No. 18-1455

IN THE
Supreme Court of the United States

ARCHDIOCESE OF WASHINGTON,
Petitioner,
v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY, ET AL.,
Respondents.

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

BRIEF OF *AMICUS CURIAE* FOUNDATION FOR MORAL LAW IN SUPPORT OF PETITIONER

JOHN A. EIDSMOE
Counsel of Record
FOUNDATION FOR MORAL LAW
One Dexter Avenue
Montgomery, AL 36104
(334) 262-1245
eidsmoeja@juno.com

Counsel for *Amicus Curiae*

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INTEREST OF AMICUS CURIAE[1]

Amicus Curiae Foundation for Moral Law ("the Foundation") is a national public-interest legal organization based in Montgomery, Alabama, dedicated to defending a strict interpretation of the United States Constitution according to the intent of its Framers.

The Foundation believes our Freedom of Speech and our Free Exercise of Religion are some of our most precious rights that we have in this country, granted by God and protected through the First Amendment to the Constitution. The Foundation is concerned that the Washington Metro Transit Authority (hereafter "WMATA") has trampled upon the First Amendment rights of the Archdiocese, and that the lower courts have ignored and tried to circumvent the principle of Equal Access repeatedly articulated by this Court. Allowing this kind of regulation will lead to the suppression and silencing of those who have a religious viewpoint.

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[1] Pursuant to Rule 37.2, counsel of record for all parties received notice of intent to file this brief at least ten days before the due date. Pursuant to Rule 37.3, all parties have consented to the filing of this brief. Pursuant to Rule 37.6, no party or party's counsel authored this brief in whole or in part, or contributed money that was intended to fund its preparation or submission; and no person other than the *amicus curiae*, its members, or its counsel, contributed money that was intended to fund the preparation or submission of this brief.

STATEMENT OF THE FACTS

On October 23, 2017, the Archdiocese of Washington attempted to purchase advertising space on the end of the buses which were operated by the Washington Metro Area Transit Authority (hereafter WMATA.) WMATA was created through the use of an interstate compact between the states of Virginia, Maryland and the District of Columbia.

The advertisement was a sign carrying the words "Find the perfect gift". It also contained a link to the website of the Find the Perfect Gift Christmas Campaign, which was funded by the Archdiocese.

Before May of 2015, WTAMA did not place any restrictions on political or religious speech in the advertising that they sold for their bus lines. However, this changed on May 28th, 2015 when WTAMA placed a temporary ban on all advertising of a political or religious nature in order to try and avoid the possibility of people being offended by the ads and causing problems for the bus line. These regulations contained Guideline 12, which stated that "Advertisements that promote or oppose any religion, religious practice or belief are prohibited." With this regulation in mind, WMATA denied the Archdiocese's request for advertising space.

SUMMARY OF THE ARGUMENT

In determining whether a restriction on free speech is valid, the Court makes a distinction between content-based restrictions and viewpoint-based restrictions.

In this case WMATA argues that Guideline 12 is content-based. However, WMATA is using this regulation to discriminate against the viewpoint of the Archdiocese. The Archdiocese attempted to place an ad related to the celebration of Christmas on WMATA's buses. However, they are being turned away because of the religious views espoused in the ad. This refusal to allow them to advertise is not because they wish to introduce a forbidden subject matter, but because they hold to a religious view of a holiday which is clearly permissible. Guideline 12 is invalid because it violates the Religious Freedom Restoration Act. It places a substantial burden on the practice of religion when they provide a generally available benefit unless you hold to certain religious principles.

Guideline 12 also openly and blatantly discriminates against the Archdiocese solely because of religion. This clearly runs afoul of the Free Exercise Clause because by allowing secular advertising and barring religious advertising, WMATA places a substantial burden on religion.

