ORAL ARGUMENT NOT YET SCHEDULED

NO. 17-7059

In the

United States Court of Appeals for the District of Columbia Circuit

AMERICAN FREEDOM DEFENSE INITIATIVE;
PAMELA GELLER; and ROBERT SPENCER,
Plaintiffs-Appellants,

v.

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

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
HONORABLE GLADYS KESSLER
CASE NO. Case No. 1:15-cv-01038-GK

APPELLANTS' REPLY BRIEF

ROBERT JOSEPH MUISE, ESQ.
AMERICAN FREEDOM LAW CENTER
P.O. BOX 131098
ANN ARBOR, MICHIGAN 48113
(734) 635-3756

DAVID YERUSHALMI, ESQ.
AMERICAN FREEDOM LAW CENTER
2020 PENNSYLVANIA AVENUE NW
SUITE 189
WASHINGTON, D.C. 20006
(646) 262-0500

Counsel for Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

GLOSSARY OF TERMS v

INTRODUCTION 1

SUMMARY OF THE ARGUMENT 2

SUMMARY OF RELEVANT AND MATERIAL FACTS 3

ARGUMENT IN REPLY 9

I. WMATA'S RESTRICTION ON PLAINTIFFS' SPEECH IS VIEWPOINT BASED AND THUS UNCONSTITUTIONAL REGARDLESS OF THE FORUM QUESTION 9

II. WMATA'S RESTRICTIONS LACK OBJECTIVE STANDARDS IN VIOLATION OF THE FIRST AND FOURTEENTH AMENDMENTS 16

III. WMATA'S ADVERTISING SPACE IS A PROPER FORUM FOR PLAINTIFFS' SPEECH 18

A. WMATA's Forum Should Be Treated as a Public Forum 18

B. It Is Unreasonable to Ban Plaintiffs' Ads from WMATA's Forum ... 21

C. There Is Ample Evidence to Infer that WMATA Attempted to Close Its Forum Based on Its Animus toward Plaintiffs' Speech 23

IV. DEFENDANTS ARE LIABLE FOR VIOLATING PLAINTIFFS' CONSTITUTIONAL RIGHTS 26

CONCLUSION 27

CERTIFICATE OF COMPLIANCE 28

CERTIFICATE OF SERVICE 29

TABLE OF AUTHORITIES

CASES

Am. Civil Liberties Union Found. v. Wash. Metro. Area Transit Auth.,
Case No. 1:17-cv-01598 (D.D.C. filed Aug. 9, 2017) 1

Am. Freedom Def. Initiative v. Mass. Bay Transp. Auth.,
781 F.3d 571 (1st Cir. 2015) 19, 20, 21

Am. Freedom Def. Initiative v. Suburban Mobility Auth. for Reg'l Transp.,
698 F. 3d 885 (6th Cir. 2012) 11

**Am. Freedom Def. Initiative v. Wash. Metro. Area Transit Auth.*,
898 F. Supp. 2d 73 (D.D.C. 2012) 19

Anderson v. Liberty Lobby, Inc.,
477 U.S. 242 (1986) 24

Christ's Bride Ministries, Inc. v. Se. Pa. Transp. Auth.,
148 F.3d 242 (3d Cir. 1998) 21

City Council of Los Angeles v. Taxpayers for Vincent,
466 U.S. 789 (1984) 15

**Coleman v. Ann Arbor Transp. Auth.*,
947 F. Supp. 2d 777 (E.D. Mich. 2013) 23

**Cornelius v. NAACP Legal Def. & Educ. Fund,*
473 U.S. 788 (1985) 2, 14, 18, 21, 23

**Ex Parte Young*,
209 U.S. 123 (1908) 27

**Forsyth Cnty. v. Nationalist Movement,*
505 U.S. 123 (1992) 17

**Good News Club v. Milford Cent. Sch.*,
533 U.S. 98 (2001) 15

**Gregoire v. Centennial Sch. Dist.*,
907 F.2d 1366 (3d Cir. 1990)..16

Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Bos.,
515 U.S. 557 (1995)..4

