No. _____

In the Supreme Court of the United States

YOUNG ISRAEL OF TAMPA, INC.,

Petitioner,

v.

HILLSBOROUGH AREA REGIONAL TRANSIT AUTHORITY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Young Israel of Tampa is an Orthodox Jewish synagogue that sought to advertise its annual Chanukah celebration on public buses run by the Hillsborough Area Regional Transit Authority. HART accepts a wide variety of advertisements on its buses, including for secular holiday events, but rejected Young Israel's ad based on a policy banning ads that "primarily promote a religious faith or religious organization."

This Court has repeatedly held that similar religious-speech bans constitute impermissible viewpoint discrimination. *E.g.*, *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995). Even so, there is a 5-3 circuit split over *Rosenberger*'s application to religious-speech bans in government fora. Five circuits hold that such bans are necessarily viewpoint discrimination—without the need to inquire into a ban's "reasonableness." Three circuits hold that governments can ban religion as a "subject matter" if they have "reasonable" standards for doing so.

Acknowledging a "circuit split," the court below declined to hold that HART's policy was viewpoint discriminatory. Instead, it held that the policy was "unreasonable" for "lack of standards and guidance"—thereby curtailing Young Israel's injunctive relief and siding with the circuits holding that bans on religious speech are not inherently viewpoint discriminatory.

The question presented is:

Whether a public transit agency's ban on advertisements that "primarily promote a religious faith or religious organization" violates the First Amendment's prohibition on religious viewpoint discrimination.

CORPORATE DISCLOSURE STATEMENT

Young Israel of Tampa has no parent entities and does not issue stock.

RELATED PROCEEDINGS

The following proceedings are directly related to this case within the meaning of Rule 14.1(b)(iii):

- *Young Israel of Tampa* v. *Hillsborough Area Regional Transit Authority*, No. 22-11787, U.S. Court of Appeals for the Eleventh Circuit. Judgment entered January 10, 2024.
- *Young Israel of Tampa* v. *Hillsborough Area Regional Transit Authority*, No. 8:21-cv-294, U.S. District Court for the Middle District of Florida. Judgment entered April 27, 2022.

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INTRODUCTION

The Hillsborough Area Regional Transit Authority is a public transit agency that accepts a wide variety of ads on the outside of its buses, but prohibits ads that "primarily promote a religious faith or religious organization." Here, HART invoked that policy to reject an ad from an Orthodox Jewish synagogue, Young Israel of Tampa, for its annual "Chanukah on Ice" celebration featuring ice skating, kosher food, and a menorah lighting. Meanwhile, HART accepted a parallel ad for a secular "Winter Village" event featuring ice skating, seasonal eats, and holiday films. HART even offered to let Young Israel run its ad if it removed its religious essence—by eliminating "all references" to the "religious-based icon" of the menorah.

This is blatant viewpoint discrimination in violation of the First Amendment. As this Court has explained, religion is not just a "subject matter" but also "a standpoint from which a variety of subjects may be discussed"; thus, when a government forum excludes speech on otherwise permissible subjects because the speech is "religious"—as HART did here—the government "[i]s discriminating on the basis of viewpoint." *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 831-832 (1995); see also *Lamb's Chapel* v. *Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Good News Club* v. *Milford Cent. Sch.*, 533 U.S. 98 (2001); *Shurtleff* v. *City of Boston*, 596 U.S. 243 (2022).

Unfortunately, as the court below recognized, there is a "circuit split" over the application of *Rosenberger* to religious-speech bans like HART's, including in the specific context of advertising on public transit systems. App. 3a. Five circuits apply *Rosenberger* to mean

that banning speech simply because it is "religious" is necessarily viewpoint discrimination. In these circuits, there is no such thing as a "reasonable" ban on religious speech. Three circuits, by contrast—the Ninth, D.C., and now Eleventh—construe *Rosenberger* to allow governments to ban religious speech as a "subject-matter" if they have "objective and workable standards" for doing so. App. 3a. According to these circuits, it *is* possible to craft "reasonable" bans on religious speech.

In this case, the panel declined to hold that HART's religious-ad ban constituted viewpoint discrimination under *Rosenberger*. Instead, hoping to avoid the "circuit split" on "this question of first impression," the court held that HART's religious-ad ban was "unreasonable due to a lack of objective and workable standards." App. 3a. However, the court emphasized it was holding "only" that "*this particular* ban on religious advertising" was unlawful—not "that any future variation of the policy" banning religious ads "would necessarily be unconstitutional." App. 27a (cleaned up). Thus, it ordered the district court to "narrow" its injunction so that it "appl[ies] only to HART's current policy," App. 28a, and, in the words of HART's counsel, allows HART to "take another crack at an advertising policy that restricts [religious] advertisements," 14-2 C.A. App. 124.

Far from avoiding the split, this ruling exacerbates it—placing the Eleventh Circuit on the side of the Ninth and the D.C. Circuits in holding that bans on religious speech are not necessarily viewpoint discriminatory and allowing governments to experiment with "objective and workable standards" for banning religious speech. App. 3a.

The importance of this split has already been recognized by members of this Court. When the D.C. Circuit refused to invalidate another transit system's religious-ad ban as viewpoint discriminatory, Justices Gorsuch and Thomas noted that "this Court has already rejected no-religious-speech policies materially identical to [this one] on no fewer than three occasions," and that this Court's "intervention and a reversal would be warranted" but for one "complication": Justice Kavanaugh's recusal. *Archdiocese of Washington* v. *WMATA*, 140 S. Ct. 1198, 1199 (2020) (Gorsuch, J., statement respecting denial of certiorari). That complication is not present here.

Meanwhile, the need for this Court's review persists. Over two dozen transit systems, including many of the nation's largest, continue banning religious ads. Like HART, they group religious speech with "pornography," "nudity," and "obscen[ity]" as too "controversial" for public view. App. 4a, 93a-97a. Worse, the decision below doesn't just refuse to condemn such bans as viewpoint discriminatory; one judge, who cast an outcome-determinative vote, openly questioned whether *Rosenberger* is "accurate," offering his criticism of *Rosenberger* as the reason for declining to find viewpoint discrimination here. App. 37a (Newsom, J., concurring). That reasoning, left unchecked, invites other courts to disregard *Rosenberger*, too.

