[ORAL ARGUMENT NOT YET SCHEDULED]
No. 17-7171

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

ARCHDIOCESE OF WASHINGTON, DONALD CARDINAL WUERL, ROMAN CATHOLIC ARCHBISHOP OF WASHINGTON,

Plaintiff-Appellant,

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY, and PAUL J. WIEDEFELD, in his official capacity,

Defendants-Appellees.

Appeal from the United States District Court for the District of Columbia, No. 1:17-cv-02554-ABJ

BRIEF OF AMICI CURIAE BECKET FUND FOR RELIGIOUS LIBERTY, UNITED STATES SENATOR JEFF FLAKE, AND THE INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS SUPPORTING PLAINTIFF-APPELLANT

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CERTIFICATE OF PARTIES, RULING, AND RELATED CASES

Amici curiae the Becket Fund for Religious Liberty, United States Senator Jeff Flake, and the International Society for Krishna Consciousness, Inc. respectfully file this Certificate of Parties, Rulings, and Related Cases, as required by Fed. R. App. P. 28(a)(1) and D.C. Cir. Rule 28(a)(1).

PARTIES AND AMICI

Archdiocese of Washington, Plaintiff-Appellant

Washington Metropolitan Area Transit Authority, Defendant-Appellee

Paul J. Wiedefeld, Defendant-Appellee

United States of America, amicus curiae

United States Senator Jeff Flake, amicus curiae

The Becket Fund for Religious Liberty, amicus curiae

The International Society for Krishna Consciousness, Inc., amicus curiae

Ethics and Public Policy Center, amicus curiae

First Liberty Institute, amicus curiae

Franciscan Monastery USA, Inc., amicus curiae

RULING UNDER REVIEW

Under review in this proceeding is the Honorable Amy Berman Jackson's December 8, 2017 Memorandum Opinion and Order denying Plaintiff-Appellant's motion for a temporary restraining order and preliminary injunction in United

States District Court for the District of Columbia, JA416 (case number 1:17-cv-02554 (ECF Nos. 17-18)).

RELATED CASES

There are no related cases.

Respectfully submitted,

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and D.C. Cir. R. 26.1, amici the Becket Fund for Religious Liberty, United States Senator Jeff Flake, and the International Society for Krishna Consciousness, Inc., state as follows:

The Becket Fund for Religious Liberty, United States Senator Jeff Flake, and the International Society for Krishna Consciousness, Inc., do not have parent corporations and do not issue stock.

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STATEMENT OF INTEREST, IDENTITY, AND SOURCE OF AUTHORITY

Amicus the Becket Fund for Religious Liberty is a non-profit law firm that protects the free expression of all religious faiths. It has successfully litigated numerous religious liberty cases before the Supreme Court of the United States and in state and federal courts throughout the country, including *Zubik v. Burwell*, 136 S. Ct. 1557 (2016), *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), and *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171 (2012). As a longstanding protector of minority groups from religious targeting by government actors, Becket has accordingly appeared as counsel or amicus in many cases in which the government has singled out religion, a religious group, or a religious practice for worse treatment than its secular analogues. Becket's expertise makes it uniquely suited to articulate, as a friend of both the Court and the First Amendment, the proper analysis of alleged religious targeting under the First Amendment's Free Exercise Clause.

Amicus Jeff Flake is Arizona's junior United States Senator. As duly elected to serve in the Congress of the United States, possessing "[a]ll legislative Powers" granted by the United States Constitution, U.S. CONST. ART. I § 1, including the power "[t]o exercise exclusive Legislation in all Cases whatsoever, over" the District of Columbia, U.S. CONST. ART. I § 8 CL. 17, Senator Flake has a strong institutional interest in the First Amendment's protection and application

within Washington, D.C. As a member of the U.S. Senate Committee on the Judiciary, Senator Flake routinely preserves the Free Exercise Clause's guarantees in evaluating nominees to the federal courts and in considering legislation. Furthermore, as a member of the Senate Foreign Relations Committee, he has worked to ensure religious liberty abroad, by ensuring the access of religious missionaries to foreign nations like Botswana and Cuba, and promoting religious pluralism to nations otherwise lacking such a history. Given his role and experiences, Senator Flake is well situated to provide insight into the application of the Free Exercise Clause within the District of Columbia.

