

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-Appellants.

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

**BRIEF OF AMICI CURIAE ETHICS AND PUBLIC POLICY CENTER
AND FIRST LIBERTY INSTITUTE
IN SUPPORT OF PLAINTIFF-APPELLANT**

Lea Patterson
Joseph Bingham
FIRST LIBERTY INSTITUTE
2001 W. Plano Parkway, Suite 1600
Plano, Texas 75075
Telephone: (972) 941-4444
Facsimile: (972) 423-6162Shannen W. Coffin
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
Telephone: (202) 429-3000
Facsimile: (202) 429-3902
scoffin@steptoe.com

Dated: January 12, 2018

Counsel for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES iv

CORPORATE DISCLOSURE STATEMENT vi

INTRODUCTION1

INTEREST OF THE AMICI.....4

ARGUMENT5

 I. WMATA’s Advertising Guideline No. 12 Discriminates Against the
 Archdiocese’s Religious Viewpoint.....5

 II. The District Court’s Application of Advertising Guideline No. 12
 Exacerbates the Viewpoint Discrimination Found in the Guideline ...9

CONCLUSION.....18

CERTIFICATE OF COMPLIANCE WITH WORD LENGTH AND TYPEFACE
REQUIREMENTS.....19

CERTIFICATE OF SERVICE20

TABLE OF AUTHORITIES

Page(s)

Cases

<i>Byrne v. Rutledge</i> , 623 F.3d 46 (2d Cir. 2010)	9
<i>City Council of L.A. v. Taxpayers for Vincent</i> , 466 U.S. 789 (1984).....	12
<i>Cornelius v. NAACP Legal Def. & Educ. Fund</i> , 473 U.S. 788 (1985).....	6
<i>DeBoer v. Village of Oak Park</i> , 267 F.3d 558 (7th Cir. 2001)	6
<i>Epperson v. Arkansas</i> , 393 U.S. 97 (1968).....	12
* <i>Good News Club v. Milford Cent. Sch.</i> , 533 U.S. 98 (2001).....	3, 9, 13
* <i>Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.</i> , 508 U.S. 384 (1993).....	3, 7, 9, 13
<i>Lynch v. Donnelly</i> , 465 U.S. 668 (1984)	7
* <i>Rosenberger v. Rector & Visitors of Univ. of Va.</i> , 515 U.S. 819 (1995).....	3, 5, 6, 9, 10, 13
<i>Travis v. Owego-Apalachin Sch. Dist.</i> , 927 F.2d 688 (2d Cir. 1991)	12
<i>Va. Bd. of Pharm. v. Va. Citizens Consumer Council</i> , 425 U.S. 748 (1976).....	8

* Authorities on which we chiefly rely are marked with asterisks

Other Authorities

Charles Dickens, <i>A Christmas Carol</i> (Hodder & Stoughton 1911) (1843)	1
David Brooks, <i>Creed or Chaos</i> , <i>The New York Times</i> , Apr. 21, 2011, http://www.nytimes.com/2011/04/22/opinion/22brooks.html	16
Joseph Walker, <i>LDS Church buys ad space in ‘Book of Mormon’ playbill</i> , <i>Deseret News</i> , Sept. 6, 2012, https://www.deseretnews.com/article/865561906/LDS-Church- buys-ad-space-in-Book-of-Mormon-musical-playbill.html	16
Pew Research Center, <i>Americans Say Religious Aspects of Christmas Are Declining in Public Life</i> , Dec. 12, 2017, http://www.pewforum.org/2017/12/12/americans-say-religious- aspects-of-christmas-are-declining-in-public-life/	2
<i>Webster’s New World College Dictionary</i> (1997).....	14
WMATA, <i>Guidelines Governing Commercial Advertising</i> (2015), https://www.wmata.com/about/records/upload/Advertising_Guidel ines.pdf	6

CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES**A. Parties and *Amici***

Pursuant to Circuit Rule 28(a)(1)(A), Amici Curiae Ethics and Public Policy Center and First Liberty Institute certifies that the parties and *amicus curiae* in the case are as follows:

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*

Becket Fund for Religious Freedom, *amicus curiae*

Ethics and Public Policy Center, *amicus curiae*

First Liberty Institute, *amicus curiae*

B. Ruling Under Review

The ruling under review is the district court order and accompanying memorandum denying the Archdiocese a preliminary injunction. Judge Amy Berman Jackson of the D.C. District Court issued both the order and opinion on December 8, 2017. The order is entry 18 on the district court docket and is available in the appendix at JA416. The opinion does not yet have an official

citation but can be found on Westlaw at 2017 WL 6314142 and on the district court docket as entry 17. It is available in the appendix at JA375-415.

C. Related Cases

There are no related cases.

Respectfully submitted,

Lea Patterson
Joseph Bingham
FIRST LIBERTY INSTITUTE
2001 W. Plano Parkway, Suite 1600
Plano, Texas 75075
Telephone: (972) 941-4444
Facsimile: (972) 423-6162

/s/ Shannen W. Coffin
Shannen W. Coffin
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
Telephone: (202) 429-3000
Facsimile: (202) 429-3902
scoffin@steptoe.com

Counsel for Amici Curiae

January 12, 2018

CORPORATE DISCLOSURE STATEMENT

Amici curiae are both non-profit organizations. They have no parent corporations and do not issue stock.

INTRODUCTION

“[K]eep Christmas in your own way, and let me keep it in mine.”¹ Ebenezer Scrooge’s bitter advice to his nephew Fred has a ring of familiarity in this dispute. Washington Metropolitan Area Transit Authority’s response to the Archdiocese of Washington’s “Find the Perfect Gift” campaign could have been penned by old Scrooge himself. WMATA’s advertising guidelines permit WMATA to keep Christmas in its own way, promoting a Christmas devoid of higher meaning and tied to a vacuous commercialism that might even have warmed the heart in Scrooge, which Dickens said “[n]o warmth could warm.”² But an advertisement that addressed the same subject from a religious viewpoint—that invited the public to attend Mass during Advent, to give the gift of Christian-inspired charity, and to nourish the soul—was strictly forbidden.

The District Court was not troubled by WMATA’s decision to exclude the Archdiocese’s Christmas message from its buses. It concluded that WMATA’s advertising guidelines establish a permissible viewpoint-neutral, content-based restriction on religious speech. *Archdiocese of Wash. v. Wash. Metro. Area Transit Auth.*, No. 17-2554, Doc. # 17 at 3 (D.D.C. Dec. 8, 2017) (“Mem. Op.”). But there is nothing viewpoint neutral about WMATA’s guidelines. In allowing

¹ Charles Dickens, *A Christmas Carol* 15 (Hodder & Stoughton 1911) (1843), available at <http://www.read.gov/books/christmas-carol.html>.

² See *id.* at 12.

advertisements reflecting what WMATA calls the “secular half” of Christmas, *see* WMATA TRO Opp. at 14 n.3 (Doc. # 10), WMATA *already* permitted its buses to carry messages containing a particular viewpoint on the topic of Christmas.

Christmas advertising is just fine with WMATA if it relates to Santa Claus, Frosty the Snowman, and gift giving. WMATA may have concluded that this secular message does not “promote” or “oppose” the religious holiday within the meaning of its advertising guidelines, but it surely reflects a viewpoint about how people should celebrate that holiday.

The “Find the Perfect Gift” ad campaign was all the more important to the Archdiocese *because* a commercial viewpoint on Christmas is allowed on Metro bus ads. Public polling shows that Americans are largely buying into the “secular half” of Christmas. More Americans view Christmas through a purely secular lens than at any time in our history. *See* Pew Research Center, *Americans Say Religious Aspects of Christmas Are Declining in Public Life*, Dec. 12, 2017, <http://www.pewforum.org/2017/12/12/americans-say-religious-aspects-of-christmas-are-declining-in-public-life/> (“As long-simmering debates continue over how American society should commemorate the Christmas holiday . . . most U.S. adults believe the religious aspects of Christmas are emphasized less now than in the past—even as relatively few Americans are bothered by this trend.”).

