No. 23-1276

IN THE
Supreme Court of the United States

YOUNG ISRAEL OF TAMPA, INC.,

Petitioner,

v.

HILLSBOROUGH AREA REGIONAL TRANSIT AUTHORITY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF *AMICI CURIAE* CONSTITUTIONAL LAW SCHOLARS IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF *AMICUS CURIAE* 1

BACKGROUND 1

SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. THIS CASE SQUARELY PRESENTS THE QUESTION WHETHER A GOVERNMENT'S BAN ON RELIGIOUS ADVERTISEMENTS IS UNCONSTITUTIONAL VIEWPOINT DISCRIMINATION 5

A. The Circuits Disagree About Whether Public Transit Authorities Can Provide A Forum for Advertisements But Ban Religious Advertisements 5

B. This Case Squarely Presents The Issue of Viewpoint Discrimination For Resolution 8

II. THIS CASE PRESENTS AN ISSUE OF EXCEPTIONAL IMPORTANCE 11

A. This Court Has Held That The Government Cannot Open A Forum To Certain Subjects And Then Prohibit Religious Speech About Those Subjects 11

B. Transit Authorities That Refuse "Religious" Advertisements Discriminate Based On Viewpoint 12

C. The Case Presents A Recurring Issue of Critical Importance 14

TABLE OF CONTENTS—continued

Page

D. The Decision Below Is Wrong Under This This Court's Precedent 20

CONCLUSION 22

APPENDIX—LIST OF *AMICI* 23

TABLE OF AUTHORITIES

CASES Page

Archdiocese of Wash. v. WMATA, 140 S. Ct. 1198 (2020) 4, 7
Archdiocese of Wash. v. WMATA, 897 F.3d 314 (D.C. Cir. 2018) 4, 5, 6
Bronx Household of Faith v. Bd. of Educ., 226 F. Supp. 2d 401 (S.D.N.Y. 2002), *aff'd*, 331 F.3d 342 (2d Cir. 2003) 21
Byrne v. Rutledge, 623 F.3d 46 (2d Cir. 2010) 6
Citizens United v. FEC, 558 U.S. 310 (2010) 10
Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788 (1985) 20
Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326 (1980) 10
DiLoreto v. Downey Unified Sch. Dist. Bd. of Educ., 196 F.3d 958 (9th Cir. 1999) 6
Espinoza v. Mont. Dep't of Rev., 591 U.S. 464 (2020) 16
Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001) 12
Hutto v. Davis, 454 U.S. 370 (1982) 20
Kennedy v. Bremerton Sch. Dist., 597 U.S. 507 (2022) 19
Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384 (1993) 11, 16, 18
Lynch v. Donnelly, 465 U.S. 668 (1984)..... 18
Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988) 20
McDaniel v. Paty, 435 U.S. 618 (1978)..... 18
Minn. Voters All. v. Mansky, 585 U.S. 1 (2018) 8, 20
Mitchell v. Forsyth, 472 U.S. 511 (1985) 8
Mitchell v. Helms, 530 U.S. 793 (2000) 15, 16

TABLE OF AUTHORITIES—continued

Page

N.Y.C. Transit Auth. v. Beazer, 440 U.S. 568 (1979) 8
Nixon v. Fitzgerald, 457 U.S. 731 (1982) 9
Ne. Pa. Freethought Soc'y v. Cnty. of Lackawanna Transit Sys., 938 F.3d 424 (3d Cir. 2019) 4, 6
Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819 (1995) 11, 12, 13, 20
Seattle's Union Gospel Mission v. Woods, 142 S. Ct. 1094 (2022) 18
Shurtleff v. City of Boston, 596 U.S. 243 (2022) 14, 19
Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd., 460 U.S. 533 (1983) 20
Town of Greece v. Galloway, 572 U.S. 565 (2014) 19
United States v. Ballard, 322 U.S. 78 (1944) 21
United States v. Paradise, 480 U.S. 149 (1987) 10

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Richard W. Garnett, *A Quiet Faith? Taxes, Politics, and the Privatization of Religion*, 42 B.C. L. Rev. 771 (2001) 17, 18, 21
Richard W. Garnett, *Religion, Division, and the First Amendment*, 94 Geo. L. J. 1667 (2006) 19
Richard W. Garnett, *The Story of Henry Adams's Soul: Education and the Expression of Associations*, 85 Minn. L. Rev. 1841 (2001) 21

TABLE OF AUTHORITIES—continued

Page

Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105 (2003) 16

Michael W. McConnell, *The New Establishmentarianism*, 75 Chi.-Kent L. Rev. 453 (2000) 17

Michael W. McConnell, *Political and Religious Disestablishment*, 1986 B.Y.U. L. Rev. 405 19

