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

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Despite Petitioner's protest to the contrary, there is no conflict amongst the Circuits as to the legal question posed by Petitioner. The parties' arguments, as well as the relevant holdings, are consistent. In short – we are all saying the same thing. The state of the law is that a public transit authority may prohibit subject matters on its non-public forum, including religion, so long as it is reasonable in light of the forum and is not viewpoint discrimination. A public transit authority may not prohibit religious advertisements on an otherwise permissible subject matter.

The Petitioner consistently relies on the "Trilogy" of *Rosenberger*, *Lamb's Chapel*, and *Good News* Club and their progeny for the proposition that religious speech may never be regulated because religion is not a subject, but always a viewpoint. However, that is not what any of the cited cases hold. In fact, if any of the cited cases held that regulating religious speech was per se, viewpoint discrimination, the opinions would be very short. Instead, this Court, and each of the circuit courts, go through a detailed analysis of content-based regulations versus viewpoint regulations. Petitioner is asking this Court wade into the muck to rule that religious advertisements are not a subject matter, but are always a viewpoint, no matter the forum, or what the forum allows – in contravention with long standing precedent.

The question presented is:

Whether this Court should upend settled law and rule a transit authority's prohibition of religious advertisements on its non-public forum is per se viewpoint discrimination regardless of the purpose or use of the forum?

RULE 29.6 CORPORATE DISCLOSURE

Hillsborough Area Regional Transit Authority has no parent entities and does not issue stock.

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STATEMENT OF THE CASE

HART's advertising policy prohibits advertisements that "primarily promote a religion or religious organization." *See* Pet. App. at pp. 50a-51a. In early 2013, HART rejected the "#MyJihad" advertisement submitted by the Council on American-Islamic Relations ("CAIR"). Pet. App. at p. 52a. Believing that the advertisement primarily promoted the Islamic religion HART's Board of Directors (the "Board") rejected the advertisement at a meeting on August 5, 2013. *Id.*

CAIR appealed the denial of its advertisement and made a presentation to the Board on September 23, 2013, after which HART's Board agreed to run a CAIR advertisement (but not as originally submitted). Pet. App. 53a. Following HART's running CAIR's advertisements, the American Freedom Defense Initiative ("AFDI") sought to run an advertisement with HART to "counter" CAIR's advertisements alleging that CAIR was not a civil rights organization but a supporter of terrorism. *Id.* Following the CAIR advertisement controversies, HART amended its advertising policy in an attempt to limit its advertising space to strictly commercial advertisements. *Id.* HART's current advertising policy provides, in pertinent part, as follows:

> 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.
>
> **(4) Prohibitions**
>
> The following types of advertising are prohibited in and on all vehicles and/or property:
>
> (e) Advertisements that primarily promote a religious faith or religious organization;

Pet. App. 91a-95a.

On Friday, October 30, 2020, Rabbi Uriel Rivkin of Young Israel of Tampa, an orthodox synagogue, submitted a proposed advertisement to HART's advertising contractor, Vector Media, for its Chanukah on Ice event (that could not be held due to the COVID pandemic) to be placed on HART's buses in late November through December. Pet. App. 7a. The advertisement displayed a prominent menorah and explained the event will feature "lighting of a sculpted Grand Ice Menorah" and dancing around the "Flaming Menorah." *Id.* On Monday, November 2, 2020, Laurie Gage with Vector Media replied that she could not help with placing the advertisement because HART did not allow religious advertisements. Pet. App. 8a. Rabbi Rivkin appealed

the decision to HART's CEO, however, because the advertisement primarily promoted religion and a religious holiday, the advertisement was not accepted by HART. *Id.*

Petitioner filed its initial complaint in this case on February 5, 2021. 1-1 C.A. App. at pp. 22-54 (excluding exhibits).[1] Young Israel's complaint alleged HART discriminated against Young Israel by prohibiting Young Israel from exercising its right of free speech and free exercise of religion. The parties filed cross-motions for summary judgment and on January 26, 2022, the District Court granted Young Israel's Motion for Summary Judgment and denied HART's Amended Motion for Summary Judgment. Pet. App. 48a-81a. The District Judge directed the parties to confer and submit proposed joint language for the declaratory judgment and permanent injunction in accordance with the District Court's ruling in favor of Young Israel for the District Court's consideration. Pet. App. 80a-81a.

