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)

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 IN SUPPORT OF PLAINTIFF-APPELLEE'S PETITION FOR REHEARING AND REHEARING EN BANC

Blaine H. Evanson
GIBSON, DUNN & CRUTCHER LLP
3161 Michelson Drive
Irvine, CA 92612
(949) 451-3805

Katie Rose Talley
GIBSON, DUNN & CRUTCHER LLP
2001 Ross Avenue, Suite 2100
Dallas, TX 75201
(214) 698-3358

Macey L. Olave
GIBSON, DUNN & CRUTCHER LLP
One Embarcadero Center, Suite 2600
San Francisco, CA 94111
(415) 393-8287

John Matthew Butler
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, DC 20006
(202) 887-3739

Counsel for Amici Curiae

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, 26.1-3, 29-3, and 29-4, *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 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.

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

1. Adams, David W. (Attorney for Defendant-Appellant)
2. Becket Fund for Religious Liberty (Attorneys for Plaintiff-Appellee)

3. Bennett, Jacobs & Adams, P.A. (Attorneys for Defendant-Appellant)
4. Butler, John Matthew (Attorney for *Amici Curiae*)
5. Christian Legal Society (*Amicus Curiae*)
6. Coalition for Jewish Values (*Amicus Curiae*)
7. Covington, Hon. Virginia M. Hernandez (United States District Court Judge)
8. Davis, Joseph Charles (Attorney for Plaintiff-Appellee)
9. Ethics and Religious Liberty Commission (*Amicus Curiae*)
10. Evanson, Blaine H. (Attorney for *Amici Curiae*)
11. Glaser, Zachary J. (Attorney for Defendant-Appellant)
12. Goodrich, Luke William (Attorney for Plaintiff-Appellee)
13. Haun, William J. (Attorney for Plaintiff-Appellee)
14. Hillsborough Area Regional Transit Authority (Defendant-Appellant)
15. Holtzman Vogel Baran Torchinsky & Josefiak, PLLC (Attorneys for Plaintiff-Appellee)

16. Jewish Coalition for Religious Liberty (Attorneys for Plaintiff-Appellee)
17. National Association of Evangelicals (*Amicus Curiae*)
18. Olave, Macey L. (Attorney for *Amici Curiae*)
19. Rivkin, Rabbi Uriel of Young Israel of Tampa (leader of Plaintiff-Appellee)
20. Slugh, Howard (Attorney for Plaintiff-Appellee)
21. Talley, Katie Rose (Attorney for *Amici Curiae*)
22. Union of Orthodox Jewish Congregations of America (*Amicus Curiae*)
23. Wenger, Edward Mark (Attorney for Plaintiff-Appellee)
24. Young Israel of Tampa, Inc. (Plaintiff-Appellee)

Pursuant to 11th Cir. R. 26.1-3(b), counsel certifies that no publicly traded corporation has an interest in this proceeding.

11th CIRCUIT RULE 35-5(c) STATEMENT

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decisions of the Supreme Court of the United States or the precedents of this Circuit and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this Court: *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); *Good News Club v. Milford Central School*, 533 U.S. 98 (2001); and *Shurtleff v. City of Boston*, 596 U.S. 243 (2022). In addition, this appeal involves one or more questions of exceptional importance—namely, whether a restriction on advertisements that "primarily promote a religious faith or religious organization" constitutes such clear viewpoint discrimination under Supreme Court and circuit precedent that the Court should affirm the district court's permanent injunction.

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

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INTERESTS OF *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 over 125 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 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 raise issues of importance to the Orthodox Jewish community, including *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Locke v. Davey*, 540 U.S. 712 (2004); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449 (2017); *Espinoza v. Montana Department of Revenue*, 140 S. Ct. 2246 (2020); *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021); and *Carson ex rel. O.C. v. Makin*, 142 S. Ct. 1987 (2022).

The Coalition for Jewish Values ("CJV") is the largest Rabbinic public policy organization in America, representing over 2,500

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 *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021), and *Yeshiva University v. YU Pride Alliance*, No. 22A184, 2022 WL 4127422 (U.S. Sept. 9, 2022).

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 13 million members in roughly 50,000 churches and congregations. 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 in-dispensable, 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.[1]

[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.

INTRODUCTION

The Hillsborough Area Regional Transit Authority ("HART") accepts a wide variety of advertisements for display on its buses, including holiday-related advertisements. 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) in order 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).

The district court granted summary judgment for Young Israel, holding that HART's advertising policy constituted viewpoint discrimination in violation of the First Amendment's Free Speech Clause. D.E. 87 at 2. The court also concluded that HART's policy was "unreasonable" (*id.*) because "HART's application and enforcement of the Policy [was] inconsistent and haphazard" (D.E. 72 at 38). The court enjoined HART from enforcing Section 4(e) as written and permanently

enjoined HART from rejecting future advertisements based on their inclusion of religious language, imagery, or symbols. D.E. 87 at 2–3.