Int'l Soc'y for Krishna Consciousness, Inc. v. Lee,
505 U.S. 672 (1992)..20

**Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*,
508 U.S. 384 (1993)...2, 10, 14, 15

Lebron v. AMTRAK,
69 F.3d 650 (2d Cir. 1995)..26

**Lebron v. Wash. Metro. Transit. Auth.*,
749 F.2d 893 (D.C. Cir. 1984)...18, 27

**Lebron v. Wash. Metro. Area Transit Auth.*,
665 F. Supp. 923 (D.D.C. 1987)...26

Lehman v. City of Shaker Heights,
418 U.S. 298 (1974)...11, 26

**Matal v. Tam*,
137 S. Ct. 1744 (2017)...1, 9, 10, 12

McCullen v. Coakley,
134 S. Ct. 2518 (2014)..20

NAACP v. Button,
371 U.S. 415 (1963)..16

**NAACP v. City of Phila.*,
39 F. Supp. 3d. 611 (E.D. Pa. 2014)...21

**NAACP v. City of Phila.*,
834 F.3d 435 (3d Cir. 2016)..22, 23

Ridley v. Mass. Bay Transp. Auth.,
390 F.3d 65 (1st Cir. 2004)..23

**Rosenberger v. Rector & Visitors of the Univ. of Va.*,
515 U.S. 819 (1995)..10, 15

Se. Promotions, Ltd. v. Conrad,
420 U.S. 546 (1975)..16

**United Food & Commercial Workers Union Local 1099 v. Sw. Ohio Reg'l Transit Auth.*,
163 F.3d 341 (6th Cir. 1998) 17

**United States v. Griefen*,
200 F.3d 1256 (9th Cir. 2000) 23

United States v. Kokinda,
497 U.S. 720 (1990)..20

United States v. Taylor,
166 F.R.D. 356 (M.D.N.C. 1996) 8

Statutes

*D.C. Code § 9-1107.01(80)..26

Rules

Fed. R. Civ. P. 30(b)(6)..6, 8, 16

---

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

GLOSSARY OF TERMS

AFDI	American Freedom Defense Initiative
WMATA	Washington Metropolitan Area Transit Authority

INTRODUCTION

WMATA's disdain for Plaintiffs and their speech is evident from the record below, and it is on full display in its brief filed in this Court.[1] WMATA's lack of regard for Plaintiffs and their message is second only to its lack of regard for the First Amendment and its prohibition on government censorship of speech, particularly when the government is seeking to silence a speaker wishing to express a controversial viewpoint in Washington, D.C.—"the seat of the federal government." (R-20-3; JA-79[Bowersox Dep. at 30:3-11]). And Plaintiffs are not the only parties recognizing this. *See Am. Civil Liberties Union Found. v. Wash. Metro. Area Transit Auth.*, Case No. 1:17-cv-01598 (D.D.C. filed Aug. 9, 2017) (challenging, *inter alia*, WMATA's advertising guidelines under the First and Fourteenth Amendments as "explicitly or implicitly" viewpoint based).

Make no mistake, what WMATA is attempting to do here is to cleanse its advertising space (a forum for speech) from any message that WMATA's government censors deem offensive. However, "[g]iving offense is a viewpoint." *Matal v. Tam*, 137 S. Ct. 1744, 1763 (2017) (plurality opinion).[2] And the First

---

[1] WMATA's disdain for Plaintiffs is evident by its irrelevant reference to Plaintiffs' prior ads and its citation to a district court's impertinent and erroneous reference to Plaintiffs' speech as "hate speech"—a category of speech that any serious student of the First Amendment knows does not exist. (*See* WMATA Br. at 10 & n.2).

[2] WMATA makes the bizarre claim that this Court should simply disregard this recent and exceedingly important First Amendment decision, incorrectly stating, "AFDI's frolic and detour through *Matal v. Tam*, 137 S. Ct. 1744 (2017), sheds no

Amendment prohibits viewpoint discrimination regardless of the nature of the forum. *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993) ("[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).

In sum, this Court should reverse the District Court and enter judgment in Plaintiffs' favor.

SUMMARY OF THE ARGUMENT

WMATA's restriction on Plaintiffs' speech is inherently viewpoint based, rendering unnecessary any extended treatment of other questions raised by the parties. Closely related to the viewpoint-based nature of WMATA's restriction on Plaintiffs' speech is the fact that its restrictions are unconstitutional due to their lack of objective criteria by which WMATA officials are permitted to censor speech.

Additionally, pursuant to *Cornelius v. NAACP Legal Defense and Educational Fund,* 473 U.S. 788 (1985), WMATA's advertising space is a public forum for Plaintiffs' speech. Consequently, WMATA's content-based restrictions

---

light on the issue before this Court." (WMATA Br. at 26). While *Matal* may not have been a "forum" case, it certainly "sheds light" on what constitutes viewpoint discrimination—the *central*, if not dispositive, issue in this case.

cannot survive strict scrutiny nor can WMATA meet is heavy burden of justifying its prior restraint on Plaintiffs' speech.

Assuming, *arguendo*, that WMATA's advertising space is a nonpublic forum, in light of the characteristic nature and function of the forum, WMATA's restriction on "issue-oriented" advertising is nonetheless unreasonable. 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. And this is particularly true because Washington, D.C., as the seat of the federal government, is a market that is distinct in the amount of issue oriented advertising.

Moreover, the government's ability to "close" a forum for protected speech is not without constitutional limits. Here, there is ample evidence to infer that WMATA sought to close its forum based on its animus toward Plaintiffs' speech.

