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[PUBLISH]

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 22-11787

YOUNG ISRAEL OF TAMPA, INC.,

Plaintiff-Appellee,

versus

HILLSBOROUGH AREA REGIONAL TRANSIT AUTHORITY,

Defendant-Appellant,

ADELEE LE GRAND, et al.,

Defendants.

Appeal from the United States District Court
for the Middle District of Florida
D.C. Docket No. 8:21-cv-00294-VMC-CPT

Before JORDAN, NEWSOM, Circuit Judges, and GRIMBERG,* District Judge

JORDAN, Circuit Judge:

The Hillsborough Area Regional Transit Authority has a policy which prohibits placing, on its vehicles and property, advertisements that "primarily promote a religious faith or religious organization." Young Israel of Tampa, Inc., an Orthodox Jewish synagogue, sued HART in federal court, alleging that its rejection of a proposed Chanukah on Ice advertisement was unconstitutional.

The district court granted summary judgment in favor of Young Israel on two grounds. First, HART's policy violated the Free Speech Clause of the First Amendment because it discriminated on the basis of viewpoint. Second, even if HART's policy was viewpoint neutral, it was unreasonable because it lacked objective and workable standards and its application and enforcement were inconsistent and haphazard.

Based on these rulings, the district court permanently enjoined HART from rejecting any

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* The Honorable Steven D. Grimberg, United States District Judge for the Northern District of Georgia, sitting by designation.

advertisement on the ground that it primarily promotes a religious faith or religious organization. The injunction covered not only HART's current policy, but also any future policies.

In its appeal, HART asks us to overturn the district court's summary judgment order and hold that its policy prohibiting advertisements that primarily promote a religious faith or religious organization is a permissible content (i.e., subject-matter) regulation of a nonpublic forum, and does not constitute improper viewpoint discrimination. We decline to answer this question of first impression—which has generated a small circuit split—because we affirm the district court's alternative ruling that HART's policy, even if viewpoint neutral, is unreasonable due to a lack of objective and workable standards.

I

At summary judgment, we review the record in the light most favorable to HART, and draw all reasonable inferences in its favor. *See Carrizosa v. Chiquita Brands Int'l, Inc.*, 47 F.4th 1278, 1328 (11th Cir. 2022). Having said that, the relevant facts in this case are largely undisputed.

A

HART, a public transit agency, provides mass transportation in the City of Tampa and Hillsborough County. For a fee, it places advertisements on its vehicles and property. In 2013, HART adopted a policy prohibiting advertisements that "primarily promote a religious faith or religious organization." The policy

does not define the word "religious" or the term "primarily promote."[1]

HART refuses to accept primarily religious advertisements because of its "interests in ensuring safe and reliable transportation services and operating in a manner that maintains demand of its service to multi-cultural, multi-ethnic, and religiously diverse ridership, without alienating any riders, potential riders, employees, or advertisers." HART's policy is "intended to maintain a safe environment on its vehicles without unnecessary controversy, risks of violence, or risks of vandalism while maintaining employee morale." According to HART, religious advertisements could "be deemed either controversial" or "create a bad experience for [its] customers," particularly "if somebody didn't agree with [it] and . . . they're upset about it." HART, however, admits that it does not know "what would specifically upset customers on religious ads," and concedes that it has no record of disruptions, vandalism, or threats of violence attributable to any advertisement.[2]

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[1] The policy contains other content-based prohibitions, including bans on partisan political advertisements and advertisements containing profanity, discriminatory messages, or depicting violence. Those aspects of the policy are not at issue here.

[2] The record does reference at least one instance of some limited complaints in 2013 when HART was considering running advertisements from the Council on American-Islamic Relations Florida deemed the #MyJihad campaign and the CAIR-FL Diversity campaign. HART concedes that these limited complaints did not amount to disruptions, incidents of vandalism, or threats of violence.

Pursuant to its policy, HART has selected a contractor to conduct an initial review of proposed advertisements. The contractor is "responsible for the administration of the HART advertising program consistent with HART's adopted policies and guidelines." If a dispute remains unresolved after the contractor has determined that an advertisement is inconsistent with the advertising policy, then an "appeal may be made to the CEO or [COO] of HART or his/her designee for final resolution." The "[a]pplication of HART's advertising guidelines are fact specific and analysis of a permissible ad[vertisement], once brought to the CEO (or her designee), is done on a fact-specific basis, with assistance from counsel, when necessary."

Significantly, HART acknowledges that "there is no specific training or written guidance to interpret its . . . policy." Laurie Gage, an employee of HART's advertising contractor, testified that, outside of HART's written policy itself, there are no guidance documents, advisory opinions, or other materials available to help her implement or interpret the policy. Ms. Gage has never received any training on how to apply the policy, and she explained that if there was ever any question or concern about whether an advertisement was permissible under the policy, she would forward the issue to HART.

Tyler Rowland, HART's communication and creative services manager and corporate representative, is responsible for reviewing proposed advertisements. Like Ms. Gage, he testified that HART does not provide any guidance documents, advisory opinions, or other materials to help interpret or apply the policy. He also confirmed that HART does

not provide training on the policy. When determining whether an advertisement "primarily promot[es]" a religious faith or organization, he acts on a case-by-case basis, depending on the advertisement's "design and . . . messaging."

HART concedes that its policy allows "different people in the same roles [to] have different methodologies." Although HART says that it is "not part of [its] practice" to review organizational websites to determine if an advertisement is primarily religious, Ms. Gage testified that she might review a religious organization's website to determine if an advertisement is primarily religious depending on "[w]hat was going on with [her] day." She explained that the application of the policy varies based on her understanding of the symbolism in an advertisement as religious. For instance, an advertisement featuring an image of Jesus Christ would result in her asking the organization whether it wanted to "pursue" the matter further, because she knows that "Jesus Christ is associated with religion." But if she "didn't know that," "then [she] probably wouldn't have a conversation, and [she] would just submit [the matter] to HART."

B

For more than 14 years, Young Israel has hosted a Chanukah on Ice celebration, which it has historically promoted through advertising in Jewish media and on Facebook. Young Israel's Chanukah on Ice event begins with an hour of ice skating with Jewish music playing and Jewish food available. Then the rabbi lights a large ice menorah and offers blessings. Attendees sing Jewish songs and the rabbi speaks about the Chanukah miracle—oil in the holy temple,

which was meant to last only one day, lasted eight days. Chanukah on Ice is a "very big event" with "at least 200 people" typically in attendance. The event is part of the synagogue's outreach to the community and "offers a crucial opportunity to foster Jewish identity during a season many associate with Christmas."

In October of 2020, Young Israel sent HART a proposed advertisement for its Chanukah on Ice event at the Advent Health Center Ice Rink, which is near the synagogue on a HART bus line. The advertisement included—in addition to time, place, and contact information—images of a menorah, a dreidel, and skaters, and stated that the event would "featur[e] lighting of a sculpted Grand Ice Menorah and ice skating to Jewish music around the flaming menorah." For the reader's benefit, we reproduce the advertisement here.

Young Israel wanted the advertisement to run in the HART transit system from late November through December.

Ms. Gage rejected Young Israel's advertisement because "HART does not allow religious affiliation advertising[.]" Young Israel appealed, and HART's CEO, communications manager, and legal counsel met to discuss the rejection of the Chanukah on Ice advertisement. They collectively concluded that, "[b]ased off . . . legal counsel's knowledge of what the menorah meant," the advertisement primarily focused on a "religious-based icon." As a result, Young Israel's advertisement violated HART's prohibition on religious advertisements.

Mr. Rowland then sent an email to Young Israel with "suggested edits." Those edits consisted of removing the image of the menorah and all uses of the word "menorah."[3]

Young Israel 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." Young Israel requested that HART approve its "ad[vertisement] as originally designed." But the following day, HART formally refused to run the Chanukah on Ice advertisement. HART said that its decision was "consistent with prior determinations involving similar advertisement requests under th[e] policy."

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[3] Mr. Rowland testified that if HART had known more about Judaism, it would have proposed eliminating the dreidel as well.

C

Young Israel responded to HART's rejection of its advertisement with a federal lawsuit. Its complaint asserted claims for violations of the Free Speech and Free Exercise Clauses of the First Amendment, as well as claims for violations of the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Following discovery, both parties moved for summary judgment.

Young Israel argued that it was entitled to summary judgment because HART's policy violated the First Amendment's Free Speech Clause in several ways. First, it discriminated on the basis of viewpoint. Second, even if it was viewpoint-neutral, the policy constituted an unreasonable content-based restriction. Third, it was standardless and arbitrary. Young Israel also asserted that HART's policy violated the First Amendment's Free Exercise clause because it singled out religion for disfavored treatment.

HART, on the other hand, maintained that summary judgment should be granted in its favor on all of Young Israel's claims. With respect to the claims based on the Free Speech Clause, HART made several arguments. First, its property and vehicles were nonpublic forums where speech could be reasonably restricted. Second, its policy was a reasonable content-based restriction. Third, its policy had not been arbitrarily or inconsistently applied.

The district court granted summary judgment in favor of Young Israel. It held that HART's advertising policy violated the Free Speech Clause of the First Amendment, and found it unnecessary to address Young Israel's other claims. *See Young Israel of*

Tampa, Inc. v. Hillsborough Area Regional Transit Auth., 582 F. Supp. 3d 1159 (M.D. Fla. 2022).

In the district court's view, the policy discriminated on the basis of viewpoint because HART allowed advertisements for a secular holiday event with ice skating and seasonal food, but disallowed an ice skating event with seasonal food that was in celebration of Chanukah. HART's prohibition on advertisements that "primarily promote a religious faith or organization" targeted the "specific motivating ideology or the opinion or perspective of the speaker" because HART "expressly suggested edits to [Young Israel's] ad[vertisement] that removed all references to and images of the menorah, which both parties agree[d] is considered a Jewish religious symbol." *Id.* at 1171. Those proposed edits suggested to the district court that HART "impliedly would have allowed an advertisement of the *exact same event* if presented with secular symbols or emphasizing a secular viewpoint, but it was not allowed if presented with religious symbols or emphasizing a religious viewpoint." *Id.* (emphasis in original).

In reaching its conclusion that HART's advertising policy discriminated on the basis of viewpoint, the district court relied on a trilogy of cases from the Supreme Court addressing viewpoint discrimination with respect to religion. *See id.* at 1170-71 (citing *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 386-90 (1993); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995); and *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 105-06 (2001)). The district court also discussed the conflicting opinions of the D.C. and Third Circuits applying the trilogy of Supreme Court cases in the

context of restrictions on religious advertisements in public transit. *See* 582 F. Supp. 3d at 1170-72.[4]

The district court acknowledged that the parties disagreed about whether it had to make a threshold forum analysis determination for the advertising space on HART's vehicles and property. But it was persuaded by the Third Circuit's analysis that "'no matter what kind of property is at issue, viewpoint discrimination is out of bounds.'" *Id.* at 1168 (quoting *Freethought*, 938 F.3d at 432). The district court also concluded that the Third Circuit's approach "better conforms to the prevailing Supreme Court caselaw on the issue of religious viewpoint discrimination." *Id.* at 1170. The district court explained that Young Israel's Chanukah on Ice event was "a means of outreach to the community and an expression of Jewish identity." *Id.* at 1171. According to the district court, although HART "disallowed this statement of organizational existence, identity, and outreach," it "allowed outreach messages from Alcoholics Anonymous ("Is Alcohol a Problem? Call Alcoholics Anonymous."), the Ronald McDonald House Charities ("Joy Is One of the Best Gifts You Can Give."), and Florida Healthy Transitions ("We're here to help. You are not alone.")."

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[4] *Compare Archdiocese of Wash. v. Wash. Metro. Area Transit Auth.*, 897 F.3d 314, 321–29 (D.C. Cir. 2018) (upholding a public transit authority policy banning issue-oriented advertisements—including political, religious, and advocacy advertisements—against a challenge by a Catholic archdiocese because the policy regulated content, not viewpoint), *with Ne. Pa. Freethought Soc'y v. Cty. of Lackawanna Transit Sys.*, 938 F.3d 424, 432–37 (3d Cir. 2019) (reversing a judgment in favor of a public transit system that had enacted a policy prohibiting religious messages because it constituted viewpoint discrimination in violation of the First Amendment).

Id. Thus, the district court concluded that HART's advertising policy, both on its face and as applied, violated Young Israel's right to free speech under the First Amendment. *See id*. at 1172.

Applying *Minnesota Voters Alliance v. Mansky*, 138 S. Ct. 1876 (2018), the district court alternatively held that even if HART's advertising policy was "viewpoint neutral," it was unreasonable because it lacked workable norms. *See* 582 F. Supp. 3d at 1173. Assuming that the prohibition on certain types of religious advertisements served permissible ends, HART's policy lacked objective, workable standards. For example, the word "religious" was "unadorned and unexplained" in the policy and is a word that has a "range of meanings and can be interpreted differently by different people." *Id*. The district court noted HART's admission that, other than the policy itself, "there [wa]s no additional written guidance or training . . . on how to interpret" the policy. *See id*. The district court also observed that HART conceded that "different people in the same roles [could] have different methodologies for reviewing submitted advertisements' compliance" with the policy. *See id*. at 1174 (internal quotation marks omitted) (alteration in the original). In the district court's view, the summary judgment record established that HART's application and enforcement of its policy violated the First Amendment because it was "inconsistent and haphazard." *Id*. at 1175.

D

After entry of the summary judgment order, the parties submitted a proposed declaratory judgment and permanent injunction as required by the district court. *See* D.E. 74. Young Israel and HART agreed on

the proposed language of the permanent injunction except with respect to the breadth of the injunction. The injunction language submitted by the parties, with Young Israel's requested additional language in bold, was as follows:

> The Court therefore GRANTS Young Israel's request for a permanent injunction. HART, its agents and employees, and all those acting in concert with any of them, are ENJOINED, on a permanent basis, from rejecting any advertisement on the ground that the advertisement primarily promotes a religious faith or religious organization **or employs religious language, imagery, or symbols, whether** under Section 4(e) of its Advertising Policy effective as of December 2, 2013, **or otherwise.**

Id. at 7-8 (emphasis added). Essentially, Young Israel requested the additional language because it did not want the injunction limited to HART's current policy. HART, on the other hand, wanted the injunction to apply only to the current policy.

After supplemental briefing and oral argument, the district court resolved the dispute in Young Israel's favor. The district court enjoined HART "from rejecting any advertisement on the ground that the advertisement primarily promotes a religious faith or religious organization, whether under Section 4(e) of its Advertising Policy effective as of December 2, 2013, *or in any future advertising policy that HART might adopt and implement*." D.E. 86 at 1-2 (emphasis added). According to the district court, its chosen language was "tailored to fit the violation because it pertains directly to the language of the Advertising

Policy, which was the focus of [its] . . . summary judgment order" and it "takes into account the possibility of future HART advertising policies." *Id*. at 2.

After the district court entered its final judgment and permanent injunction, HART appealed. We set the case for oral argument.