OTHER AUTHORITIES

Peter L. Berger & Richard John Neuhaus, *To Empower People: The Role of Mediating Structures in Public Policy* (Michael Novak, ed. 1977) 17

The Federalist No. 55 (James Madison) 5, 16

Richard John Neuhaus, *Religion in Public Places,* Wash. Times (May 2, 1986) 15

Richard John Neuhaus, *The Naked Public Square: Religion and Democracy in America* (1984) 15

Michael Otterson, Church of Jesus Christ of Latter Day Saints, *Why I Won't Be Seeing the Book of Mormon Musical* (2022), https://newsroom.churchofjesuschrist.org/article/book-of-mormon-musical-column .. 14

George Washington, *Farewell Address, Sept. 19, 1796*, *George Washington: A Collection* (William B. Allen ed., 1988) 16

INTEREST OF *AMICUS CURIAE*[1]

Amici Richard W. Garnett, Michael P. Moreland, and Robert J. Pushaw are scholars of the First Amendment who write and teach about the intersection of the Free Speech Clause, the Free Exercise Clause, and public life. They have a shared interest in the sound development of the law. They have submitted briefs in cases addressing questions under the First Amendment in this Court and in the federal courts of appeals.

BACKGROUND

Amici adopt the background set forth in the Petition, and highlight a number of facts relevant to the Court's decision whether to grant plenary review.

1. Respondent Hillsborough Area Regional Transit Authority ("HART") accepts a wide variety of advertisements on its buses, including for secular public events, secular community gatherings, and secular holiday celebrations. HART, however, has adopted the policy that it will not accept advertisements that "primarily promote a religious faith or religious organization." Petition Appendix ("Pet. App.") 95a. Thus, when Plaintiff Young Israel of Tampa, a Jewish congregation, sought to advertise its annual "Chanukah on Ice" event, HART refused. Pet. App. 8a; see Pet. App. 7a (reproducing "Chanukah on Ice" advertisement submitted to HART). Young Israel sued, highlighting that HART's rejection of the advertisement violated its

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[1] Pursuant to Rule 37.6, no party's counsel authored this brief in whole or in part, and no party, counsel for a party, or person other than *amici curiae* and their counsel made any monetary contribution intended to fund the preparation or submission of this brief. *Amici* provided timely notice to the parties of their intention to file this brief in accordance with Rule 37.2.

rights under the Free Speech and Free Exercise Clauses of the First Amendment.

The district court granted summary judgment for Young Israel, reaching only the free speech grounds. The district court ruled that "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'" and was thus viewpoint discrimination in violation of the First Amendment. Pet. App. 70a (quoting *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995)). In the alternative, the district court ruled that HART's policy violated the First Amendment because it lacks "objective, workable standards" and was therefore not reasonable in light of the purposes of the forum. Pet. App. 80a (quoting *Minn. Voters All. v. Mansky*, 585 U.S. 1, 21 (2018)). The district court entered a permanent injunction against HART, prohibiting it "from rejecting any advertisement on the ground that the advertisement primarily promotes a religious faith or religious organization," whether under its current policy "or in any future advertising policy that HART might adopt and implement." Pet. App. 82a-83a.

2. A panel of the Eleventh Circuit agreed that HART's existing policy against "religious" advertisements is constitutionally "unreasonable because it lacked objective and workable standards." Pet. App. 2a. Nevertheless, the court of appeals did not affirm the district court's judgment; rather, it "affirm[ed] the … grant[] [of] summary judgment," but remanded "the case to the district court to limit the scope of its permanent injunction to HART's current policy." Pet. App. 28a-29a. Under the judgment, as amended, HART would be free to seek to adopt another policy that discriminated against advertisements that

reflected a religious viewpoint. Under the majority's ruling, "HART can continue drafting viewpoint discriminatory policies while also failing to reasonably apply them–perpetually evading review of the ultimate constitutional flaw." Pet. App. 46a-47a (Grimberg, J., concurring).

On this point, the panel acknowledged that it could "see why the district court crafted the permanent injunction the way that it did," given that the district court ruled on the viewpoint discrimination issue. Pet. App. 27a. The panel's refusal to affirm that determination is especially troubling given that two of the panel members concluded that this case involved a clear instance of viewpoint discrimination. Pet. App. 30a (Newsom, J., concurring) ("HART's policy is self-evidently—in fact, bunglingly—viewpoint discriminatory."); Pet. App. 44a (Grimberg, J., concurring) ("I see no way around concluding … that the public transportation system engaged in unconstitutional viewpoint discrimination."). Yet, the panel "declined to address whether HART's policy constitutes impermissible viewpoint discrimination." Pet. App. 27a. Instead, the panel (1) adopted a "more narrow resolution of the case" that limited the relief previously awarded to Young Israel and (2) directed the district court "to limit the scope of its permanent injunction to HART's current policy." Pet. App. 27a-29a.

