No. 22-11787

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

YOUNG ISRAEL OF TAMPA, INC.,

Plaintiff-Appellee,

v.

HILLSBOROUGH AREA REGIONAL TRANSIT AUTHORITY,

Defendant-Appellant.

On Appeal from the United States District Court
for the Middle District of Florida
Case No. 8:21-cv-294-VMC-CPT
(Hon. Virginia M. Hernandez Covington)

MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* CHRISTIAN LEGAL SOCIETY, NATIONAL ASSOCIATION OF EVANGELICALS, UNION OF ORTHODOX JEWISH CONGREGATIONS OF AMERICA, COALITION FOR JEWISH VALUES, AND ETHICS AND RELIGIOUS LIBERTY COMMISSION

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CORPORATE DISCLOSURE STATEMENT & CERTIFICATE OF INTERESTED PERSONS

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29, as well as Eleventh Circuit Rules 26.1-1, 26.1-2, and 26.1-3, Movants Christian Legal Society, National Association of Evangelicals, Union of Orthodox Jewish Congregations of America, Coalition for Jewish Values, and Ethics and Religious Liberty Commission state as follows:

Christian Legal Society, National Association of Evangelicals, Union of Orthodox Jewish Congregations of America, Coalition for Jewish Values, and Ethics and Religious Liberty Commission have no parent corporations, and no publicly held corporations own 10% or more of their stock.

Movants further certify that the following persons, associations of persons, or corporations may have an interest in the outcome of this case:

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2. Evanson, Blaine H. (Attorney for Movants)
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INTRODUCTION

Pursuant to Federal Rule of Appellate Procedure 29, proposed *amici curiae* Christian Legal Society, National Association of Evangelicals, Union of Orthodox Jewish Congregations of America, Coalition for Jewish Values, and Ethics and Religious Liberty Commission respectfully move for leave to file the accompanying brief as *amici curiae* in support of Plaintiff-Appellee, Young Israel of Tampa, Inc.

Counsel for Movants certify that they have obtained consent from Plaintiff-Appellee's counsel to file the accompanying brief in this matter. Counsel for Movants sought the consent of Defendant-Appellant, which was not given.

IDENTITIES & INTERESTS OF PROPOSED *AMICI CURIAE*

Christian Legal Society ("CLS") is a nonprofit, non-denominational association of Christian attorneys, law students, and law professors with members in every state and chapters on ninety law school campuses. Since 1975, CLS's Center for Law & Religious Freedom has worked to protect religious freedom in the courts, legislatures, and public square. CLS believes that civic pluralism, which is essential to a free society, prospers only when the First Amendment rights of all Americans are

protected. CLS filed *amicus curiae* briefs in support of the inclusion of religious speech and religious speakers in *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993); *Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819 (1995); and *Good News Club v. Milford Central School*, 533 U.S. 98 (2001). The Center has represented students, community groups, and other speakers seeking to engage in religious speech on public property in many cases in the courts of appeals as well as the Supreme Court. CLS also helped to lead the coalitions that supported passage of the Equal Access Act, 20 U.S.C. §§ 4071-4074, which protects public secondary school students' meetings for religious, political, philosophical, and other speech, as well as the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq.*, which protects against infringement by the federal government all Americans' right to the free exercise of religion.

The National Association of Evangelicals ("NAE") is the largest network of evangelical churches, denominations, colleges, and independent ministries in the United States. It serves forty member denominations, as well as numerous evangelical associations, missions, social-service charities, colleges, seminaries, and independent churches.

NAE serves as the collective voice of evangelical churches, as well as other church-related and independent religious ministries. It believes that religious freedom is both a God-given right and a limitation on civil government, as recognized in the First Amendment, and that freedom of speech extends to all content and viewpoints without regard to religion.

The Union of Orthodox Jewish Congregations of America ("Orthodox Union") is the nation's largest Orthodox Jewish synagogue organization, representing nearly 1,000 congregations as well as more than 400 Jewish non-public K-12 schools across the United States. The Orthodox Union, through its OU Advocacy Center, has participated as *amicus curiae* in many cases that, like this one, raise issues of importance to the Orthodox Jewish community, including *Carson ex rel. O.C. v. Makin*, 142 S. Ct. 1987 (2022); *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021); *Espinoza v. Montana Department of Revenue*, 140 S. Ct. 2246 (2020); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014); *Locke v. Davey*, 540 U.S. 712 (2004); and *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

The Coalition for Jewish Values ("CJV") is the largest Rabbinic public policy organization in America, representing over 2,000 traditional, Orthodox rabbis. CJV promotes religious liberty, human rights, and classical Jewish ideas in public policy, and does so through education, mobilization, and advocacy, including by filing *amicus curiae* briefs in defense of equality and freedom for religious institutions and individuals. Cases in which CJV has filed *amicus curiae* briefs include *Yeshiva Univ. v. YU Pride All.*, No. 22A184, 2022 WL 4127422 (U.S. Sept. 9, 2022), and *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021).