II

The district court's grant of summary judgment in favor of Young Israel is subject to *de novo* review. *See Williams v. Radford*, 64 F.4th 1185, 1188 (11th Cir. 2023). The same plenary standard applies to the constitutionality of HART's policy. *See Benning v. Comm'r, Georgia Dep't of Corr.*, 71 F.4th 1324, 1328 (11th Cir. 2023).

III

HART seeks reversal on three grounds. First, it argues that the district court erred in following the Third Circuit's approach in *Freethought*, 938 F.3d at 432-37, and in concluding that its policy constituted impermissible viewpoint discrimination. Second, it asserts that its policy is reasonable under the Supreme Court's decision in *Mansky*. Third, relying on the Fourth Circuit's decision in *White Coat Waste Project v. Greater Richmond Transit Co.*, 35 F.4th 179 (4th Cir. 2022), it contends that the permanent injunction constitutes an abuse of discretion because it applies to any future policy that might restrict advertising on religious faith or religious organization grounds.

A

The First Amendment prohibits Congress from enacting any law "abridging the freedom of speech." *See* U.S. CONST. amend. I. It applies to the states (and their political subdivisions) through the Due Process Clause of the Fourteenth Amendment. *See Edwards v. South Carolina*, 372 U.S. 229, 235 (1963) ("It has long been established that [ ] First Amendment freedoms are protected by the Fourteenth Amendment from invasion by the states.").

HART says that this case "presents an interesting question on balancing the competing interests of the First Amendment against [its] right to regulate the content of its advertising in a nonpublic forum." Appellant's Br. at 8. It urges us to follow the D.C. and Fourth Circuits, both of which consider the type of forum at issue before addressing the nature of the restriction, *see, e.g., WAMATA*, 897 F.3d at 321-29, and to reject the approach of the Third Circuit in *Freethought*, 938 F.3d at 432-36, which examines the question of viewpoint discrimination without first performing a forum analysis. Although it takes a different position on the merits, Young Israel also asks us to weigh in on this First Amendment question and hold that HART's policy discriminates on the basis of viewpoint. *See* Appellee's Br. at 23; Audio of Oral Arg. at 32:38.

We have not been asked to apply the Supreme Court's trilogy—*Lamb's Chapel*, *Rosenberger*, and *Good News*—to a government prohibition on advertisements that "primarily promote a religious faith or religious organization." But in a 2019 case involving a First Amendment challenge to a state prohibition on prayers at highschool football games,

we stated that "[t]he first critical step in the analysis is to discern the nature of the forum at issue." *Cambridge Christian Sch., Inc. v. Fla. High Sch. Athl. Ass'n, Inc.*, 942 F.3d 1215, 1236 (11th Cir. 2019). If we addressed the forum/viewpoint discrimination issue here—as the parties urge us to do—we would have to consider not only the impact of our decision in *Cambridge Christian* but also the different approaches taken by the D.C. and Fourth Circuits on the one hand and by the Third Circuit on the other. *Compare, e.g.*, *WMATA*, 897 F.3d at 321-29, and *White Coat*, 35 F.4th at 196-98, *with Freethought*, 938 F.3d at 432-36.

To borrow language from a Supreme Court case, "we resist the pulls to decide the constitutional issues involved [here] on a broader basis than the record before us imperatively requires." *Street v. New York*, 394 U.S. 576, 581 (1969). The district court ruled in the alternative that, even if HART's advertising policy was viewpoint neutral, it was constitutionally unreasonable because it lacked objective and workable standards. As explained below, we agree with the district court on this point, and that provides a sufficient basis on which to affirm its judgment. *See Harbourside Place, LLC v. Town of Jupiter, Fla.*, 958 F.3d 1308, 1322 (11th Cir. 2020) ("[T]his is a good opportunity for us to practice judicial minimalism, and decide no more than what is necessary to resolve [the] appeal.").

B

Though the analysis would not change one way or another, we'll assume, without deciding, that the HART vehicles and property at issue here are nonpublic forums as opposed to limited public forums. Even so, when the government restricts speech in

nonpublic forums, it "must avoid the haphazard and arbitrary enforcement of speech restrictions in order for them to be upheld as reasonable." *Cambridge Christian*, 942 F.3d at 1243. Although a restriction need not be narrowly tailored, the government must offer a "sensible basis for distinguishing what may come in from what must stay out." *Mansky*, 138 S. Ct. at 1882.

In *Mansky*, the Supreme Court addressed a First Amendment challenge to a Minnesota law banning voters from wearing political apparel at polling places. *See id*. at 1883. The Court treated polling places as nonpublic forums, and concluded that Minnesota had pursued permissible ends because it could reasonably seek to reinforce the solemnity of voting. *See id*. at 1887-88.

The Supreme Court then turned to whether Minnesota had "draw[n] a reasonable line." *Id*. at 1888. The Court held that Minnesota had not used reasonable means to implement its ends because the ban on political apparel was not "capable of reasoned application." *Id*. at 1892. Due to the ambiguity of the word "political"—despite a list of examples Minnesota had provided—the Court ruled that the ban on political apparel could not be objectively applied. Indeed, the ban gave election judges at each polling place too much discretion to decide what qualified as "political." *Id*. at 1891. According to the Court, that discretion had to be "guided by objective, workable standards." *Id*. The Court held that the ban violated the First Amendment, explaining that the states "must employ a more discernible approach than the one Minnesota offered [there]." *Id*.

We have not yet had an occasion to apply *Mansky* in the context of advertising in a public transportation setting. We have held, however, that a Christian school plausibly alleged that a state ban on prayer over a loudspeaker at a high school football game was applied arbitrarily and haphazardly in violation of *Mansky*. *See Cambridge Christian*, 942 F.3d at 1243-44. Based on the allegations in the complaint, the state's decision to prohibit the prayer appeared arbitrary, capricious, and haphazard because the prohibition was enforced inconsistently—on at least four other occasions prayers during football games had been allowed. *See id.* at 1246. We explained that "[p]ermitting certain speech on Monday, Tuesday, Wednesday, and Thursday, and barring precisely the same message on Friday without any credible explanation of what may have changed is the essence of arbitrary, capricious, and haphazard—and therefore unreasonable—decisionmaking." *Id.* at 1244.

Several of our sister circuits have applied *Mansky* in the public transportation/advertising context. Although their cases involved restrictions on political rather than religious advertisements, the decisions are consistent with our ruling in *Cambridge Christian*. *See White Coat*, 35 F.4th at 199-201 (transit company's ban on "political" advertisements failed under *Mansky* because there was no formal definition of "political" and "no written guidelines clarifying how the standard is to be applied"); *Am. Freedom Def. Initiative v. Suburban Mobility Auth. for Reg'l Trans.*, 978 F.3d 481, 493-98 (6th Cir. 2020) (similar holding); *Ctr. for Investigative Reporting v. Se. Pennsylvania Transp. Auth.*, 975 F.3d 300, 315-17 (3d Cir. 2020) (applying *Mansky* to invalidate a policy prohibiting

advertisements which were "political" or which expressed an "opinion, position, or viewpoint on matters of public debate about economic, political, religious, historical or social issues").

The district court here correctly applied *Mansky*. It properly concluded that HART's advertising policy is unreasonable because it fails to define key terms, lacks any official guidance, and vests too much discretion in those charged with its application.

HART's policy prohibits "[a]dvertisements that primarily promote a religious faith or religious organization," but does not define what is a "religious faith" or "religious organization." D.E. 1-1 at 146. Although the policy defines certain terms, including "commercial advertisement," "governmental entity public service announcements," and "governmental entity," *id*. at 144-145, "the word 'religious' is unadorned and unexplained[.]" *Young Israel*, 582 F. Supp. 3d at 1173.

The word "religious" here, like the word "political" in *Mansky*, has a range of meanings. "Religious," for example, is defined as "[h]aving or showing belief in and reverence for God or a deity," as well as "[o]f, concerned with, or teaching religion." The American Heritage Dictionary of the English Language 1474 (4th ed. 2009). *See also id.* (defining "religion" as a "[b]elief in and reverence for a supernatural power or powers as creator and governor of the universe"). Although the word "religious" is used as an adjective in the policy to modify "faith" and "organization," the lack of any definition whatsoever is constitutionally problematic.

In addition, the term "primarily promote" is also left undefined in the policy. Although the word "primarily" may not generally be difficult to understand on its own, see In re Stewart, 175 F.3d 796, 808 (10th Cir. 1999) (defining the word as meaning "for the most part" or "more than fifty percent"), here it modifies the word "promote" for purposes of a "religious faith" or "religious organization." Does "primarily promote" equate to proselytization? If it can be something less, how much less? We are left to guess. As the Supreme Court said when faced with similarly expansive language, we simply do not know the reach, or limits, of the term "primarily promote" in this context. See Rosenberger, 515 U.S. at 836 ("The prohibition on funding on behalf of publications that 'primarily promot[e] or manifes[t] a particular belie[f] in or about a deity or an ultimate reality,' in its ordinary and commonsense meaning, has a vast potential reach.").

Given the inherent ambiguity of the word "religious," the uncertainty and potential breadth of the term "primarily promote," and the lack of any definitions, we agree with the district court that the policy fails to provide any objective or workable standards. The policy therefore fails under Mansky. *See Am. Freedom Def. Initiative*, 978 F.3d at 494 ("SMART cannot rely on its Advertising Guidelines' unadorned use of the word 'political' to create workable standards by itself. The word has a range of meanings."). *Cf. WMATA*, 897 F.3d at 340 (Wilkins, J., concurring) ("Guideline 12 is . . . readily distinguishable from the [law] struck down in *Mansky*. WMATA's prohibition on advertisements that 'promote or oppose any religion, religious practice or

belief,' is narrower and more precise than simply a general ban on 'religious' or 'political' speech.").

HART's policy is also completely devoid of "any official guidance to create workable standards." *Am. Freedom Def. Initiative*, 978 F.3d at 495. As the district court aptly noted, "HART admits that, outside of the [p]olicy itself, there is no additional written guidance or training given by HART on how to interpret the [p]olicy." *Young Israel*, 582 F. Supp. 3d at 1173.

This lack of guidance, as the district court explained, has caused inconsistency in how HART's agents and employees define and interpret the policy. For example, Ms. Gage testified that she would forward to HART for approval an advertisement containing Easter eggs because it was "possible" that there is a secular component to Easter. *See* D.E. 60-6 at 80. But, according to Ms. Gage, if an advertisement said "Easter," that would "maybe" necessitate a conversation with the advertiser. *See id.* at 81.

As a result, the policy vests too much unchecked discretion in HART's agents and employees. Indeed, HART concedes that "different people in the same roles [could] have different methodologies" for reviewing submitted advertisements' compliance with the policy. *See* D.E. 60-8 at 96. Such *ad hoc* decision-making is far from the "objective, workable standards" that must guide the discretion of those who enforce HART's policy. *See Mansky*, 138 S. Ct. at 1891.

Take Mr. Rowland's view on how the policy operates. For Mr. Rowland, an advertisement promoting the reading of the Bible would be prohibited, while an advertisement touting the Book of Mormon would be fine because he does not know

what that is and to him it would be "an ad about selling a book." D.E. 60-8 at 33. The Book of Mormon is, of course, a volume of sacred scripture for members of the Church of Jesus Christ of Latter-Day Saints. And one would think that it would (and should) be treated like the Bible under Mr. Rowland's view, but that does not seem to be the case. To make matters more difficult for someone like Mr. Rowland, *The Book of Mormon* is also the name of a musical parody which premiered on Broadway in 2011. *See* Trey Parker, Matt Stone, and Robert Lopez, *The Book of Mormon* (2011). If *The Book of Mormon* had a two-week run in Tampa, it is unclear to us whether HART would run or prohibit an advertisement promoting the musical. That is a big problem under *Mansky*.

The concern about inconsistent application of the policy is not conjectural. As the district court explained, *see Young Israel*, 582 F. Supp. 3d at 1175, HART rejected an advertisement from St. Joseph's Hospital based on information that the Hospital was "[f]ounded as a mission by the Franciscan Sisters of Allegany," but said it would accept the advertisement if the Hospital used the name of its parent company, Baycare. *See* D.E. 60-38. Yet HART ran advertisements from St. Leo University—the oldest Catholic institution of higher education in Florida (established in 1889 by the Order of Saint Benedict of Florida)—without any changes because St. Leo is an "institution of higher learning, not a religious organization." D.E. 60-18; D.E. 60-37. By that logic, why wasn't St. Joseph's Hospital considered a medical institution rather than a religious organization?

HART's erratic application of its policy mirrors the problems identified by the Supreme Court in *Mansky*,

138 S. Ct. at 1891, and demonstrates that it is not capable of reasoned application. HART's reference to some undefined abstract guidance that might have been (but was not) provided is insufficient to establish reasonableness. "We cannot infer the reasonableness of a regulation from a vacant record." *Cambridge Christian*, 942 F.3d at 1246 (internal quotation marks and citation omitted).

In sum, HART has failed to define the word "religious" and the term "primarily promote," has not provided guidance that sets out "objective, workable standards" for its agents and employees, and has vested too much discretion in those who apply the policy. These deficiencies are fatal. *See Mansky*, 138 S. Ct. at 1891. Assuming without deciding that a prohibition on certain types of religious advertisements may serve permissible ends, HART has failed to create the necessary standards for "reasoned application" of its policy. *See id.* at 1891-92.

C

HART concedes that its advertisement policy is not reasonable as applied to Young Israel, but maintains that it is reasonable on its face. *See* Appellant's Br. at 31 n.1. HART argues that its policy is "capable of reasonable application" and "[w]ith well-defined guidance on exactly 'what can come in the forum and what must stay out' [the] policy is certainly capable of reasonable application." Appellant's Reply Br. at 15-16. HART thus contends that the district court erred in ruling that its policy was unconstitutional on its face under *Mansky*.

At one level, we understand where HART is coming from. After all, the Supreme Court has sometimes said

that a successful facial challenge requires a showing that the law in question is unconstitutional in all of its applications. *See, e.g.*, *United States v. Salerno*, 481 U.S. 739, 745 (1987). And it has stated that a "plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others." *Holder v. Humanitarian Law Project*, 561 U.S. 1, 18-19 (2010) (internal quotation marks and citation omitted). *See also Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 497 (1982) ('To succeed [on a facial vagueness challenge] the complainant must demonstrate that the law is impermissibly vague in all of its applications.").

In terms of *Mansky* reasonableness we can imagine a religious advertisement which clearly falls within the ban in HART's policy—think of an advertisement for a well-known faith which singularly declares that it is the only true religion and urges readers to become believers ("___ism is the only way to salvation, so come worship at ______ and convert now before it is too late"). Such an advertisement would "primarily promote" a "religious faith" and would not be vague as applied.[5]

The problem for HART is that in its more recent cases the Supreme Court has cut back on the broad statement in *Salerno*, at least when vagueness is the constitutional vice. *See, e.g.*, *Sessions v. Dimaya*, 138 S. Ct. 1204, 1212, 1218-23 (2018) (civil immigration statute providing for removal); *Johnson v. United*

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[5] We mean only that this hypothetical advertisement would be prohibited by HART's policy. We express no view on whether such a prohibition would be constitutional.