Young Israel sought rehearing and rehearing en banc, which the Eleventh Circuit denied.

SUMMARY OF ARGUMENT

Review should be granted to decide whether a public transit agency's ban on advertisements that "primarily promote a religious faith or religious organization" violates the First Amendment's prohibition on religious viewpoint discrimination.

First, the question presented has generated an ongoing circuit split recognized not only by the participating circuits but by Justices of this Court. *See* Pet. App. 3a; *Ne. Pa. Freethought Soc'y v. Cnty. of Lackawanna Transit Sys.*, 938 F.3d 424, 434–35 (3d Cir. 2019); *Archdiocese of Wash. v. WMATA*, 897 F.3d 314 (D.C. Cir. 2018); *Archdiocese of Wash. v. WMATA*, 140 S. Ct. 1198 (2020) (Gorsuch, J., respecting the denial of certiorari).

Second, this case squarely presents that question for this Court's review. Petitioner Young Israel has shown in the district court and in the court of appeals, that HART's ban on religious advertisements is unconstitutional viewpoint discrimination. The district court agreed and granted an injunction designed to remedy that specific violation. On appeal, the Eleventh Circuit narrowed the scope of the injunction, which it acknowledged was appropriate to remedy a viewpoint discrimination violation. The fact that Young Israel obtained *some* measure of relief from the Eleventh Circuit is no barrier to review because Young Israel did not prevail on appeal on the issue of viewpoint discrimination.

Third, the issue whether transit authorities can engage in viewpoint discrimination to exclude religious speech is a question of exceptional importance. As Petitioner has shown, at least two-dozen transit authorities have similar bans on "religious" speech, including the nation's largest. These laws promote a "naked public square," one shorn of the varied, meaning-giving, and diverse expressions of religious experience.

Finally, as reflected in this Court's precedent, the Constitution *forbids* viewpoint discrimination that would prohibit religious speech in public life. Instead, the American tradition of religious freedom invites religious people and institutions to be full participants

in the public square. To the Founders, religion was an indispensable source of moral formation. They understood that "Republican government presupposes the existence of . . . sufficient virtue," but does not itself create such virtue. *The Federalist* No. 55 (James Madison). Banishment of religious viewpoints from public life would negate manifold public goods and deprive our civic life of important voices, while simultaneously limiting the scope or religious voices and thus harming religion itself.

ARGUMENT

I. THIS CASE SQUARELY PRESENTS THE QUESTION WHETHER A GOVERNMENT'S BAN ON RELIGIOUS ADVERTISEMENTS IS UNCONSTITUTIONAL VIEWPOINT DISCRIMINATION.

A. The Circuits Disagree About Whether Public Transit Authorities Can Provide A Forum for Advertisements But Ban Religious Advertisements.

Review of the petition is warranted because, as more fully explained by Petitioner, the circuit courts disagree about whether a public transit authority's prohibition on religious advertisements is impermissible viewpoint discrimination under the First Amendment.

On the one hand, the D.C. Circuit has held, over several dissents, that the Washington Metropolitan Transit Authority's policy prohibiting "[a]dvertisements that promote or oppose any religion, religious practice or belief" is consistent with the First Amendment. *Archdiocese of Wash. v. WMATA*, 897 F.3d 314, 320 (D.C. Cir. 2018) (citation omitted). In *WMATA*, the Archdiocese of Washington had sought to advertise the church at Christmastime, placing an ad with the

words "Find the Perfect Gift," a silhouette of three shepherds, and the church's web address, but the transit authority refused the ad because it promoted religion. *Id.* The D.C. Circuit rejected the Archdiocese's argument that WMATA's restrictions on religious advertisements are unconstitutional viewpoint discrimination and instead characterized WMATA's ban as a "subject-matter" or "content-based" restriction that is permissible in a non-public forum. *Id.* at 322, 327.

In stark contrast, the Third Circuit ruled that a substantially similar policy of the County of Lackawanna Transit System ("COLTS") unconstitutionally discriminated on the basis of viewpoint. *Ne. Pa. Freethought Soc'y*, 938 F.3d at 434–35. "COLTS's ban on religious messages in practice operates not to restrict speech to certain subjects but instead to distinguish between those who seek to express secular and religious views *on the same subjects*." *Id.* at 434 (emphasis original) (alteration omitted).