On February 10, 2022, pursuant to the District Court's Order, the parties submitted a Notice of Jointly Proposed Declaratory Judgment and Permanent Injunction with differing language regarding the injunction. 14-2 C.A. App. at pp. 103-111. HART proposed an injunction limited to the issue before the District Court – HART's current advertising policy, while Young Israel proposed a broad injunction on all future policies HART could ever enact. *Id.* On March 21, 2022, the District Court issued an Endorsed Order noting the parties had reached an agreement on the proposed language for the declaratory judgment and permanent injunction on all but one point and

[1] To be consistent with the Petition, as used herein "C.A. App." refers to Appellant's appendix filed with the Eleventh Circuit; preceding numerals refer to the relevant volume.

instructed the parties to submit supplemental briefs on this issue. 14-2 C.A. App. at p. 113

On March 24, 2022, the parties submitted their respective Supplemental Briefs supporting their proposed language for the injunction pursuant to an earlier Order of the District Court. 14-2 C.A. App. at pp. 116-125. Following oral argument before the District Court on the proper scope of the injunctive relief on April 27, 2022, the District Court issued its Final Judgment and Permanent Injunction in favor of Young Israel against HART with the District Court's own language siding towards Young Israel's proposed language enjoining HART from enacting a restriction on religious advertisements in "any future advertising policy that HART might adopt and implement." Pet. App. 82a-87a.

HART appealed the Final Judgment to the Eleventh Circuit – conceding HART's policy was viewpoint discriminatory as applied to Young Israel, but primarily[2] appealing the scope of the injunction as overbroad as it applied to "any future advertising policy that HART might adopt and implement."

The Eleventh Circuit affirmed the District Court based on *Minnesota Voters Alliance v. Mansky*, 585 U.S. 1 (2018) "on *Mansky* reasonableness grounds—the district court's alternative and more narrow ruling." Pet. App. 27a. The Circuit Court declined to address whether HART's policy constitutes impermissible viewpoint discrimination on its face, and "held only that the policy is unreasonable under *Mansky.* Our ruling 'means that there is no circumstance in which

[2] HART also appealed the District Court's denial of its Amended Motion for Summary Judgment, which is not an issue before this Court.

this particular ban on [religious] advertising could ever be lawful' 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." Pet. App. 27a. Accordingly, the Circuit Court affirmed in part and remanded the case so the District Court could revise the permanent injunction to apply only to HART's current policy. Pet. App. 28a.

The Eleventh Circuit denied Young Israel's request for rehearing *en banc*. Pet. App. 89a-90a.

REASONS FOR DENYING THE PETITION

I. This Court has Already Articulated the Applicable Legal Standards Which Have Been Consistently Applied by the Circuit Courts.

While the Eleventh Circuit noted a "small circuit split" the split is not over the interpretation or application of this Court's precedent. In the cases Petitioner alleges are conflicting (excluding this case in which the Eleventh Circuit did not rule on this issue), the circuit courts found that the governmental agency at issue did not engage in viewpoint discrimination because it prohibited religion as a subject and did not allow secular advertisements relating to the same subject matter. While reasonable people can disagree on the application of the facts to the law, the law stated in these cases was consistent with the other decisions and the state of the law on this issue. Conversely, the would-be conflicting cases Petitioner relies on applied the same legal tests, but found the governmental agency engaged in viewpoint discrimination because they prohibited religious speech on

otherwise permissible subject matters. The state of the law is clear as this Court's precedent establishes. The government may prohibit subject matters in/on its non-public forum but may not prohibit viewpoints on subject matters that are otherwise allowed in/on that forum. Therefore, Petitioner is not asking this Court settle a circuit split or to reverse an allegedly conflicting ruling to this Court's precedent. Petitioner mischaracterizes *Rosenberger* and is really asking this Court to expand *Rosenberger's* dicta and rule that religion is not a subject, but a "specific premise," standpoint, and viewpoint on every conceivable subject matter and therefore is the only subject that cannot be prohibited in non-public fora.

Petitioner (and its counsel in *DiLoreto*, *infra*) have taken the position that *dicta* in *Rosenberger* was actually a holding that excluding religion as a subject or category from a forum always constitutes viewpoint discrimination. This mischaracterizes *Rosenberger* and, as Judge Newsom explained, is inconsistent with how this Court has treated other forms of core First Amendment expression, such as political speech. Pet. App. at p. 37a. (Newsom, J., concurring). In *Rosenberger*, this Court explained "in determining whether the State is acting to preserve the limits of the forum it has created so that the exclusion of a class of speech is legitimate, we have observed a distinction between, on the one hand, 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 impressible when directed against speech otherwise within the forum's limitations." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829-830 (1995)(citing *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."))