States, 576 U.S. 591, 602-03 (2015) (criminal sentencing statute). At the end of the day, we are not persuaded by HART's argument that the policy is unconstitutional only as applied to Young Israel.

First, the reasonableness holding in *Mansky* concerned the facial validity of the Minnesota statute, as the as-applied claim in the case was not before the Supreme Court. *See Mansky*, 138 S. Ct. at 1885 ("MVA, Cilek, and Jeffers . . . petitioned for review of their facial First Amendment claim only."). No wonder, then, that our sister circuits treat *Mansky* reasonableness challenges as facial. *See Ostrewich v. Tatum*, 72 F.4th 94, 105-06 (5th Cir. 2023); *White Coat*, 35 F.4th at 204; *Zukerman v. U.S. Postal Serv.*, 961 F.3d 431, 436 (D.C. Cir. 2020). We do the same here.[6]

Second, as a logical matter, a law (or, as here, a policy) found to be constitutionally unreasonable under *Mansky* due to lack of standards and guidance is by definition facially invalid. *See Kolender v. Lawson*, 461 U.S. 352, 361 (1983) ("We conclude [that the statute] is unconstitutionally vague on its face because it encourages arbitrary enforcement by failing to describe with sufficient particularity what a suspect must do in order to satisfy the statute."); *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 757 (1988) (the First Amendment problem of placing "unbridled discretion" in the hands of government

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[6] Some have suggested that the "animating logic" of Mansky comes from a line of vagueness cases concerned with "arbitrary enforcement," even though the Supreme Court did not mention the vagueness doctrine by name. See Note, The Supreme Court 2017 Term—Minnesota Voters Alliance v. Mansky, 132 Harv. L. Rev. 337, 344–46 (2018).

officials "can be effectively alleviated only through a facial challenge"). Our "conclusion that [HART's] policy is incapable of reasoned application does not depend on [Young Israel's] identity or the advertisement it wished to run; it depends on the vagueness and imprecision of [HART's] policy in a vacuum, so the policy is facially unconstitutional." *White Coat*, 35 F.4th at 204.

IV

The distinction between facial and as-applied challenges, though sometimes difficult to discern, generally "goes to the breadth of the remedy." *Citizens Utd. v. Fed. Election Comm'n*, 558 U.S. 310, 331 (2010). So we turn to the scope of the permanent injunction.

To obtain a permanent injunction, a plaintiff must show (1) that he has suffered an irreparable injury; (2) that his remedies at law are inadequate; (3) that the balance of hardships weighs in his favor; and (4) that a permanent injunction would not disserve the public interest. *See eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006). The district court here did not err in issuing a permanent injunction. *See Six Star Holdings, LLC v. City of Milwaukee*, 821 F.3d 795, 803 (7th Cir. 2016) ("[A] facial challenge usually invites prospective relief, such as an injunction[.]"). Indeed, no one disputes that a permanent injunction was appropriate. The parties' disagreement is about whether the injunction should be limited to HART's current policy (HART's position) or should encompass any future policies prohibiting advertisements that "primarily promote a religious faith or religious organization" (Young Israel's position).

Given its ruling that the policy constituted impermissible viewpoint discrimination, we can see why the district court crafted the permanent injunction the way that it did. But our affirmance on *Mansky* reasonableness grounds—the district court's alternative and more narrow ruling—changes the calculus for the breadth of the injunction.

A permanent injunction "must be tailored to fit the nature and extent of the established [constitutional] violation." *Gibson v. Firestone*, 741 F.2d 1268, 1273 (11th Cir. 1984). In other words, the injunction "must be no broader than necessary to remedy the constitutional violation." *Newman v. Ala.*, 683 F.2d 1312, 1319 (11th Cir. 1982). *See also* Richard H. Fallon, Jr., *Fact and Fiction About Facial Challenges*, 99 Cal. L. Rev. 915, 923 n.31 (2011) ("When a court pronounces a statute facially invalid, the force of its holding inheres entirely in the doctrines of claim preclusion, issue preclusion, and precedent as well as in the scope of any injunction that the court issues to enforce its judgment.").

We have declined to address whether HART's policy constitutes impermissible viewpoint discrimination, and have held only that the policy is unreasonable under *Mansky*. Our ruling "means that there is no circumstance in which *this particular* ban on [religious] advertising could ever be lawful," *White Coat*, 35 F.4th at 204, but it does not constitute a holding that any future variation of the policy—no matter how phrased and regardless of how words and terms might be defined and what guidance might be provided—would necessarily be unconstitutional. *See Ctr. for Investigative Reporting*, 975 F.3d at 317-18 (holding that certain provisions of a public

transportation authority's advertising standards were unreasonable under *Mansky* and instructing the district court to issue an injunction "barring enforcement" of the challenged provisions of the "current" advertising standards).

Given our more narrow resolution of the case, the permanent injunction needs to be revised to apply only to HART's current policy. As we have done in similar cases, we will remand the case to the district court for that purpose. *See Barrett v. Walker Cnty. Sch. Dist.*, 872 F.3d 1209, 1230 (11th Cir. 2017) ("The district court did not abuse its discretion in granting a permanent injunction. But because we affirm the district court's entry of summary judgment with respect to only the facial unbridled discretion claim, the district court must alter the scope of the injunction on remand so that the injunction remedies only the harm created by the unconstitutional grant of unbridled discretion that we have previously discussed."). *See also Wollschlaeger v. Governor, Fla.*, 848 F.3d 1293, 1319 (11th Cir. 2017) (en banc) ("The record-keeping, inquiry, and antiharassment provisions of FOPA violate the First Amendment, but the anti-discrimination provision, as construed, does not. The district court's judgment is affirmed in part and reversed in part, and the case is remanded so that the judgment and permanent injunction can be amended in accordance with this opinion.").

V

We affirm the district court's order granting summary judgment in favor of Young Israel on the ground that HART's advertising policy was unreasonable under *Mansky*. We remand the case to

the district court to limit the scope of its permanent injunction to HART's current policy.

AFFIRMED AS TO THE GRANT OF SUMMARY JUDGMENT AND REMANDED FOR PURPOSES OF REVISING THE PERMANENT INJUNCTION.

NEWSOM, Circuit Judge, Concurring:

This is an easy case. Lurking just beneath the surface, though, is an almost unfathomable mystery that underlies—but if taken seriously, would seem to under*mine*—existing First Amendment doctrine as applied to regulations of "religious" speech: What, exactly, is religion?

I

First, though, the easy part: HART's policy, which prohibits advertisements that "primarily promote a religious faith or organization," violates the Free Speech Clause for at least two independent reasons. First, as the majority holds, the policy "fails to define" or provide any "official guidance" regarding key terms—most notably, "religious"—and thus "vests too much discretion in those charged with its application." Maj. Op. at 20. Accordingly, the policy violates the settled rule that speech restrictions—even those operative in non-public and limited public fora—must be "capable of reasoned application" and "guided by objective, workable standards." *Minnesota Voters All. v. Mansky*, 138 S. Ct. 1876, 1891-92 (2018).

Second, and separately, HART's policy is self-evidently—in fact, bunglingly—viewpoint discriminatory. By its plain terms, the policy doesn't just prohibit speech "about" religion, it singles out speech that "promotes" religion. And to be clear, the lopsidedness of the policy's religious-speech restriction isn't just patent, it's conspicuous: Other provisions of HART's advertising policy, for example, neutrally prohibit advertising "*containing* profane language, obscene materials or images of nudity," Hillsborough Transit Authority Policy Manual § 810.10(4)(b), Doc.

1-1 at 145 (emphasis added), or advertising that "*contain[s]* discriminatory materials and/or messages," *id.* § 810.10(4)(c) (emphasis added). Whatever the constitutionality of those provisions, a speech restriction that prohibits only the "promot[ion]" of a religious faith or organization constitutes viewpoint discrimination, plain and simple.

II

Now for the hard part. Underlying both issues that I've flagged is a question that, I fear, neither policymakers nor judges are particularly well-equipped to answer: What is religion? Let me explain.

A

Consider first what I'll call the "*Mansky* issue": As already explained, today's majority correctly holds that HART's policy violates the First Amendment because it fails to define or explain the phrase "religious faith or organization" or otherwise guide officials' discretion in applying it. *See* Maj. Op. at 18-24. And again, I agree. It seems to me, though, that an even more fundamental problem looms. I'm not sure that *any* religious-speech restriction could survive a reasonableness inquiry under *Mansky*—because I'm not sure that any policymaker could define or identify "religious" speech using "objective, workable standards." 138 S. Ct. at 1891.

The majority opinion says that the word "religious" has a "range of meanings." Maj. Op. at 20. That's true, but colossally understated. Closer to the mark, I think, is the majority opinion's recognition that the term "religious" is "inherent[ly] ambigu[ous]." *Id.* at 21. Pretty much any criterion one can imagine will exclude faith or thought systems that most have

traditionally regarded as religious. Consider, for instance, one definition of "religious" that the majority opinion posits: "'[h]aving or showing belief in and reverence for God or a deity.'" *Id.* at 20-21 (quoting The American Heritage Dictionary of the English Language 1474 (4th ed. 2006)). That, as I understand things, would eliminate many Buddhists and Jains, among others. Or another: "'[b]elief in and reverence for a supernatural power or powers as creator and governor of the universe.'" *Id.* at 21 (quoting the same source's definition of "religion"). Again, I could be wrong, but I think many Deists and Unitarian Universalists would resist that explanation. And so it goes with other defining characteristics one might propose. Belief in the afterlife? I'm pretty sure that would knock out some Taoists, and presumably others, as well. Existence of a sacred text? My research suggests that at least in Japan, Shintoism has no official scripture. Existence of an organized "church" with a hierarchical structure? Neither Hindus nor many indigenous sects have one. Adherence to ritual? Quakers don't. Existence of sacraments or creeds? Many evangelical Christians resist them. A focus on evangelization or proselytizing? So far as I understand, Jews typically don't actively seek to convert non-believers.

Relatedly, what truly distinguishes "religious" speech from speech pertaining to other life-ordering perspectives? Where does the "religious" leave off and, say, the philosophical pick up? Is Randian Objectivism "religious"? *See* Albert Ellis, *Is Objectivism a Religion?* (1968). My gut says no, but why? How about "Social Justice Fundamentalism"? *See* Tim Urban, *What's Our Problem?: A Self-Help Book for Societies* (2023).

Same instinct, same caveat. Scientology? TM? Humanism? Transhumanism? You get the picture.

Bottom line: No matter how hard they try—no matter how many definitions they supply, and no matter how much guidance they provide—I'm doubtful that policymakers can define "religious" speech in a sufficiently principled and comprehensive way to satisfy *Mansky*. "What is religion?" just isn't a question that they are particularly well-suited to answer.[1] *Cf. Kondrat'yev v. City of Pensacola*, 949 F.3d 1319, 1336 (11th Cir. 2020) (Newsom, J., concurring) ("[C]an it really be that I—as a judge trained in the law rather than, say, neurology, philosophy, or theology, am charged with distinguishing between 'psychological' injury, on the one hand, and 'metaphysical' and 'spiritual' injury, on the other?").

B

Separately, the parties here vigorously dispute whether transit advertising policies that (like HART's) restrict "religious" speech regulate on the basis of *content* or *viewpoint*. *See* Br. of Appellant at 29-31; Br. of Appellee at 23-27. And it's understandable why

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[1] Notably, this is the very inquiry that free-exercise jurisprudence eschews. *See Watts v. Florida Int'l Univ.*, 495 F.3d 1289, 1296–97 (11th Cir. 2007) ("We need not delve far into philosophy, however, because the Supreme Court has at least twice instructed us not to engage in any 'objective' test of whether a particular belief is a religious one.") (citing *Thomas v. Review Bd. of the Ind. Emp. Sec. Div.*, 450 U.S. 707 (1981), and *United States v. Seeger*, 380 U.S. 163 (1965)); *see also Employment Div., Dep't of Hum. Res. of Oregon v. Smith*, 494 U.S. 872, 887 (1990) (quoting *Hernandez v. C.I.R.*, 490 U.S. 680, 699 (1989) ("[I]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds.").

that's such a flashpoint: The categorization matters given the standards that apply to speech in the various First Amendment "fora." Reasonable content-based distinctions are permissible, for instance, in both limited public and non-public fora. *See Cornelius v. NAACP Legal Def. and Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985) (non-public fora); *Keister v. Bell*, 29 F.4th 1239, 1252 (11th Cir. 2022) (limited public fora). But "'viewpoint discrimination' is forbidden" no matter the forum classification. *Matal v. Tam*, 582 U.S. 218, 243 (2017); *see also Cook v. Gwinnett Cnty. Sch. Dist.*, 414 F.3d 1313, 1321 (11th Cir. 2005) (observing that "even in a non-public forum," the law is "clearly established that the state cannot engage in viewpoint discrimination").

For its part, Young Israel insists that HART's policy constitutes impermissible viewpoint discrimination—and not just because (as already explained) it targets speech that "promotes" religion, but rather, and more broadly, because *any* restriction on religious speech is, ipso facto, viewpoint-discriminatory. *See* Br. of Appellee at 23 *et seq*. And under existing free-speech precedent, I think Young Israel may well be right about that. It points to what it calls a "trilogy" of Supreme Court decisions that invalidated educational institutions' policies that specifically forbade the use of school facilities or resources for "religious" purposes. *See Lamb's Chapel v. Center of Moriches Union Free Sch. Dist.*, 508 U.S. 384, 387 (1993); *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 831-32 (1995); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 109, 120 (2001). Young Israel particularly emphasizes the following passage from the opinion in *Rosenberger*, zeroing in on the last sentence:

> It is, in a sense, something of an understatement to speak of religious thought and discussion as just a viewpoint, as distinct from a comprehensive body of thought. The nature of our origins and destiny and their dependence upon the existence of a divine being have been subjects of philosophic inquiry throughout human history. We conclude, nonetheless, that here . . . viewpoint discrimination is the proper way to interpret the University's objections to [a student-run religious magazine]. By the very terms of [its] prohibition, the University does not exclude religion as a subject matter but selects for disfavored treatment those student journalistic efforts with religious editorial viewpoints. *Religion may be a vast area of inquiry, but it also provides . . . a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered.*

515 U.S. at 831 (emphasis added).

That passage, Young Israel says—and, again, especially the concluding sentence—indicates the Supreme Court's verdict that "religion" is a distinct viewpoint and, it follows, that any restriction on "religious" speech constitutes impermissible viewpoint discrimination.

