoint Neutral

The parties do not dispute that the government has a right to convert a designated public forum into a nonpublic forum. See Mot. at 7-8; Cross-Mot. at 17-18; Pls.' Rep. at 10; Cornelius, 473 U.S. at 802 ("the government is not required to indefinitely retain the open character of [a] facility"). However, Plaintiffs argue that WMATA's decision to close its property to issue-oriented advertising was improper because the change specifically targeted Plaintiffs' ads.[1] See Pls.' Rep. at 10.

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[1] To the extent that Plaintiff brings their claims under WMATA's pre-May 28, 2015 policy which permitted the publication of issue-oriented ads on WMATA's property, WMATA's May 28 Moratorium mooted any such claim. See AFDI v. MTA, 815 F.3d 105 (2d. Cir. 2016). In AFDI, the same Plaintiffs sued the New York Metropolitan Transit Authority for refusing to publish a similarly political ad. Id. After the district court granted Plaintiffs' Motion for a preliminary injunction, the MTA changed its advertising standards to convert MTA's property from a designated public forum to a nonpublic forum. Id. The district court held that the MTA's new policy mooted Plaintiffs' claims, and the Second Circuit affirmed. Id.

The AFDI case is consistent with the law in our Circuit. See Initiative & Referendum Inst., 685 F.3d at 1074 ("[a] challenge to a superseded law is rendered moot unless there is evidence indicating that the challenged law likely will be reenacted"). Even considered in the light most favorable to Plaintiffs, they have not presented any facts suggesting that WMATA is likely to reverse its regulation. On the contrary, WMATA's May 28 Moratorium was made permanent on November 19, 2015 and has remained in effect ever since. Plaintiffs' argument that WMATA's financial difficulties will force it to redesignate its property as a designated public forum are nothing more than speculation.

Needless to say, it would be unconstitutional for WMATA to close its property to issue-oriented advertising "merely as a ruse for impermissible viewpoint discrimination." See Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 394 (1993) ("[T]the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others") (internal quotations omitted); Ridley v. Mass. Bay Transp. Auth., 390 F.3d 65, 77 (1st Cir. 2004).

WMATA argues that its reasons for closing its advertising space to issue oriented ads were "that controversial ads were hurting WMATA's reputation with the community; ensuring employee morale, which was adversely affected by constant exposure to messages they might find offensive; minimizing vandalism directed at issue-oriented ads; and reducing the administrative burden on WMATA, its outside advertising management company, and its counsel, who were forced to review controversial ads to determine if they complied with the former advertising policy." Defs.' Rep. at 10 (citing Bowersox Depo at 41:6-48:13).

Plaintiffs argue that the timing of WMATA's May 28 Moratorium shows that it was targeted at Plaintiffs' ads. Specifically, Plaintiffs allege that because their ad was pending when WMATA took what they characterize as an "unprecedented and hasty action of passing a 'moratorium' which created a sea change in the way WMATA had been doing business for decades," the new guidelines must have been "timed so as to prevent the display of Plaintiffs' advertisements." Pls.' Rep. at 10 (emphasis in original).

However, Defendants cite many cases in which the government changed its guidelines during the pendency of a lawsuit and the court did not infer viewpoint discrimination from such timing. For example, in Ridley, a case which Plaintiffs cite as well, the defendant agreed to run an ad in April 2002, mooting a pending appeal over the refusal to publish the ad, rejected an additional ad in August 2002, and changed its guidelines in January 2003. Ridley, 390 F.3d at 74-75. Despite the timing of the changed guidelines, the court found "no evidence that the 2003 changes were adopted as a mere pretext to reject plaintiff's advertisements." Id. at 77.