In *Rosenberger*, the University of Virginia's guidelines prohibited payment to a contractor of a student publication – "Wide Awake: A Christian Perspective at the University of Virginia." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 826 (1995). The guidelines identified 11 categories of groups that could have costs paid by the school's activity fund so long as they are "related to the educational purpose of the University of Virginia." *Id.* at 824-825. Included in this group was "student news, information, opinion, entertainment, or academic communications media groups." *Id.* This Court noted that "[r]eligion may be a vast area of inquiry, but it also provides, **as it did here**, a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered." *Id.* at 831 (emphasis added). The University of Virginia allowed reimbursement for all publications related to the educational purposes of the university including the very broad, if not indefinite permissible subjects of "information" and "opinion" – unless, like Wide Awake, they did so from a religious perspective. That is relatively clear viewpoint discrimination (though, even on those facts four (4) Supreme Court Justices dissented). Notably, this Court did not hold that all religion is actually a specific viewpoint – just that "as it did [t]here," Wide Awake's religious publications were viewpoints on subjects otherwise allowed by the University of Virginia. Indeed, had *Rosenberger* held that excluding religion as a subject from a forum always constitutes viewpoint discrimination as Petitioner contends, this Court would not have needed to dive

into what other permissible subjects the University of Virginia allowed.

Similarly, in *Lamb's Chapel*, a school district allowed after hours use of its facilities by community groups for a wide variety of social, civic, and recreational purposes. *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993). Believing that the Establishment Clause required it, the school district enacted a formal policy against opening facilities to groups for religious purposes. Invoking its policy, the school district rejected a request from a group seeking to show a film series addressing various child rearing questions from a religious standpoint *Id.* at 387–389. The school district claimed its ban was "a permissible subject matter exclusion rather than a denial based on viewpoint." *Id.* at 396. This Court disagreed, holding that a film series about family values was "a subject otherwise permissible" under the government's policy; so, rejecting a film "dealing with the subject matter from a religious standpoint" "discriminates on the basis of viewpoint." *Id.* at 393-94. This Court concluded that the school district's policy "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." *Id.* The challenged rule allowed all viewpoints on a broad topic – family issues – except religious viewpoints. The School District had not made a subject matter choice to exclude all "familial" subjects, it allowed the subject – just not from a religious viewpoint. *Lamb's Chapel* does not hold that excluding religion as a subject or category from a forum always constitutes viewpoint discrimination, only when the government excludes religious viewpoints on otherwise permissible subjects.

In *Good News Club* the Millford Central School District enacted a community use policy allowing all district residents to use its property for the very broad subjects of "instruction in any branch of education, learning or the arts" and for "social, civic and recreational meetings and entertainment events, and other uses pertaining to the welfare of the community, provided that such uses shall be nonexclusive and shall be opened to the general public." *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 102 (2001). The local Good News Club, a private Christian organization for children ages 6 to 12 requested permission to hold the Club's weekly afterschool meetings in the school cafeteria. *Id.* at 103. The school district denied the request claiming the community use policy prohibits use "by any individual or organization for religious purposes." *Id.* Relying on *Rosenberg* and *Lamb's Chapel*, this Court held that because school district allowed anyone in the community to use the property for social, civic, recreational, entertainment, and any "other uses pertaining to the welfare of the community" it could not prohibit religious groups from doing the same from a religious viewpoint. This Court stated the Good News Club sought to "address a subject otherwise permitted under the rule"—namely, "the teaching of morals and character" from a religious perspective—excluding it because it was religious was "viewpoint discriminatory." *Id.* at 107-09.

Each of these cases involve a school opening its property up to an immensely broad range of topics, but then prohibiting religious discourse on those otherwise permitted topics. Importantly, each of these cases makes clear that subject matter prohibitions are acceptable, however, viewpoint discrimination – prohibiting religious speech on otherwise permissible subject matters – violates the First Amendment. This

Court has clearly established the legal doctrine to be applied by district and circuit courts. If, as the Petitioner argues, this Court ruled that religious prohibitions were *per se* unlawful, the cases would be very short following *Rosenberger* without the need to determine if the religious speech was related to an otherwise permissible subject matter. The Circuit Courts apply the same legal standard.