Amicus the International Society for Krishna Consciousness, Inc. ("ISKCON") is a monotheistic, or Vaishnava, faith within the Hindu tradition. As part of its tradition, ISKCON engages in service to others in society. It is a core belief among ISKCON's members that ISKCON members should act as appropriate role models in their belief, practice, and application of spiritual ethics, including when they serve others. Based on this belief, ISKCON supports and engages the freedom of all religious entities and other charities to engage in speech that promotes their efforts to assist those in need in accordance with the entity's own religious dictates. It is thus acutely interested in the application of the policy at issue in this litigation.

Amici the Becket Fund for Religious Liberty, Senator Jeff Flake, and ISKCON received the parties' respective consent to file this brief. *See* D.C. Cir. R. 29(b). Moreover, amicus Senator Flake joins this brief in his official capacity as an officer of the United States. *See* Fed. R. App. P. 29(a) and D.C. Cir. R. 29(b), (d).[1]

[1] Pursuant to Fed. R. App. 29(a)(4)(E), Amici represent that no party or party's counsel authored this brief in whole or in part, nor has a party or party's counsel contributed money that was intended to fund preparing the brief or submitting the brief, nor has a person other than amici curiae and their counsel contributed money that was intended to fund preparing or submitting the brief.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Sometimes, it is hard for courts to see—or plaintiffs to prove—that a government body has engaged in religious discrimination. Sometimes, rather than admitting that it is targeting religion or religious conduct, the government will engage in "subtle departures from neutrality," or the "covert" suppression of religious beliefs, or will otherwise "mask[]" its targeting of religion for worse treatment. *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993) (internal citations omitted). Courts can sometimes struggle to find and interpret the subtle and, at times, indirect evidence of religious targeting. Such obfuscation can make some religious discrimination cases hard.

This is not one of the hard cases. Here, the Archdiocese of Washington's ("Archdiocese") proposed advertisements were rejected by the Washington Metropolitan Area Transit Authority ("WMATA") for one reason, and one reason only: the ads were religious. To WMATA's credit, its Guideline Twelve does not try to obscure its targeting of religion, but instead plainly bans advertisements because of their religious content, namely "[a]dvertisements that promote or oppose any religion, religious practice or belief." JA209.

WMATA's candor is commendable, but its policy is unconstitutional. As the Supreme Court has explained, the Free Exercise Clause forbids the government from targeting religion; "a law targeting religious beliefs as such is *never*

permissible." *Lukumi*, 508 U.S. at 533 (emphasis added); *see also Employment Division v. Smith*, 494 U.S. 872, 877 (1990) (explaining that the Free Exercise Clause "obviously" prohibits the "impos[ition] [of] special disabilities on the basis of religious views or religious status"). On its face, Guideline Twelve violates this basic Free Exercise Clause principle. That alone is sufficient to reverse the district court.

WMATA tries to escape this basic Free Exercise principle by arguing that the Supreme Court's recent Free Exercise cases should not be applied either because this case does not involve a "public benefit" or because the Free Speech Clause's "forum" analysis overrides the Free Exercise analysis. Neither argument works, however, because the Supreme Court did not limit the Free Exercise Clause to "public benefit" cases, and because the Free Exercise Clause is governed by its own analysis (if anything, the Free Speech issues here enhance, rather than erase, the Archdiocese's Free Exercise claim).

Nor can WMATA defend its discrimination by claiming that Guideline Twelve is "neutral and generally applicable." Even if the Court were to reach that test here (and it need not, since Guideline Twelve targets religion as such), Guideline Twelve still fails. WMATA's effort to foreclose religious speech reveals an impermissible value judgment that renders its law both non-neutral and not generally applicable. As WMATA itself admits, Guideline Twelve "prohibit[s]

advertisements related to the subject of the religious half of Christmas, but not the secular half." JA176. Christmas can have different meanings to different people, of course. But the government has no authority to privilege the view of Christmas that starts at the shopping mall over the view that starts in a manger. Even Charlie Brown understood that privileging a secular, commercial expression of Christmas over one with religious motivation *is* a value judgment. *See, e.g.*, *A Charlie Brown Christmas* (CBS television broadcast Dec. 9, 1965) (CHARLIE BROWN: "Linus is right; I won't let all this commercialism ruin my Christmas."). When the Free Exercise Clause is carefully considered and applied, as it was not below, Guideline Twelve's open secular favoritism at the very least would require it to mount a strict scrutiny affirmative defense. WMATA does not even attempt to meet its burden of proving up the affirmative defense. Accordingly, Guideline Twelve violates the Free Exercise Clause, the district court should be reversed, and the Archdiocese should receive a preliminary injunction.