The Ethics and Religious Liberty Commission ("ERLC") is the moral concerns and public policy entity of the Southern Baptist Convention ("SBC"), the nation's largest Protestant denomination, with over 50,000 churches and congregations and nearly 14 million members. The ERLC is charged by the SBC with addressing public policy affecting such issues as religious liberty, marriage and family, the sanctity of human life, and ethics. Religious freedom is an indispensable, bedrock value for Southern Baptists. The Constitution's guarantee of freedom from governmental interference in matters of faith is a crucial protection

upon which SBC members and adherents of other faith traditions depend as they follow the dictates of their conscience in the practice of their faith.

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), Movants state that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from amici, their members, and their counsel, made any monetary contribution toward the preparation or submission of this brief.

DESIRABILITY & RELEVANCE OF THE PROPOSED BRIEF

Movants seek leave to file an *amicus curiae* brief because they believe that discrimination against religious speech based on viewpoint violates the Free Speech and Free Exercise Clauses of the First Amendment. Given their decades-long experience advocating on behalf of religious communities across the United States, Movants are well-equipped to provide informed, relevant arguments regarding the legal issues before this Court.

Movants have reviewed the filings in this case and believe that their proposed brief is particularly desirable because it expands upon Plaintiff-Appellee's argument that Defendant-Appellant's ban on religious advertising violates the Free Exercise Clause.

CONCLUSION

Christian Legal Society, National Association of Evangelicals, Union of Orthodox Jewish Congregations of America, Coalition for Jewish Values, and Ethics and Religious Liberty Commission respectfully move this Court for leave to file the *amicus curiae* brief in support of Plaintiff-Appellee, Young Israel of Tampa, Inc. accompanying this motion.

DATED: September 14, 2022

Respectfully submitted,

/s/ *Blaine H. Evanson*

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 27(d) and Eleventh Circuit Local Rule 27.1, I hereby certify that this Motion complies with the applicable typeface, type-style, and type-volume limitations. This Motion contains 966 words and was prepared using a proportionally spaced typeface using Microsoft Word 2010 in 14-point New Century Schoolbook font.

As permitted by Fed. R. App. P. 32(g)(1), the undersigned has relied upon the word count feature of this word-processing system in preparing this certificate.

/s/ *Blaine H. Evanson*
Blaine H. Evanson

CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of September, 2022, I electronically filed the foregoing using the CM/ECF system. I further certify that a true and correct copy of the foregoing was served via the Court's CM/ECF System upon all counsel of record.

/s/ *Blaine H. Evanson*
Blaine H. Evanson

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[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), *amici* state that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amici*, their members, and their counsel, made any monetary contribution toward the preparation or submission of this brief.

STATEMENT OF ISSUES

1. Whether the Hillsborough Area Regional Transit Authority's policy of refusing to accept advertisements that promote religion violates the First Amendment's Free Speech Clause.

2. Whether the Hillsborough Area Regional Transit Authority's policy of refusing to accept advertisements that promote religion violates the First Amendment's Free Exercise Clause.

SUMMARY OF ARGUMENT

The Hillsborough Area Regional Transit Authority ("HART") accepts a wide variety of advertisements for display on its buses, including holiday-related advertisements for local businesses and charitable campaigns. But HART rejected an advertisement from the Young Israel of Tampa synagogue promoting its annual "Chanukah on Ice" ice-skating event. HART explained that Section 4(e) of its advertising policy forbids advertisements that "primarily promote a religious faith or religious organization" (D.E. 60 ¶¶ 11–13) because HART wishes to avoid alienating its ridership, employees, and other advertisers with "controversial" topics that would "create a bad experience for [its] customers" (D.E. 60-8 at 23, 80:11–20).