II. There is no Circuit Split Concerning the Applicable Law, Only Application of Differing Factual Findings to the Same Legal Standard.

Petitioner alleges there is a "5-3 circuit split over *Rosenberger*'s application to religious speech bans in government fora." *See* Petition at p. i (Question Presented). However, there is no disagreement on the holdings and applicable legal standards amongst the circuits, at best there is a disagreement as to the application of the facts to the same legal standard.

A closer review of the cases comprising the alleged split show there is no circuit split for this Court's consideration. According to Petitioner "Five circuits apply *Rosenberger* to mean that banning speech simply because it is 'religious' is necessarily viewpoint discrimination." Petition at pp. 1-2. However, that is not correct. As set forth above, *Rosenberger* did not hold that religion is *per se* a viewpoint immune from prohibition, nor did any of the cases relied upon by Petitioner. Petitioner alleges that in the allegedly split circuits "there is no such thing as a 'reasonable' ban on religious speech while [] the Ninth, D.C., and Eleventh [circuits] - construe *Rosenberger* to allow governments to ban religious speech as a 'subject matter' if they have 'objective and workable standards' for doing so. App. 3a. According to these circuits, it *is* possible

to craft 'reasonable' bans on religious speech." *See* Petition at p. 2. Conversely, the Petitioner is asking this Court to rule that it is impossible to EVER create reasonable restrictions on religious advertisements.

Petitioner argues that "Five circuits—the Second, Third, Seventh, Eighth, and Tenth—apply *Rosenberger* to hold that banning religious speech on otherwise permissible subjects is necessarily viewpoint discrimination. Three circuits—the Ninth, D.C., and now the Eleventh—construe *Rosenberger* to allow governments to exclude religion as "a permissible content (i.e., subject-matter) regulation" if the government has "objective and workable standards" for doing so. App. 3a." Petition at p. 15. The cases cited in the Petition, however, establish that each of the eight circuits is consistently applying the same legal standard – that banning religious speech on **otherwise permissible subjects** is viewpoint discrimination.

First, the Petition points to the Second Circuit's ruling in *Byrne v. Rutledge*, 623 F.3d 46 (2d Cir. 2010). There, "Vermont freely permit[ed] motorists to use vanity plates for expression on a wide variety of subjects, including one's personal philosophy, beliefs, and values, and similarly allows statements of self-identity, affiliation, and inspiration." *Id.* at 56. The Second Circuit began its analysis by noting "the government enjoys greater latitude in restricting speech in a nonpublic forum and may limit access or content 'based on 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.'" *Id.* at 54 (citing *Cornelius,* 473 U.S. at 806; and *Perry,* 280 F.3d at 169.

"In evaluating viewpoint neutrality within the context of a nonpublic forum, two guiding principles

emerge. First, the government may permissibly restrict content by prohibiting *any* speech on a given topic or subject matter. Second, however, once the government has permitted *some* comment on a particular subject matter or topic, it may not then "regulate speech in ways that favor some viewpoints or ideas at the expense of others." Accordingly, while "a speaker may be excluded from a nonpublic forum if he wishes to address a topic not encompassed within the purpose of the forum ... the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject." *Id.* at 54-55. (Citing *Good News Club v. Milford Central School,* 533 U.S. 98, 106, (2001); *Rosenberger v. Rector & Visitors of Univ. of Va.,* 515 U.S. 819, 829**;** *Perry,* 280 F.3d at 170; *Choose Life Ill., Inc., v. White,* 547 F.3d 853, 865 (7th Cir.2008); *Lamb's Chapel,* 508 U.S. 384, 394, *City Council of L.A. v. Taxpayers for Vincent,* 466 U.S. 789, 804, (1984); *Cornelius,* 473 U.S. at 806, (internal quotations omitted)).