ARGUMENT

I. GUIDELINE TWELVE'S PLAIN LANGUAGE VIOLATES THE FREE EXERCISE CLAUSE.

A. Guideline Twelve Discriminates Against Religion.

As the Supreme Court continues to emphasize, a law that "obviously" "impose[s] special disabilities on the basis of religious views or religious status" violates the Free Exercise Clause. *Smith*, 494 U.S. at 877 (citing *McDaniel v. Paty*, 435 U.S. 618 (1978)). Indeed, just last Term, the Court confirmed that it is "odious to our Constitution" to exclude religious groups from government programs just because they are religious. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2025 (2017).

Neither the district court nor WMATA accurately accounted for Guideline Twelve's plain language handicapping religious advertisements *simply because* they are religious advertisements. In fact, the district court and WMATA both characterized the case as though it really had to do with Guideline Nine, characterizing the discrimination as a matter of "issue-based advertising." But the cited reason for excluding this ad—an invitation to attend church, not "issue-based advertising"—is Guideline Twelve. The plain language of Guideline Twelve alone violates the Free Exercise Clause.

The analysis WMATA set forth, and the district court embraced, misunderstands what the Free Exercise Clause requires. In an effort to recast

Guideline Twelve's religious discrimination as mere speech discrimination, WMATA avoids admitting that Guideline Twelve singles out religious advertisements by jumping directly to a discussion of whether Guideline Twelve is a neutral law of general application. *See* JA548. But this analysis skips over the crucial threshold question: Whether the law's plain text is, literally, "prohibiting the free exercise [of religion]." *See* 494 U.S. at 878 (citing U.S. CONST. AM. 1). *Lukumi* confirms this; "a law targeting religious beliefs as such is *never permissible*." 508 U.S. at 533 (emphasis added).

Smith also contemplated—and condemned—the sort of per se religious targeting at issue here. There, the Court suggested that "though no case of ours has involved the point," a government action "would be '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*." 494 U.S. at 877 (emphasis added). That is precisely the case here.

On its face, Guideline Twelve prohibits "[a]dvertisements that promote or oppose any religion, religious practice or belief." JA209. Moreover, WMATA *admits*—and the district court acknowledged—that Guideline Twelve is a "content-based restriction[]" on religious exercise. JA548 (quoting the district court). Because Guideline Twelve's plain terms seek "to ban such acts . . . only when they are engaged in for religious reasons, or only because of the religious

belief that they display," Guideline Twelve violates the Free Exercise Clause. *See Smith*, 494 U.S. at 877; *see also Trinity Lutheran*, 137 S. Ct. at 2021 ("Nor may a law regulate or outlaw conduct because it is religiously motivated.").[2]

B. Trinity Lutheran Confirms Guideline Twelve Violates the Free Exercise Clause.

Trinity Lutheran confirms that Guideline Twelve's impermissible "rule is simple: No churches need apply." *Id.* at 2024. And *Trinity Lutheran* confirms that such a rule violates the Free Exercise Clause. *See id.*

In response, WMATA tries to distinguish *Trinity Lutheran* in two contrived ways:

First, WMATA argues that *Trinity Lutheran* was limited to the context in which the government distributes a "public benefit." *See* JA549. But the case cannot be cabined to that context. When *Trinity Lutheran* explained that the Free

[2] There is no dispute that the Archdiocese is engaging in sincere religious exercise. Moreover, despite WMATA's conclusory assertion to the contrary, *see* JA549, a burden exists when a law's plain terms impose disabilities on religious exercise because the exercise is religious. *Cf. Holt v. Hobbs*, 135 S. Ct. 853, 862 (2015) (explaining, when applying the Religious Land Use and Institutionalized Persons Act, a department policy "substantially burdened" a prisoner's religious exercise because the policy "put[] petitioner to th[e] choice" of having to either "contravene[] that policy" or violate his religious beliefs). As the Archdiocese explains, WMATA ad space provides unique visibility in promoting the message of the Catholic faith; forcing the Archdiocese to choose between the Great Commission, *cf.* MATTHEW 28:18-20, and Guideline Twelve is a burden. Moreover, "in the free exercise context, [as opposed to the Religious Freedom Restoration Act,] the claimant need prove only a burden, not a substantial burden." Douglas Laycock, *Religious Liberty, Hearing before the Senate Committee on the Judiciary*, 106TH CONG., 1ST SESS. 72, 143 (Sep. 9, 1999) (statement).