HART's policy is unconstitutional. The Supreme Court has repeatedly recognized, including in multiple opinions this past Term, that when the government "eschew[s] any visible religious expression . . . [it] undermine[s] a long constitutional tradition under which learning how to tolerate diverse expressive activities has always been 'part of learning how to live in a pluralistic society.'" *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2431 (2022) (quoting *Lee v. Weisman*, 505 U.S. 577,

590 (1992)). This constitutional tradition demands from the government a "benevolent neutrality which . . . permit[s] religious exercise to exist without sponsorship and without interference." *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 669 (1970). But "there is nothing neutral" about a policy, like HART's, that openly privileges the secular over the religious. *Carson ex rel. O.C. v. Makin*, 142 S. Ct. 1987, 1998 (2022). HART's exclusion of Young Israel's advertisement because of its religious character "constitutes impermissible viewpoint discrimination . . . and violate[s] the Free Speech Clause." *Shurtleff v. City of Boston*, 142 S. Ct. 1583, 1593 (2022) (internal quotation marks omitted). Likewise, because HART's policy imposes "special disabilities on the basis of religious views or religious status," it also violates the Free Exercise Clause. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2021 (2017).

In granting summary judgment, the district court held that HART's advertising policy is viewpoint discriminatory in violation of the First Amendment's Free Speech Clause. D.E. 87 at 2. The district court enjoined HART from enforcing Section 4(e) as written and also permanently enjoined HART from rejecting future advertisements based

on their inclusion of religious language, imagery, or symbols. *Id.* at 2–3. HART now challenges these rulings on two main fronts, arguing that (1) the district court's injunction was "overly broad" insofar as it restricts HART from adopting *future* advertising policies that discriminate against religious viewpoints, and (2) Section 4(e) is merely a reasonable restriction of religious content in a nonpublic forum, and therefore constitutional. Appellant's Br. at 11, 22.

This Court should affirm the district court's judgment. Section 4(e) of HART's policy plainly violates the First Amendment's Free Speech Clause, and it also violates the First Amendment's Free Exercise Clause. Summary judgment is appropriate on both grounds. And because any future policy that excludes advertisements solely based on their religious nature is necessarily unconstitutional under both the Free Speech and the Free Exercise Clauses, the district court's permanent injunction should be affirmed.

ARGUMENT

I. HART's Policy Is Viewpoint Discriminatory in Violation of the Free Speech Clause.

"Where the Free Exercise Clause protects religious exercises," such as Young Israel's "Chanukah on Ice" advertisement, "the Free Speech Clause provides overlapping protection." *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2421 (2022) (citing *Widmar v. Vincent*, 454 U.S. 263, 269 n.6 (1981), and *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 841 (1995)). This "doubl[e] protect[ion] [of] religious speech . . . is a natural outgrowth of the framers' distrust of government attempts to regulate religion and suppress dissent." *Id.*

Our nation's founders made clear that a "government may not treat religious persons, religious organizations, or religious speech as second-class" by restricting religious expression. *Shurtleff v. City of Boston*, 142 S. Ct. 1583, 1595 (2022) (Kavanaugh, J., concurring). But this is exactly what HART has done by banning an advertisement for a family ice-skating event simply because the advertisement evokes the Jewish religion. This Court should affirm the district court's holding that

HART's policy violates Young Israel's right to Free Speech under the First Amendment.

The Free Speech Clause protects religion both as "a vast area of inquiry" (*i.e.*, religious subject or content) and as a "premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered" (*i.e.*, religious viewpoints). *Rosenberger*, 515 U.S. at 830–31. Although "the distinction is not a precise one," the analysis here is cut and dried. *Id*. Just this past Term in *Shurtleff*, the Supreme Court held that where speech is "denied . . . solely because [it] 'promot[es] a specific religion,'" such denial is unconstitutional *viewpoint* discrimination. 142 S. Ct. at 1593 (holding unconstitutional City's rejection of Christian organization's request to fly a cross-bearing flag in the City Hall Plaza when other organizations were allowed to fly flags displaying their symbols); *see also* Appellant's Br. at 7 ("[B]ecause the advertisement primarily promoted religion and a religious holiday, the advertisement was not accepted by HART."). Since HART "denied [Young Israel]'s request solely because the [advertisement] promoted a specific religion . . . that refusal discriminated based on religious

viewpoint and violated the Free Speech Clause." *Shurtleff*, 142 S. Ct. at 1593 (alteration and internal quotation marks omitted).