This conflict among the federal courts of appeals further extends to cases involving restrictions on religious viewpoints in other public fora. The Ninth Circuit, for instance, has approved a prohibition on religious advertisements on the outfield fences of a public school's baseball diamond. *DiLoreto v. Downey Unified Sch. Dist. Bd. of Educ.*, 196 F.3d 958, 969 (9th Cir. 1999). In contrast, the Second Circuit, applying this Court's decisions in "*Lamb's Chapel*, *Rosenberger* and *Good News Club*," struck down a Vermont rule restricting religious vanity-plate messages because it was "facially impermissible viewpoint discrimination." *Byrne v. Rutledge*, 623 F.3d 46, 59 (2d Cir. 2010).

This circuit conflict has been acknowledged not only by the circuit courts themselves, but also by two Supreme Court justices. Specifically, when the

Archdiocese of Washington sought certiorari in the *WMATA* case, Justice Gorsuch, joined by Justice Thomas, wrote specially to underscore that the Court's decisions in *Good News Club*, *Rosenberger* and *Lamb's Chapel*, dictated that governmental entities may not adopt "no-religious- speech policies" because they reflected "viewpoint discrimination" in "violation of the First Amendment." *See Archdiocese of Wash. v. WMATA*, 140 S. Ct. 1198 (2020) (Gorsuch, J., respecting the denial of certiorari). Justice Gorsuch noted that "the full Court [was] unable to hear this case," and, "[b]ut for that complication, [the Court's] intervention and a reversal would be warranted . . . ." *Id.* at 1199.

Noting the conflict between the D.C. Circuit in *WMATA* and the Third Circuit in *Freethought*, Justice Gorsuch highlighted that the D.C. Circuit had erred in holding that WMATA's prohibition on religious advertisements was a prohibition on a certain subject matter. "[R]eligion is not just a subject isolated to itself, but often also 'a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered.'" *Id.* (quoting *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 831 (1995)). WMATA's policy ran afoul of the First Amendment by "allow[ing] a subject to be discussed"—in *WMATA*, the ad's subject was Christmas or gift-giving—and then "silenc[ing] religious views on that topic." *Id.*

In sum, review is warranted because the question presented has generated an acknowledged conflict in the federal circuit courts.

B. This Case Squarely Presents The Issue of Viewpoint Discrimination For Resolution.

This case squarely presents the question whether "a public transit agency's ban on advertisements that 'primarily promote a religious faith or religious organization' violates the First Amendment's prohibition on religious viewpoint discrimination." Pet. i.

1. Throughout this litigation, Petitioner Young Israel has consistently shown that HART's ban on religious advertisements amounts to unconstitutional viewpoint discrimination. It made that showing before the district court. See Pet. App. 62a ("Young Israel argues that HART's [policy] . . . discriminates based upon viewpoint, specifically a religious viewpoint"). The district court agreed and enjoined HART from adopting any policy against religious advertisements. Pet. App. 82a-83a. Likewise, the Eleventh Circuit acknowledged that Young Israel asked it to "hold that HART's policy discriminates on the basis of viewpoint." Pet. App. 15a. As such, Young Israel has presented the issue of viewpoint discrimination throughout this litigation.

2. The Eleventh Circuit's focus on the issue of the reasonableness of HART's policy under *Minnesota Voters Alliance v. Mansky*, 585 U.S. 1 (2018), does not pose a barrier to this Court's consideration of the viewpoint-discrimination issue. Specifically, the law is settled that "[t]he failure of the Court of Appeals to address the … issue decided by the District Court does not . . . prevent this Court from reaching the issue." *N.Y.C. Transit Auth. v. Beazer*, 440 U.S. 568, 583 n.24 (1979). That is especially so, where, as here, Young Israel "fully aired" the viewpoint discrimination issue to both the district court and the court of appeals. *Id.*; *see also Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985) (A "purely legal question … is 'appropriate for [the Court's]

immediate resolution' notwithstanding that it was not addressed by the Court of Appeals." (citation omitted)); *Nixon v. Fitzgerald*, 457 U.S. 731, 743 n.23 (1982) (same). Indeed, as Judge Newsom noted, "HART's policy is self-evidently—in fact, bunglingly—viewpoint discriminatory." Pet. App. 30a (Newsom, J., concurring); see also Pet. App. 44a (Grimberg, J., concurring) ("I see no way around concluding, based on the trilogy, that the public transportation system engaged in unconstitutional viewpoint discrimination").

3. The fact that Young Israel obtained *some* measure of relief from the Eleventh Circuit is no barrier to review because Young Israel did not prevail on the question presented.