I tend to think that Young Israel has correctly read *Rosenberger*, and the "trilogy" more generally. Although the *Rosenberger* Court nodded at the possibility that religion might be a general "subject matter," it certainly seemed to land on a narrower, more specific view. And *Good News Club*, decided several years later, likewise described religion as "*the*

viewpoint from which ideas are conveyed." 533 U.S. at 112 n.4 (emphasis added). Notably, others have since interpreted the trilogy the same way, including in cases remarkably similar to this one. *See, e.g.*, *Northeastern Pennsylvania Freethought Soc'y v. County of Lackawanna Transit Sys.*, 938 F.3d 424, 437 (3d Cir. 2019) (invalidating a transit-system policy prohibiting "religious" ads and emphasizing that "[r]eligion is not only a subject" but "a worldview through which believers see countless issues").[2]

The upshot, it seems to me, is that the Supreme Court has effectively merged content and viewpoint—at least for purposes of religious speech. Religion, the Court appears to have said, is *both* (and simultaneously) a general, content-based category *and* a more particular viewpoint. And the result of that move, I think, is to render any formulation of a religious-speech restriction—whether blanket or promotion-only—an exercise in unlawful viewpoint discrimination.

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[2] In *Archdiocese of Wash. v. Washington Metro. Area Transit Auth.*, the D.C. Circuit read the trilogy differently and held that a similar restriction on "religious" ads regulated only content, not viewpoint. *See* 897 F.3d 314 (D.C. Cir. 2018). The Supreme Court's denial of certiorari drew a sharp dissent. *See Archdiocese of Wash. v. Washington Metro. Area Transit Auth.*, 140 S. Ct. 1198, 1199 (2020) (Gorsuch, J., dissenting from the denial of certiorari) ("[WMATA's religious speech ban] 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." (citing *Good News Club*, 533 U.S. at 98; *Rosenberger*, 515 U.S. at 819; *Lamb's Chapel*, 508 U.S. at 384))

I understand the impulse—the "distinction" between content and viewpoint, after all, "is not a precise one." *Rosenberger*, 515 U.S. at 831. I'm skeptical, though, for two reasons. For starters, it's inconsistent with how the Supreme Court has treated other forms of core First Amendment expression. Most notably, perhaps, the Court has assiduously enforced the content-viewpoint distinction with respect to political speech, despite the fact that it "occupies the highest, most protected position" in the First Amendment hierarchy. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 422 (1992) (Stevens, J., concurring); *see also, e.g.*, *Meyer v. Grant*, 486 U.S. 414, 420, 426 (1988) (observing that "[c]ore political speech" is where "First Amendment protection is 'at its zenith'"). The Court has held, for instance, that laws regulating political content are permissible in non-public fora, while those regulating on the basis of political viewpoint aren't. *See, e.g.*, *Mansky*, 138 S. Ct. at 1885-86; *Greer v. Spock*, 424 U.S. 828, 831, 837-39 (1976). In fact—and somewhat closer to home—the Court has specifically held that local transit authorities can prohibit general "paid political advertising" in public streetcars without violating the Free Speech Clause. *See Lehman v. City of Shaker Heights*, 418 U.S. 298, 299, 304 (1974) (plurality).

More fundamentally, I'll confess that I'm just not sure that it's accurate to characterize religion as "a specific premise, a perspective, a standpoint." *Rosenberger*, 515 U.S. at 831. Perhaps it's just that I'm not sure what that means. Is the suggestion that there is a single all-encompassing religious "premise, perspective, [or] standpoint"? Or is "religion," in the way the Supreme Court is using the term, a general umbrella-like descriptor that houses multiple sect-

specific viewpoints? Or maybe the Court means to say that a "religious" viewpoint can just be defined on a case-by-case basis in contrast to some "secular" comparator? Any of these, I think, is a fair reading of *Rosenberger*, but all, I fear, entail complications.

The religion-as-a-single-overarching-viewpoint reading maybe intuitive—we figure we know a "religious" viewpoint when we see one—but I think it masks important nuance and complexity. Can we really say, for instance, that there's a single "religious" perspective about anything? The death penalty? Climate change? The good life more generally? I'm doubtful.

What about the notion that "religion" is a category that comprises various "religious" viewpoints? Maybe, but doesn't that just land us right back where we started? What qualifies a particular viewpoint as sufficiently "religious" that it's entitled to protection as "religious speech" under the trilogy—supreme beings, afterlives, creeds, catechisms, etc.? *See supra* at 2-3. And relatedly— I mean in a metaphysically inextricable sense—what is it about, say, "philosophical" speech that disqualifies it from "religious" status and the accompanying protection?

There's one more possibility, I suppose: Maybe the Supreme Court means that "religious" viewpoints can be identified on an ad hoc basis vis-à-vis some "secular" comparator. So, for instance, in *Lamb's Chapel*, the Court held that a school district had impermissibly discriminated on the basis of viewpoint when it opened its premises for all "social, civic, or recreational purposes" but refused to allow their use to screen a film that addressed "family issues and child rearing" from a "religious perspective." 508 U.S. at

391-94. At first blush, that seems pretty straightforward. But I wonder whether it's too easy—and maybe even tautological? Does the mere existence of a non-religious or irreligious alternative automatically transform any regulation of religious content into a restriction of the "religious" viewpoint? If so, why doesn't the same logic hold in the political-speech context? Imagine a "content"-based ban on political advertising on city buses—which, again, would be permissible under existing doctrine. *See Lehman*, 418 U.S. at 304. Couldn't an advocacy group simply repackage its challenge, complaining that the prohibition discriminates on the basis of viewpoint because it permits ads about, say, gas prices from commercial perspectives but not political ones?

However you slice it, I'm just not sure the religion-as-ipso-facto-viewpoint approach holds up very well. I fear that it may cause more confusion than it's worth.

* * *

One last thing: Wouldn't cases like this be better handled under the Free Exercise Clause? At the very least, the analysis seems pretty free-exercise-y to me. Justice Scalia made a similar point in his concurring opinion in *Good News Club*. There, in the course of agreeing with the Court's free-speech-based disposition, he said that he didn't "suppose it matter[ed]" whether the restriction at issue was "characterized as viewpoint or subject-matter discrimination." *Good News Club*, 533 U.S. at 122 (Scalia, J., concurring). The reason, he explained—conspicuously citing free-*exercise* precedents—is that "excluding the Club's speech . . . because it's religious' will not do." *Id*. (citing *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532-33, 546

(1993); *Employment Div., Dep't of Hum. Res. of Ore. v. Smith,* 494 U.S. 872, 877-78 (1990)). I suspect that under modern free-exercise doctrine, litigants like Young Israel will rack up the wins. But, if free-exercise logic is "doing the work," we might be better off just deciding the cases on those grounds.

III

I'm not sure there's an easy answer to any of this. In fact, I'm pretty sure there isn't. The difficulty, I think, is inherent in the nature of religion—and particularly in using "religion," or "religious"-ness, as a constitutional measuring stick. We use those terms daily, and I think it's probably fair to say that we have a rough-and-ready sense of what they entail. But as is so often the case, the devil (or in this case the deity) is in the details. And the deeper one probes, the harder it becomes to settle on a precise, necessary-and-sufficient definition of "religion," and thus of "religious" speech. Truth is, there is no one defining characteristic of "religion"; there are arguably—and a thoroughly argued—many. Accordingly, the lines separating "religious" from philosophical and even political traditions (and expression) are hazy at best. At the end of the day, I fear that the terms "religion" and "religious" are exactly as the majority describes them, "inherent[ly] ambigu[ous]," Maj. Op. at 21, and thus particularly precarious foundations on which to build free-speech doctrine.

GRIMBERG, District Judge, Concurring:

I join Parts I, II, III.B, and III.C of the Court's opinion. I write separately because I would have gone farther. In my view, our analysis should not have stopped at the obvious *Mansky* violation if HART's policy is incapable of ever being applied constitutionally. It cannot be. The policy's inability to be applied reasonably should not inoculate it from its more severe and incurable constitutional flaw. By constructing a policy that is so clearly and completely incapable of reasonable application, HART has successfully evaded a ruling on the viewpoint-versus-subject-matter dispute that is at the heart of this case. And that evaded ruling, in my view, has long been settled by the Supreme Court's "trilogy" of cases: *Lamb's Chapel v. Center of Moriches Union Free School District,* 508 U.S. 384, 387 (1993), *Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819, 831-32 (1995), and *Good News Club v. Milford Central School,* 533 U.S. 98, 109, 120 (2001). Even if HART drafted a policy in theoretically perfect compliance with *Mansky* (although I share Judge Newsom's skepticism that this is even possible), I believe the trilogy is fatal to HART's religious ad prohibition.

A review of the trilogy cases is in order. In *Lamb's Chapel*, a school district allowed use of facilities for "social, civic, or recreational" purposes, but not "religious purposes." On that basis, it denied the use of its facilities to a church that wanted to show a film series on family values and childrearing. The government argued that the school's ban was a permissible subject matter exclusion rather than a denial based on viewpoint. The Supreme Court

disagreed. According to the Court, the subjects—family values and childrearing—were permissible, and the school therefore engaged in viewpoint discrimination by excluding the church from addressing the topics from its Christian viewpoint.

Next came *Rosenberger*. There, the University of Virginia subsidized the costs of some student publications but declined to fund those that "primarily promot[ed] or manifest[ed] a particular belie[f] in or about a deity or an ultimate reality." The Supreme Court held that this constituted viewpoint discrimination since it precluded a religious perspective, or viewpoint, as to subjects that could otherwise be discussed and considered from a secular perspective. The Court noted that "religion may be a vast area of inquiry, but it also provides…a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered." *Id*. at 831.

Finally, in *Good News Club*, a local Christian organization applied for use of a school cafeteria, a space open for community use, to hold the group's weekly afterschool meetings. But, the school's community use policy, which foreclosed use "by any individual or organization for religious purposes," barred the group's request. The Supreme Court held that this constituted impermissible viewpoint discrimination. The unconstitutional nature of the policy was rooted in its acceptance of groups that would promote the moral and character development of children, but its exclusion of the Club's activities—which also promoted the moral and character development of children—because they were religious in nature. The Court held that "speech discussing

otherwise permissible subjects cannot be excluded from a limited public forum on the ground that the subject is discussed from a religious viewpoint." 533 U.S. at 112.

The trilogy cases have been applied to public transportation systems at least twice—with opposing results. In *Archdiocese of Wash. v. Wash. Metro. Area Transit Auth.*, 897 F.3d 314 (D.C. Cir. 2018), the public transportation system (WMATA) rejected a proposed advertisement from the Catholic Church bearing the silhouette of three shepherds and sheep, along with the words "Find the Perfect Gift" and a church website URL, based on a policy prohibiting religious advertisements. The D.C. Circuit determined that the policy, materially identical to the policy before us today, did not constitute unconstitutional viewpoint discrimination but rather an appropriate subject matter prohibition. The Supreme Court denied certiorari.[1] Justice Gorsuch, however, dissented from the denial of cert, noting that in his view this case was wrongly decided under the trilogy. While that statement of course bears no precedential value, the logic is sound and deftly articulates my position in this case. As Justice Gorsuch pointed out, "[n]o one dispute[d] that, if Macy's had sought to place the same advertisement with its own website address, [WMATA] would have accepted the business gladly. Indeed, WMATA admit[ted] that it views Christmas as having 'a secular half ' and 'a religious half,' and it has shown no hesitation in taking secular Christmas advertisements." *Archdiocese of Washington v. Washington Metro. Area Transit Auth.*, 140 S. Ct.

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[1] The full Court could not hear the case because then-Circuit Court Judge Kavanaugh participated in the appellate decision.

1198, 1199 (2020). Where the *same advertisement*, with the same *content* is welcomed when references to religion are removed and replaced with secular ones, I see no way around concluding, based on the trilogy, that the public transportation system engaged in unconstitutional viewpoint discrimination.[2]

That is precisely what happened in this case. When presented with Young Israel's ad, HART suggested that it would run the advertisement if Young Israel removed references in the ad to Judaism—the menorah and the word Chanukah, for example. HART essentially asked Young Israel to remove the religious angle of the ad, but not otherwise change the content. What's more, HART previously had accepted ads for secular holiday events that involved ice skating and seasonal décor. I read the trilogy of cases as concluding that this is precisely what HART cannot do—permit advertising on "a *subject* sure to inspire religious views"—holiday events—"and then suppress those views" while allowing a secular analogue. *Archdiocese of Washington*, 140 S. Ct. at 1200.

The majority opinion rightly notes that our circuit's holding in *Cambridge Christian School, Inc. v. Florida High School. Athletic Ass'n*, 942 F.3d 1215 (11th Cir. 2019), must be considered in any viewpoint discrimination analysis. Maj. Op. at 17-18. In *Cambridge Christian*, a case decided on a motion to

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[2] The other post-trilogy public transportation case is *Ne. Pa. Freethought Soc'y v. Cnty. of Lackawanna Transit Sys.*, 938 F.3d 424, 432-37 (3d Cir. 2019), where the Third Circuit determined that the Lackawanna Transit System violated the First Amendment when it enacted a policy with prohibitions on religious messages, finding that the policy and its application constituted religious viewpoint discrimination.

dismiss, the Florida High School Athletic Association (FHSAA) rejected two Catholic schools' requests to read a prayer on the loudspeaker before a football game. This Court determined that the FHSAA's restriction was content-based, not viewpoint-based, because the complaint was clear "that the FHSAA relied on the nature of the proposed message as a prayer when it decided not to grant the schools' request....The complaint [did] not allege, for instance, that Christian prayer was prohibited but that Jewish or Muslim prayer would have been allowed, which would present an obvious case of viewpoint discrimination." *Id.* at 1242. The Court explicitly did not rule out the possibility of discovery revealing that the prayer prohibition was discriminatory of a viewpoint if, for example, "a secular act of solemnization or invocation of some sort would have been permitted by the state at the outset of the game." *Id.* at n.8. In other words, if the content of the prayer could otherwise have been invoked for a secular purpose, the schools would have a "strong" case that the prohibition constituted viewpoint discrimination.

For this reason, I believe *Cambridge Christian* offers little guidance for our purposes. We have far more facts presented here, at the summary judgment stage, than the *Cambridge Christian* Court had before it when ruling on the motion to dismiss. In fact, we have precisely the facts that the *Cambridge Christian* Court indicated would make a strong case for viewpoint discrimination—specifically, a secular comparator. The facts and procedural posture of our case cleave far closer to those in the trilogy cases. I see no material difference between the facts in the trilogy cases and the facts here. HART's policy constitutes unconstitutional viewpoint discrimination, and there

is no change in the way its policy is administered and applied that can fix this fundamental constitutional flaw.

Of course, my position provides no solution to the legitimate concerns posed in Judge Newsom's concurrence about the inherent difficulty of drawing a religious-based viewpoint/subject matter distinction in the first instance. I share his skepticism that there can ever be a coherent categorical determination that religious speech is *ipso facto* an expression of one's viewpoint rather than a subject matter. Even with respect to my position, I acknowledge that the logical distinction is not precise—it matters greatly how we define the scope of a policy and prohibition. For example, in *Lamb's Chapel*, the Court determined the subject matter to be "family issues/childrearing" and the viewpoint to be religious. However, it could just as easily have determined that the subject matter was "religious films" and gone the other way. Here, HART's position that the subject matter of Young Israel's advertisement was "Chanukah on Ice" is a reasonable one. The subject matter/viewpoint distinction can arguably be drawn in favor of either party.