When the government discriminates based on viewpoint, courts scrutinizing that conduct under the First Amendment do not engage in a forum analysis. This is because "even in a non-public forum, the law is clearly established that the state cannot engage in viewpoint discrimination—that is, the government cannot discriminate in access to the forum on the basis of the government's opposition to the speaker's viewpoint." *Cook v. Gwinnett Cnty. Sch. Dist.*, 414 F.3d 1313, 1321 (11th Cir. 2005); *see also Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1280 (11th Cir. 2004) ("[g]overnment actors may not discriminate against speakers based on viewpoint, even in places or under circumstances where people do not have a constitutional right to speak in the first place"); *Barrett v. Walker Cnty. Sch. Dist.*, 872 F.3d 1209, 1226 (11th Cir. 2017) (describing viewpoint discrimination as "a particular evil").

HART does not deny this fact (nor could it). Instead, HART conspicuously chooses not to engage *at all* with the line of Supreme Court precedent establishing that when the government opens a forum to expressions related to a particular subject, it cannot then ban expressions

of that subject from a religious viewpoint. *See Shurtleff*, 142 S. Ct. 1583; *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001) (where a school opened up its facilities after-hours for use by community organizations, the exclusion of a Christian children's club because of its religious nature was unconstitutional viewpoint discrimination); *Rosenberger*, 515 U.S. 819 (where non-religious student publications received university funding, university's denial of funding for Christian student newspaper was unconstitutional viewpoint discrimination); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993) (where a school opened up its facilities after-hours to community organizations, denying a church access to school premises solely because it wished to show a film on child-rearing from a religious perspective was unconstitutional viewpoint discrimination).

In all of these cases, the Supreme Court held squarely that, although the government entity was not required to create the forum at issue, once that forum was created, religious organizations could not be excluded. This precedent applies here: HART was not required to permit advertising for community events, but once it allowed such advertisements, HART could not then bar an advertisement for a

religious community event simply because of the advertisement's religious nature.

HART nevertheless insists that this Court engage in forum analysis on the ground that "HART's advertising policy reasonably prohibits religious content, not religious viewpoints." Appellant's Br. at 30. HART tries to defend its position with an example, but in doing so highlights precisely the problem with this argument. HART reasons that, under its policy, "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." *Id*. at 31. HART categorizes the advertisement for Sunday worship as "prohibited religious content" and the advertisement for the "The Book of Mormon" as "a commercial offering from a religious viewpoint." *Id.* But the supposed "commercial offering from a religious viewpoint" that HART would permit to be advertised on its buses is a secular musical which *satirizes* and *demeans* the beliefs of the Church of Jesus Christ of Latter-day Saints. *See* Michael Otterson, *Why I Won't Be Seeing the Book of Mormon Musical*, Newsroom, The Church of Jesus Christ of Latter-day Saints, https://bit.ly/3QS7Zxy (last accessed on Aug. 23, 2022) (noting the

show's "over-the-top blasphemous and offensive language"). Meanwhile, HART would exclude an advertisement for a pro-religious musical put on by the very faith group that "The Book of Mormon" ridicules. Permitting secular views that disparage religion while excluding religious views as such is blatant viewpoint discrimination.

HART's "Book of Mormon" example highlights that its policy does not necessarily "exclude religion as a subject matter but selects for disfavored treatment those [advertisements] with religious . . . viewpoints." *Rosenberger*, 515 U.S. at 830–31. This HART cannot do. *See id.* at 829 ("The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction."). "[O]nce the government allows a subject to be discussed," whether that subject is a musical about Latter-day Saint missionaries or a community ice-skating party, "it cannot silence religious views on that topic." *Archdiocese of Wash. v. Wash. Metro. Area Transit Auth.*, 140 S. Ct. 1198, 1199 (2020) (citation omitted) (statement of Gorsuch, J., with whom Thomas, J., joins, respecting the denial of certiorari). This principle applies with equal force to non-public forums, which is why forum analysis is unnecessary

in this case. *See Good News Club*, 533 U.S. at 107 ("Because the restriction is viewpoint discriminatory, we need not decide whether it is unreasonable in light of the purposes served by the forum.").