Before the district court, Young Israel won on its claim of viewpoint discrimination and thus obtained an injunction preventing HART from "rejecting any advertisement on the ground that the advertisement primarily promotes a religious faith or religious organization, whether under [its current policy], or in any future advertising policy that HART might adopt and implement." Pet. App. 82a-83a. On appeal, the Eleventh Circuit curtailed the scope of that relief. Because it "declined to address whether HART's policy constitutes impermissible viewpoint discrimination," Pet. App. 27a, the panel mandated that the permanent injunction "needs to be revised to apply only to HART's current policy," Pet. App. 28a; see Pet. App. 28a-29a ("We remand the case to the district court to limit the scope of its permanent injunction to HART's current policy.").

As such, Young Israel lost in the court of appeals on its claim of viewpoint discrimination. Indeed, the Eleventh Circuit made clear that it was limiting the injunction because its "affirmance" of the district court's "more narrow ruling" "changes the calculus for

the breadth of the injunction." Pet. App. 27a. The Eleventh Circuit thus directed the district court to modify its injunction so that it no longer provided Young Israel with the relief it had obtained to remedy the district court's viewpoint discrimination ruling. As a result, HART, not Young Israel, was the prevailing party on the issue of viewpoint discrimination before the Court of Appeals. *Cf. Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 333 (1980) ("A party who receives *all* that he has sought generally is not aggrieved by the judgment affording the relief and cannot appeal from it." (emphasis added)).

As Young Israel has explained, the normal practice of this Court (and others) has been to consider whether a policy discriminates on the basis of viewpoint *before* considering whether the policy is reasonable in light of the purposes of the forum. See Pet. 25-27. Courts have "not merely the power but the duty to render a decree which will . . . eliminate the discriminatory effects of the past as well as bar like discrimination in the future." *United States v. Paradise*, 480 U.S. 149, 183 (1987) (plurality opinion). The district court awarded relief to Young Israel that would "bar like discrimination in the future." Pet. App. 83a (quoting *Paradise*). By narrowing Young Israel's relief to permit future HART policies that restrict religious advertisements, the Eleventh Circuit, in effect, set aside the district court's holding that the HART policy reflected impermissible viewpoint discrimination that merited a prospective injunction. See *Citizens United v. FEC*, 558 U.S. 310, 375 (2010) (Roberts, C.J., concurring) ("When constitutional questions are 'indispensably necessary' to resolving the case at hand, 'the court must meet and decide them.'") (quoting *Ex parte Randolph,* 20 F. Cas. 242, 254 (No. 11,558) (CC Va. 1833) (Marshall, C.J.)).

In sum, review is warranted because the Petition squarely presents the issue of viewpoint discrimination upon which the circuits have rendered conflicting decisions.

II. THIS CASE PRESENTS AN ISSUE OF EXCEPTIONAL IMPORTANCE.

A. This Court Has Held That The Government Cannot Open A Forum To Certain Subjects And Then Prohibit Religious Speech About Those Subjects.

The Free Speech Clause of the First Amendment prohibits the government from discriminating "against speech on the basis of its viewpoint." *Rosenberger*, 515 U.S. at 829. This Court has decided a trilogy of cases that each made clear that, if government opens a forum to the discussion of particular subjects, it cannot prohibit religious speech about those same subjects.

First, in *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993), a school district allowed community members after-hours use of its facilities for "social, civic, or recreational" purposes but not "religious purposes." *Id.* at 387. A church sought to show a series of video-taped lectures on child-rearing and family values, but the school district denied the request as contrary to its policy. This Court held the denial was unconstitutional viewpoint discrimination, reasoning that the film series "dealt with a subject otherwise permissible …, and its exhibition was denied solely because the series dealt with the subject from a religious standpoint." *Id.* at 394.

In *Rosenberger*, the University of Virginia funded a wide variety of student clubs, but excluded funding for "religious activity," which it "defined as any activity that 'primarily promotes or manifests a particular

belie[f] in or about a deity or an ultimate reality.'" 515 U.S. at 825. The plaintiffs sought funding for a student publication with a Christian perspective. This Court held that the restriction was impermissible viewpoint discrimination because it precluded a religious perspective as to "a variety of subjects [that] may be discussed and considered." *Id.* at 831. While the University argued that religion was merely a subject matter, this Court disagreed: "Religion may be a vast area of inquiry, but it also provides, as it did here, a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered." *Id.*

Finally, *Good News Club v. Milford Central School*, 533 U.S. 98 (2001), involved a school that, like in *Lamb's Chapel*, opened its facilities to the broader community for after-hours use but prohibited use "for religious purposes." 533 U.S. at 102-103. The plaintiffs sought to use the school's facility to host meetings of a private club for religious instruction and Bible study. The government again argued that it was prohibiting only a subject of instruction and not a viewpoint, and this Court, again, reversed because the excluded club "s[ought] to address a subject otherwise permitted under the rule, the teaching of morals and character, from a religious standpoint." *Id.* at 109.

