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

REPLY BRIEF FOR PETITIONERS

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INTRODUCTION

"Deny the split" is a common BIO tactic, but denying the split touted in your own briefing below takes chutzpah.

Throughout this litigation, HART urged the lower courts to recognize the split between the Third and D.C. Circuits over whether transit systems can ban religious ads. The heading of its Eleventh Circuit brief blared: "**There is Currently a Split Between the Third Circuit and the D.C. Circuit Regarding Whether Public Transit Authorities (Nonpublic Forums) Can Exclude Religious Speech From Advertisements.**" HART said the Third Circuit "expressly disagreed with its 'sister court,'" the D.C. Circuit. And it urged the panel to reject "the Third Circuit's incorrect analysis" and "join the D.C. Circuit" instead.

Now that the panel did so, HART pretends the split doesn't exist. But the split has been recognized not just by HART but by the courts below, other circuits, and Justices of this Court—who said it "warrant[s]" this Court's "intervention." *Archdiocese of Washington* v. *WMATA*, 140 S. Ct. 1198, 1199 (2020) (Gorsuch, J., statement respecting denial of certiorari).

Alternatively, HART claims the split isn't implicated here because the panel "declined to address" viewpoint discrimination and instead held HART's current policy unreasonable. But HART doesn't dispute that this ruling "change[d] the calculus for the breadth of the injunction" and deprived Young Israel of the relief it would have received under a finding of viewpoint discrimination. Nor does it dispute that this ruling gives HART freedom to "take another crack" at

a policy restricting religious ads. That places the court below on the wrong side of the now 5-3 split over *Rosenberger*.

Finally, HART doesn't dispute that over two dozen transit systems covering tens of millions of Americans ban religious ads. These bans stifle religious speech and are flagrantly unconstitutional. Yet local governments continue imposing these and similar bans in other fora, and lower courts continue refusing to invalidate them under *Rosenberger*. As the amicus briefs of religious organizations, scholars, and twenty-six states attest, this is an exceptionally important issue necessitating this Court's review.

ARGUMENT

I. The decision below deepens a recognized split over religious viewpoint discrimination.

Circuits are split 5-3 over whether *Rosenberger* allows government fora to exclude speech on otherwise permissible subjects because the speech is "religious." Pet.14-23. Five circuits take *Rosenberger* to mean what it says: "discriminating against religious speech [i]s discriminating on the basis of viewpoint." *Rosenberger* v. *Rector and Visitors of Univ. of Virginia*, 515 U.S. 819, 832 (1995). Three circuits hold that a forum may ban all religious speech as a "subject" if it has "workable standards" for doing so. Pet.10-13. This split has produced conflicting results in the precise context at issue here: the Third Circuit struck down a transit system's ban on religious ads as viewpoint discriminatory (*Freethought*), while the D.C. Circuit (*WMATA*) and panel below refused to do the same. HART's efforts to minimize this split are unpersuasive.

1. HART first claims "[t]here is no Circuit Split." BIO.10. But this is the opposite of what HART told the courts below: "there is clearly a split among the circuits on this precise issue." C.A. Reply Br.7. Specifically, HART told the district court that the Third Circuit in *Freethought* "expressly disagreed with its 'sister court' – the [D.C. Circuit]" in *WMATA*. 14-1 C.A. App.72-73. It then told the panel, "There is Currently a Split Between the Third Circuit and the D.C. Circuit," and urged the panel to reject "the Third Circuit's incorrect analysis" and "join the D.C. Circuit." C.A. Br.22-23 (emphasis omitted).

Unsurprisingly, both courts below recognized the split. As the district court said: "The Third Circuit in [*Freethought*] expressly rejected the reasoning set forth by its sister court in [*WMATA*]," "resulting" in a "Circuit split." App.68a & n.3. Likewise, all three Eleventh Circuit panelists acknowledged the "circuit split." App.3a (panel opinion); App.36a (Judge Newsom: Third and D.C. Circuits "read the [*Rosenberger*] trilogy differently"); App.43a (Judge Grimberg: Third and D.C. Circuits reached "opposing results").

The Third Circuit, too, said, "We recognize that [our] holding diverges from * * * the D.C. Circuit," but "we respectfully disagree with our sister court." *Northeastern Pa. Freethought Soc'y* v. *County of Lackawanna Transit Sys.*, 938 F.3d 424, 435 (3d Cir. 2019). And Justices Gorsuch and Thomas likewise noted the Third Circuit's "disagreement with [the] D.C. Circuit." *WMATA*, 140 S. Ct. at 1199 (Gorsuch, J., statement).