The Court should grant certiorari to resolve the growing split over *Rosenberger*, defend its precedents, and confirm that treating religious speech like pornography is naked viewpoint discrimination.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-47a) is reported at 89 F.4th 1337. The opinion of the district court granting summary judgment (App. 48a-81a) is reported at 582 F. Supp. 3d 1159. The opinion of the district court regarding the scope of injunctive relief (App. 82a-84a) is unreported but available at 2022 WL 1819250.

JURISDICTION

The court of appeals entered judgment on January 10, 2024. The petition for rehearing en banc was denied on March 5, 2024. This Court has jurisdiction under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides, in relevant part, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech." U.S. Const. amend. I.

STATEMENT OF THE CASE

1. HART is a government agency that provides public bus and streetcar transportation in Hillsborough County, Florida. App. 3a. To maximize revenue, it sells advertising space on its vehicles, bus shelters, and other property. App. 3a, 91a.

To ensure ads are "non-controversial," HART adopted a written advertising policy listing the types of ads that "are prohibited." App. 91a, 94a. These include ads containing "profane language, obscene materials," "nudity," or "pornography"; ads containing

"discriminatory materials and/or messages"; ads containing "an image or description of graphic violence"; ads promoting "tobacco" or "alcohol" (with some exceptions); "[p]artisan political advertisements"; ads promoting "illegal behavior" or "illegal goods or services"; ads that are "false," "misleading," or "deceptive"; and ads that are "libelous" or constitute "infringement of copyright." App. 94a-96a.

In the same list, HART also prohibits "[a]dvertisements that primarily promote a religious faith or religious organization." App. 95a; App. 3a-4a. According to HART, the point of this religious-ad prohibition is to avoid "alienating any riders, potential riders, employees, or advertisers," because religious ads could "be deemed either controversial" or "create a bad experience for [its] customers" if "they're upset about it." App. 4a. HART "concedes that it has no record of disruptions, vandalism, or threats of violence attributable to any advertisement." App. 4a.

In practice, HART accepts a diverse range of ads on various subjects from many speakers and viewpoints. See, *e.g.*, 12-2 C.A. App. 113 to 14-1 C.A. App. 35.[1] This includes ads promoting a wide variety of nonprofit organizations and events—such as music festivals, arts festivals, and a "Winter Village" event featuring "Ice skating," "Seasonal eats," and "Classic Holiday films." 12-1 C.A. App. 45-48. HART's agent testified it is "very rare" for an ad to be denied, and there have "only been a couple of instances" in "20 years" in which an ad has "come into question." 3-1 C.A. App. 15.

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[1] "C.A. App." refers to appellant's appendix filed with the Eleventh Circuit; preceding numerals refer to the relevant volume and part.

2. Young Israel of Tampa is an Orthodox Jewish synagogue that has served the Tampa area for over 30 years. One of its premier events is "Chanukah on Ice," its annual celebration of Chanukah at a local ice rink. App. 6a-7a. The event begins with ice skating, Jewish music, and kosher food. It centers on the lighting of a large ice menorah, after which Young Israel's rabbi recites blessings, attendees sing Jewish songs, and the rabbi speaks about the Chanukah miracle—in which a small jar of oil, enough to light the Temple menorah for only one day, instead lasted for eight days. The event typically draws at least 200 people and is part of the synagogue's efforts to foster Jewish identity and engage the broader community. App. 6a-7a.

In October 2020, Young Israel submitted to HART a proposed ad for Chanukah on Ice, which was to be held at an ice rink served by one of HART's bus lines. App. 7a. The proposed ad included the event details along with images of ice skates and a menorah, and noted that the event would include Jewish music, kosher food, and the "lighting of a sculpted Grand Ice Menorah." App. 7a. The ad is pictured below:

Young Israel wanted the ad to run in the lead-up to Chanukah. App. 7a-8a.

On the next business day, HART rejected the ad, explaining to Young Israel that "HART does not allow religious affiliation advertising, as well as banning adult, alcohol, tobacco, and political ads." 2-2 C.A. App. 7.

Young Israel then appealed to HART's CEO. After conferring with legal counsel, HART's CEO concluded that, based on "'what the menorah meant,' the advertisement primarily focused on a 'religious-based icon'" and therefore "violated HART's prohibition on religious advertisements." App. 8a.

HART then emailed Young Israel "suggested edits" to the ad, which "consisted of removing the image of the menorah and all uses of the word 'menorah.'" App. 8a. Young Israel's rabbi, Uriel Rivkin, replied that HART's proposed changes were both "offensive and not possible to make" because "the lighting of the menorah is a central aspect of the Orthodox Jewish celebration of Chanukah." App. 8a. He requested that HART approve the ad as originally designed. HART declined. App. 8a.

3. Young Israel filed suit in February 2021, alleging that HART's religious-ad ban violated the First Amendment's Free Speech and Free Exercise Clauses. After discovery, the district court granted summary judgment to Young Israel on two free-speech grounds.

First, the court held that the religious-ad ban was unlawful viewpoint discrimination under "a trilogy of cases from the Supreme Court addressing viewpoint discrimination with respect to religion." App. 10a (citing *Rosenberger*, *Lamb's Chapel*, and *Good News Club*). Specifically, HART "allowed advertisements for a secular holiday event with ice skating and seasonal

food," but rejected an ad for "an ice-skating event with seasonal food that was in celebration of Chanukah." App. 69a-70a. And the viewpoint discrimination was "even more clear[] in this case," because HART "would have allowed an advertisement of the *exact same event* if presented with secular symbols or emphasizing a secular viewpoint," but not "if presented with religious symbols or emphasizing a religious viewpoint." App. 70a.