Exercise Clause requires "the strictest scrutiny [to] laws that target the religious for 'special disabilities' based on their 'religious status,'" it was *not* referring solely to the "public benefit" context. *See* 137 S. Ct. at 2019. Indeed, the Court called this a "basic principle" of the Free Exercise Clause, *see id.*, and cited *Lukumi*—a case that has nothing to do with "public benefits." The Court reinforced this same point by citing *Smith*—a case that, while spawned by the denial of unemployment benefits, addressed the Free Exercise Clause's applicability to a general criminal law, not a "public benefit." *See* 494 U.S. at 884-85 (declining to apply *Sherbert v. Verner*, 374 U.S. 398 (1963) precisely because *Smith* dealt with "a generally applicable criminal law" and not "the unemployment compensation field"). *Trinity Lutheran* itself compels rejecting this purported distinction.

Second, WMATA contends that *Trinity Lutheran* and the Free Exercise Clause are not violated because its "policy equally bars advertisements opposing religion," so the Archdiocese's "advertisement could not have been rejected '*because it* is religiously motivated.'" JA550 (emphasis in JA550) (citing *Trinity Lutheran*, 137 S. Ct. at 2021). But Guideline Twelve's focus is clear: it bans advertisements "only because of the religious belief that they display." *See Smith*, 494 U.S. at 877. Indeed, that is *precisely* why the Archdiocese's advertisement was rejected here. It is no defense to say that, so long as the government also regulates ads "opposing religion" it can do what the Free Exercise Clause deems

"*never permissible*:" target the expression of religious beliefs. *See Lukumi*, 508 U.S. at 533 (emphasis added).

A law that requires the "abandonment" of "religious activity" is, as *Trinity Lutheran* confirmed, as "squarely rejected by precedent" as a law that "directly prohibit[s] religious activity." 137 S. Ct. at 2022 (quoting *McDaniel*, 435 U.S. at 633 (Brennan, J., concurring in judgment)). Here, by requiring that a party abandon *any* kind of religious motivation, Guideline Twelve impermissibly "outlaw[s] conduct because it is religiously motivated." *See id.* at 2021. WMATA provides a limited amount of advertising space to private parties, just as Missouri's Department of Natural Resources provided a limited amount of reimbursement grants to nonprofits to install playground surfaces made from recycled tires in *Trinity Lutheran*. Here, because Guideline Twelve bars *all* ads regarding religion, parties with religious motivations—solely because they are religiously motivated—cannot compete for ad space on an equal footing with parties possessing secular motivations. Similarly in *Trinity Lutheran*, a church was excluded from a public benefit "because it is religiously motivated." *See id.* It is the lack of equal opportunity—due to a party's religiously-motivated status—that renders Guideline Twelve in violation of the Free Exercise Clause. *Trinity Lutheran* only confirms this result.

C. Forum Analysis Does Not Eviscerate the Free Exercise Clause.

This case's Free Exercise analysis has proceeded as if it is entirely contingent upon the Freedom of Speech Clause's "forum analysis," thereby prohibiting the Free Exercise Clause from doing any independent analytical work. Indeed, WMATA's district court briefing went so far as to claim that *Smith* should not even apply to Guideline Twelve because *Smith* does not "involve nonpublic or limited purpose public forums." JA185; *see also* JA185 (arguing that *Smith*, *Lukumi*, and *Trinity Lutheran* are irrelevant to whether the Archdiocese possesses a Free Exercise claim because the Archdiocese "cites no authority to suggest those cases control a content-based, viewpoint-neutral restriction like Guideline 12."). Not even the district court agreed with this, and WMATA has shifted its theory on appeal to adopt, verbatim, the district court's position: *Smith* applies, but it poses no obstacle to Guideline Twelve because the Guideline "is just one of several content-based restrictions placed on the nonpublic forum." JA548 (quoting the district court's opinion). Neither approach is correct—the government may not read out the Free Exercise Clause simply by designating an area as a "nonpublic forum" under the Free Speech Clause.