Undaunted, HART now insists that all these jurists and its own prior briefs were wrong. Instead,

HART says, all circuits apply "the same legal standard – that banning religious speech **on otherwise permissible subjects** is viewpoint discrimination." BIO.11.

But HART had it right the first time. The "standard" it invokes is indeed the legal principle set forth by *Rosenberger*. The problem is that circuits interpret that principle in conflicting ways. Five circuits take it to mean that bans on religious speech *as such* are unconstitutional—because religion isn't just a subject but a viewpoint. But the D.C., Ninth, and Eleventh Circuits say it means governments can define religion as a subject and ban it entirely.

Compare *Freethought* and *WMATA*, starting with the facts. In both cases, a transit authority allowed various ads but excluded ads on a list of prohibited subjects, such as ads for tobacco or political candidates. See *Freethought*, 938 F.3d at 448-449 (Cowen, J., dissenting) (comparing lists). In both cases, the transit authority adopted nearly verbatim bans on the subject of religion. Compare *id.* at 430 ("promote, criticize or attack a religion"), with *Archdiocese of Washington* v. *WMATA*, 897 F.3d 314, 320 (D.C. Cir. 2018) ("promote or oppose any religion"). In both cases, the transit authority relied on that ban to reject an ad highlighting the organization's website—an atheist organization in *Freethought*, and a Catholic archdiocese in *WMATA*. And in both cases, the transit authority defended the ban using the same legal argument: it was not banning religious speech on an otherwise permissible subject, but banning "the entire subject matter of religion." *WMATA*, 897 F.3d at 325; *Freethought*, 938 F.3d at 430 ("the entire subject of religion"). As

Judge Cowen said in *Freethought*: "I see no meaningful difference between the advertisements and policies at issue in the WMATA proceeding and in this case." 938 F.3d at 447 (Cowen, J., dissenting).

Yet the Third and D.C. Circuits applied conflicting analyses and reached conflicting results. The Third Circuit held that even though the atheist ad "relates to the 'subject' of religion writ large[,] * * * its message is one of organizational existence, identity, and outreach"—which is "a subject to which the forum is otherwise open." *Freethought*, 938 F.3d at 435. Thus, exclusion of the ad was unlawful viewpoint discrimination indistinguishable from *Rosenberger*. *Id.* at 436-437.

By contrast, the D.C. Circuit held that although the archdiocese contended its ad addressed the topics of Christmas and charitable giving—both of which were permissible subjects within the forum—it was instead "a religious ad, * * * which is not a subject included in the WMATA forum." *WMATA*, 897 F.3d at 329. The court purported to distinguish *Rosenberger* on the ground that the forum there was open to a "wide[r] range of subjects." *Id.* at 327. Any other result, the court said, "would eliminate the government's prerogative to exclude religion as a subject matter in any non-public forum." *Id.* at 325.

In other words, the D.C. Circuit construes *Rosenberger* to *protect* "the government's prerogative to exclude religion as a subject matter in any non-public forum." *WMATA*, 897 F.3d at 325. The Third Circuit construes *Rosenberger* to *restrict* that prerogative; indeed, it says claiming such a "prerogative" "echoes the protestations of the *Rosenberger* dissent, not the reasoning of the majority." *Freethought*, 938 F.3d at 436.

Further, the D.C. Circuit says the key question is whether the forum is open to a "wide" or "narrow" range of subjects, and says the government can exclude "the entire subject matter" of religion. *WMATA*, 897 F.3d at 325, 327. The Third Circuit, by contrast, says "we respectfully disagree with our sister court": the key question is *not* whether the forum is open to a "wide" or "narrow" range of subjects, but "whether the range of subjects—narrow, wide, or in-between—includes the one the speaker wants to address." *Freethought*, 938 F.3d at 435-436. And if a forum includes "topics susceptible to a religious perspective," then it is "difficult, if not impossible, to exclude religion 'as a subject matter.'" *Id.* at 436. That is a circuit split.