Second, the district court held that HART's religious-ad ban was not "reasonable in light of the purposes of the forum" under *Minnesota Voters Alliance* v. *Mansky*, 585 U.S. 1 (2018), because HART failed to adopt "objective, workable standards" for enforcing its policy, and HART's enforcement was "inconsistent and haphazard," App. 75a-76a, 79a.

After issuing its opinion, the district court ordered supplemental briefing on the scope of injunctive relief. HART argued the injunction should be limited to its current advertising policy—which the court had deemed unreasonable due to a lack of objective standards—leaving HART free, in its own counsel's words, to "take another crack at an advertising policy that restricts [religious] advertisements." 14-2 C.A. App. 124. The district court rejected that argument, reasoning that any rejection of a religious ad because it is religious would constitute viewpoint discrimination, and an injunction must "eliminate the discriminatory effects of the past as well as bar like discrimination in the future." App. 83a (quoting *United States* v. *Para-*

dise, 480 U.S. 149, 183 (1987)). The court thus enjoined HART—under either its current or future policies—"from rejecting any advertisement on the ground that the advertisement primarily promotes a religious faith or religious organization." App. 87a.

4. The Eleventh Circuit purported to "affirm" on what it called a "more narrow" ground. App. 28a. The panel identified no error either in the district court's opinion or in the way it "crafted the permanent injunction." App. 27a. But seeking to avoid what it called "a small circuit split" on the viewpoint-discrimination question, the panel nonetheless "declined to answer" whether HART's religious-ad ban constituted "viewpoint discrimination." App. 3a (cleaned up). Instead, the panel held that HART's policy was "unreasonable due to a lack of objective and workable standards," because it "fails to define key terms, lacks any official guidance, and vests too much discretion in" enforcement officials. App. 3a, 19a.

The court stressed that it was holding "only" that "*this particular* ban on religious advertising" was unlawful—not "that any future variation of the policy" banning religious ads "would necessarily be unconstitutional." App. 27a (cleaned up). This "narrow ruling," the court said, "change[d] the calculus for the breadth of the injunction." App. 27a. The court therefore remanded the case with instructions to reduce Young Israel's relief, stating that "the permanent injunction needs to be revised to apply only to HART's current policy." App. 28a-29a.

Judges Newsom and Grimberg filed separate concurrences.

Judge Newsom acknowledged that the district court "correctly read *Rosenberger*, and the 'trilogy' more generally." App. 35a. He also agreed that "HART's policy is self-evidently—in fact, bunglingly—viewpoint discriminatory." App. 30a. Nevertheless, he declined to affirm the district court's viewpoint-discrimination ruling because he was "just not sure" *Rosenberger*'s viewpoint-discrimination analysis was "accurate," given "that the terms 'religion' and 'religious'" are "hazy at best," and thus "precarious foundations on which to build free-speech doctrine." App. 37a-40a. He therefore joined Judge Jordan's majority opinion holding HART's policy "unreasonable" and ordering the district court to revise its injunction.

Judge Grimberg also concurred, but said the court should not have "evaded a ruling on the viewpoint-versus-subject-matter dispute that is at the heart of this case." App. 41a. Notwithstanding Judge Newsom's "broader concerns" about *Rosenberger*, he explained, the court "must work with and within current Free Speech doctrine"—and "the trilogy answers the viewpoint/subject matter dispute here loudly and clearly." App. 46a (citing *Rosenberger*, *Lamb's Chapel*, and *Good News Club*). "So much so" that he would have found viewpoint discrimination "as the district court did." App. 46a. "Otherwise, and as it currently stands, HART can continue drafting viewpoint discriminatory policies" while "evading review of the ultimate constitutional flaw." App. 46a-47a.

The court denied Young Israel's petition for rehearing en banc. App. 89a-90a.

REASONS FOR GRANTING THE PETITION

This Court has three times considered and three times invalidated attempts to banish religious speech from a government-operated forum. In each case—*Rosenberger*, *Lamb's Chapel*, and *Good News Club*—a religious group challenged a policy that opened a government forum to a variety of speech, but excluded all speech from a religious perspective. In each case, the Court explained that religion is not just a topic but a viewpoint; thus, "discriminating against religious speech [i]s discriminating on the basis of viewpoint"—and violates the First Amendment. *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 832 (1995).

Despite this unbroken line of precedent, there is an acknowledged circuit split over the application of *Rosenberger* to restrictions on religious speech in government fora generally and on public transit systems specifically. Five circuits take *Rosenberger* at face value, concluding that banning speech because it is "religious" constitutes viewpoint discrimination—without the need to conduct forum analysis or inquire into the "reasonableness" of the speech restriction. In these circuits, there is no such thing as "reasonable" religious viewpoint discrimination. By contrast, three circuits—the Ninth and D.C. Circuits, now joined by the Eleventh—have refused to take *Rosenberger* at face value and have concluded instead that governments can ban the entire "subject-matter" of religion if they have "objective and workable

standards" for doing so. App. 3a. This split has produced conflicting results on indistinguishable facts—with the D.C. Circuit and the court below refusing to hold that a transit system's religious-ad ban was viewpoint discriminatory, while the Third Circuit invalidated the same kind of ban as viewpoint discriminatory, stating that "we respectfully disagree with our sister court." *Northeastern Pa. Freethought Soc'y* v. *County of Lackawanna Transit Sys.*, 938 F.3d 424, 435 (3d Cir. 2019).

Nor is there any question which side of the split is correct. Under *Rosenberger*, *Lamb's Chapel*, and *Good News Club*, this should have been an easy case. HART concedes that it accepted an ad for a holiday ice-skating event promoted from a secular perspective, but rejected Young Israel's ad for Chanukah on Ice solely because it "primarily promote[d] a religious faith or religious organization." App. 69a-70a. HART even offered to let Young Israel run its ad if it was stripped of "the image of the menorah and all uses of the word 'menorah'"—the central religious symbol of Chanukah. App. 8a. This policy is blatantly discriminatory and indistinguishable from policies this Court has repeatedly invalidated: It forbids speech on otherwise-permissible topics if that speech reflects a religious perspective.