ARGUMENT

I. THE CIRCUIT COURT DECISION IS INCONSISTENT WITH DECISIONS OF THIS COURT AND OTHER COURTS ON EQUAL ACCESS.

This Court articulated the doctrine of Equal Access – that religious views, persons, and organizations must be given the same access to public facilities that is given to others generally – in *Widmar v. Vincent,* 454 U.S. 263 (1981), holding 8-1

that the Establishment Clause did not prohibit the University of Missouri – Kansas City from allowing religious organizations to use campus meeting rooms on the same basis as other organizations and that denying them the right to use such facilities because they were religious violated the Free Speech Clause. This Court reiterated the Equal Access doctrine in *Westside v. Mergens,* 496 U.S. 226 (1990) (upholding the Equal Access Act); in *Lamb's Chapel v. Center Moriches Union Free School District,* 508 U.S. 384 (1993) (upholding right of church to use public school auditorium); in *Rosenberger v. Rector,* 515 U.S. 819 (1995) (striking down the University's policy of withholding funding for student religious publications); *Trinity Lutheran Church v. Comer,* 137 S.Ct. 2012 (2017) (striking down Missouri policy making religious institutions ineligible for grants for playground improvement); and others.

But some lower courts, such as the Circuit Court in this case and the Second Circuit in *Bronx Household of Faith v. Board of Education of the City of New York,* 650 F.3d 30 (2nd Cir. 2011), cert. den. 565 U.S. 1087 (2011) (denying church the right to meet in school facilities), seem to be dragging their feet and straining at gnats to avoid the implementation of equal access. Because of this conflict in the courts, because the issue is raised in mass transit systems and other public facilities that allow advertising all across the nation, and because many are uncertain how to proceed and are looking to this Court for guidance on this issue, this Court should grant certiorari and settle the Equal Access doctrine for all.

II. WMATA GUIDELINE 12 INFRINGES UPON THE FREEDOM OF SPEECH RIGHTS OF THE ARCHDIOCESE BECAUSE IT UNREASONABLY PROHIBITS ADVERTISEMENTS WITH A RELIGIOUS VIEWPOINT.

A. Guideline 12 discriminates based on the religious viewpoint espoused in the advertisement.

Our right to freely speak our mind and to express our opinions is one of the most valuable rights we enjoy in this country. It is central among those "unalienable right" "endowed by [the] Creator," essential to self-expression and a necessary check on government power. This Court has recognized that any restriction on a particular viewpoint while favoring others is forbidden. *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, (1984). This is precisely what WTAMA Guideline 12 does: It not only removed religion as a subject matter, but also is excluding religious viewpoints on neutral and permissible subject matters. And Guideline 12 is not only content discrimination but also viewpoint discrimination, because it forbids the Archdiocese from urging people to "Find the perfect gift" but does not forbid other advertisers from promoting other gifts during the Christmas season. Other advertisers such as Russell Stover, Jack Daniels, and Olay are free to promote what they consider the "perfect gift" for Christmas, but the Archdiocese's message is censored.

The case of *Rosenberger v. Rector* held that a state university could not allow a regulation which prohibited writing articles for their student publications from a religious viewpoint. *Rosenberger v. Rector & Visitors of the Univ. of Va.,* 515 U.S. 819 (1995). In *Good News Club v Milford Central School District*, the Supreme Court held that if a school opened its doors after hours for people to rent for recreational activities, then it could not deny religious organizations the right to rent the facilities for the purpose of meeting for religious reasons. *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001). And in the case of *Lamb's Chapel v. Center Moriches Union Free School District*, this Court said that if a school opened its doors to use for community discussions, they cannot then close their doors to people who wanted to screen a film about raising children from a Christian perspective. *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384, 392-93 (1993)