HART further argues that it made a "managerial decision to limit advertising space to *innocuous and less controversial* commercial and service-oriented advertising." Appellant's Br. at 33 (emphasis added). But this is just another example of why HART's exclusion of Young Israel's advertisement is viewpoint discrimination. "A group is controversial or divisive because some take issue with its viewpoint." *Child Evangelism Fellowship of N.J. Inc. v. Stafford Twp. Sch. Dist.*, 386 F.3d 514, 527 (3d Cir. 2004) (citing *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 812 (1985)). Therefore, a "policy that on its face single[s] out 'controversial' or 'offensive' messages [is] viewpoint discriminatory." *Ne. Pa. Freethought Soc'y v. Cnty. of Lackawanna Transit Sys.*, 938 F.3d 424, 438 (3d Cir. 2019); *see also Searcey v. Harris*, 888 F.2d 1314, 1325 (11th Cir. 1989) (finding that the government discriminated based on viewpoint where "avoiding debate about controversial matters" was one of its justifications for limiting access to a nonpublic forum). In any event, "[o]ur tradition assumes that adult

citizens, firm in their own beliefs, can tolerate and perhaps appreciate" the religious expressions of others. *Town of Greece v. Galloway*, 572 U.S. 565, 584 (2014); *see also Kennedy*, 142 S. Ct. at 2432–33 ("Respect for religious expressions is indispensable to life in a free and diverse Republic.").

If HART decides that its riders cannot (or should not have to) tolerate an advertisement that mentions Chanukah, "it may close its buses to all advertisements" or "it might restrict advertisement space to subjects where religious viewpoints are less likely to arise without running afoul of our free speech precedents." *Wash. Metro. Area Transit Auth.*, 140 S. Ct. at 1200 (statement of Gorsuch, J., with whom Thomas, J., joins, respecting the denial of certiorari). But HART may not define the limits of its advertising program in a way that excludes the viewpoint of religious groups. HART's policy is plainly unconstitutional under the First Amendment's Free Speech Clause. This Court should affirm the ruling below.

II. HART's Policy Facially Discriminates Against Religion in Violation of the Free Exercise Clause.

HART openly admits that its advertisement policy excludes some advertisements purely because they contain religious expression. That position is irreconcilable with the Free Exercise Clause and decades of Supreme Court precedent, including multiple decisions from this past Term. Young Israel's Free Exercise claim provides an independent basis for affirming the judgment. *See Lucas v. W.W. Grainger, Inc.*, 257 F.3d 1249, 1256 (11th Cir. 2001) (this Court has discretion to affirm a district court's judgment "on any ground that finds support in the record" (internal quotation marks and citation omitted)).

A. The Plain Language of HART's Policy Discriminates Against Religion.

The Free Exercise Clause forbids laws "prohibiting the free exercise [of religion]." U.S. Const. amend. I. Among other limitations, government policy may not "penalize religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other[s]." *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 449 (1988). The Constitution does not countenance laws that facially discriminate against religion, unless they survive the "most rigorous of

scrutiny." *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993). HART's discriminatory policy does not clear that hurdle.

By its own terms, HART's policy singles out and excludes messages containing religious expression—and it does so "solely because of their religious character." *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2021 (2017). Section 4(e) expressly prohibits "[a]dvertisements that primarily promote a religious faith or religious organization." D.E. 72 at 4. And HART freely admits that it rejected Young Israel's "Chanukah on Ice" advertisement for one reason alone: "because the advertisement was blatantly religious."[2] D.E. 63 at 2.

As the Supreme Court has long made clear, "a law targeting religious beliefs *as such* is never permissible." *Lukumi*, 508 U.S. at 533 (emphasis added). The State may not "penalize religious activity" (*Lyng*, 485 U.S. at 449) or impose "special disabilities on the basis of religious views or religious status" (*Trinity Lutheran*, 137 S. Ct. at 2021 (internal

[2] There is no dispute that Young Israel's advertisement represented its sincerely held religious beliefs.

quotation marks and citation omitted)). But this is exactly what HART's policy does.

Indeed, HART clarified that it did not object to the event itself, only Young Israel's expression of the religious reason for its event. HART informed Young Israel that it would run the advertisement only if the advertisement was scrubbed of its religious references (*e.g.*, the depictions of the menorah). It could not be any clearer that HART discriminated based on religion.

HART's disparate treatment "burdened [Young Israel's] religious exercise by putting it to the choice" of stripping its message of religious expression or foregoing the opportunity to advertise on the public transit system. *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1876 (2021). HART does not impose this same lose-lose choice on groups with secular (or expressly anti-religious) messages. The policy thus embodies an impermissible value judgment, disregarding decades of Supreme Court instruction that laws abandon neutrality when they "treat *any* comparable secular activity more favorably than religious exercise." *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021) (per curiam) (emphasis

in original); *see also Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2254 (2020); *Trinity Lutheran*, 137 S. Ct. at 2021; *Lyng*, 485 U.S. at 449.