Based on Vermont's policy of allowing vanity plates reflecting anyone's beliefs, perspectives, inspirations – other than religion, the Circuit Court ruled the policy was viewpoint discrimination in violation of the First Amendment. Specifically, the Second Circuit found "[h]aving opened the forum to these "permissible subjects," the question before us is whether Vermont's ban on "any refer[ence] to ... a religion" or "deity" serves to "exclude" speakers who wish to comment upon those otherwise permissible subjects simply because they seek to do so "from a religious viewpoint." We answer in the affirmative. *Id.* at 56. The Circuit Court held "consistent with *Lamb's Chapel*, *Rosenberger*, and *Good News Club,* that Vermont's ban on all religious messages in a forum it has otherwise broadly

opened to comment on a wide variety of subjects, including personal philosophy, affiliation, and belief, serves not to restrict content but instead to discriminate against 'a specific premise, [ ] perspective, [and] standpoint,' and, as such, is impermissible." *Id.* at 59. The Second Circuit's approach is consistent with each of the other cases in Petitioner's alleged "circuit split." The Second Circuit did not hold that religion was always a specific premise, perspective or standpoint which could never be regulated. The Second Circuit simply applied the teachings of *Lamb's Chapel*, *Rosenberger*, and *Good News Club* to its specific facts and found that because Vermont allowed such a vast array of topics on its license plates, the state could not then close its forum to religious perspectives on the same topics.

Similarly, in *Freethought* the Third Circuit followed the Second Circuit's analysis above and applied the same legal questions to the specific facts of its case. The Third Circuit noted that "not every public space is Hyde Park, so a government may sometimes impose content or speaker limitations that protect the use of its property." *Ne. Pennsylvania Freethought Soc'y v. Cnty. of Lackawanna Transit Sys.*, 938 F.3d 424, 432 (3d Cir. 2019)(c*iting Mansky*, 585 U.S. at 11-12). However, viewpoint discrimination does not "aim[] at an entire subject, it 'targets ... particular views taken by speakers'" and that, conversely, violates the First Amendment. So, in any forum, "[t]he 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." *Id.* at 432 (quoting *Rosenberger*, 515 U.S. at 829; and citing *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 111–12 (2001)).

In *Freethought*, the ad at issue "was meant to communicate to believers and atheists alike that 'a local organization for atheists exists.'" Again, the Third Circuit applied the same set of rules and found that the transit authority (COLTS) would not prohibit secular associations from advertising their "organizational existence, identity and outreach" and, therefore, could not prohibit a religious organization from doing the same exact thing. *Id.* at 434-435. Again, the Third Circuit did not rule that religion is such an all-encompassing topic that regulating religious advertisements was never allowed. Quite to the contrary, the court found "[w]hat 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.* at 435 (emphasis added).

As stated in the Petition, "The Seventh Circuit agrees." *See* Petition at p.17. "In *Grossbaum v. Indianapolis-Marion County Building Authority*, 63 F.3d 581, 590 (7th Cir. 1995), the government adopted a policy allowing private groups to erect seasonal displays in the City-County Building but prohibiting displays that were religious—and on that basis rejected an Orthodox Jewish group's request to display a Chanukah menorah." *Id.* In *Grossbaum*, the parties stipulated that the lobby was a nonpublic forum so "the district court followed the analysis for evaluating access to nonpublic forums under the Free Speech Clause set forth in *Lamb's Chapel v. Center Moriches Union Free School District,* 508 U.S. 384 (1993). Under that approach, discrimination on the basis of subject matter was permissible, but discrimination on the basis of viewpoint was not." *Grossbaum*, 63 F.3d 581, 583.

Again, the Seventh Circuit applied the same legal analysis to the specific facts of the case. There, the Board of the Indianapolis-Marion County Building Authority unanimously adopted a policy prohibiting religious displays in the City-County building's lobby, though the policy allowed all other seasonal displays. *Id.* at 589. At a meeting following the adoption of the policy, the Board was asked to interpret the policy and "decided that a Christmas tree could be put in the lobby, consistent with the Policy as previously adopted, because it was secular in nature. *Id.* However, when a Jewish group sought to display a menorah in the lobby, the Board rejected the request because it was religious in nature. *Id.* at 592. Thus, the "Policy selectively allows private access for secular holiday displays, while excluding access for all private holiday displays expressing a religious viewpoint." *Id.* at fn.12. Accordingly, the Seventh Circuit concluded "that, based on the Policy as it was written, and based on the Building Authority's practice of granting permission to use the lobby both before and after the enactment of the Policy, the Policy's prohibition can be characterized only as one based on seasonal displays in the City–County Building that express a religious perspective on the season." *Id.* at 589. Thus, the Seventh Circuit held that "the prohibition of the menorah's message because of its religious perspective was unconstitutional under the First Amendment's Free Speech Clause. *Id.* at 592. Again, the circuit court applied the same analysis and correctly determined that if a Christmas tree is allowed as a seasonal display, the Board could not prohibit a menorah as a "religious" seasonal display.