The district court's ruling was correct. And on appeal to this Court, the panel affirmed the ruling that HART's application of Section 4(e) was unreasonable. Op. 3, 30. But out of concern for "judicial minimalism" and to steer clear of "a small circuit split," the panel did not reach the question of viewpoint discrimination. *Id.* at 3, 17. The panel reversed the district court's permanent injunction and remanded for it to be narrowed "to apply only to HART's current policy." *Id.* at 29.

Amici respectfully submit that the panel's reversal of the injunction warrants rehearing. The panel's decision to duck the viewpoint discrimination analysis and to reverse the injunctive relief awarded to Young Israel ignores long-settled Supreme Court precedent and conflicts with this Court's standards for abuse-of-discretion review. The Supreme Court has made clear that restricting an activity because it "primarily promotes a religious faith or religious organization" constitutes unlawful viewpoint discrimination and requires no further reasonableness analysis. *See 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); *Good News Club v. Milford Central School*, 533 U.S. 98 (2001); *Shurtleff v. City of Boston*, 596 U.S. 243 (2022). And in refusing to defer to the district court's discretion despite the absence of a "clear error of judgment" or the district court's application of an "incorrect legal standard" (*United States v. Ahmed*, 73 F.4th 1363, 1381 (11th Cir. 2023)), the panel departed from the established standard of review.

This departure is not only troubling in itself but opens the door to continued judicial intervention over future versions and applications of HART's fraught policy. Rehearing is appropriate to correct these deviations from settled First Amendment law and abuse-of-discretion review.

ARGUMENT

The Supreme Court has repeatedly recognized that when speech is "denied ... solely because [it] 'promot[es] a specific religion,'" such denial is unconstitutional viewpoint discrimination. *Shurtleff*, 596 U.S. at 258; *see also Good News Club*, 533 U.S. at 109–12 (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. at 829–32 (where nonreligious student publications received university funding, university's denial of funding for Christian student newspaper was unconstitutional viewpoint discrimination); *Lamb's Chapel*, 508 U.S. at 390–97 (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).

The Supreme Court has also made clear that when a "restriction is viewpoint discriminatory, [a court] need not decide whether it is unreasonable in light of the purposes served by the forum" before invalidating the restriction. *Good News Club*, 533 U.S. at 107. This is because "[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." *Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1280 (11th Cir. 2004); *see also Cook v. Gwinnett Cnty. Sch. Dist.*, 414 F.3d 1313, 1321 (11th Cir. 2005) ("even in a non-public forum, the law is clearly established that the state cannot engage in viewpoint discrimination").

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*, 596 U.S. at 258–59 (alteration and internal quotation marks omitted).

Instead of following this straightforward approach, the panel opted for a narrower holding and reversed the district court's remedial ruling to avoid "a small circuit split" and out of concern for "judicial minimalism." Op. 3, 16–17. Although the panel's intended minimalism may be laudable, its decision was, respectfully, not faithful to binding Supreme Court precedent. And the panel's holding guarantees that this issue will continue to arise and require future litigation. The Court should grant rehearing for a few important reasons.

First, the panel was not required to engage in a reasonableness analysis or wade into any related "small circuit split" (Op. 3) in order to resolve the case based on viewpoint discrimination. As explained above, viewpoint discrimination on the basis of religion—such, as here, discriminating against an advertisement "promot[ing] a religious faith or organization" (*id.* at 10)—is unconstitutional regardless of the "place[] or

... circumstances." *Holloman*, 370 F.3d at 1280. *See also Good News Club*, 533 U.S. at 106–09 (assuming "a limited public forum" and resolving the case based on unconstitutional viewpoint discrimination). Once HART permitted advertising on its city buses, an advertising policy that included restrictions on the basis of religious viewpoint was unlawful—full stop. *See* D.E. 72 at 18–19.

The panel's approach establishes a dangerous precedent for second-guessing a district court's considered remedies that conflicts with this Circuit's abuse-of-discretion caselaw. Although the panel agreed that the permanent injunction was appropriate given the district court's "ruling that the policy constituted impermissible viewpoint discrimination," the panel nevertheless reversed the district court's relief determination and remanded it for narrowing. Op. 28–30. As Young Israel explains in its petition, the panel's holding sits in tension with this Circuit's precedents on appellate review of abuse of discretion. *See* Pet. 11–14.

