No. 23-1276

In the Supreme Court of the United States

YOUNG ISRAEL OF TAMPA, INC., *Petitioner*,
v.
HILLSBOROUGH AREA REGIONAL TRANSIT AUTHORITY

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

BRIEF OF PROTECT THE FIRST FOUNDATION AS *AMICUS CURIAE* SUPPORTING PETITIONER

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QUESTION PRESENTED

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.

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INTRODUCTION AND INTEREST OF *AMICUS CURIAE*[1]

This Court should grant review to clarify the proper scope of injunctive relief in First Amendment cases. District courts have inherent discretion to fashion an equitable remedy appropriate to the scope of the wrong committed. In cases in which constitutional rights have been infringed, however, that discretion is constrained by the responsibility to not only redress the wrong that has occurred, but to also prevent the reoccurrence of such wrongs. The Eleventh Circuit recognized this responsibility and acknowledged the appropriateness of the district court's injunction here given its finding of unconstitutional viewpoint discrimination. Pet. App. 27a. But it erroneously declined to reach viewpoint discrimination itself, instead holding that Respondent's policy was constitutionally unreasonable under *Mansky*, and improperly narrowed the district court's injunction to apply only to the current policy.

The proper scope of injunctive relief to redress First Amendment violations is a key issue for *amicus* Protect the First Foundation (PT1), a nonprofit, nonpartisan organization that advocates for First Amendment rights in all applicable arenas. PT1 advocates on behalf of people from across the ideological spectrum, people of all religions and no

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[1] This brief was not authored in whole or in part by counsel for any party and no person or entity other than *amicus curiae* or its counsel has made a monetary contribution toward the brief's preparation or submission. All parties were notified of the intent to file this brief at least 10 days prior to the deadline.

religion, and people who may not even agree with its views. PT1 is particularly interested in the scope of relief because overly narrow injunctions regarding First Amendment violations multiply the burden of challenging repeated violations, forcing courts and litigants to expend unnecessary time and resources.

Amicus writes to emphasize two main reasons why this case warrants review. First, this Court should clarify that the issue of viewpoint discrimination cannot be constitutionally avoided when it necessarily impacts the scope of injunctive relief. The Eleventh Circuit erred by ruling on a ground that was insufficient to fully remedy Young Israel's injury. Second, this Court should clarify that any injunction seeking to vindicate First Amendment rights *must* include preventive relief. Both the unmatched importance of the rights at stake and the nature of the injunctive remedy as a mechanism for preventing future violations of those rights demand that remedy.

STATEMENT

Young Israel is an Orthodox Jewish synagogue in Tampa, Florida, that sought to advertise its "Chanukah on Ice" celebration with the Hillsborough Area Regional Transit Authority (HART). Pet. App. 6a-7a. HART prohibits advertisements "that primarily promote a religious faith or religious organization." Pet. App. 51a. Pursuant to this policy, HART rejected Young Israel's request because Young Israel's poster included an image of a menorah. Pet. App. 8a.

Young Israel sued, arguing that HART's religious-ad ban was unconstitutional viewpoint discrimination. Pet. App. 9a. The district court granted summary

judgment to Young Israel and issued a permanent injunction enjoining HART "from rejecting any advertisement on the ground that the advertisement primarily promotes a religious faith or religious organization[.]" Pet. App. 82a.

On appeal, the Eleventh Circuit concluded that HART's advertising policy was "constitutionally unreasonable" under *Minnesota Voters Alliance* v. *Mansky*, 585 U.S. 1 (2018), because it "lacked objective and workable standards." Pet App. 16a-17a. But the panel declined to reach the core issue of viewpoint discrimination, deciding that the reasonableness holding "provide[d] a sufficient basis on which to affirm [the] judgment." Pet. App. 16a. And because it refused to reach the viewpoint discrimination question, the panel ordered the district court to narrow the injunction "to apply only to HART's current policy." Pet. App. 28a. Young Israel petitioned for and was denied en banc review. Pet. App. 90a.

SUMMARY

Because the Eleventh Circuit declined to reach the issue of viewpoint discrimination and instead addressed only the "more narrow" issue of *Mansky* reasonableness, the panel narrowed the district court's injunction to apply only to HART's current policy. Pet. App. 28a. That was error because the reasonableness holding was not "sufficient" to review the scope of the district court's injunction and award Young Israel full relief from the constitutional injury it suffered. Indeed, no amount of added objectivity or workability can cure the fundamental First Amendment flaw of Respondent's viewpoint-

discriminatory policy. This Court should grant certiorari to address the issue of viewpoint discrimination and hold that, in cases such as this where the government infringes important First Amendment rights, appropriate relief must include injunctive relief barring the government from engaging in the same conduct in the future. Failure to include such preventive relief should be considered a *per se* abuse of discretion.