The Archdiocese sought to respond to this pervasive secular message with an understated reminder that Christmas means something much larger than silver bells and tinsel. The Archdiocese was not seeking to foreclose Christmas festivities, just remind its celebrants that there is a deeper meaning to the Season – one that does not split Christmas into halves but celebrates it as an integrated, religious and spiritual whole. Permitting one message without the other eroded this greater meaning of Christmas and denied the Archdiocese an opportunity to respond to that erosion in the same forum.

WMATA's application of its guidelines here discriminated against the Archdiocese's religious viewpoint in violation of the First Amendment. WMATA objected not to the specific words of the Archdiocese's message, or even to the various subject matters that the Archdiocese's ad addresses, but rather, to the *religious viewpoint* of that message. The First Amendment does not allow the government to choose winners and losers in the public discussions of Christmas—or any other topic (such as charity or self-improvement) otherwise permitted on the side of a bus. See *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829-31 (1995); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 111-12 (2001); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993). The District Court's order should be reversed.

INTEREST OF THE AMICI

Amici curiae Ethics and Public Policy Center (“EPPC”) and First Liberty Institute respectfully submit this brief in support of the Archdiocese of Washington to share their views on the important constitutional values underlying the Archdiocese’s complaint.³ *Amici* were granted leave to participate in the district court proceedings in this case, based, in large part, on *amici*’s “keen interest” in the religious liberties issues raised by this case. Minute Order (Nov. 30, 2017). All parties have consented to the filing of this brief.

EPPC is a nonprofit, ecumenical research institution dedicated to defending American ideals and to applying the Judeo-Christian moral tradition to critical issues of public policy. A strong commitment to a robust understanding of religious liberty pervades EPPC’s work.

First Liberty Institute is a non-profit, public interest law firm dedicated to the preservation of America’s religious liberty. First Liberty Institute provides pro bono legal representation to institutions and individuals of all faiths, including Catholic and Protestant institutions, synagogues and Jewish schools, faith-based universities, Native American religious practitioners, an Islamic cemetery, the

³ Pursuant to Fed. R. App. P. 29(a)(4)(E), amici state that no party’s counsel authored this brief in whole or in part; that no party or its counsel contributed money that was intended to fund the preparation or submission of this brief; and no person other than amici or their counsel contributed money to fund this brief.

Falun Gong, and others. First Liberty Institute often appears in court, as counsel and as amicus curiae, in defense of vital First Amendment freedoms.

EPPC and First Liberty Institute respectfully submit that this brief will assist the Court in the consideration of this matter. Both organizations are active in the promotion and protection of religious liberties. Both engage in litigation involving the conflict between government regulation and First Amendment protections. They also represent a broader range of religious perspectives than the particular plaintiffs in this case, and their interest in free speech and free exercise reach beyond this particular dispute or WMATA's particular advertising guidelines.

ARGUMENT

I. WMATA's Advertising Guideline No. 12 Discriminates Against the Archdiocese's Religious Viewpoint

For all of the debate about what type of forum a Metro bus is, the question of forum is ultimately a sideshow in this case. No matter the type of forum, WMATA cannot discriminate among the viewpoint of speakers it permits on its bus advertisements. "It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys," and "[i]n the realm of private speech or expression, government regulation may not favor one speaker over another." *Rosenberger*, 515 U.S. at 828. Even "[t]he existence of reasonable grounds for limiting access" to a government-created speech forum "will not save

a regulation that is in reality a facade for viewpoint-based discrimination.”

Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 811 (1985).

The central problem for WMATA is that its Advertising Guideline No. 12 discriminates among speakers’ viewpoints *on its face*. The Guideline prohibits “[a]dvertisements that *promote* or *oppose* any religion, religious practice or belief.”