Finally, WMATA cannot escape liability in this case based on a claim of immunity. WMATA has waived any such claim. The leasing of its advertising space, and thus WMATA's refusal to permit Plaintiffs to advertise within this space, is a proprietary (as opposed to governmental) function.

SUMMARY OF RELEVANT AND MATERIAL FACTS

WMATA seeks to whitewash the record below by mischaracterizing Plaintiffs' arguments and evidence and ignoring crucial facts demonstrating that its

rejection of Plaintiffs' ads and the policy and procedures by which WMATA accomplished this rejection violate Plaintiffs' rights under the First and Fourteenth Amendments. Upon its *de novo* review of the entire record, *see Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Bos.*, 515 U.S. 557, 567 (1995) (requiring courts to "conduct an independent examination of the record as a whole, without deference to the trial court" in cases involving the First Amendment), this Court should reject WMATA's effort to subvert the First Amendment.

In summary, as the record demonstrates:

- Since the 1970's, WMATA has permitted a wide array of commercial and non-commercial advertising on its advertising space.[3]
- "[A]s the seat of the federal government, the D.C. market is distinct in the amount of issue oriented advertising."[4]
- On May 20, 2015, Plaintiffs submitted to WMATA's advertising agent the ads at issue here, which are depicted below.[5]

[3] (R-20-3; JA-81[Bowersox Dep. at 38:21-25 to 39:1]).
[4] (R-20-3; JA-79[Bowersox Dep. at 30:3-11]).
[5] (R-20-2; JA-42-43, 52-54[Geller Decl. ¶¶ 13, 17, Ex. D (email with WMATA ad agent)]).

- At the time Plaintiffs submitted the ads, the ads complied with WMATA's policy—in other words, there was "no reason to reject" Plaintiffs' ads.[6]

- At the time Plaintiffs submitted the ads, there was known availability for their placement.[7]

- *Contemporaneous with the submission of Plaintiffs' ads, WMATA prepared a memorandum which suggested a change in policy* ***that would be designed to restrict Plaintiffs' ads***.[8]

- On May 26, 2015 and prior to suggesting a policy change, the WMATA Board Chairman sent an email to Ms. Bowersox *regarding Plaintiffs' ads at issue here* in which the chairman is reacting to a news article about the ads

---

[6] (R-20-3; JA-75-76[Bowersox Dep. at 16:23-25 to 17:1-8 (conceding that Plaintiffs' ads were compliant with WMATA policy and that there was "no reason to reject" the ads at the time)]).

[7] (R-20-3; JA-68, 109-10[Muise Decl. ¶ 7, Ex. F ("History with AFDI Advertising")]).

[8] (R-20-3; JA-76-77[Bowersox Dep. at 19:3-23, 21:9-22]; R-20-3; JA-109-10[Ex. F ("History with AFDI Advertising") (referencing policy change of "MTA/NY" that would "ban[] both religious and political ads," and stating, "[t]he question then becomes if AFDI's ads can always be defined as religious ads?")]).

and directs Ms. Bowersox to be prepared to discuss the matter with the Board on May 28, to which Ms. Bowersox responded, "we are."[9]

- Following the submission of Plaintiffs' ads, Ms. Bowersox prepared for the WMATA Board of Directors a proposal to change WMATA's policy on a temporary basis so as to suspend the acceptance of "issue-oriented" advertising.[10] A proposal that was intended to ban the ads submitted by Plaintiffs. *See* n. 8, *supra*.

- In a candid moment, WMATA's Rule 30(b)(6) witness conceded that the submission of Plaintiffs' ads was the proximate cause for the dramatic policy shift.[11]

- Despite the unprecedented nature of this "moratorium" and its negative impact on revenue, it wasn't until the executive session held just prior to the Board meeting that the "moratorium" motion was presented to the members of the Board. In other words, <u>*this was the first time the Board received the suggestion*</u>.[12]

---

[9] (R-20-3; JA-77[Bowersox Dep. at 23:1-25 to 24:1-10]; R-20-3; JA-68, 112-16[Muise Decl. ¶ 7, Ex. G (email between Downey and Bowersox)]).

[10] (R-20-3; JA-80[Bowersox Dep. at 33:3-7]; *see also* R-20-3; JA-68, 100, 112-16[Muise Decl. ¶¶ 5, 7 Exs. D (motion), G (email between Downey and Bowersox)]).

[11] (R-20-3; JA-82[Bowersox Dep. at 49:10-21 (conceding that Plaintiffs' ads were "the straw that broke the camel's back")]).

[12] (R-20-3; JA-84-85[Bowersox Dep. at 60:15-25 to 62:1-3]; *see also* R-20-3; JA-68, 112-16[Muise Decl. ¶ 7, Ex. G (email between Downey and Bowersox)]).