In Ridley, the court did find that one of the defendants had engaged in viewpoint discrimination based on statements by some of its officials. Id. at 87-88. Here, Plaintiffs rely on a statement by Defendants' representative that Plaintiffs' ad was the "straw that broke the camel's back" and pushed WMATA to change its guidelines. Even in the light most favorable to Plaintiffs, that statement does not support an inference that WMATA's guidelines were revised for the purpose of rejecting Plaintiffs' ads. Rather, the statement suggests that WMATA had previously been considering a policy change for other reasons and only saw Plaintiffs' ad as additional support for their previous thinking.

Plaintiffs argue that because WMATA published issue-oriented ads in the past, the changes to its guidelines and subsequent rejection of Plaintiffs' ads can only be due to a preference for other controversial messages over Plaintiffs' message. Cross-Mot. at 25-26. However, having established that WMATA was

permitted to change its guidelines, the relevant inquiry is not whether WMATA allowed other controversial messages before the May 28 Moratorium, but whether WMATA has consistently enforced the new guidelines since they were enacted. Plaintiffs have submitted no evidence that the new guidelines have been inconsistently enforced.[2]

2. WMATA's Restriction is Reasonable

"A regulation 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 (citing Perry, 460 U.S. at 50-51). A restriction "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). There is no "requirement that the restriction be narrowly tailored or that the Government's interest be compelling," Cornelius, 473 U.S. at 809, especially because the nonpublic forum is "rarely []the only means of contact with a particular audience." Id.

Plaintiffs respond that "it is unreasonable to argue that an ad displayed on the outside of a bus traveling through Washington, D.C.- a bustling city in which passengers and outside observers are besieged by a

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[2] Plaintiffs' argument that the government may not "discriminate" against non-commercial ads in favor of commercial ads, see Pls.' Rep. at 12, is unsupported by the case it cites, Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 514 (1981), and runs counter to the holdings of many of the other cases cited above upholding guidelines that prohibit political or issue-oriented advertising. See e.g. SMART, 698 F.3d 885.

cacophony of expressive, and quite often political and controversial, media- would somehow interfere with the operation of WMATA' s bus system." Cross-Mot. at 28.

Yet, Defendants explained how such ads have interfered with WMATA's operations. For example, WMATA stated that controversial ads had led to vandalism directed at issue-oriented ads and an administrative burden on WMATA's advertising agent and counsel who were forced to review them to determine if they complied with the former advertising policy. Courts have consistently held that restrictions on issue-oriented advertising on public transportation for reasons such as these are reasonable. This Court finds WMATA's restrictions to be reasonable as well. See Lehman v. City of Shaker Heights, 418 U.S. 298, 304 (1974) ("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"); SMART, 698 F.3d at 892-893.

B. WMATA's Restriction Is not Unconstitutionally Vague

Plaintiffs argue that the May 28 Moratorium and subsequent guidelines are "hopelessly vague," and therefore violate the First Amendment by giving "officials [] unbridled discretion over [the] forum's use." Cross-Mot. at 16 (quoting Se. Promotions, Ltd. v. Conrad, 420 U.S. 546, 553 (1975)). A law or guideline limiting free speech must have "narrow, objective, and definite standards to guide the licensing authority." Shuttlesworth v. City of Birmingham, Ala., 394 U.S. 147, 151 (1969).

WMATA's advertising guidelines include sufficiently definite standards regarding what constitutes "issue-oriented ads." The guidelines specify that the Restriction is "including but not limited to, political, religious and advocacy advertising." Bowersox Decl., Ex. B. The guidelines further elaborate each of the modifiers in that part of the Restriction. For example, the guidelines state that "[a]dvertisements that promote or oppose any political party or candidate are prohibited;" and that "[a]dvertisements that promote or oppose any religion, religious practice or belief are prohibited; and that "[a]dvertisements intended to influence members of the public regarding an issue on which there are varying opinions are prohibited," among other specifications. Id.

Thus, WMATA's Restriction is clearly not unconstitutionally vague. See SMART, 698 F.3d 885 (held that a restriction on "political or political campaign advertising" was "not so vague or ambiguous that a person could not readily identify the applicable standard" and therefore upheld another transit authority's rejection of another one of plaintiffs' ads).