Religion itself is not simply a topic to talk about. It is also a mindset or worldview through which to see the world. *Rosenberger* states, "Religion may be a vast area of inquiry, but it also provides, as it did here, a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered." *Rosenberger.,* 515 U.S. 819 (1995). Thus, a prohibition on religious expression excludes one view of reality while permitting other views of reality. This clearly constitutes viewpoint discrimination, allowing secular worldviews but prohibiting religious worldviews on subjects such as what might be an appropriate "gift" at Christmas. Jack Daniels, Avon Products, and Russell Stover are

free to advertise what they consider the "perfect gift," but the Archdiocese's view of the perfect gift is censored. As Judge Griffith, joined by Judge Katsas, recognizes in his dissenting opinion on the Circuit Court's decision to deny rehearing *en banc* in this case, "this case does nothing more than present us with an issue already decided by the Supreme Court: whether the government can prohibit a religious viewpoint on subjects it allows others to discuss without restriction." *Archbishop* p. 9.

In this case, the Archdiocese is attempting to voice its opinion on the subject of how Christmas should be celebrated and even more specifically on the subject of giving gifts during the holiday season. This topic is clearly a permissible subject matter according to WMATA, since they allow secular ads that provide information about gift-giving during the holiday season. However, when the Archdiocese attempted to obtain advertising space for this same topic, they were turned away. They were refused, not because they wanted to talk about a forbidden subject matter, but because they tried to voice their opinion on how that subject matter should be celebrated.

B. Guideline 12 is unreasonable based on the context and purposes of the forum.

In addition to being viewpoint-neutral, a regulation must also be reasonable to be valid. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983).

Minnesota Voters Alliance v. Mansky provides an excellent example of an unreasonable regulation on speech. In that case, this Court held that a restriction on wearing political buttons or clothing violated the plaintiff's freedom of speech because there was no reasonable basis for enforcing the regulation. *Minn. Voters All. v. Mansky,* 138 S. Ct. 1876 (2018) There they determined that even in a nonpublic forum "the State must draw a reasonable line… (The State) must be able to articulate some sensible basis for distinguishing what may come in from what must stay out." *Id.*[2] The restriction in that case had to deal with political apparel.

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[2] The Circuit Court assumed the WMATA buses are a nonpublic forum, because they assumed that there are only three kinds of fora: traditional open forum, designated open forum, and nonpublic (closed) forum. The Circuit Court overlooked the "limited forum" in which some content discrimination may be permitted but viewpoint discrimination is prohibited. The Ninth Circuit considers the limited forum to be a sub-category of the designated public forum, where the government opens a nonpublic forum but reserves access to it for only certain groups or categories of speech. *Faith Center Church Evangelistic Ministries v. Glover,* 462 F.3d 1194 (9th Cir. 2006): "We have recognized that the Supreme Court, in decisions subsequent to *Perry* and *Cornelius,* has identified another category -- the 'limited public forum' -- to describe a nonpublic forum that the government intentionally has opened to certain groups or for the discussion of certain topics. *See DiLoreto,* 196 F.3d at 965 (citing *Rosenberger v. Rector & Visitors of the Univ. of Virginia,* 515 U.S. 819, 829 ... (1995)). Restrictions governing access to a limited public forum are permitted so long as they are viewpoint neutral and reasonable in light of the purpose served by the forum." *Faith Center* at 1203. Space does not permit a detailed forum analysis, but the Foundation suggests that WMATA buses are at least a limited forum if not a designed open forum.

However, there was no determination of what "political" means. There was no line which could be firmly drawn as to what is permissible clothing and what is restricted clothing.

The obvious danger with this kind of restriction is that without clear lines drawn the government will be allowed to have a more or less unfettered application of the regulation. Indeed, *Minnesota Voters* states "It is "self-evident" that an indeterminate prohibition carries with it "[t]he opportunity for abuse, especially where [it] has received a virtually open-ended interpretation." *Id.* An overbroad regulation can be incredibly dangerous to our freedoms and rights if it is left unchecked by objective and workable standards.