This rule is consistent with the approach taken by this Court and is warranted both by the nature of the right at stake and by the nature of the remedy. First Amendment rights are fundamental rights essential to every other form of freedom. As a result, First Amendment rights warrant special protection. Because courts enjoin conduct and do not "strike down" unconstitutional laws, a court cannot adequately protect First Amendment interests without including prohibitions against future illegal conduct. Without such preventive relief, governments would be free to repeat the same constitutional violation in the future. As a result, any resolution of this case that fails to prevent future harm does not adequately vindicate the First Amendment.

The district court's injunction prohibiting HART from engaging in viewpoint discrimination under its current and future advertising policies thus was not an abuse of discretion. Indeed, the panel's decision is too narrow to adequately protect Young Israel from experiencing foreseeable and similar discrimination in the future. This Court should grant review and, as Judge Grimberg would have done, decide the viewpoint discrimination question. Pet. App. 41a.

"Otherwise," HART "can continue drafting viewpoint discriminatory policies while also failing to reasonably apply them—perpetually evading review of the ultimate constitutional flaw." *Ibid.*

ADDITIONAL REASONS FOR GRANTING THE PETITION

This Court should grant certiorari and restore the full scope of the district court's original injunction. Such a holding is necessary to (1) clarify the need for a district court to decide all issues that are necessary to award a party full relief from the actual constitutional injury inflicted and (2) clarify the need to include preventive relief in all injunctions remedying First Amendment violations.

I. Review Is Necessary to Clarify that Constitutional Issues Cannot Be Avoided When They Determine the Appropriate Scope of Relief.

After deciding that HART's advertising policy was constitutionally unreasonable under *Mansky* because it "lacked objective and workable standards," the panel declined to reach the issue of viewpoint discrimination because it believed its holding "provide[d] a sufficient basis on which to affirm [the district court's] judgment." Pet. App. 16a. That conclusion was incorrect and contrary to this Court's precedent.

Courts can decline to reach difficult constitutional questions only if "answering those questions is unnecessary to coherent resolution of the issue presented in the case." *National Aeronautics & Space Admin.* v. *Nelson*, 562 U.S. 134, 166 (2011) (Scalia, J.,

concurring). This Court should clarify that an issue that determines the scope of the relief warranted is "necessary" to that resolution.

Here, a determination of viewpoint discrimination was necessary to support the full relief that would remedy Young Israel's actual injury, not merely some flaw in a policy that is irretrievably defective regardless of any modification. Indeed, the Eleventh Circuit acknowledged that its holding of constitutional unreasonableness was a "more narrow resolution of the case" than if it had considered the issue of viewpoint discrimination. Pet. App. 28a. Because a holding of constitutional unreasonableness applies only to HART's current policy, the Eleventh Circuit concluded that "the permanent injunction need[ed] to be revised" to exclude any prohibition against future conduct. *Ibid.* But in fact, the revised injunction was far too narrow to cure the genuine problem. Thus, by declining to reach the issue of viewpoint discrimination, the Eleventh Circuit inherently "change[d] the calculus for the breadth of the injunction." Pet. App. 27a.

Indeed, the narrowing of the injunction itself shows why addressing the issue of viewpoint discrimination was necessary. If the Eleventh Circuit's legal conclusions cannot support the full scope of the district court's injunction, they are not "sufficient" to support the relief sought by Young Israel. Resolving the viewpoint discrimination issue is thus necessary to cure Young Israel's actual and inevitable future injury.

Nor is the issue of viewpoint discrimination superfluous. Because the "nature of the violation" directly determines the scope of the injunctive relief, the court was wrong to conclude that it could decline to reach the issue of viewpoint discrimination. And the violation here was not the procedural problem with the law's language, but the substantive problem with its core discrimination, no matter how clear that language may be. This error is especially egregious where, as here, a majority of the panel judges acknowledge that the government engaged in viewpoint discrimination. Judge Newsom wrote that "HART's policy is self-evidently *** viewpoint discriminatory," Pet. App. 30a, and Judge Grimberg likewise stated that "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," Pet. App. 45a-46a. But despite the viewpoint discrimination that plainly violates this Court's precedent in *Rosenberger* v. *Rector and Visitors of University of Virginia*, 515 U.S. 819 (1995), *Lamb's Chapel* v. *Center Moriches Union Free School District*, 508 U.S. 384 (1993), and *Good News Club* v. *Milford Cent. Sch.*, 121 S. Ct. 2093 (2001), see Pet. App. 24a-27a, the Eleventh Circuit denied Young Israel the full relief required to remedy such discrimination.