Defendants' Motion for Summary Judgment is therefore granted and Plaintiffs' Cross-Motion for Summary Judgment is denied.[3]

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[3] Plaintiffs seek nominal damages under 42 U.S.C. § 1983. Defendants argue that WMATA is immune from suit under Section 1983, and that Plaintiffs are therefore not entitled to nominal damages. Because this Court finds that Defendants are not liable, Plaintiffs are not entitled to nominal damages and the Court need not reach the issue of whether WMATA posseses sovereign immunity.

IV. CONCLUSION

For the foregoing reasons, Defendants' Motion for Summary Judgment shall be **granted;** and Plaintiffs' Cross-Motion for Summary Judgment shall be **denied.** An Order shall accompany this Memorandum Opinion.

s/_____
Gladys Kessler
United States District Judge

March 28, 2017

Copies to: attorneys on record via ECF

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 15-1038 (GK)

[Filed March 28, 2017]

AMERICAN FREEDOM DEFENSE INITIATIVE, et. al.,	)
Plaintiffs,	)
v.	)
WMATA, et. al.,	)
Defendants.	)

ORDER

Plaintiffs, American Freedom Defense Initiative, Pamela Geller and Robert Spencer, (collectively, "Plaintiffs," or "AFDI"), bring this action against the Washington Metropolitan Area Transit Authority, et. al., (collectively, "Defendants," or "WMATA"), alleging violations of their First Amendment rights. This dispute arose when Plaintiffs submitted an ad to WMATA to display on its property. After Plaintiffs submitted the ad, WMATA changed its policy to close its advertising space to all "issue-oriented" advertising. WMATA then rejected Plaintiffs' ad under the new policy. Plaintiffs claim that WMATA's denial is a prior restraint on Plaintiffs' speech in violation of their First Amendment rights.

This matter is before the Court on the Parties' Cross-Motions for Summary Judgment [Dkt. Nos. 19, 20]. Upon consideration of the Motions, Oppositions [Dkt. Nos. 20, 25], and Replies [Dkt. Nos. 25, 29], and the entire record herein, and for the reasons stated in the accompanying Memorandum Opinion, it is hereby

ORDERED, that Defendant's Motion for Summary Judgment shall be **granted;** and it is further

ORDERED, that Plaintiff's Motion for Summary Judgment shall be **denied.**

s/_____
Gladys Kessler
United States District Judge

March 28, 2017

Copies to: attorneys on record via ECF

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17-7059
September Term, 2018
1:15-cv-01038-GK

[Filed October 29, 2018]

American Freedom Defense Initiative, et al.,

Appellants

v.

Washington Metropolitan Area Transit Authority, WMATA and Paul J. Wiedefeld, in his official capacity as General Manager for WMATA,

Appellees

BEFORE: Garland, Chief Judge; Henderson, Rogers, Tatel, Griffith, Srinivasan, Millett, Pillard, Wilkins, and Katsas, Circuit Judges; Ginsburg, Senior Circuit Judge

O R D E R

Upon consideration of appellants' petition for rehearing en banc, the response thereto, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken R. Meadows
Deputy Clerk

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1:15-cv-1038-JDB

[Filed December 21, 2018]

AMERICAN FREEDOM DEFENSE INITIATIVE, *et al.*,	)
Plaintiffs,	)
v.	)
WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY, *et al.*,	)
Defendants.	)

DEFENDANTS' REPLY TO PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO STAY PROCEEDINGS PENDING APPELLATE REVIEW IN A RELATED MATTER