The same conflict is apparent when comparing the other cases on either side of the split. Compare, *e.g.*, *Byrne* v. *Rutledge*, 623 F.3d 46, 50, 58 (2d Cir. 2010) ("blanket ban" on the "subject matter" of "religion," to avoid "distraction and disruption," was "facially impermissible viewpoint discrimination"), with *DiLoreto* v. *Downey Unified Sch. Dist. Bd. of Educ.*, 196 F.3d 958, 968-969 (9th Cir. 1999) (blanket ban on "the subject of religion," to avoid "distraction" and "disruption," was "a permissible, content-based limitation on the forum, and not viewpoint discrimination"); Pet.16-20. Indeed, that is why Judges Griffith and Katsas, even prior to *Freethought*, noted in their *WMATA* dissent that "[o]ther circuits," including the Second, Seventh, and Tenth, read *Rosenberger* differently than the D.C. Circuit did. 910 F.3d 1248, 1252 & n.2 (D.C. Cir. 2018) (Griffith, J., dissenting from denial of rehearing en banc) (citing *Byrne*, *Grossbaum*, and *Summum*); Pet.16-18 (same).

The conflict is even more obvious considering the decision below. Here, the panel didn't dispute that Young Israel's ad addressed a subject otherwise permissible in the forum—a holiday event—and was excluded solely because it was religious. Pet.21-22. That is unquestionably viewpoint discrimination under the Third Circuit's approach. Yet the panel refused to find viewpoint discrimination here.

2. Unable to wish away the split, HART claims the split isn't implicated here because the panel "declined to address" viewpoint discrimination and instead held HART's current policy unreasonable. BIO.20. What this argument misses, however, is that the panel's refusal to find viewpoint discrimination curtailed Young Israel's relief.

When the district court found that banning religious ads constituted viewpoint discrimination, it properly enjoined HART from banning ads "on the ground that" they are "religious." App.82a. But the Eleventh Circuit—because it held "only" that "*this particular* ban" was "unreasonable"—ordered the district court to "narrow" its injunction, leaving HART free to enact a "future variation of the policy" that bans ads because they are "religious." App.27a-28a. That result is identical to a finding of no-viewpoint-discrimination and would be impossible under the Third Circuit's approach. Pet.22.

And the reduction in remedy matters. It matters throughout the Eleventh Circuit, where local governments are now invited to craft "reasonable" bans on religious speech. And it matters to Young Israel, because it leaves HART free to "continue drafting viewpoint discriminatory policies"—and continue denying

Chanukah on Ice ads as "religious." App.46a (Grimberg, J., concurring).

This concern is especially acute given HART's stated interest in "tak[ing] another crack" at a policy banning religious ads. 14-2 C.A. App.124. HART now complains that this statement needs "context," but the context it provides only makes the statement worse. BIO.22-23. HART says it was worried any new policy would run "the risk of being in contempt" of the district court's injunction. BIO.23. But that injunction merely barred HART from rejecting ads "on the ground that the advertisement primarily promotes" religion. App.82a. So when HART says it was "preserving its right to try to craft" another such policy, BIO.23, it is claiming the very "prerogative" the Third Circuit says this Court has "disclaimed." *Freethought*, 938 F.3d at 436.

Finally, even if the panel didn't effectively address and reject the district court's finding of viewpoint discrimination, "[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." *NYC Transit Auth.* v. *Beazer*, 440 U.S. 568, 583 n.24 (1979). And this Court has not hesitated to grant certiorari when a circuit court narrows an injunction to curtail relief on "significant questions," even when petitioner prevailed on other issues below. See, *e.g.*, *United States* v. *Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 489 (2001); *California* v. *American Stores Co.*, 495 U.S. 271, 275 (1990). That is this case.

3. Unable to dispute the split or its impact here, HART attacks a strawman—claiming Young Israel "wants this Court to change the law" so that "religious speech may never be regulated." BIO.23. Not so.

Of course, *Rosenberger* makes it difficult, if not impossible, for governments to ban religious speech *because it is religious*. That is as it should be. Religious speech is "doubly protected by the Free Exercise and Free Speech Clauses." *Kennedy* v. *Bremerton Sch. Dist.*, 597 U.S. 507, 543 (2022). So when the government seeks a "legitimate reason" to exclude speech from a forum, "'because it's religious' will not do." *Good News Club* v. *Milford Cent. Sch.*, 533 U.S. 98, 122 (2001) (Scalia, J., concurring).

But that doesn't stop governments from restricting religious speech for *nonreligious reasons*. Thus, HART can exclude religious ads that are "libelous" or "obscene," infringe a copyright, depict "graphic violence," or promote "alcohol, "tobacco," or "illegal behavior," App.94a-96a (listing prohibitions). HART can also limit the forum to certain speakers—like for-profit businesses. And HART can "minimize religious speech incidentally by reasonably limiting [its] forum" to "subjects where religious views are unlikely or rare"—like for-profit sales or events. *WMATA*, 140 S. Ct. at 1199 (Gorsuch, J., statement).