In each case, this Court explained that prohibitions on religious speech discriminated based on viewpoint in violation of the First Amendment. That is because, in each case, secular speech about the same subject matter was allowed into the forum.

B. Transit Authorities That Refuse "Religious" Advertisements Discriminate Based On Viewpoint.

This *trilogy* of cases *(Lamb's Chapel*, *Rosenberger*, and *Good News Club*) confirm that HART's policy is

unlawful viewpoint discrimination. Just as the schools discriminated based on viewpoint by treating religious speech differently, a transit authority impermissibly discriminates based on viewpoint when it accepts secular advertisements but refuses religious ones.

Here, HART's Policy provides that it "intends to maximize advertising revenue by establishing a favorable environment to attract a lucrative mix of commercial advertisers" but then excludes those "[a]dvertisements that *primarily promote* a religious faith or religious organization." Pet. App. 49a, 51a (emphasis added). That action violates the First Amendment because HART rejected Young Israel's advertisement on account of its religious viewpoint. As Judge Grimberg explained, "HART previously had accepted ads for secular holiday events that involved ice skating and seasonal décor." Pet. App. 44a (Grimberg, J., concurring). HART thus *permitted* "advertising on 'a *subject* sure to inspire religious views'—holiday events—'and then suppress[ed] those views' while allowing a secular analogue." *Id.* This is "precisely what HART cannot do" under *Lamb's Chapel*, *Rosenberger* and *Good News Club*. *Id.*

HART's exclusion of advertisements "that primarily promote a religious faith or organization" is no different than the restriction struck down in *Rosenberger*, which prohibited funding for an activity that "*primarily promotes or manifests a particular belie[f]* in or about a deity or an ultimate reality." 515 U.S. at 825 (emphasis added). Under its Policy, HART excluded Young Israel's advertisement asking the community to attend a Chanukah-themed ice-skating event ***not*** because it prohibits advertisements promoting community events, but because the advertisement promotes a religious perspective.

The conclusion that the Policy is viewpoint discrimination is further confirmed by HART's acceptance of advertisements designed to foster outreach to the community by secular groups such as Alcoholics Anonymous, Ronald McDonald House Charities, and Florida Healthy Transitions. Pet. App. 71a. If outreach to the community is permissible under the Policy when offered from a secular perspective, then HART cannot ban the same outreach when it provides a religious perspective or viewpoint. The First Amendment prohibits that viewpoint discrimination. *See Shurtleff v. City of Boston*, 596 U.S. 243, 258 (2022).

HART itself has laid bare its viewpoint discrimination. In the court of appeals, HART defended its Policy by arguing that "an advertisement promoting the sale of tickets to the Broadway show 'The Book of Mormon' is acceptable, while an advertisement for Sunday worship at the Mormon temple is not acceptable." HART CA11 Br. 31. Under HART's view, advertisements for events that *parody* religious belief are permissible, but advertisements that *promote* religious belief are not.[2] HART's position confirms that its Policy discriminates based upon viewpoint.

C. The Case Presents A Recurring Issue of Critical Importance.

As the circuit split reflects, government prohibitions on religious advertisements remain an ongoing feature of twenty-first century American life. Young Israel has identified at least two-dozen transit authorities

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[2] *See* Michael Otterson, Church of Jesus Christ of Latter Day Saints, *Why I Won't Be Seeing the Book of Mormon Musical* (2022), https://newsroom.churchofjesuschrist.org/article/book-of-mormon-musical-column ("While extolling the musical for its originality, most reviewers also make reference to the play's over-the-top blasphemous and offensive language.").

that ban "religious" advertisements, including transit authorities in New York, Chicago and Los Angeles. Pet. 28. These laws promote a "naked public square," one shorn of the varied and sometimes uncomfortable expressions of Americans' religious life. *See generally* Richard John Neuhaus, *The Naked Public Square: Religion and Democracy in America* (1984); *see also* Neuhaus, *Religion in Public Places,* Wash. Times (May 2, 1986) ("A public square that is stripped of all signs of our differences may offend nobody, but it will also be a public square in which nobody feels at home. A naked public square or a homogenized public square is a profoundly undemocratic public square."). The Constitution does not mandate a naked public square; rather, it *forbids* viewpoint restrictions on religious speech in public life.

1. The American tradition of religious freedom invites religious people and institutions to be full participants in public life. A policy barring religious advertisements is contrary to the Founders' view of the role of religion in public life because it would require that religious people mute their core convictions before they can engage in public speech.