The Free Exercise Clause forbids government favoritism of secular views and "protects religious observers against unequal treatment." *Trinity Lutheran*, 137 S. Ct. at 2019 (alteration and internal quotation marks omitted). Indeed, the Supreme Court underscored that principle twice in its most recent Term.

In *Carson ex rel. O.C. v. Makin*, the Court struck down Maine's express requirement that children attend "nonsectarian" high schools in order to be eligible for funding under the state's tuition-assistance program. 142 S. Ct. 1987 (2022). In doing so, the Court rebuffed Maine's attempts to draw narrow factual distinctions between the Court's prior decisions. The determinative fact, for Free Exercise purposes, was that "[r]egardless of how the benefit and restriction are described, the program operates to identify and exclude otherwise eligible schools on the basis of their religious exercise." *Id.* at 2002.

The Court applied the same logic in *Kennedy v. Bremerton School District* to hold that the school district violated the Free Exercise clause when it ordered Kennedy, a high school football coach, to cease his

practice of offering a silent, personal prayer on the field after football games. 142 S. Ct. 2407. Like HART, the school district acknowledged that it "restrict[ed] Kennedy's religious conduct because the conduct [was] religious"—while it permitted coaches to engage in secular personal matters during the free time following a game. *Id.* at 2420 (alterations in original). And as with *Carson*, the government failed to put forth a constitutionally sufficient basis to justify its discriminatory policy.

In sum, government policy may not permit an employee to make personal calls and appointments during his free time while prohibiting personal prayer (*Kennedy*, 142 S. Ct. at 2415–16); it may not provide vouchers to children who attend secular high schools while denying them to students at religious schools (*Carson*, 142 S. Ct. at 1997–98). And for the same reasons, HART may not sanction the secular while shunning the religious when it comes to advertising on public buses.

HART's policy goes beyond facial discrimination and openly demeans religion by equating it with illicit and illegal conduct. In pursuit of its goal to ensure that advertisements on its buses are "not offensive" to "the community," HART bans advertisements related to a broad swath of social ills, including: "alcohol," "tobacco," "profane language," "obscene

materials," "pornography," "discriminatory materials," "illegal behavior," and "graphic violence." D.E. 72 at 3–4. According to HART, promotion of "religious faith" fits within this group. *Id.* Linking sincerely held religious beliefs to pornography and graphic violence, among other vices, is offensive and suggests an animus toward religion that is antithetical to the First Amendment. *See Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rights Comm'n*, 138 S. Ct. 1719, 1731 (2018) ("[T]he government . . . cannot impose regulations that are hostile to the religious beliefs of affected citizens."); *Capitol Square Rev. & Advisory Bd. v. Pinette*, 515 U.S. 753, 767 (1995) ("It will be a sad day when this Court casts piety in with pornography . . . .").

At the end of day, HART's policy sends a message that HART views religious expression—including benign representations of the menorah—as controversial or offensive to the public. That "signal of official disapproval" chills religious expression in violation of the Free Exercise Clause. *Masterpiece Cakeshop, Ltd.*, 138 S. Ct. at 1731. And it is irrelevant to the Free Exercise analysis that HART sought to avoid conflicts and public opposition through its exclusion of religion: "it is not . . . the role of the State or its officials to prescribe what shall be offensive"

or to "elevate[] one view of what is offensive over another." *Id.*; *see also United States v. Eichman*, 496 U.S. 310, 319 (1990) ("[T]he Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." (internal quotation marks and citations omitted)).

As a result of its exclusion of and hostility toward religion, HART's policy runs afoul of the First Amendment unless it can satisfy "the most exacting scrutiny." *Trinity Lutheran*, 137 S. Ct. at 2021. It does not, and HART makes no attempt to argue otherwise.

B. HART's Policy Does Not Survive Strict Scrutiny.

Naked discrimination against religious views cuts to the core of First Amendment protections and thus is subject to the "strictest scrutiny." *Espinoza*, 140 S. Ct. at 2255. To satisfy strict scrutiny, "a law restrictive of religious practice must advance [government] interests of the highest order and must be narrowly tailored in pursuit of those interests." *Lukumi*, 508 U.S. at 546 (internal quotation marks omitted). HART's policy falls woefully short of that exacting standard.