When the Supreme Court evaluates "expressive" activities under the Free Speech Clause's forum analysis, it does not use that analysis to then evaluate a Free Exercise claim as well. *See, e.g.*, *CLS v. Martinez*, 561 U.S. 661, 697 & n.27

(2010) (rejecting, in the first instance, "CLS's free-speech and expressive-association claims" because "Hastings' open-access condition on RSO status occurred in a limited public forum, was reasonable, and viewpoint neutral," but proceeding to separately apply *Smith*'s analysis to CLS's Free Exercise claim). Separate analytical treatment is appropriate because the rights guaranteed by the Free Speech Clause and the Free Exercise Clause are distinct.[3] The Freedom of Speech, in some respects, guarantees fora—a *marketplace* of ideas, a robust, wide open *public square*. *Cf. Matal v. Tam*, 137 S. Ct. 1744, 1766 (2017). The Free Exercise of Religion, on the other hand, protects, among other things, the manifestation of religious conscience from government interference—regardless of where it occurs. Free Exercise analysis accordingly proceeds not by asking *where* the religious exercise is occurring, but by assessing the religious claimant's *sincerity*, *see Wisconsin v. Yoder*, 406 U.S. 205, 216 (1972), and, if strict scrutiny applies, it applies "*to the person*" and not to the location, *see Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430-31 (2006) (noting this as the test under the Religious Freedom Restoration Act) (emphasis added). Conditioning the Free Exercise Clause's application on whether the Free Speech

[3] WMATA has cited a single Ninth Circuit decision, *Berry v. Department of Social Services*, 447 F.3d 642 (9th Cir. 2006) in support of the proposition that the nonpublic forum analysis governs a government employee's Free Exercise rights. But *Berry* is squarely within the distinct realm of government-employee jurisprudence following *Pickering v. Board of Education*, 391 U.S. 563 (1968).

Clause permits content-based restrictions in certain spaces would condition religious liberty on where it manifests, not whether an individual suffers a burden on religious exercise.[4]

Forcing forum analysis on to the Archdiocese's Free Exercise claim does not resolve Guideline Twelve's unconstitutional restriction upon the Archdiocese's right to exercise its religion. Rather, forum analysis leaves the problem in place. Guideline Twelve is, as WMATA admits, a "content-based restriction[]" on religion. JA548. Saying Guideline Twelve is a "content-based restriction[]" on religion is just another way of saying it "obviously" "impose[s] special disabilities on the basis of religious views or religious status." *See Smith*, 494 U.S. at 877.

[4] Indeed, the only discussion in *Smith* about the interrelationship of the Free Speech and Free Exercise analyses is that, when those clauses are raised together, they warrant *strict* scrutiny. *See Smith*, 494 U.S. at 881 (explaining that strict scrutiny applies when "religiously motivated action . . . involve[s] not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech"). Moreover, the Free Exercise analysis can account for the government's interests behind a nonpublic or limited public forum designation in the course of assessing whether a compelling government interest exists to burden a person's religious exercise; it is unnecessary, and dangerous to religious freedom, to let mere forum designation be an "on/off" switch for standard Free Exercise analysis. *Cf. Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2781 n.37 (2014) (declining to "giv[e] the Government an entirely free hand to impose burdens on religious exercise so long as those burdens confer a benefit on other individuals." Rather than let the government's policy decisions dictate whether religious exercise may be burdened without an analysis under strict scrutiny, "the burdens a requested accommodation may impose on nonbeneficiaries" "will often inform the analysis of the Government's compelling interest and the availability of a less restrictive means of advancing that interest.") (internal quotations and citations omitted).

For all of the reasons discussed above, a "content-based restriction[]" on religion cannot endure a separate Free Exercise Clause analysis.

II. GUIDELINE TWELVE IS SUBJECT TO STRICT SCRUTINY BECAUSE IT IS NEITHER NEUTRAL NOR GENERALLY APPLICABLE.

Even if the plain language of Guideline Twelve were not, somehow, targeting religion, "[t]he Free Exercise Clause protects against governmental hostility which is masked, as well as overt." *Lukumi*, 508 U.S. at 534; *see also id.* at 542 (explaining that the Free Exercise Clause protects "religious observers against unequal treatment"). Accordingly, Guideline Twelve is also subject to strict scrutiny because it is neither a neutral law nor a law of general application.