WMATA, *Guidelines Governing Commercial Advertising* at 2 (2015),

https://www.wmata.com/about/records/upload/Advertising_Guidelines.pdf

(emphasis added). Those are two categories of viewpoint about religion, but they are not the *only* such categories. Speech *related* to religion and religious practices, but otherwise sufficiently neutral to satisfy WMATA’s tastes, is still permissible under Guideline No. 12. The District Court’s conclusion that the Guideline excludes religion as a subject matter, *see* Mem. Op. at 20, rests on what the Supreme Court has called an “insupportable assumption that all debate is bipolar and that antireligious speech is the only response to religious speech.”

Rosenberger, 515 U.S. at 831; *see also DeBoer v. Village of Oak Park*, 267 F.3d 558, 571 (7th Cir. 2001) (“In enforcing the ‘promote or espouse’ requirement [of its regulations], the Village has violated the First Amendment’s requirement of viewpoint neutrality.”). It is thus “as objectionable to exclude both a theistic and an atheistic perspective on the debate as it is to exclude one, the other, or yet another political, economic, or social viewpoint.” *Rosenberger*, 515 U.S. at 831.

WMATA's approach to Christmas advertising illustrates the viewpoint-discriminatory nature of Guideline No. 12. By its own admission, WMATA *does* permit *some* advertising relating to Christmas, which by any measure is a holiday with a religious foundation. For WMATA, the "mere mention of Christmas" does not run afoul of its advertising guidelines. WMATA TRO Opp. at 14. Christmas advertising is not *categorically* excluded from WMATA buses; it is permitted if it relates to what WMATA calls the "secular half" of Christmas. *Id.* at 10 n.3.⁴

WMATA's notion of a "secular half" of Christmas is *itself* a viewpoint on a religious holiday. By permitting advertising promoting this "secular half," WMATA is allowing a very definite viewpoint about the meaning of Christmas to be expressed on its buses. If the "perfect gift" at Christmas is an iPhone or a new

⁴ WMATA, in fact, posits not simply two "halves" of Christmas, but two *Christmases*, "reflecting two different Christmas-related subject matters." Appellee's Mot. Opp. Inj. Pending Appeal at 15 n.3. WMATA's conclusion that the government can permit speech about one, but not the other, has no foundation in the law. WMATA relies for its "secular half" argument on Establishment Clause cases, not Free Speech cases. *See id.* (citing *Allen v. Hickel*, 424 F.2d 944 (D.C. Cir. 1970); *Lynch v. Donnelly*, 465 U.S. 668 (1984)). These cases establish only that government may recognize Christmas as a holiday without violating the Establishment clause; they say nothing about whether the government may open a space for *private* expressions relating to Christmas but prohibit those that recognize the religious component of the holiday. Once WMATA allowed advertisements reflecting a secular interpretation of Christmas, it could not prohibit advertisements reflecting a religious interpretation. *See Lamb's Chapel*, 508 U.S. at 394 (explaining that the government may not "regulate speech in ways that favor some viewpoints or ideas at the expense of others") (citation omitted).

Mercedes-Benz, WMATA will happily take the advertiser's money.⁵ But the Archdiocese's advertisement, which tells viewers that the perfect Christmas gift is Christ Himself, is excluded. WMATA thus permits advertisements that invite the public to secularize a holiday sacred to Christians, while it excluded an advertisement designed to counteract that message and the cultural trend that goes along with it. Whether intended or not, WMATA, in effect, chose sides in the much debated "War on Christmas," where First Amendment free speech principles demand neutrality.