That circuits continue getting this issue wrong, however, only underscores the importance of the split. Here, for example, by refusing to follow *Rosenberger*, the court below not only deprived Young Israel of protection from viewpoint discrimination, it explicitly gave HART a do-over after three years of litigation—inviting HART to experiment with a "future variation of the policy" banning religious ads. App. 27a. And

HART is not alone: over two dozen transit authorities serving tens of millions of Americans have religious-ad bans comparable to HART's. These and other government fora regularly discriminate against religious speech under the guise of banning the entire "subject-matter" of religion. App. 3a. The decision below—with an opinion openly questioning whether *Rosenberger* is "accurate"—only encourages more jurisdictions to do the same.

It is a "sad day" for the First Amendment when the government "casts piety in with pornography" and bans religious speech as too offensive for public view. *Capitol Square Rev. & Advisory Bd.* v. *Pinette*, 515 U.S. 753, 767 (1995) (plurality opinion). The problem with that result is not that governments have failed to devise sufficiently "objective and workable standards" for banning religious speech. App. 3a. It is that governments have forgotten that religious speech is doubly protected by the Free Speech and Free Exercise Clauses. Thus, the right answer here is the simple one: When the government seeks a "legitimate reason for excluding [private] speech from its forum," "'because it's religious' will not do." *Good News Club* v. *Milford Cent. Sch.*, 533 U.S. 98, 122 (2001) (Scalia, J., concurring). The Court should grant certiorari to resolve the split over *Rosenberger* and uphold core First Amendment rights.

I. The decision below exacerbates an acknowledged circuit split over religious viewpoint discrimination.

It is well established that "the government violates the First Amendment" if it opens a forum for speech but "denies access to a speaker" because of "the point

of view he espouses on an otherwise includible subject." *Cornelius* v. *NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985). The Court has applied this viewpoint-discrimination rule in a series of cases involving the exclusion of religious speech from a government forum—*Rosenberger*, *Lamb's Chapel*, and *Good News Club*. Each time, the Court rejected efforts to treat religion as a subject matter that could be excluded from the forum, and instead reasoned that religion is also a "perspective" or "standpoint" from which many subjects can be discussed; thus, "discriminating against religious speech [is] discriminating on the basis of viewpoint." *Rosenberger*, 515 U.S. at 831-832.

The panel's refusal to follow *Rosenberger* here exacerbates an acknowledged circuit split over the application of *Rosenberger* to government fora generally and to public transit systems in particular. Five circuits—the Second, Third, Seventh, Eighth, and Tenth—apply *Rosenberger* to hold that banning religious speech on otherwise permissible subjects is necessarily viewpoint discrimination. Three circuits—the Ninth, D.C., and now the Eleventh—construe *Rosenberger* to allow governments to exclude religion as "a permissible content (i.e., subject-matter) regulation" if the government has "objective and workable standards" for doing so. App. 3a. The split is square, acknowledged, and has produced conflicting results in indistinguishable cases.

1. Start with *Freethought*, which involved another religious-ad ban like HART's. 938 F.3d 424 (3d Cir. 2019). There, a public transit system allowed a wide range of ads but prohibited ads it thought would be

controversial—including ads that "promote the existence or non-existence of a supreme deity," "promote, criticize or attack * * * religious beliefs or lack of religious beliefs," or "are otherwise religious in nature." *Id.* at 430. Based on this policy, the transit system rejected an ad from an atheist group that stated "Atheists" and included the group's web address. *Id.* at 429.

Invoking the "trilogy" of "*Rosenberger*, *Lamb's Chapel*, and *Good News Club*," the Third Circuit invalidated the religious-ad ban as viewpoint discriminatory. *Freethought*, 938 F.3d at 432, 434-435. As the court explained in an opinion by Judge Hardiman, the ban prohibited the atheist group from communicating on "a subject to which the forum is otherwise open"—namely, messages of "organizational existence, identity, and outreach"—simply because of its "religious (or atheistic) viewpoint." *Id.* at 435. That was viewpoint discrimination. And the court rejected the argument that the government had the "prerogative to exclude religion as a subject matter," reasoning that "[r]eligion is not only a subject" but also "a worldview through which believers see countless issues." *Id.* at 436-437. Thus, it is "difficult, if not impossible, to exclude religion 'as a subject matter' in a forum open to topics susceptible to a religious perspective." *Id.* at 436.

Freethought relied on the Second Circuit's similar ruling in *Byrne* v. *Rutledge*, 623 F.3d 46 (2d Cir. 2010). There, Vermont allowed motorists, for a fee, to select a "vanity license plate" with various combinations of up to seven letters or numbers. *Id.* at 49. But "controversial" messages were prohibited, including those that "refer, in any language," to "religion" or a "deity." *Id.* at 50 & n.1. The Second Circuit, in an opinion by

Judge Livingston, held this was "facially impermissible viewpoint discrimination" under *Rosenberger*, *Lamb's Chapel*, and *Good News Club*. *Id.* at 59. As the court explained, "the Supreme Court's guidance has been both extensive and clear": a "ban on all religious messages in a forum [a government] has otherwise broadly opened to comment on a wide variety of subjects * * * serves not to restrict content but instead to discriminate against 'a [viewpoint],' and, as such, is impermissible." *Ibid.*

The Seventh Circuit agrees. In *Grossbaum* v. *Indianapolis-Marion County Building Authority*, 63 F.3d 581, 590 (7th Cir. 1995), the government adopted a policy allowing private groups to erect seasonal displays in the City-County Building but prohibiting displays that were religious—and on that basis rejected an Orthodox Jewish group's request to display a Chanukah menorah. The Seventh Circuit invalidated the policy as viewpoint discriminatory, noting that "[a]ny lingering doubts about whether the religious displays prohibited by the Policy are properly characterized as 'viewpoint' rather than 'subject matter' have been dispelled by" *Rosenberger*. *Id.* at 590; see also *Hedges* v. *Wauconda Cmty. Unit Sch. Dist. No. 118*, 9 F.3d 1295, 1297 (7th Cir. 1993) ("no arm of government may discriminate against religious speech when speech on other subjects is permitted in the same place at the same time").