As a threshold matter, HART never argues that its policy furthers a compelling government interest. And the interests that HART did

identify do not rise to this level. HART first claims an interest in "ensuring safe and reliable transportation services and operating in a manner that maintains demand of its service to multicultural, multi-ethnic, and religiously diverse ridership, without alienating any riders, potential riders, employees, or advertisers." D.E. 63 at 19. It also argues that the policy furthers its interest in "[m]aintaining a safe, welcoming environment for all HART passengers," "without unnecessary controversy, risks of violence, or risks of vandalism." *Id.*

To the extent that HART's purpose is preventing rider offense caused by religious messages, this interest is wholly insufficient to justify restricting a core individual liberty. Shielding some members of the public from the discomfort that they may feel when faced with religious messaging is never a legitimate state interest—much less one that satisfies strict scrutiny. *See*, *e.g.*, *Matal v. Tam*, 137 S. Ct. 1744, 1764 (2017) (the idea that "the Government has an interest in preventing speech expressing ideas that offend . . . strikes at the heart of the First Amendment"). To the contrary, government entities may not "base laws or regulations on hostility to a religion or religious viewpoint." *Masterpiece Cakeshop, Ltd.*, 138 S. Ct. at 1731.

HART has failed to heed this longstanding First Amendment principle. Rather than prevent offense, HART's policy fosters intolerance. *But see Kennedy*, 142 S. Ct. at 2430 ("[L]earning how to tolerate speech or prayer of all kinds is part of learning how to live in a pluralistic society . . . ." (internal quotation marks and citation omitted)). By flatly banning messages that promote religious views because they may engender opposition, HART has effectively codified some individuals' religious animus. That places its policy squarely at odds with the Free Exercise Clause.

If HART's interest is in preventing violent confrontations or conflicts on its property, its policy is not remotely tailored to achieving that end. HART provides no evidence of violence or imminent public danger resulting from Young Israel's specific advertisement, or from any prior ads with religious messages or overtones. The most heated exchange on record appears to be a proposed "counter" advertising campaign to a series of advertisements in 2013 promoting awareness of Islam and religious diversity—but there is no hint of this clash becoming anything more than an exchange of words. *See* D.E. 57-1 ¶¶ 5–13. More problematic, HART's policy is both over- and under-inclusive: it sweeps

in any message promoting religion, regardless of whether it is likely to incite violence, while ignoring an entire subset of advertisements related to religion (*i.e.*, anti-religious advertisements) that might create conflict. By the policy's plain terms, it bans advertisements that primarily *promote* religion and religious organizations; advertisements that *disparage* religion are welcome.

Lastly, HART's policy contains no provision specifically excluding any advertisements—secular or otherwise—likely to incite violence. If HART's exclusion of religious advertisements is truly an attempt to prevent violence, it is a half-hearted effort at best. There is no serious argument that HART's discriminatory policy passes muster under strict scrutiny.

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Free Exercise jurisprudence is often fraught with complexities and gray zones. Not so here. HART's policy is a striking Free Exercise violation—it openly discriminates against and disparages religion without pursuit of any compelling interest or attempt to narrowly tailor its exclusion. Accordingly, Young Israel's Free Exercise claim provides an independent ground to affirm the district court's judgment.

CONCLUSION

The Court should affirm the district court's judgment.

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Respectfully submitted,

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FRAP 32(g)(1) CERTIFICATE OF COMPLIANCE

I certify that this document complies with the type-volume limitation set forth in FRAP 29(a)(5) and 32(a)(7)(B)(i). This document contains 4730 words, excluding the parts exempted by FRAP 32(f) and 11th Cir. R. 32-4. This document complies with the typeface requirements of FRAP 32(a)(5) and the type-style requirements of FRAP 32(a)(6). It has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point New Century Schoolbook font.

/s/ *Blaine H. Evanson*
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CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of September, 2022, I electronically filed the foregoing Brief of *Amici* Christian Legal Society, National Association of Evangelicals, Union of Orthodox Jewish Congregations of America, Coalition for Jewish Values, and Ethics and Religious Liberty Commission using the CM/ECF system. I further certify that a true and correct copy of the foregoing Brief of *Amici* Christian Legal Society, National Association of Evangelicals, Union of Orthodox Jewish Congregations of America, Coalition for Jewish Values, and Ethics and Religious Liberty Commission was served via the Court's CM/ECF System upon all counsel of record.

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