- During the May 28, 2015 Board meeting, the motion was raised as the last item.[13]
- The "moratorium" proposal *was not on the Board's agenda for the meeting that evening*.[14]
- During the public meeting, the Board was confused in terms of how to present and approve the proposed "moratorium" motion, questioning its procedural propriety.[15]
- There was very little discussion of the motion prior to the Board approving it, despite the unprecedented nature of the "moratorium."[16]
- The Board voted unanimously to approve the motion, thereby imposing a temporary "moratorium" on "issue-oriented" ads.[17]
- Thus, because WMATA was determined to not display Plaintiffs' ads, the Board took the unprecedented step of approving a motion that "directs management to close WMATA's advertising space to any and all issue-

[13] (R-20-3; JA-86[Bowersox Dep. at 67:14-17]; R-20-3; JA-67, 94-95[Muise Decl. ¶ 3, Ex. B (meeting transcript)]).
[14] (R-20-3; JA-86[Bowersox Dep. at 65:17-25 to 66:1-10]; R-20-2; JA-43-44, 59-60[Geller Decl. ¶ 19, Ex. F (agenda)]).
[15] (R-20-3; JA-87-88[Bowersox Dep. at 71:14-25 to 74:1-13 (transcription of recording of Board meeting)]; R-20-3; JA-67, 94-95[Muise Decl. ¶ 3, Ex. B (meeting transcript)]).
[16] (R-20-3; JA-87-88[Bowersox Dep. 71:25 to 75:1-15]; *see also* R-20-3; JA-67, 94-95[Muise Decl. ¶ 3, Ex. B (meeting transcript)]).
[17] (R-20-3; JA-85[Bowersox Dep. at 61:24-25 to 62:1-3]; *see also* R-20-2; JA-43[Geller Decl. ¶ 18]; R-19-3; JA-32, 34[Bowersox Aff. ¶ 3, Ex. A (motion)]).

oriented advertising, including but not limited to, political, religious, and *advocacy* advertising until the end of the calendar year."[18]

- The policy change contained no guidelines, guidance, or definitions. *See* n. 18 *supra*.
- The proposed motion (marked Bates # 10 and produced by WMATA) *had printed on it "Approved Unanimously May 22, 2015"; yet, the meeting to consider it was not scheduled to take place until* <u>*May 28, 2015*</u>*, and, as noted, this motion was not on the Board's published agenda*.[19]
- WMATA rejected Plaintiffs' ads because it claims that the ads "advocate[] free speech."[20]
- On November 19, 2015, WMATA passed a resolution, stating, *inter alia*, "9. Advertisements intended to influence members of the public regarding an issue on which there are varying opinions are prohibited."; "11.

---

[18] (R-19-3; JA-32, 34[Bowersox Aff. ¶ 3, Ex. A (motion) (emphasis added)]; R-20-3; JA-68, 100, 109-10, 112-16[Muise Decl. ¶¶ 5, 7 Ex. D (motion), Ex. F ("History with AFDI Advertising), Ex. G (email between Downey and Bowersox)]).

[19] (R-20-3; JA-68, 100[Muise Decl. ¶ 5, Ex. D (motion)]).

[20] (R-20-3; JA-90[Bowersox Dep. at 107:17-25 to 108:1-17]). WMATA retreats from this position in its brief. (WMATA Br. at 40 n.8). However, Ms. Bowersox was WMATA's designated witness to testify on its behalf in this matter pursuant to Rule 30(b)(6). *See, e.g., United States v. Taylor*, 166 F.R.D. 356, 361 (M.D.N.C. 1996) ("The [Rule 30(b)(6)] designee, in essence, represents the corporation just as an individual represents him or herself at a deposition. Were it otherwise, a corporation would be able to deceitfully select at trial the most convenient answer presented by a number of finger-pointing witnesses at the depositions. Truth would suffer.") (internal citation omitted).

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."[21]

- There are no objective criteria under the new policy for determining whether an ad should be permitted.[22]
- Plaintiffs want to display their ads on WMATA property, and they wanted to do so when the ads were originally submitted, but WMATA refuses to this day.[23]

ARGUMENT IN REPLY

I. WMATA'S RESTRICTION ON PLAINTIFFS' SPEECH IS VIEWPOINT BASED AND THUS UNCONSTITUTIONAL REGARDLESS OF THE FORUM QUESTION.

The "viewpoint discrimination rationale" for ruling in Plaintiffs' favor "renders unnecessary any extended treatment of other questions raised by the parties." *See Matal*, 137 S. Ct. at 1765 (Kennedy, J., concurring). As noted by Justice Kennedy, "The First Amendment's viewpoint neutrality principle protects

[21] (R-19-3; JA-32-33, 35-38[Bowersox Aff. ¶ 5, Ex. B (resolution)]).