The American tradition of religious freedom invites religious people and institutions to be full participants in the public square. *Full* participation means religious people who "take their religion seriously" and "think that their religion should affect the whole of their lives." *Mitchell v. Helms*, 530 U.S. 793, 827–28 (2000) (plurality opinion). Speakers with a religious viewpoint are not required to set aside their religious convictions when they run for office, speak out on the issues of the day, form voluntary associations, or celebrate in public for all to see. The Constitution (i) prohibits "governments from discriminating in the distribution of public benefits based upon religious status or

sincerity," *id.* at 828, and (ii) "protects not just the right to *be* a religious person, holding beliefs inwardly and secretly," but also "the right to *act* on those beliefs outwardly and publicly." *Espinoza v. Mont. Dep't of Rev.*, 591 U.S. 464, 510 (2020) (Gorsuch, J., concurring) (citing cases).

The Founders encouraged public religious expression because they "believed that the public virtues inculcated by religion are a public good." *Lamb's Chapel*, 508 U.S. at 400–01 (Scalia, J., concurring) (citing *Zorach v. Clauson*, 343 U.S. 306, 313–14 (1952) ("When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions.")). They understood that "Republican government presupposes the existence of . . . sufficient virtue," but does not itself create such virtue. *The Federalist* No. 55 (James Madison). To meet our society's need for moral formation, the Founders looked to religion. See Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105, 2195–96 (2003) ("[C]reation of the American republic . . . stimulated concern for religion that would promote republican virtue").

For example, George Washington, in his Farewell Address (written with Alexander Hamilton), identified "Religion and morality" as the "indispensable supports" of "political prosperity." George Washington, *Farewell Address, Sept. 19, 1796*, *George Washington: A Collection* 521 (William B. Allen ed., 1988). President Washington explained that "reason and experience both forbid us to expect that National morality can prevail in exclusion of religious principle." *Id.*

The Founders also recognized that there was a superficial tension between their embrace of religion as

a source of public virtue and the diversity of religious sects in the early republic. "The great solution to the republican problem was to promote public virtue *indirectly*, by protecting freedom of speech, association, and religion, and leaving the nation's communities of belief free to inculcate their ideas of the good life, each in their own way." Michael W. McConnell, *The New Establishmentarianism*, 75 Chi.-Kent L. Rev. 453, 475 (2000).

To secure religious pluralism and the public good of religion, the American tradition of religious freedom welcomes all religious people and institutions as full participants in public life. The government is not permitted to restrict *public* discourse to secular views while banishing religious speech to *private* houses of worship. Banishment of religious viewpoints from the public square would negate manifold public goods while simultaneously harming religion, which "depends on institutions and associations for its transmission." Richard W. Garnett, *A Quiet Faith? Taxes, Politics, and the Privatization of Religion*, 42 B.C. L. Rev. 771, 799 (2001) ("[T]he privatization of faith and its retreat to the sphere assigned to it by the state will likely be accompanied by a similar retreat of authentically religious associations and by the hollowing out of civil society."). Indeed, the danger for civil society is that, if religion is limited by law to a private sphere, religious people and institutions will internalize that lesson and stop serving as society's "mediating" structures. *See* Peter L. Berger & Richard John Neuhaus, *To Empower People: The Role of Mediating Structures in Public Policy* (Michael Novak, ed. 1977).

Viewpoint-discriminatory policies would drive religious "organizations from the public square" and thereby "not just infringe on their rights to freely exercise religion but would greatly impoverish our

Nation's civic and religious life." *Seattle's Union Gospel Mission v. Woods*, 142 S. Ct. 1094, 1096 (2022) (Alito, J., respecting the denial of certiorari). "A free and liberal society, and the goods for which it aims, depend on a busy and crowded public square . . . . The classical liberal hope, remember, is that this kind of competition is more likely than state-sponsored homogenization to nurture civic virtue and produce citizens oriented toward the common good." Garnett, *A Quiet Faith?*, 42 B.C. L. Rev. at 800.

2. Concerns that religious speech may stir controversy cannot justify banishment of religious viewpoints. HART has sought to justify its policy by arguing that advertisements with a religious perspective run too great a risk of "unnecessary controversy," which in turn creates a risk of "alienating any riders, potential riders, employees, or advertisers." HART CA11 Br. 31-32. Simply put, the risk of "unnecessary controversy" does not justify viewpoint discrimination under the First Amendment.

As this Court explained when a similar justification was offered by the school district in *Lamb's Chapel*, it "would be difficult to defend" a fear of "public unrest and even violence … as a reason to deny the presentation of a religious point of view about a subject." 508 U.S. at 395-96; *see also Lynch v. Donnelly*, 465 U.S. 668, 684–85 (1984) (holding that "political divisiveness" could not invalidate inclusion of creche in municipal Christmas display). "That public debate of religious ideas, like any other, may arouse emotion, may incite, may foment religious divisiveness and strife does not rob it of constitutional protection." *McDaniel v. Paty*, 435 U.S. 618, 640 (1978) (Brennan, J., concurring).