In *Lukumi*, the Supreme Court struck down three ordinances banning animal sacrifice, unanimously concluding that the ordinances fell "well below the minimum standard necessary to protect First Amendment rights." *Id.* at 543. The ordinances were neither "neutral" nor "generally applicable" because they burdened "Santeria adherents but almost no others;" they "proscribe[d] more religious conduct than [wa]s necessary to achieve their stated ends;" and they exempted "[m]any types of animal deaths or kills" that undermined the government's interests in a similar or greater degree than Santeria sacrifice does." *Id.* at 536-38, 543.

Lukumi confirms two key analytical points needed to assess whether Guideline Twelve is, in fact, both neutral and generally applicable:

First, "The Court explicitly said that laws do not have to be as bad as *Lukumi* to be unconstitutional." Douglas Laycock & Steven T. Collins, *Generally Applicable Law and the Free Exercise of Religion*, 95 NEB. L. REV. 1, 5 (2016). A law does not violate the Free Exercise Clause only when it falls, as the Court said, "*well below the minimum standard* necessary to protect First Amendment rights." *Lukumi*, 508 U.S. at 543 (emphasis added).

Second, establishing that a law is "neutral" and "generally applicable" is a two-step analysis; the inquiry into "neutrality" is separate from the inquiry into "general applicability." *Lukumi*'s structure evinces this—neutrality and general applicability are analyzed in separate, enumerated sections within the opinion, each satisfying different standards. If a law fails *either* the "neutral" test *or* the "generally applicable" test, it cannot survive the Free Exercise Clause.

A. Guideline Twelve is not "Neutral."

For the reasons set forth above, *see supra* pp. 7-15, Guideline Twelve plainly targets religion and therefore is not "neutral." WMATA attempts to avoid this obvious conclusion by asserting that Guideline Twelve is merely part of a broader scheme of content-based restrictions on "issue ads" that target more than just religion. But this argument—that a Free Exercise violation cannot exist because other activity is also prohibited—does not render Guideline Twelve

neutral. Instead, it evinces that Guideline Twelve serves to pile a *particular* restriction on to religious advertisements without a secular analogue.

When the government pinpoints "the limited nature of the problem," the "reasonable" course is for the government "to enact a limited solution." *McCullen v. Coakley*, 134 S. Ct. 2518, 2532 (2014). Thus, "[w]hen selecting among various options for combating a particular problem, legislatures should be encouraged to choose the one that restricts less speech, not more." *Id.* Absent "persuasive indications to the contrary, [] a law which visits gratuitous restrictions on religious conduct seeks not to effectuate the stated governmental interests, but to suppress the conduct because of its religious motivation." *Lukumi*, 508 U.S. at 538 (internal quotation marks and citations omitted). Indeed, "significant evidence" of "improper targeting" of religion exists when the law at issue "proscribe[s] more religious conduct than is necessary to achieve [the government's] stated ends." *Id.*

This is precisely the problem here. WMATA enacted Guideline Twelve's ban on religious advertisements in response to a rider survey about "issue-oriented advertising" causing offense. *See* JA206. In due course, WMATA adopted separate Guidelines that directly address "issue-oriented advertising." Guideline Nine, for example, bans ads "intended to influence members of the public regarding an issue on which there are varying opinions." JA208. In a similar vein, Guideline Thirteen bans ads that "support or oppose an industry position or an

industry goal" when the advanced "position[s]" or "goal[s]" lack "any direct commercial benefit to the advertiser." JA209. Guideline Fourteen comparably bars ads "that are intended to influence public policy." JA209. WMATA enacted these other Guidelines to address the particular problem it sought to solve ("issue-oriented advertising").

WMATA's multiple other Guidelines consist of specific prohibitions tailored to address the supposed "issue ad" problem.[5] But by imposing Guideline Twelve to *also* ban ads addressing *any* religion, religious practice, and religious belief—no matter how kind, peaceful, and unobtrusive, even bare invitations to attend worship services or merely providing an address of a place to worship—Guideline Twelve evinces "significant evidence" of "improper targeting" by "proscrib[ing] more religious conduct than is necessary to achieve [the government's] stated ends." *Lukumi*, 508 U.S. at 538.