Laws and regulations must provide citizens with reasonably certain notice of what actions will and will not be permitted and to provide officials with reasonably certain notice as to the extent and limits of their powers. Vague statutes and regulations give rise to arbitrary and discriminatory enforcement, especially in areas involving civil liberties.

The *Minnesota Voters* principle applies to this case. Guideline 12 is absolute: "Advertisements that promote or oppose any religion, religious practice or belief are prohibited." The Guideline is replete with ambiguities. What does "promote" or "oppose" religion means? Does it have to directly give aid and benefit to a religion or can it be incidental to the main goal? Does the promotion have to be an endorsement contained in the advertisement itself or can you promote religion using the funds you gained as a result of the advertisement? And what do the

terms "religion" and "religious practice" mean as used in Guideline 12? Does it include a belief in a deity? Does it apply to all opinions on ultimate questions of life and death? If the answer is, "I don't know" to any of these questions, then the regulation creates a severe risk to your right to free speech.

The danger which is produced by this Guideline is evident in their decisions to bar some religious advertisements while they allow others that could reasonably be seen as promoting religion. For example, WMATA allows an advertisement from the Salvation Army which encourages people to give during the holiday season. The money that would be collected would go to the Salvation Army which is a distinctly Christian organization. Shouldn't this also qualify as promoting the religious ideals that the Salvation Army holds to? WMATA also allows an advertisement for a yoga studio. Yoga in and of itself can be seen as an act of worship. Yet WMATA decided that the Salvation Army ad and the yoga ad were acceptable but the Archdiocese's ad was not.

This Court recognized in *Rosenberger* that a "danger to liberty…lies in granting the State the power to examine publications to determine whether or not they are based on some ultimate idea and, if so, for the State to classify them." *Rosenberger*, 515 U.S. at 835. Enforcement of this guideline would require that the officials in charge read through each advertisement and make a determination for themselves if each one of them violates the policy. Through this, there is possibility that the prejudice of the official can shine through. He may restrict speech he doesn't like while allowing the speech that

he approves, all under the guise of WMATA's governmental interest.

III. WMATA'S GUIDLINE 12 VIOLATES THE RELIGIOUS FREEDOM RESTORATION ACT BECAUSE IT PLACES A SUBSTANTIAL BURDEN ON RELIGION AND BECAUSE IT IS NOT THE LEAST RESTRICTIVE WAY OF FURTHERING A COMPELLING GOVERNMENTAL INTEREST.

A. The Religious Freedom Restoration Act is applicable to this case.

When determining whether the defendant violated the Religious Freedom Restoration Act (hereinafter "RFRA"), the first question which must be asked is whether RFRA applies to this situation.

As has been pointed out in the appellate decision, WMATA is a compact joined by Maryland, Virginia and the District of Columbia. The appellate court held that since Maryland and Virginia are sovereign states, RFRA does not apply to the WMATA compact. However, this is not supported by the law. The compact provides that "The Authority 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, in accordance with the law of the applicable signatory". D.C. Code § 9-1107.01 Sect. 80. So, we can see that, even if RFRA does not apply to actions under the

Compact that arise in Maryland or Virginia, in this case the occurrence which gave rise to the suit happened in the District of Columbia, which applies federal law. Thus, RFRA applies. Nothing in the language of RFRA, in the *Boerne v. Flores,* 521 U.S. 507 (1997) decision that held RFRA inapplicable to states, or in the *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal,* 546 U.S. 418 (2006) decision which held that RFRA is constitutional as applied to the federal government, suggests that a federal instrumentality may avoid RFRA simply by making a state a party to its action.

Moreover, the compact states that it is unequivocally severable with respect to its application. Section 85 states: "The provisions of this Title and of the agreements thereunder shall be severable and if any phrase, clause, sentence or provision of this Title or any such agreement is declared to be unconstitutional or the applicability thereof to any signatory party, political subdivision or agency thereof is held invalid." D.C. Code § 9-1107.01 Sect. 85

Thus, we can clearly see that RFRA can apply to a regulation and agreement in WMATA as its application to the signatory party of the District of Columbia even if it is not applicable to Maryland and Virginia.