That said, the Supreme Court has drawn this line so that it favors Young Israel in this case. Putting aside broader concerns about the nature of religion, to decide this case we must work with and within current Free Speech doctrine and I believe the trilogy answers the viewpoint/subject matter dispute here loudly and clearly. So much so that I would have reached that question in the majority opinion, as the district court did. Otherwise, and as it currently stands, HART can continue drafting viewpoint discriminatory policies

while also failing to reasonably apply them—perpetually evading review of the ultimate constitutional flaw.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Case No. 8:21-cv-294-VMC-CPT

YOUNG ISRAEL OF TAMPA, INC.,

Plaintiff,

v.

HILLSBOROUGH AREA REGIONAL TRANSIT AUTHORITY,

Defendant.

ORDER

This matter comes before the Court upon consideration of the Motion for Summary Judgment filed on October 4, 2021, by Plaintiff Young Israel of Tampa, Inc. ("Young Israel") and the Amended Motion for Summary Judgment filed on October 8, 2021, by Defendant Hillsborough Area Regional Transit Authority ("HART"). (Doc. ## 60, 63). Both parties filed a response and a reply. (Doc. ## 64, 67-69). For the reasons that follow, the Court grants Young Israel's Motion and denies HART's Motion.

I. Background

A. HART and HART's Advertising Policy

HART was created under Florida law and provides public transit in Hillsborough County, the City of Tampa, Florida, and the City of Temple Terrace, Florida. (Doc. # 1-1 at 6-8). HART's Policy Manual

contains an advertising policy (the "Policy"). (*Id.* at 142-48). The current, applicable version of the Policy went into effect on December 2, 2013. (*Id.* at 148). The Policy provides in relevant part:

> **(1) Policy Statement**
>
> HART is engaged in commerce as a provider of public transportation services and the advertising space located on its public information pieces, buses, stops or other HART property constitutes a part of this commercial venture and is not intended to be and shall not be considered a public forum. The advertising accepted is intended to be strictly commercial in nature as further defined herein with limited Governmental Entity Public Service Announcements, as that term is defined below, including but not limited to HART's own such announcements. HART's objective in selling advertising on or in its vehicles or property is to maximize advertising revenues to supplement unfunded operating costs, while maximizing transit services revenue by attracting, maintaining, and increasing ridership. Maintaining a safe, welcoming environment for all HART passengers is part of HART's primary mission and is essential to maximizing revenues to accomplish that mission. The advertising revenues are secondary to HART's primary mission. HART intends to maximize advertising revenue by establishing a favorable environment to attract a lucrative mix of commercial advertisers. The goal is to maintain the value of HART advertising space by keeping it in good condition and non-controversial at the

same time, endeavoring to ensure that the advertisement is not offensive to HART customers and the community.

(2) Advertising Program and Administration

HART shall select an "Advertising Contractor" responsible for the administration of the HART advertising program consistent with HART's adopted policies and guidelines and its agreement with HART. HART shall designate an employee as its "Contract Administrator" to be the primary contact with the Advertising Contractor. The Advertising Contractor shall be the recipient of all advertising requests and shall be the one who initially addresses the application of HART guidelines thereto. Any question or disagreement in that regard shall be referred to the Contract Administrator for resolution. The Contract Administrator shall determine whether the advertisement in question is consistent with these policies and guidelines. . . . If a dispute remains unresolved, appeal may be made to the CEO or Chief Operating Officer of HART or his/her designee for final resolution.

. . .

(4) Prohibitions

The following types of advertising are prohibited in and on all vehicles and/or property:

(a) Except as provided with regard to the Tampa Historic Streetcar, advertising of tobacco, alcohol, or related products or activities;

(b) Advertising containing profane language, obscene materials or images of nudity, similar adult themes, activities or products, including, but not limited to, pornography and any message offense to the community standards applicable to same;

(c) Advertising containing discriminatory materials and/or messages;

(d) Advertisements for firearms or that contain an image or description of graphic violence . . .

(e) Advertisements that primarily promote a religious faith or religious organization;

(f) Partisan political advertisements which advocate any political party, or advocate and/or promote any candidate or issue upon which the electorate is scheduled to vote . . .;

(g) Advertisements that promote or have any material contained in it, that promotes, encourages or appears to promote or encourage, unlawful or illegal behavior or activities;

(h) Advertisements that promote a commercial transaction that has any material contained in it that is false, misleading, or deceptive;

(i) Advertisements, or any material contained therein that promotes or encourages or appears to promote or encourage the use or possession of unlawful or illegal goods or services; and

> (j) Advertisements or any material contained therein that is libelous or an infringement of copyright, or is otherwise unlawful or illegal or likely to subject HART to litigation.

(*Id.* at 142-46 (emphasis added)).

The Policy also contains certain written "guidelines," including a definition of "commercial advertisement" as "an advertisement dealing with commercial speech which is an expression that proposes a commercial transaction related solely to an economic interest of the speaker and his or her audience, but which is intended to influence consumers in their commercial decisions and usually involves advertising products or services for sale." (*Id.* at 144).

The current Policy has its genesis in an earlier controversy. In early 2013, HART rejected the "#MyJihad" advertisement submitted by the Council on American-Islamic Relations ("CAIR"). (Doc. # 63 at ¶ 2; Doc. # 67 at ¶ 2). Believing that the advertisement primarily promoted the Islamic religion, HART's Board of Directors (the "Board") rejected the advertisement at an August 5, 2013, meeting. (Doc. # 63 at ¶ 3; Doc. # 67 at ¶ 3).

According to the declaration of a HART representative, "[a]t the August [2013] Board meeting, HART's Board realized it needed to amend its Advertising Policy to close its forum to commercial advertising to avoid situations like it was facing with CAIR." (Doc. # 57-1 at ¶ 7). Young Israel points out that HART's policy at that time already limited the forum to "strictly commercial" advertisements and also prohibited advertisements "that primarily

promote a religious faith or religious organization." (Doc. # 67-2; Doc. # 60-43).

CAIR appealed the denial of its advertisement and made a presentation to the Board in September 2013. (Doc. # 63 at ¶ 8; Doc. # 67 at ¶ 8). At the conclusion of that meeting, the Board agreed to run a modified CAIR advertisement, which did not contain the "#MyJihad" language and instead read: "CAIR Florida, Embracing Diversity at Work, Defending Civil Rights in the Community." (Doc. # 57-1 at ¶ 9; Doc. # 57-4).

Shortly after the modified CAIR ads ran, the American Freedom Defense Initiative ("AFDI") sought to run advertisements that, as HART describes it, were "counter" to the CAIR ads. (Doc. # 57-1 at ¶ 11). AFDI submitted eight proposed advertisements. (Doc. # 57-6). One of the advertisements referenced "honor killings" and asked: "Is your family threatening you? Is your life in danger? We can help: go to FightforFreedom.us." (*Id.* at 1). Other ads quoted government officials to claim that "CAIR 'has ties to terrorism'" and "give[s] aid to international terrorist groups." (*Id.* at 4, 5). Others contained quotes from individuals allegedly defrauded, misled, or deceived by CAIR, along with the website "TruthAboutCAIR.com." (*Id.* at 2, 3, 7). HART refused to run AFDI's advertisements, and AFDI threatened to sue HART. (Doc. # 57-1 at ¶ 13).

Following the CAIR advertisement controversies and the August 2013 Board meeting, HART amended its advertising policy. (Doc. # 63 at ¶ 14; Doc. # 67 at ¶ 14). In December 2013, HART adopted the Advertising Policy currently in effect. (Doc. # 57-1 at ¶ 16).

According to HART, its refusal to accept primarily religious advertisements "is supported by HART's interests in ensuring safe and reliable transportation services and operating in a manner that maintains demand of its service . . . without alienating any riders, potential riders, employees, or advertisers. HART's policy is intended to maintain a safe environment on its vehicles without unnecessary controversy, risks of violence, or risks of vandalism while maintaining employee morale." (Doc. # 60-18 at 6). As HART's corporate representative explained, religious ads could be deemed controversial or "create a bad experience for our customers" "if somebody didn't agree with it and . . . they're upset about it." (Doc. # 60-8 at 80:11-20).

This prohibition on primarily religious advertisements applies without distinction between exterior spaces, such as bus exteriors or shelters, and bus interiors. (Doc. # 60-8 at 78:22-25). According to HART, "[a]pplication of HART's advertising guidelines are fact specific and analysis of a permissible ad, once brought to the CEO (or her designee), is done on a fact-specific basis, with assistance from counsel, if necessary." (Doc. # 60-18 at 6).

Laurie Gage, an employee of Vector Media (HART's designated Advertising Contractor), is the first line of review under HART's Policy. (Doc. # 60-6 at 10, 13, 15-16). Gage testified that, outside of HART's written Advertising Policy, there are no guidance documents, advisory opinions, or other material available to help her implement or interpret the Policy. (Id. at 14). She has never received any training on how to apply the Policy. (*Id.* at 14-15). She also testified that if there was ever any question or concern about whether an

advertisement was allowable under the Policy, she would forward the issue to HART. (*Id.* at 13, 80).

Tyler Rowland, HART's manager of communications and creative services, and who was deposed in his capacity as HART's corporate representative, stated that one of his responsibilities is reviewing submitted advertisements. (Doc. # 60-8 at 13). Rowland also testified that HART does not provide any guidance documents, advisory opinions, or other material to help interpret the Policy, and there is no training provided on the Policy. (*Id.* at 15). Rowland testified that, when determining whether an ad was "primarily promoting" a religious faith or organization, he would make that determination on a case-by-case basis, depending on the ad's "design and . . . messaging." (*Id.* at 34-35).

HART admits that it does not know "what would specifically upset customers on religious ads" and it also admits that it has no record of disruptions, vandalism, or threats of violence attributable to any advertisement. (Doc. # 60 at ¶ 13; Doc. # 64 at ¶ 13).

B. Young Israel and the "Chanukah on Ice" Advertisement

Young Israel is an Orthodox Jewish synagogue in Tampa, Florida, led by Rabbi Uriel Rivkin. (Doc. # 60 at ¶ 1; Doc. # 64 at ¶ 1). The synagogue has hundreds of attendees, conducts charitable endeavors, and reaches the community via publicly advertised celebrations of Jewish holidays like Passover and Chanukah. (Id.). For more than 14 years, Young Israel has hosted the Chanukah celebration "Chanukah on Ice." (Doc. # 60 at ¶ 2; Doc. # 64 at ¶ 2). Chanukah is a Jewish festival commemorating a miracle in which the

oil in the holy temple, meant to last only one day, instead lasted for eight. (Doc. # 60-4 at 15:23-16:9).

According to Rabbi Rivkin, Chanukah on Ice is a "very big event" with "at least 200 people" typically in attendance. (Doc. # 60-4 at 17, 28; Doc. # 60-2 at 3).[1] Rabbi Rivkin stated that the Chanukah on Ice event was part of the synagogue's outreach to the community and "offers a crucial opportunity to foster Jewish identity during a season many associate with Christmas." (Doc. # 60-2 at 2-3).

The event begins with an hour of ice skating with Jewish music playing and Jewish food available. (Doc. # 60 at ¶ 3; Doc. # 64 at ¶ 3; Doc. # 60-4 at 28:11-23, 29:24-30:3). Next, Rabbi Rivkin lights a large ice menorah and offers blessings. (Doc. # 60 at ¶ 3; Doc. # 64 at ¶ 3; Doc. # 60-4 at 30:4-16). Attendees sing Jewish songs, and Rabbi Rivkin speaks about the Chanukah miracle. (*Id.*). Rabbi Rivkin testified that, in his opinion, the menorah is a Jewish religious symbol celebrating Chanukah. (Doc. # 60-4 at 18:25-19:3).

Rabbi Rivkin usually begins planning Chanukah on Ice in September by booking a rink. (Doc. # 60-4 at

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[1] HART takes issue with most of the exhibits attached to Young Israel's summary judgment Motion because they were submitted as attachments to a lawyer's affidavit. (Doc. # 64 at 2-7). HART misunderstands the Court's requirements in this respect. While lawyers may not submit affidavits as proof of substantive facts, counsel's affidavit here was submitted solely as the vehicle by which other, admissible evidence was submitted. Thus, the Court will consider the documents submitted by Young Israel. Furthermore, while HART also objects to "rank hearsay documents," it does not identify which documents it means or why those documents are hearsay.

54:18-55:8). In 2019, Young Israel hosted Chanukah on Ice at the AdventHealth Center Ice Rink, which is near the synagogue, on one HART bus line, and near another. (Doc. # 60-2 at 3). Young Israel has historically promoted the event through advertising in Jewish press publications and on Facebook. (Doc. # 60-4 at 32:24-33:7). For 14 years, Young Israel has utilized essentially the same print ad, which features a menorah and a dreidel. (Doc. # 60-4 at 104:3-9). Rabbi Rivkin testified that the dreidel is a Jewish cultural symbol. (*Id.* at 106:15-107:17).

On October 30, 2020, Young Israel sent HART its proposed Chanukah on Ice advertisement "to run in the HART transit system in late November through December." (Doc. # 1-2 at 2). The advertisement included the details of the Chanukah on Ice event and contained images of a menorah, a dreidel, and ice skaters. (Id. at 3). It stated that the event would "feature[e] lighting of a sculpted Grand Ice Menorah and ice skating to Jewish music around the flaming menorah." (*Id.*). The advertisement is reproduced below:

On November 2, 2020, Gage, an employee with Vector Media, rejected the ad, writing: "Thank you for writing, unfortunately we cannot assist. HART does not allow religious affiliation advertising, as well as banning adult, alcohol, tobacco, and political ads. Thank you again for your interest." (Doc. # 1-3).

Young Israel expressed its "disappoint[ment]" with the decision and thereafter contacted the agency's

interim CEO to initiate an appeal of the decision. (Doc. # 1-4; Doc. # 1-6). At that point, HART's interim CEO, legal counsel, and communications manager met and concluded that, "based off . . . legal counsel's knowledge of what the menorah meant," the ad was primarily focused on a "religion-based icon" and therefore violated HART's advertising policy. (Doc. # 60-8 at 67:9-13, 70:5-12, 88:6-15). HART's corporate representative testified that while he "assume[d]" that the word Chanukah was a religious term, if the focus of the advertisement "stay[ed] towards the ice skating and the event and the celebration, then we can . . . work within those parameters and still not be violating our [P]olicy." (Doc. # 60-8 at 74:18-75:3).

Accordingly, on December 8, 2020, Rowland, in his role as HART's communications manager, emailed Rabbi Rivkin with "suggested edits" to the print advertisement, including removing the picture of the menorah and all uses of the word "menorah." (Doc. # 1-7). Rabbi Rivkin testified that he found it "offensive" that HART would seek to take out all references to the menorah. (Doc. # 60-4 at 131:4-16, 131:1-5). He told HART that the proposed changes were "not possible to make" because the lighting of the menorah "is a central aspect of the Orthodox Jewish celebration of Chanukah," and he asked HART to run the ad as originally submitted. (Doc. # 1-8). On December 15, 2020, HART formally refused to run the Chanukah on Ice advertisement. (Doc. # 1-9). HART's interim CEO said that this decision was "consistent with prior determinations involving similar advertisement requests under this policy." (*Id.*).