This Court should grant certiorari to clarify that constitutional issues that control the appropriate scope of injunctive relief are necessary to the resolution of the case.

II. Review is Necessary to Clarify That All Injunctions Remedying First Amendment Violations Should Include Preventive Relief.

This Court should also grant certiorari to clarify that it is necessary to include preventive relief in *all* injunctions remedying First Amendment violations.[2] When the government infringes important First Amendment rights, appropriate relief must include injunctive relief barring the government from repeating its unconstitutional conduct in the future. This Court should make clear that failure to include such preventive relief constitutes a *per se* abuse of discretion. Both the crucial nature of the First Amendment rights at stake and the nature of the injunctive remedy require a rule of preventive relief.

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[2] This case does not raise the concerns some members of this Court have expressed regarding facial challenges and standing. See, *e.g.*, *Moody* v. *NetChoice, LLC*, 603 U.S. __, Nos. 22-277, 22-555, 2024 WL 3237685 (July 1, 2024) (THOMAS, J., concurring). HART's policy singles out religious expression for adverse treatment, and no matter how much clearer or more manageable future policies may be, that basic flaw will remain. Hart's counsel has admitted as much, stating that a narrowed injunction allows them to "take another crack at an advertising policy that restricts [religious] advertisements." Pet. 2 (quoting 14-2 C.A. App. 124). There are no lawful applications of such a viewpoint discriminatory law. And unlike many overbreadth challenges, the law is unconstitutional as applied to Young Israel itself as well as to any other religious organization. Thus there is no concern that an injunction will protect third-party rights but not Petitioner's own rights. See *Moody*, 2024 WL 3237685, at *24 (THOMAS, J., concurring).

A. The Importance of First Amendment Rights Warrants Preventive Injunctive Relief.

The rights protected by the First Amendment are "implicit in the concept of ordered liberty" and the "indispensable condition[] of nearly every other form of freedom." *Palko* v. *Connecticut*, 302 U.S. 319, 324-327 (1937), *overruled on other grounds by Benton* v. *Maryland*, 395 U.S. 784 (1969). First Amendment rights thus warrant special protection and courts typically apply special rules to remedies for First Amendment violations.

For example, "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury" sufficient to justify a preliminary injunction. *Elrod* v. *Burns*, 427 U.S. 347, 373 (1976). In fact, most appellate courts hold that when a party shows a "likely violation of his or her First Amendment rights," the "other requirements for obtaining a preliminary injunction" are generally satisfied. *Rodgers* v. *Bryant*, 942 F.3d 451, 456 (8th Cir. 2019) (citation omitted); see also *Pryor* v. *School Dist. No. 1*, 99 F.4th 1243, 1254 (10th Cir. 2024) ("When a movant establishes the first prong of a preliminary injunction based on a First Amendment claim, the remaining prongs generally also weigh in his favor." (citations omitted)); *Junior Sports Mags. Inc.* v. *Bonta*, 80 F.4th 1109, 1120 (9th Cir. 2023) ("[W]hen a party has established likelihood of success on the merits of a constitutional claim—particularly one involving a fundamental right—the remaining *** factors favor enjoining the likely unconstitutional law."). As these cases show, such

rules have long been deemed necessary to adequately protect First Amendment rights.

Requiring injunctive relief against future First Amendment violations when a final determination of a constitutional violation has been made is another such rule, and rests on the same First Amendment foundation. See, *e.g.*, *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 582 U.S. 449, 456-457 (2017) (reversing lower courts' denial of injunctive relief against future First Amendment violations). In short, courts must award preventive injunctive relief to adequately protect against future violations of First Amendment rights.

B. The Purpose of Injunctive Relief Necessitates Including Preventive Relief in Injunctions Seeking to Remedy First Amendment Violations.

The nature of injunctive relief also requires the inclusion of preventive relief against future conduct in remedies for First Amendment violations. First, courts enjoin conduct, not government policy. When federal courts declare a law or government policy unconstitutional, they do not "strike down" the statute. Jonathan F. Mitchell, *The Writ-of-Erasure Fallacy*, 104 Va. L. Rev. 933, 935 (2018). Indeed, "federal courts have no authority to erase a duly enacted law from the statute books." *Id.* at 936. Instead, a court may "enjoin executive officials from taking steps to enforce [the] statute[.]" *Ibid.* In other words, the court enjoins "not the execution of the statute, but the acts of the official, the statute

notwithstanding." *California* v. *Texas*, 593 U.S. 659, 672 (2021) (citation omitted).