[22] (R-20-3; JA-91[Bowersox Dep. at 113:23-25 to 115:1-9] ("I try to view it on a case-by-case basis."); *see also* R-19-3; JA-32-33, 35-38[Bowersox Aff. ¶ 5, Ex. B (resolution)]).

[23] (R-20-3; JA-44[Geller Decl. ¶ 23]).

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*. . . ." *Id*. at 1766 (Kennedy, J., concurring) (emphasis added).

As the case law make plain, and as WMATA concedes (WMATA Br. at 23), viewpoint discrimination is an egregious form of content discrimination that is prohibited in *all* forums. *See Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995); *Lamb's Chapel*, 508 U.S. at 394. And "[w]hen 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).

Realizing this problem, WMATA argues that its speech restriction "restricts only speech addressing 'topic[s]' not deemed appropriate for the forum, regardless of the position espoused." (WMATA Br. at 17). WMATA is wrong as a matter of fact and law. It restricts *viewpoints* and not topics. And because it might restrict numerous viewpoints does not remedy the problem. Silencing multiple viewpoints, whether religious, political or otherwise, doesn't make the restriction less viewpoint based; it makes it more so. *Id.* at 831-32 ("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.").

Indeed, what is the *topic* of Plaintiffs' ads, *which display the winning entry to an art contest*, that is prohibited by the moratorium and subsequently revised guidelines? The ad does not mention politics or religion. WMATA's memorandum uncovered during discovery demonstrates the pretzel-twisting it engaged in to try and restrict Plaintiffs' speech. As noted in the memorandum, WMATA grappled with considering a ban of "both religious and political ads" and was concerned that *"[t]he question then becomes if AFDI's ads can always be defined as religious ads?"* (R-20-3; JA-109-10[Ex. F ("History with AFDI Advertising")] (emphasis added)). As a result, WMATA drafted a vague restriction that "close[d] WMATA's advertising space to any and all *issue-oriented advertising*, including but not limited to, political, religious, and *advocacy* advertising." And what precisely is advocacy advertising? Or perhaps more to the point, what advertising is not advocacy advertising? Indeed, this restriction on its face does *not* restrict "topics," such as alcohol, gambling, etc., it plainly restricts *viewpoints* on a "topic."[24] For example, a Budweiser ad selling (*i.e.*, *advocating*

---

[24] WMATA's reliance on *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974) (upholding the City's consistently enforced ban on political *campaign* advertising), and *American Freedom Defense Initiative v. Suburban Mobility Authority for Regional Transportation* (*AFDI v. SMART*), 698 F. 3d 885, 892-93 (6th Cir. 2012) are misplaced. In both cases, the restriction was expressly a content restriction. In *AFDI v. SMART*, for example, the restriction stated: "In order to minimize chances of abuse, the appearance of favoritism, and the risk of imposing upon a captive audience, [SMART] shall not allow the following content: 1. Political or political campaign advertising." *Id.* at 888. And to be clear, Plaintiffs believe that the Sixth

for the purchase of) its beer necessarily promotes the sale of alcohol and such an ad would not be prohibited under the restriction. But an ad that encouraged viewers not to purchase Budweiser because it opposes the sale of alcohol for religious reasons, as an example, would be prohibited. The same would be true for an ad purchased by a casino or a company that sells contraceptives or a defense contractor. Without question, people have varying opinions on alcohol, gambling, contraception, and war, and the very purpose of advertising, whether commercial or not, is to advocate an opinion. Budweiser is the "king of beers." Sellers of condoms necessarily advocate for the use of contraception through their ads encouraging viewers to buy their products. Defense contractors necessarily do not oppose the use of military force and encourage military spending. Consequently, advocating in support of an "issue" is permissible, so long as the opinion expressed is not objectionable to WMATA. That is quintessential viewpoint discrimination. *Matal*, 137 S. Ct. at 1763 ("Giving offense is a viewpoint."). WMATA simply fails to comprehend the concept of viewpoint discrimination. But WMATA's blindness, willful or otherwise, to the demands of the First Amendment does not permit it to escape the factual and legal conclusion that its restrictions are

---

Circuit's decision reversing the district court's order granting AFDI's motion for preliminary injunction was wrong. Nonetheless, that was a preliminary ruling and the case continues today in the lower court as the parties are awaiting the district court's ruling on their pending cross-motions for summary judgment.

viewpoint based, thereby compelling this Court to rule in favor of Plaintiffs regardless of the forum question.

And contrary to WMATA's argument (WMATA Br. at 38), the revised guidelines, which help clarify what WMATA meant by an "issue-oriented" ad, further illustrate the viewpoint-based nature of the restriction. They don't remedy it. Per these guidelines, "Advertisements intended to influence members of the public regarding an issue on which there are varying opinions are prohibited." However, as noted above, members of the public have varying opinions on alcohol consumption, gambling, contraception, and the military, among others. But these "topics" are not excluded. Indeed, the guideline stating, "Advertisements 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. Moreover, religion as a "topic" is not excluded. However, "Advertisements 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 Plaintiffs' noted in their opening brief, "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)." (Pls.' Br. at 38). WMATA has no answer.