Furthermore, the compact states that if an agreement or rule in the compact conflicts with the laws of any signatory, then the rule in the compact will be invalid. D.C. Code § 9-1107.01 Sect. 76e. Hence, if Guideline 12 is invalid as applied to the

District of Columbia because of RFRA, it must be struck down.

The Foundation notes, finally, that the State of Virginia has its own RFRA, Code of Virginia Sec. 57-2.02.

B. Guideline 12 places a substantial burden on religion.

RFRA's stated goal is to "restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398, 83 S. Ct. 1790, 10 L. Ed. 2d 965 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205, 92 S. Ct. 1526, 32 L. Ed. 2d 15 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened." 42 U.S.C. § 2000bb(b)(1). Because RFRA expressly stated that its purpose was to return the test back to the substantial burden test of *Sherbert v Verner* this case can be a guide for us as to what would constitute a substantial burden. *Sherbert* held that the government could not condition Sherbert's unemployment compensation so as to penalize her for her practice of her faith. *Sherbert*, 374 U.S. at 404. Under RFRA, a "substantial burden" is imposed when individuals are forced to choose between following the tenets of their religion and receiving a governmental benefit" *Navajo Nation v. United States Forest Serv.,* 535 F.3d 1058 (9th Cir. 2008).

A restriction on the Archdiocese inviting people to come to church to worship would place a substantial burden on their efforts to evangelize. Evangelism is not an optional part of the Christian religion. In fact, it is probably one of the most fundamental

duties of a Christian. Jesus told his disciples to "Go therefore and make disciples of all the nations, baptizing them in the name of Father and of the Son and of the Holy Spirit." Matthew 28:19. Guideline 12 restricts where the Archdiocese may practice their evangelism. Even more than that, they give a benefit to the Archdiocese if they refrain from evangelizing with their ads. This would be the very definition of requiring them to choose between following their religion and receiving a publicly available benefit. Therefore, Guideline 12 places a substantial burden on the Archdiocese's practice of religion.

C. Guideline 12 does not serve a compelling governmental interest.

According to RFRA, a law or regulation which places a substantial burden on religion is invalid unless the government can demonstrate that it serves a compelling governmental interest and where it is the least restrictive means of accomplishing this goal.

WMATA's stated goal that it wished to achieve with their regulations was to avoid community and public opposition and vandalism to speech on government property. However, although there had been some complaints about religious ads, there is no evidence that there had been any violence or vandalism or even threats of violence and vandalism. As this Court recognized in *Cohen v. California,* 403 U.S. 15 (1971), that government may not ban speech just because others find that speech offensive.

This Court has held that "only the gravest abuses, endangering paramount interests, give occasion for permissible limitation," *Thomas v. Collins*, 323 U.S. 516, 530 (1945). Because of the importance and sensitivity of the right to freely exercise your religion, the Supreme Court in *Sherbert v Verner* stated "It is basic that no showing merely of a rational relationship to some colorable state interest would suffice" *Sherbert v. Verner*, 374 U.S. 398 (1963).

Here, the interests which are claimed by WMATA do not even come close to the passing the high level of scrutiny which is required to pass the compelling interest test. In the case of *Werner v. McCotter* the government argued that its restriction on the defendant's practice of religion was necessary because of a compelling interest in keeping the prison safe and secure. However, this reasoning was not compelling enough to keep the restriction from being struck down by RFRA. *Werner v. McCotter*, 49 F.3d 1476 (10th Cir. 1995). A bus line is clearly a less restrictive forum than a prison.

D. Guideline 12 is not the least restrictive way to serve the government's interest.

Even if the regulation is found to serve a compelling governmental interest, it will still fail under RFRA if there is a less restrictive means of accomplishing the same goal.