What HART cannot do is "allow[ ] a subject to be discussed" and then "silence religious views on that topic." *Ibid.* The rule is simple: government cannot "exclude[ ]" religious speech "because of religion." *Shurtleff* v. *City of Boston,* 596 U.S. 243, 261 (2022) (Kavanaugh, J., concurring).

II. The decision below conflicts with this Court's cases.

Each time this Court has considered a ban on religious speech in a government forum, it has held the

ban to be viewpoint discriminatory—without analyzing the forum type or reasonableness. Here, the panel did the opposite. Pet.23-25.

In response, HART first tries to dismiss as "dicta" (BIO.6, 21) *Rosenberger*'s assertion that religion provides a "perspective" or viewpoint "from which a variety of subjects may be discussed and considered." 515 U.S. at 831. But this Court in *Good News Club* treated that assertion as the holding, finding *Rosenberger* "dispositive" on the question "whether speech can be excluded from a limited public forum on the basis of the religious nature of the speech." 533 U.S. at 105, 110. And *Rosenberger* itself identified as the "holding" of *Lamb's Chapel* that "discriminating against religious speech was discriminating on the basis of viewpoint." 515 U.S. at 832. That is not dicta.

Alternatively, HART criticizes *Rosenberger*. It says that treating religion as "ALWAYS a viewpoint" doesn't "hold[] up very well," and improperly makes religion "the only subject that cannot be prohibited in non-public fora." BIO.6, 21.

But *Rosenberger* doesn't say religion is "a viewpoint on every single subject matter." BIO.21. Of course there are "subjects where religious views are unlikely or rare." *WMATA*, 140 S. Ct. at 1199 (Gorsuch, J., statement). But unlike "a typical 'subject,'" religion is also "a worldview through which believers see countless issues." *Freethought*, 938 F.3d at 436-437. Thus, excluding religious speech *because it is religious* is tantamount to viewpoint discrimination. *Ibid.*

Nor is it surprising that religious speech receives especially robust protection. *Rosenberger*'s free-speech rule harmonizes with parallel protections under the

Free Exercise Clause. Just as under the Free Exercise Clause, governments cannot deny benefits to a religious organization because it is religious, *e.g.*, *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 582 U.S. 449, 462 (2017), so also under the Free Speech Clause, governments cannot exclude speech because it is religious. This approach has the two Clauses "work in tandem." *Kennedy*, 597 U.S. at 523. HART's approach (and the D.C., Ninth, and Eleventh Circuits') throws them into disharmony.

Ultimately, HART can't escape this Court's cases. Four times this Court has addressed exclusion of religious speech from government fora. Four times the Court held that the exclusion constituted viewpoint discrimination without addressing the forum type or reasonableness. Pet.26. That is because "the First Amendment's dictate isn't for [governments] to discriminate *better*, but for [them] to stop discriminating against religious viewpoints *altogether*." States Br.2. The panel's refusal to stop viewpoint discrimination here contradicted this Court's precedents.

III. The decision below has profound ramifications beyond this case.

HART doesn't dispute that the scope of the First Amendment's prohibition on viewpoint discrimination is crucial to a democratic society; that religious viewpoint discrimination is doubly odious to the Constitution; that the decision below leaves HART free to continue crafting policies excluding ads because they are "religious"; that over two dozen transit authorities serving tens of millions of Americans ban religious ads; or that these policies, and similar ones in other fora, stifle religious speech daily. Pet.27-32.

HART says only that a "ruling that HART's policy was viewpoint discrimination" would "do[] nothing for any other cases or transit authorities" because it wouldn't "change[] the law." BIO.23-24. But HART is wrong. *Lamb's Chapel*, *Rosenberger*, *Good News Club*, and *Shurtleff* are a tetralogy for a reason: local officials are sometimes hostile to religious speech and slow to follow this Court's precedents. Thankfully, the tetralogy has tamed some of the worst viewpoint discrimination in some fora. But government officials in other fora—including public transit systems affecting tens of millions of Americans—still believe the Constitution lets them ban the entire "subject matter" of religion. And three circuits have affirmed their "prerogative" to do so—in conflict with *Rosenberger* and other circuits.

As a result, the scope of the fundamental protection against religious viewpoint discrimination varies by circuit. Governments continue lumping religious speech in with pornography as too controversial for public view. And millions of Americans, on public transit and elsewhere, experience a "'naked public square,' one shorn of the varied, meaning-giving, and diverse expressions of religious experience." Scholars Br.4.

CONCLUSION

The Court should grant certiorari to resolve the conflict and reaffirm the Constitution's vital protections for religious speech.

Respectfully submitted.

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