C. Procedural History

Young Israel initiated this case on February 5, 2021, asserting multiple claims of First Amendment free speech and freedom of religion violations, as well as violations of its Fourteenth Amendment equal protection and due process rights. (Doc. # 1). HART filed its answer on March 2, 2021. (Doc. # 17). The case proceeded through discovery. The parties now both move for summary judgment. (Doc. ## 60, 63). The Motions are fully briefed and ripe for review.

II. Legal Standard

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A factual dispute alone is not enough to defeat a properly pled motion for summary judgment; only the existence of a genuine issue of material fact will preclude a grant of summary judgment. *Anderson v. Liberty Lobby*, Inc., 477 U.S. 242, 247-48 (1986).

An issue is genuine if the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Mize v. Jefferson City Bd. of Educ.*, 93 F.3d 739, 742 (11th Cir. 1996) (citing *Hairston v. Gainesville Sun Publ'g Co.*, 9 F.3d 913, 918 (11th Cir. 1993)). A fact is material if it may affect the outcome of the suit under the governing law. *Allen v. Tyson Foods, Inc.*, 121 F.3d 642, 646 (11th Cir. 1997). The moving party bears the initial burden of showing the court, by reference to materials on file, that there are no genuine issues of material fact that should be decided at trial. *Hickson Corp. v. N. Crossarm Co.*, 357 F.3d 1256, 1260 (11th Cir. 2004) (citing *Celotex Corp.*

v. Catrett, 477 U.S. 317, 323 (1986)). "When a moving party has discharged its burden, the non-moving party must then 'go beyond the pleadings,' and by its own affidavits, or by 'depositions, answers to interrogatories, and admissions on file,' designate specific facts showing that there is a genuine issue for trial." *Jeffery v. Sarasota White Sox*, Inc., 64 F.3d 590, 593-94 (11th Cir. 1995) (quoting *Celotex*, 477 U.S. at 324).

If there is a conflict between the parties' allegations or evidence, the non-moving party's evidence is presumed to be true and all reasonable inferences must be drawn in the non-moving party's favor. *Shotz v. City of Plantation*, 344 F.3d 1161, 1164 (11th Cir. 2003). If a reasonable fact finder evaluating the evidence could draw more than one inference from the facts, and if that inference introduces a genuine issue of material fact, the court should not grant summary judgment. *Samples ex rel. Samples v. City of Atlanta*, 846 F.2d 1328, 1330 (11th Cir. 1988). But, if the non-movant's response consists of nothing "more than a repetition of his conclusional allegations," summary judgment is not only proper, but required. *Morris v. Ross*, 663 F.2d 1032, 1034 (11th Cir. 1981).

Finally, the filing of cross-motions for summary judgment does not give rise to any presumption that no genuine issues of material fact exist. Rather, "[c]ross-motions must be considered separately, as each movant bears the burden of establishing that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law." *Shaw Constructors v. ICF Kaiser Eng'rs, Inc.*, 395 F.3d 533, 538-39 (5th Cir. 2004); see also *United States v. Oakley*, 744 F.2d 1553, 1555 (11th Cir. 1984)("Cross-

motions for summary judgment will not, in themselves, warrant the court in granting summary judgment unless one of the parties is entitled to judgment as a matter of law on facts that are not genuinely disputed . . . ." (quotation omitted)).

III. Analysis

Young Israel argues that HART's Advertising Policy is facially unconstitutional in four respects. First, it argues that the Policy violates the First Amendment's Free Speech Clause because it discriminates based on viewpoint, specifically a religious viewpoint. (Doc. # 60 at 1, 12-16). Second, even if the Policy is viewpoint-neutral, Young Israel argues that it violates the Free Speech Clause because it is an unreasonable restriction based on content. (Id. at 1-2, 18-20). Third, Young Israel contends that the Policy is also unconstitutional because it is standardless and arbitrary. (*Id.* at 2, 20-23). Finally, according to Young Israel, the Policy violates the Free Exercise Clause because it singles out religion for disfavored treatment. (*Id.* at 2, 23-25).

For its part, HART argues that it is entitled to summary judgment on all of Young Israel's claims because HART's property is a non-public forum. (Doc. # 63 at 12-16). Furthermore, it contends that non-public forums may reasonably restrict speech, and that HART's Policy is reasonable. (*Id.* at 16-21). Finally, HART claims that it has not arbitrarily or inconsistently applied its Policy. (*Id.* at 21-24).

A. Viewpoint Discrimination

"The First Amendment prohibits the political restriction of speech in simple but definite terms: 'Congress shall make no law . . . abridging the freedom

of speech.' Those same terms, and their guarantee of free speech, now apply to states and municipalities as well as to the federal government." *Otto v. City of Boca Raton*, 981 F.3d 854, 860-61 (11th Cir. 2020) (quoting U.S. Const. amend. I). As the Supreme Court has explained:

> When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant. Viewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.

Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 818, 829 (1995) (internal citations omitted).

The parties dispute whether this Court must make a threshold determination of into which government forum HART's ad space falls.[2] For reasons more fully

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[2] As HART notes, caselaw has identified various types of government forums. *See United States v. Kokinda*, 497 U.S. 720, 726–27 (1990) (explaining the "tripartite framework" for analyzing First Amendment interests with respect to government property and the various levels of scrutiny afforded to each forum (citing *Perry Educ. Ass'n v. Perry Local Educators' Ass'n,* 460 U.S. 37, 45-46 (1983)); *see also Barrett v. Walker Cty. Sch. Dist.*, 872 F.3d 1209, 1224-25 (11th Cir. 2017) (identifying four categories of government fora – the traditional public forum, the designated public forum, the limited public forum, and the nonpublic forum – and explaining that, in earlier Supreme Court precedent, "the term 'nonpublic forum' was synonymous with 'limited public forum'"). HART claims that its property qualifies as a nonpublic forum.

described below, the Court finds a recent decision from the Third Circuit Court of Appeals to be persuasive, and that case held that "no matter what kind of property is at issue, viewpoint discrimination is out of bounds." *Ne. Pa. Freethought Soc'y v. Cty. of Lackawanna Transit Sys.*, 938 F.3d 424, 432 (3d Cir. 2019). Additionally, "even in a non-public forum," as HART claims its property to be, "the law is clearly established that the state cannot engage in viewpoint discrimination — that is, the government cannot discriminate in access to the forum on the basis of the government's opposition to the speaker's viewpoint." *Cook v. Gwinnett Cty. Sch. Dist.*, 414 F.3d 1313, 1321 (11th Cir. 2005).

The Supreme Court has published a trilogy of cases explaining the law on viewpoint discrimination with respect to religion. In the first,

> [A] school district had opened school facilities for use after school hours by community groups for a wide variety of social, civic, and recreational purposes. The district, however, had enacted a formal policy against opening facilities to groups for religious purposes. Invoking its policy, the district rejected a request from a group desiring to show a film series addressing various childrearing questions from a "Christian perspective.". . . [The Supreme Court's] conclusion was unanimous: "It discriminates on the basis of viewpoint to permit school property to be used for the presentation of all views about family issues and childrearing except those dealing with the subject matter from a religious standpoint."

Rosenberger, 515 U.S. at 830 (citing *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 386-90 (1993)).

The Supreme Court revisited this subject just two years after Lamb's Chapel with its decision in Rosenberger. The issue in that case was a university's decision to withhold funding from a student publication that published articles with a religious perspective. *Rosenberger*, 515 U.S. at 823-27. In that case, the University, as HART does here, insisted that its stated guidelines "draw lines based on content, not viewpoint" because it equally denied funding to any "religious activity," which was defined in the relevant guidelines as any activity that "primarily promotes or manifests a particular belie[f] in or about a deity or an ultimate reality." *Id.* at 825, 830. This argument gained traction with the four-justice dissent. Justice Souter wrote that:

> If the Guidelines were written or applied so as to limit only such Christian advocacy and no other evangelical efforts that might compete with it, the discrimination would be based on viewpoint. Bu that is not what the regulation authorizes; it applies to Muslim and Jewish and Buddhist advocacy as well as to Christian. And since it limits funding to activities promoting or manifesting a particular belief not only "in" but "about" a deity or ultimate reality, it applies to agnostics and atheists as well as it does to deists and theists. . . . [The University] simply [denies] funding for hortatory speech that 'primarily promotes or manifests' any view on the merits of religion; they deny funding on the entire subject of religious apologetics. . . . If this

> amounts to viewpoint discrimination, the Court has all but eviscerated the line between viewpoint and content.

Id. at 895-98 (Souter, J., dissenting).

The five-justice majority, however, rejected this argument because it "reflects an insupportable assumption that all debate is bipolar and that antireligious speech is the only response to religious speech." Further, "[t]he dissent's declaration that debate is not skewed so long as multiple voices are silenced is simply wrong; the debate is skewed in multiple ways." *Id.* at 831-32.

While acknowledging that the distinction between viewpoint and content in the context of religion "is not a precise one," the majority concluded that viewpoint discrimination was the proper way to interpret the University's objections to the student publication. The Court determined that the "prohibited [religious] perspective, not the general subject matter, resulted in the refusal to make third-party payments, for the subjects discussed [in the publication] were otherwise within the approved category of publications." *Id.* at 831.

In the years that followed Rosenberger's release, a circuit split developed on the question of "whether speech can be excluded from a limited public forum on the basis of the religious nature of the speech." *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 105-06 (2001). In *Good News Club*, a local private Christian organization for children sought permission to hold the group's weekly afterschool meetings in a school cafeteria. *Id.* at 103. However, the school's community use policy, which prohibited use "by any individual or

organization for religious purposes," foreclosed the group's request. *Id.*

Relying heavily on its prior precedents in *Lamb's Chapel* and *Rosenberger*, the Court held that the exclusion constituted impermissible viewpoint discrimination. *Id.* at 107. The Court explained that the school's policy allowed groups that would promote the moral and character development of children, but it excluded the Club's activities because they were religious in nature. *Id.* at 108. In other words, using Aesop's Fables to teach children moral values or allowing the Boy Scouts to meet to develop a child's character was permissible, but allowing a Christian group to do the same was not allowed. This was impermissible viewpoint discrimination. *Id.* at 108-09. The Court in Good News Club therefore "reaffirm[ed]" its prior holdings and held that "speech discussing otherwise permissible subjects cannot be excluded from a limited public forum on the ground that the subject is discussed from a religious viewpoint." *Id.* at 112.

Here, HART seeks to avoid the implication of this Supreme Court precedent by pointing out that those decisions all involved schools, not public transit. As the parties note in their briefing, two Circuit Courts of Appeal have addressed this Supreme Court trilogy in the context of advertisements on public transit and have reached opposite conclusions.

In 2018, the D.C. Circuit addressed a policy enacted by the transit authority that provides service to the Washington, D.C. metro area ("WMATA") – which policy banned "issue-oriented ads, including political, religious, and advocacy ads." *Archdiocese of Wash. v. Wash. Metro. Area Transit Auth.*, 897 F.3d

314, 318 (D.C. Cir. 2018). There, the D.C. Circuit considered an advertisement submitted by a Catholic archdiocese that depicted a starry night and the silhouettes of three shepherds and sheep on a hill facing a bright shining star high in the sky, along with the words "Find the Perfect Gift." *Id.* at 467. The Court upheld the policy because it regulated subject matter, not viewpoint. *Id.* at 325; *see also Rosenberger*, 515 U.S. at 829-30 (observing a difference between "content discrimination, which may be permissible if it preserves the purposes of that limited forum, and, on the other hand, viewpoint discrimination, which is presumed impermissible when directed against speech otherwise within the forum's limitations").

Conversely, in 2019, the Third Circuit (in a 2-1 opinion), determined that the County of Lackawanna Transit System, which operates the bus transit service in Scranton, Pennsylvania, ran afoul of the First Amendment when it enacted a policy with prohibitions on religious messages. *Ne. Pa. Freethought Soc'y v. Cty. of Lackawanna Transit Sys.*, 938 F.3d 424, 432 (3d Cir. 2019). In *Freethought*, the plaintiff group (an "association of atheists, agnostics, secularists, and skeptics") proposed an ad displaying the word "Atheists" along with the group's name and website on public transit run by the defendant. *Id.* at 428. The Third Circuit in that case expressly rejected the reasoning set forth by its sister court in Archdiocese of Washington. *Id.* at 436-37.[3]

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[3] For a more fulsome description of the facts and holdings in *Archdiocese of Washington* and *Freethought* and the resulting Circuit split, readers may refer to the following law review article. Jonathan P. Rava, Note, *Religious Advertisements*

The Court has carefully read and considered each of these Circuit cases, which are persuasive but not binding upon it. The Eleventh Circuit has not yet published a decision on this topic. In this Court's view, the Third Circuit's approach better conforms to the prevailing Supreme Court caselaw on the issue of religious viewpoint discrimination.[4]

Here, HART's Advertising Policy constitutes viewpoint discrimination. The record demonstrates that HART allowed advertisements for a secular holiday event with ice skating and seasonal food (Doc. # 60-21), but it disallowed an ice-skating event with

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Sparking Debates on Buses: A Circuit Court Split on Viewpoint Versus Content-Based Discrimination, 21 Rutgers J. L. & Religion 502 (2021).

[4] The Court makes this determination on the basis of controlling and published Supreme Court precedents. Still, the Court notes a statement made by Justice Gorsuch, joined by Justice Thomas, that accompanied the Supreme Court's denial of certiorari in the *Archdiocese of Washington* case. That statement made clear that at least a faction of the Court favored the Third Circuit's analysis and, had the Court taken up the case, "a reversal would be warranted for reasons admirably explained by Judge Griffith in his dissent below and by Judge Hardiman in [*Freethought*]." *Archdiocese of Wash. v. Wash. Metro. Area Transit Auth.*, 140 S. Ct. 1198, 1199 (2020) (denying certiorari). As Justice Gorsuch explains it, "[n]o one disputes that, if Macy's had sought to place the same advertisement along with its own website address, [WMATA] would have accepted the business gladly. . . . That is viewpoint discrimination by a governmental entity and a violation of the First Amendment." (*Id.*). Pointing to the Court's precedents in *Lamb's Chapel*, *Rosenberger*, and *Good News Club*, Justice Gorsuch wrote that "this Court has already rejected no-religious-speech policies materially identical to WMATA's on no fewer than three occasions[.] . . . What WMATA did here is no different."). (*Id.*).

seasonal food that was in celebration of Chanukah. Thus, HART's ban on advertisements that "primarily promote a religious faith or religious organization" targets the "specific motivating ideology or the opinion or perspective of the speaker." *See Rosenberger*, 515 U.S. at 829.