Because courts cannot strike down an unconstitutional law or policy, a plaintiff who suffers a constitutional injury now also "faces the threat of future injury" due to an illegal policy "ongoing at the time of suit[.]" *Friends of the Earth, Inc.* v. *Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 185 (2000). To adequately redress such injury, the court's sanction must "abate[] that conduct and prevent[] its recurrence[.]" *Id.* at 186. It is thus necessary for the court to enjoin *future* unconstitutional conduct that might be taken under that statute. Without such preventive relief, a judicial injunction aimed at protecting First Amendment rights would be "so narrow as to invite easy evasion[.]" *McComb* v. *Jacksonville Paper Co.*, 336 U.S. 187, 193 (1949). In fact, Respondent openly admits it will attempt such evasion by "tak[ing] another crack at an advertising policy that restricts [religious] advertisements." Pet. 2 (quoting 14-2 C.A. App. 124). This Court should not allow it to do so. Such an effort only burdens litigants and the courts by giving Respondent multiple bites at a plainly unconstitutional apple. And it establishes a substantial likelihood of future injury that justifies the broader injunction entered by the district court.

The judicial power to provide preventive relief necessarily extends beyond the facts presented to the court and encompasses future unconstitutional conduct. "[W]here legal rights have been invaded, *** federal courts may use any available remedy to make good the wrong done." *Bell* v. *Hood*, 327 U.S. 678, 684 (1946). As scholars have explained, "The preventive

injunction *** has roots deep in the common law. Its purpose is to prevent the defendant from inflicting future injury on the plaintiff." Tracy A. Thomas, *The Prophylactic Remedy: Normative Principles and Definitional Parameters of Broad Injunctive Relief*, 52 Buff. L. Rev. 301, 316 n.66 (2004) (quoting Elaine W. Shoban & William Murray Tabb, *Cases and Problems on Remedies* 246 (2d ed. 1995)). For that reason, too, a proper injunction against First Amendment violations must include not only current but also future conduct.

C. Courts—Including This Court—Routinely Issue and Uphold Injunctions Against Future First Amendment Violations.

The Eleventh Circuit nevertheless narrowed the injunction in this case to cover only Respondent's current policy and not future conduct, even though its exclusion of religious advertising was "self-evidently" and "clear[ly]" viewpoint-discriminatory. Pet. App. 30a (Newsom, J, concurring), 46a (Grimberg, J., concurring). That approach is at odds with the precedents of this Court and the other circuits, which routinely issue injunctions that apply not only to the specific facts of the case, but also to analogous conduct.

For example, in *Trinity Lutheran*, the plaintiff sought an injunction prohibiting repetition of the unconstitutional action as a remedy redressing the violation of its free exercise rights, and the Supreme Court instructed the lower courts to issue that injunction. 582 U.S. at 456-457, 467. This Court articulated the remedy as "injunctive relief prohibiting the [defendant] from discriminating against the

Church on [a religious] basis in future grant applications." *Id.* at 456. That approach certainly would not have permitted the defendant to "take another crack" at excluding religious organizations. See Pet. 2 (quoting 14-2 C.A. App. 124).

Likewise, the Fourth Circuit has recognized that an injunction that merely "ratifie[d] [the plaintiff]'s current course of conduct" and did not encompass analogous action did not adequately protect First Amendment rights. *Ostergren*, 615 F.3d at 288-290 (citation omitted). As a result, the court concluded that the injunction issued by the district court "contradict[ed] [the court's] First Amendment holding" and "ignor[ed]" the full scope of First Amendment rights. *Id.* The Fourth Circuit thus "conclude[d] that the district court abused its discretion by not 'tailor[ing] the scope of the remedy to fit the nature and extent of the constitutional violation.'" *Id.* (quoting *Dayton Bd. of Educ.* v. *Brinkman*, 433 U.S. 406, 420 (1977)).

This Court should thus grant certiorari and hold that an injunction vindicating First Amendment rights must encompass future unconstitutional conduct of the same sort as the conduct giving rise to the injunction. Otherwise, defendants are likely simply to repeat their unconstitutional conduct under a different guise—thereby imposing enormous costs on both the injured party and the judicial system.

CONCLUSION

When important constitutional rights have been infringed, the discretion of the court in fashioning an appropriate remedy is constrained by the court's responsibility to prevent the reoccurrence of such wrongs. In narrowing the scope of the district court's injunction in this case, the Eleventh Circuit failed to appropriately protect Young Israel's First Amendment rights. This Court should grant certiorari to ensure not only that Young Israel's rights are protected, but also that other governments that violate their citizens' First Amendment rights are not allowed to repeat essentially the same constitutional violations with impunity.

Respectfully submitted,

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