The Supreme Court's discussion in *Lamb's Chapel* (a nonpublic forum case) is instructive:

> The Court of Appeals thought that the application of Rule 7 in this case was viewpoint neutral because it had been, and would be, applied in the same way to all uses of school property for religious purposes. That all religions and all uses for religious purposes are treated alike under Rule 7, however, does not answer the critical question whether it discriminates on the basis of viewpoint to permit school property to be used for the presentation of all views about family issues and child rearing except those dealing with the subject matter from a religious standpoint.
>
> There is no suggestion from the courts below or from the District or the State that a lecture or film about child rearing and family values would not be a use for social or civic purposes otherwise permitted by Rule 10. *That subject matter is not one that the District has placed off limits to any and all speakers*. Nor is there any indication in the record before us that the application to exhibit the particular film series involved here was, or would have been, denied for any reason other than the fact that the presentation would have been from a religious perspective. In our view, denial on that basis was plainly invalid under our holding in *Cornelius, supra*, at 806, that
>
> > "although a speaker may be excluded from a nonpublic forum if he wishes to address a topic not encompassed within the purpose of the forum . . . or if he is not a member of the class of speakers for whose special benefit the forum was created . . . , the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject."
>
> The film series involved here no doubt dealt with a subject otherwise permissible under Rule 10, and its exhibition was denied solely because the series dealt with the subject from a religious standpoint.

> The principle that has emerged from our cases "is that the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others." *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984).

Lamb's Chapel, 508 U.S. at 393-94 (emphasis added); *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."). Thus, as demonstrated above, advertisements on alcohol, gambling, contraception, or the military, as just a few examples, are permissible, but not if the ad addresses these permissible "topics" from a religious viewpoint. Similarly, there would be no prohibition on an ad that featured the winning film at the Cannes Film Festival or a piece of artwork from the Vincent Van Gough collection at the National Gallery of Art. However, WMATA will not permit Plaintiffs to display the winning entry of its art contest because WMATA deems it objectionable.[25] That is viewpoint discrimination plain and simple. WMATA's arguments to the contrary are wrong.

---

[25] WMATA appears to argue that the Court should consider the ad proponent's motive for displaying an ad rather than the substance of the ad itself. (*See* WMATA at 39 [citing to the Complaint and its reference to Plaintiffs' motive for displaying this ad]). That is a very dangerous (and unlawful) proposition. *See Rosenberger,* 515 U.S. at 829 (stating that when the "rationale for the restriction" is "the specific motivating ideology or the opinion or perspective of the speaker," the government engages in forbidden viewpoint discrimination). It would permit WMATA to reject ads based on the personal political or religious views of the advertiser rather than the content of the ad itself.

II. WMATA'S RESTRICTIONS LACK OBJECTIVE STANDARDS IN VIOLATION OF THE FIRST AND FOURTEENTH AMENDMENTS.

Closely related to the viewpoint-based nature of WMATA's speech restrictions is the fact that these restrictions are unconstitutional due to their lack of objective criteria by which WMATA officials are permitted to censor speech. *See NAACP v. Button*, 371 U.S. 415, 438 (1963) ("Broad prophylactic rules in the area of free expression are suspect. . . . Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms.") (internal citations omitted). WMATA's claim that its restrictions survive this challenge (WMATA Br. at 38) must be rejected. Indeed, its argument flies in the face of the actual language of the restrictions, and it is contrary to the testimony of its Rule 30(b)(6) witness, who admitted, perhaps unwittingly, that the restrictions contain no objective guidance for WMATA's censors. (R-20-3; JA-91[Bowersox Dep. at 113:23-25 to 115:1-9] ("I try to view it on a case-by-case basis."); *see also* R-19-3; JA-32-33, 35-38[Bowersox Aff. ¶ 5, Ex. B (resolution)]).

As the Supreme Court warned, "[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." *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553 (1975). As a result, "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). "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," *United Food & Commercial Workers Union, Local 1099 v. Sw. Ohio Reg'l Transit Auth.*, 163 F.3d 341, 359 (6th Cir. 1998) (same) (hereinafter "*United Food*"), such as the speaker's viewpoint, *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 130 (1992) ("A government regulation that allows arbitrary application . . . has the potential for becoming a means of suppressing a particular point of view.").