AFDI argues that "the current record reveals" that "the justification for WMATA's rejection of Plaintiffs' ad is found in Guideline 9." Plfs.' Resp. Defs.' Mot. Stay, Dkt. 39, at ECF 5. This argument contradicts AFDI's representation to the D.C. Circuit that "it is not clear on what basis WMATA rejected its

advertisements." *Am. Freedom Def. Initiative v. Washington Metro. Area Transit Auth.*, 901 F.3d 356, 369 (D.C. Cir. 2018). It is also untrue. WMATA rejected AFDI's proposed advertisements under a then effective and now rescinded moratorium ("the Moratorium") that temporarily prohibited all "issue-oriented advertising, including but not limited to, political, religious and advocacy advertising." *Id.* at 360. AFDI did not resubmit the advertisements once WMATA adopted the Guidelines Governing Commercial Advertising ("the Guidelines") that replaced the Moratorium. *Id.* at 369. As the D.C. Circuit explained, AFDI therefore "has only itself to blame for any uncertainty as to why its specific advertisements were rejected." *Id.*

Moreover, the record before this Court is devoid of any evidence suggesting that WMATA rejected AFDI's argument based solely on its political, as opposed to religious, advocacy. The deposition testimony of Lynn Bowersox—an assistant general manager at WMATA for customer service, communications, and marketing, and not an attorney—is not to the contrary. Ms. Bowersox specifically noted that WMATA has "a panel of three attorneys who interpret the board policy and determine what is issue oriented, political, religious, and advocacy." Bowersox Dep., Dkt. 20-3, 108:7-17. Her testimony therefore stands only for the proposition that WMATA rejected AFDI's proposed advertisements pursuant to its moratorium on political, religious, or advocacy advertising—a moratorium that was replaced by the Guidelines, including Guidelines 9 and 12.

AFDI is wrong that resolution of appellate review in the *Archdiocese* matter would not resolve this case. The D.C. Circuit's opinion in *Archdiocese*, if left

undisturbed, will resolve this case in WMATA's favor by upholding Guideline 12. For all these reasons, Defendants' Motion to Stay (Dkt. 38) should be granted to await the outcome of the *Archdiocese* case.

II. ARGUMENT

AFDI has repeatedly represented that its claims in this suit involve a challenge to Guideline 12. The facts of the case make clear that the proposed advertisements would be rejected under Guideline 12. And AFDI concedes that an ultimate decision in the *Archdiocese* case "may inform this Court when it decides this case." Plfs.' Resp. Defs.' Mot. Stay, Dkt. 39, at ECF 7. The Court should therefore grant Defendants' motion, and this case should be stayed until the *Archdiocese* parties exhaust their right to appellate review.

A. AFDI has repeatedly represented that it is challenging Guideline 12, and it is clear that the proposed advertisements are prohibited by Guideline 12.

Despite AFDI's characterizations otherwise, the instant motion does not rely on a "new claim" by WMATA that Guideline 12 "serves as an alternate basis for rejecting Plaintiffs' ad." Plfs.' Resp. Mot. Stay, Dkt. 39, at ECF 7. Because AFDI did not resubmit its advertisements after the Guidelines replaced the Moratorium, there is not a clear record as to which Guidelines apply. However, based on AFDI's own briefings, the D.C. Circuit expressly found that AFDI

is challenging both Guideline 9 and Guideline 12.[1] *AFDI*, 901 F.3d at 363. AFDI's current representation that "the justification for WMATA's rejection of Plaintiffs' ads is found in Guideline 9" contradicts its arguments before the D.C. Circuit. Plfs.' Resp. Defs.' Mot. Stay, Dkt. 39, at ECF 5; *AFDI*, 901 F.3d at 369 ("AFDI complains . . . that it is not clear on what basis WMATA rejected its advertisements.").