The Eighth and Tenth Circuits also concur. In *Good News/Good Sports Club* v. *School District of City of Ladue*, 28 F.3d 1501, 1506 (8th Cir. 1994), the court invalidated a school district's policy of allowing the Boy Scouts to use its facilities for "speech relating to

moral character and youth development," but prohibiting a religious club from addressing similar topics. Citing *Lamb's Chapel*, the court held that this was "viewpoint discrimination because it denies the Club access based on the Club's religious perspective on otherwise includible subject matter." *Id.* at 1507. Similarly, the Tenth Circuit has recognized that "problems arise when the government allows *some* private speech on [its] property" but excludes religion. *Summum* v. *Callaghan*, 130 F.3d 906, 918 (10th Cir. 1997). "If, for example, the government permits secular displays on a nonpublic forum, it cannot ban displays discussing otherwise permissible topics from a religious perspective." *Ibid.*; see also *American Freedom Def. Initiative* v. *Suburban Mobility Auth. for Reg'l Transport*, 978 F.3d 481, 499 (6th Cir. 2020) ("viewpoint discrimination exists even when the government does not target a narrow view on a narrow subject and instead enacts a more general restriction—such as a ban on all 'religious' speech") (citing *Lamb's Chapel*).

There is no material difference between the policies held to be viewpoint discriminatory in these cases and HART's policy, which the court below declined to hold viewpoint discriminatory here. In each of these cases, the government created a forum broad enough to encompass speech on a variety of topics, yet excluded any speech that was religious. And in each of these cases, the court rightly held that excluding religious speech on a subject otherwise permitted in the forum was viewpoint discrimination. The decision below cannot be squared with these cases.

2. Unfortunately, the decision below is not alone. The Ninth and D.C. Circuits, like the court below,

have declined to take *Rosenberger* at its word and instead maintain that a prohibition on religious speech can be "a permissible content (i.e., subject-matter) regulation" if the government has reasonable grounds for imposing it. App. 3a.

The Ninth Circuit took the first misstep in *DiLoreto* v. *Downey Unified School District Board of Education*, 196 F.3d 958 (9th Cir. 1999). There, a public school accepted a variety of paid advertisements on its baseball field fence, but, to avoid "disruption" and "controversy," banned ads on "religion"—including an ad listing the Ten Commandments. *Id.* at 963. The Ninth Circuit upheld the ban. It construed *Rosenberger* narrowly, rejecting the "view that excluding religion as a subject or category from a forum always constitutes viewpoint discrimination." *Id.* at 969. Instead, it held that excluding religion was a "reasonable" "content-based limitation on the forum" "given the District's concerns regarding disruption and controversy." *Ibid.*

The D.C. Circuit expressly followed *DiLoreto* in *WMATA*. There, the public transit authority accepted a wide variety of ads on its buses, but prohibited ads that "promote or oppose any religion, religious practice or belief." *Archdiocese of Washington* v. *WMATA*, 897 F.3d 314, 318-320 (D.C. Cir. 2018). Citing this prohibition, WMATA rejected an ad submitted by the Archdiocese of Washington during Advent, which depicted shepherds, a star, and the words "Find the Perfect Gift." *Id.* at 319-320. Although WMATA accepted secular holiday ads, the D.C. Circuit upheld the religious-ad ban, reasoning that it "does not function to exclude religious viewpoints but rather proscribes advertisements on the entire subject matter of religion." *Id.* at 325. It construed *Rosenberger*, *Lamb's Chapel*, and

Good News Club narrowly as turning on "the breadth of the forums involved." *Id.* at 327. "This view," the court said, "accords with that of the Ninth Circuit" in *DiLoreto*. *Id.* at 328. And any other view would "undermine the forum doctrine" and eliminate "the government's prerogative to exclude religion as a subject matter in any non-public forum." *Id.* at 325.

Judge Griffith, joined by Judge Katsas, dissented from denial of rehearing en banc, noting that "WMATA's policy discriminates against religious viewpoints no less than the restrictions in *Rosenberger*, *Lamb's Chapel*, and *Good News Club*." *Archdiocese of Washington* v. *WMATA*, 910 F.3d 1248, 1252 (D.C. Cir. 2018).

Justices Gorsuch and Thomas issued a statement respecting the denial of certiorari, noting that "this Court has already rejected no-religious-speech policies materially identical to WMATA's on no fewer than three occasions." *Archdiocese of Washington* v. *WMATA*, 140 S. Ct. 1198, 1199 (2020). They said "our intervention and a reversal would be warranted" but for one "complication": Justice Kavanaugh was recused after participating in the oral argument at the D.C. Circuit. *Ibid.*

3. This split is square, acknowledged, and outcome-determinative here. The Third Circuit in *Freethought*—which struck down a transit system's religious-ad ban as viewpoint discriminatory—expressly disagreed with the D.C. Circuit's contrary decision in *WMATA*: "We recognize that this holding diverges from a recent decision of the United States Court of Appeals for the D.C. Circuit, [*WMATA*]. * * * But we respectfully disagree with our sister court." 938 F.3d

at 435. For good measure, the court added: "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, see *WMATA*, 897 F.3d at 329, we disagree with that too." *Id.* at 437.