In Petitioner's own words, [t]he Eighth and Tenth Circuits also concur." *See* Petition at p. 17. As alleged in the Petition,

> [i]n *Good News/Good Sports Club v. School District of City of Ladue*, 28 F.3d 1501, 1506 (8th Cir. 1994), the court invalidated a school district's policy of allowing the Boy Scouts to use its facilities for "speech relating to moral character and youth development," but prohibiting a religious club from addressing similar topics. Citing *Lamb's Chapel*, the court held that this was "viewpoint discrimination because it denies the Club access based on the Club's religious perspective on **otherwise includible subject matter**." *Id.* at 1507. Similarly, the Tenth Circuit has recognized that "problems arise when the government allows *some* private speech on [its] property" but excludes religion. *Summum v. Callaghan*, 130 F.3d 906, 918 (10th Cir. 1997). "If, for example, the government permits secular displays on a nonpublic forum, it cannot ban displays discussing **otherwise permissible topics** from a religious perspective." *Ibid.*; see also *American Freedom Def. Initiative v. Suburban Mobility Auth. for Reg'l Transport*, 978 F.3d 481, 499 (6th Cir. 2020) ("viewpoint discrimination exists even when the government does not target a narrow view on a narrow subject and instead enacts a more general restriction—such as a ban on all 'religious' speech")

See Petition at pp. 17-18 (emphasis added).

Thus, in Petitioner's own words these cases also applied the same legal standard to the specific facts of their cases. These cases did not hold that religion is a specific viewpoint impossible to regulate, but that because the government agency at issue allowed

speech on specific (or broad array of) subjects, it is viewpoint discrimination to prohibit religious speech on otherwise permissible subjects. The law is clear and is consistently applied in the allegedly conflicting cases cited by Petitioner.

Similar to the five Circuit Courts Petitioner alleges are in favor with Petitioner's position, the allegedly conflicting cases from the Ninth, D.C., and now Eleventh Circuits which with Petitioner takes issue apply the same laws to their facts but came to different conclusions.

In *DiLoreto v. Downey Unified School District Board of Education*, 196 F.3d 958 (9th Cir. 1999) a public school solicited advertisements from local businesses to place on its baseball field fence to raise money through its Booster Club. *Id.* at 962. The school district refused to post an ad listing the Ten Commandments to avoid possible disruptions, controversies, and litigation expenses that it could cause. *Id.* at 963. The Ninth Circuit upheld the school district's decision. The court specifically rejected the view submitted by *amicus curiae*, The Becket Fund for Religious Liberty's – counsel for the Petitioner – "that excluding religion as a subject or category from a forum always constitutes viewpoint discrimination. This argument mischaracterizes the holding in *Rosenberger*…" *Id.* at 969. Instead, it held that "the District's decision to exclude ads on certain subjects, including religion, was reasonable "given the District's concerns regarding disruption and controversy." *Id.* The court then stated that "[a]lthough the District's decision not to post the ad was reasonable in light of the purpose served by the forum, it may still violate the First Amendment if it discriminates on the basis of viewpoint, rather than content." *Id.* Applying the same legal analysis as

set forth above, the Ninth Circuit ruled that "Unlike the other signs that were posted on the fence, Mr. DiLoreto's sign does not advertise, or even mention, a business. **Mr. DiLoreto's ad was not a statement addressing otherwise permissible subjects from a religious perspective**…We conclude that the District's decision not to post Mr. DiLoreto's sign was pursuant to a permissible, content-based limitation on the forum, and not viewpoint discrimination. *Id.* (Emphasis added).