The panel's "narrow" holding here is also problematic because, in its silence on viewpoint discrimination, the panel implicitly enters yet a second circuit split. By failing to take the approach established in *Good News Club* and bypassing the forum question, the panel suggests that

the reasonableness analysis will somehow impact whether HART's restrictions on "advertisement[s] primarily promot[ing] a religious faith or religious organization" (Op. 14) are unconstitutional. In doing so, the panel implicitly sides with the D.C. Circuit's decision in *Archdiocese of Washington v. Washington Metropolitan Area Transit Authority*, 897 F.3d 314, 329–30 (D.C. Cir. 2018), where the court held that a similar restriction on "religious" advertisements regulated only content (which may be regulated with reasonable policies), not viewpoint (which may never be regulated). *Archdiocese of Washington* conflicts with a Third Circuit decision (*see Ne. Pa. Freethought Soc'y v. COLTS*, 938 F.3d 424, 432, 437 (3d Cir. 2019)), and has been sharply criticized by both Justice Gorsuch and Justice Thomas (*see Archdiocese of Wash. v. WMATA*, 140 S. Ct. 1198, 1199 (2020) (Gorsuch, J., statement respecting denial of certiorari) ("[T]his Court has already rejected no-religious-speech policies materially identical to WMATA's on no fewer than three occasions.")).

Second, the panel's unwillingness to address a clear case of viewpoint discrimination undermines the very judicial minimalism that it seeks to promote. By addressing the constitutionality of only HART's now-defunct advertising policy, the panel achieves a slightly narrower

holding in this case at the cost of nearly guaranteed future litigation when HART drafts the next version of its policy concerning the promotion of religion. *See* Jay D. Wexler, *Defending the Middle Way: Intermediate Scrutiny as Judicial Minimalism*, 66 Geo. Wash. L. Rev. 298, 305 (1998) ("[A]lthough the decision costs may be lower for the actual judge who employs judicial minimalism, the minimalist decision may 'export' decision costs to lower courts and practitioners by leaving open a variety of unanswered questions."). Indeed, at least one member of the panel foresaw this possibility. *See* Oral Arg. at 17:16–22, *available at* https://shorturl.at/izAF4 ("Should the challenger have to just make these seriatim challenges every time you recategorize the same policy?"). The upshot of holdings like the panel's here, which eschew the established "one-step" viewpoint discrimination analysis, is that district courts will be frequently saddled with the task of determining whether a given ban targeting religious speech is "reasonable"; and they will have to make these determinations without the benefit of clear precedent.

Constitutional avoidance, too, provides no basis for the panel's approach, because addressing viewpoint discrimination would not require the panel to resolve a constitutional question either "'in advance

of the necessity of deciding [one]'" or "'broader than is required.'" *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 346–47 (1936) (Brandeis, J., concurring). Because both of the district court's holdings were based on the First Amendment, the panel could not avoid resolving at least one constitutional question and opted for examining the reasonableness of HART's application of Section 4(e), rather than addressing viewpoint discrimination. Op. 2–3. But affirming the viewpoint-discrimination holding in this case required no undue speculation on the part of the panel either as to the nature of HART's policy or the bounds of the Free Speech Clause's protections. Indeed, as two members of the panel noted in their concurrences, HART's policy is "self-evidently" and "patent[ly]" viewpoint-discriminatory (*id.* at 31 (Newsom, J., concurring)), and the relevant law has been "long been settled by the Supreme Court's 'trilogy' of [*Lamb's Chapel*, *Rosenberger*, and *Good News Club*]" (*id.* at 43 (Grimberg, J., concurring)).

* * *

Avoiding a clear constitutional violation and overturning a district court's exercise of discretion is not proper judicial minimalism. The

Court should cut to "the heart of this case" (Op. 43 (Grimberg, J., concurring)), and affirm the injunction.

CONCLUSION

The petition for rehearing should be granted.

DATED: Februay 7, 2024

Respectfully submitted,

/s/ Blaine H. Evanson

Blaine H. Evanson
GIBSON, DUNN & CRUTCHER LLP
3161 Michelson Drive
Irvine, CA 92612
Telephone: (949) 451-3805
Email: bevanson@gibsondunn.com

Macey L. Olave
GIBSON, DUNN & CRUTCHER LLP
One Embarcadero Ctr., Ste. 2600
San Francisco, CA 94111
Telephone: (415) 393-8287
Email: molave@gibsondunn.com

Katie Rose Talley
GIBSON, DUNN & CRUTCHER LLP
2001 Ross Avenue, Suite 2100
Dallas, TX 75201
Telephone: (214) 698-3358
Email: ktalley@gibsondunn.com

John Matthew Butler
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, DC 20006
Telephone: (202) 887-3739
Email: mbutler@gibsondunn.com

Counsel for 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*

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 2,335 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*
Blaine H. Evanson

CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of February, 2024, 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.

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