The panel here likewise acknowledged the "circuit split"—citing "the different approaches taken by the D.C. [Circuit]" in *WMATA* and "the Third Circuit" in *Freethought*. App. 3a, 16a. It mistakenly dubbed the split "small" only by confining its discussion to the three most recent transit cases, while ignoring how circuits have applied (or not applied) *Rosenberger* to other government fora.[2]

The split also changed the outcome here. Under the Third Circuit's approach, the resolution of this case is straightforward. As in *Freethought*, the religious-ad ban prohibits Young Israel from communicating on "a subject to which the forum is otherwise open"—namely, messages of "organizational existence, identity, and outreach"—solely because of its religious viewpoint. 938 F.3d at 435. If anything, the viewpoint discrimination is "even more clear[] in this case," because HART offered to let Young Israel advertise "the *exact same event*" if it did so using "secular symbols" (by deleting all references to the menorah) but not if it

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[2] The panel also counted the Fourth Circuit with the D.C. Circuit on the question whether to "consider the type of forum at issue before addressing the nature of the restriction." App. 15a-16a (citing *White Coat Waste Project* v. *Greater Richmond Transit Co.*, 35 F.4th 179 (4th Cir. 2022)). But while courts are divided on that issue, too, the core of the split here is over whether bans on *religious* speech necessarily constitute viewpoint discrimination regardless of forum type. Because *White Coat* involved a ban on "political" ads, it doesn't address that issue. 35 F.4th at 187.

did so using "religious symbols or emphasizing a religious viewpoint." App. 70a.

Nevertheless, the Eleventh Circuit declined to find viewpoint discrimination here. Citing the "circuit split" over "viewpoint discrimination," the panel instead held "that HART's policy, even if viewpoint neutral, is unreasonable due to a lack of objective and workable standards." App. 3a; see also App. 16a-23a. This holding, as the panel acknowledged, fundamentally "change[d] the calculus for the breadth of the injunction." App. 27a. In holding that "the policy is unreasonable," the panel held only that "*this particular* ban" is unlawful "due to a lack of objective and workable standards." App. 3a, 27a. Thus, on the panel's view, a "future variation of the policy" banning religious ads could still "be lawful" depending on "how words and terms might be defined and what guidance might be provided." App. 27a. It therefore directed the district court to "limit the scope of its permanent injunction," App. 29a, so that HART can "take another crack at an advertising policy that restricts [religious] advertisements," 14-2 C.A. App. 124.

That result would be impossible under *Freethought* or the decisions of the Second, Seventh, Eighth, and Tenth Circuits. In those circuits, banning religious speech on otherwise permissible subjects is necessarily viewpoint discrimination. It doesn't matter how religion "might be defined" or "what guidance" a future policy might provide (App. 27a); in those circuits, HART simply could not ban ads because they "primarily promot[e] a religious faith or religious organization." App. 3a. The panel here, by contrast, refused to find viewpoint discrimination, and thereby took away a critical component of Young Israel's injunctive relief.

This leaves HART free to "continue drafting viewpoint discriminatory policies"—just as it would be in the Ninth and D.C. Circuits. App. 46a (Grimberg, J., concurring).

II. The decision below conflicts with this Court's cases on religious viewpoint discrimination.

The decision below likewise conflicts with this Court's cases. Every time this Court has addressed a ban on religious speech in a government forum, it has found it to be viewpoint discriminatory—without any need to analyze the forum type or the ban's "reasonableness." In this case, the panel did the opposite.

1. The first example is *Lamb's Chapel*. There, a school district allowed after-hours use of its facilities for "social, civic, or recreational" purposes, but not "religious purposes." 508 U.S. 384, 387 (1993). On that basis, it denied a church's request to show a film series on family values. *Id.* at 394. The government claimed its ban was "a permissible subject-matter exclusion rather than a denial based on viewpoint." *Id.* at 396. But this Court disagreed. Because a film series about family values was "a subject otherwise permissible" in the forum, the government could not reject a film "dealing with the subject matter from a religious standpoint." *Id.* at 393-394. This was unlawful viewpoint discrimination. *Id.* at 391-393. And given this viewpoint-discrimination holding, the Court said it "need not rule" on what kind of speech forum was at issue and "need not pursue" whether the restriction was reasonable. *Id.* at 391-392, 393 n.6.

Next came *Rosenberger*. There, a state university subsidized the costs of some student publications while excluding those that "primarily promote[d] or

manifest[ed] a particular belie[f] in or about a deity or an ultimate reality." 515 U.S. at 822-823 (1995). The government claimed this limitation sounded in "content, not viewpoint." *Id.* at 830; see also *id.* at 896 (Souter, J., dissenting) (similar). But this Court again disagreed. "Religion," it explained, "may be a vast area of inquiry, but it also provides, as it did here, a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered." *Id.* at 831. Thus, "discriminating against religious speech was discriminating on the basis of viewpoint." *Id.* at 832. Again, the Court did not address reasonableness, and no forum analysis was necessary, because viewpoint discrimination is "presumed to be unconstitutional" even in a "limited forum." See *id.* at 829-831.

Third was *Good News Club*. There, a government permitted after-hours use of public-school facilities for various purposes, but it prohibited use "by any individual or organization for religious purposes"—including by a Christian club that wanted to teach Bible lessons. 533 U.S. at 102-103 (2001). The lower courts upheld this restriction as a permissible limit on "subject matter," not viewpoint. *Id.* at 111. But this Court disagreed, reasoning that speech that is "'quintessentially religious' or 'decidedly religious in nature'" may still constitute a distinct "viewpoint from which ideas are conveyed." *Id.* at 111, 112 n.4. And because the group sought to "address a subject otherwise permitted under the rule"—"the teaching of morals and character"—excluding that speech because it was religious was "viewpoint discriminatory." *Id.* at 107-109. Yet again, the Court noted that, "[b]ecause the restriction is viewpoint discriminatory, we need not decide whether it is unreasonable in light of the purposes

served by the forum" nor "resolve the [forum] issue." *Id.* at 106-107.