All that we have to do is to determine that there was a way in which the same goal of safe and secure public transit could be achieved without a violation

of the Archdiocese's right to the free exercise of its religion. Several possible solutions come to mind for the problem that would not restrict the speech of the plaintiff. WMATA could hire more security for their trains and buses. They could store their buses in an area which is not accessible to the general public. They could place security cameras to watch their buses. Additionally, they could focus their efforts on deterring this criminal activity by punishing the criminals who are creating the damage. Or, WMATA could be more specific on the types of ads it needs to prohibit because of their propensity to create violence or vandalism. WMATA could also post a disclaimer to the effect that advertising on the WMATA vehicles reflects only the views of the advertiser and not necessarily those of WMATA. If any one of these methods is effective it will invalidate any compelling interest which WMATA may claim. The Foundation suggests these possibilities even though the record is devoid of any evidence that there is any danger of violence or vandalism at all.

Guideline 12 constitutes a substantial burden upon the Archdiocese. WMATA is unlikely to be able to claim that they have a compelling interest which could not have been achieved in any less restrictive means. Thus, WMATA's Guideline 12 is clearly in violation of RFRA.

IV. WMATA'S GUIDELINE 12 INFRINGES UPON THE FREE EXERCISE RIGHTS OF THE ARCHDIOCESE BY PLACING A SUBSTANTIAL BURDEN ON THE PRACTICE OF RELIGION WITH A

GUIDELINE THAT IS NOT NEUTRAL NOR OF GENERAL APPLICABILITY

Even if RFRA does not apply to this case, Guideline 12 violates the Free Exercise Clause of the First Amendment. *Employment Div. v. Smith*,494 U.S. 872 (1990), held that the compelling interest / less restrictive means test does not apply to laws of general applicability, but it does apply to laws that are directly aimed at religion and to hybrid claims that allege violations of both free exercise of religion and another right such as freedom of speech.

A. Guideline 12, on its face, places a substantial burden on the practice of religion.

The First Amendment to the Constitution provides that "Congress may make no law respecting an establishment of religion or prohibiting the free exercise thereof" US Const. Amend. I. Religious liberty is the first right set forth in the Bill of Rights, and it is the most important right, because as our Declaration of Independence recognizes, rights themselves are "endowed by [the] Creator."

In *Church of the Holy Trinity v. United States,* 143 U.S. 457 (1892), this Court concluded that a law which prohibited a church from calling a pastor or priest from outside the United States violated the Free Exercise Clause, because it conflicted with Christianity. After explaining at great length the numerous legal and historical evidences of Christianity's influence upon American law, this

Court concluded:

> If we pass beyond these matters to a view of American life, as expressed by its laws, its business, its customs, and its society, we find every where a clear recognition of the same truth. Among other matters note the following: The form of oath universally prevailing, concluding with an appeal to the Almighty; the custom of opening sessions of all deliberative bodies and most conventions with prayer; the prefatory words of all wills, "In the name of God, amen;" the laws respecting the observance of the Sabbath, with the general cessation of all secular business, and the closing of courts, legislatures, and other similar public assemblies on that day; the churches and church organizations which abound in every city, town, and hamlet; the multitude of charitable organizations existing everywhere under Christian auspices; the gigantic missionary associations, with general support, and aiming to establish Christian missions in every quarter of the globe. These, and many other matters which might be noticed, add a volume of unofficial declarations to the mass of organic utterances that this is a Christian nation.

Id. at 471.