[5] Moreover, to the extent WMATA was concerned about "violent reactions" to ads in light of "external world events" and not merely rider perceptions, *see* JA167 (citing "a proposed ad featuring a cartoon depiction of the Prophet Mohammad"), WMATA could have crafted a regulation responsive to that concern. For example, WMATA could have barred ads likely to incite imminent violence or damage to WAMTA property. This would be entirely consistent with the First Amendment. Instead, WMATA "proscribed more religious conduct than is necessary" by barring religious advertisements of *any* kind simply because they are religious in character. *See Lukumi*, 508 U.S. at 538. That cannot survive examination under the Free Exercise Clause. *See id.*

Moreover, Guideline Twelve evinces its lack of neutrality "in its real operation." *Id.* at 535. Guideline Twelve's "real operation" causes "a religious gerrymander." *Id.* WMATA admits that, in the law's real operation, Guideline Twelve "prohibited advertisements related to the subject of the religious half of Christmas, but not the secular half." JA176. WMATA also does not dispute that it "accepts" "advertising that mentions Christmas or seasonal fundraising ads" that "sell commercial products," despite banning religious advertisements about Christmas, Advent fundraising ads, or religious entities that sell products. *See* JA163. Under *Lukumi*, Guideline Twelve's "religious gerrymander" requires strict scrutiny.

B. Guideline Twelve is not "Generally Applicable."

Far from prohibiting advertisements "across the board," *see Smith*, 494 U.S. at 884, Guideline Twelve is not generally applicable because it privileges secular advertisements over religious advertisements.

Despite WMATA's and the district court's collapsing neutrality and general applicability into a single test, "[g]eneral applicability . . . does not depend on targeting, gerrymandering, discrimination, legislative motives, or the object of laws." Laycock & Collins, *Generally Applicable Law and the Free Exercise of*

Religion, 95 NEB. L. REV. at 7.[6] *Lukumi* confirms that a law's lack of general applicability can be demonstrated in multiple ways, *see* 508 U.S. at 543-44, but the most relevant inquiry here is this: Whether the law "fail[s] to prohibit nonreligious conduct that endangers" the government's regulatory interest "in a similar or greater degree" than the prohibited religious conduct. *Id.* at 543. A few examples, including *Lukumi*, are illustrative:

In *Lukumi*, the county regulated animal sacrifices because of the threat the carcasses of sacrificed animals pose to public health. But, a health official testified that restaurant garbage was a greater public health hazard than the carcasses of sacrificed animals. "[R]estaurants," the Court explained, "are outside the scope of the ordinances. Improper disposal is a general problem that causes substantial health risks, but which [the city] addresses only when it results from religious exercise." *Id.* at 544-45. Such a law is not generally applicable.

[6] WMATA's argument is also circular. WMATA claims that both neutrality and general applicability are satisfied because Guideline 12 "applies across the board to advertisements that touch on the subject matter of religion from any perspective or motivation[.]" JA548 (quoting the district court). But "[e]very law applies to everything it applies to. And opponents of religious liberty often argue that a law is generally applicable for just this circular reason—it is a generally applicable prohibition of whatever it prohibits." Laycock & Collins, *Generally Applicable Law and the Free Exercise of Religion*, 95 NEB. L. REV. at 16. In determining general applicability, the issue is not whether Guideline Twelve proscribes any and every religious motivation, but whether this proscription makes a value judgment in favor of secular conduct that also implicates the government's regulatory interest. It does.

Two opinions authored by then-Judge Alito also stand out: In the first, *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359 (3d Cir. 1999), the Third Circuit considered a Free Exercise challenge to a police department's grooming policy. The policy exempted beards grown for medical reasons, but not religious reasons. Writing for the court, then-Judge Alito held that the policy was not generally applicable, because the exemption for medical reasons involved "a value judgment that secular (i.e., medical) motivations for wearing a beard are important enough to overcome [the government's] general interest in uniformity but that religious motivations are not." *Id.* at 366. Judge Alito set forth a similar analysis in *Blackhawk v. Pennsylvania*, 381 F.3d 202 (3d Cir. 2004). There, the Third Circuit held that a wildlife permitting fee was not generally applicable where it exempted zoos and circuses, but not Native Americans. *Id.* at 211. Cases from other circuits take similar positions.[7]