Even assuming, *arguendo*, that Advertising Guideline No. 12 targets religion "as a subject matter," Mem. Op. at 20, it still discriminates against religious viewpoint. "Religion may be a vast area of inquiry, but it also provides . . . a

⁵ The district court erroneously assumed that commercial advertisements can only express one idea – "buy a good or service" –and cannot, for that reason, also communicate moral or religious purposes or ideas. Mem. Op. at 21. That suggestion betrays both common sense and the law. Of course commercial advertisements can, and in many cases do, communicate ideas beyond the mere invitation to commerce. Watching Super Bowl advertisements these days often makes a viewer wonder how the advertisement is meant to promote a product at all. The Supreme Court has recognized even where advertisements have the ultimate purpose of selling a good or service, they can communicate messages that relate to a broader public interest: "Even an individual advertisement, though entirely 'commercial,' may be of general public interest . . . There are few [advertisements] to which such an element . . . could not be added." *Va. Bd. of Pharm. v. Va. Citizens Consumer Council*, 425 U.S. 748, 764 (1976)) (citations omitted) (pointing to abortion advertisements, advertisements promoting domestic jobs, and an artificial fur manufacturer's advertisement advocating against killing fur-bearing mammals).

specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered.” *Rosenberger*, 515 U.S. at 831.

The Guidelines’ prohibition, as applied by WMATA, excludes religious perspectives on a range of topics otherwise permissible on Metro bus advertisements. In this context, WMATA’s “ban on religious messages in practice operates not to restrict speech to certain subjects but instead to distinguish between those who seek to express secular and religious views on the same subjects.” *Byrne v. Rutledge*, 623 F.3d 46, 56-57 (2d Cir. 2010). This is precisely what the Supreme Court has prohibited in *Rosenberger*, *Lamb’s Chapel*, and *Good News Club*. See, e.g., *Lamb’s Chapel*, 508 U.S. at 393 (school district’s denial of application to show a film on child rearing and family issues from Christian perspective constituted viewpoint discrimination because topics covered in the film were otherwise permissible in the after-school forum); see also *Byrne*, 623 F.3d at 51-52 (striking down Vermont vanity license plate regulation prohibiting messages if the speaker intended to refer to religion). This Court should similarly find that WMATA’s advertising guidelines unlawfully discriminate against viewpoint in violation of the First Amendment.

II. The District Court’s Application of Advertising Guideline No. 12 Exacerbates the Viewpoint Discrimination Found in the Guideline

While the Court need look no further than the text of Advertising Guideline No. 12 to find unlawful viewpoint discrimination, the handful of comparable

advertisements discussed in the District Court’s opinion illustrates the scope and depth of the problem. In applying its Guideline No. 12, WMATA permits promotion and discussion of a range of topics, like charity (Salvation Army), self-improvement (CorePower Yoga), and even faith (The Book of Mormon), provided it is only a satirical look at faith. But the Archdiocese’s advertisement that addresses the very same topics from a religious viewpoint is excluded under Guideline 12. Under *Rosenberger* and similar cases, WMATA’s singling out of the Archdiocese’s religious viewpoint on a topic permitted on bus ads constitutes invidious discrimination and cannot stand.

Thus, for instance, on charity: The District Court tied itself into knots to deny the obvious – that an advertisement for the Salvation Army’s Red Kettle campaign is an ad for a uniquely *religious* charity campaign. *See* Mem. Op. at 28. The court concluded that while the Red Kettle “may be a well-known symbol of the season . . . there is *nothing religious* about it” and the ad “does not promote or oppose any religion or religious practice.” *Id.* (emphasis added).

The District Court’s reasoning blinks reality. The very name of the organization—*Salvation Army*—identifies the religious perspective of the ad campaign. Visiting the website incorporated by reference in the advertisement—

www.salvationarmynca.org—strongly reinforces that religious viewpoint.⁶ One merely had to scroll down on the home page to learn that the Salvation Army is “an evangelical part of the Universal Christian Church,” whose “message is based on the Bible.” More relevant to the specific advertisement here, the Salvation Army’s stated mission is to “meet human needs in His [Jesus Christ’s] name without discrimination.” *Id.* The Red Kettle campaign is indeed about serving others, but service from a Christian perspective.

