

No. 18-1455

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In the  
**Supreme Court of the United States**

ARCHDIOCESE OF WASHINGTON, a corporation sole,  
*Petitioner,*

v.

WASHINGTON METROPOLITAN AREA TRANSIT  
AUTHORITY; PAUL J. WIEDEFELD, in his official  
capacity as General Manager of the Washington  
Metropolitan Area Transit Authority,  
*Respondents.*

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

**PETITIONER'S SUPPLEMENTAL BRIEF**

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## SUPPLEMENTAL BRIEF FOR PETITIONER

As the Petition in this case explains at length, the decision below here squarely conflicts with this Court's cases holding that the government impermissibly discriminates based on viewpoint when it bans religious speech from its forums. *See* Pet.19-24 (discussing *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995); *Lamb's Chapel v. Cent. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993)). The Petition further detailed how the D.C. Circuit's decision here conflicted with the decisions of other circuits faithfully following this Court's decisions. *See* Pet.24-27. The only thing missing from the Petition was a square and acknowledged circuit split in the specific factual context of government policies restricting religious advertising on bus exteriors. The Third Circuit has now filled that gap with its recent decision in *Northeastern Pennsylvania Freethought Society v. County of Lackawanna Transit System*, \_\_ F.3d \_\_, 2019 WL 4437822 (3d Cir. Sept. 17, 2019). The Third Circuit's *Lackawanna* decision not only finds a transportation advertising policy materially indistinguishable from the one at issue here to constitute unconstitutional viewpoint discrimination under the clear teaching of *Lamb's Chapel*, *Rosenberger*, and *Good News Club*, but it expressly rejects the analysis in the decision below. In light of the Third Circuit's decision, the already strong case for certiorari has become truly compelling.

In *Lackawanna*, the Third Circuit confronted a county policy that, like WMATA's, barred advertisements on public transportation that are

“religious in nature.” *Id.* at \*2. The Freethought Society proposed an advertisement that simply read “Atheists” and included the group’s web address, superimposed on a blue sky with clouds. *Id.* at \*1. The Freethought Society intended the advertisement “to show local religious believers that there are atheists in the community and to provide a resource for those believers to learn about Freethought.” *Id.* Lackawanna County rejected the Freethought Society’s advertisement and two other similar proposals, because the transportation authority “does not accept advertisements that promote the belief that ‘there is no God’ or advertisements that promote the belief that ‘there is a God;’” because belief in “supreme deity is a public issue;” and because the transportation authority believed the proposed advertisements “may offend or alienate a segment of its ridership and thus negatively affect ... revenue.” *Id.* at \*2.

In reviewing Lackawanna County’s no-religious-speech policy and rejection of the Freethought Society’s advertisements, the Third Circuit found its “task ... greatly simplified by a trilogy of Supreme Court decisions each addressing blanket bans on religious messages and each concluding that such bans constitute impermissible viewpoint discrimination.... —*Rosenberger, Lamb’s Chapel, and Good News Club.*” *Id.* at \*4 (internal citation omitted). The Third Circuit restated the clear holding of those cases: that religious speech bans like Lackawanna County’s “operate[ ] 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.*” *Id.* at \*6. Because Lackawanna County’s policy would permit secular associations to advertise

“[w]e exist, this is who we are, consider learning about or joining us,” but denied the Freethought Society the same opportunity, the policy discriminated based on viewpoint and violated the First Amendment’s free speech guarantee. *Id.* at \*6.

In rejecting Lackawanna County’s policy, the Third Circuit explicitly and in considerable detail rejected the D.C. Circuit’s decision *approving* WMATA’s policy. The Third Circuit believed WMATA’s policy was materially indistinguishable not only from Lackawanna County’s, but also from the policies this Court considered and rejected in *Good News Club*, *Rosenberger*, and *Lamb’s Chapel*. Those cases “cannot be distinguished by reasoning that those forums were open to a ‘wider range of subjects,’” than WMATA’s bus-exterior forum, as the D.C. Circuit held, because “[w]hat matters is whether the range of subjects—narrow, wide, or in-between—includes the one the speaker wants to address.” *Id.* at \*7. Nor could the D.C. Circuit validly worry that “the Archdiocese’s position would eliminate the government’s prerogative to exclude religion as a subject matter in any nonpublic forum.” *Id.* That “‘prerogative’ is based on a dictum in *Rosenberger* that the Supreme Court has since disclaimed,” and “it echoes the protestations of the *Rosenberger* dissent, not the reasoning of the majority.” *Id.* “In any case, no prerogative to ban subjects can justify viewpoint discrimination.” *Id.* “Finally, to the extent the D.C. Circuit reasoned that religious speech on a permissible topic may be censored if it is not ‘primarily’ about that topic,” the Third Circuit “disagree[d] with that too.” *Id.* at \*8. As this Court explained in *Good News Club*, “that a message on a

permitted topic is ‘quintessentially religious’ or ‘decidedly religious in nature’ does not relegate it to second-class status.” *Id.*

The Third Circuit alternatively rejected Lackawanna County’s transit advertising policy as an unreasonable restriction on content, just as the Archdiocese has argued here. *Id.* at \*8-10. The policy had two goals: to generate advertising revenue while maintaining or increasing ridership. *Id.* at \*9. But a ban on religious speech could not reasonably further those goals. Lackawanna County’s fears of religious advertisements causing disruption were “mere supposition,” and Lackawanna County could not justify its concerns for captive audiences when most of its advertisements ran on the *exterior* of its buses. *Id.* at \*9-10.

The striking parallels between the two cases are underscored by the inconsistent enforcement of the religious-speech bans in the two cases. As the Third Circuit observed, “[b]eyond the thin support for its concerns,” Lackawanna County’s “enforcement [wa]s scattershot at best,” rejecting, for example, an advertisement for an event because the website promoted drinking while running an advertisement for a blog that contained racist and anti-Semitic content. *Id.* at \*11. The “inconsistencies raise the specter of arbitrary censorship.” “An obscure religious reference may be allowed, while the same message from a better-known faith tradition is excluded,” and “[e]ven worse, officials may selectively decide to dig deeper when they receive proposals from disfavored groups.” *Id.*

The Third Circuit's decision in *Lackawanna County* reinforces that the decision below squarely conflicts with this Court's decisions in *Good News Club*, *Rosenberger*, and *Lamb's Chapel*. The Third Circuit also favorably relied on nearly every one of the court of appeals cases that the Archdiocese identified in its Petition as having faithfully followed this Court's precedents. *See* Pet.24-27. By providing the only missing piece—a clear and acknowledged circuit split in the precise context of religious-speech bans on bus exteriors—the Third Circuit's decision makes the case for this Court's review overwhelming.

**CONCLUSION**

For the foregoing reasons and those set forth in the Petition and Reply, this Court should grant the Petition for Certiorari.

Respectfully submitted,

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