The distinction is drawn even more clearly in this case, where HART expressly suggested edits to the print ad that removed all references to and images of the menorah, which both parties agree is considered a Jewish religious symbol. (Doc. # 60-4 at 18:25-19:3; Doc. # 60-8 at 70:5-12). So HART impliedly would have allowed an advertisement of the *exact same event* if presented with secular symbols or emphasizing a secular viewpoint, but it was not allowed if presented with religious symbols or emphasizing a religious viewpoint. The Court therefore sees no difference between these facts and those in *Good News Club*, where a school could invite children to learn "morals and character" in the Boy Scouts, or in some other non-religious fashion, but not in a Bible club. See 533 U.S. at 108.

What's more, as the Third Circuit explained in *Freethought*, the advertisement there related to the subject of religion "writ large." 938 F.3d at 435. "But at its core, its message is one of organizational existence, identity, and outreach. . . . What matters for the viewpoint discrimination inquiry isn't how religious a message is, but whether it communicates a religious (or atheistic) viewpoint on a subject to which the forum is otherwise open." *Id.*

Here, Rabbi Rivkin stated that the synagogue's Chanukah on Ice event was a means of outreach to the community and an expression of Jewish identity. (Doc.

60-2 at 2-3). HART disallowed this statement of organizational existence, identity, and outreach, and yet it allowed outreach messages from Alcoholics Anonymous ("Is Alcohol a Problem? Call Alcoholics Anonymous"), the Ronald McDonald House Charities ("Joy Is One of the Best Gifts You Can Give"), and Florida Healthy Transitions ("We're here to help. You are not alone."). (Doc. # 60-23; Doc. # 60-24; Doc. # 60-40).

HART argues that because its Policy contains a ban on **any** advertisements that "primarily promote a religious faith or religious organization," it is a permissible subject-matter based restriction. *See* (Doc. # 64 at 15 ("HART's policy makes a subject-matter based restriction, not a viewpoint restriction.")). HART also argues that the Supreme Court trilogy of *Lamb's Chapel*, *Rosenberger*, and *Good News Club* is distinguishable because in those cases the religious group sought to address a subject otherwise permitted under the rule or policy and was silenced from expressing their views on that topic through a religious lens. (Doc. # 64 at 15-16). They argue that, here, HART's Policy is limited to "commercial endeavors," and it "prohibits all content-based advertisements that would promote a religion or religious viewpoint." (*Id.* at 16-18). Thus, the Policy "lawfully prohibits the entire subject matter of religion since it only allows commercial advertisements." (*Id.* at 18).

But this argument has been repeatedly rejected by the Supreme Court. *See Byrne v. Rutledge*, 623 F.3d 46, 58 (2d Cir. 2010) ("[The government] contends that because the law bans 'all speech on' religion 'whether positive, negative, or neutral' it is, 'by definition

viewpoint-neutral.' In the context of restrictions on all religious speech, this argument has been expressly considered – and rejected – by the Supreme Court.").

The Court agrees with Young Israel that this argument was precisely the one made by Justice Souter in his dissent in *Rosenberger* and was explicitly rejected by the majority opinion. Even before *Rosenberger*, the Court in *Lamb's Chapel* wrote that:

> The Court of Appeals thought that the application of [the district policy] in this case was viewpoint neutral because it had been, and would be, applied in the same way to all uses of school property for religious purposes. That all religions and all uses for religious purposes are treated alike under [the policy], however, does not answer the critical question whether it discriminates on the basis of viewpoint to permit school property to be used for the presentation of all views about family issues and child rearing except those dealing with the subject matter from a religious standpoint.

Lamb's Chapel, 508 U.S. at 392-93. And in *Good News Club*, the Court explicitly wrote that: "Although in *Rosenberger* there was no prohibition on religion as a subject matter, our holding did not rely on this factor. Instead, we concluded simply that the university's denial of funding to print [the religious student publication] was viewpoint discrimination, just as the school district's refusal to allow Lamb's Chapel to show its films was viewpoint discrimination." *Good News Club*, 533 U.S. at 110; *see also Freethought*, 938 F.3d at 434 (explaining that *Good News Club* "foreclosed the argument that a broad prohibition on

religious speech can validate religious viewpoint discrimination").

In sum, HART's Advertising Policy, both on its face and in its application to this Plaintiff, is a denial of Young Israel's right to free speech under the First Amendment. *See Otto*, 981 F.3d at 864 (while not adopting a per se rule, noting that "there is an argument that [viewpoint discriminatory] regulations are unconstitutional per se") *see also Rosenberger*, 515 U.S. at 837 (writing that "[d]iscrimination against speech because of its message is presumed to be unconstitutional" and, once determining that the University's guidelines were viewpoint discriminatory, therefore holding them unconstitutional); *Good News Club*, 533 U.S. at 107-08 (invalidating the applicable policy as viewpoint discriminatory and not even reaching the issue of whether it was unreasonable in light of the purposes served by the forum).

B. Reasonableness

Even if HART's Advertising Policy were viewpoint neutral, it would still need to be reasonable in light of the purposes of the forum.[5] *Freethought*, 938 F.3d at 437; *see also Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985) ("[A]ccess to a nonpublic forum can be based upon subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral.").

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[5] The parties appear to agree for purposes of this argument that HART property is either a nonpublic forum or a limited public forum. Both are subject to the same restrictions and level of scrutiny.

When it comes to reasonableness, the Supreme Court has recently held that the government "must be able to articulate some sensible basis for distinguishing what may come in from what must stay out." *Minn. Voters All. v. Mansky*, 138 S. Ct. 1876, 1888 (2018). In other words, there must be "objective, workable standards" guiding the regulation's enforcement. *Id.* at 1891. Young Israel argues that HART lacks such workable standards in enforcing the Policy. (Doc. # 60 at 20-23). The Court agrees.

The Eleventh Circuit recently described the *Mansky* decision in this way:

> The Supreme Court has made it clear that even in a nonpublic forum the government must avoid the haphazard and arbitrary enforcement of speech restrictions in order for them to be upheld as reasonable. Thus, for example, in *Minnesota Voters Alliance v. Mansky*, the Supreme Court invalidated a state law prohibiting voters from wearing certain kinds of expressive clothing and accessories inside the polling place. The Minnesota law at issue prohibited voters from wearing any "political badge, political button, or other political insignia." The Court determined that the polling place was a nonpublic forum, that the law did not facially discriminate on the basis of viewpoint, and that it was reasonable for the State to determine that "some forms of advocacy should be excluded from the polling place, to set it aside as 'an island of calm in which voters can peacefully contemplate their choices.'" But the Court determined that the law still failed the reasonableness test because the ban on

> “political” apparel was too indeterminate and haphazardly applied.

Cambridge Christian Sch., Inc. v. Fla. High Sch. Athletic Ass’n, Inc., 942 F.3d 1215, 1243 (11th Cir. 2019) (citations omitted) (holding that plaintiff school plausibly alleged that the speech restriction imposed – a ban on prayer over the loudspeaker at a high school football game – was applied arbitrarily and haphazardly in violation of *Mansky*).

There is no controlling Eleventh Circuit opinion interpreting *Mansky* in the context of a rapid transit service. Again, the Court looks to persuasive guidance from outside this Circuit. This time it turns to a case originating from the Sixth Circuit Court of Appeals, in which the Court applied *Mansky*’s standard to strike down a transit system’s prohibition on “political” speech. *Am. Freedom Def. Initiative v. Suburban Mobility Auth. for Reg’l Transp.* (“*SMART*”), 978 F.3d 481, 498 (6th Cir. 2020).

To begin, the Court agrees with the Sixth Circuit that HART’s prohibition on certain types of advertisements serves “permissible” ends. HART aims to maintain a “safe, welcoming environment” for its passengers without alienating any riders, potential riders, employees, or advertisers. (Doc. # 1-1 at 142; Doc. # 60-18 at 6). *See SMART*, 978 F.3d at 494 (finding it permissible that the SMART transit system sought to minimize the chances of abuse, appearance of favoritism, and risk of imposing upon a captive audience). Nevertheless, HART must adopt “objective, workable standards” to achieve its permissible ends. *See Mansky*, 138 S. Ct. at 1891.

But HART's Policy fails to do so for similar reasons articulated by the Court in *SMART*. First, the word "religious" is unadorned and unexplained in the Policy. This word, like the word "political," has a range of meanings and can be interpreted differently by different people. *See SMART*, 978 F.3d at 494.

And HART admits that, outside of the Policy itself, there is no additional written guidance or training given by HART on how to interpret the Policy. (Doc. # 64 at ¶ 18). As in *SMART*, this lack of guidance "has caused inconsistency in how [HART] agents define it." 978 F.3d at 495.

For example, Rowland testified that whether an ad contains religious symbols would be based on the background knowledge and professional experience of the HART employee applying it. (Doc. # 60-8 at 72:9-12). So, Rowland testified that Macy's would be allowed to run a "holiday-based ad" with the slogan "Perfect Gift Sale" that included certain percentages off items, but if a church ran an ad with the slogan "Find the Perfect Gift" that was meant to promote the church, that "would fall into the primarily promoting a religious organization" prohibition. (Id. at 38-42). Rowland struggled to describe why these two hypothetical advertisements might be treated differently, saying at various times that it would depend on the advertisement's "call to action," whether the advertising client is "known" to the HART employee based on their professional experience, or whether the HART employee perceives the ad's design to focus on religious symbols. (*Id.* at 39-42, 77-78).

Similarly, when presented with the same hypothetical Macy's ad, Laurie Gage, the employee of HART's advertising contractor and the first line of

review for submitted advertisements, stated that "the Young Israel ad clearly had [a] lot of religious wording and imagery, whereas this has Christmas gifts. This is neutral." (Doc. # 60-6 at 24:12-14). In a similar vein, Gage testified that she would forward to HART an advertisement containing Easter eggs because it was "possible" that there is a secular component to Easter. (*Id.* at 80:7-25 (specifically, when asked whether there's a "secular half of Easter," Gage responded that "[a]nything is possible")). If, however, an advertisement said "Easter," that would "maybe" necessitate a conversation with the advertiser and Gage would forward the ad to HART officials. (*Id.* at 81:3-8). But for the Young Israel ad, Gage acknowledged that she denied the request out of hand, without ever sending it along to HART. (*Id.* at 81:19-22).

Nor is there any clarity on how an advertisement could "primarily," as opposed to incidentally, or in some other way, "promote a religious faith or religious organization." HART's corporate representative conceded that, when determining whether an ad was "primarily promoting" a religious faith or organization, he would make that determination on a case-by-case basis, depending on the ad's "design and . . . messaging." (Doc. # 60-8 at 34:18-35:2; *see also Id.* at 47:1-8, 43:20-44:5 (stating that if the advertiser is not a religious organization, then religious symbols might just be artwork and the determination of how to tell the difference between the two is "subjective" and subject to his "professional experience").

Like the *SMART* court, the undersigned will now "[t]urn to process. How should officials decide if an ad is [primarily promoting a religious faith or religious

organization]? Should they limit themselves to the ad's four corners? Or should they consider related content like information on websites?" *SMART*, 978 F.3d at 495. Like the Sixth Circuit, there is no official guidance to answer these questions and the Court again sees inconsistencies.

For example, while HART now claims that it does not review an organization's website to determine whether an ad violates the Policy, it has repeatedly done so in the past, and its contractor testified that she sometimes looked at clients' websites "[i]f time permitted and [she] was curious enough." (Doc. # 60-8 at 93:17-19; Doc. # 60-6 at 73:13-18; Doc. # 60-28; Doc. # 60-39). HART also conceded that "different people in the same roles [could] have different methodologies" for reviewing submitted advertisements' compliance with the Policy. (Doc. # 60-8 at 96:18-20).

Young Israel also proffered evidence[6] that HART had previously rejected an advertisement from St. Joseph's Hospital based on information on the hospital's website that it was "[f]ounded as a mission by the Franciscan Sisters of Allegany," but would accept the ad if the client used the name of its parent company, Baycare. (Doc. # 60-38). HART, however,

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[6] The Court is aware that HART objects to this evidence and others like it, claiming that it is outside the record. The Court notes, however, that these documents, such as internal HART emails, contain HART Bates stamps and were, presumably, produced by HART in discovery. *See Commercial Data Servers, Inc. v. Int'l Bus. Mach. Corp.*, 262 F. Supp. 2d 50, 58 (S.D.N.Y. 2003) ("It is disingenuous and wasteful for [CDS] to object that its own documents are not authenticated").

ran ads from St. Leo University with no such changes.[7] (Doc. # 60-37). HART explains that it permitted these ads because St. Leo is an "institution of higher learning, not a religious organization." (Doc. # 60-18 at 3). What if, for example, a private Catholic girls' school or a preschool affiliated with a church or synagogue wished to advertise on HART? Would it matter if the organization was "primarily" a school or "primarily" a religious organization? Who would make that decision? And what would be their criteria? Would it matter if the school's advertisement contained religious symbols or phrases? If so, which religious symbols or phrases qualify? Without workable, objective standards, the Court does not know the answer to these questions and neither does HART.

In sum, the record evidence establishes that HART's application and enforcement of the Policy is inconsistent and haphazard. *See Cambridge*, 942 F.3d at 1243-44 ("Permitting certain speech on Monday, Tuesday, Wednesday, and Thursday and barring precisely the same message on Friday without any credible explanation of what may have changed is the essence of arbitrary, capricious, and haphazard — and therefore unreasonable — decisionmaking."); *see also Mansky*, 138 S. Ct. at 1891 ("A shirt simply displaying the text of the Second Amendment? Prohibited. But a shirt with the text of the *First* Amendment? It would be allowed."). Under *Mansky*, this violates the First Amendment. As the Sixth Circuit explained:

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[7] According to its website, St. Leo University is "the oldest Catholic institution of higher education in Florida" and was "established in 1889 by the Order of Saint Benedict of Florida." See St. Leo University, About Us, https://www.saintleo.edu/about (last visited Jan. 15, 2022).

> Up to now, SMART has not written down "objective, workable standards" to define the word "political" and guide officials on the steps to take when deciding if specific ads qualify. Officials thus have had to apply the ban on the fly on a "case-by- case basis." But [under *Mansky*] the subjective enforcement of an "indeterminate prohibition" increases the "opportunity for abuse" in its application. The First Amendment favors rules over standards because the former make an administrator's job largely ministerial whereas the latter leave room for the administrator to rely on "impermissible factors." . . . As in Mansky, we do not question that SMART seeks to act in an "evenhanded manner," but it has yet to create the workable standards that it needs for "reasoned application" of its ban.

SMART, 978 F.3d at 497. The same is true here.

IV. Conclusion

All counts in Young Israel's complaint center on the constitutionality of HART's Advertising Policy. *See* (Doc. # 1). Having found that summary judgment can be properly granted in Young Israel's favor because the Policy is viewpoint discriminatory and unreasonable, and therefore in violation of the Free Speech Clause, the Court declines to address arguments in Young Israel's Motion for Summary Judgment relating to the Free Exercise, Equal Protection, or Due Process Clauses.

Finally, the Court is aware that Young Israel has requested both declaratory relief and a permanent injunction. *See* (Doc. # 1). The parties are directed to

confer and, by February 10, 2022, submit proposed joint language for the declaratory judgment and permanent injunction for the Court's consideration. The parties may submit this with their joint final pretrial statement or as a separate document.