The *Holy Trinity decision* is entirely consistent with the Establishment Clause of the First Amendment. This does not mean they favored an official established church. Justice Brewer, the author of the *Holy Trinity* decision, understood that

Christianity was not the official religion of the United States. In his 1905 book, *The United States a Christian Nation*, he clarified:

> But in what sense can [the United States] be called a Christian nation? Not in the sense that Christianity is the established religion or the people are compelled in any manner to support it. ... Neither is it Christian in the sense that all its citizens are either in fact or in name Christians. On the contrary, all religions have free scope within its borders. Numbers of our people profess other religions, and many reject all. Nor is it Christian in the sense that a profession of Christianity is a condition of holding office or otherwise engaging in public service, or essential to recognition either politically or socially. In fact, the government as a legal organization is independent of all religions.
>
> Nevertheless, we constantly speak of this republic as a Christian nation—in fact, as the leading Christian nation of the world. The popular use of the term certainly has significance.[3]

Because of the high place given to religious liberty in our legal system, the First Amendment prohibits regulations which place a unique disability on religion or religious activity. *McDaniel v. Paty*, 435 U.S. 618 (1978). Furthermore, if a statute's purpose is to single out religion for adverse

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[3] David J. Brewer, *The United States a Christian Nation* 12 (1905).

treatment, it will violate the Free Exercise Clause unless it is narrowly tailored to serve a compelling governmental interest. *Church of Lukumi Babalu Aye v. City of Hialeah,* 508 U.S. 520 (1993). Even more recently the Supreme Court held that "denying a generally available benefit solely on account of religious identity imposes a penalty on the free exercise of religion that can be justified," if at all, "only by a state interest 'of the highest order." *Trinity Lutheran Church of Columbia, Inc. v. Comer,* 137 S. Ct. 2012, 2025 (2017).

The government is prohibited from placing a person at a disadvantage simply because he holds a religious view. However, this is exactly what is being done with WMATA's Guideline 12. As the Court said in *Employment Division v Smith,* the Amendment forbids a statute or regulation "prohibiting the free exercise [of religion] if it sought to ban such acts or abstentions only when they are engaged in for religious reasons, or only because of the religious belief that they display. It would doubtless be unconstitutional" *Employment Div. v. Smith*, 494 U.S. 872 (1990).

Guideline 12 can survive constitutional analysis only if WMATA has a compelling interest that cannot be achieved by less restrictive means. WMATA argues that it has a compelling interest in protecting their buses from people who would oppose the views espoused in the advertisements. But this purpose is far from compelling. As noted earlier, although there have been a few complaints from people who say they are offended by religious ads, there has been no violence or vandalism or even threats of violence or

vandalism. As noted from *Cohen v. California, supra,* the possibility that people may be offended by religious or other expression is not a sufficient basis to ban such expression. See also, *National Socialist Party of America v. Village of Skokie,* 432 U.S. 43 (1977) (possibility that Jewish residents of Skokie would be offended or even traumatized by a Nazi parade is not sufficient reason to ban the parade). And even if the possibility of violence exists, the state must not allow a "heckler's veto" to shut down freedom of expression but must consider other means of preventing the violence instead, *Terminiello v. City of Chicago,* 337 U.S. 1 (1949).

The Circuit Court argues that open hostility toward religion is required in order to show a free exercise violation. However, this is simply not the case. The passage that they are referring to reads "The Court "begin[s] with its text" and then considers whether there might be "governmental hostility which is masked, as well as overt. *Church of Lukumi Babalu Aye v. City of Hialeah,* 508 U.S. 520 (1993). However, this statement was made in the context of describing how the government may make covert suppressions of free exercise rights through a facially valid regulation. Here, Guideline 12 is clearly invalid on its face since it places a restriction on the free exercise of religion in its plain wording, so it is unnecessary to determine whether WMATA harbored any secret hostility toward religion.

B. Guideline 12 is not neutral and it is not a law of general applicability.

Guideline 12 prohibits religious advertising and is therefore directly aimed at religion. Therefore, even under the *Smith* rationale, the compelling interest / less restrictive means test applies.

