

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

BRIEF *AMICI CURIAE* OF NATIONAL ASSOCIATION
OF EVANGELICALS, ETHICS & RELIGIOUS LIBERTY
COMMISSION OF THE SOUTHERN BAPTIST
CONVENTION, CONCERNED WOMEN FOR
AMERICA, NATIONAL LEGAL FOUNDATION, THE
PACIFIC JUSTICE INSTITUTE, AND THE
INTERNATIONAL CONFERENCE OF EVANGELICAL
CHAPLAIN ENDORSERS

in support of the Petition for a Writ of Certiorari

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INTEREST OF *AMICI CURIAE*¹

The National Association of Evangelicals (“NAE”) is the largest network of evangelical churches, denominations, colleges, and independent ministries in the United States. It serves 40 member denominations, as well as numerous evangelical associations, missions, social-service providers, colleges, seminaries, religious publishers, and independent churches. NAE serves as the collective voice of evangelical churches, as well as other church-related and independent religious ministries. It believes that religious freedom is both a God-given right and a limitation on civil government, all as recognized in the First Amendment, and that freedom of speech extends to all content and viewpoints without regard to religion.

The Ethics & Religious Liberty Commission (“ERLC”) is the moral concerns and public policy entity of the Southern Baptist Convention (“SBC”), the nation’s largest Protestant denomination, with over 46,000 churches and 15.2 million members. The ERLC is charged by the SBC with addressing public policy affecting such issues as religious liberty, marriage and family, the sanctity of human life, and ethics.

¹ Pursuant to Supreme Court Rule 37, all Parties have received timely notice of *Amici’s* intent to file this Brief and have consented to its filing. 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 *Amici Curiae*, their members or their Counsel, contributed money that was intended to fund the preparation or submission of this Brief.

Religious freedom is an indispensable, bedrock value for Southern Baptists. The Constitution's guarantee of freedom from governmental interference in matters of faith is a crucial protection upon which SBC members and adherents of other faith traditions depend as they follow the dictates of their conscience in the practice of their faith.

Concerned Women for America ("CWA") is the largest public policy organization for women in the United States, with approximately half a million supporters from all 50 States. Through its grassroots organization, CWA encourages policies that strengthen women and families and advocates for the traditional virtues that are central to America's cultural health and welfare. CWA actively promotes legislation, education, and policymaking consistent with its philosophy. Its members are people whose voices are often overlooked—everyday, middle-class American women whose views are not represented by the powerful elite.

The National Legal Foundation ("NLF") is a public interest law firm dedicated to the defense of First Amendment liberties, including our First Freedoms of speech, assembly, and religion. The NLF and its donors and supporters, in particular those from Washington, D.C., are vitally concerned with the outcome of this case because of its effect on the speech and assembly rights of charitable and religious organizations and people of faith.

The Pacific Justice Institute ("PJI") is a nonprofit legal organization established under Section 501(c)(3) of the Internal Revenue Code. Since its founding in 1997, PJI has advised and represented in

court and administrative proceedings thousands of individuals, businesses, and religious institutions, particularly in the realm of First Amendment rights. Such include those who have faced termination from employment, prosecution, suspension and expulsion from public schools, and a variety of governmental restrictions because they have engaged in free speech activities on religious topics. As such, PJI has a strong interest in the development of the law in this area.

The International Conference of Evangelical Chaplain Endorsers (“ICECE”) has as its main function to endorse non-denominational chaplains to the military and other organizations, avoiding the entanglement with religion that the government would otherwise have if it determined chaplain endorsements. A proper understanding of Religion Clauses of the First Amendment is essential to allow ICECE to achieve its purposes.

SUMMARY OF THE ARGUMENT

The petition presents an issue of extraordinary importance to the *Amici*: may government entities exclude only “religion” from public forums? The D.C. Circuit’s answer in the affirmative is profoundly wrong, demonstrating a misunderstanding of the Constitution’s guarantee of religious freedom and an improper hostility to religion.

ARGUMENT

The Washington Metropolitan Area Transit Authority (“WMATA”) allows advertising on its property on almost any subject *except* those that “promote or oppose any religion, religious practice or

belief.” (Pet. 5,19, 22 (each page citing the Joint Appendix filed in the court below, at 209.) Petitioner has well set out how this policy restriction violates both the First Amendment and the Religious Freedom Restoration Act. *Amici* make the following additional points in summary fashion.

1. The D.C. Circuit has a cramped and inaccurate understanding of religion. Underlying its decision is the unconstitutional notion that “religion” should be neatly circumscribed and kept in its own, private, out-of-sight places. This is not how religion works. Rather than being peripheral and largely irrelevant to everyday living, religion for millions of Americans is at the central core of their being, permeating everything they do. Religion often has “something to say” about what, on first glance, seems wholly secular. Americans may not be prevented from communicating their messages solely because they are religious.

2. Nor may WMATA constitutionally decide which messages are “religious” or “too religious” and which are not. Government officials are neither qualified nor permitted to entangle themselves in such questions. “It is not only the conclusions that may be reached by the Board which may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions.” *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 502 (1979); *see also Town of Greece v. Galloway*, 134 S. Ct. 1811, 1822-23 (2014) (“government may not seek to define permissible categories of religious speech”).

3. The viewpoint discrimination inherent in WMATA’s policy is well illustrated by the ads

WMATA published during the 2018 Christmas season. Despite the fact that many people of faith believe that violence and sexual promiscuity are especially deleterious to the young, WMATA plastered throughout its system an advertisement for a new video game that also included a warning that it involved extreme violence and sexual themes. Under WMATA's policy, such ads are permissible, while people of faith could not use the same platform to object to such forms of entertainment on religious grounds.

4. Another wrongheaded, underlying assumption used to validate WMATA's policy is that religious speech can be more readily restricted because people are more likely to disagree with it. This turns the First Amendment on its head. Of course, people often disagree with religious speech; that is because it deals with critically important and sensitive topics and makes demands on how people live their lives. For that reason, totalitarian states often clamp down on religious speech. The First Amendment, on the other hand, protects such speech all the more diligently. *See, e.g., Snyder v. Phelps*, 562 U.S. 443 (2011).

5. This D.C. Circuit precedent, if allowed to stand, has the potential to affect not just religious organizations and individuals in the D.C. area, but throughout the country. The religious often advertise in their communities, and to allow governmental entities to shut off avenues of communication to them as a class often will foreclose them from answering in kind or advertising most effectively. As things now stand, vendors can advertise on WMATA buses where to buy the latest violent video games, but the Billy Graham Evangelistic Association would not be

permitted to advertise one of its upcoming TV specials. But religious entities can no more be foreclosed from government forums just because they are religious than they can be denied government benefits for that reason. See *Trinity Lutheran Church of Colum., Inc. v. Comer*, 137 S. Ct. 2012 (2017); *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819 (1995).

CONCLUSION

The D.C. Circuit has set a dangerous precedent that gives governments a roadmap of how to foreclose religious speech. The petition should be granted, and the decision reversed.

Respectfully submitted,
This 21st day of June 2019.

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