WMATA and the District Court put significant emphasis on the content of the Archdiocese’s “Find the Perfect Gift” website in discerning the purpose of its advertising campaign. *See* Mem. Op. at 30 n. 17 (“[I]t is hardly unfair to take the content of plaintiff’s website into consideration since that is the very content plaintiff seeks to disseminate”). Yet the court was not willing to do more than a cursory (and quite blinkered) review of the Salvation Army’s website (the address for which was included in the advertisement), concluding only that it was “focused on fundraising and service.” *Id.* at 30. That fundraising and service—and the Red Kettle campaign advertisement brought attention to it—is all done “in His name.” *See* www.salvationarmynca.org.

⁶ The website was modified after Christmas, but this discussion refers to the website at the time of the Red Kettle campaign (last visited the week before Christmas 2017). The Salvation Army’s mission statement appeared on the home page for the website then, as it does now.

To permit advertisements for one patently religious Christian charity campaign and not allow similar advertisements for the Archdiocese's "Gift" campaign constituted blatant viewpoint (and religious) discrimination.⁷ WMATA singled out one religious viewpoint as preferable to another. The First Amendment "mandates governmental neutrality between religion and religion, and between religion and nonreligion." *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968); *see also Travis v. Owego-Apalachin Sch. Dist.*, 927 F.2d 688, 693–94 (2d Cir. 1991) (denial of a religious fundraiser in a limited public forum where other religious fundraisers had been allowed violated free speech clause of the First Amendment); *City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984) (government may not "favor some viewpoints or ideas at the expense of others").

But even accepting, for sake of argument, the District Court's erroneous conclusion that the Salvation Army advertisement does not itself promote religion, WMATA's exclusion of the Archdiocese's comparable charitable advertisement from an admittedly religious viewpoint is no less violative of the First Amendment.

⁷ This Court's Order denying interim injunctive relief reasoned that nothing in the Salvation Army advertisement "suggest[s] that WMATA is discriminating against a religious perspective on worthwhile eleemosynary activities; in fact, it indicates the opposite." Dec. 20, 2017 Order at 2 (Doc. # 17098000). But the point of the Salvation Army advertisement in this case is not that WMATA discriminated against the Salvation Army's religious message; obviously, it did not. The point is that a similar message by the Archdiocese was rejected – and that amounts to viewpoint discrimination.

See, e.g., Good News Club, 533 U.S. at 111-12. The District Court sought a way around that problem by concluding that the “*sole purpose* of directing the public to www.findthepperfectgift.org is to promote religion.” Mem. Op. at 20 (emphasis added). While there is no doubt that *a* fundamental purpose of the website is to promote the Catholic faith, it certainly is not the *only* purpose. One of the three boxes at the top of the Archdiocese’s “Find the Perfect Gift” web page asked the viewer to “Give.” In clicking on that box, visitors are invited by the Archdiocese to “Share the joy of Christmas this season by helping others,” with a number of suggestions on how to give.⁸ The website explicitly encourages charity at Christmas, much like the Salvation Army, but does so from an undeniably religious viewpoint. Permitting the promotion of secular charities, but not charities that speak from a religious viewpoint, strikes at the core of *Good News Club*, *Rosenberger* and *Lamb’s Chapel*.⁹

⁸ *See* <https://www.findthepperfectgift.org/give-perfect-gift/> (visited January 9, 2018). The Archdiocese’s “Find the Perfect Gift” website promotes, on its “Give the Perfect Gift” link, the Archdiocese’s Angel Tree program. *See id.* The Salvation Army’s website home page had a similar internet “meme” asking for the Salvation Army’s “Angel Tree” program, which stated: “Sponsors needed to help local kids in need this Christmas.” *See* <http://salvationarmynca.org> (visited Dec. 13, 2017).