Accordingly, it is

ORDERED, ADJUDGED, and **DECREED:**

1) Plaintiff Young Israel of Tampa, Inc.'s Motion for Summary Judgment (Doc. # 60) is **GRANTED.**
2) Defendant HART's Amended Motion for Summary Judgment (Doc. # 63) is **DENIED.**

DONE and **ORDERED** in Chambers in Tampa, Florida, this 20th day of January, 2022.

/s/ Virginia M. Hernandez Covington
VIRGINIA M. HERNANDEZ COVINGTON
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Case No. 8:21-cv-294-VMC-CPT

YOUNG ISRAEL OF TAMPA, INC.,

Plaintiff,

v.

HILLSBOROUGH AREA REGIONAL TRANSIT AUTHORITY,

Defendant.

ORDER

This cause comes before the Court pursuant to the parties' Joint Motion for Entry of Judgment and Extension of Time to File Motion for Fees and Costs (Doc. # 82), filed on March 24, 2022. In this matter, the parties have reached an agreement as to the disposition of this case, except for their differing views on the scope of the permanent injunction. After soliciting written submissions and oral argument at the conference held on March 29, 2022, the Court holds that the injunctive language will be as follows:

> HART, its agents and employees, and all those acting in concert with any of them, are ENJOINED, on a permanent basis, from rejecting any advertisement on the ground that the advertisement primarily promotes a religious faith or religious organization, whether under Section 4(e) of its Advertising

> Policy effective as of December 2, 2013, or in any future advertising policy that HART might adopt and implement.

"In the case of a constitutional violation, injunctive relief must be tailored to fit the nature and extent of the established violation." *Georgia Advoc. Off. v. Jackson*, 4 F.4th 1200, 1209 (11th Cir. 2021) (quotation marks and citation omitted). "In other words, the injunction must be no broader than necessary to remedy the constitutional violation." Id. (quotation marks and citation omitted). The Court's adopted language is tailored to fit the violation because it pertains directly to the language of the Advertising Policy, which was the focus of the Court's prior summary judgment order. And it takes into account the possibility of future HART advertising policies. *See United States v. Paradise*, 480 U.S. 149, 183 (1987) (explaining that courts have a duty to "render a decree which will . . . eliminate the discriminatory effects of the past as well as bar like discrimination in the future").

Further, the Court will extend the time for Young Israel to file a motion for fees and costs. Any such motion shall be filed within 14 days after the expiration of the deadline to appeal or after final resolution of all appeals, whichever is later.

Accordingly, it is now

ORDERED, ADJUDGED, and **DECREED:**

The parties' Joint Motion for Entry of Judgment and Extension of Time to File Motion for Fees and Costs (Doc. # 82) is **GRANTED.** The Court will enter final judgment by separate order.

DONE and **ORDERED** in Chambers in Tampa, Florida, this 27th day of April, 2022.

/s/ Virginia M. Hernandez Covington
VIRGINIA M. HERNANDEZ COVINGTON
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Case No. 8:21-cv-294-VMC-CPT

YOUNG ISRAEL OF TAMPA, INC.,

Plaintiff,

v.

HILLSBOROUGH AREA REGIONAL TRANSIT AUTHORITY,

Defendant.

FINAL JUDGMENT AND PERMANENT INJUNCTION

By previous order, the Court granted Plaintiff's motion for summary judgment and denied Defendant's motion. (Doc. # 72). Following that order, the parties stipulated to entry of judgment on Plaintiff's claim of money damages. In the same stipulation, the claims not addressed in the Court's summary-judgment order were dismissed without prejudice, but may be brought again only if HART successfully appeals the Court's grant of summary judgment or this final judgment.

The Court has granted the parties' Joint Motion for Entry of Judgment (Doc. # 86). The Court therefore enters the following final judgment in favor of Plaintiff Young Israel of Tampa, Inc. ("Young Israel"), and against Defendant Hillsborough Area Regional Transit Authority ("HART"):

The Court **DECLARES** that HART's Advertising Policy, which prohibits advertisements that "primarily promote a religious faith or religious organization," is viewpoint-discriminatory and therefore violates the Free Speech Clause of the First Amendment to the United States Constitution as incorporated against HART through the Fourteenth Amendment of the United States Constitution.

The Court further **DECLARES** that HART's Advertising Policy, which prohibits advertisements that "primarily promote a religious faith or religious organization," is unreasonable for the reasons set forth in the Court's Order and therefore violates the Free Speech Clause of the First Amendment to the United States Constitution as incorporated against HART through the Fourteenth Amendment of the United States Constitution.

The Court further **DECLARES** that HART's application of its Advertising Policy to reject Young Israel's "Chanukah on Ice" advertisement was viewpoint discriminatory and therefore violated Young Israel's rights under the Free Speech Clause of the First Amendment to the United States Constitution as incorporated against HART through the Fourteenth Amendment of the United States Constitution.

The Court further **DECLARES** that HART's application of its Advertising Policy to reject Young Israel's "Chanukah on Ice" advertisement was unreasonable and therefore violated Young Israel's rights under the Free Speech Clause of the First Amendment to the United States Constitution as incorporated against HART through the Fourteenth Amendment of the United States Constitution.

It is **ORDERED, ADJUDGED, and DECREED** that Plaintiff shall recover from Defendant the stipulated amount of $40,000 in money damages, exclusive of costs and attorney's fees. This amount is not subject to the accrual of interest.

Furthermore, HART, its agents and employees, and all those acting in concert with any of them, are **ENJOINED**, on a permanent basis, from rejecting any advertisement on the ground that the advertisement primarily promotes a religious faith or religious organization, whether under Section 4(e) of its Advertising Policy effective as of December 2, 2013, or in any future advertising policy that HART might adopt and implement.

It is hereby **ORDERED** that any motion for attorneys' fees and expenses filed by Young Israel shall be filed within 14 days after the expiration of the deadline to appeal or after final resolution of all appeals, whichever is later.

The Court declines to retain jurisdiction over this action, except to the extent set forth herein. The Clerk shall **CLOSE** the case.

DONE and **ORDERED** in Chambers in Tampa, Florida, this 27th day of April, 2022.

/s/ Virginia M. Hernandez Covington
VIRGINIA M. HERNANDEZ COVINGTON
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE
COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

March 05, 2024

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 22-11787-JJ

Case Style: Young Israel of Tampa, Inc. v. Hillsborough Area Regional Transit Authority

District Court Docket No: 8:21-cv-00294-VMC-CPT

The enclosed order has been entered on petition(s) for rehearing.

See Rule 41, Federal Rules of Appellate Procedure, and Eleventh Circuit Rule 41-1 for information regarding issuance and stay of mandate.

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 22-11787

YOUNG ISRAEL OF TAMPA, INC.,

Plaintiff-Appellee,

versus

HILLSBOROUGH AREA REGIONAL TRANSIT AUTHORITY,

Defendant-Appellant,

ADELEE LE GRAND, et al.,

Defendants.

Appeal from the United States District Court
for the Middle District of Florida
D.C. Docket No. 8:21-cv-00294-VMC-CPT

Order of the Court

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

Before JORDAN, NEWSOM, and GRIMBERG,* Circuit Judges.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. FRAP 35. The Petition for Panel Rehearing also is DENIED. FRAP 40.

*The Honorable Steven D. Grimberg, United States District Judge for the Northern District of Georgia, sitting by designation.

HILLSBOROUGH TRANSIT AUTHORITY POLICY MANUAL

800: MISCELLANEOUS POLICIES
810: ADVERTISING POLICY

810.10 ADVERTISING POLICY

(1) Policy Statement

HART is engaged in commerce as a provider of public transportation services and the advertising space located on its public information pieces) buses, stops or other HART property constitutes a part of this commercial venture and is not intended to be and shall not be considered a public forum. The advertising accepted is intended to be strictly commercial in nature as further defined herein with limited Governmental Entity Public Service Announcements, as that term is defined below, including but not limited to HART's own such announcements. HART's objective in selling advertising on or in its vehicles or property is to maximize advertising revenues to supplement un-funded operating costs, while maximizing transit services revenue by attracting, maintaining and increasing ridership. Maintaining a safe, welcoming environment for all HART passengers is part of HART's primary mission and is essential to maximizing revenues to accomplish that mission. The advertising revenues are secondary to HART's primary mission. HART intends to maximize advertising revenue by establishing a favorable environment to attract a lucrative mix of commercial advertisers. The goal is to maintain the value of HART advertising space by keeping it in good condition and non-controversial at the same time, endeavoring to

ensure that the advertisement is not offensive to HART customers and the community.

(2) Advertising Program and Administration

HART shall select an "Advertising Contractor" responsible for the administration of the HART advertising program consistent with HART's adopted policies and guidelines and its agreement *with* HART. HART shall designate an employee as its "Contract Administrator" to be the primary contact with the Advertising Contractor. The Advertising Contractor shall be the recipient of all advertising requests and shall be the one who initially addresses the application of HART guidelines thereto. Any question or disagreement in that regard shall be referred to the Contract Administrator for resolution. The Contract Administrator shall determine whether the advertisement in question is consistent with these policies and guidelines. Any determination by the Contract Administrator that the adve1tising request is not consistent with these policies and guidelines must be in writing and sent to applicant at the address provided by the applicant. The Contract Administrator's opinion must state the basis for finding the advertisement in question not in compliance, including the policies and guidelines with which the advertisement in question does not comply. If a dispute remains unresolved, appeal may be made to the CEO or Chief Operating Officer of HART or bis/her designee for final resolution. Any request for review must be in writing and must be received within thirty (30) days of any written decisions by the party who's determination is being appealed. Such request must state the basis for the view that the rejection was not consistent with HART guidelines and policies

including identification of the guideline or policy at issue and the nature of the inconsistency. The CEO or his/her designee shall determine whether the handling of the advertisement in question is consistent with the advertising policy and guidelines and shall render an opinion in writing sent to the address of the applicant as provided by the applicant indicating that the advertisement in question is consistent with the guidelines and policies or, if not, the basis for his opinion including the policies and guidelines supporting that denial.

(3) Guidelines

(a) All advertising must meet the guidelines provided herein and shall as at minimum meet those standards governing broadcast and private sector adve1iising with respect to good taste, decency and community standards. That is, the average person applying contemporary community standards must find that the advertisement, as a whole, does not appeal to a prurient interest. The advertisement must not describe, in a patently offensive way, sexual conduct or contain messages or graphic representations pertaining to sexual conduct.

(b) Any advertising, which demeans or disparages an individual or group, is prohibited. In making any such determination the test will be whether the advertisement in question contains material that ridicules or mocks, is abusive or hostile to, or debases the dignity or stature of, an individual or group.

(c) The advertisers and/or any outside Advertising Contractor will indemnify and bold harmless HART from any and all claims brought as a result of the display of an advertisement.

(d) “Commercial Advertisement” shall mean an advertisement dealing with commercial speech which is an expression that proposes a commercial transaction related solely to an economic interest of the speaker and his *or* her audience, but which is intended to influence consumers in their commercial decisions and usually involves advertising products or services for sale.

(e) “Governmental Entity Public Service Announcements” are announcements or information provided by any governmental entity or governmental agency in furtherance of such governmental entities’ or agencies’ functions, objectives and/or public responsibilities. A governmental entity is a state, county or municipality or any agency, department> commission, authority, or board created for the purpose of carrying out any functions of the state, county or municipality or any other entity statutorily created or created pursuant to a statutorily authorized process, such as special districts or the like to carryout, implement or monitor any governmental function whether it be proprietary, regulatory, administrative, educational or otherwise: related to the public health, safety or welfare.

(4) Prohibitions

The following types of advertising are prohibited in and on all vehicles and/or property:

(a) Except as provided with regard to the Tampa Historic Streetcar, adv1ertising of tobacco, alcohol, or related products or activities;

(b) Advertising containing profane language, obscene materials or images of nudity, similar adult themes, activities or products, including, but not

limited to, pornography and any message offensive to the community standards applicable to same;

(c) Advertising containing discriminatory materials and/or messages;

(d) Advertisements for firearms or that contain an image or description of graphic violence, including but not limited to (i) the description of human or animal bodies or body parts, or fetuses, in states of mutilation, dismemberment, decomposition, or disfigurement; and (ii) the depiction of weapons or other implements or devices used in the advertisement in an act or acts of violence or harm to a person or animal.

(e) Advertisements that primarily promote a religious faith or religious organization;

(f) Partisan political advertisements which advocate any political party, or advocate and/or promote any candidate or issue upon which the electorate is scheduled to vote, speech that refers to a specific ballot question, initiative petition, or referendum or seeks to promote the initiation of same;

(g) Advertisements that promote or have any material contained in it, that promotes, encourages or appears to promote or encourage, unlawful or illegal behavior or activities;

(h) Advertisements that propose a commercial transaction that has any material contained in it that is false, misleading or deceptive;

(i) Advertisements, or any material contained therein that promotes or encourages or appears to encourage or promote the use or possession of unlawful or illegal goods or services; and

(j) Advertisements or any material contained therein that is libelous or an infringement of copyright, or is otherwise unlawful or illegal or likely to subject HART to litigation.

(5) Advertising on Behalf of Tampa Historic Streetcar, Inc. (THS)

Advertising on behalf of THS that promotes local economic growth and tourism relating to the regional cigar industry and the regional hospitality industry through alcohol beverage sales, shall be exceptions to the prohibition of tobacco and alcohol advertising, provided that the advertisements meet the requirements in this paragraph, and all other advertising requirements. Alcohol and cigar advertisements for use on THS or associated stops will be considered on a case by case basis by the HART CEO or bis/her designee under this adve1tising policy. Alcohol and cigar advertisements will not be accepted if the images, text and/or messages contained in the advertisements depict or imply underage or otherwise illegal use of the products, depict or imply paraphernalia for use of the products, or depict or imply consumption or other use of these products by any specified or implied person or groups of persons or violate any applicable Federal, State or local government prohibition governing same. All alcohol adve1iising must also display a responsible drinking message.

(6) Non-endorsement

Allowing advertisements does not constitute an endorsement by HART (or any of its partners, such as THS) of any of the products, services or messages so advertised. Advertisements may not contain any

message stating or implying endorsement by HART (or any of its partners) of any of the products, services or messages so advertised, unless authorized in writing and so stated within the advertisements. HART reserves the right in *all* circumstances to require any advertisement to contain a disclaimer indicating that it is not sponsored by, and does not necessarily reflect the views of HART.

(7) Other Restrictions

The HART CEO or his/her designee shall set forth additional restrictions and/or requirements by means of RFP requirements, contract provisions, specifications and otherwise, to include materials utilized, application methods and that reflective materials be integrated at a minimum running horizontally in the mid part of the sides of the buses.

Specific Authority: 120.52(1)(b); 163.568(2)(k), F.S.
Law Implemented: 163.568, FS.

This policy is approved by the HART Board of Directors and is effective on December 2, 2013

Name: Yelena Petit
Title: Clerk of the Board
Signature: /s/ Beth Date: 12/3/13