Finally, the Court recently reaffirmed this "trilogy"—and made it a tetralogy—in *Shurtleff*. There, Boston allowed private groups to fly various flags in front of city hall but excluded a Christian flag because it "promoted a specific religion." 596 U.S. 243, 258 (2022) (cleaned up). Once the Court determined the flags were private (not government) speech, the resolution was simple. Citing *Rosenberger* and *Good News Club*, the Court unanimously held that Boston's policy "discriminated based on religious viewpoint and violated the Free Speech Clause." *Id.* at 258-259. There was no forum or reasonableness analysis. Instead, in *Shurtleff* as in prior cases, "[t]he Court's finding of viewpoint bias ended the matter." *Iancu* v. *Brunetti*, 588 U.S. 388, 399 (2019).

2. Under *Rosenberger*, *Lamb's Chapel*, *Good News Club*, and *Shurtleff*, the resolution of this case is straightforward. As in those cases, Young Israel seeks to "address a subject otherwise permitted" in the forum—advertising a winter holiday event. *Good News Club*, 533 U.S. at 107-109. As in those cases, the government prohibits Young Israel's speech solely because it "primarily promote[s] a religious faith or religious organization." App. 2a. Indeed, HART's policy is nearly identical to the policy in *Rosenberger*. Compare App. 3a (excluding ads that "primarily promote a religious faith or religious organization") with *Rosenberger*, 515 U.S. at 825 (excluding speech that "primarily promotes or manifests a particular belie[f] in or about a deity or an ultimate reality"); see also *Shurtleff*, 596 U.S. at 258 (excluding flag that "promot[ed] a specific religion").

Nevertheless, the court below declined to find viewpoint discrimination, holding instead that HART's policy was "unreasonable" due to a lack of objective and workable standards. App. 3a. That approach cannot be reconciled with this Court's cases. In fact, it is the *opposite* of what this Court did in *Rosenberger*, *Lamb's Chapel*, *Good News Club*, and *Shurtleff*. In each case, this Court "*first* address[ed] whether the exclusion constituted viewpoint discrimination" and *then* declined to reach the question of reasonableness. *Good News Club*, 533 U.S. at 107 (emphasis added). As the Court said: "Because the restriction is viewpoint discriminatory, we need not decide whether it is unreasonable in light of the purposes served by the forum." *Ibid.*; see also *Lamb's Chapel*, 508 U.S. at 393 n.6 ("need not pursue" reasonableness after finding viewpoint discrimination); *Rosenberger*, 515 U.S. at 829-831 (no reasonableness analysis); *Shurtleff*, 596 U.S. at 258-259 (same). The court below, however, reversed the order of operations—first finding HART's policy unreasonable and then declining to reach the question of viewpoint discrimination.

As in grade-school math, reversing the order of operations yields the wrong result—here, an improper reduction of Young Israel's relief. When the district court rightly found viewpoint discrimination, it enjoined HART, under its current or future policies, "from rejecting any advertisement on the ground that [it] primarily promotes a religious faith or religious organization." App. 82a. This injunction was "tailored to fit the nature and extent of the established violation"—*i.e.*, viewpoint discrimination—and to "bar like discrimination in the future." App. 83a (quoting *Paradise*, 480 U.S. at 183). The panel didn't disagree with this analysis; indeed, it said that "we can see why the

district court crafted the permanent injunction the way that it did" given the finding of "viewpoint discrimination." App. 27a.

But when the panel held the policy unreasonable rather than viewpoint discriminatory, that "change[d] the calculus for the breadth of the injunction." App. 27a. And the panel ordered the district court to take away Young Israel's protection from viewpoint discrimination—in direct opposition to this Court's precedent.

III. The decision below has far-reaching consequences on issues of exceptional importance.

The decision below not only exacerbates a circuit split and conflicts with this Court's cases, but also has profound ramifications far beyond this case.

Justices Gorsuch and Thomas have already recognized the importance of this split, noting that this Court's "intervention and reversal would [have] be[en] warranted" in *WMATA* but for Justice Kavanaugh's recusal. 140 S. Ct. at 1199. Moreover, during the *WMATA* oral argument, then-Judge Kavanaugh identified WMATA's policy as "pure discrimination" of the sort "[n]o case" from this Court has ever sanctioned. Oral Argument at 1:01:01, *Archdiocese of Washington* v. *WMATA*, 897 F.3d 314 (2018) (No. 17-7171), https://perma.cc/DCR9-NUAJ.

With good reason. "At the heart of the First Amendment's Free Speech Clause is the recognition that viewpoint discrimination is uniquely harmful to a free and democratic society." *National Rifle Ass'n of Am.* v. *Vullo*, No. 22-842 (May 30, 2024), slip op. 8. And *religious* viewpoint discrimination is doubly odious to the

Constitution, because religious speech is "doubly protected by the Free Exercise and Free Speech Clauses." *Kennedy* v. *Bremerton Sch. Dist.*, 597 U.S. 507, 543 (2022). Yet the decision below positively invites HART to devise "objective and workable standards" for banning religious speech. App. 3a. As a result, after three-plus years of litigation, and despite the clear teachings of the *Rosenberger* tetralogy, HART remains free to "continue drafting viewpoint discriminatory policies" that exclude ads simply because they are "religious." App. 46a (Grimberg, J., concurring).

Nor are the consequences of the decision below limited to Young Israel and Chanukah on Ice. Governments regularly attempt to banish religious speech by classifying religion as a controversial subject matter rather than a protected viewpoint. In the transit context alone, over two dozen transit authorities serving tens of millions of Americans currently ban religious ads.[3] Some candidly prohibit expressing any "religious

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[3] See, *e.g.*:

- New Jersey, N.J. Admin. Code § 16:86-1.2;
- New York, NY (https://perma.cc/Q6VH-2FRF);
- Los Angeles, CA (https://bit.ly/3Kn2ULJ);
- Chicago, IL (https://perma.cc/DRY4-99GB);
- Santa Clara County, CA (https://perma.cc/7ZWY-LUV9);
- San Diego, CA (https://perma.cc/WF5X-ZPYF);
- San Francisco, CA (https://perma.cc/LZ6U-6Q9M);
- Seattle, WA (https://perma.cc/SUM5-CHF7);
- San Mateo County, CA (https://perma.cc/7YLG-7324);
- Denver, CO (https://perma.cc/35VK-D8WN);
- District of Columbia (https://perma.cc/3N4B-5FXA);

viewpoint" (Seattle) or even "indirectly refer[ring] to religion" (San Diego); others posit gauzy distinctions between religious "policy" and religious "existence" (New York); most, like HART, lump religious speech with "pornography," "nudity," and "obscen[ity]" as too controversial for public view. App. 94a-95a. Examples abound, but the point remains: sending the government on a snipe hunt for "reasonable" religion bans exposes the First Amendment to a "wondrous diversity of flaws." *Good News Club*, 533 U.S. at 127 (Scalia, J., concurring).