⁹ Similarly, the CorePower Yoga ad, *see* Mem. Op. at 29, invites consumers to a journey of “self-discovery” and self-improvement through meditation and exercise. *See* Archdiocese Mot. for Injunction Pending Appeal at 15. The CorePower Yoga ad has suggestions of religiosity in its motto: “Muscle + Mantra.” Like yoga itself, which has its roots in Hindu mysticism (*see*, for example,

Similarly, on faith—at least a satirical look at faith: In our brief below, *amici* noted that “[o]ne can easily imagine, under the WMATA guidelines, an advertisement for the Kennedy Center’s recent run of the irreverent “The Book of Mormon” musical by Matt Stone and Trey Parker of *South Park* fame.” See Doc. # 11 at 6. “But an advertisement by the Church of Jesus Christ of Latter-Day Saints inviting patrons of the musical to learn the teachings of the actual Book of Mormon would be verboten simply because of its religious viewpoint.” *Id.*

What was necessarily, in the compressed time for briefing on a temporary restraining order, a hypothetical illustration is, in fact, a real world example of WMATA’s uneven application of its advertising guidelines: WMATA recently ran bus advertisements for “The Book of Mormon” musical¹⁰:

Patanjali’s *Yoga Sutras*), “Mantra” is a term loaded with religious significance. See *Webster’s New World College Dictionary* 876 (1997) (defining “mantra” as “*Hinduism*: a hymn or portion of text, esp. from the Veda, chanted or intoned as an incantation or prayer”). The district court disregarded the religious significance of this motto, noting that it did not change the court’s conclusion that the ad does not promote religion or religious practice “just because the word mantra can mean a religious incantation.” Mem. Op. at 29 n.16. But, again, regardless of whether this Court agrees with the District Court’s narrow reading of the yoga advertisement, the exclusion of a Catholic advertisement that invites the same journey to “Discover” (see <https://www.findthepperfectgift.org/discover-advent-and-christmas-traditions/>) from a religious perspective cannot be excluded.

¹⁰ The ad was located through internet searches. The photo was published online by the company that created the bus wrap, Spectrum Media Group, Inc., and is available at <http://www.thepictaram.club/share/Bbm2Pp51KMV>



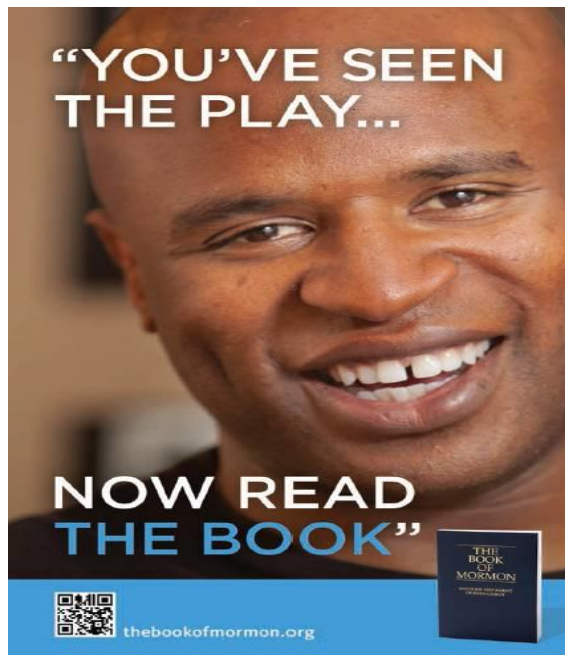
The District Court dismissed the significance of this example, concluding that “the fact that there will be a satire presented onstage does not transform a poster publicizing the existence of the performance or the availability of tickets into a communication that *itself* promotes or opposes a religion.” Mem. Op. at 28. A cursory review of the advertisement belies that conclusion. In the musical’s title, the second “o” in “Mormon” is replaced by a doorbell button. The photo in the advertisement is of a Mormon missionary with the Book of Mormon tucked by his side, wearing black pants, a white shirt and plain tie, and a nametag. Like the musical it advertises, but perhaps more subtly, the bus advertisement pokes fun at Mormon religious practice—in this case their practice of door-to-door

evangelization—saying, in effect, “Come see this musical that makes fun of Mormons.”¹¹

Nevertheless, this Court need not reject the District Court’s view that WMATA’s “Book of Mormon” bus advertisement did not “*itself* promote[] or oppose[] a religion” to conclude that failing to allow the Church of Jesus Christ of Latter Day Saints to run this advertisement inviting people who have seen the musical to learn the teachings of the faith would constitute viewpoint discrimination¹²:

¹¹ The district court complained that the suggestion that the “Book of Mormon” musical “disparages, or at least, pokes fun at, a religion,” was a “somewhat cursory summary of the show.” Mem. Op. at 28 n.15. Others would disagree. *The New York Times*’s David Brooks, for instance, explained that the “central theme of ‘The Book of Mormon’ is that many religious stories are silly—the idea that God would plant golden plates in upstate New York. Many religious doctrines are rigid and out of touch.” See David Brooks, *Creed or Chaos*, *The New York Times*, Apr. 21, 2011, <http://www.nytimes.com/2011/04/22/opinion/22brooks.html>. The district court ultimately settled on “satire” to describe the musical. Mem. Op. at 28 n.15.

¹² See Joseph Walker, *LDS Church buys ad space in ‘Book of Mormon’ playbill*, *Deseret News*, Sept. 6, 2012, <https://www.deseretnews.com/article/865561906/LDS-Church-buys-ad-space-in-Book-of-Mormon-musical-playbill.html>.



Yet that invidious form of discrimination is precisely what WMATA embraces by its selective application of Guideline No. 12. The LDS Church ad campaign cleverly played off of the musical to invite patrons to learn the real teachings of the faith, as opposed to the teachings and practices lampooned in the musical. Under Guideline No. 12, the LDS ad—and a similar advertisement inviting people to learn and practice the teachings of the Catholic faith—is verboten, while the musical ad satirizing a faith is permitted.

These examples illustrate that WMATA's application of advertising guidelines is fraught with value judgments about the viewpoint of the advertisement's sponsor. *Some* speech relating to religion is just fine with WMATA—whether it is the familiar red kettle of a religious charity or the mockery of religion in an award-winning musical. Ads relating to Christmas and

Christmas gift giving are acceptable to WMATA if sufficiently commercial in nature. But a simple message to “find the perfect gift” is excluded because it invites viewers to realize the true meaning of Christmas. Both in its selective application to exclude a particular religious message from the Catholic Church and its prohibition of religious viewpoint on topics otherwise open to advertisement on Metro buses, WMATA’s advertisement ban on speech that “promotes or opposes” religion violates core protections of the First Amendment.

CONCLUSION

For the reasons stated herein and in the Brief of Appellant, the District Court’s order under review should be reversed.

Respectfully submitted,

Lea Patterson
Joseph Bingham
FIRST LIBERTY INSTITUTE
2001 W. Plano Parkway, Suite 1600
Plano, Texas 75075
Telephone: (972) 941-4444
Facsimile: (972) 423-6162

/s/ Shannen W. Coffin
Shannen W. Coffin
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
Telephone: (202) 429-3000
Facsimile: (202) 429-3902
scoffin@steptoe.com

Counsel for Amici Curiae

January 12, 2018

**CERTIFICATE OF COMPLIANCE WITH WORD LENGTH AND
TYPEFACE REQUIREMENTS**

This brief complies with Federal Rule of Appellate Procedure 32(a)(7)(B)(i) because it contains 5,011 words.

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14 point font.

/s/ Shannen W. Coffin

Shannen W. Coffin (DC Bar # 449197)

STEPTOE & JOHNSON LLP

1330 Connecticut Ave., NW

Washington, D.C. 20036

Telephone: (202) 429-6255

Facsimile: (202) 429-3902

scoffin@steptoe.com

Counsel for Amici Curiae

January 12, 2018

CERTIFICATE OF SERVICE

I, Shannen W. Coffin, hereby certify that on January 12, 2018, I caused a true and correct copy of a copy of the foregoing document to be served on all parties of record via the CM/ECF system.

/s/ Shannen W. Coffin

Shannen W. Coffin (DC Bar # 449197)

STEPTOE & JOHNSON LLP

1330 Connecticut Ave., NW

Washington, D.C. 20036

Telephone: (202) 429-6255

Facsimile: (202) 429-3902

scoffin@steptoe.com

Counsel for Amici Curiae