Here, WMATA's speech restriction "offends the First Amendment [because] it grants a public official unbridled discretion such that the official's decision to limit speech is not constrained by objective criteria, but may rest on ambiguous and subjective reasons." *United Food*, 163 F.3d at 359 (internal quotations and citation omitted). Indeed, it is implausible to argue that WMATA's restriction on speech that addresses "an issue on which there are varying opinions" (*i.e.*, its "issue-oriented" restriction) is based on any objective criteria or standard whatsoever. Such restrictions violate the First and Fourteenth Amendments. *See id.*

III. WMATA'S ADVERTISING SPACE IS A PROPER FORUM FOR PLAINTIFFS' SPEECH.

A. WMATA's Forum Should Be Treated as a Public Forum.

According to the Supreme Court, "[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 Plaintiffs' speech. The advertising space remains open for *certain speakers*, such as Plaintiffs (persons willing to pay for advertising). And, as demonstrated above, the *subject* (or "topic") of Plaintiffs' ads is not excluded. Consequently, to restrict Plaintiffs' ads based on content requires WMATA to satisfy strict scrutiny, *id.* at 800, which it cannot, and WMATA does not argue that it could. Moreover, contrary to WMATA's argument,[26] its restriction on Plaintiffs' speech is 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

---

[26] (WMATA Br. at 27 ["AFDI goes on for page after page arguing that issue-oriented advertising is a 'prior restraint' subject to a 'heavy presumption against constitutional validity.' . . . That is plainly wrong."]).

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

The government could convert this public forum into a nonpublic forum by shutting down _all_ private speech, but that is not what WMATA is trying to do here. As Plaintiffs argued in their opening brief, the blurred and often confused distinction between forums, which essentially results in the blending of a designated public forum (or limited public forum) with a nonpublic forum is a mistake, and it operates in a way that favors the government and disfavors the First Amendment.[27] (*See* Pls.' Br. at 23 n.5).

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,

---

[27] Contrary to WMATA's misapprehension of Plaintiffs' argument, Plaintiffs are not asking this Court to "create a new subcategory including transit advertising space." (*see* WMATA Br. at 22-23 n.5). Rather, Plaintiffs are asking this Court to faithfully apply the existing categories so as to protect the First Amendment.

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) (emphasis added). 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 Plaintiffs' speech.

This argument leads further to the conclusion that WMATA's speech restrictions are unreasonable.

B. It Is Unreasonable to Ban Plaintiffs' Ads from WMATA's Forum.

WMATA's argument that restricting "issue-oriented" ads from its advertising space is "reasonable" (WMATA Br. at 33-38) is belied by the facts. 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).

WMATA's forum was unquestionably a public forum at the time Plaintiffs' ads were submitted (R-31; JA-152[Mem. OP. at 9]), and there is no dispute that Plaintiffs' ads are perfectly compatible with this forum (R-20-3; JA-75-76[Bowersox Dep. at 16:23-25 to 17:1-8 [conceding that at the time Plaintiffs' ads were submitted, there was "no reason to reject" them]). WMATA has previously displayed Plaintiffs' ads on their property, and these ads generated $65,200 in revenue for the transit authority. (R-20-3; JA-109[Ex. F ("History with AFDI Advertising")]).

In light of this undisputed evidence, 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 advertisements. 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." (R-20-3; JA-79[Bowersox Dep. at 30:3-11]). 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. *See 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.

C. There Is Ample Evidence to Infer that WMATA Attempted to Close Its Forum Based on Its Animus toward Plaintiffs' Speech.

The government's ability to "close" a forum for protected speech is not 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").

It is indisputable that WMATA didn't issue its "moratorium" or adopt new guidelines *in response to any expressed constitutional concerns*. Consequently, cases involving policy changes during the course of litigation to address the constitutional concerns raised by the litigation are inapposite. (*See* WMATA Br. at 18-19 [relying on such cases]). Here, there is ample evidence demonstrating that WMATA acted *in response to the submission of Plaintiffs' ads*—ads which WMATA officials were determined to prevent from running in their advertising space.

WMATA incorrectly asserts that "AFDI relies *solely* on the timing of WMATA's forum change to allege discriminatory motive." (WMATA Br. at 18 [emphasis added]; *see also id.* at 44 ["Under AFDI's misguided position that the timing of a change, on its own, is enough to infer pretext, this decision would also be wrong."]). Make no mistake, the timing of WMATA's *abrupt* policy change certainly calls into question WMATA's motive and presents an incredibly strong inference in Plaintiffs' favor—an inference the District Court improperly dismissed when granting summary judgment in WMATA's favor. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) (stating that when a court considers a

motion for summary judgment, "the evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in [its] favor"). But timing is not the only evidence, as noted above in the Summary of Relevant and Material Facts. In fact, the "memorandum" uncovered during the course of discovery in this case is a "smoking gun." It was prepared contemporaneous with the submission of Plaintiffs' ads, and it makes clear that WMATA's focus was to create a policy that would specifically exclude Plaintiffs' ads. (R-20-3; JA-109-10[Ex. F ("History with AFDI Advertising") (referencing policy change of "MTA/NY" that would "ban[] both religious and political ads," and stating, *"[t]he question then becomes if AFDI's ads can always be defined as religious ads?"*")]) (emphasis added).