[7] *See, e.g.*, *Midrash Sheparди, Inc. v. Town of Surfside*, 366 F.3d 1214, 1234-35 (11th Cir. 2004) (holding that a zoning code which exempted clubs and lodges, but not houses of worship, "violates the principles of neutrality and general applicability because private clubs and lodges endanger [the town's] interest in retail synergy as much or more than churches and synagogues"); *Ward v. Polite*, 667 F.3d 727, 739-40 (6th Cir. 2012) (per Sutton, J.) (holding that a policy which "permit[ted] referrals for secular—indeed mundane—reasons," such as when a client could not pay for a particular counselor or wanted end-of-life counseling, but would not permit referrals for religious reasons, was an "exception-ridden policy" that was "the antithesis of a neutral and generally applicable policy and just the kind of state action that must run the gauntlet of strict scrutiny").

In sum, "when the government makes a value judgment in favor of secular motivations, but not religious motivations, the government's actions must survive heightened scrutiny." *Fraternal Order of Police*, 170 F.3d at 366.

Guideline Twelve must accordingly be subjected to strict scrutiny. The prohibition on only religious advertisements, coupled with WMATA's corresponding practice of allowing ads to address the "secular" or "commercial" aspects of Christmas, demonstrates that "the government ma[de] a value judgment in favor of secular motivations, but not religious motivations." *See id*; *see also* JA176 ("Here, WMATA has simply prohibited advertisements related to the subject of the religious half of Christmas, but not the secular half."). This value judgment comes in spite of the fact that WMATA's regulatory interest in restricting advertisements that give offense applies with *equal force* to religiously-motivated ads and secularly-motivated ads. *Cf. Metro Ad Slammed as "Sexist," "Offensive,"* NBC WASHINGTON, Dec. 4, 2013, https://www.nbcwashington.com/news/local/Shoes-Metro-Ad-Slammed-as-Sexist-Offensive-234457061.html ("A new D.C. Metro ad is being called sexist and offensive for depicting a woman rider who wants to 'just talk about shoes,' not about Metro's reliability."). This presents the same inconsistency the Court admonished in *Lukumi*. *See* 508 U.S. at 544-45 ("Improper disposal is a general

problem that causes substantial health risks, but which [the city] addresses *only* when it results from religious exercise.") (emphasis added).

Evidently, WMATA does not consider privileging a secular view of Christmas to be a value judgment that gives offense. But as the Archdiocese aptly points out, "[t]he undeniable reality is that the commercial and spiritual aspects of the [Christmas] season make competing demands on people[.]" Opening Br. 21. By choosing to accept only ads that represent Christmas as a mere secular, commercial bonanza divorced from any religious content, WMATA's value judgment *can and does* offend people. *See, e.g.*, *A Charlie Brown Christmas* (CBS television broadcast Dec. 9, 1965) (CHARLIE BROWN: "Isn't there anyone who knows what Christmas is all about?!?"). In order to protect viewers from "offensive" ads, WMATA has decided that it is fine to advance Lucy's position that "Christmas is just a big commercial racket," while prohibiting Linus's presentation of the Gospel of Luke as "what Christmas is all about." *See id.*

This *is* a "value judgment," masquerading as a uniform regulatory interest. Guideline Twelve is not generally applicable.

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As neither a neutral nor generally applicable law, the Free Exercise Clause requires that Guideline 12 be subjected to strict scrutiny. For the reasons the

Archdiocese has aptly articulated, WMATA comes nowhere close to satisfying it. Accordingly, Guideline Twelve violates the Free Exercise Clause.[8]

[8] Moreover, for the reasons the Archdiocese explains, the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C.A. § 2000bb *et seq.* also applies strict scrutiny to Guideline Twelve. The same underinclusiveness toward secularly motivated advertisements discussed in the general applicability analysis above, as well as Guideline Twelve burdening more religion than necessary to achieve the government's regulatory interest, *see supra* pp. 16-23, also confirm that Guideline Twelve cannot satisfy RFRA's "compelling government interest/lease restrictive means" analysis.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7) because it contains 5,417 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2013 in 14-point Times New Roman font, a proportionally spaced typeface.

/s/ *Ryan A. Shores*
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CERTIFICATE OF SERVICE

I hereby certify that on January 19, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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