Moreover, the facts of this case clearly demonstrate that AFDI's proposed advertisements would be rejected under Guideline 12. Plaintiffs attempt to prove otherwise by (1) emphasizing that the ad at issue in the *Archdiocese* case is a "Christmas ad sponsored by a religious organization"; and (2) characterizing their own advertisement as a "'Support Free Speech' ad." Plfs.' Resp. Mot. Stay, Dkt. 39, at ECF 7. But Plaintiffs' proposed advertisements reference a specific religious practice and belief: the Islamic prohibition against depicting the Prophet Mohammed. *See, e.g.*, Daniel Burke, *Why Images of Mohammed Offend Muslims*, CNN (May 4, 2015, 3:50 AM), https://cnn.it/2ED6Yrr (describing the prohibition as a "central tenet of Islam"). They therefore fall within Guideline 12's prohibition on "[a]dvertisements that promote or oppose any religion, religious practice or belief."

The D.C. Circuit's own summary of Guideline 12's scope is instructive:

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[1] The court found that AFDI is challenging Guidelines 9, 11, 12, and 13, but that Guidelines 11 and 13 are "obviously inapplicable." *AFDI*, 901 F.3d at 363.

> WMATA prohibits "[a]dvertisements that *promote or oppose* any religion, religious practice or belief." 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.

Archdiocese, 897 F.3d at 337 (D.C. Cir. 2018) (internal citation omitted). The identity of the speaker is irrelevant; so too is whether discrete elements of the advertisement could, on their own, be categorized as political speech. What matters is whether the advertisement—as is the case here—opposes a particular religious belief or practice. AFDI's proposed advertisements include the phrase "free speech," but the use of that phrase in conjunction with the other text and imagery clearly renders the advertisement anti-religious advocacy. The advertisements therefore are impermissible under Guideline 12.

B. AFDI has conceded that a decision in the *Archdiocese* case will inform the outcome of this case.

In its response to Defendants' motion, AFDI represents that it is "pure speculation . . . that [a subsequent decision in the *Archdiocese* case] will completely resolve this case such that no further discovery or briefing is necessary." Plfs.' Resp. Mot. Stay, Dkt. 39, at ECF 7. In addition to misstating Defendants' argument, that representation mischaracterizes the applicable legal standard. A court determining whether to stay a case need not conclude that the questions at issue in the related proceeding

are identical. *See United States v. Honeywell Int'l, Inc.*, 20 F. Supp. 3d 129, 132 (D.D.C. 2013). Rather, the court may find it efficient and fair to stay an action "pending resolution of independent proceedings *which bear upon the case*." *Id.* (emphasis added) (internal quotation marks and citation omitted). A stay of proceedings in one case pending the resolution of proceedings in another matter is "justifiable" if it would "settle some outstanding issues and simplify others." *Bridgeport Hosp. v. Sebelius*, No. 09-CV-1344, 2011 WL 862250, at *1 (D.D.C. Mar. 10, 2011).

Here, AFDI has conceded that "a decision in the Archdiocese case may inform this Court when it decides this case." Plfs.' Resp. Mot. Stay, Dkt. 39, at 7. For the reasons more fully explained in Defendants' motion, that is correct. AFDI has challenged Guideline 12 in addition to Guideline 9, and AFDI's proposed advertisements violate Guideline 12. A decision by the D.C. Circuit or U.S. Supreme Court that Guideline 12 is constitutional would thus defeat AFDI's case, as would the denial of *en banc* review or a petition for certiorari. A decision the other way would eliminate one of the two Guidelines at issue here. Either way, a stay of this case pending exhaustion of the Archdiocese's right to appeal would, at minimum, prevent this Court and the parties from expending further resources on this matter before outstanding issues are settled or simplified. A stay is therefore warranted. *Bridgeport Hosp.*, 2011 WL 862250, at *1 (deeming a stay of proceedings in one case pending the resolution of proceedings in another matter "justifiable" if it would "settle some outstanding issues and simplify others").

III. CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court grant their pending Motion to Stay (Dkt. 38) and stay all proceedings in this matter until the parties in the *Archdiocese* litigation have exhausted their right to appellate review.

Dated: December 21, 2018

Respectfully submitted,

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