Moreover, WMATA's exceedingly hasty and incredibly sloppy adoption of its "moratorium" undermines any claim that this was simply WMATA putting into practice a well-considered policy change based on "longstanding concerns about the effects of issue-oriented advertising." (*See, e.g.,* WMATA Br. at 18). And the subsequent "survey" was simply a way for WMATA to cover its tracks.[28]

[28] Consider the examples that WMATA sets forth in its brief as the types of ads that were causing employees and members of the community to react with dissatisfaction. (WMATA Br. at 8 [setting forth examples]). Neither the "moratorium" nor the revised guidelines provide that marijuana, condoms, airlines, or healthcare are prohibited subject matter. Nor do they prohibit LGBT businesses from running ads that describe their businesses as LGBT friendly. All that these examples demonstrate is that WMATA is in fact engaging in viewpoint discrimination. *See supra* Sec. I.

IV. DEFENDANTS ARE LIABLE FOR VIOLATING PLAINTIFFS' CONSTITUTIONAL RIGHTS.

WMATA argues that its decision to reject Plaintiffs' ads is immune from challenge by the Eleventh Amendment. (WMATA Br. at 53-54 ["As a governmental, and not propriety function, WMATA's decision to change its forum and reject AFDI's Prophet Muhammad advertisement under its new policy is plainly immune from suit."]). WMATA is mistaken. WMATA has waived its immunity under the circumstances of this case. D.C. Code § 9-1107.01(80) (providing that WMATA "shall be liable for its contracts and for its torts and those of its Directors, officers, employees and agent committed in the conduct of any proprietary function"). WMATA's leasing of its advertising space, and thus its refusal to permit Plaintiffs to advertise within this space, is a proprietary (as opposed to governmental) function. To accept WMATA's view, any time it rejected an ad under its guidelines it would be engaging in a governmental function and thus it would enjoy Eleventh Amendment immunity. But that is not what the cases hold in this context. *Lehman*, 418 U.S. at 304 ("These are reasonable legislative objectives advanced by the city in a *proprietary capacity*.") (emphasis added); *Lebron v. AMTRAK*, 69 F.3d 650, 657 (2d Cir. 1995) ("It is especially significant that, as in *Lehman*, Amtrak acts in this case in a *proprietary capacity*, rather than as a governmental regulator.") (emphasis added); *Lebron v. Wash. Metro. Transit Auth.*, 665 F. Supp. 923, 935 (D.D.C. 1987) ("The rental of

commercial advertising space is clearly a proprietary function. . . . Thus, WMATA, under the clear language of section 80 [of the WMATA Compact], has waived its Eleventh Amendment immunity in this case."); *see also Lebron*, 749 F.2d at 893 (holding WMATA liable for violating the First Amendment when it refused to display an ad on its transit advertising space). Nonetheless, the parties agree that Plaintiffs "may seek prospective injunctive relief against WMATA's General Manager under *Ex Parte Young*, 209 U.S. 123 (1908)." (WMATA Br. at 55).

CONCLUSION

The Court should reverse and enter judgment in Plaintiffs' favor.

AMERICAN FREEDOM LAW CENTER

/s/ *Robert J. Muise*
Robert J. Muise, Esq. (D.C. Court Bar No. MI 0052)
P.O. Box 131098
Ann Arbor, Michigan 48113
rmuise@americanfreedomlawcenter.org
Tel: (734) 635-3756

/s/ *David Yerushalmi*
David Yerushalmi, Esq. (D.C. Bar No. 978179)
2020 Pennsylvania Avenue NW, Suite 189
Washington, D.C. 20006
dyerushalmi@americanfreedomlawcenter.org
Tel: (646) 262-0500
Fax: (801) 760-3901

Counsel for Appellants

CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P. 32(a)(7), the foregoing Brief is proportionally spaced, has a typeface of 14 points Times New Roman, and contains 6,481 words, excluding those sections identified in Fed. R. App. P. 32(a)(7)(B)(iii).

AMERICAN FREEDOM LAW CENTER

/s/ *Robert J. Muise*
Robert J. Muise, Esq.

Counsel for Appellants

CERTIFICATE OF SERVICE

I hereby certify that on September 6, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. I further certify that all of the participants in this case are registered CM/ECF users. I further certify that eight (8) copies of this filing were sent this day via Federal Express overnight delivery to the Clerk of the Court.

AMERICAN FREEDOM LAW CENTER

/s/ *Robert J. Muise*
Robert J. Muise, Esq.

Counsel for Appellants