Moreover, such concerns are also easily overstated, and, if accepted, would offer a license for the

government to strip the public square of religious groups or viewpoints. In this country, "[r]eligious differences . . . have never generated the civil discord experienced in political conflicts over such issues as the Vietnam War, racial segregation, the Red Scare, unionization, or slavery." Michael W. McConnell, *Political and Religious Disestablishment*, 1986 B.Y.U. L. Rev. 405, 413.

To the contrary, religious expressions in the public square, like ceremonial prayers, "strive for the idea that people of many faiths may be united in a community of tolerance and devotion." *Town of Greece v. Galloway*, 572 U.S. 565, 584 (2014). That is so even when the specific religious expression is sectarian in nature, for "[o]ur tradition assumes that adult citizens, firm in their own beliefs, can tolerate and perhaps appreciate a ceremonial prayer delivered by a person of a different faith." *Id.*; *see also Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 514 (2022) ("The Constitution and the best of our traditions counsel mutual respect and tolerance, not censorship and suppression, for religious and nonreligious views alike.").

The alternative—the approach taken by HART—awards a heckler's veto to the critics of religion. It must be remembered that "efforts to soothe the social irritation of religion-related strife [frequently] have the effect . . . of silencing or excluding from public deliberation those citizens whose views and values are connected to, or emerge from, their religious commitments." Richard W. Garnett, *Religion, Division, and the First Amendment*, 94 Geo. L. J. 1667, 1710 (2006). The Constitution permits no such thing. "Under the Constitution, a government may not treat religious persons, religious organizations, or religious speech as second-class." *Shurtleff*, 596 U.S. at 261 (Kavanaugh, J., concurring).

D. The Decision Below Is Wrong Under This This Court's Precedent.

Although the Eleventh Circuit panel framed its reasoning as avoiding the "broader" issue of viewpoint discrimination, the majority opinion evidences a clear discomfort with the trilogy and the task of applying it correctly. Pet. App. 16a. Ultimately, Judge Newsom took aim at *Rosenberger* itself and the oft-quoted line that the "religious" journalism being excluded there was "a specific premise, a perspective, a standpoint." 515 U.S. at 831. "I'll confess that I'm just not sure that it's accurate to characterize religion as 'a specific premise, a perspective, a standpoint.'" Pet. App. 37a (quoting *Rosenberger*, 515 U.S. at 831).

Insofar as the Eleventh Circuit denied Young Israel relief because it disagreed with the analysis in *Rosenberger* and the trilogy, that is error. "[O]nly this Court may overrule one of its precedents." *Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, 460 U.S. 533, 535 (1983) (per curiam). "[U]nless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be." *Hutto v. Davis*, 454 U.S. 370, 375 (1982) (per curiam).

Moreover, the Eleventh Circuit's alternative approach invites a set of vexing judicial inquiries. A court that applies the "reasonable in light of the purpose[s] [of] the forum" standard and concludes that the restrictions on religious speech are workable would then have to decide whether the religious speech is important enough to warrant protection in the particular context. See *Mansky*, 585 U.S. at 13; *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 809 (1985). This Court and countless others have cautioned against any such inquiry. *See, e.g.*, *Lyng v. Nw.*

Indian Cemetery Protective Ass'n, 485 U.S. 439, 457-58 (1988) ("[Weighing] the value of every religious belief and practice that is said to be threatened by any government program . . . cannot be squared with the Constitution or with our precedents.").

One lower court has described this task as "impossible." *Bronx Household of Faith v. Bd. of Educ.*, 226 F. Supp. 2d 401, 422 (S.D.N.Y. 2002), *aff'd*, 331 F.3d 342 (2d Cir. 2003). That is because "Man's relation to his God was made no concern of the state." *United States v. Ballard*, 322 U.S. 78, 87 (1944). But the Eleventh Circuit is effectively asking district courts to weigh the importance of religious belief and practice.

Deciding when religious speech deserves protection also "subtly reshapes religious consciousness itself" and "molds religion's own sense of what it is." Richard W. Garnett, *A Quiet Faith?*, 42 B.C. L. Rev. at 796. By asking that question, a court "reinforces the belief that religion is a private matter, of private import, for the private sphere." *Id.* at 798–99. And when religious groups predictably "retreat to private life" and accept their "banishment from civil society," they will inevitably "stop functioning as intermediate institutions" that are crucial to the strength and health of their respective communities. *Id.* at 799; *see also* Richard W. Garnett, *The Story of Henry Adams's Soul: Education and the Expression of Associations*, 85 Minn. L. Rev. 1841, 1853 (2001) ("[Religious institutions] are about social structure as much as self-expression.").

CONCLUSION

For these reasons, and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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