AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

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Supplementary Material

Chapter 12: The Contemporary Era – Individual Rights/Religion/Free Exercise

**Archdiocese of Washington v. Washington Metropolitan Area Transit Authority, 140 S.Ct. 1198** (2020)

*The Archdiocese of Washington’s “Find the Perfect Campaign” sought to run an advertisement during the holiday season on metrobuses that featured three shepherds, two sheep and a website that invited all persons to Catholic Mass and noted opportunities for charitable service. The Washington Metropolitan Area Transit Authority (WMATA) refused to run that ad on the ground that transit policy forbade “advertisements that promote or oppose any religion, religious practice, or belief.” The Archdiocese filed a lawsuit against WMATA claiming that this policy violated the free exercise clause of the First Amendment. The local district court rejected that lawsuit and that decision was affirmed by the Court of Appeals for the District of Columbia. The Archdiocese appealed to the Supreme Court.*

 *The Supreme Court refused to issue a writ of certiorari. Justice Neil Gorsuch was troubled by the WMATA police. His statement insisted that WMATA was discriminating against religion when permitted advertisements about secular Christmas (buy toys) but not about religious Christmas (go to Mass). Is there a constitutional difference between speech urging persons to engage in religious action and speech urging persons to engage in secular activities? Do people who ride city buses have a right to be free from religious proselytism but not a right to be free from other advertisements? What policy would you urge WMATA to adopt?*

Archdiocese of Washington v. Washington Metropolitan Area Transit Authority

The petition for a writ of certiorari is denied.

Statement of Justice [GORSUCH](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0183411701&originatingDoc=Ied0a0ad8620f11eaadfea82903531a62&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=Ied0a0ad8620f11eaadfea82903531a62), with whom Justice [THOMAS](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0216654601&originatingDoc=Ied0a0ad8620f11eaadfea82903531a62&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=Ied0a0ad8620f11eaadfea82903531a62) joins, respecting the denial of certiorari.

. . . .

At Christmastime a few years ago, the Catholic Church sought to place advertisements on the side of local buses in Washington, D. C. The proposed image was a simple one—a silhouette of three shepherds and sheep, along with the words “Find the Perfect Gift” and a church website address. No one disputes that, if Macy's had sought to place the same advertisement with its own website address, the Washington Metropolitan Area Transit Authority (WMATA) would have accepted the business gladly. Indeed, WMATA admits that it views Christmas as having “ ‘a secular half’ ” and “ ‘a religious half,’ ” and it has shown no hesitation in taking secular Christmas advertisements. Still, when it came to the church's proposal, WMATA balked.

That is viewpoint discrimination by a governmental entity and a violation of the First Amendment. In fact, this Court has already rejected no-religious-speech policies materially identical to WMATA's on no fewer than three occasions over the last three decades. See *Good News Club v. Milford Central School* (2001); *Rosenberger v. Rector and Visitors of Univ. of Va.* (1995); *Lamb's Chapel v. Center Moriches Union Free School Dist.* (1993). In each case, the government opened a forum to discussion of a particular subject but then sought to ban discussion of that subject from a religious viewpoint. What WMATA did here is no different.

WMATA's response only underscores its error. WMATA suggests that its conduct comported with our decision in [*Rosenberger*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1995137604&pubNum=0000780&originatingDoc=Ied0a0ad8620f11eaadfea82903531a62&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) because it banned religion as a*subject* rather than discriminated between religious and nonreligious *viewpoints*. But that reply rests on a misunderstanding of [*Rosenberger*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1995137604&pubNum=0000780&originatingDoc=Ied0a0ad8620f11eaadfea82903531a62&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)). There, the Court recognized that religion is not just a subject isolated to itself, but often also “a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered.”  That means the government may minimize religious speech incidentally by reasonably limiting a forum like bus advertisement space to subjects where religious views are unlikely or rare. But once the government allows a subject to be discussed, it cannot silence religious views on that topic. So the government may designate a forum for art or music, but it cannot then forbid discussion of Michelangelo's David or Handel's Messiah. And once the government declares Christmas open for commentary, it can hardly turn around and mute religious speech on a subject that so naturally invites it.

That's not to say WMATA lacks a choice. The Constitution requires the government to respect religious speech, not to maximize advertising revenues. So if WMATA finds messages like the one here intolerable, it may close its buses to all advertisements. More modestly, it might restrict advertisement space to subjects where religious viewpoints are less likely to arise without running afoul of our free speech precedents. The one thing it cannot do is what it did here—permit a subject sure to inspire religious views, one that even WMATA admits is “half ” religious in nature, and then suppress those views. The First Amendment requires governments to protect religious viewpoints, not single them out for silencing.