These policies stifle religious speech both overtly and subtly. HART, for example, not only overtly rejected Young Israel's ad but also admitted it gets "telephone calls from churches and other [religious] groups who desire to advertise" and "discourage[s]" them from doing so "based on a potential violation of the HART advertising policy." 12-1 C.A. App. 35. This sort of "soft censorship" suppresses religious speech just as insidiously as overt rejection, as most religious

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- Atlanta, GA (https://bit.ly/3KpuKXM);
- Raleigh, NC (https://perma.cc/LY8J-VFNR);
- Pittsburgh, PA (https://perma.cc/N7TA-SGJX);
- Reno, NV (https://perma.cc/YRT7-RPFT);
- Toledo, OH (https://perma.cc/G5R7-C9FE);
- Boise, ID (https://perma.cc/TT97-W9L4);
- Richmond, VA (https://perma.cc/SZ6T-XUDW);
- Grand Rapids, MI (https://perma.cc/EU4V-DB6L);
- Gainesville, FL (https://perma.cc/G3DR-DWM8);
- Champaign-Urbana, IL (https://perma.cc/ESB6-9846);
- Santa Fe, NM (https://bit.ly/3V6jvst);
- Longview, TX (https://perma.cc/7EWN-98HP);
- Bloomington, IN (https://perma.cc/B3XL-8APC);
- Greenville, SC (https://bit.ly/4bWqF9u);
- Charlottesville, VA (https://bit.ly/3x3gVex).

groups lack the wherewithal to challenge faceless bureaucratic stonewalling. And this censorship denudes the public square not just on public transit systems serving tens of millions of Americans but in every forum where governments concoct so-called "reasonable" bans on religious speech.

Beyond these practical consequences, the rationale for the decision below damages the law and respect for this Court's precedents. Judge Newsom, who cast a deciding vote, declined to apply *Rosenberger* on the ground that "I'm just not sure that it's accurate to characterize religion as 'a specific premise, a perspective, a standpoint.'" App. 37a (quoting *Rosenberger*, 515 U.S. at 831). Instead, in his view, "the terms 'religion' and 'religious'" are "hazy at best," impossible to separate "from philosophical and even political traditions," and "thus particularly precarious foundations on which to build free-speech doctrine." App. 40a (Newsom, J., concurring).

This is both wrong and improper. It is improper because, while "[l]ower court judges are certainly free to note their disagreement with a decision of this Court," they nonetheless "must follow it." *DIRECTV, Inc.* v. *Imburgia*, 577 U.S. 47, 53 (2015). "[U]nless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be." *Hutto* v. *Davis*, 454 U.S. 370, 375 (1982) (per curiam).

It is also wrong—and the reasoning behind it would undermine numerous areas of the law. If courts can't sufficiently distinguish the "religious" from the "philosophical" to apply settled free-speech precedent, App.

32a, then the same problem would plague the application of everything from the Religious Freedom Restoration Act, 42 U.S.C. 2000bb-1(a), to Title VII, 42 U.S.C. 2000e-1(a), 2000e-2(a)(1), to state and federal tax law, *e.g.*, 26 U.S.C. 501(c)(3), to the Free Exercise and Establishment Clauses themselves—all of which require courts to determine what counts as "religious."

Fortunately, far from hesitating to distinguish the "philosophical and personal" from the "religious," this Court has deemed that distinction essential to "the very concept of ordered liberty." *Wisconsin* v. *Yoder*, 406 U.S. 205, 215-216 (1972). And unsurprisingly so, since that distinction is rooted in the founding generation's "prevailing understandings" of "the difference between religious faith and other forms of human judgment." Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1488-1499 (1990). For the Founders, religious faith, unlike other forms of human judgment, involved obedience to a transcendent, spiritual authority whose demands take precedence over the claims of civil society. *Ibid.* That is why Madison denoted "religion" as "the duty which we owe to our Creator and the manner of discharging it." James Madison, *Memorial and Remonstrance Against Religious Assessments* (ca. June 20, 1785). And while Judge Newsom noted that some "faith or thought systems" typically counted as "religious" might not reference "God or a deity," App. 31a-32a, that "problem" is neither new nor especially vexing: the founding-era conception of "religion" as obedience to a transcendent extrapersonal authority can "be extended without distortion to transcendent extrapersonal authorities not envisioned in traditionally theistic terms." McConnell, 103 Harv. L. Rev. at 1493.

Simply put, it is "inescapable that the courts * * * must sometimes say what counts as 'religion' in our legal system and what does not." Michael W. McConnell et al., *What Is "Religion"?*, in *Religion and the Constitution* 761-762 (3d ed. 2011). Musings about the theoretical difficulty of doing so can't justify nullifying this Court's precedents. Indeed, there is a reason why "[t]here are probably 50 law review articles on the problem of defining religion for every case where the definition is a litigated issue." *Ibid.* It's because the definition of "religion" is clear enough in virtually every litigated case—including here, where no one doubts that speech promoting the millennia-old Jewish holiday of Chanukah qualifies.

The Court should grant certiorari to vindicate its religious-viewpoint-discrimination precedents, resolve the growing circuit split it was prevented from addressing in *WMATA*, and stop governments and lower-court judges from treating religious speech like a regulatory gratuity instead of a constitutional guarantee.

CONCLUSION

The Court should grant the petition.

Respectfully submitted.

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