Hialeah held that "The Free Exercise Clause, like the Establishment Clause, extends beyond facial discrimination. The Clause "forbids subtle departures from neutrality," *Church of Lukumi Babalu Aye v. City of Hialeah,* 508 U.S. 520 (1993) (citing *Gillette v. United States*, 401 U.S. 437, 452 (1971)). Thus, even if a law is valid on its face, it may still violate the Free Exercise Clause by the way that it is enforced. The test that is used to determine this is whether the law is a neutral law and if it is a law of general applicability. If a regulation is directly aimed at religion, either on its face or in the way it is enforced, it will be invalidated.

Hialeah also held that "if the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral". *Id.* This seems like a fairly simple situation. The object of this Guideline is to restrict religious organizations from advertising on their buses simply because they have a motivation behind them to advance their religions. This is conceded by WMATA when they stated that they created Guideline 12 to be a content-based restriction on religion. It is unmistakable that WMATA's goal is to place a restriction on religion simply because it is religious. In its most basic form,

a determination of the religious neutrality of a law will have a lot in common with an equal protection analysis because "neutrality in its application requires an equal protection mode of analysis." *Walz v. Tax Comm'n of New York City*, 397 U.S. at 696. (1970). Thus, we have to look and see if the law is being applied equally to everyone, secular people and religious people. In Guideline 12 we see that there is a substantial difference in how the law is applied to secular applicants and how it is applied to religious applicants. While those organizations which post secular ads advancing secular goals are allowed, religious ads advancing religious goals are denied. This denial is religious discrimination in its most basic form.

When considering if a law is generally applicable the court will determine what the interest were when the regulation was created and if the law fails to prohibit secular threats to the interest while prohibiting the religious threats to the interest. *Church of Lukumi Babalu Aye v. City of Hialeah,* 508 U.S. 520 (1993). Inequality results when a legislature decides that the governmental interests it seeks to advance is worthy of being pursued only against conduct with a religious motivation. *Id.*

In the words of WMATA, they put the guidelines in place because they had "concerns that issue-oriented advertising could provoke community discord, create concern about discriminatory statements, and generate potential threats to safety and security from those who [sought] to oppose the advertising messages." However, these concerns seem to be attributed to the religious side of

advertising. This is despite the fact that secular views on the subject of Christmas can be just as divisive and disruptive.

Thus, since the regulation places a burden on the free exercise of religion by its plain reading and because it is not a neutral and generally applicable regulation, it will be subject to strict scrutiny. Moreover, when the strict scrutiny test is applied, the regulation will likely fail since its purpose falls very short of the level of importance which is required to show a compelling governmental interest.

C. Guideline 12 violates freedom of speech as well as free exercise of religion.

Because the Archdiocese has claimed that Guideline 12 violates freedom of speech as well as free exercise of religion, the Archdiocese has asserted a hybrid claim that, even under the *Smith* rationale, requires a compelling interest / less restrictive means analysis.

CONCLUSION

WMATA Guideline 12 is a direct attack upon religion, and specifically the religion of the Archdiocese. The Circuit Court decision flies in the face of past decisions of this Court and of other courts and seems to circumvent this Court's repeatedly-stated doctrine of Equal Access. Furthermore, the equal access issue comes up in mass transit facilities all across this nation, and in many other contexts as well. Lower courts, government officials, and the general public are looking to this Court to definitively set the standard

of Equal Access for all. This case also presents to this Court an excellent opportunity to revisit *Smith v. Employment Division* and clearly articulate the true meaning of the Free Exercise Clause of the First Amendment, and also an opportunity to correct the flawed analysis of the Circuit Court and of other lower courts concerning forum analysis.

The Foundation therefore respectfully urges this Court to grant the Archdiocese of Washington's petition for a writ of certiorari.

Respectfully submitted,

JOHN A. EIDSMOE
Counsel of Record
FOUNDATION FOR MORAL LAW
One Dexter Avenue
Montgomery, AL 36104
(334) 262-1245
eidsmoeja@juno.com

Counsel for *Amicus Curiae*