Similarly, the D.C. Circuit conducted the same analysis in *Archdiocese of Washington v. WMATA*, 897 F.3d 314, 318-320 (D.C. Cir. 2018). There, the public transit authority prohibited ads that "promote or oppose any religion, religious practice or belief." *Id.* at 318-319. Accordingly, the transit authority rejected an ad submitted by the Archdiocese of Washington during Advent, which depicted shepherds, a star, and the words "Find the Perfect Gift." *Id.* at 319-320. Once again, the allegedly conflicting Circuit Court correctly stated the same precedents and legal analysis as its sister Courts. "The precedents from our sister circuits on which the Archdiocese relies do not disturb this understanding of the trio of Supreme Court cases. …[T]hese cases underscore that precedent requires an evaluation of the forum the government has created in order to determine whether a challenged regulation discriminates on the basis of viewpoint, and are an application of that analysis, rather than an affirmation of the principle that religion as a subject may never be banned in a non-public forum." *Id.* at 327. In affirming denial of a preliminary injunction, the Circuit Court noted its "holding thus accords with WMATA's view that the government may in a non-public forum it has established for its advertising space proscribe religion as a subject matter consistent with the Supreme

Court's precedent. This view also accords with that of the Ninth Circuit, which has held that *Rosenberger* permits a school district seeking to avoid "disruption" to proscribe display of religious messages in a non-public forum reserved for commercial messages. *See DiLoreto v. Downey Unified School Dist.*, 196 F.3d 958, 967–70 (9th Cir. 1999).

As set forth above, "[t]he other circuit cases [do not assist the Petitioner] because they do not construe *Rosenberger* but apply it to invalidate as viewpoint discriminatory government policies that sought to exclude religious viewpoints on otherwise includable topics in a non-public forum." *Id.* at 328 (examining *Grossbaum v. Indianapolis-Marion County Bldg. Auth.*, 63 F.3d 581, 588 (7th Cir. 1995), *Good News/ Good Sports Club v. School Dist. of Cty. of Ladue*, 28 F.3d 1501, 1506 (8th Cir. 1994); and *Summum v. Callaghan*, 130 F.3d 906, 918 (10th Cir. 1997).

The D.C. Circuit's concurring opinion noted "the Supreme Court has repeatedly held that the government may categorically limit the subject matter of private speech in nonpublic forums, provided the limitation is reasonably related to the forum's purposes and, as with restrictions on unprotected speech, not a cover for suppressing viewpoints with which the government disagrees." *Id.* at 336 (citations and quotations omitted). The concurring opinion found that WMATA's policy "fits comfortably within this longstanding doctrinal framework. WMATA prohibits '[a]dvertisements that *promote or oppose* any religion, religious practice or belief." J.A. 209 (emphasis added). Guideline 12 is thus a categorical subject-matter restriction by its own terms: It prohibits any advertisement whatsoever on the subject of religious or anti-religious advocacy, whether favoring or

opposing religion in general, or any particular religion, belief, or practice…It does not take sides; it restricts all speech on the topic equally, without discriminating within the defined category." *Id.* at 337 (citations omitted) (Wilkins Concurring).

Just as each of these allegedly conflicting cases did, the Eleventh Circuit correctly analyzed the "Trilogy" and applied it to the facts of the case, but despite Petitioner's encouragement (as its counsel had encouraged the Ninth Circuit) the Circuit Court would not go so far as to rule that *Rosenberger* stands for the proposition "that excluding religion as a subject or category from a forum always constitutes viewpoint discrimination [as t]his argument mischaracterizes the holding in *Rosenberger*…" *See DiLorenzo* 196 F. 3d. at 969. In fact, far from "exacerbating" any alleged conflict, the Eleventh Circuit "declined to address whether HART's policy constitutes impermissible viewpoint discrimination and have held only that the policy is unreasonable under *Mansky.*" Pet. App. at p. 27a. The Court continued to explain its "ruling 'means that there is no circumstance in which *this particular* ban on [religious] advertising could ever be lawful,' 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." *Id.* (citations omitted).

Petitioner argues that Judge Newsom's concurring opinion from the Eleventh Circuit "openly questioned whether *Rosenberger* is 'accurate,' offering his criticism of *Rosenberger* as the reason for declining to find viewpoint discrimination here [and t[hat reasoning, left unchecked, invites other courts to disregard *Rosenberger*, too." *See* Pet. at p. 3. That is not a fair

characterization of Judge Newsom's concurrence. First, despite Petitioner's mischaracterization of *Rosenberger*, Judge Newsome was not questioning the accuracy of *Rosenberger*'s holding, but the *dicta* when he wrote "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. at p. 37a. Religion "as it [was in *Rosenberger*]" can be "a specific premise, a perspective, a standpoint" *Rosenberger* 515 U.S. at 831, however it is not accurate for Petitioner to claim that religion is ALWAYS a viewpoint on every single subject matter. As Judge Newsom summarized "[h]owever 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." Pet. App. at p. 39a. What truly matters is whether the government agency at issue prohibits religious messages on otherwise permissible subjects.

Ultimately, there is no conflict amongst the Circuit Courts for this Court to clear up. Petitioner is blatantly asking this Court to change its prior precedent and take the extreme view – that religion is an all-encompassing viewpoint on every possible subject in the world and therefore may never be restricted. That is not the correct state of the law, and this Court should not take such an extreme position and should deny certiorari.

III. Young Israel's Remedy was Appropriate.

Despite partially remanding the case to the District Court, following the Eleventh Circuit's ruling HART will still be permanently enjoined from enforcing the prohibition of religious advertisements in its current advertising policy. As the Circuit Court noted, "the injunction 'must be no broader than necessary to remedy the constitutional violation.'" Pet. App. 27a

(quoting *Newman v. Ala.*, 683 F.2d 1312, 1319 (11th Cir. 1982)). HART's constitutional violation was enforcing its policy against Young Israel's request to run an advertisement on an otherwise permissible subject from a religious perspective. HART can never enforce this policy again. Young Israel's remedy is appropriate.

According to Petitioner, the Eleventh Circuit "directed the district court to 'limit the scope of its permanent injunction,' App. 29a, so that HART can 'take another crack at an advertising policy that restricts [religious] advertisements,' 14-2 C.A. App. 124." *See* Pet. at p. 22. Petitioner (repeatedly) relies on an out-of-context sentence from an email that is not properly in the record to make it appear to this Court (and each below) that HART's counsel has told Petitioner it intends to immediately draft a new advertising policy barring religious advertisements to evade the effect of the injunction. *See* 14-2 C.A. App. at p. 124 (email is "on file with counsel"). This is not true. While this email is not in properly in the record, the context of Petitioner's favorite soundbite is important. While discussing the different proposed injunctions to be submitted to the District Court counsel for HART stated:

> We agree that HART is enjoined from rejecting any religious advertisement based on Section 4(e) of the policy. There is currently no other basis for HART to reject a religious advertisement and, accordingly, HART will not be able, nor will it try, to do so. However, this case was about HART's current policy. There is a chance in the future that HART's Board may want to take another crack at an advertising policy that restricts advertisements, including religious advertisements,

> under certain circumstances that may very well be constitutional (or at least they may try). If they do, they may be sued again and who knows what the result will be. However, we believe that even attempting to revise the policy under your proposed language would be in contempt of this Order and we cannot agree to hogtie future HART boards from trying to do so and we don't believe that is what this case was about. Keep in mind that any future attempts to amend HART's policy would be discussed over multiple meetings open to the public. I hope that makes sense and is workable for Young Israel.

HART's counsel was not intimating that HART's Board would immediately (or any time soon, if ever) create a new advertising policy. HART was merely preserving its right to try to craft a constitutional advertisement policy without the risk of being in contempt of the injunction for merely attempting to do so. Once remanded, the injunction will sufficiently protect Petitioner and any other religious entity seeking to advertise on HART's non-public fora.

Petitioner is not seeking a more robust injunction to protect it from future constitutional violations. Petitioner wants this Court to change the law. For example, Petitioner claims this Court should grant certiorari on this issue of "exceptional importance" as there are a number of transit authorities that prohibit religious advertisements. *See* Pet. at p. 28. This case is not about those transit authorities. This case would only impact those other transit authorities if this Court changes the law and rules, contrary to prior precedent, that religion is not a subject matter, but is a viewpoint on all possible subjects, as a matter of law.

Otherwise, simply ruling that HART's policy was viewpoint discrimination because HART allowed advertisements on permissible subjects, but not from a religious viewpoint does nothing for any other cases or transit authorities. The law is the same – a transit authority can prohibit certain subjects from its nonpublic forum but cannot prohibit different (religious) viewpoints on those otherwise permissible subjects.

CONCLUSION

There is no actual conflict amongst the circuits. In each of the circuit court cases Petitioner raises, after applying the same legal standards each court pointed out that the prohibitions at issue prevented groups seeking to address a subject otherwise permitted under the rule in a nonsecular way and the exclusion thereof is viewpoint discriminatory. The Court should deny the Petition.

Respectfully submitted,

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